Developments

Germany's Dialogue with Strasbourg: Extrapolating the *Bundesverfassungsgericht*'s Relationship with the European Court of Human Rights in the Preventive Detention Decision

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A. Introduction

I. The Relationship of the ECtHR with National States and National Courts

Within the Council of Europe, the relationship between the ECtHR and the member states is crucial for the survival and effective functioning of the Court.[1] The ECtHR is currently overwhelmed by applications, the bulk of which emanate from a relatively small number of states, notably Russia, Rumania, Turkey, and the Ukraine.[2] The backlog of cases will soon be toppling the vertiginous mark of 160,000, the adjudication of which alone would take the Court more than six years.[3] The sheer number of cases exemplifies the system's urgent need for reform. Lately, discussions have been heavily influenced by considerations of subsidiarity, which the earlier Interlaken Declaration—as well as the recent Brighton Conference—emphasized as the key for the future relationship between the ECtHR and member states.[4] Discussions about the principle's proper role in the relationship between

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[1] Jean-Paul Costa, President, Eur. Ct. of H.R., Speech on the Occasion of the Opening of the Judicial Year, (Jan. 25, 2008), *in* EUR. CT. H.R., ANNUAL REPORT 33, 38 (2008), *available at* http://www.echr.coe.int/NR/rdonlyres/D5B2847D-640D-4A09-A70A-7A1BE66563BB/0/ANNUAL_REPORT_2008.pdf (last visited Apr. 29, 2012).

[2] EUR. CT. H.R., STATISTICS (2011), *available at* http://www.echr.coe.int/NR/rdonlyres/7B68F865-2B15-4DFC-85E5-DEDD8C160AC1/0/Statistics_2011.pdf.

[3] The Court can adjudicate around 1700 cases on the merits per year. In 2010, it decided a total of 29,102 petitions, of which a total of 27,345 were either inadmissibility decisions or cases struck out of the list. *See id*.

[4] *See* Interlaken Declaration of the High Level Conference on the Future of the European Court of Human Rights ¶ 4, Feb. 19, 2010, *available at* http://www.coe.int/t/dgi/brighton-conference/Documents/Interlaken-declaration_en.pdf (last visited Apr. 29, 2012); Brighton Declaration of the High leval Conference on the Future of the European Court of Human Rights ¶¶ 3, 11, 12 (inviting Committee Ministers to amend the Preamble of the Convention to make reference to the prinicple of subsidiarity), Apr. 20, 2012, *available at* https://wcd.coe.int/ViewDoc.jsp?id=1934031&Site=CM (last visited Apr. 29, 2012); *see also* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 49–56 (2003);

member states and the ECHR, however, are far from over. This is due to questions regarding the principle itself, as well as to the factual realities dominating in the ECtHR-national court relationship. The principle often focuses on a strict separation of competences at two different levels,[5] the national and the international, and many understandings of that principle require that the two levels stand in a more or less hierarchical relationship.[6] This is difficult to assume in the Council of Europe context, where, compared to the EU, neither the doctrine of direct effect nor the principle of primacy in application reigns. Moreover, Strasbourg's emphasis on subsidiarity appears to focus on the responsibility of the member states to remedy human rights violations.[7] In line with that argument, scholars have opined that the ECHR system should focus on an approach in which the ECtHR would be involved only if there are good reasons to depart from interpretation at the national level.[8] Nonetheless, others recently doubted the overall usefulness of such an understanding of subsidiarity, since those member states responsible for the lion's share of new applications to the ECHR often neither possess a functioning judiciary nor functioning judicial or executive institutions, in general.[9]

The debate on the proper role and definition of subsidiarity in the Strasbourg system is reflective of current discussions about the proper role and interaction of national judiciaries with the Strasbourg court. Member states' national courts struggle with the influence and interpretative authority of Strasbourg's jurisprudence at the national level. Several questions still require proper answers. Must member states' courts, in all cases, simply adhere to the interpretative authority of Strasbourg and adopt the ECtHR´s interpretations? Do Strasbourg's interpretations, even at the constitutional level, create an *erga omnes* effect, as some have recently argued?[10] Or is there actually room for

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Laurence Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 133–34 (2008); Dinah Shelton, *Subsidiarity and Human Rights Law*, 27 HUM. RTS. L.J. 4 (2006).

[5] *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 93 (2009).

[6] *Compare* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 72(2), *with* Treaty on European Union art. 5(3), Feb. 7, 1992, 2010 O.J. (C83) 13.

[7] *See* Brighton Declaration, *supra* note 4, ¶ 12.

[8] Geir Ulfstein, *International Constitutionalization: A Research Agenda*, EUR. SOC'Y INT'L L. NEWSL. (Eur. Soc'y Int'l L., Florence, It.), May 2010, *available at* http://www.esil-sedi.eu/english/ESIL-SEDI%20NEWSLETTER_May_mai%202010.pdf (last visited Apr. 29, 2012); Geir Ulfstein, *The International Judiciary*, *in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 126, 144 (Jan Klabbers et al. eds., 2009).

[9] Helen Keller et al., *Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals*, 21 EUR. J. INT'L L. 1025, 1034 (2010).

[10] *See* Anthony Lester, *The European Court of Human Rights After 50 Years*, *in* THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 98, 115 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011); THE CONSCIENCE OF EUROPE - 50 YEARS OF THE EUROPEAN COURT OF HUMAN RIGHTS, 209 (J. Egbert Myjer et. al. eds., 2010); Joge Rodruíguez-Zapata Pérez, *The Dynamic Effect of the Case-law of the European Court of Human Rights and the Role*

individual interpretation of ECHR rights by national constitutional and supreme courts? The discussions are crucial both for the acceptance and effective functioning of the ECHR across all of Europe and for decisions on the proper interaction between the Strasbourg court and the constitutional and supreme courts of member states. In the preventive detention decision, the *Bundesverfassungsgericht* chose a cooperative solution, which recognized the persuasive authority of the ECtHR's judgments and built upon dialogue with that Court.

II. The Bundesverfassungsgericht *and the ECtHR:* Görgülü*,* Caroline*, and Subsequent Decisions*

Before delving right into the heart of the matter, it is essential to read the current judgment of the *Bundesverfassungsgericht* in light of its previous decisions that had tackled its relationship with the ECtHR. Despite earlier decisions of that Court already adopting the much-cited interpretative approach toward the ECHR and the ECtHR's judgments,[11] the *Görgülü* decision is widely recognized to be the *Bundesverfassungsgericht*'s first important case on the matter.[12] *Görgülü* dealt with a Turkish father who wanted the German courts to enforce his right to visit his daughter.[13] He lost at all levels and achieved a judgment in his favor only in Strasbourg.[14] Still, even after the ECtHR's decision, the national judges were none too keen to follow the ECtHR's ruling. In particular, the lower regional court in charge stated that the ECtHR's judgments were binding only on the state of Germany as a subject of international law, but not on the

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of the Constitutional Courts, *in* EUR. CT. H.R., DIALOGUE BETWEEN JUDGES 36, 42 (2007). *But see* Mr. Jean-Paul Costa, President, Eur. Ct. of H.R., Speech Given on the Occasion of the Opening of the Judicial Year (Jan. 19, 2007), *in* EUR. CT. H.R., DIALOGUE BETWEEN JUDGES 80, 87 (2007). Some answers are provided in the recent book by PATRICIA POPELIER ET AL., HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER: THE INTERACTION BETWEEN THE EUROPEAN AND THE NATIONAL COURTS (2011), however, the May judgment of the *Bundesverfassungsgericht* has not been discussed by Rainer Arnold, who provided the contribution on Germany. Rainer Arnold, *The Federal Constitutional Court of Germany in the Context of the European Integration*, *in* HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER: THE INTERACTION BETWEEN THE EUROPEAN AND THE NATIONAL Courts 237 (Patricia Popelier et al. eds., 2011).

[11] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1570/03, Mar. 1, 2004, 3 BVerfGK 4 (Ger.). For an assessment of the relationship between the Federal Constitutional Court and the ECHR, see Christian Tomuschat, *The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court*, 11 GERMAN L.J. 513 (2010).

[12] *See* Mads Andenas & Eirik Bjorge, *National Implementation of ECHR Rights: Kant's Categorical Imperative and the Convention* (Apr. 22, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818845&. *See also* Tomuschat, *supra* note 11.

[13] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1481/04, Oct. 14, 2004, 111 BVERFGE 307 (Ger.).

[14] Görgülü v. Germany, 2004 Eur. Ct. H.R. 89, ¶ 71.

judiciary as independent organ in charge of the administration of justice.[15] Mr. Görgülü therefore returned to the *Bundesverfassungsgericht* claiming that his right to a fair trial had been violated.

In its judgment, the *Bundesverfassungsgericht*, noting that the ECHR had initially required implementation into national law, began by pointing to the fact that ECHR provisions only have the legal force of ordinary federal law, which ranks below the Basic Law. Nonetheless, the Court found that judgments of the ECtHR serve as aids with regard to interpreting constitutional rights under German law and national courts had a general duty to follow the interpretations of the ECtHR. This results from the friendliness of the Basic Law towards international law, as seen both in the Preamble and in Articles 24 and 25 of the Basic Law.[16] But due to the status of the ECHR in the national legal order—having the status of an ordinary law and ranking below the Constitution—the Court held that national courts were not obliged to follow Strasbourg in all circumstances: they could put forward specific reasons explaining why they decide to depart from the ECHR's jurisprudence. As the *Bundesverfassungsgericht* put it, "The responsible authorities or courts must discernibly consider the decision and, if necessary, justify understandably why they nevertheless do not follow the international-law interpretation of the law."[17] The *Bundesverfassungsgericht* concluded that it must have appellate jurisdiction for complainants' appeals arising from claims that national authorities had misapplied or ignored a decision of the ECtHR.[18]

While the *Görgülü* case was going back and forth between the ECtHR and the lower courts, scholars disagreed on whether the ECHR and judgments of the ECtHR were only to be considered by national courts if they were found to have legal effects in national law.[19] Such consideration would have asked lower courts to consider the ECHR, as well as the

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[15] Oberlandesgericht Naumburg [OLG - Naumburg Higher Regional Court], Case No. 14 WF 64/04, Apr. 20, 2004, 2004 OLGZ 64 (Ger.) ("Doch bindet dieser Urteilsspruch unmittelbar nur die Bundesrepublik Deutschland als Völkerrechtssubjekt, nicht aber deren Organe oder Behörden und namentlich nicht die Gerichte als nach Art. 97 Abs. 1 GG unabhängige Organe der Rechtsprechung" (citations omitted)).

[16] For more on this openness of the Basic Law towards international law, see Christian Tomuschat, *Die staatsrechtliche Entscheidung für die internationale Offenheit*, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 483 (Josef Isensee & Pail Kirchhoff eds., 1992); ANDREAS ZIMMERMANN, *Rezeption völkerrechtlicher Begriffe durch das Grundgesetz*, 67 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 297, 298 (2007).

[17] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1481/04, Oct. 14, 2004, 111 BVERFGE 307, ¶ 50 (Ger.).

[18] *Id*. ¶ 49.

[19] Haiko Sauer, *Die neue Schlagkraft der gemeineuropäischen Grundrechtsjudikatur*, 65 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 35, 45 (2005).

judgments of the ECtHR, both in criminal revision cases[20] and in those cases where the claimant had actually obtained a favorable judgment from Strasbourg.[21] The *Görgülü* decision might be understood to require this, since it dealt with a case where the ECtHR had ruled in ruled in favor of the claimant.[22] Nonetheless, prior decisions of the *Bundesverfassungsgericht* had already considered the ECHR and the ECtHR's judgments, as well as the doctrine of the friendliness of the Basic Law towards the ECHR, without assessing whether the ECtHR judgments had a legal effect in national law.[23] And the *Görgülü* decision itself had not made the duty to consider the ECtHR's judgments dependent upon the legal effect of the judgment.[24]

In the subsequent *Caroline* judgment, the *Bundesverfassungsgericht* consulted the jurisprudence of the ECtHR without discussing the question of a legal effect of the ECtHR's judgments in German national law.[25] In so doing, the Court affirmed that its interpretive approach is not conditioned upon on that effect in national law.[26] Nonetheless, *Caroline*

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[20] Findings of the Eur. Court H.R. may provide a reason for an appeal. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT, TEIL I [BGBL. I] 1074, as amended, § 359(6) (Ger.). *See also* Sauer, *supra* note 19, at 58 (suggesting that the Code of Criminal Procedure should be applied analogously by the courts of other jurisdictions).

[21] Sauer, *supra* note 19, at 35-68, 58. C*ontra* Alexander Proelß, *Der Grundsatz der völkerrechtsfreundlichen Auslegung im Lichte der Rechtsprechung des BVerfG*, *in* HARTMUT RENSEN, TRENDS IN THE CASE LAW OF THE GERMAN FEDERAL CONSTITUTIONAL COURT 565, 565–67 (Stefan Brink ed., 2009).

[22] Generally, the parties to the case "undertake to abide" by the judgment of the European Court of Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms art. 46(1), Nov. 4, 1950, 213 U.N.T.S. 221. This creates an obligation to implement the judgment at the national level. *See* CLARE OVEY & ROBIN WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (4th ed. 2006). Even though the redress for certain Convention violations, such as of Art. 6 ECHR, can imply a duty to reopen of proceedings. *See* Sejdovic v. Italy, 2006 Eur. Ct. H.R. 181, ¶ 126; COUNCIL OF EUR., RECOMMENDATION NO. R (2000) 2 OF THE COMMITTEE OF MINISTERS TO MEMBERS STATES ON ACTIONS ON THE RE-EXAMINATION OR REOPENING OF CERTAIN CASES AT DOMESTIC LEVEL FOLLOWING JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS, European Court of Human Rights judgments are not automatically legally enforceable in the member states. *But see* Treaty on the Functioning of the European Union arts. 280, 290, Mar. 25, 1950, 2010 O.J. (C83) 47. Despite this, a European Court of Human Rights judgment may have a legal effect equivalent to *res judicata*, such that the member state cannot deny the violation of convention right with regard to the particular circumstances of the case. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1481/04, Oct. 14, 2004, 111 BVERFGE 307, ¶ 41 (Ger.).

[23] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. No. 2 BvR 1570/03, Mar. 1, 2004, 3 BVerfGK 4 (Ger.).

[24] It discussed the duty to consider the European Court of Human Right's judgments by national organs in a separate paragraph. BVerfG, *supra* note 13, at ¶ 47.

[25] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1602/07, Feb. 26, 2008, 120 BVERFGE 180 (Ger.).

[26] Nonetheless also this case was preceded by a judgment of the Eu. Ct. HR., which in 2004 had decided the case in favor of the princess: 2004 Eu. Ct. HR. IV, ¶ 79, 80.

raised further questions with regard to the interpretative force of the ECHR in the German national legal order. The case, which different senates of the German Supreme Court decided oppositely,[27] dealt, amongst others, with a tabloid newspaper story published about Caroline von Hannover and some accompanying photos which showed her on holiday in a public street. Even though the princess had objected, the story was eventually published together with the pictures. The courts had to reconcile her right to privacy with the rights of the press to freedom of the press. In *Caroline*, the *Bundesverfassungsgericht* used the doctrine of the ECHR as an aid in the interpretation of constitutional rights and argued that national courts had to consider the restrictive nature of Article 8 of the ECHR when assessing the freedom of the press under the German constitution.[28] At the same time, it acknowledged that this method should not result in any restriction or lowering of the standard of constitutional protection already in existence under the Basic Law.[29]

Following the judgment, scholars doubted whether the ECHR could be regarded as a formal restriction on basic rights under the Basic Law, particularly in cases involving multiple parties in which different rights had to be balanced against one other.[30] Payandeh pointed out that this would require the relevant provisions of the ECHR to be directly applicable in German law.[31] In turn, he argued that direct applicability would require that the rights enshrined in the ECHR be sufficiently clear.[32] In his view, this was not the case.[33] Moreover, it had to fulfill the rule of law requirements under Article 20(3) of the Basic Law. Therefore, in situations involving multiple parties, which would require the balancing of several basic rights and would potentially involve decisions of the executive, legislature, or judiciary–any of which could address the core of the very rights involved–possible violations of basic rights would have to be addressed by a formal law issued by the legislature.[34] The wording of the *Caroline* judgment is ambiguous on this point. It mentioned Article 8 of the ECHR as a law restricting the freedom of communication of Article 5 Basic Law; yet, it is not clear whether the *Bundesverfassungsgericht* actually

[27] *See* Bundesgerichtshof [BGH - Federal Court of Justice], Case No. VI ZR 67/08 (July 1, 2008), http://juris.bundesgerichtshof.de/cgin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=f723efac26719146f67e1769ffef58fe&nr=45013&pos=0&anz=1 (last visited Apr. 29, 2012). *But see* BGH, Case Nos. VI ZR 256/06, VI ZR 260/06, VI ZR 271/06, VI ZR 272/06 (Oct. 14, 2008).

[28] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1602/07, Feb. 26, 2008, 120 BVERFGE 180 (Ger.). ¶ 52 (Ger.).

[29] *Id.*

[30] Mehrdad Payandeh, *Die EMRK als grundrechtsbeschränkendes Gesetz?*, 49 JURISTISCHE SCHULUNG 212 (2009).

[31] *Id.* at 214.

[32] *Id.*

[33] *Id.*

[34] This latter concept is also known as the core rights theory. *Id.* at 216.

meant to employ Article 8 ECHR in this way, or whether Article 8 ECHR and the ECHR "merely" impacted the balancing between the individual rights involved, *i.e.*, the freedom of the press versus the right to privacy of the princess. The question had to remain until the May 2011 decision of the *Bundesverfassungsgericht*.

Subsequent decisions of the *Bundesverfassungsgericht*, in particular a decision of October 2010, merely confirmed the Court's reasoning in *Görgülü*.[35] The October decision affirmed that the ECHR had to be considered by national courts in a methodologically sound manner, but only *as long as* this did not lead to a weakening of the Basic Law's standard of constitutional protection.[36] This ultimate condition, in particular, strongly resembles the *Bundesverfassungsgericht's* reasoning in *Solange II*, in which, concerning its relationship with the European Court of Justice (ECJ), the *Bundesverfassungsgericht* established the famous dictum that it will accept the ECJ's binding decisions at the constitutional rights level, as long as the European level of fundamental rights protection had not sunken below the standard of the Basic Law.[37] The dictum was later refined, to the effect that the complainant had the burden of proof to show that the European standard of individual rights protection had sunken below the national level in a given case.[38] The ultimate effect of the *Solange II* jurisprudence is nonetheless clear: It leaves the *Bundesverfassungsgericht,* as well as national courts, with the final authority to decide whether or not to follow the ECJ or the ECtHR.[39] The result is more problematic in EU law, where the principle of primacy in application and the direct effect of EU legislation militate against this German *Sonderweg*. At the ECHR level, however, Article 53 ECHR actually allows and acknowledges higher standards of human rights protection by national constitutions.[40] Nonetheless, *Solange II*, as well as Article 53 ECHR, has no answer for those cases in which national constitutional courts have to weigh two conflicting

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[35] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2307/06, Feb. 4, 2010, not reported, *available at* http://www.bverfg.de/entscheidungen/rk20100204_2bvr230706.html (last visited Apr. 29, 2012).

[36] *Id.* at ¶ 21. *See also* Tomuschat, *supra* note 11.

[37] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case Nos. 2 BvR 2134 & 2159/92, July 2, 1993, 89 BVERFGE 155, 175, 188 (Ger.).

[38] For the most recent refinement, see Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2661/06, July 6, 2010, __ BVERFGE __, at ¶ 61, *available at* http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106.html (last visited Apr. 29, 2012). There, the Federal Constitutional Court utilized the same terminology as ECJ, making reference to the Fresh Marine case.

[39] For an assessment of the *Solange II* jurisprudence, see Franz C. Meyer, *Multilevel Constitutional Jurisdiction*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Jürgen Bast & Armin von Bogdandy eds., 2010).

[40] Catherine Van de Heyning, *No Place Like Home: Discretionary Space for the Domestic Protection of Fundamental Rights*, *in* HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER: THE INTERACTION BETWEEN THE EUROPEAN AND THE NATIONAL Courts 71 (Patricia Popelier et al. eds., 2011).

fundamental rights and come to a different conclusion than the ECHR, as was the case in the *Caroline* decision. Resolving this situation also needed to wait until 4 May 2011.

B. The Judgment of 4 May 2011

The judgment of 4 May 2011 is the second major and principled pronouncement of the *Bundesverfassungsgericht* since *Görgülü*. It addresses the question of the legal effect of the ECHR in national law and whether the ECHR can serve as a law restricting the exercise of constitutional rights under the Basic Law. It also proposes a way of dealing with the ECtHR's findings in cases concerning conflicting constitutional rights. Despite the answers it gives with regard to those questions, the ultimate approach of the *Bundesverfassungsgericht* still leaves room for further interpretation.

The judgment of the Constitutional Court of 4 May 2011 tackles the complaints of three internees against their preventive detention.[41] All complainants had decisions rendered against them which retroactively ordered their preventive detention.[42]

Germany allowed for the preventive detention and hospitalization of prisoners in various laws under varying conditions, especially if there was a serious risk that those imprisoned would commit a serious crime which threatened sectors of general society if released.[43] Between 2004 and 2007, several cases concerning the rules on preventive detention were launched before the ECHR against Germany. In 2009, in the case of *M. v. Germany*,[44] the ECtHR delivered its first judgment on the matter and held that the German rules concerning retroactive imposition of preventive detention violated the claimant's rights under Article 5 as well as Article 7 of the Convention. This judgment came into effect on 10 May 2010. The ECtHR also found violations in similar, subsequent cases against Germany.[45] Following the *M. v. Germany* decision, not all lower level courts implemented the ECtHR's findings: Although several courts involved in the execution of criminal judgments declared further preventive detention to be null and void or terminated,[46] other courts refused to release the imprisoned, even though the maximum time for detention,

[41] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2365/09, May 4, 2011, 2011 NJW 1931 (Ger.).

[42] *Id.* at ¶¶ 36, 44, 52, 64.

[43] *See* STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT, TEIL I [BGBL. I] 1074, prior to Dec. 22, 2010 amendment, § 66(1).

[44] M. v. Germany, 2009 Eur. Ct. H.R. 2071, ¶¶ 103–05, 133–37.

[45] Kallweit v. Germany, 2011 Eur. Ct. H.R. 26; Mautes v. Germany, 2011 Eur. Ct. H.R. 27; Schummer v. Germany, App. Nos. 27360/2004 & 42225/2007 (Eur. Ct. H.R. Jan. 13, 2011).

[46] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2365/09, May 4, 2011, 2011 NJW 1931 (Ger.).

which had been introduced by a law of 1998, had been exceeded.[47] Eventually, following the proceedings before the ECtHR, the German laws on preventive detention were amended.[48] The provisions on preventive detention were deleted.[49] Nevertheless, the new provisions applied only to cases that were decided on or after 1 January 2011, the date on which the new laws came into force.[50] For crimes committed prior to that date, the old laws still applied.[51]

C. The Court's Findings on Its Relationship with the ECHR

The impact and importance of the ECHR's findings on the German body of rules on preventive detention has been discussed in depth earlier in this journal and shall not be discussed further here.[52] Probably the most innovative part of the judgment concerns the relationship of the *Bundesverfassungsgericht* with the ECtHR.[53] The Constitutional Court addressed both the effect of judgments of the ECtHR in German constitutional law and the question whether the ECHR can be held to restrict fundamental rights under the Basic Law. It also proposed a solution on how the ECtHR's case law can be accommodated by the national law in further cases concerning, for example, the weighing of conflicting constitutional rights.

Concerning the first issue, the Court reaffirmed that the ECHR, as well as the ECtHR's judgments, serve as an aid to the interpretation of constitutional rights. They determine the content and scope of constitutional rights as well as rule of law principles of the Basic Law, as long as they do not restrict the Basic Law's own scope of protection.[54] Moreover, the Court determined that the persuasive force of judgments of the ECtHR might also be derived from the leading and guiding role of the jurisprudence of the ECtHR, which

[47] *Id.*

[48] Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu Begleiten Regelungen [Regulations of the Law for Assurance and Custodial Services], Dec. 22, 2010, BGBL. I at 2300 [hereinafter *Regulations*].

[49] *Id.* at art. 1.

[50] *Id.* at art. 4.

[51] *Id.*

[52] *See* Grischa Merkel, *Incompatible Contrasts? – Preventive Detention in Germany and the European Convention on Human Rights*, 11 GERMAN LJ 1046 (2010); Grischa Merkel, *Case Note - Retrospective Preventive Detention in Germany: A Comment on the ECHR Decision* Haidn v. Germany *of 13 January 2011*, 12 GERMAN L.J. 968 (2011).

[53] *See* Mads Andenas and Eirik Bjorge, *"Preventive Detention." No. 2 BvR 2365/09*, 105 AM. J. INT'L L. 768, 772–73 (2011).

[54] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2365/09, May 4, 2011, 2011 NJW 1931, at ¶88 (Ger.).

transcends individual cases.[55] This finding is in almost perfect synchrony with the recent findings of the International Court of Justice, which for the same reasons held that, despite their lack of binding force, great weight must be accorded to the Views of the Human Rights Committee on questions concerning the interpretation of the rights of the International Covenant on Civil and Political Rights.[56]

In addition, and most importantly, the *Bundesverfassungsgericht* explicitly rejected the view that judgments of the ECtHR were persuasive at the national level only if the case considered by the ECtHR concerned the same underlying factual situation and had acquired legal effect in national law.[57] According to the Court, the domestic effect of judgments of the ECtHR followed from Articles 20(3) and 59(2) of the German Basic Law,[58] *i.e.,* rule of law considerations, as well as from the ECHR's incorporation into national law.[59] This meant that the obligation to recognize the judgments of the ECtHR at the domestic level was not limited to cases with the same underlying factual situation.[60] On the contrary, bearing in mind the precedential effect of decisions of international courts and tribunals, the Basic Law sought to prevent conflicts between the international obligations of the Republic of Germany and national law.[61]

The Court further alluded to the fact that the friendliness of the Basic Law towards international law was reflected in an understanding of sovereignty which was not against an involvement in international and supranational contexts or those contexts' further development; rather, the friendliness anticipated these developments and took them for granted.[62] The friendliness of the Basic Law towards international law also called for judgments of the ECHR to be taken into consideration.[63] This latter duty was reflected in the content of the Basic Law itself, in particular Article 1, which accords a special protection to the common core of all human rights.[64]

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[55] *Id.* at ¶ 89.

[56] Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), 50 I.L.M. 37, ¶ 66 (Nov. 30, 2010).

[57] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2365/09, May 4, 2011, 2011 NJW 1931, at ¶ 89 (Ger.).

[58] *Id*.

[59] *Id*.

[60] *Id*.

[61] *Id*.

[62] *Id*.

[63] *Id*.

[64] *Id.* ¶ 90.

Even though the friendliness of the Basic Law towards international law created a duty to consider the ECHR and the ECHR's judgments when interpreting constitutional rights, the Court held that this consideration needed to be result-oriented.[65] The interpretation of constitutional notions in light of the ECHR did not imply a parallel use of identical concepts or notions at the ECHR and the national levels.[66] Even though it was certainly desirable for national laws to be harmonized with the Convention, this was not compulsory. The nations were free to choose the appropriate means to fulfill their obligations under the ECHR.[67]

For further illustration of the actual relationship of the Basic Law with the Convention, the *Bundesverfassungsgericht* resorted to substantive and methodological arguments.[68] That is, it considered an interpretation of the Basic Law in light of the ECHR and the ECtHR's judgments to be inappropriate, where the protection of the Basic Law would be undercut by resorting to the ECHR's standard (which is a thought already reflected by Article 53 of the ECHR). It also held an interpretation in light of the ECHR to be inappropriate where an interpretation in light of the ECHR did not comply with the methods of constitutional interpretation.[69] The *Bundesverfassungsgericht* identified two examples of when this could actually be the case. First, the obligation to recognize the jurisprudence of the ECtHR, as well as the ECHR, could be suspended in multipolar situations involving more than one affected party, where the rights involved needed to be carefully balanced against each other, and where more protection given to one would imply less protection to the other.[70] Second, the *Bundesverfassungsgericht* would be barred from recognizing the

[65] *Id.* ¶ 91.

[66] *Id*. The imposition of a preventive detention could be imposed after a previous finding of guilt and imposition of a regular penalty, since it was not regarded as "penalty," but as "correction measure," according to sections 66 *et seq.* of the German Criminal Code, valid until 1 January 2011. By contrast, ECHR art. 5(1) allows for the deprivation of liberty only after a "conviction," which entails a finding of guilt and the imposition of a penalty thereupon. *See* M. v. Germany, 2009 Eur. Ct. H.R. 2071, ¶¶ 89–95.

[67] The member states' leeway on how to implement the judgments of the European Court of Human Rights, as well as the exercise of the Court's margin of appreciation in interpreting the convention are at the heart of current discussions about the proper exercise of the Court's authority. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2365/09, May 4, 2011, 2011 NJW 1931, ¶ 91 (Ger.) (citing the European Court of Human Rights's findings in Scozzari v. Italy, 2008-XIII Eur. Ct. H.R. 529); *see* also Convention for the Protection of Human Rights and Fundamental Freedoms art. 46, Nov. 4, 1950, 213 U.N.T.S. 221.

[68] That is, it turned to arguments which compared the actual protection provided by the Basic Law and the ECHR, and to arguments which compared the methods of constitutional interpretation with the methods of interpretation utilized in the ECHR system.

[69] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2365/09, May 4, 2011, 2011 NJW 1931, ¶ 93 (Ger.).

[70] *Id*.

jurisprudence of the ECHR or the rights enshrined in the ECHR in cases where they conflicted with the "recognized methods of constitutional or statutory interpretation."[71] In this regard, the Court referred to the regular methods of constitutional interpretation, the core rights theory, and Article 79(3) of the Basic Law, which refers to the guarantee of prevalence.[72]

The reference by the *Bundesverfassungsgericht* to multipolar relations between various affected parties tackles the question on how ECtHR interpretations can be accommodated in cases where various rights need to be weighed against each other. Even though the *Bundesverfassungsgericht* in *Caroline* had made clear that the interpretations of the ECHR by the ECtHR needed to be taken into account also in those cases, it had not taken a view on whether the ECtHR's interpretations could also be set aside, if the balancing of interests so required. Moreover, the Court still needed to turn to the debate upon the question whether the ECHR could be used as a formal restriction to constitutional rights.[73] Therefore, the Court first reaffirmed that the ECHR cannot be utilized to legitimize restrictions of constitutional rights where the constitutional rights of different actors are at stake.[74] This follows already from the substantive consideration that the standard of the Basic Law may not be undercut by the ECHR or the findings of the ECtHR:[75] If certain constitutional rights can, for example, only be restricted by law, their restriction in light of other constitutional interests requires a law which takes this relationship into account.[76] Second, turning to the question as to whether the ECtHR's interpretations needed to be taken into account in all cases, the Court held that where different constitutional rights compete against each other, even a ground-breaking decision and interpretation of the ECHR by the ECtHR needs to be balanced against all the other rights involved in the underlying context: It constituted only one interpretation of one right in a situation involving possibly many different rights.[77] Thus, the Court did not exclude that a balancing

[71] *Id.* ¶ 93.

[72] *Id.* ¶ 93.

[73] *Id.* ¶¶ 20–21.

[74] *Id.* ¶ 93.

[75] *Id*. *See also* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 67, at art. 53.

[76] Compare this with the laws enacted after the so called headscarf decision, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1436/02, June 3, 2003, 2003 NJW 3111 (Ger.), which balanced the constitutional interests of the keeping of peace in public schools with the religious interests of teachers. *See* Schulgesetz für das Land Nordrhein-Westfalen [Education Act of North Rhine-Westphalia], Feb. 15, 2005, GV. NRW. 102, as amended § 57(4) (Ger.).

[77] On the balancing of rights, see ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 397 (2002).

of interests in a multiple rights relationship could—in principle—require the setting aside of an interpretation of the ECtHR.[78]

The *Bundesverfassungsgericht* then turned to those instances where it might be required to divert from the ECtHR's findings. Hence, it opined that a recognition of the ECHR in constitutional interpretation must not conflict with the recognized *methods* of constitutional and statutory interpretation.[79] This paragraph of the judgment deserves further elaboration and possibly further future interpretation. The *Bundesverfassungsgericht*'s allusion to possible methodological conflicts with Strasbourg, in particular, is puzzling. The Karlsruhe court essentially employs the same methods of interpretation as the ECtHR does, with regard to both constitutional and statutory interpretation.[80] In both systems, context, object, purpose, the ordinary meaning of the text, and the historical interpretation of a provision, which requires turning to the *travaux préparatoires* of the original text, are relevant for the interpretation of provisions of the Basic Law and the ECHR.[81] Moreover, both the *Bundesverfassungsgericht* and the ECHR are renowned for their dynamic interpretation of the Basic Law and the ECHR, respectively.[82] Only the margin of appreciation doctrine of the ECtHR finds no parallel at the national level. However, rather than reemphasizing the interpretative authority of the ECtHR, this doctrine stresses the authority of national courts and authorities to interpret a right of the Convention.[83] Therefore, it is difficult to imagine an area in which *methodological* conflicts of interpretation might actually arise. Nonetheless, the *Bundesverfassungsgericht's* focus on interpretative methods might have aimed at cases in

[78] *But see* Tomuschat, *supra* note 11, at 524 (warning that the Strasbourg court will also have regard for all the rights concerned before delivering its final judgment).

[79] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2365/09, May 4, 2011, 2011 NJW 1931, ¶ 93 (Ger.).

[80] *See, e.g.*, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/92, May 24, 1995, 1996 NVwZ 574, 578 (Ger.). For more regarding interpretations taking into account history, object, and purpose, see Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvL 11/59, May 17, 1960, 11 BVERFGE 126, 132 (Ger.). For more on those methods, including references to the systematic, historical, and literal methods and on the ultimate limitation of an interpretation in conformity with the rights of the Basic Law see Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 952/75, May 9, 1978, 1978 NJW 2499 (Ger.). *See also* Matthias Herdegen, Verfassungsinterpretation als methodische Disziplin, 59 JURISTENZEITENG 873, 875 (2004).

[81] The European Court of Human Rights frequently refers to Art. 31 of the Vienna Convention on the Law of Treaties for the nterpretation of the ECHR. *See, e.g.*, Demir & Baykara v Turkey, 2008 Eur. Ct. H.R. 1345, ¶ 68.

[82] Tyrer v. United Kingdom, 1978 Eur. Ct. H.R. 2, ¶ 31. For the dynamic interpretation of the BVerfG, see ROBERT ALEXY, THEORIE DER GRUNDRECHTE 504 (1994).

[83] *See* Eyal Benevisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843–46 (1999); Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 115–16 (2004).

which the *Bundesverfassungsgericht* and the ECHR differ on the ultimate, i.e. *substantive,* result of an interpretation. This could, for example, apply to those cases in which the weighing of two conflicting constitutional or human rights provisions in Strasbourg and in Karlsruhe produced diverging ultimate results, like the *Caroline* decision.

Moreover, possibly with *Caroline* in mind, the *Bundesverfassungsgericht* thus concluded that the jurisprudence of the ECtHR had to be accommodated very carefully within the existing dogmatic framework of constitutional interpretation at the national level.[84] In cases where diverging dogmatic rules had developed, the principle of proportionality could be used to reconcile interpretations of the ECHR with the German doctrine.[85] More specifically, national courts should use the underlying reasons and evaluations used by the ECtHR in their proportionality assessment in individual cases.[86]

The ultimate balancing of interests for and against a justified limitation of constitutional rights, which constitutes the root of the proportionality test,[87] is possibly the best place to reconcile diverging fundamental rights interpretations at the Basic Law and ECHR levels. The mere possibility of diverging interpretations, however, disproves those who support an *erga omnes* effect for ECHR judgments, even at the constitutional level.[88] This would be tantamount to the adoption of a doctrine of primacy in application and interpretation, which Strasbourg has not yet ventured to do.[89] Yet it should be clear that national divergences from Strasbourg's case law should be reduced to exceptional cases, and that national constitutional courts should refrain from interpreting constitutional provisions in ways that would deny applicants the enjoyment of rights otherwise granted by the ECHR.[90] The recently adopted Brighton Declaration is firm on this point. It states: "The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court."[91]

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[84] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2365/09, May 4, 2011, 2011 NJW 1931, ¶ 94 (Ger.).

[85] *Id*.

[86] *Id*.

[87] For a source that is instructive on the proportionality principle, see Alec S. Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 104 (2008).

[88] *See* Keller et al., *supra* note 9.

[89] For the establishment of those doctrines by the Court of Justice of the European Union, see Case C-26/26, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen, 1963 E.C.R. 1, 12; Case C-6/64, Flaminio Costa v. E.N.E.L., 1964 E.C.R. 585, 593-94.

[90] The European Court of Human Rights uses a similar argument. *See, e.g.*, Chapman v. United Kingdom [GC], 2001-I Eur. Ct. H. R. 43, ¶ 70.

[91] Brighton Declaration, *supra* note 4, at ¶ 3.

D. Concluding Observations

The *Bundesverfassungsgericht*'s preventive detention judgment of 4 May 2011 provides some important clarifications concerning relationship with the ECHR. The judgment answers some of the questions that remained after the *Görgülü* and *Caroline* decisions. First, the method of constitutional interpretation in the light of the ECHR is not restricted to ECHR cases that have acquired legal effect in German law. Second, the method of inclusive constitutional interpretation may not cause the ECHR to be invoked in a way that restricts constitutional rights in cases concerning multiple rights relationships.

Regarding the methods of constitutional interpretation, the *Bundesverfassungsgericht* made clear that any interpretation of constitutional rights in light of the ECHR would have to remain within the general framework of recognized methods of constitutional interpretation. The *Bundesverfassungsgericht* clarified that it will not adopt the same methods of interpretation utilized by the ECHR. It is not compelled to do so. States are free to choose the methods by which they want to render ECHR rights effective at the national level. The *Bundesverfassungsgericht*, however, also affirmed that it has to take the reasoning of the ECtHR into account in its interpretation of the Basic Law.

Concerning the more abstract relationship and the allocation of competences between the ECHR and national constitutional courts, the *Bundesverfassungsgericht* adopted a solution which builds upon a cooperative and dialogue-based relationship with the ECHR. It goes even further than previous judgments insofar as the *Bundesverfassungsgericht*'s 4 May 2011 judgment did not focus on strict separation of ECtHR competences from its own. It promoted an integrative solution and sought to combine the reasoning and jurisprudence of the ECtHR with national constitutional interpretation as much as possible, in particular by suggesting the application of the principle of proportionality.[92]

Therefore, the *Bundesverfassungsgericht*'s decision may have positive implications for the understanding of the concept of subsidiarity, which can guide the future relationship of the ECHR with the member states. This judgment reveals a cooperative understanding of subsidiarity, which builds upon the dialogue between national courts and the ECHR. It appears to tend towards a conception of subsidiarity, which is similar to the doctrine of dialogic or polyphonic federalism, which has been advocated in American constitutional theory.[93] Since federalism usually entails a dualist approach to the relations between the

[92] Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUR. L.J. 158, 166 (2010).

[93] SCHAPIRO, *supra* note 5; Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 187–88 (2006); Margaret E. McGuiness, *Federalism and Horizontality in International Human Rights*, 73 MO. L. REV. 1265, 1277 (2008); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incoporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 290–96 (2001); Robert A. Schapiro, *Towards a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 301–14 (2005).

federal state and the states or the *Lander*,[94] the supporters of dialogic federalism support that diverging interpretations by courts at the federal and national levels are possible and can exist side by side.[95] The essential and uniting aspect of dialogic federalism is the exercise of comity, cooperation, and dialogue amongst the courts.[96] Building upon the same understanding of dialogue and cooperation, perhaps the *Bundesverfassungsgericht's* solution can serve as one example of the future relationship of national constitutional courts with the ECHR.[97] The ECtHR, in fact, appears to think so. It has mentioned the preventive detention decision, in particular the part on the friendliness of the Basic Law towards international law, in all subsequent judgments involving claims of detainees against Germany.[98]

[94] *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 72.

[95] SCHAPIRO, *supra* note 5, at 137.

[96] *Id.* at 136; Powell, *supra* note 93, at 288–96.

[97] The Brighton Declaration expressly recognizes and encourages dialogue between the European Court of Human Rights and the States' highest courts, including a reference to the optional recognition of an advisory opinion procedure "on the interpretation of the Convention in the context of a specific case at the national level." *See* Brighton Declaration, *supra* note 4, ¶ 12(c)–(d).

[98] *See* Schmitz v. Germany, 2011 Eur. Ct. H.R. 916, ¶ 28; Schönbrod v. Germany, 2011 Eur. Ct. H.R. 1974, ¶ 57; O.H. v. Germany, 2011 Eur. Ct. H.R. 1975, ¶ 51.