**Vortrag für Riga**

Supervision of national measures for the execution of judgments of the Court and separation of powers: national identity as an obstacle to execution

President of the Constitutional Court of Latvia, ladies and gentlemen

#  Introduction

It is an honour to be here again today. I vividly remember speaking to you last year on the occasion of the anniversary of the Constitution and the Constitutional Court. I had mentioned how an Irish friend of mine said that my English is so funny, I could make a lot of money appearing on television, so long as I did not improve my English skills. As I might need that money in the future after all, I have done my best to comply with this condition. Therefore, I must once again ask for your patience with my English skills.

Last year I was shocked by the big countdown timer showing the remaining speaking time. This year I have come prepared. I have ten minutes to elaborate on the topic of ‘Supervision of national measures for the execution of judgments of the Court and separation of powers: national identity as an obstacle to execution’, or, at this point, 9 minutes and 10 seconds to be exact.

#  Foundations

##  The legal status of the Convention in Germany

The European Convention of Human Rights (from now on abbreviated ‘Convention’) leaves it to the contracting parties to decide in what way they will comply with their duty to observe the provisions of the Convention.[[1]](#endnote-2) In Germany the Convention is directly applicable federal law.[[2]](#endnote-3) However, it only has the rank of ordinary federal law. Consequently, the Convention generally cannot take precedence over other federal law that is newer or more specific.[[3]](#endnote-4) The German Constitutional Court tries to compensate for this somewhat awkward predicament by, firstly, interpreting newer federal law in light of the Convention, and secondly, interpreting German fundamental rights in light of the Convention and measuring the law in question against this adjusted standard of review.[[4]](#endnote-5) In practice, the interpretation of German fundamental rights in light of the Convention often results in the Federal Constitutional Court assessing whether its result arrived at on the basis of German fundamental rights is compatible with the European Court of Human Rights’ case-law[[5]](#endnote-6) (from now on abbreviated ‘Court’). Moreover, the Federal Constitutional Court will ‘read between the lines’ to uncover guarantees that are not explicitly laid down in the German Basic Law, such as, in particular, the presumption of innocence,[[6]](#endnote-7) the right to a fair trial[[7]](#endnote-8) and the prohibition of excessively lengthy court proceedings.[[8]](#endnote-9)

##  Cases where the Court ruled against Germany

The question of the legal status of the Convention in German law is of some relevance as - despite substantial similarities - differences remain both with regard to the wording and the interpretation. The Court, in particular, has ruled against Germany in, among other cases, those concerning:

- quite often, the excessive length of proceedings,

- further, the strict duty of loyalty to the Constitution owed by members of the German public service,[[9]](#endnote-10)

- the weak position of the biological, but not legal, father under German family law;[[10]](#endnote-11)

- the protection of personality rights of celebrities,[[11]](#endnote-12)

‑ the protection against retrospective imposition of [measures of reform and prevention](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0421) on offenders,[[12]](#endnote-13)

‑ the consequences of the unlawful use of undercover police officers and agents provocateurs for criminal proceedings,[[13]](#endnote-14)

- the inadmissibility of the forced administration of emetics to potential drug dealers[[14]](#endnote-15)

- and, in the future, potentially also with regard to strike actions by civil servants.

##  Duty to abide by the case-law of the Court

If the Court determines that the decision of a German court is incompatible with the Convention, this alone does not signify that the decision becomes void at the national level. The reason for this is that the judgments of the Court are declaratory in nature and addressed to the Federal Republic of Germany as a contracting party.

However, there is room for compliance with the Court’s decision in spite of the fact that the concrete court proceedings had become final at the national level, because German procedural law provides a corresponding legal basis for reopening proceedings.[[15]](#endnote-16)

In addition, the Federal Constitutional Court has introduced a constitutional duty to take decisions of the Court into account.[[16]](#endnote-17) If a German court does not pay due regard to relevant case-law of the Court in a way that complies with the principle of openness to international law, this can constitute an independent violation of fundamental rights that can be the subject of a constitutional complaint before the Federal Constitutional Court.[[17]](#endnote-18) This duty to take into account the Court’s case-law varies in rigour, depending on how relevant the case-law is to the matter at hand.[[18]](#endnote-19)

#  Limits of the duty to take into account the case-law of the Court

With regard to the limits of the duty to observe the stipulations of the Convention and the decisions of the Court, one can distinguish between soft and hard relativisations of this duty.

##  Soft means of adaptation

### Alignment focussed on the outcome

As far as the Convention is binding, it is crucial to avoid, as far as is possible, any contradictions with regard to the end result. This does, however, not require harmony or identity of terms or legal doctrines. The Federal Constitutional Court uses the phrase that the alignment is ‘focussed on the outcome’.[[19]](#endnote-20) The primary aim is to avoid a violation of international treaties.[[20]](#endnote-21)

This is of particular relevance when the Federal Constitutional Court attempts to retrospectively adapt constitutional stipulations after the Court has ruled against Germany in order to avoid a repeated condemnation. For example, the fact that the Court found the retrospective extension of [measures of reform and prevention](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0421) imposed on offenders to violate the prohibition of retrospective penalties pursuant to Art. 7 of the Convention[[21]](#endnote-22) did not cause the Federal Constitutional Court to qualify [measures of reform and prevention](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0421) as a penalty. Rather, it applied the general prohibition on retroactivity, which arises from the rule of law and applies to all intrusive measures, in a particularly strict fashion to [measures of reform and prevention](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0421), thereby arriving at the same conclusion it would have reached had the prohibition of retrospective criminal laws been applicable.[[22]](#endnote-23)

### Context-specific interpretation

In addition, the Federal Constitutional Court also points out that any adaptation must be assessed on a context-specific basis.[[23]](#endnote-24) This means that the case-law of the Court must be integrated as carefully as possible into the existing national legal system.[[24]](#endnote-25)

Therefore, international law concepts must not be adopted indiscriminately. Similarities in the wording of certain legal provisions must not cover up the differences which follow from the context of the legal systems: the human rights content of the relevant international treaty must be ’adapted’ to the context of the receiving constitutional system in an active process (of acknowledgement).[[25]](#endnote-26)

From the perspective of the Basic Law in particular, the principle of proportionality comes into consideration as an inherent constitutional principle when taking into account assessments of the Court. This is especially true when, in the case of textually similar guarantees, the interpretation of a concept that the Court has developed autonomously differs from the corresponding concept according to the Basic Law.[[26]](#endnote-27)

##  Hard limits of the duty to take into account

The Federal Constitutional Court also emphasises that there are limits to the possibilities of approximation of the national legal order and the Convention. The Federal Constitutional Court refers to these as obstacles to the acknowledgement of international law.[[27]](#endnote-28) The Federal Constitutional Court lays down three explicit limits:[[28]](#endnote-29)

- An interpretation of fundamental rights in a manner that is open to the Convention must not result in a limitation of the protection of fundamental rights afforded to others by the Basic Law. This may become significant in multi-polar fundamental rights relationships.

- An interpretation of fundamental rights in a manner that is open to the Convention must remain within the limits of the recognised methods of interpretation of statutes. German courts are obliged to give precedence to an interpretation that is in accordance with the Convention only to the extent that there is room for interpretation and balancing. The precedence ends if observing the decision of the Court would violate clearly opposing federal statutory law or German constitutional provisions.

- Finally, the absolute limit of the core of constitutional identity must not be violated.[[29]](#endnote-30)

To date, these limits have not been exceeded in practice. However, the Federal Constitutional Court has, on a preventive basis, made clear in its decision on the ban on strike actions by civil servants that it will likely not adapt the domestic constitutional order if the Court finds a violation of Art. 11 of the Convention.[[30]](#endnote-31) It remains to be seen how the Court will decide.

Who knows, maybe I will be standing here again next year to report on the impact of the Court’s decision.

Thank you for your attention.

1. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 111, 307 <316>; BVerfGE 128, 326 <367>; BVerfGE 148, 296 (Strike actions by civil servants), juris para. 127. [↑](#endnote-ref-2)
2. BVerfGE 74, 358 <370>; BVerfGE 82, 106 <120>; BVerfGE 111, 307 <316 f.>; BVerfGE 128, 326 <367>; BVerfGE 148, 296 (Strike actions by civil servants), juris para. 127. [↑](#endnote-ref-3)
3. BVerfGE 138, 296 juris para. 248. [↑](#endnote-ref-4)
4. BVerfGE 128, 326 <369>: ‘The Basic Law’s substantive focus on human rights is expressed in the German people’s acknowledgement of inviolable and inalienable human rights in Article 1(2) of the Basic Law in particular. In Article 1(2), the Basic Law accords special protection to core human rights. In conjunction with Article 59(2) of the Basic Law, this provision is the basis for the constitutional duty of using the European Convention on Human Rights in its specific manifestation as an interpretation guideline even when applying German fundamental rights. Article 1(2) of the Basic Law is therefore not a gateway to give the European Convention on Human Rights direct constitutional rank, but the provision is more than a non-binding programmatic statement in that it provides a principle for the interpretation of the Basic Law and spells out the fact that its fundamental rights must also be understood as a manifestation of general human rights and have incorporated the latter as a minimum standard (cf. BVerfGE 74, 358 <370>; 111, 307 <329>; […]’). [↑](#endnote-ref-5)
5. BVerfGE 160, 79, juris para. 101. [↑](#endnote-ref-6)
6. BVerfGE 82, 106 juris para. 86; BVerfGE 74, 358 juris para. 35. [↑](#endnote-ref-7)
7. BVerfGE 110, 339, juris para. 10. [↑](#endnote-ref-8)
8. Federal Constitutional Court, Order of the Complaints Chamber of 20 August 2015 – 1 BvR 2781/13 - Vz 11/14 –, juris para. 29. [↑](#endnote-ref-9)
9. ECtHR, Judgment of 26 September 1995 – 17851/91, NJW 1996, 375 ff. [↑](#endnote-ref-10)
10. ECtHR, Judgment of 26 February 2004, Görgülü / Germany, Application No. 74969/01; BVerfGE 111, 307 <330 ff.> – Görgülü; see also BVerfGE 127, 132 juris para. 74. [↑](#endnote-ref-11)
11. ECtHR, Judgment of 24 June 2004, von Hannover/Germany, Application No. 59320/00, para. 64; see also ECtHR, Judgment of 16 November 2004, Karhuvaara und Iltalehti / Finland, Application No. 53678/00, para. 45; BVerfGE 101, 361 <390 ff.> - Caroline II; earlier already BVerfGE 34, 269 <283>; BVerfGE 120, 180 <220 f.> - Caroline III. [↑](#endnote-ref-12)
12. Foundationally, ECtHR, Mücke / Germany, Judgment of 17 December 2009, No. 19359/04; BVerfGE 109, 133 <159> (Preventive detention I); BVerfGE 128, 326 <370> (Preventive detention II). [↑](#endnote-ref-13)
13. ECtHR, Judgment of 23 October 2014, 54648/09, NJW 2015, 3631; ECtHR, Judgment of 15 October 2020 - 40495/15, NJW 2021, 3515; still different in Federal Constitutional Court, Order of Non-Admission of 18 December 2014 - 2 BvR 209/14 -, juris, NJW 2015, 1083 ff. [↑](#endnote-ref-14)
14. ECtHR, Jalloh ./. Germany, Judgment of 11 July 2006, Application No. 54810/00, NJW 2006, 3117 ff. [↑](#endnote-ref-15)
15. § 580 no. 8 of the Code of Civil Procedure; § 153 of the Code of Administrative Court Procedure in conjunction with § 580 no. 8 of the Code of Civil Procedure; § 79 Labour Court Act in conjunction with § 580 no. 8 of the Code of Civil Procedure; § 134 Code of Procedure for Fiscal Courts in conjunction with § 580 no. 8 of the Code of Civil Procedure. [↑](#endnote-ref-16)
16. BVerfGE 128, 326 <368 f.>. ‘When using the European Convention on Human Rights as a guideline for interpretation, the Federal Constitutional Court also takes into account decisions of the European Court of Human Rights even if they do not concern the same issue. This is based on the factual function of direction and guidance attached to the case-law of the European Court of Human Rights with regard to interpreting the European Convention on Human Rights, also beyond the decision of a specific case (with regard to this guidance function cf. BVerfGE 111, 307 <320>; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 10, 66 <77 f.>; 10, 234 <239>; each with further references). Since the Basic Law is intended to avoid conflicts between domestic law and Germany’s obligations under international law, where possible and with regard to the at least factual precedent character of the decisions of international tribunals, the effects of decisions of the European Court of Human Rights on the domestic level are, in that respect, not restricted to the duty, derived from Art. 20(3) in conjunction with Art. 59(2) of the Basic Law, to take account of these decisions regarding only the circumstances on which the specific decisions are based (cf. BVerfGE 109, 13 <23 f.>; 109, 38 <50>; 111, 307 <318, 328>; 112, 1 <25>; 123, 267 <344 ff., 347>; BVerfGK 9, 174 <193>). The Constitution’s openness to international law thus expresses an understanding of sovereignty that is not only in favour of an integration into international and supranational contexts and their further development, but requires and expects them. Against this background, even the “final say” of the German Constitution is not opposed to an international and European dialogue of courts, but provides its normative basis.’ See also BVerfGE 148, 296 (Strike actions by civil servants), juris para. 130. [↑](#endnote-ref-17)
17. BVerfGE 111, 307 <329 f.>; Federal Constitutional Court, Order of the Second Chamber of the Second Senate of 18 December 2014 – 2 BvR 209/14 –, juris para. 41; cf. also BVerfGE 128, 326 <368>. [↑](#endnote-ref-18)
18. BVerfGE 148, 296 (Strike actions by civil servants), juris paras. 129, 132, 173; BVerfGE 128, 326, juris para. 89. [↑](#endnote-ref-19)
19. BVerfGE 128, 326 <369>: ‘Using the European Convention on Human Rights as a guideline for interpretation of the provisions of the Basic Law is focussed on the outcomes, just like the European Convention on Human Rights itself with regard to its implementation at the national level: It does not aim at schematically aligning individual constitutional concepts in parallel, but serves to avoid violations of international law. While it may often be easier to cure or avoid violations of international law if domestic law is harmonised with the Convention, this is not imperative under international law: The Convention leaves it to the Contracting Parties to decide in what way to comply with their duty to observe the provisions of the Convention (cf. BVerfGE 111, 307 <316> with further references and <322>; see also ECtHR, Judgment of 13 July 2000, Application No. 39221/98 and No. 41963/98, Scozzari and Giunta ./. Italy, para. 249; *Tomuschat*, German Law Journal, Volume 5 [2011], p. 513 [517 f.] with regard to the principle that a member state that has been condemned by the ECtHR remains free to choose the means to fulfil its obligations under Art. 46 ECHR).’. Cf. BVerfGE 148, 296 (Strike actions by civil servants), juris para. 130. [↑](#endnote-ref-20)
20. BVerfGE 148, 296 (Strike actions by civil servants), juris para. 131. [↑](#endnote-ref-21)
21. ECtHR, Judgment of 24 November 2011 - Application No. 4646/08 - O.H. ./. Germany, para. 103 ff.). [↑](#endnote-ref-22)
22. BVerfGE 128, 326, juris para. 87 ff.; BVerfGE 134, 33 juris para. 86. [↑](#endnote-ref-23)
23. BVerfGE 128, 326 <369>: ‘In light of this, it must be stated that similarities of norm texts must not cover up the differences which follow from the context of the legal systems. This applies to the interpretation of concepts of the Basic Law in a manner that is open to international law and, in a similar way, to the interpretation based on the comparative analysis of constitutions. The human rights content of the relevant international treaty must be “adapted” to the context of the receiving constitutional system in an active process (of acknowledgement) (cf. *Häberle*, Europäische Verfassungslehre, 7th Edition 2011, p. 255 f.; cf. also *Dreier*, GG, Volume 1, 2nd Edition 2004, Art. 1(2), para. 20).’ Cf. BVerfGE 148, 296 (Strike actions by civil servants), juris para. 131. [↑](#endnote-ref-24)
24. BVerfGE 128, 326 <370>; BVerfGE 111, 307 <327>; BVerfGE 148, 296 (Strike actions by civil servants), juris para. 135. [↑](#endnote-ref-25)
25. BVerfGE 128, 326 <370> with reference to *Häberle*, Europäische Verfassungslehre, 7th Edition 2011, p. 255 f. [↑](#endnote-ref-26)
26. BVerfGE 128, 326 <370>; BVerfGE 111, 307 <324>; BVerfGE 148, 296 (Strike actions by civil servants), juris para. 153; BVerfGK 3, 4 <8 ff.>). [↑](#endnote-ref-27)
27. BVerfGE 128, 326 <370>; BVerfGE 137, 273, juris para. 130. [↑](#endnote-ref-28)
28. BVerfGE 128, 326 <370>. ‘f) The limits of an interpretation that is open to international law follow from the Basic Law. Firstly, an interpretation of fundamental rights in a manner that is open to international law must not result in a limitation of the protection of fundamental rights as afforded by the Basic Law; this is also excluded by the European Convention on Human Rights itself (cf. Art. 53 ECHR; see BVerfGE 111, 307 <317>). Above all, this obstacle to acknowledging international law may become significant in multi-polar fundamental rights relationships in which the increase of liberty for one holder of fundamental rights means a decrease of liberty for the other at the same time (cf. *Wahl/Masing*, JZ 1990, p. 553 ff.; *Hoffmann-Riem*, EuGRZ 2006, p. 492; *Calliess*, in: Merten/Papier, HGR, Volume II, 2006, § 44 para. 18 ff. with further references). The possibilities of interpretation in a manner open to the Convention end where such an interpretation no longer appears tenable according to the recognised methods of interpretation of statutes and of the Constitution (cf. BVerfGE 111, 307 <329> […])’; cf. also BVerfGE 148, 296 (Strike actions by civil servants), juris para. 132; BVerfGE 137, 273 juris para. 129. [↑](#endnote-ref-29)
29. S. BVerfGE 148, 296 (Strike actions by civil servants), juris para. 172. [↑](#endnote-ref-30)
30. BVerfGE 148, 296 (Strike actions by civil servants), juris para. 172: ‘In particular, there is presently no need to clarify, whether the ban on strike actions by civil servants, which is a traditional principle of the career civil service system and a traditional element of the German state structure also is a fundamental constitutional principle (exempt from adaptation by way of interpretation).’ [↑](#endnote-ref-31)