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The European Court of Human Rights and the German Federal Constitutional Court¹

1) Origins of the two courts and developments in the early period of their existence

When the European Court of Human Rights (ECHR) was established in 1959 it already had an older “sibling” who was also endowed with the task of human rights protection, albeit not on the international, but on the national level. The German Federal Constitutional Court (FCC) had started its work some years earlier, in 1951. By the year 1959 it could already be proud of some remarkable achievements. It had not only adopted 302 judgments and decisions, nicely published in nine volumes, but had also elaborated many distinctive features of its human rights doctrine and defined its status in the newly established constitutional system in the Federal Republic of Germany.

Among many important judgments there are three landmark judgments adopted in the early 1950s which put the system of human rights protection on a track which turned out to be the track to success.

The first decisive case of 16 January 1957² was brought to the FCC by a politician fighting against the official Government policy in matters of reunification and rearmament. He was denied the prolongation of his passport as his trips abroad were seen to endanger the public security of the Federal Republic of Germany. In this famous case called “Elfes” the FCC held that, although the right to travel abroad was not included into the human rights catalogue of the German Basic Law, this right nevertheless formed part of what was called the “general freedom of action” (allgemeine Handlungsfreiheit) as laid down in Article 2 of the Basic Law.³ This meant that basically every restriction to an individual’s liberty had to be justified on the basis of a law within the constitutional order. Such an approach implemented the assumption that all that is not forbidden is allowed and led to an all-embracing human rights protection.

The second landmark case of 15 January 1958⁴ became known under the name of the spokesman of the city of Hamburg, Mr. Lüth, who openly called for a boycott of the films of Veit Harlan as he had been the director of an anti-Semitic propaganda film during the war. Two film producing companies brought a successful complaint against Mr. Lüth prohibiting him to further call for a boycott. Although this case concerned a controversy between

¹ The views expressed are personal only. A Russian version of the text is to be published in the journal Журнал «Права человека. Практика Европейского Суда по правам человека».

² Judgment of the FCC “Elfes”; BVerfGE 6, 32.

³ Wording of Article 2 of the Basic Law: “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”

⁴ Judgment of the FCC “Lüth”; BVerfGE 7, 377.

private individuals and not between an individual and the State the FCC found a violation of freedom of expression. In this context the Court developed the theory of the horizontal effect (Drittwirkung) of human rights and argued that the human rights provisions in the Constitution set up an objective “order of values” (Wertordnung) which is also relevant in the relations between individuals. Furthermore, the Court explained the functioning of freedom of expression which could theoretically be restricted by a general law; but at the same time this general law had to be interpreted in such a way as to guarantee freedom of expression effectively. On this basis the FCC found a violation of the Basic Law in the judgments of the German courts prohibiting Mr Lüth’s call for a boycott.

The third landmark case of 11 June 1958⁵, the so-called Apothekenurteil, concerned a pharmacist who wanted to open a pharmacy in a little town, but was prohibited to do so based on the argument that there were already enough pharmacies in the town. In this judgment the FCC elaborated the so-called “theory of different steps” (Stufentheorie), i.e. the application of the proportionality principle to concrete human rights restrictions. It distinguished between objective and subjective restrictions to the right of access to a profession and requested the existence of especially important public interests in order to justify objective restrictions.

This means that when the ECHR timidly started its work with the case *Lawless v. Ireland* handing down its first procedural decision on 14 November 1960 the German Constitutional Court had already acquired an impressive reputation as an effective protector of human rights and galloped on without ever looking what its younger sibling was doing.

It was only in the 1970s that the ECHR also adopted ground-breaking judgments and elaborated new doctrinal approaches, above all in *Tyrer v. United Kingdom*,⁶ *Marckx v. Belgium*⁷ and *Airey v. Ireland*.⁸ All of a sudden it had its own “trumps” such as the doctrine of the “living instrument” or the doctrine of the “effectiveness” of human rights protection according to which human rights must not be “theoretical and illusory, but practical and effective”. Similar approaches had not yet been developed by the FCC. So it is no wonder that the FCC started looking with interest to what the younger, but more and more self-confident sibling was doing.

What is therefore unique in the relationship between the two courts is the parallel development of their jurisprudence after an initial period, in which the FCC was ahead of the ECHR. The other founding States of the Council of Europe⁹ either had no constitutional courts¹⁰ or the constitutional courts were founded much later.¹¹ The few countries which had constitutional courts already in the late 1950s, early 1960s, Italy (1955) and Turkey (1961), did not allow citizens to file human rights complaints. The Central and Eastern European States which ratified the ECHR only after 1990 were, as a rule, inspired by the

⁵ Judgment of the FCC “Apothekenurteil”; BVerfGE 7, 377.

⁶ *Tyrer v. United Kingdom* judgment of 25.4.1978, application no. 5856/72.

⁷ *Marckx v. Belgium* judgment of 13.06.1979, application no. 6833/74.

⁸ *Airey v. Ireland* judgment of 09.10.1979, application no. 6289/73.

⁹ Belgium, Denmark, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey, United Kingdom

¹⁰ Denmark, Iceland, Ireland, Luxembourg, Netherlands, Norway, Sweden, United Kingdom.

¹¹ E.g. Belgium: the Constitutional Court was founded in 1984 as the Court of Arbitration.

model of the ECHR and the FCC when building up their own systems of constitutional justice; even if they had had some earlier experimental periods of constitutional justice such as the Czech Republic, they did not have an elaborated jurisprudence to build on and to compete with the ECHR.

Another distinctive feature of the “special relationship” between ECHR and FCC is that up to the present time the individual complaint procedure as allowed by the Law on the FCC is one of the most comprehensive ones in Europe so that it almost never happens that the ECHR decides a case against Germany which the FCC has not yet seen before. As a consequence there is a very direct contact between the two courts’ jurisprudence.

2) Normative regulations on the interaction between the FCC and the ECHR

It is interesting to note that according to the German Basic Law the basis for including international law into the national legal order is weaker than in other member States. As a rule, the ECHR has a hierarchical status above statutory law, but below the Constitution.¹² According to Article 59 (3) of the German Basic Law the ECHR has the same status as other federal laws. Thus, in theory, a law adopted after the Convention entered into force in Germany would derogate the Convention in accordance with the principle “leg posterior derogate legi priori”. Although the FCC has refused to consider the ECHR as part of the principles of international law (“allgemeine Regeln des Völkerrechts”) and to grant it a higher standard on this basis (Article 25 of the Basic Law), it has found a way to guarantee its effective application already in 1987 when it was confronted with the problem for the first time. The FCC has held that the ECHR should be taken into account when interpreting national law. Unless explicitly stated it could not be assumed that the national legislator would enact a law contradicting the Convention. Conflicts were thus solved on the basis of an interpretation based on openness for international law (“völkerrechtsfreundliche Auslegung”).¹³ Furthermore, as the High Contracting Parties were bound to abide by the final judgments of the Court on the basis of Article 46 (1) of the Convention, all State organs, including courts, had to take the ECHR’s judgments into account.

3) Harmonious development of the jurisprudence of the two courts up to the year 2004

On this doctrinal basis the relationship between the ECHR and the FCC developed without frictions over many decades. Statistics show that very few violations of the Convention were found, most of them concerning length of procedure. Between 1959 and 2003 82 judgments were adopted against Germany; only in a bit more than half of them violations were found. Some can be called anecdotic such as the case Karl-Heinz Schmidt v. Germany.¹⁴ In one of the German Länder only men, but not women had to pay a certain fee if they were not willing to serve in the voluntary fire brigade. Karl-Heinz Schmidt complained successfully of this discriminatory approach. Much more serious was the case Storck v. Germany in which

¹² Cf. for example Article 15 para. 4 of the Russian Constitution.

¹³ BVerfG E 74, 358 et seq.

¹⁴ Karlheinz Schmidt v. Germany judgment of 18.07.1994, application no. 13580/88.

the Court held that a young woman's rights under Article 5 of the Convention had been violated by an involuntary confinement in a private psychological clinic.

As most of the incompatibilities were caused by the application of the law in specific cases and not by the legislation itself, no major changes of the legal system were required.

There is another bunch of cases during this period which can be considered as closely linked to the particularities of German history after World War II. As Germany was a divided country with a Western democratic and an Eastern communist part, in the Western part it was considered necessary to adopt protective measures against communist propaganda. Therefore civil servants were not allowed to be members of the communist party. Mrs. Vogt, a teacher who was a leading member of the German communist party considered this prohibition to be incompatible with the Convention. In a very tight judgment of 9 to 8 votes the Court found a violation, even if "Germany's position in the political context of the time" as well as the "experience under the Weimar Republic and during the bitter period that followed the collapse of that regime" was especially acknowledged.¹⁵

After the reunification the Court had to decide in property and restitution cases¹⁶ as well as in cases concerning prison sentences for crimes committed during the GDR regime, especially shooting fugitives at the German-German borders.¹⁷ In none of those cases has the Court found a violation of the Convention, although the issues raised were highly controversial.

4) Conflict and compromise in the period after 2004

The conflicts between the FCC and the ECHR started with the judgment of the ECHR in the case von Hannover v. Germany.¹⁸ In comparison to the difficult "reunification cases" touching upon fundamental issues and involving philosophical questions of transitional justice the subject matter of the von Hannover case was rather banal. It concerned the protection of celebrities against the intrusion of the media into their private life. Nevertheless, the issue turned out to provide an exemplary battle field for different approaches to human rights protection occupying a considerable number of courts over a long period of time.

The conflict between the FCC and the ECHR was not confined to the conflict between freedom of the press and right to private life in the von Hannover case, but developed in three steps each characterized by the name of one case. It started with the von Hannover case, was lifted to a more theoretical level in the Görgülü case and finally led to a compromise in the case of preventive detention.

¹⁵ Vogt v. Germany judgment of 26.09.1995, application no. 17851/91, para. 59.

¹⁶ V. Maltzan v. Germany, judgment of 2.3.2005, application no. 71916/01 71917/01 10260/02; Jahn v. Germany judgment of 30.06.2005, application no. 46720/99, 72203/01, 72552/01.

¹⁷ Streletz, Kessler and Krenz v. Germany, judgment of 22.3.2001, application no. 34044/96 35532/97 44801/9834044/96 35532/97 44801/98, K.-H.W. v. Germany, judgment of 22.3.2001, application no. 37201/97.

¹⁸ Von Hannover v. Germany judgment of 24.06.2004, application no. 59320/00.

a) The case “Von Hannover v. Germany”

The controversial question discussed in the von Hannover case was if journalists could write an article about the Princess von Hannover’s everyday life using photos showing her shopping on the market place or dining with a friend in a separate room in a restaurant.

aa) The jurisprudence of the FCC as starting-point of the debate

Before the adoption of the von Hannover case in 2004 by the ECHR there had been a long-standing jurisprudence of the German Federal Court of Justice, the highest civil court, and the FCC on how to solve conflicts between freedom of the press and right to private life.¹⁹ The basic ideas were the following: The level of protection may vary in relation to the famousness of the person which is the object of (photo)reporting in the press. Celebrities have to accept reports on and photos of their private life as long as those reports are not connected with what has to be considered as an “intrusive approach”. This does not apply to all celebrities, but only to “figures of contemporary society ‘par excellence’” (“Personen der Zeitgeschichte”) because of the public interest in their life and life-style. This interest is legitimate in view of their influence and leading function in society.

In the first Von-Hannover-case the Federal Constitutional Court accepted the Federal Court of Justice’s distinction between photos taken of Caroline von Hannover, who was considered to be a “Person der Zeitgeschichte”, on the market place and photos taken in a moment of private intimacy in a separate room in a public restaurant. While the former were allowed to be published, the latter were not.

bb) The jurisprudence of the ECHR as a response to the FCC’s jurisprudence

This approach was not accepted by the European Court of Human Rights. Although it also took as starting-point the necessity of balancing the right to private life against the freedom of the press, it arrived at a different conclusion.

The argumentation of the two courts differed basically with respect to one criterion: the contribution of reports and photos to the public debate in a given society. While for the FCC it was sufficient to note the public interest in the lifestyle of celebrities because of their leading function and their influence, the Strasbourg Court held that the mere desire to satisfy public curiosity did not justify the infringement of the right to private life. In such a situation the protection of private life outweighed the freedom of the press:

“The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for

¹⁹ The most important judgment summarizing the jurisprudence is the judgment of 15.12.1999 underlying the von Hannover case at the ECHR (BVerfGE 101, 361).

example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of “watchdog” in a democracy by contributing to “impart[ing] information and ideas on matters of public interest (...) it does not do so in the latter case.”²⁰

As a consequence the publication of the photos of Caroline von Hannover on the market place was considered to violate her right to private life.

The gist of the Strasbourg Court’s jurisprudence was the development of an additional criterion to be taken into account in balancing the right of freedom of the press and protection of the private sphere: “the contribution to a public debate”.²¹ This criterion had not existed as such in the German legal doctrine.

The Strasbourg Court did, however, not only focus on the contribution to a public debate in balancing the rights at stake, but went even further and criticized the conceptual basis of the German courts’ approach. It held that the description of persons as “figures of contemporary society ‘par excellence’” afforded them only very limited protection of their private lives and of the right to control the use of their image. Furthermore, the Court argued that the concepts developed in German doctrine were too vague and did not give any legal security to the persons concerned as they could not foresee in how far their private sphere would be protected and when they would have to tolerate inferences.²²

It is thus possible to identify three strands of criticism: the neglect of the criterion of “contribution to a public debate” in weighing the interests involved, the vague and unforeseeable character of German law as interpreted by the courts, and the “wrong” result of the balancing exercise. With this argumentation the Court initiated a shift in human rights protection under Article 10 and Article 8. While the protection of the tabloid press under Article 10 was considerably weakened, the protection of celebrities’ private life under Article 8 was enhanced.

cc) The revised jurisprudence of the FCC as a response to the ECHR’s critique

According to Article 46 ECHR it is not sufficient to cure the violation in the specific case and to pay compensation. In order to prevent further human rights violations it is necessary to adopt general measures. In the von Hannover case the violation had been caused by a specific case-law of the Federal Court of Justice as modified and confirmed by the FCC. This had to be modified. But in implementing the judgment the German courts were confronted with significant difficulties.

²⁰ ECHR Von Hannover v. Germany, judgment of 24.6.2004, application no. 59320/00, RJD 2004-VI, para. 63.

²¹ This criterion was, however, not new, but had been already been put forward by the Court in other cases; cf. ECHR, Tammer v. Estonia, judgment of 6.2.2001, application no. 41205/98, para. 59 et seq.; ECHR News Verlags GmbH & Co. KG v. Austria, judgement of 11.1.2000, application no. 31457/96, para. 52 et seq.; ECHR 2000-I; and Krone Verlag GmbH & Co. KG v. Austria, judgment of 26.2.2002, application no. 34315/96, para. 33 et seq.

²² Von Hannover v. Germany, judgment of 24.6.2004, application no. 59320/00, RJD 2004-VI, para 72.

First, they had to revise their jurisprudence on the basis of indications in one single case solving a concrete problem in a multipolar conflict. As each new case would demand a new balancing exercise, it would be difficult to guarantee legal security. Second, they had to avoid lowering the standard of protection of the freedom of the press as this would have created a problem under Article 53 of the Convention. Third, the criteria developed by the European Court were vague and unforeseeable. There was no generally accepted definition of what could be understood as a “public debate” and what would “contribute” to such a debate, especially taking into account that the use of photos illustrating articles was the main issue. Furthermore, it was unclear if the whole jurisprudence on protecting private rights against media interferences had to be revised or if it was sufficient to modify it slightly and to integrate as a new criterion the contribution of the publication to a public debate.

The Federal Court of Justice accepted to change its case-law without, however, reversing it.²³ It modified the idea of limited protection for “figures of contemporary society ‘par excellence’” and replaced it by a concept of graduated protection (abgestuftes Schutzkonzept). It took into account the criteria developed by the Strasbourg Court and explained that, insofar as “figures of contemporary society” were concerned, consideration had to be given to the question whether the report contributed to a public debate and whether the content went beyond a mere intention to satisfy public curiosity. It also did not insist any longer on the idea of protection confined to situations of spatial isolation which the Strasbourg Court had criticized as too vague. At the same time it stretched the interpretation of the notion of “public debate” very far and accepted quite a loose link between the subject of the article and the photo. Thus, for publishing a photo of Caroline von Hannover during her ski holidays it was considered sufficient to link it to an article about the ill-health of the reigning Prince of Monaco.²⁴

The Constitutional Court accepted the Federal Court of Justice’s interpretation and explicitly referred to its restricted right to control the civil courts’ decisions in this respect:

“The fact that the court’s balancing exercise of the various rights in complex multipolar disputes can also result in a different outcome is not sufficient reason for requiring the Federal Constitutional Court to correct a court decision. However, there would be a violation of the Constitution if the protective scope (Schutzbereich) or extent of a fundamental right had been wrongly or incompletely determined and the balancing exercise were accordingly flawed, or if the requirements under constitutional law or the Convention had not been duly taken into account. This is especially true for the constitutionally relevant directives (Maßgaben) of the European Convention on Human Rights.”²⁵

dd) The ECHR’s reaction to the revised jurisprudence of the FCC

²³ Cf. the leading case of the Federal Supreme Civil court BGHZ 171, 275.

²⁴ BGHZ 171, 275.

²⁵ Judgment of the FCC; BVerfGE 120, 180 (210).

On the basis of a thorough analysis of the German courts' jurisprudential developments the Strasbourg Court accepted the interpretation of the notion of "debate of general interest" in an important Grand Chamber case on the problem, in the case von Hannover No. 2:

"The Court can therefore accept that the photos in question, considered in the light of the accompanying articles, did contribute, at least to some degree, to a debate of general interest."²⁶

As a consequence the Court also accepted the result of the balancing exercise between freedom of expression and right to private life.

Although the Court's statement is rather cautious it can be interpreted as a step towards the German courts in the debate. It evinces the main principles in implementing ECHR judgments based on the proportionality principle in the national context, i.e. the principle of subsidiarity and the principle of margin of appreciation.

The same approach was upheld in the case of von Hannover no. 3 v. Germany. The complaint of the applicant concerned an article about a house owned by the von Hannover family in Kenia including some reflections on a purportedly new development that rich people rented their holiday houses to "normal people". The article was accompanied by an unrelated picture of Caroline of Hannover and her husband. In this case the regional court prohibited in 2005 the publication as it considered it to be an unjustified interference with private life. On the next level in 2006 the court of appeal put more weight on the freedom of the press. The Federal Court of Justice decided in 2007 that the criteria developed by the ECHR had not been respected in the court of appeal's judgment as the article did not tackle any subject of public interest. The Constitutional Court in 2008 saw it once more differently and criticized the Federal Court of Justice for not applying the Strasbourg Court's jurisprudence correctly. In its view the report on renting family houses could kick off a social debate and was therefore a subject of public interest. When the Federal Court of Justice had to decide a second time in 2008 it accepted the evaluation given by the FCC, which, in turn, did not find a violation of the Constitution and declined to deal with the case once more without giving any motivation.

This solution was accepted by the Strasbourg Court. The statement was, however, preceded by an indication of the limits of interpretation of "debate of general interest". Thus the Court emphasized that the text of the article must not be used as a mere pretext for publishing a photo. Furthermore, it requested that the link between the photo and the text must not be artificial. Thus, the Court gave leeway to the national courts in applying the relevant criteria, but not without any limits.

b) The case "Görgülü v. Germany"

²⁶ Von Hannover v. Germany (no. 2), judgment of 7.2.2012, application no. 40660/08 and 60641/08, RJD 2012, para. 118.

While these judgments mainly focused on solving the conflict between freedom of the press and right to respect for private life, in the FCC's judgment in the case *Görgülü* a more theoretical explanation of and doctrinal approach to the interrelation between the two courts was given.

The *Görgülü* case concerned a biological father's right of access and custody rights after the child had been given away for adoption without the father's knowledge or consent. In its judgment on 26 February 2004 the ECHR found a violation as the German courts dealing with the case had not "examined all possible solutions to the problem" and had not sufficiently taken into account the rights of the father and the best interests of the child.

The Naumburg Higher Regional Court refused, however, to implement the Strasbourg Court's judgment based on the assumption that it was not directly bound by it; in this context it explicitly referred to the hierarchical status of the Convention in the German legal system. Therefore the applicant turned to the FCC for a second time and complained about the non-implementation of the ECHR's judgment. This gave the FCC an occasion to elaborate a theoretical approach to the implementation of the Court's judgments in German law which was probably all the more welcome to the FCC as the conflict in the *von Hannover* case had started shortly before.

The FCC's judgment has often been misunderstood and quoted in a distorted manner. It is important to note that the FCC has followed a twofold approach, on the one hand going an important step towards the ECHR and enhancing the position of the Convention in the German legal order, but on the other hand also clearly showing and explaining the limits in implementing the ECHR's judgments into national law.

Thus the FCC found the position of the national courts not implementing the ECHR's judgment unacceptable and in violation of the German Basic Law:

"The challenged decision of the Naumburg Higher Regional Court of 30 June 2004 violates Article 6 of the Basic Law in conjunction with the principle of the rule of law. The Higher Regional Court did not take sufficient account of the judgment of the ECHR of 26 February 2004 when making its decision, although it was under an obligation to do so."²⁷

Furthermore, the FCC raised the position of the Convention in the German legal order declaring the observance of the Convention and the judgments based on it to be a part of the "rule of law principle" which is an "eternal principle" of the German Basic Law which cannot be changed or modified under any conditions. In this context it is helpful to quote the FCC's judgments more extensively:

"The binding effect of a decision of the ECHR extends to all state bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a

²⁷ Judgment of the FCC "*Görgülü*"; BVerfGE 111, 307 (quotation of the English version available at https://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html, para. 64.

continuing violation of the Convention and to create a situation that complies with the Convention. The nature of the binding effect depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law. A complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law.”²⁸

At the same time the FCC clearly spelled out where the limits of the implementation of the ECHR’s judgments lie. According to the FCC a precondition for the implementation is that the ECHR’s judgments are “part of a methodologically justifiable interpretation of the law”. Furthermore, the implementation must not be a “schematic enforcement”, but has to take the effects on the national legal system into account.

These two caveats are important. There is not yet any illustration for the first point; for the time being it might be understood as a more theoretical warning, a sort of emergency break. In any case it indicates that the FCC is willing to have a close look at the interpretative method applied. The second request concerning a non-automatic, “conscientious and conscious” implementation can be seen in the case of preventive detention where the views of the two Courts initially had also been different.

c) The case “M. v. Germany”

In Germany there is a twin-track system of criminal sanctions combining penalties based on guilt and preventive detention based on the dangerousness of the criminal for society. Measures of preventive detention are possible only under very specific circumstances based on the principle of “ultima ratio”. The problem was that the 10-years limit of preventive detention was retroactively abolished in order to enhance the protection of the society against the most dangerous criminals.

In 2009 in the case M. v. Germany²⁹ the ECHR declared the system of preventive detention as it had been developed on the basis of new legislation after 1998 incompatible with Article 5 and Article 7 ECHR.³⁰

As Germany was bound on the basis of international law not only to implement the Court’s judgment in the concrete case, i.e. to free the applicant and pay him the relevant compensation, but also to bring its jurisprudence and legislation in accordance with the Convention, the German Federal Constitutional Court accepted to revise its own former jurisprudence which had denied any incompatibility of the system of preventive detention with the German Basic Law in 2004.³¹ In its new judgment in 2011 the Constitutional Court

²⁸ BVerfGE 111, 307, para. 30.

²⁹ ECHR, M. v. Germany, judgment of 17.12.2009, application no. 19359/04, RJD 2009.

³⁰ ECHR, M. v. Germany, judgment of 17.12.2009, application no. 19359/04, RJD 2009.

³¹ Judgment of the FCC; BVerfGE 109, 133.

adopted the same position as the ECHR and declared the relevant regulations in the Criminal Code unconstitutional.³²

The result of the interaction between the two courts is straightforward and exemplary. Nevertheless, the implementation was not “automatic”, but was adapted to the specificities of the German legal system.

Thus the two courts differed over the understanding of the legal concept of “preventive detention”. In its pleading in the leading case *M. v. Germany*³³ the Government based its argumentation on the “twin-track system of sanctions” which made a strict distinction between “penalties” and “measures of correction and prevention”, such as preventive detention. The Government highlighted that penalties were of a punitive nature and were fixed with regard to the offender’s personal guilt, whereas measures of correction and prevention were of a preventive nature and were ordered because of the danger presented by the offender, irrespective of his or her guilt.³⁴ The Court did not accept this doctrinal distinction. It explained that “penalty” as understood in the Convention (Article 7) was an autonomous concept. The starting-point was whether the measure in question was imposed following conviction for a criminal offence. Furthermore its nature and purpose, the procedures involved in its making and implementation, and its severity had to be taken into account.³⁵ Under all these criteria preventive detention as applied under German law qualified as a penalty. Although the Court accepted that the characterization of the measure under domestic law was a relevant factor as well, it did not consider it as decisive. Thus the Court held that preventive detention, even if it was qualified as a “measure of correction and prevention” under German law was to be seen as a “penalty” under European law.

The German Constitutional Court followed the Strasbourg Court’s approach in holding retroactive ordering of preventive detention to be a violation of human rights, but it did not accept the Court’s legal qualification. On the contrary, in its leading judgment in 2011 it explained in a detailed manner that the twin-track system of sanctions had to be upheld. The ECHR’s reasoning was thus adapted to the German system of penal sanctions as defined in the Penal Code. The alternative approach followed by the ECHR was taken up and discussed, but the legal doctrine was not changed. As a consequence the absolute ban on the retrospective application of criminal law under Article 103 § 2 of the Basic Law was considered not to cover preventive detention. The “traditional” qualification of preventive detention as “measure of correction and prevention” was, however, interpreted in a new way as an especially serious interference in the right to liberty justifiable only under exceptional circumstances.³⁶ On this basis the Constitutional Court developed the legal concept of “Abstandsgebot” (requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment) as a measurement for the constitutionality of preventive detention. The “Abstandsgebot” had not been mentioned by the Strasbourg Court in its judgment *M. v. Germany*. Nevertheless, the idea was taken up by the German legislator in the Act on establishment of a difference in the provisions on

³² Judgment of the FCC; BVerfGE 128, 326.

³³ ECHR, *M. v. Germany*, judgment of 17.12.2009, application no. 19359/04, RJD 2009.

³⁴ ECHR *M. v. Germany*, judgment of 17.12.2009, application no. 19359/04, RJD 2009, para. 113.

³⁵ ECHR *M. v. Germany*, judgment of 17.12.2009, application no. 19359/04, RJD 2009, para. 120.

³⁶ BVerfGE 128, 326 (374).

preventive detention compared to those on prison sentences (*Gesetz zur bundesrechtlichen Umsetzung des Abstandsgebotes im Recht der Sicherungsverwahrung*)³⁷.

The Strasbourg Court acknowledged and commended the approach of the German Constitutional Court in its later judgments:³⁸

“[The Court] agrees with the Government that by its judgment, the Federal Constitutional Court implemented this Court’s findings in its above-mentioned judgments on German preventive detention in the domestic legal order. It gave clear guidelines both to the domestic criminal courts and to the legislator on the consequences to be drawn in the future from the fact that numerous provisions of the Criminal Code on preventive detention were incompatible with the Basic Law, interpreted, *inter alia*, in the light of the Convention. Its judgment thus reflects and assumes the joint responsibility of the State Parties and this Court in securing the rights set forth in the Convention.”³⁹

Nevertheless, in the case *Glien v. Germany*⁴⁰ the Court also highlighted the differences in implementation without, however, criticizing them:

“[The Constitutional Court] considered that it was not necessary schematically to align the meaning of the constitutional notion of “penalty” to that under the Convention. Recourse should rather be had to the valuations (*Wertungen*) under the Convention in a result-oriented manner in order to prevent breaches of public international law (...).”⁴¹

It is true that subsequently the Court found violations of the Convention in the implementation of the new rules on preventive detention during the transitional period granted to the German legislator by the Constitutional Court.⁴² But this was not due to conceptual differences. The problem was that even those kept under preventive detention as “persons of unsound mind” under Article 5 para. 1 (e) of the Convention remained in prison and were not transferred to appropriate institutions for mental health patients.⁴³

This is not yet the end of the story of bringing the regulation on preventive detention in line with the Convention. Nevertheless, it can be considered as a success story as the two courts were involved in a genuine dialogue and have tried to find common solutions.

5) Conclusion

³⁷ Law adopted on 5 December 2012, BGBl. 2425.

³⁸ *Kronfeldner v. Germany*, judgment of 19.1.2009, application no. 21906/09, para. 41 et seq.

³⁹ *Kronfeldner v. Germany* judgment of 19.1.2009, application no. 21906/09, para. 59.

⁴⁰ *Glien v. Germany*, judgment of 28.11.2013, application no. 7345/12.

⁴¹ *Glien v. Germany*, judgment of 28.11.2013, application no. 7345/12, para. 47.

⁴² *Glien v. Germany*, judgment of 28.11.2013, application no. 7345/12.

⁴³ *Glien v. Germany*, judgment of 28.11.2013, application no. 7345/12, para.92 et seq.

Since the establishment of the two courts in the 1950s the basic parameters have fundamentally changed. The Cold War has come to an end, 47 European countries have decided to contribute to the project of a common human rights jurisprudence. Human rights courts are no longer considered as a terra incognita, an experiment with an unknown result, but are deeply enshrined in all European societies.

The pioneer-like developments of an all-embracing human rights theory the FCC had initiated in the 1950s have been taken up by other courts, among them the ECHR.

Even if the European Convention of Human Rights did not contain any provision comparable to the “general freedom of action” and the Court has not developed an equivalent, in recent times Article 8 ECHR, the right to private life, tends to be interpreted as a similar guarantee. The horizontal effect of human rights is being amply discussed in the context of positive obligations. The highly differentiated approach of the FCC to proportionality has also been seen as an inspiration in recent cases of the Court such as the case *Vinter v. United Kingdom*.⁴⁴

The book dedicated to the ECHR to its 50th anniversary interprets the ECHR’s role as that of the “conscience of Europe”. On the occasion of the 60th anniversary of the FCC the two senates were called the “chambers of the heart of the Republic”. Both metaphors show how important those courts are, one on the national, the other one on the European level. Therefore they are not to be understood as competitors, but as partners in a long-lasting dialogue. There might be conflicts, it might be necessary to look for compromises. But all that is done with the common aim of improving human rights protection in Europe.

⁴⁴ *Vinter and others v. United Kingdom* judgment of 09.07.2013, application no. 66069/09, 130/10, 3896/10.