# EUROPEAN AND CONSTITUTIONAL STANDARDS OF HUMAN RIGHTS PROTECTION

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# European Fundamental Freedoms as Subjective Rights for EU-citizens by means of the EU Freedom of Movement for Workers

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## I. Introduction

The establishment of an internal market is one of the primary goals of the European integration process according to Art. 3 TEU. To achieve this aim of an area without internal frontiers Art. 26 para. 2 TFEU mentions four fundamental freedoms. Those are in concrete the free movement of goods (Art. 28 et sq. TFEU), the free movement of persons including the freedom of movement for workers (Art. 45 TFEU) and the freedom of establishment (Art. 49 TFEU), the free movement of services (Art. 56 TFEU) and the free movement of capital and payments (Art. 63 TFEU).

As you can see with the wording, the fundamental freedoms were originally designed to function as a prohibition of discrimination for certain economic activities.[1] Over time, the ECJ developed the fundamental freedoms to subjective rights for each individual EU-citizen. Because of this and their dogmatic structure, they are comparable to the fundamental rights, but there a still differences in several aspects. One of the most important ones is that the fundamental freedoms require a cross-border case to be applicable.[2]

Overall, there were two ground-breaking steps in the jurisdiction of the ECJ in the development of fundamental freedoms as subjective rights. The first one was the acknowledgment of a direct effect of the EU-Law in the famous ruling *Van Gend en Loos* (II.).[3] The second one was the development of the fundamental freedoms from a prohibition of discrimination to prohibition of limitation (III.).[4] Finally, to define the scope of those liberty rights we will take a closer look at the beneficiaries (IV.) and the addressees (V.) of the fundamental freedoms especially concerning the freedom of movement for workers. To the latter ECJ pronounced some influencing rulings for the fundamental freedom doctrine particularly for the direct horizontal effect.

[1] Cf. Art. 36 cl. 2 TFEU, Art. 45 para. 2, Art. 49 para. 2, Art. 57 cl. 3, Art. 63 para. 2, 3.

[2] With additional references for the differences of fundamental freedoms and fundamental rights, *Manger/Nestler*, Europäische Grundfreiheiten und Grundrechte, JuS 2013, 503 ff.; *Ehlers*, in: id., Europäische Grundrechte und Grundfreiheiten, 2014, § 7 para. 13 f.

[3] ECJ, ECR 1963, 3 [Van Gend & Loos] = ECLI:EU:C:1963:1.

[4] Cf. ECJ, ECR 1974, 837 [Dassonville] = ECLI:EU:C:1974:82; ECJ, ECR 1995, I-4165 [Gebhard] = ECLI:EU:C:1995:411; ECJ, ECR 1995, I-4921 [Bosman] = ECLI:EU:C:1995:463; ECJ, ECR 1974, 1299 [van Binsbergen] = ECLI:EU:C:1974:131.

## II. The direct effect of the EU Law

The direct effect of the EU Law is the basis for the existence of subjective rights in the EU-law. To understand why it is such a special aspect, that the treaties confer subject rights, we have to look at the legal nature of those treaties first. The TEU und TFEU are international treaties, which originally bind only the parties of the contract.[5] Due to that, the fundamental freedoms were originally not designed to confer subjective rights to the EU-citizens.[6] In his ground-breaking judgement *van Gend en Loos* the ECJ refused this understanding of the legal nature of the TFEU. Instead, he decided that EU-law has a under certain conditions direct effect and thus it confers subjective rights.[7] This leads to an immediate enforceability by the beneficiaries of those rights in front of national courts.[8]

The ECJ argued with the spirit, the general scheme and the wording of the fundamental freedoms.[9] He pointed out, that the functioning of an internal market, which is a primary aim and of direct concern for the member states, implies that the treaty is more as only an agreement, which only creates obligations between the contracting parties.[10] As you can see the reasoning of the ECJ was led by a vision he had of what he understood of the European Community and as consequences of the new legal order of international law. This interpretation is also supported by the wording of the preamble, which does not only refer to the member states but also to the citizens.[11]

The current[12] requirements an article has to comply with for having a direct effect are that it has to be sufficiently clear, precise, and unconditional to be invoked by individuals.[13] Today there is a consensus that all fundamental freedoms fulfil these requirements. So with regard to the wording of Art. 45 TFEU each individual EU-Citizen has the right to leave state of origin, to enter the territory of another Member State and to reside and pursue an economic activity here.

As this judgement was ground-breaking for the early understanding of the effect of EU Law and for the European integration process it is nowadays clear, that all fundamental freedoms confer subjective rights for each individual EU-citizen, on which they can lay claim on and which the courts have to protect. This understanding leads to a way higher effectiveness in practice of the fundamental freedoms in Europe.

[5] Cf. the definition in Art. 2 para. 1 VCLT

[6] *Kingreen*, in: Calliess/Ruffert, EUV/AEUV, 2016, Art. 36 para. 9 AEUV; *Ehlers*, in: id., Europäische Grundrechte und Grundfreiheiten, 2014, § 7 para. 10.

[7] ECJ, ECR 1963, 3 [Van Gend & Loos] = ECLI:EU:C:1963:1.

[8] *Ehlers*, in: id., Europäische Grundrechte und Grundfreiheiten, 2014, § 7 para. 10; Craig/DeBurca, EU Law, 2015, p. 189.

[9] ECJ, ECR 1963, 3 [Van Gend & Loos] = ECLI:EU:C:1963:1.

[10] Ibid.

[11] Ibid.

[12] The conditions for a direct effect have been broadened over time since van Gend en Loos.

[13] Craig/DeBurca, EU Law, 2015, p. 192.

## III. From a prohibition of discrimination to prohibition of Limitation

### 1. Prohibition of Discrimination

The fundamental freedoms were primarily regarded to function as prohibition of discrimination. As such, they specify the general prohibition of limitation in Art. 18 TFEU.[14]

This for example can clearly be seen by the wording of article 45 para. 2 TFEU, which says that "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment".

This article contains a clear prohibition of discrimination based on nationality. As you can see the wording refers to measures "between […] the Member States". On the basis of the foregoing the ECJ demands a cross-border situation for the fundamental freedoms to be applicable.[15] The ECJ differentiates between two types of discrimination namely the direct and indirect discrimination. In case of a direct discrimination, national measures explicitly put cross-border scenarios at a disadvantage in comparison to national scenarios.[16] An indirect discrimination can be described that nationals can more easily fulfil a certain requirement than non-nationals, whether the requirement does not differentiate between those two explicitly.[17] A discrimination does not always lead to a suspension of the measure; it can also be justified.[18]

### 2. Prohibition of Limitation

For a long time it was unclear, if also measures which were neither directly or indirectly discriminatory on the ground of nationality should be considered as violation of the scope of a fundamental freedom. Over time, the ECJ developed the fundamental freedoms to prohibitions of limitation. He first invented this prohibition of limitation for the free movement of goods in his famous ruling *Dassonville*.[19] The ECJ stated clear that "measures having an equivalent effect" (cf. Art 34 TFEU) are "all trading rules enacted by a member state which capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"[20]. Now it was clear that also non-discriminatory measures could under certain circumstances be seen as a breach of the contract.[21]

[14] *Ehlers*, in: id., Europäische Grundrechte und Grundfreiheiten, 2014, § 7 para. 24.

[15] Cf. ECJ, ECR 1979, 1129 [Saunders] = ECLI:EU:C:1979:88; ECR 1992, I-341 [Steen I] = ECLI:EU:C:1992:40; ECR 1994, I-2715 [Steen II] = ECLI:EU:C:1994:254.

[16] Cf. for example ECJ, ECR 1974, 359 [Commission v French Republic] = ECLI:EU:C:1974:35; ECR 1998, I-6601 [Commission v Hellenic Republic] = ECLI:EU:C:1998:516.

[17] Cf. ECJ, ECR 1974, 153 [Sotgiu] = ECLI:EU:C:1974:13; ECR 1988, 4635 [Beentjes] = ECLI:EU:C:1988:422; ECR 2003, I-14887 [DocMorris] = ECLI:EU:C:2003:664.

[18] Cf. *Ehlers*, in: id., Europäische Grundrechte und Grundfreiheiten, 2014, § 7 para. 107 ff.

[19] ECJ, ECR 1974, 837 [Dassonville] = ECLI:EU:C:1974:82.

[20] ECJ, ECR 1974, 837, para. 5 [Dassonville] = ECLI:EU:C:1974:82.

[21] The ECJ later limited this broad approach of possible interferences in his Keck-ruling, cf. ECJ, ECR 1993, I-6097 [Keck] = ECLI:EU:C:1993:905.

In context of the freedom of movement for workers this problem first raised in the famous Bosman-judgement[22], in which the transfer-system of European professional football associations was found to be in breach with Art. 45 TFEU. In his ruling the ECJ said, that "the rules […] directly affect players' access to the employment market in other member states and are thus capable of impeding freedom of movement for workers."[23]
Overall, a limitation of a fundamental freedom can be seen in every measure, which is "liable to hinder or make less attractive the exercise of a fundamental freedoms guaranteed by the Treaty"[24].

If you take a closer look at the development of the fundamental freedoms, you can see that their scope of protection got widened over time because of the jurisdiction of the ECJ. The ECJ wanted to create an internal market as most effective as possible. Because of the this the fundamental freedoms do not only function as an equality right due the prohibition of discrimination, but also a liberty right because of the prohibition of limitation.[25]

## IV. Beneficiaries of the fundamental freedoms

Until now, we saw that fundamental freedoms confer a subjective right, which also contains a prohibition of limitation. Now we want to look at the beneficiaries of the fundamental freedoms, which means who can rely on the fundamental freedoms. Primary the nationals of an EU member state are the beneficiaries of the fundamental freedoms. In the context of Art. 45 TFEU the question aroused, whether Art 45 included non-EU national residents, which are working within the EU. This question was early declined because of secondary legislation[26] to Art. 45 TFEU, which restricted its application only to workers who were nationals of a member state. The legal status of non-EU nationals, which are living and working in an EU member state, is now governed by secondary law.[27] Apart from this, special rights are granted to family members of a beneficiary, even if the family member are non-EU members. Those persons have a derived right because of secondary law[28] from the scope of protection of Art. 45 TFEU. Furthermore fundamental freedoms can also be provided to non-EU citizens by association agreements.[29]

[22] ECJ, ECR 1995, I-4921, [Bosman] = ECLI:EU:C:1995:463.
[23] ECJ, ECR 1995, I-4921, para. 103 [Bosman] = ECLI:EU:C:1995:463.
[24] ECJ, ECR 1995, I-4165, para. 37 [Gebhard] = ECLI:EU:C:1995:411.
[25] Cf. *Ehlers*, in: id., Europäische Grundrechte und Grundfreiheiten, 2014, § 7 para. 30 ff; for a different view: *Kingreen*, in: Calliess/Ruffert, EUV/AEUV, 2016, Art. 36 para. 66 ff. AEUV.
[26] Regulation 492/2011 (former 1612/68).
[27] Directive 2003/109.
[28] Cf. directive 2004/38.
[29] Concerning Georgia the freedom of movement for workers is not included, cf.: https://eur-lex.europa.eu/legal-content/de/TXT/PDF/?uri=CELEX:22014A0830(02); cf. *Franzen*, in: Streinz, EUV/AEUV, 2018, Art. 45 para. 49 ff.

## V. Addressees of the fundamental freedoms

Addressees of the fundamental freedoms means which entities are bound by those. The treaties bind first and foremost the member states as mentioned above. The term member state has to be seen as a functional one, thus it includes all governmental action of a member state for example also in form of local or state authorities.[30]

The institutions of the EU are also bound by the fundamental freedoms.[31] Due to that, measures of the institution of the EU can also infringe a single person in their fundamental freedoms.

In regard to the free movement for workers one of the most discussed question was, whether also private persons are legally bound by the fundamental freedoms. This problem is also known as direct horizontal effect of the fundamental freedoms. The ECJ first acknowledged this principle in the *Walrave*-case[32] and confirmed in the *Bosman*-case. The rules, which were challenged in this case, were made by international sporting associations which were privately organised. The court said, that those rules aiming at "collectively regulating gainful employment and services" can be prohibited by Art. 45 TFEU.[33] One of the main arguments for these rulings have been, that those associations have a very high regulatory power.[34] A single employee has under normal circumstances no influence on the content of such regulations.

The ECJ went even beyond this approach in his *Angonese*-case, when he ruled the prohibition of discrimination of Art. 45 TFEU also applies to private persons.[35] In this case private savings bank in the Italian city of Bolzano required its employees to be bilingual in German and Italian due to the language characteristics of the region. It demanded a certain certificate as proof of bilingualism ("patentino") which was issued only by public offices in Bolzano. Angonese was Italian and had studied in Austria. He was told he could not apply for a job at the bank because he had no certificate, despite being able to speak both languages. The ECJ saw in the requirement of the "patentino" an indirect discrimination on the ground of nationality, because nationals of other member states cannot acquire a "patentino" as easy as the Italian nationals. In the consequence the ECJ ruled that also private persons, in concrete the bank in Bolzano, are bound by the prohibition of discrimination. The court argued with the importance of the freedom of movement of workers as seen in Art. 45 TFEU, it's similarity with Art. 18 TFEU and its potential obstruction by private parties. The ECJ confirmed this judgement in the *Raccanelli*-Case.[36]

[30] Cf. *Ehlers*, in: id., Europäische Grundrechte und Grundfreiheiten, 2014, § 7 para. 43; *Kingreen*, in: Calliess/Ruffert, EUV/AEUV, 2016, Art. 36 para. 104 ff. AEUV.

[31] ECJ, ECR 1994, I-3879 [Meyhui] = ECLI:EU:C:1994:312; ECR 2004, I-11893 [Swedish Match] = ECLI:EU:C:2004:802; *Kingreen*, in: Calliess/Ruffert, EUV/AEUV, 2016, Art. 36 para. 109 f.. AEUV.

[32] ECJ, ECR 1974, 1405 [Walrave] = ECLI:EU:C:1974:140; ECR 1995, I-4921 [Bosman] = ECLI:EU:C:1995:463

[33] ECJ, ECR 1974, 1405, para. 16 ff. [Walrave] = ECLI:EU:C:1974:140; ECR 1995, I-4921, para. 24 ff [Bosman] = ECLI:EU:C:1995:463.

[34] *Franzen*, in: Streinz, EUV/AEUV, 2018, Art. 45 para. 93.

[35] ECJ, ECR 2000, I-4139 [Angonese] = ECLI:EU:C:2000:296.

[36] ECJ, ECR 2008, I-5939 [Raccanelli] = ECLI:EU:C:2008:425.

Until today it is still discussed whether the fundamental freedoms should have a direct horizontal effect or not.[37] On the one side, it broadens the scope of protection for each individual EU-citizen, but on the other side, it infringes the basic principle of private autonomy.

## V. Conclusion

All in all we could see that the understanding of the fundamental freedoms as subjective rights was mainly shaped by the jurisdiction of the ECJ. He first acknowledged the legal nature of the fundamental freedoms as subjective rights and broadened their scope of protection over time. Especially concerning his interpretation of the freedom of movement for workers in Art. 45 TFEU he wants to ensure that there is no discrimination on the labour market, neither by entities of the member states or by private persons.

[37] *Ehlers*, in: id., Europäische Grundrechte und Grundfreiheiten, 2014, § 7 para. 60 f.; *Franzen*, in: Streinz, EUV/AEUV, 2018, Art. 45 para. 95 f.; *Kingreen*, in: Calliess/Ruffert, EUV/AEUV, 2016, Art. 36 para. 111 ff. AEUV; *Birkemeyer*, Die unmittelbare Drittwirkung der Grundfreiheiten, EuR 2010, 662.

# Do You Control Your Virtual Identity? Data Protection and Privacy under EU Law

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[38] The views expressed herein are the Authors and shall in no way be associated to Lund University or Magle Chemoswed AB.

## 1. Summary

The technological developments open immense opportunities, advance our lives in many ways and carry unlimited potential. However, development of science and technology comes at a price-it requires processing of personal data and creates possibilities to intrude into our private life. In other words, privacy is vulnerable in the era of technological advancements. Therefore, it is not surprising that privacy and data protection is a hot topic among academic circles of different disciplines, policy makers, legal practitioners and etc. The right to privacy encompassing the protection of personal data is not a new phenomenon for many legal jurisdictions and the EU's policy on the protection of privacy and personal data stands out with its robust legal framework and fast evolving case law.

A contemporary lawyer perhaps would not have second thoughts on the right to privacy. However, the discussion herein aims to critically reflect on the right to privacy, asking questions as follow: Should there be a fundamental/human right[39] to privacy or the protection of the private sphere is already inherent in other fundamental/human rights? Is protection of personal data part of privacy and how far can and shall we control our privacy in the context of fast-evolving technologies? These questions are used as critical lenses while taking a journey in the legal foundations of privacy, investigating the current legal framework for the protection of privacy at the EU level and discussing the controversial case concerning the personal data protection and privacy: *Google Spain*.[40]

The aim of this discussion is to instigate thought-provoking questions surrounding the legal protection of privacy, outline the challenges that privacy faces in modern society and to question the privacy itself as a possible impediment to technological advancements.

## 2. Setting the scene

We live in the era of the information society having a huge impact on our lives. We constantly provide our personal information and data-whenever we buy tickets to the concert, flying elsewhere, buying cloths, applying for a loan and the list can go on countlessly. Due to the development of science and technology, interconnected devices share the information without people being involved, hence, the possibility to intrude into someone's privacy increases. The development of computer technology also makes it possible to store information without limits to the amount, to the scope of analysis or to the duration of its storage. The collected information can be organized in a systematic order and be transferred instantly.

These technological developments have somewhat paradoxical effect. On the one hand, the private sphere of someone becomes more open, as the new developments make more intrusion into it, more and more aspects of private life can be reached or touched through technologies. 'On the other hand, the individual becomes more closed in the offline world as

[39] The terms fundamental rights and human rights are used interchangeably herein. However, in the EU context it is more common to refer to 'fundamental rights', instead of human rights. For discussion on the terminology concerning human rights in the EU context see: B. Van Der Sloot, "Legal Fundamentalism: Is Data Protection Really a Fundamental Right?", *Data Protection and Privacy:(In) visibilities and Infrastructures*. Springer, Cham, 2017. 3-30, p. 3.

[40] Case C-131/12, *Google Spain SL*, ECLI:EU:C:2014:317

people tend to withdraw, their relationships become less personal, as more areas of life are conducted online.'[41] Due to new possibilities brought by the advancement of technology, it is possible to have a complete life online: to work, have friends, do the shopping etc. 'As a consequence, in the society the individual is determined not by himself/herself, but it is the information obtained about him/ her that determines him/her.'[42] The individual becomes virtual- it is a group of data (collection of zeros and ones).

Enormous data circulating about us, in many cases without our knowledge, and due to lack of control over our virtual selves, creates the fear of Big Brother, being it Google or Facebook, watching us constantly. How shall we react on this? Can we still demand and enjoy the same privacy in the era of Internet? Shall we? How shall we control our digital identity, can we control it? What has the EU to offer with respect to the protection of our privacy and personal data?

## 3. Privacy and its origins

The starting point in our discussion is to contemplate on whether the privacy is natural to human and whether it is value worth of legal protection, or contrary, 'privacy maybe an anomaly'.[43]

Privacy has a very long history, it has its origins already in the ancient societies. The very first pages of Bible telling, presumably, the story of beginning of mankind, introduces us with the feeling of shame as a violation of privacy.[44]

> After Adam and Eve had eaten the fruit of the tree of knowledge, 'the eyes of both were opened and they knew that they were naked; and they sewed fig leaves together and made themselves aprons.' Thus mystically, we have been taught that our very knowledge of good and evil, our nature as men-is somehow, by divine ordinance, linked with a sense and a realm of privacy.[45]

Leaving behind the Garden of Eden and taking the legal point of view to the subject, we see that already the Code of Hammurabi contained a paragraph against the intrusion into someone's home, similarly the Roman law regulated the same question. [46]

Although Privacy is as old as mankind and some sort of protection against the intrusion to individuals' houses/place of living, existed, the privacy as such was not a legally protected right. The one controversy around the privacy is owed to the discussion as to what is considered to be private and what is legally protected as private.

Capturing the privacy as a concept that would commonly be accepted is not an easy task, people differ in their opinions as to what they regard to be the part of their private life and what they want to keep in private from others. Hence, there are

[41] A. Lukacs, 'What is Privacy? The History and Definition of Privacy', (2016) :pp.256-265, p. 261.
[42] Ibid
[43] Words of vp of Google -Vintor Cerf, see: < https://www.businessinsider.com/google-vinton-cerf-declares-an-end-to-privacy-2013-11?r=US&IR=T>
[44] Supra note 4, p.257.
[45] J. Wagner DeCew, *In pursuit of Privacy: Law, Ethics, and the Rise of Technology*, Cornell University Press, [1997], p.11.
[46] Supra note 4, p.257.

numerous attempts to capture the concept of privacy. American jurist and economist Richard Posner identified a very essential element of privacy: "one aspect of privacy is the withholding or concealment of information about oneself".[47]

To give rather poetic definition of primacy, Emily Dickenson's poem provides a beautiful catch of the essence of privacy:

*The Soul selects her own society.*
*Then shuts the door;*
*On her divine majority*
*Obtrude no more.*[48]

It is interesting coincidences that this poem was published just one month before the birth of the theory on the right to privacy. The two Boston Lawyers-Louis Brandeis and Samuel Warren are considered to be founders of the contemporary notion of privacy.[49] Their paper on the right to privacy was published in Harvard Law review in 1890.[50] The authors therein argued for the right to privacy, suggesting that without protection of privacy, individual's personality- 'his estimate of himself' becomes injured when information about an individual's private life is made available to others.[51]

Although in the US constitution there is no explicit article on the privacy, the 'founding fathers of privacy'[52] considered it to be derived from the right to be let alone, whilst the latter is the part of an even more general right to enjoy life and which in its turn is part of the individual's fundamental right to life itself.[53] 'The right to life was part of the familiar triad of fundamental, inherent, individual rights reflected in the fifth amendment to the United States Constitution: "No person shall . . . be deprived of life, liberty, or property, without due process of law.'[54] The privacy is not an isolated right or freedom, it is intimately connected with other cherished human values. As Charles Fried has argued, love, friendship and trust are impossible without it. [55]

Without doubt, privacy for a modern European, is the ability to withhold information about 'oneself or, put differently, the ability to have a secluded sphere of life and to select which parts of one's life will be accessible to the public.'[56] However, the privacy became a legally protected value quite recently, and nowadays it is recognized right in the Universal Declaration of Human Rights-Article 12, in the European Convention of Human Rights-Article 8, and in the Charter of Fundamental Rights of the European Union-Article 7.

The privacy has perhaps two main elements: i) secrecy and ii) autonomy and intrusion in these spheres can have different forms, different perpetrators, and hence the protection of each intrusion differs accordingly. As the topic of our discussion

[47] Ibid, p. 258.
[48] Poems by Emily Dickenson (1890), quoted in EMILY DICKENSON 17-18 (J.M. Brinnen ed. 1960).
[49] D. J. Glancy, 'The Invention of the Right to Privacy', [1979] *Arizona law review*, volume 21, number 1, pp 1-39
[50] Warren and Brandies, 'The Right to Privacy', 4 *Harv. L. Rev.* 193 (1890).
[51] Supra note 12, p.1.
[52] I mean here Warren and Brandies.
[53] Supra note 12, p.3
[54] Ibid
[55] Gerald G. Watson, 'The Ninth Amendment: Source of a Substantive Right to Privacy', *J Marshall Law Review* 19, (1985), p. 961
[56] A. Savin, *EU Internet Law*, Edward Elgar Publishing, 2017.

is privacy protection in the context of data processing, hence below we shall look at how EU law regulates processing of personal data in order to protect our privacy in the era of information technology.

## 4. Privacy and data protection in the EU

One has to be reminded that the EU was not created with the purpose of protecting human rights as such, contrary to the ECHR system whose sole purpose is the protection of human rights in the signatory states. Although, the EU has always recognized that human rights that stem from the common constitutional traditions of the member states of the EU form part of the EU legal order, it had been criticized for the insufficient protection of human rights. The human rights deficit in the EU had to be addressed for many reasons, i.e., to guarantee supremacy of EU law, to ensure legitimacy of EU's ruling polity and so on. Therefore, EU adopted the Charter of fundamental rights in 2009, as well as the EU subscribed itself to the legal obligation to accede to the ECHR.

The EU Charter of Fundamental Rights is the main document of human rights protection in the EU. It has the same legal status as EU founding treaties, meaning that it is directly applicable, has direct effect and has supremacy over the national laws. The latter means that when a member state implements the EU act, let's say-a directive, a member state has to comply with human rights enshrined in the Charter. Consequently, this provides the Court of Justice of the European Union (herein ECJ) power and the competence to annul the national acts implementing and/or derogating from the EU law and breaching the fundamental rights enshrined in the Charter. It is clear that the EU Charter protects, in addition to the member states constitutions, the fundamental human rights, and the subject of our interest is the right to privacy and personal data protection that are enshrined respectively in Articles 7 and 8 of the Charter.

These two rights are closely linked in the jurisprudence of the ECJ. There is a conceptual inevitable connection between privacy and data protection, by controlling what data is processed about us, how it is processed, and whether we would like to remove the data concerning us from circulation has at heart the protection of the valuable concept of privacy. However, it is important to note that by having separate Articles- one concerning privacy, and another personal data indicates that these rights are not entirely the same and do not have exactly same scope of protection, indeed there are considerable overlaps between the scope of both rights, but at some areas their personal and substantive scope diverge.

Though both courts, i.e. the ECJ and ECtHR, tend to treat data protection as an expression of the right to privacy, the specifics of each right must be respected. And both Courts used Article on privacy to give rise to the protection of data. However, one clear and easily noticeable distinction between these two systems is that in the EU Charter, the data protection is a separate value protected under Article 8 just following the right to privacy.

Also, an obvious distinction is that the right to privacy is formulated and termed as more traditional human right- prohibiting the intervention and allowing the latter only in strictly prescribed situations such as for the protection of security, public health and so on. Whilst, the data protection already starts with intrusion-interference with personal data is already accepted and Article 8 only prescribes the ways how such intrusion shall be carried on.

When it comes to the personal scope, the ECJ excluded legal persons from data protection. It is, though difficult to base this exclusion on the wording of the Charter, since both privacy and personal data protection are granted to 'everyone'.

Another aspect of the personal scope concerns the responsibilities of private parties. The EU data protection law puts similar obligations with regard to the processing of personal information on both-public authorities and private parties. However, these obligations for private parties do not directly stem fom Articles 7 or 8 of the Charter. While the fundamental rights to privacy and data protection as set forth in the Charter are framed with sufficient openness to allow for the obligations of private parties, their context suggests that they only address public authorities. According to Article 51(1) of the Charter, its provisions are addressed to the institutions, bodies, offices, and agencies of the Union and to the Member States when they are implementing EU law. Thus it appears that in EU law neither the right to privacy nor the right to data protection as contained in the Charter directly creates obligations to private parties.[57]

However, this hurdle has been overcome by the direct legislative piece regulating the Processing of personal data. The General Data Protection Regulation which came into force on May 25 in 2018 and is the scariest piece of legislation for everybody, does not distinguishes who processes the personal data, natural person, legal person or public authority, the obligations enshrined therein are applicable to all.

The GDPR[58] is based on Article 16 TFEU and has been issued in the form of a Regulation to minimize the disparities between the Member States. The EU heightens the protection of personal data to the highest level; it is seen as a fundamental right and the EU has an explicit mandate to regulate the field of data protection established by the Treaty, which is rather unique compared to other fundamental rights. And with the General Data Protection Regulation, the right to data protection is regulated in detail on the highest level possible in the EU, namely a Regulation. It is important to stress that the whole Regulation must be seen as an implementation of the fundamental right to data protection, as laid down in the Charter and the Treaty.

The one of the most and obvious changes GDPR brought compare to the old system is the choice of the legal instrument that is a Regulation, in contrast to a Directive, which means that GDPR has direct effect and needs no implementation in the national legal frameworks of the different countries.

## 5. Privacy and data protection in the era of virtual immortality: The Google Spain Case

We all agree that the right to data protection enshrined in the Charter is quite clear and sets out that the data processing must be done fairly and correctly for the legitimate purpose and with the consent of the data subject. But, what does actually this means? Who can and for what purpose process our personal data? What is personal data? How does a consent on

[57] However, this is a controversial issue in the EU law. There are some indications in the ECJ's caselaw that the EU charter of Fundamental rights has horizontal direct effect, i.e. the obligations stemming therefrom apply to private parties too.
[58] Rregulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

processing personal data be given? Does the right to data protection extend so far as to include the erasure of the data, or the right to be forgotten? Can we say that right to be forgotten is inherent to data protection? We all soon got used to the feeling that virtual immortality exists. In the era of virtual immortality can one make a decision to be forgotten. If so, how? Can one decide to die in the virtual world too?

These questions were discussed in the light of the case Google Spain.[59] [this paper omits discussions on the case].
This case is clearly a controversial. At the same time, well-known for its wide reach of protection of personal data and for setting the limits to virtual immortality to the benefit of the personal data protection and to the detriment of the right to receive and access the information.

## 6. Concluding remarks: privacy – a stumbling stone?

We have discussed so far that the protection of privacy or even the data protection is a generally accepted right in the contemporary legal system and the EU is a flagship in this matter.

As the technology moves forward, the intrusions to our personal lives become easier and unavoidable, as well as technological developments heavily rely on the processing of personal data and machines simply require more data to be more precise. Then it is inevitable not to ask-how legal protection of our personal data and privacy will affect our lives and will it impede the technological advancement? Are we really at all sensitive in sharing our personal data? Aren't we humans more prone to give and trade our data?

A small experiment conducted by a performance artist Risa Puno showed that almost half of the attendees at a Brooklyn arts festival had no problem to trade their private data (image, fingerprints, or social security number) for a delicious cinnamon cookie. Some even proudly tweeted it out.[60]

Sharing of information and personal data is valuable for our health and safety, e.g. researchers have already discovered that if patients of the deadly Vioxx drug had shared their health information publicly, statisticians could have detected the side effects earlier enough to save 25,000 lives. 'If we want to know whether we will suffer a heart attack, we will have to release our data for public research, otherwise privacy could mean an early death sentence.'[61]Already, health insurers are beginning to offer discounts for people who wear health trackers and let others analyze their personal movements. 'If history is a guide, the costs and convenience of radical transparency will once again take us back to our roots as a species that could not even conceive of a world with privacy.'[62] Then we have to perhaps ask ourselves: are we so concerned about data privacy that in the end we trade off the health, wealth and comfort of life to privacy

[59] See: Case C-131/12, *Google Spain SL*, ECLI:EU:C:2014:317
[60] See: 'The Birth and Death of Privacy: 3,000 Years of History Told Through 46 Images', available at < https://medium.com/the-ferenstein-wire/the-birth-and-death-of-privacy-3-000-years-of-history-in-50-images-614c26059e>, last visited December 19, 2019.
[61] Ibid.
[62] Ibid.

# Constitutional Interpretation over the Course of Time: Gender Equality and Same-Sex Marriages in Germany – A methodological approach

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## A. Abstract

Human rights based within the constitution are designed on a high level of abstractness to grant a wide scope of protection. These rules have to be interpreted to be applicable at the specific and individual case at hand. As the wording of any constitutional rule is to be formulated on such a high level of abstractedness, to guarantee protection for many differing individual cases, it makes it even more complicated to interpret these provisions in a sustainable manner.

Furthermore, even if the German Basic Law is still a young constitution it is already in force since the year 1949. It is not hard to imagine that the cultural and social environment did change over the course of time. With regard to the specific German history, especially the Nazi Regime it is clear that the introduction of basic human rights was on the one hand hardly desired[63] but on the other hand implemented in a at least autocratic influenced or even autocratic educated society[64]. Therefore, the understanding of basic human rights within the young Federal Republic may differ from our todays understanding blatantly. The interpretation of human rights is a methodologic sensitive topic; hence, any law operator is obliged to use the common interpretation rules carefully to achieve sustainable results.

Based on the example of same-sex marriages under Art. 6 (1) Basic Law and the development of constitutional perception over the course of time the general scope of the established protection under Art. 6 (1) will be analyzed. Therefore, firstly, a general theoretical fundament will be demonstrated (**B**) and secondly the same-sex marriage itself will be investigated in the light of Art. 6 (1) Basic Law (**C**).

This paper summarizes the arguments which have been developed in the debate and brings them in a methodologic framework.

[63] *Herdegen* in Maunz/Dürig Kommentar zum Grundgesetz, Präambel, Rn. 21, 53.
[64] An analyzes of the obstacles the German Democracy had to overcome after the Dictatorship see: *Sharp*, From Dictatorship To Democracy – A Conceptual Framework of Liberation, The Albert Einstein Institution, 2003.

## B. Theoretical Fundaments on the interpretation of Law Terms

In German Legal Tradition the interpretation of legal terms is to be made by the so-called Canons formed mainly on the legal doctrine formed by Friedrich Carl von Savigny.[65] Based on his doctrine mainly four closely interrelated procedures were developed.[66] Namely the grammatical, the systematical, the historical, and the teleological interpretation canon.

### 1. Grammatical Interpretation Rule

The very first interpretation rule is the grammatical approach to the meaning of a specific law rule. This grammatical interpretation consists an interpretation based on the specific linguistic appearance and the linguistic understanding of a legal term.

This method might be regarded at first sight as simple, since in particular it seems to be an appropriate approach to analyze the wording from a general language perspective by only using a Concise Dictionary.[67] This offers a wide scope of possible interpretations as, even in a general language the meaning of a single word is not always clear and there is all the time a linguistic discretion. E.g. when becomes a "*stock of trees*" a "*forest*" or in which second a night "*begins*". As one can see in these very general examples the general language does not always lead to a single precise answer.

Moreover, the legal term's wording may have a different meaning in legal terminology than in general language.[68] In general language it is possible to say "I borrow a car" but in a legal context this would mean that the legal relationship between the borrower and the lender is free of charge. In reality both parties know that to rent a car is in return for payment, since the car rental is pursuing economic goals, this legal relationship is legally to be interpreted as rental contract, even if parties call it in general language differently by using the term "borrow" instead of the legally correct term "rent".

Therefore, it is necessary to broaden the horizons and to analyze the wording from a legal perspective, too.[69]
Hence, it is to be investigated if the lawmaker used the specific wording in other legal rules.[70] If there is the similar expression within the same legal text, there is a presumption that the wording has to be understood uniformly. But even then, there are exemptions from this general presumption rule, and the presumption is only valid within the same legal source.[71] For example, there is no presumption by comparing the Basic-Law wording to the wording of the German Civil Code. In those cases, it has to investigated if the two terms from different legal sources have still the same scope, or if the wording has to be interpreted differently.

[65] *Savigny*, 1840, p. 213.
[66] *Mann*, Einführung in die juristische Arbeitstechnik, 5th Edition, p. 128; *Zippelius*, Juristische Methodenlehre, 11th Edition, p. 35.
[67] *Mann*, Einführung in die juristische Arbeitstechnik, 5th Edition, p. 131.
[68] Larenz, Methodenlehre der Rechtswissenschaft, S. 300.
[69] *Zippelius*, Juristische Methodenlehre, 11th Edition, p. 35.
[70] Larenz, Methodenlehre der Rechtswissenschaft, S. 349.
[71] *Mann*, Einführung in die juristische Arbeitstechnik, 5th Edition, p. 130.

In any case, a grammatical interpretation does not always lead to a clear answer. Even, in those rare cases there the wording leads to only one single potential interpretation there is still room for other interpretation methods, since the grammatical interpretation is not somehow to be regarded as a superior method which would be able to supersede any other interpretation rule. Even if the grammatical wording is the beginning and the end of any application of law, it is not somehow a superior method which would be able to supersede any other interpretation method.

But is has to be clarified why the interpretation of the wording is that important, if it's not leading to a precise and irrevocable answer:
The wording of a rule is the law makers' unique and direct mode of expression, so it claims the democratically rebound to the elected parliament; therefore the wording of a legal term ensures the democratic lawfulness of any interpretation:[72] The wording of a legal source embodies the legislative or even constitutional decision which has to be entered into force with respect to the democratic political decision-making. The end of lawful interpretation is by crossing the border of a linguistic logical interpretation of textual wordings, since, one would move away from the parliamentary resp. constitutional will of the democratic actors. It is to be asked if the result of the interpretation leads to an interpretation which is still in accordance with the linguistic wording of the specific rule, or if the result of the interpretation crossed this linguistic border.[73]

Of course, this "textual border" is not a hard limit determining legality, but it marks the methodic line between interpretation and developing law by judicial decisions.[74] Within the area of developing law specific requirements have to be fulfilled with respect to the need of the democratic reconnection of the applicable rule of law. Every development of legal rules is constitutionally somewhat difficult, as under the German Basic Law the separation of powers entitles the parliament to decide on the governing law and the judicial power has to apply it. But of course, developing law can be even necessary. Therefore, the Basic Law states even a constitutional obligation for the judicial power to develop the law system as well, but in a careful manner with respect to the separation of powers. E.g. in the criminal sector the German Basic Law prohibits under Art. 103 (2) any analogous application of law placed to the debit of the perpetrator; thus, any development of law is prohibited in this area.[75] Within the Civil Law it is not that sensitive to develop law but still the separation of powers has to be respected by using specific rules to develop law rules.[76]

It can be summarized that by interpreting a legal rule it is important to detect whether the application of law is in the area of interpretation or in the area of developing law by giving respect to the textual wording.

[72] *Wiedemann* NJW 2014, 2407, 2407.
[73] *Wiedemann* NJW 2014, 2407, 2407.
[74] *Wiedemann* NJW 2014, 2407, 2408.
[75] *Radtke/ Hagemeier* in BeckOK GG, 41. Edition 2019, Art. 103, Rn. 38; *Schmitz/ Wulf* in MüKo Kommentar zum StGB, 3. Auflage 2019, § 370 AO Rn. 26.
[76] *Wiedemann* NJW 2014, 2407, 2408.

## 2. Systematic Interpretation Rule

The systematic canon considers the context of provisions by embedding the rule which is to be interpreted in the context of a specific sector or even the entire law system. By reflecting the system one may find out about the lawmaker's will[77] which establishes a democratically rebound to its legislation and hence, to a democratic decision. It is to be analyzed which result of an interpretation fits in the regulatory system and helps to fulfil the lawmaker's intention regarding the inner law system. Thus, the systematic canon considers the context of provisions and analyses what the law maker intended to regulate by implementing this rule context.

## 3. Historical Interpretation

By using the historical interpretation, one analyzes the legislative materials to understand why a specific rule was implemented and what the law maker expressive verbis intended during the lawmaking process.[78]

Even if this seems on the first step the most democratic approach to interpret legal terms, it is to consider that the lawmaker itself is no static institution. Even if the lawmaker did decide on a specific regulation and clarified it's intention by doing so, after the upcoming elections the lawmaker and its democratic rebound is kind of overwritten. By not overruling the specific regulation made by the ancient parliament the new elected parliament impliedly accepts the will of regulation.[79] However, this does not mean, that the new elected parliament based this implied decision on the same reasons as the ancient parliament did by implementing the rule. Hence, the (historic) intention may lead to some aspects which should be recognized in the interpretation, but a law makers' general intention cannot be detected, since, firstly there is no static law maker itself and furthermore the regulation intention might change over the course of time[80], even if this change does not have any impact on the wording of a specific rule.

Once more, the historical interpretation suffers from another methodological problem: By analyzing the grammatical and the systematical interpretation of the legislative materials the same problems arise as by using grammatical and the systematical interpretation on the first step by analyzing the legal rule itself.

One can see that a historical interpretation itself is not enough to get a precise answer as well, but somehow it will give some good indications to find a methodological interpretation approach.

## 4. Teleological Interpretation

The teleological interpretation analyzes the sense and purpose of a single rule. Some scholars teach that the teleological interpretation is only applicable if there is no possibility to achieve results out of a historic interpretation; but they mistake

[77] *Larenz*, Methodenlehre der Rechtswissenschaft, S. 463.
[78] *Schimmel/Weinert/Basak*, Juristische Themenarbeiten, S. 48.
[79] See *Larenz*, Methodenlehre der Rechtswissenschaft, S. 312 et seq.
[80] An analyzes how the ECJ uses the historical interpretation in its jurisdiction see: *Leisner*, EuR 2007 H6, 0689.

that the historic interpretation is no superseded interpretation rule neither, since, as shown above the historical interpretation is not inevitable representing to the present situation in a legal system. Thus, the regulation extent, namely its sense and purpose are always to be analyzed for achieving sustainable results of interpretation.

### C. Same-Sex marriages under Art. 6 (I) German Basic Law

For analyzing how a same-sex marriage is protected under Art. 6 (I) German Basic Law one has to use the presented interpretation rules.

The interpretation of a constitutional rule is even more sensitive, due to high abstractedness in its wording and to the high importance for a state under the rule of law.[81] The constitution states the whole legal framework to determine the lawfulness of any governmental act and organizes the state itself. This is why the interpretation of constitutional terms is that sensitive. In the year 2017 the same-sex marriage was implemented in the German law system on the level of Federal Law, namely in § 1353 Civil Code, which states from them on that persons of different and same-sex can enter into a marriage for life. As this is only implemented on a federal level, in contrast to a constitutional amendment, this implementation poses legal problems, since, every federal law is subordinated to constitutional law and therefore, every federal law as to comply with the requirements of the constitution as superior rule of law.

Hence, it is highly discussed whether this Federal Law is in accordance with the German Basic Law. To give an answer to this question one needs to interpret the constitution. Therefore, the very first question which was highly disputed is whether the implementation of a same-sex marriage in federal law is in accordance to Art. 6 (1) German Basic law which states that "*Marriage and the family shall enjoy the special protection of the state*".

Since Art. 6 (1) Basic Law establishes a privileged status for the legal institution of marriage some jurists argue that this means in return that any privileged treatment of other relationships would state a violation of Art. 6 (1) Basic Law, since, the rule could only complete its constitutional mission if the marriage is the only legal institute which enjoys the given benefits[82]

This theory is based on two assumptions:
**1st assumption**: Art. 6 (1) Basic Law gives a privilege to the legal institution of "*marriage*" and visa versa establishes a constitutional discrimination of other forms of life partnerships, since, every privilege would contain inevitably a discrimination for the non-privileged.

**2nd assumption**: The term "marriage" could not to be interpreted the same way on the constitutional as, henceforth, on the federal level. So under the constitutional level the term "marriage" could not be understand as a partnership between two persons of the same-sex.

[81] *Larenz*, Methodenlehre der Rechtswissenschaft, S. 349.
[82] *Hillgruber*, JZ 2010, 41, 42.

## 1. Art. 6 (1) Basic Law as legal based lawful discrimination

Starting with the first assumption, to analyze this argumentation the presented interpretation rules have to be considered. First the wording does not state an expressively discrimination of other life partnerships, it simply states that "*marriage shall enjoy the special protection of the state*". There is no direct manifestation on any discriminatory intention in the wording within this specific rule.

The systematic canon considers the context of provisions by embedding the rule which is to be interpreted in the context of a specific sector or even the entire law system.[83] Since, Art. 6 (1) Basic Law is silent to any expressively discrimination one has to consider other legal rules of our constitution which may give an answer to this question.
One sees that the German Basic Law embodies a general prohibition of discrimination by prohibiting the arbitrary unequal treatment of what is basically equal under Art. 3 Basic Law.
From a systematic point of view, by analyzing any discriminatory impact of Art. 6 (1) Basic Law one shall ask whether such a discrimination would be in accordance with Art. 3 (1) Basic Law if only this rule would be applicable at the case at hand.

Under Art. 3 (1) Basic Law it is to be ask whether there is an arbitrary unequal treatment of what is basically equal.
Of course, from a religious and even traditional and conservative perspective, one may argue that a same-sex relation is not equal to a heterosexual relation.[84] But it has to be considered, that due to the high abstractness of constitutional rules the interpretation is always at risk to be heavy influenced by personal opinions, like religious and moral values. Therefore, the legal practitioners have to interpret rules carefully to avoid a politicization of human rights even if a hard separation is a utopian idea as well. But a political interpretation without any legal connection is a hidden value judgement and states a violation of the constitution.

Therefore, by answering the question if same-sex relations are equal to heterosexual relations one shall again consider the constitutions assessments for a systematical approach.

Without any further doubt homosexuality itself is today protected under Art. 1 and Art. 2 (1) Basic Law, since a personal sexual orientation is part of human dignity and the right of personal development. Today it is clear that homosexuality is a normal human behavior and not a personal choice or abnormality of the concerned persons.[85]

Art. 1 (1) Basic Law states that "*Human Dignity shall be inviolable and to respect and protect the Dignity shall be the duty of all state authority*". Therefore, since, the right of being homosexual is protected under the inviolable Art. 1 in conjunction with Art. 2 Basic Law, the right of protection triggered by Art. 1 Basic Law is of the highest possible intensity.

[83] See above.
[84] *Hillgruber*, JZ 2010, 41, 42.
[85] BVerfG v. 19.6.2012, 2 BvR 1397/09.

By coming back to the initial question whether a same-sex relation is equal to a heterosexual relation the legal operators have to consider those constitutional circumstances as well. Therefore, from a systematic perspective under consideration the constitutional protection mandate resulting out of Art. 1 Basic Law there is no legal basis to define a same-sex relation as generally unequal to heterosexual relations. In principle Art. 3 Basic Law requires a material equal treatment of same-sex relations and hence, prohibits any further unlawful discrimination.

Furthermore, since Art. 6 (1) Basic Law does not expressively state within the specific wording a permission of discrimination there is no space left of an interpretation which may establish a lawful discrimination against same-sex couples under this provision. That is why the Constitutional Court stated in another context already in the year 2002 that "*Art. 6 (1) Basic Law does not contain any requirement to discriminate against persons who are not able to be married by reasons of their sexual orientation*"[86]

In summary Art. 6 (1) Basic Law states a scope of protection against intrusions into the protected area of "*marriage*" and "*family life*" and guarantees the existents of this legal institute but it does not consist a universal privilege to be generally better treated as other forms of personal relationships. Hence, a same-sex marriage cannot be in conflict to the constitution in any case, since, no matter if the constitutional interpretation of marriage is the same as the interpretation on federal level, as Art. 6 (1) Basic Law does not contain such a discrimination, a same-sex marriage does not affect the protection of "*marriage*" under Art. 6 (1) Basic Law.

## 2. Art. 6 (1) Basic Law as a structural decision made by the constitution

Even if one may disagree and still presumes that Art. 6 (1) Basic Law does contain such a discrimination one has to analyze the 2nd assumption, whether the term "marriage" under Art. 6 (1) Basic Law is to be interpreted as the relation between man and woman in contrast to the term "marriage" under Federal Law which from now on includes a same-sex marriage.

If the term "marriage" under Art. 6 (1) Basic Law does not differ from the interpretation on the federal level, which includes a same-sex marriage, then even under the presumption that there is a discrimination contained in this article, a same-sex marriage would still be in accordance to the constitutional law. Therefore, the term "*marriage*" under Art. 6 (1) Basic Law is to be analyzed by the common interpretation rules, in the first instance without any regard to the understanding of this term on Federal Level.

Starting by the grammatical interpretation it's to be analyzed how the "marriage" it's to be determined. The German Constitutional Court stated, as still settled case law, that a marriage is the relation between a man and a woman[87] without presenting any methodologic evidence. This interpretation is dogmatically groundless, since the Constitution provides no expressive legal definition of the term marriage nowhere, so the general interpretation rules have to be considered.

[86] BVerfGE 105, 131, para 30.
[87] BVerfG v. 19.6.2012, 2 BvR 1397/09.

Without any doubt in general language a "*marriage*" will mostly be called a relation between one man and one woman. But this is not caused by any obligatory linguistic fact, it is caused by the circumstance that only man and woman could enter in a legal binding marriage till the year 2017. Hence, to refer in this case to the usage of the term marriage in general language states a very good example for a vicious circle. How should a word's usage in general language within the society change if it is based on a legal source which itself is determined by the law maker as a legally binding relation between a man and woman?

Hence, in the case at hand, it has to be considered that the general language is affected by the lawmaker's decision how a marriage is implemented in federal law. In other words: If there is no legal same-sex "*marriage*" people won't call any same-sex relation, even if there is a similar legal institute for same-sex relations like a "*registered partnership*", a marriage. Furthermore, leaving the grammatical interpretation with regard to a systematical approach one can see a specialty of the interpretation of Art. 6 (1) Basic Law.

One the one hand it is to consider again the methodologic, or even systematic, relation between constitutional and federal laws, as, in general a federal law cannot affect the interpretation of a constitutional term, since, the constitution itself is a superior rule of law to the federal law. This hierarchy of law rules obliges, as a basic principal, the legal operator to interpret the constitution independent from the federal law. Hence, in principle the fact that the German Civil Code implemented a same-sex marriage does not affect the interpretation of the term "marriage" under Art. 6 (1) Basic Law. As seen above, any presumption that the two terms have to be interpreted equally is not valid, since, both terms are placed in different legal sources.

But on the other hand, a "*marriage*" itself is a legal term. That means, that a marriage does not exist without the existence of a law system, therefore, a marriage is constituted by Federal Law. One may argue that this leads to a different contribution within the system of separated powers. If the constitution refers to a legal institute which is constituted by Federal Law, it might be intended that the Federal Law Maker is entitled to design this legal institute by its own. That would actually lead to the fact that the Federal Law would state a superior rule of law in comparison to the constitutional law, by interpreting the term "marriage". This would lead to a partial turn around of the constitution and the Federal Law.

But this methodologic approach cannot be in accordance with the constitutions' protection mission, since, any constitutional protection would run dry if the full competence of determining the term "marriage" is given back to the federal law maker. E.g. it would be theoretically possible that the Federal Law maker decided on overruling the Federal Law of marriage, that it would only be possible to marry at age of 85 years. As long as people aren't married, they cannot enjoy the special protection of the state, so the constitutional protection would be without any practical benefit and run dry. Thus, the Federal Law maker is not entitled to decide on the constitutional interpretation by implementing a Federal Law all alone, because this would be suitable to undermine the constitutional protection mission.

However, it is to be seen that the constitutional interpretation is one the one hand dependent from Federal Law to implement and design a marriage, since, a marriage would not even exist without a Federal Law. But on the other hand, the constitution needs to prevent its protection function. Therefore, from a systematic perspective the constitution entitles and forces the Federal Law maker to implement the legal institute of marriage and gives a margin of appreciation on the design of this legal institution to the federal law maker. But as the constitution itself is not allowed to decrease the constitutional protection it has to guarantee a minimum protection and establishes a regulatory framework. Only within this framework the Federal Law maker is free to design the term marriage. From now on, one has to define this framework by interpreting the term "*marriage*" autonomically from the federal Law. The wording doesn't lead to a clear answer, as seen above. The general language cannot change until the Law is modified and the specific wording of the Federal Law cannot serve as a benchmark.

Starting with a historical interpretation one can be quite sure that the constitutional legislator was not willing to protect homosexuality in any case. The prohibition of homosexuality between men has a long tradition in Germany. During the Nazi Regime homosexuals were prosecuted in a cruel manner. Therefore, a legal source was implemented, which prohibited officially any homosexual act between men, not even sex itself. The consequences were horrible: Firstly, they tried to re-educate homosexuals by forcing them to visit brothels for having sex with women there under SS-supervision.

If they refused or if they simply could not do so, they were brought into a concentration camp and the Nazi Doctors tested how to "heal" them from homosexuality. Most of them died during the procedure or due to the violence within the camps. One might think that this legal basis for those actions was overruled asap after the German Federal Republic was constituted. But unfortunately, the history of unlawful prosecuting did not stop. The rule of law which prohibited homosexuality, namely § 175 German Criminal Code was overruled the first time in the year 1969. Of course, no homosexual was brought to any more concentration camps in the German Federal Republic after the ending of the Nazi Regime, but Homosexuals had still to fear an imprisonment up to 10 years.

In the year 1969 the lawmaker overruled this hard threat of punishment the first time. But a real legislation of homosexuality was firstly achieved in the year 1990. Without any doubt the constitutional protection of homosexuals was not even thinkable in the German society when the constitution was made; hence, from a historic perspective the term "marriage" cannot interpreted as a same-sex relation falls under its scope, if one just assumes the historic interpretation of the constitution.

However, this historical approach does not lead to any reliable interpretation. Our todays understanding of freedom and fundamental rights did change so much, that we cannot simply rely on any historical will. To proof that the historical will of the constitution legislator is not the right approach to interpret basic rights can be seen in the area of gender-equality. Married women have not been legally competent to conclude any treaty until the year 1969; until the year 1977 married women were only allowed to work if the husband did agree on it. It is obvious that we cannot decide on legal questions regarding any gender-equality today by referring to real social circumstances in the time of the implementation of our

constitution. And if we would interpret every undefined term in a historical manner that would lead to unacceptable results in our times.

As one can see that an isolated historical approach does not lead to an answer if the society changed and does not longer accept the violation of (minority) rights. Hence, the historical interpretation cannot be based on the constitutional legislators will, the historical interpretation has to be regarded in a wider scope. One has to ask how the constitutional understanding changed during the course of time. Only by analyzing the development of the jurisdiction during the course of time one can see leanings in the jurisdiction, which give a substantiate interpretation method.

In the last years the German Constitutional Court decided on the so called “Civil partnership act” which was the forerunner of the same-sex marriage and established an analogue institution for same-sex couples before it was possible to enter into a marriage.

In the last years the Constitutional Court decided several times on that act and generated a rapprochement of the “civil partnership” and the “marriage” under consideration the change within the society. This indicates that the undefined term “marriage” can be interpreted that same-sex-couples are under the scope of this provision, since the court approved a content-related rapprochement, that finally the just the naming of the institution is the biggest difference between the institutions.

Finally, one needs to ask whether this interpretation is still an interpretation or a development of law.
One may argue that this interpretation which is mainly based on the historic and systematic canons passes in the end the “textual boarder” mentioned in the beginning. But there is no binding and ubiquitous understanding of this term. For example, in some mostly Arabic countries, the polygyny is an established manner of marriage, which is not accepted in our society. But it is even in accordance to our linguistic understanding. By defining the wording, we cannot see a hard textual boarder, which would lead to the assumption that a same-sex marriage could not be seen as a marriage in a linguistic way.

The arguments, which have been developed within the common discussion, show the diverse interpretation possibilities of law terms. To avoid a violation of constitutional law, which is always on a high level of abstractedness, one has to ensure that the interpretation fits in general methodologic framework. This review focused on the methodologic basis for any application of constitutional law.

# Protection of Fundamental Rights

# with regard to the Law of the European Union

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## 1. Introduction

The EU today is not only and not primarily an economic or technical Union to promote only economic welfare and financial or industrial interests. It aims at being a Union of member states with the same fundamental values and principles. These values are named in Art. 2 TEU.

Art. 2 TEU reads as follows:

> *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, (...). These values are common to the Member States (...)."*

So today one of the central values of the EU is respect for human rights which makes it obviously necessary to guarantee fundamental rights in EU Law. This guarantee today can be found in Art. 6 TEU and in the Charter of Fundamental Rights of the EU. But those provisions are in force only since 2009 when the Lisboa Treaty entered into force. It has been a long and difficult way since 1952 to achieve this level of protection of fundamental rights in EU law.

Additionally, many aspects and problems of today´s EU system of protection of fundamental rights only can be understood on the basis of a solid knowledge of the development of protection of Fundamental Rights in the EU.

## 2. The Fundamental Rights situation according to the Founding Treaties of the European Communities

The treaties establishing the ECSC (1952), the EEC and the EAEC (1958) omitted any direct reference to human rights. Reasons for this were manifold:

- They were founded after the project of a European Political Community and a European Defense Community had failed at the beginning of the 1950s
- They were seen as merely technical constructions to fulfil economic purposes without direct influence on individuals or companies
- A protection of Fundamental Rights by the national constitutions of the member states or by the ECHR seemed sufficient

The initial situation was:

- Establishment of three Communities with different restricted competences in technical or economical areas by international treaties
- No need for a specific guarantee of Fundamental Rights in those Communities or treaties
- Dualistic approach: implementation necessary
- Existing national and international Fundamental Rights guarantees seemed appropriate and sufficient

## 3. Jurisdiction of the ECJ on Direct Effect and Supremacy of EU Law?

This situation became critical with regard to the protection of fundamental rights when the ECJ developed the principles of Direct Effect and of Supremacy of EU law in his jurisdiction. Those two principles made it possible that individuals and companies could be directly affected in their individual rights and positions by EU law or by its administration and application and that the national fundamental rights could not guarantee adequate protection for them.

Direct Effect on EU Law:

- Direct Effect: capacity of a provision of EU law to be directly applied and invoked in the member states
- European law not only engenders obligations for EU countries, but also rights and obligations for individuals. It is not necessary for the EU member states to adopt the European act concerned into its internal legal system.
- Leading Case: *van Gend en Loos, Case 26/62*

Supremacy of EU Law:

- The ECJ ruled that the creation of a uniform common market between different states would be undermined if EU law could be made subordinate to national law
- The validity of EU law can therefore never be assessed by reference to national law
- National courts and authorities are required to give immediate effect to EU law of whatever rank and to set aside or to ignore national law of whatever rank which could impede the application of EU law

Results of the principles of the Direct Effect and Supremacy:

- The initial idea of no need for protection of individual rights against EU law was no longer justifiable
- Sufficient protection of individual rights against the European Communities by application of national Fundamental Rights was impossible
- But still there were no written Fundamental Rights to be found in EU law

## 4. Protection by application of national human rights

After the decisions of the ECJ on direct effect and supremacy of EU law, certain national courts began to express concerns about the protection of constitutional values such as Fundamental Rights. If European Law was to prevail even over domestic constitutional law, it was possible that this law violated fundamental principles of the national constitutions or the fundamental rights of those constitutions. In 1974 the Italian Constitutional Court and the German Federal Constitutional Court each adopted judgements in which they claimed their power to review European law to ensure its consistency with Fundamental Rights.

Federal Constitutional Court of Germany, BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß, 29 May 1974:

> *"As long as the integration process has not progressed so far that* ***Community law receives a catalogue of fundamental rights*** *decided on by a parliament and of settled validity,* ***which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law****, a reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far* ***as it conflicts with one of the fundamental rights of the Basic Law****."*

So the German Federal Constitutional Court claimed the power to review EU law on conflicts with the Fundamental Rights of the German Basic Law under certain conditions:

- as long as Community law does not include a catalogue of Fundamental Rights decided on by a parliament and of settled validity
- the catalogue must be adequate to the Fundamental Rights of the German Basic Law
- a decision of the German Federal Constitutional Court can be applied for only after a preliminary ruling of the ECJ

This approach was incompatible with the jurisdiction of the ECJ on direct effect and supremacy of EU law. It might have contributed to effective protection of fundamental rights within the EU but would have led to different national provisions being applied on EU law. Different decisions on the applicability of EU law could have been made by different national courts as well as no uniform and effective application of EU law within all member states would have been guaranteed.

## 5. Fundamental Rights as general principles of (EU) Law

As a subsequent reaction of the ECJ and to guarantee not only the adequate protection of human rights within the EU but also the uniformity and efficacy of EU law it developed since 1969 Fundamental Rights as "general principles of EU law". This jurisdiction also had the aim to avoid that constitutional courts of different member states of the EU would apply their relevant national Fundamental Rights resulting from the national constitutional order also with regard to the application of EU law in their countries.

For the first time in the "*Stauder*"-Decision (Case 29/69) the ECJ decided that fundamental human rights form an integral part of EU law as general principles of law:

> *"(...) the provision at issue contains nothing capable of prejudicing* ***the fundamental human rights enshrined in the general principles of Community law and protected by the Court****."*

This approach was strengthened in the famous decision "Internationale Handelsgesellschaft" (Case 11/70) in 1970:

> *"Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure."*

This decision "Internationale Handelsgesellschaft" (Case 11/70) continued:

> *"However, an examination should be made as to whether or not any* ***analogous guarantee inherent in Community law*** *has been disregarded. In fact,* ***respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice****. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured* ***within the framework of the structure and objectives of the Community****. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system."*

Further explanations were added in the "Nold"-Decision (Case 4/73) in 1974:

> *"As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.*
>
> *In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."*

On the basis of those decisions, the ECJ developed in his jurisdiction an elaborate and comprehensive system of protection of Fundamental Rights with the legal nature of general principles of law. Sources of inspiration for this jurisdiction were the constitutional traditions common to the member states and the international treaties for the protection of human rights which the member states have collaborated on or of which they are signatories, especially the ECHR.

So, for many years, since 1969 until 2009, the case law of the ECJ on the Fundamental Rights as general principles of EU law developed and formed the human rights system of the EU. It was formally acknowledged in the EU Treaties for the first time in the Maastricht Treaty of 1993. This jurisdiction on Fundamental Rights as general principles of law was also accepted by national constitutional courts.

German Federal Constitutional Court, Solange-II-Decision, BVerfGE 73, 339, 22 October 1986:

> *"As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100 (1) Basic Law for those purposes are therefore inadmissible."*

## 6. Codification

In 1999 the European Council proposed that a "body composed of representatives of the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments" should be formed to draft a Fundamental Rights charter of the EU. This charter should make the existing Fundamental Rights developed by the ECJ as general principles of law more visible and transparent but not create anything new. It was intended to be a showcase for what the EU already had reached in the area of protection of Fundamental Rights.

According to this mandate, the European Convention drafted a text which summarizes the legislation of the ECJ on human rights with only few new developments. This Charter of Fundamental Rights of the EU was solemnly proclaimed by the Parliament, Commission and Council in 2000. Its legal status remained undetermined and it should form a part of the Constitutional Treaty which finally failed in 2004.

So, it was the entry into force of the Lisbon Treaty in 2009 which gave the Charter of Fundamental Rights of the EU the same legal status as the Treaties themselves. The charter was not made an integral part of the Treaties as it should have been in the drafted European Constitution to avoid the opposition of certain member states against a written human rights system in the core texts of the EU. It is a separate text beside TEU and TFEU with the same legal nature and value positioned outside of the Treaties and anchored in Art. 6 § 1 TEU.

Nevertheless, three member states (UK, Poland, Czech Republic) negotiated the Protocol No. 30 to the Lisbon Treaty to limit the impact of the Charter in those states. There has been a lot of debate whether this protocol is intended to be an “opt-out” of the three member states of the application of the charter or whether it has merely declaratory character. Meanwhile the ECJ decided that it is not an opt-out but clarifies aspects of the Charter of Fundamental Rights in a declaratory way.

## 7. Accession of the EU to the ECHR

As the ECHR is the leading instrument for the protection of Fundamental Rights in Europe, and as all Member States have acceded the ECHR, the accession of the EU to the ECHR appeared as a logical solution to create adequate Fundamental Rights obligations of the EU. Such an accession was proposed by the European Commission in 1979, 1990 and would lead to an even more intense substantive and procedural homogeneity of the protection of Fundamental Rights in the EU and its member states and constitute an external international review.

Requested for an opinion on the matter, the ECJ found in 1996, in its opinion 2/94, that the Treaty did not foresee any competence for the EC to enact rules on human rights or to conclude international conventions in this field, making accession legally impossible. The Treaty of Lisbon remedied this situation by introducing Article 6 § 2 TEU, which provides that the EU shall accede to the ECHR. In 2010, right after the entry into force of the Lisbon Treaty, the EU opened negotiations with the Council of Europe on a draft Accession Agreement, which was finalized in April 2013.

In July 2013, the Commission asked the ECJ to rule on the compatibility of this agreement with the Treaties according to Art. 218 § 11 TFEU. On 18 December 2014, the ECJ issued a negative opinion stating that the draft agreement was liable to adversely affect the specific characteristics and the autonomy of EU law. on the basis of this opinion, the agreement envisaged "may not enter into force unless it is amended or the Treaties are revised".

There has been a lot of debate what have been the reasons for the ECJ to hold the agreement liable to be incompatible with Art. 6 § 2 TEU and with Protocol Nr. 8 to the Lisbon Treaty. Some of those were the lack of external control, the autonomy of the EU Law and the special relations between the Member States and the EU. Discussions on how to overcome the issues raised by the ECJ and to proceed with negotiations are under way.

## 8. Current situation: Art. 6 TEU

Art. 6 TEU is the core element of protection of Fundamental Rights in EU Law:

- giving the Charter of Fundamental Rights of the EU the same legal value and status as the Treaties
- establishing a legal basis, a competence and an obligation for the accession of the EU to the ECHR
- expressing the continued existence and relevance of Fundamental Rights as general principles of EU law and naming the main sources of inspiration

Art. 6 § 1 TEU on the Charter of Fundamental Rights of the EU:

> *"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. (...)"*

Art. 6 § 3 TEU on the Fundamental Rights as General Principles of EU law:

> *"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."*

Art. 6 § 2 TEU on the accession of the EU to the ECHR:

> *"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."*

## 9. Legal relevance of EU Fundamental Rights

What is the legal relevance of Fundamental Rights in EU law today? What are the consequences of a violation of EU fundamental rights?

- Field of Application, Art. 51 § 1 of the Charter:
  *"The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law."*
- Obligations, Art. 51 § 1 of the Charter:
  *"They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."*

The consequences of a violation would be the breach of EU Law, the illegality of the relevant measure, the subsequent restoration of a lawful situation and compensation for the ensuing damages.

Possible legal actions:

Art. 19 § 1 TEU:

> *"Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."*

Any individual or company injured in his EU human rights by EU law or by national administration or application of EU law may go to the national courts of the member states and there invoke his EU Fundamental Rights. The national courts have to review whether according to their opinion there is a violation of EU Fundamental Rights. If they find a violation by national actors, they have to directly apply the EU Fundamental Rights and to set aside the national measure violating EU Fundamental Rights. While in case of a violation by EU institutions they have to initiate a preliminary ruling of the ECJ according to Art. 267 TFEU.

If the institutions of the EU or the members states seek legal action to review the compatibility of an EU measure with Fundamental Rights, they can directly apply to the ECJ by:

- action for annulment according to Art. 263 TFEU
- action for failure to act according to Art. 265 TFEU

Only in very rare cases individuals or companies can directly apply to the ECJ by an action for annulment according to Art. 263 § 4 TFEU because of the requirement of "direct and individual concern". There is no specific individual constitutional complaint or complaint of violation of Fundamental Rights on the EU level. This is not a deficit of legal protection but he consequence of the responsibility of member states to provide remedies according to Art. 19 § 1 TEU.

Further relevance and consequences:

The respect of Fundamental Rights is one central condition for the accession to the EU, Art. 49 § 1 TEU. A serious breach of EU Fundamental Rights by a member state may lead to the initiation of the sanction mechanism according to Art. 7 TEU. Such proceedings were initiated against Poland in 2017 and Hungary in 2018.

## 10. Problems

Substantive EU Law?

- Meanwhile the EU guarantees a modern catalogue of Fundamental Rights compatible with all European and international standards
- Also the application of those Fundamental Rights has to meet all human rights requirements

Missing constitutional complaint on EU level:

- Not a deficit of the EU system of Fundamental Rights but a consequence of the responsibility of the member states to provide legal remedies for individuals and companies

Missing accession of the EU to the ECHR:

- Up to now no direct external international control of the application of human rights within the EU
- The EU shall accede the ECHR

Member States ignoring or violating Fundamental Rights in their own national legal order:

- Questions the EU as a union of states with the same indivisible common values of human dignity, freedom, equality, solidarity and the rule of law

Persisting reservations of certain national constitutional courts to apply their national fundamental rights on EU law:

- German Federal Constitutional Court, European Arrest Warrant, 15 December 2015
  *"The Federal Constitutional Court, by means of the identity review, guarantees without reservations and in every individual case the protection of fundamental rights indispensable according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 and Art. 1 sec. 1 GG."*

## 11. Conclusion

Respect and protection of Fundamental Rights within the EU have made a lot of progress since 1952. Currently, on the basis of Art. 6 TEU, the EU guarantees effective protection of Fundamental Rights within the scope of application of EU law. this protection must be respected not only by the institutions of the EU, but also by the member states as far as they are implementing EU law. This protection must be respected not only by the institutions of the EU, but also by the member states as far as they are implementing EU law.

The EU has the obligation to accede the ECHR to establish external international control on its Fundamental Rights situation and to promote the homogeneity of fundamental rights in Europe. In addition, national Constitutional Courts should accept the direct effect and supremacy of EU law also in the area of protection of human rights. Problems for the protection of Fundamental Rights as well as for the EU as a union of states with the same values arising from certain member states ignoring their national, international and EU obligations must subside, in order to guarantee the effective application of EU Law and the rights codified therein.

# Approximation of the national constitutional standards with EU law - according to the case law of the Constitutional Court of Georgia

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## Outline:

**1.** EU-integration agenda in Georgia – importance of the legislative approximation a. EU – Georgia's largest trade partner

**a.** EU-Georgia association Agreement, DCFTA i. Complex Document

*i.* Gradual regulatory approximation towards the key elements of the EU Acquis

*ii.* Common Values

*iii.* Market Access

**b.** Visa-free travel to the Schengen Area for Georgian Citizens

**c.** High popular support among Georgian population

**d.** Constitutional declaration – Article 78 of the Constitution of Georgia

**e.** Importance

*i.* Incorporation of the high-quality legislative standards

*ii.* Tool for integration and market access/smooth operation of the DCFTA

*iii.* Political dimension

**2.** Role and Jurisdiction of the Constitutional Court of Georgia a. Supremacy of the Constitution

**a.** Human Rights Protection

**b.** Separation of powers

**c.** Jurisdiction

*i.* Constitutional judicial review of the normative acts

*ii.* Competence disputes

*iii.* Other powers – elections, referendums, political parties, impeachment etc.

**3.** Examples of approximation of the national constitutional standards – case law of the Constitutional Court of Georgia a. Consideration of the EU standards while interpreting the Constitution

**a.** Establishment of the constitutional limitation for the EU-integration and the respective legislative approximation

**b.** (possible) constitutional review of the AA agreement (as a normative act)

**c.** (possible) constitutional review of the implementing legislation

**d.** Examples from the case law i. Competition Law

*i.* State Aid regulation

*ii.* Public Procurements

*iii.* Blood donations

**Reading Materials:**

**Please download the attachments to access the reading materials!**

**1.** Constitution of Georgia – *In particular* articles – 4, 60,78

**2.** Information on Constitutional Justice in Georgia – 2017, p. 20 *("jurisdiction")*

**3.** Information on Constitutional Justice in Georgia – 2018: a. pp. 17-18 ("jurisdiction");

a. pp. 55-57 *("Judgment of the Constitutional Court of Georgia on the Case of Ltd "Giganti Security" and Ltd "Security Company Tigonis" v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia (Summary)");*

*b.* pp. 73-77 *("Major Directions of Strengthening of Constitutional Justice").*

**4.** Judgment of the Constitutional Court of Georgia on the Case of "'SKS LLC' vs. the Parliament of Georgia (summary);

**5.** Article N1 – Gaga Gabrichidze, `Implementation challenges of the EU-Georgia association agreement', Eurolimes, Supplement, pp.118-129, Published: 2016

**6.** Article N2 - Roman Petrov, 'Constitutional Challenges for the Implementation of Association Agreements between the EU and Ukraine, Moldova and Georgia', European Public Law, Issue 2, pp. 241–253, Published: 2015

# Property and right of inheritance

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## II. Three main questions

- What is considered to be a property right?
- What kind of interferences exist?
- What is the relationship between property right and right of inheritance?

## III. Protection of property under the ECHR

*Art. 1 of Protocol No. 1 (P 1 – 1)*

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

| One **guarantee**: | Two kinds of **interferences**: |
|---|---|
| 'enjoyment of possessions' = **ownership** and **use** of **property** (paragraph 1 sentence 1) | – 'deprivation' of possessions = **expropriation** (paragraph 1 sentence 2)<br>– **control of property use** (paragraph 2) |

## IV. Property (Art. P 1 – 1 ECHR)

- **property rights** in the narrow sense: property recognised as such by civil law
  - property of **physical things** moveable and immovable
  - **intellectual** property
- **obligations** under civil law **sufficiently established** to be enforceable
  - recognized by **judgement** which is final and binding
  - subject to **legitimate expectations** of an individual
- economic interest and business conduct established as a company's **goodwill**, but no future income
- claims under **public law,** especially claims under **social insurance law**

– irrespective of whether the claim is acquired by specific contributions, because the social insurance system differs from country to country and the claims can also be earned by paying taxes

**V. Property**

- All kinds of property rights **depend** on their prior **recognition** by the **domestic legal system**.
  - There can be no infringement of property resulting from a restriction already provided for when establishing the property right itself.
  - As opposed to other fundamental rights, property is not a pre-existing position to be respected by domestic law.
  - The protection of property is therefore, at its essence, a **mere prohibition of self-contradiction**: If a state recognizes a certain position as an individual's asset, it may not withdraw its protection without justification.
  - The underlying concept of the protection of all property rights is the individual's **legitimate expectation** of the enjoyment of a right granted by the legal system.
    – This holds true not only for obligations for which this expectation is expressly required, but also for property in the narrow sense.

**VI. Deprivation of property (Art. P 1 – 1 par. 1 sent. 2 ECHR)**

"No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

- **formal expropriation** to the benefit of the state or another individual
  – does not require the transfer of the property right, but is effectuated upon its loss
- **factual expropriation**
  – the title holder is not **deprived** of the right, but of **any meaningful use** of the property
  – examples: a piece land is used for construction works without formal expropriation, a claim is awarded, but not fulfilled or enforced

**VII. Deprivation of property (Art. P 1 – 1 par. 1 sent. 2 ECHR)**

"No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

- "provided for by law": There has to be a **legal basis** for expropriation which …
  … does not have to consisted of a legislative act, but can **also** be an **executive** order (owing to the variety of legal systems in the member states).
  … nevertheless has to be accessible, precise and **foreseeable** and thus leaves no place for arbitrary expropriation.

… is not lacking in case of **erroneous application** of legislation by courts, unless judgements are evidently discretionary.

**VIII. Deprivation of property (Art. P 1 – 1 par. 1 sent. 2 ECHR)**

"No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

- "in the public interest": The expropriation must
  - … serve a common good other than pure financial interest (whose determination is left to the discretion of the state).
  - … be in conformity with the **principle of proportionality**:
    - The expropriation does not have to be inevitable, but only reasonable.
    - The public interest and the encroachment on property have to be in a reasonable balance.
    - In general, expropriation is only admissible against **just compensation** which
      - … if financial, must not considerably fall short of the market value of the respective object.
      - … can, and exceptionally also must, consist of a performance in kind (e.g. land for land).

**IX. Control of property use (Art. P 1 – 1 par. 2 ECHR)**

"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

- "laws to control the use of property" = regulations which demand or prohibit a certain use of property
  - examples: restrictions to construction activities on immovable property by planning law or on lease contracts by tenancy law, especially a rent-control scheme, confiscation (= temporary as opposed to permanent loss of property by way of expropriation)
- "in accordance with the **general interest**" = "in public interest" (par. 1). The state has …
  - a **wide** range of **discretion** as to the objective of a control measure.
  - nevertheless to obey the **principle of proportionality**.

**X. Other interferences**

- The ECtHR has recognized a third category of interference which **neither** constitutes an **expropriation nor** a measure to **control property use**.
  - This category was established in the case Sporrong and Lonnroth vs. Sweden in 1982: The claimant suffered form building restrictions as a consequence of expropriation orders that never had become fully executed. The Court denied both an expropriation, because the claimant was not deprived of his possessions, and a measure to control property use, because the orders were meant to lead to expropriation.

- The court held that the **requirements** for the **justification** of the other kinds of interferences shall also be met in this case, namely
  - a sufficient legal basis
  - a fair balance between public interest and the protection of the individual's rights.

- The invention of the category 'other interference' results from a **strict interpretation** of the term '**control of property use**': The court demands a certain **intention** of the authorities which must consist in the mere plan to restrict the use of property and may not be directed to its deprivation.
  - This approach **contradicts** the understanding of the term 'deprivation of possessions', since here the Court accepts that there may be also be **factual expropriations**.
    - In the case of a *de facto* expropriation the decisive criterion for its classification is the effect that a certain measure has on the individual's assets and not the authorities' intention.
    - As to the effect, also the consequences of a begun, but never terminated expropriation can easily be regarded as measures restricting the use of property.
  - The establishment of the category of 'other interferences' also **contradicts** the approach of the court in certain cases where it did **not** deem it **necessary** to **differentiate** between expropriation and control of property use, for the requirements of both types of interferences are similar.

## XI. A comprehensive approach

- The idea of 'other interferences' and the reluctance to classify certain measures as expropriation or control of property use indicate that the old-fashioned **wording** of Art. P 1 – 1 ECHR has been, and has to be, **overcome** by a **comprehensive interpretation**.
  - **All** kinds of interferences with an individual's property have to be recognized as such by their **effects on the individual's position** and irrespective of their objective.
  - **All** kinds of interferences have to be **judged** by the **same standard**, namely the requirements of a sufficient legal basis and the principle of commensurability.
  - **All** kinds of interferences may be subject to the condition of a **fair compensation**, not depending not on the artificial classification as expropriations or control of property use, but on the impact on the individual's right.

## XII. Protection of property under the EFCR

| Art. 17 ECFR | | Art. P 1 – 1 ECHR |
|---|---|---|
| (1) Everyone has the right to **own, use, dispose of and bequeath** his or her lawfully acquired possessions. |  | (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. |
| No one may be **deprived of his or her possessions**, except in the **public interest** and in the cases and under the conditions provided for by law, subject to **fair compensation** being paid in good time for their loss. |  | No one shall be **deprived of his possessions** except in the public interest and subject to the conditions provided for by law and by the general principles of international law. |
| The **use of property** may be regulated by law in so far as is necessary for the **general interest**.<br><br>(2) **Intellectual property** shall be protected. |  | (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the **use of property** in accordance with the **general interest** or to secure the payment of taxes or other contributions or penalties. |

## XIII. The guarantee of property in the ECFR …

… is basically designed **on the model of Art. P 1 – 1 ECHR** which the CJEU had already in 1979 declared to be a source of European Union law.

… is moreover linked to the Convention's guarantee by Art. 53 par. 3 ECFR:

"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

… therefore differs in its interpretation from its predecessor in the ECHR only in few aspects:

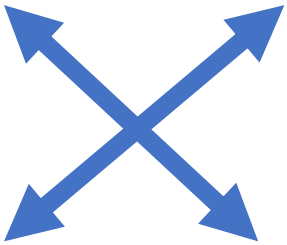
- There is more **reluctance** as to deem a company's **business** a property right, since Art. 16 ECFR stipulates the freedom of business conduct as a **special and separate fundamental right**.

- **Claims under public** law are **not** considered a property right, if they result from **EU market regulation** (granting especially production rates in agricultural market), since they are held to be only a special form of market share which is not protected.

… may differ more significantly from the ECHR by expressly naming the **right to bequeath** an asset as an aspect of the guaranteed property right.

- The mentioning of the right inheritance is, inter alia, owing to the influence of the German constitution which lists property and inheritance even as subjects of two different fundamental rights

**XIV. Inheritance rights in the ECFR and the German constitution**

| **Art. 17 ECFR** | | **Art. 14 GG** |
|---|---|---|
| (1) Everyone has the right to **own, use, dispose of and bequeath** his or her lawfully acquired possessions. |  | (1) **Property and the right of inheritance** shall be guaranteed. Their content and limits shall be defined by the laws. |
| No one may be **deprived** of his or her **possessions**, except in **the public interest** and in the cases and under the conditions provided for by law, subject to **fair compensation** being paid in good time for their loss.<br><br>The use of property may be regulated by law in so far as is necessary for the general interest.<br><br>(2) **Intellectual property** shall be protected. |  | (2) Property entails obligations. Its **use** shall also serve the public good.<br><br>(3) **Expropriation** shall only be permissible for the **public good**. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such **compensation** shall be determined by establishing an **equitable balance between the public interest and the interests of those affected**. … |

## XV. The right of inheritance right under the ECHR

*ECtHR, 13/6/1979, Marckx vs BEL, No. 6833/74, § 63:*

"The Court takes the same view as the Commission. By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 (P1-1) is in substance guaranteeing the right of property. This is the clear impression left by the words "possessions" and "use of property" … the "travaux préparatoires", for their part, confirm this unequivocally: the drafters continually spoke of "right of property" or "right to property" to describe the subject-matter of the successive drafts which were the forerunners of the present Article … **Indeed, the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property**…"

*§ 50:*

"The Court in fact excludes Article 1 of Protocol No. 1 (P1-1): like the Commission and the Government, it notes that this Article (P1-1) does **no more than enshrine the right of everyone to the peaceful enjoyment of "his" possessions, that consequently it applies only to a person's existing possessions and that it does not guarantee the right to acquire possessions** whether on intestacy or through voluntary dispositions."

*ECtHR, 28/10/1987, Inze vs AUS, No. 8695/79, § 38:*

"Like the Commission, the Court considers that the situation in the instant case **is to be distinguished from that in the Marckx case**. In the latter, the complaint concerned the **potential right** of the second applicant **to inherit** from the first applicant, who was still alive. Here, the applicant **had already acquired by inheritance** a right to a share of his deceased mother's estate, including the farm, subject to a distribution of the assets in accordance with the Provincial Act. Under Articles 545, 547 and 550 of the Austrian Civil Code, on the death of the de cuius, the heirs automatically acquire their hereditary rights over his estate …"

## XVI. Property and right of inheritance

- The right of inheritance suffers from **being split up** into the right to bequeath one's assets and the heir's position.
  - Once the testator has passed away, the right to bequeath has lost its holder.
  - Separated from the right of the deceased, the position of the heir appears to be a **mere chance to acquire property** which is, in general, not protected.
  - The **barrier** for restrictions regarding the transfer of property by inheritance, especially by way of taxation or regulations concerning succession on intestacy, appears to be **lowered**.
  - Only if the positions of the deceased and of the heir are considered as **aspects of the same right**, inheritance is subject to the same standard as the right to dispose of one's assets by contract.

*BVerfG, 30/10/2011, 1 BvR 3196/09, § 17:*

"Nevertheless, an inheritance tax in the form of an enrichment tax directed exclusively at the heir may also affect the right of the testator to inherit and, in particular, his freedom to make a will. According to the settled case-law of the BVerfG (German constitutional court), the personal scope of protection of Art. 14 I 1 GG (German constitution) is affected. The function of inheritance law is to allow private property as the basis of the independent shaping of life ... **not to perish with the death of the owner, but to secure its continued existence by way of legal succession**. In this respect, the guarantee of the right to inherit **supplements the guarantee of ownership** and, together with this, forms the basis for the private property order laid down in GG ... In fact, the scope of protection of Art. 14 I 1 Alt. 2 GG, as far as it concerns the testator, the right to bequeath. The determining element of this right is the freedom to make a will as a disposal beyond death ... the right of the testator is protected by his freedom to make a will ... This freedom to make a will may **not be undermined by an inheritance tax addressed exclusively to the heir**."

- There is **no justification** for **discriminating inheritance**, for it is the essence of property.
  - Without transfer by inheritance any property right would be a **mere usufruct** and its subject not fully attributed to its holder.
  - Transfer of property by inheritance was the **starting point** for **establishing property as such** and may therefore be regarded as its origin.
    - The oldest type of legal transaction for the purpose to dispose of one's property, the so-called 'mancipatio', was soon employed **to avoid inheritance on intestacy** by transferring the entire estate of the testator at his lifetime to a trustee who promised to pass the property to the individuals designated by the deceased.
    - This practice of evasion was accepted by the Roman law giver at the latest by the Law of the Twelve Tables in 450 B.C., since it constituted a necessary step to complete the concept of property.

***Gai 2.103 seq.***

"The first two types of wills are out of practice. But that which is made with copper and scales has been retained. However, it is done differently than in the past. For once the purchaser of property, who receives his property from the testator, was in the place of an heir, and therefore the testator told him what should be given to whom after his death. Today, however, one is appointed heir in the will, who is also burdened with legacies, and another appears merely for the sake of form to imitate the old right as a property purchaser. (104) And so it is carried out: Whoever draws up a will disposes, as in other cases of *mancipatio*, of his property in the presence of five witnesses, who are of age and Roman citizens, as well as in front of the balance holder. The purchaser of the property says the following words: 'I say that your property and your money shall be in my trust and in my custody and shall be bought by me according to the law by which you may make your will according to general law, by this copper and (as some add) with this balance'. Then he strikes the balance with the copper coin and gives it to the testator instead of a purchase price. Then the testator, holding the testamentary document in his

hands, speaks as follows: ‘As it is written in these wax tablets, so I give, so I bequeath, and ye citizens shall be my witnesses’.“

# Teaching freedom of speech and expression lexically through introducing news articles

***Dr. Tamar Dolidze***

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*Chief Advisor for the International Relations Department at the Constitutional Court of Georgia*

## I. First Amendment: An Overview

The First Amendment of the US Constitution protects the right to freedom of religion and freedom of expression from government interference. It prohibits any laws that establish a national religion, impede the free exercise of religion, abridge the freedom of speech, infringe upon the freedom of the press, interfere with the right to peaceably assemble, or prohibit citizens from petitioning for a governmental redress of grievances. It was adopted into the Bill of Rights in 1791. The Supreme Court interprets the extent of the protection afforded to these rights. The First Amendment has been interpreted by the Court as applying to the entire federal government even though it is only expressly applicable to Congress. Furthermore, the Court has interpreted the Due Process Clause of the Fourteenth Amendment as protecting the rights in the First Amendment from interference by state governments.

## II. Freedom of Religion

Two clauses in the First Amendment guarantee freedom of religion. The Establishment Clause prohibits the government from passing legislation to establish an official religion or preferring one religion over another. It enforces the "separation of church and state." However, some governmental activity related to religion has been declared constitutional by the Supreme Court. For example, providing bus transportation for parochial school students and the enforcement of "blue laws" is not prohibited. The Free Exercise Clause prohibits the government, in most instances, from interfering with a person's practice of their religion.

## III. Freedom of Speech / Freedom of the Press

The most basic component of freedom of expression is the right of freedom of speech. The right to freedom of speech allows individuals to express themselves without government interference or regulation. The Supreme Court requires the government to provide substantial justification for the interference with the right of free speech where it attempts to regulate the content of the speech. Generally, a person cannot be held liable, either criminally or civilly for anything written or spoken about a person or topic, so long as it is truthful or based on an honest opinion, and such statements.

A less stringent test is applied for content-neutral legislation. The Supreme Court has also recognized that the government may prohibit some speech that may cause a breach of the peace or cause violence. For more on unprotected and less protected categories of speech see advocacy of illegal action, fighting words, commercial speech and obscenity. The right to free speech includes other mediums of expression that communicate a message. The level of protection speech receives also depends on the forum in which it takes place.

Despite popular misunderstanding the right to freedom of the press guaranteed by the First Amendment is not very different from the right to freedom of speech. It allows an individual to express themselves through publication and dissemination. It is part of the constitutional protection of freedom of expression. It does not afford members of the media any special rights or privileges not afforded to citizens in general.

## IV. Right to Assemble / Right to Petition

The right to assemble allows people to gather for peaceful and lawful purposes. Implicit within this right is the right to association and belief. The Supreme Court has expressly recognized that a right to freedom of association and belief is implicit in the First, Fifth, and Fourteenth Amendments. This implicit right is limited to the right to associate for First Amendment purposes. It does not include a right of social association. The government may prohibit people from knowingly associating in groups that engage and promote illegal activities. The right to associate also prohibits the government from requiring a group to register or disclose its members or from denying government benefits on the basis of an individual's current or past membership in a particular group. There are exceptions to this rule where the Court finds that governmental interests in disclosure/registration outweigh interference with First Amendment rights. The government may also, generally, not compel individuals to express themselves, hold certain beliefs, or belong to particular associations or groups.

The right to petition the government for a redress of grievances guarantees people the right to ask the government to provide relief for a wrong through the courts (litigation) or other governmental action. It works with the right of assembly by allowing people to join together and seek change from the government.

**ARTICLES RELATED TO THE TOPIC:**

**The Edinburgh Festival Fringe is the worlds largest arts festival which in 2017 spanned 25 days and featured 53,232 performances of 3,398 shows in 300 venues.**

**DATES: AUG 3 – AUG 27, 2018**

http://www.chortle.co.uk/news/2018/02/17/39167/comic_sued_by_ex-husband_for_talking_about_him_on_stage

Standup comedian's husband sues for defamation over 'provocative' show.

'*Free speech means everything to me*'. Louise Reay's show was performed at the Edinburgh fringe and in London.

**Louise Reay says she faces bankruptcy if she loses the case that could boil down to judge's sense of humour.**

The lawsuit, described by a leading lawyer as a test case, relates to a show by Louise Beamont (stage name Reay). Hard Mode was billed as a "provocative show [that] explores censorship and surveillance"; though one critic described it as being "at its core … about a very recent and raw heartbreak". Thomas Reay is also suing his wife for breach of privacy and data protection, is seeking £30,000 in damages plus legal costs and wants an injunction to prevent her publishing statements about him, she said.

Beamont, the 2015 Alternative New Comedian of the Year, said she would be bankrupted if she loses the case and has launched a crowdfunding page (https://www.gofundme.com/comedian-being-sued-free-speech) to raise money for her defence. She wrote: "[Hard Mode] was a 50-minute show about censorship and authoritarianism, asking the audience to imagine that the BBC had come into the control of the Chinese government.

"During that show, I referred to my husband a couple of times – perhaps 2 minutes' worth of reference in a 50-minute show. The main gist of those references was to tell the audience how sad I was that my marriage had broken down recently." Beamont said that she removed the material from subsequent performances at the Edinburgh fringe last summer – without admitting liability – when she received the first complaint from her husband but a writ was subsequently issued.

Beamont, who refused to comment beyond a post on her gofundme page for legal reasons, wrote: "As standup comedians, I believe it's the very definition of our job to talk about our lives and social issues. So this has become a free speech issue – and free speech means everything to me." She launched the crowdfunding page on Friday and by Monday had raised just under £3,000 of the £10,000 goal.

The case could have significant implications for comedians, who often use personal material in their shows. The comedian and writer Sarah Millican made her name in standup with material about her divorce.

(https://www.theguardian.com/lifeandstyle/2013/nov/08/sarah-millican-my-family-values-comedian).

Last year's Edinburgh fringe saw separate standup shows by ex-couple Sara Pascoe and John Robins about their break-up, with Robins's performances earning him the award for best show (shared with Hannah Gadsby). Mark Stephens, a libel

lawyer at Howard Kennedy, said defamation law had been beefed up to strengthen defences for the likes of comedians, academics and scientists in the UK but ultimately the case could rest on the judge's sense of humour. He said: "There's a long history of British juries – before they were abolished [in defamation cases] – not finding in favour of claimants when it's a joke. This will be the first time [the issue comes] before a judge. It's going to be a test of whether the British judiciary understands a joke – I mean that seriously.

"It's a test case for the judge to see whether they will follow the same route as juries used to take, which was to throw libel cases which were based on humour out on their ear. Judges have traditionally had something of a humourless side."

In a statement, Taylor Hampton, solicitors for Thomas Reay, denied the case raised issues of free speech and said the offending material had caused their client enormous distress. "Beamont repeatedly performed a comedy show which identified our client verbally and in still and moving images, contained private information about him and his relationship with Ms Beamont, and made very serious and inflammatory allegations of wrongdoing against him," it said. "These allegations included the entirely false suggestion that our client's relationship with Ms Beamont was an abusive one."

*Source: http://www.chortle.co.uk/news/2018/02/17/39167/comic_sued_by_ex-husband_for_talking_about_him_on_stage*

**Published:** *17 Feb 2018*

**Louise Reay faces thousands in legal bills**

Louise Reay is facing a demand for £30,000 damages - plus huge legal costs - for speaking about their break-up in her 2017 Edinburgh Fringe show Hard Mode. Ironically, its main theme was censorship and free speech.

She said: 'He has a lot more money than me and he says that I accused him of abusing me in my show. And so he's suing me, which in my opinion is simply an attempt to silence me. 'As stand-up comedians, I believe it's the very definition of our job to talk about our lives and social issues. So this has become a free speech issue - and free speech means everything to me.' And speaking about being served with defamation, privacy and data protection proceedings, Reay said: 'I cannot tell you how oppressive that feels.'

The comedian has now launched a crowdfunding campaign to build a fighting fund of at least £10,000 to cover her legal fees.

Writing on her GoFundMe page said: 'During the show, I referred to my husband a couple of times - perhaps 2 minutes-worth of reference in a 50-minute show. The main gist of those references was to tell the audience how sad I was that my marriage had broken down recently. 'He has complained about two performances of my show in London, and my shows at the Edinburgh Fringe.'

After his lawyers complained, the comedian made an undertaking not to mention him in any further performances of the show, but says that has not seen off the legal threat.

Reay's interest in free speech was heightened by the many years she spent living in China. And as a development producer she has helped make documentaries for the BBC and Channel 4 with vulnerable people whose voices are rarely heard under her real name of Beamont. Reay, who is currently performing at the Adelaide Fringe in Australia, declined to comment further on the case to Chortle, citing legal concerns. One review of Hard Mode said that the tale of her break-up was ' too raw for comfort'.

This is not the first time a comedian has been sued by someone she mentioned in her act. In 2009, American comedian Sunda Croonquist was sued by her mother-in-law - but the case was thrown out of court.

Blogger John Fleming has pointed out that the legal action is likely to bring more attention to the statements Reay's ex is trying to suppress... a phenomenon known as the Streisand Effect after Hollywood superstar Barbra tried in vain to keep a photograph of her property out of the public domain.
https://www.theguardian.com/commentisfree/2018/feb/22/louise-beamont-thomas-reay-comedians-comedy-standup

I feel for the standup being sued by her ex: we comedians seek the truth.
Arnab Chanda (comedy writer, director and EDITOR)

Louise Reay was looking for laughs in personal stories, but emotionally it’s a high-risk path.
I don’t really feel comfortable speaking about the case of comedian Louise Beamont, known on stage as Louise Reay , in which her estranged husband, is suing her on the grounds that she defamed him in a standup show. Not only have two people’s lives genuinely been affected, but I haven’t even seen the show and, as it’s an ongoing court case, I can’t comment on it too much anyway (being sued sounds super tiring). Also, I’m just a moron comedy writer who never even studied law (I thought My Cousin Vinny was good though).
I can, maybe, try to answer one question, though: where do you draw the line when it comes to writing good comedy versus exposing someone you know or love?

Whether or not a comedian includes personal material is obviously up to each performer. In his latest Netflix special, for example, Jerry Seinfeld mentions in passing that both of his parents were Jewish orphans, before swiftly moving on to a routine about sidewalks or pencils or something. I don’t remember any more. All my stunned brain could think about was that both his parents were Jewish orphans?!? What??? Why, after more than 40 years of doing comedy had he only now brought this up? To me, it was arguably the most interesting thing about the guy. But he clearly had his reasons for withholding it until now, and those reasons were obviously more important to him than getting a laugh. If it’s the truth and you can live with it and defend it, you’ve got nothing to be ashamed about.

For the eight years I did standup professionally in my 20s, I too never mentioned my family or anything personal on stage. I was raised not to. It was impolite and rude. But there were other reasons. For most of my childhood, there were issues of alcoholism in my family. I never wrote about it, told my friends about, and in all my time doing standup, never dared speak about it. I lived in fear of it. Only now, at the age of 36, am I on stage again for the first time in seven years, actually talking about this and other very personal things.

It's still incredibly difficult and uncomfortable at times and I know I am disclosing things that my family would probably rather keep private, but I don't think it does much good holding things in. For years I did, and I nearly lost my stupid little mind and actually did lose all my beautiful, fluffy, curly hair (let it go Arnab).

Mark Stephens, a libel lawyer, said of Beamont's case, "It's going to be a test of whether the British judiciary understands a joke – I mean that seriously." Meh. I'm not sure it's about understanding a joke at all. It's actually about understanding that writing comedy, music or literature is a process and, in standup, that process doesn't involve editors or lawyers. It involves experimenting and taking risks in front of live audiences, and taking time to reflect on whether what you're saying is true and worth it. That experimentation can sometimes get you into uncomfortable areas – but that's arguably what comedy's all about.

The Beamont case doesn't make me wonder whether personal material about family, divorce, or break-ups should be included in standup. That will always be done. I mean, it's the most interesting stuff you can do. How many more jokes about pencils do we really need? But it can sometimes be a high-risk path to take, emotionally speaking. Imagine if the person you were talking about was in the audience. Would you write the show differently? If so, it might not necessarily be for the right reasons. If you're speaking honestly about your life, you shouldn't really have to change anything.

I supported Simon Amstell on three of his standup tours. He's a friend and comic I admire greatly, but I was always shocked at how he would divulge the most private details of his family on stage to complete strangers. "How do you justify throwing your family under the bus like that? Don't you feel guilt?" I'd ask. He'd despondently reply, "It's the truth. I really don't know how else to do it." And that's it really. If it's the truth and you can live with it and defend it, you've got nothing to be ashamed about. If it's not the truth, and you can't defend it … well, as Eduardo Saverin says to Mark Zuckerburg in The Social Network, "You better lawyer up asshole, 'cause I'm coming back for everything."

*Arnab Chanda is a comedy writer, director and actor*

***20 February 2018***

***http://www.dailymail.co.uk/news/article-5412377/Comedian-sued-30-000-estranged-husband.html***

***An award-winning comedian is being sued for £30,000 by her estranged husband after using material about their marriage in her Edinburgh Fringe stand-up show.***

Louise Beamont, stage name Reay, has been accused by Thomas Reay of defamation in what one leading lawyer described as a test case of whether British judges ‘can take a joke'.
Ms Beaumont, who is also being sued for breach of privacy and data protection, faces being bankrupted if she loses and launched a gofundme page, which raised £5,000 in its first days, to defend against what she calls a threat to free speech.
Louise Beamont, stage name Reay, (pictured in undated social media photos) has been accused by Thomas Reay of defamation in what one leading lawyer described as a test case of whether British judges ‘can take a joke'.

Her show, Hard Mode, was billed as an immersive comedy about life in an 'authoritarian regime' but was described by one critic as being 'at its core... about a very recent and raw heartbreak'. The couple married in 2013 and broke up before the show. Mr Reay wants £30,000 worth of damages in addition to legal costs and an injunction preventing his former wife, who was named 2015 Alternative New Comedian of the Year, from mentioning him in the future. His lawyers allege that she aired 'very serious and inflammatory allegations' including the 'entirely false suggestion that our client's relationship with Ms Beaumont was an abusive one'. The comedian wrote on her gofundmepage, which is half way to its initial target of £10,000: '[My husband] has a lot more money than me and he says that I accused him of abusing me in my show.

'And so he's suing me, which in my opinion is simply an attempt to silence me. As standup comedians, I believe it's the very definition of our job to talk about our lives and social issues. 'So this has become a free speech issue - and free speech means everything to me. As a Chinese speaker, I've spent many years in China and experienced the social impact when people do not have this freedom.

'I've also spent many years making documentaries for the BBC with vulnerable people whose voices are rarely heard.
'And, I cannot begin to tell you how difficult an experience it has been to have my Edinburgh show censored. I think therefore it's really important for me to defend myself in this case.'

Mark Stephens, libel lawyer at Howard and Kennedy, told The Guardian British juries typically found in favour of defendants who had made a joke but this would be the first time such a case would go before a judge.
'There's a long history of British juries – before they were abolished [in defamation cases] – not finding in favour of claimants when it's a joke,' he said.

Taylor Hampton, who are acting for Thomas Reay, said in a statement: 'This is not a “free speech issue”, and contrary to how Ms Beamont presents our client’s legal complaint on her fundraising page, there is no question of any censorship taking place. 'For an extended period last summer, following their separation, Ms Beamont repeatedly performed a comedy

show which identified our client verbally and in still and moving images, contained private information about him and his relationship with Ms Beamont, and made very serious and inflammatory allegations of wrongdoing against him. 'These allegations included the entirely false suggestion that our client's relationship with Ms Beamont was an abusive one. At no stage was our client asked for his consent or given any chance to put his side of the story.

'This was a highly personal attack on our client with no justification whatsoever.'

**Sarah Millican: My family values**

**The comedian talks about getting her sense of humour from both parents and the therapeutic effect of making jokes about her divorce**

*Vicki Power*

Fri 8 Nov 2013

Sarah Millican … 'I get the chatty, anecdotal stuff from my dad and the filth from my mam.'
*Photograph: David Levene for the Guardian*

**I was shy at school, but not at home**. We had a boiler that had tiles around it, so if my sister and I got new shoes we'd do a little tap dance on the tiles. I also wrote poems but would read them from behind a curtain.

**I was restless to succeed, even as a kid**. I remember seeing a five year old who won a cup for dancing in the local newspaper and having a little panicky moment, thinking, "I haven't done any activity since I was five!" We did a talent assembly at school, and I said my talent was looking after animals because I had a little menagerie. I held up a poster of a lop-eared rabbit that said, "You're No Bunny till Some Bunny Loves You," which is a message I hate now.

**At school I was quite bookish** and swotty. I handed my homework in on time and so wasn't a cool kid and didn't have a massive amount of friends. At senior school, I was bullied – mostly verbally and not that much, but it left an imprint. Now, if somebody's being a shit to me on Twitter, I block them.

**I used to help my maternal grandad** in his garden. He was a lovely, kind man. He turned his spare bedroom into a greenhouse because he didn't have room in the garden, and I remember rows of polythened plants stuffed in there. I'd follow him around the garden and collect caterpillars in a jar. I've just taken up gardening this year after moving to a house in the country and wish I could ask him for advice.

**The miners' strike was a very stressful** time for our family. My father, Philip, was an electrician down the mines. We had next to nothing for that year – £11 a week, I think, and not enough to feed four. I was nine and another girl and I had free school dinners because of the strike, and we got cuddles off the dinner ladies and sometimes extra dinners. I used to try more foods at school than at home and my mam used to go mad – she'd be like, "You won't eat peas for me!" My parents

had a very understanding bank manager who made sure they didn't lose the house. It brought us closer together.

**My humour is a mix of my parents'.** I get the chatty, anecdotal stuff from my dad and the filth from my mam, Valerie. She has a very dark sense of humour, I think from having grown up with disabilities. It's a coping mechanism. She had polio when she was eight and has been in a wheelchair for about 20 years. She once told me she found me quite coarse on stage, and I reminded her of something filthy she had told me. It's the genes.

**My dad is a storyteller**. I've heard his funny stories 500 times, but I would never stop him because he tells them so brilliantly and still knows where to put the funny bit.

**Dad didn't like lazy people**. He always said, "There's no such thing as can't." If our grades at school were a D for attainment but an A for effort, we didn't get told off. They gave me a present for my A-levels in the gap between the exams and the results because it was for working hard. I have taken that work ethic into my career and believed that to succeed I had to work very hard.

**Making jokes about my divorce** [in 2004] was therapeutic. I use the analogy of the X-Men: I knew there were people out there who'd also been dumped dramatically, even if I didn't know what they looked like. But when people laughed, I didn't feel as alone.

**I've eased up a bit in the past year**. I've taken up cooking and gone back to making crafts and reading and other things I loved doing as a kid.

**Standup comedian's husband drops defamation case**

Thu 13 Dec 2018 18.01 GMT Last modified on Thu 13 Dec 2018 19.15 GMT

**Award-winning comic Louise Reay settles lawsuit over using personal material in her show**

The estranged husband of an award-winning comedian who was suing her for defamation over material in her standup show has dropped the case.

Thomas Reay was also suing Louise Beamont (stage name Reay) for breach of privacy and data protection, arguing that he was identified without his consent in photos and videos in the show. He was claiming £30,000 in damages plus legal costs and seeking an injunction to prevent her publishing statements about him, including, he said, allegations their relationship was abusive. The case raised concerns that if Beamont – who faced bankruptcy – lost, it could prevent comedians from using material about their loved – or unloved – ones in standup shows. However, a short statement issued by both parties said they would not be going to court. It read: “A settlement has been reached, which has resulted in the claimant discontinuing the proceedings. Both parties have agreed to make no further comment following settlement.”

Posting it on her fundraising page, Beamont added: “I am really grateful for the support I have received for this case. Thank you!” At the time proceedings were launched, Beamont, the 2015 alternative new comedian of the year, described it as “the very definition of our [comedians’] job to talk about our lives and social issues. So this has become a free speech issue – and free speech means everything to me.”

Personal experience, however harrowing, has long been a rich mine to seam for comedians. The case raised the hackles of others in the industry with Nish Kumar, Josh Widdicombe and Sara Pascoe among the standups who appeared at a West End benefit git for Beamont.

David Baddiel, whose show My Family: Not the Sitcom, talks about his father’s dementia and his mother’s hyperactive sex life, said: “It would be a pity if the outcome of this case meant that comedians’ versions of their histories would have to be constantly checked by lawyers before they could be told on stage.” The lawsuit, described by a leading lawyer as a test case, related to Hard Mode, Beamont’s show, billed as as a “provocative show [that] explores censorship and surveillance”; though one critic described it as being “at its core … about a very recent and raw heartbreak”.

Her mother, Jane, wrote on the GoFundMe page, which exceeded its £10,000 target: “Fighting this lawsuit has been really tough on my daughter Louise and the whole family, and we are incredibly grateful to all the amazing people who have helped us achieve a discontinuance of the legal proceedings and a settlement.”

# The Impact of the ECHR on the German National Legal System

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## A. Summary

All Conventions States of the European Convention on Human Rights have to ensure that their national Law complies with the Convention. Therefore, every national institution and body of the Executive, Legislature and Judiciary needs the authority to be able to apply the ECHR. To do so, these bodies need to understand the scope of application of the Convention and therefore, the relevant legal national and international framework.

One the one hand complying with the ECHR is an international obligation for the Convention States. If a Convention Party fails to comply with the Convention, it is at risk to be exposed to an international liability. On the other hand, it has to be seen that in general the national law codifies Human Rights on a constitutional level as well. Facing international agreements, it has to be investigated how national constitutional rights can or even have to be interpreted in the light of international rights. In Germany the Convention itself, as an international Contract, has to be transformed into the national law according to Art. 59.2 Basic Law (which is the German constitutional law, in German: Grundgesetz) and has only the legal status of an ordinary federal law which due to the normative hierarchy in general cannot interpret the German Basic Law. However, due to constitutional principle of the Basic Law's commitment to International Law which was developed by the German Constitutional Court (in German: Bundesverfassungsgericht) as national German human rights and thus, German laws have to grant at least the scope of the Convention's Human Rights.

In cases of divergences in interpretations of Human Rights between the national and international interpretation (e.g. related to the appreciation of values in case of third-party effects of human rights or related to the scope of the merits of certain rights) those conflicts may be solved by the so called margin of appreciation doctrine which was established by the European Court of Human Rights and grant the national bodies in some cases a margin of appreciation. The doctrine is mostly applied at the proportionality test. When a margin of appreciation is granted, the European Court of Human Right reviews (only) the application of the margin itself and if an appreciation is under the chapeau of the indispensable guarantee of the Convention's rights and does not put itself at the position of the national court.

## B. Fundamentals and Nature of the ECHR

The European Convention on Human Rights (referred to as *Convention*) was agreed on 4 November 1950 and was drafted by Council of Europe[88]. It came into force on 3 September 1953. Meanwhile, all 47 Council of Europe Member States have agreed on the Convention (referred to as *Convention States*).

[88] The Council of Europe was founded in 1949 and shall protect human rights, democracy and the rule of law in Europe. In according to Art. 1 lit. b and Art. 3 of the Statute of the Council of Europe the Council of Europe Member States aim to protect human rights. The European Convention on Human Rights is the essential act to fulfill this objective.

## I. Idea, Origin and Nature of the ECHR

The Convention tackles the issue of lacking human rights protection during the time of the Third Reich and World War II. The European Countries agreed that the protection of human rights is an essential fundament for freedom and peace as well as for the rule of law.

The Convention is an international agreement and guarantees a minimum protection of Human Rights. Thus, Art. 53 of the Convention states that *"[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party"*.

The Convention consists of the Convention text itself and their Protocols. While the Convention text itself is legally binding to every Convention State, there is no obligation to agree on the Protocols. However, if a Convention State agrees on a Protocol, this Protocol gets legally binding to the agreeing Convention State.

Furthermore, the Convention addresses not only the Convention States. It is one of the first international agreement granting rights directly to the people of the Convention States (the Human Rights are so called self-executing rights) and give them the right to sue a Convention State in front of an international body. Meanwhile, as such body the European Court of Human Rights was established as a permanent structure to ensure an independent, effective and consistent legal protection, see Art. 19 of the Convention.

Since the Convention is still an international agreement every Member States has to implement the Convention in accordance with their own constitutional requirements. Therefore, is must be distinguished between the international level which refers to the international agreement and the national level which first of all refers to the national incorporation act.

## II. Relevance for the Executive, Legislature and Judiciary

Every Convention State's institution and body of the Executive, Legislature and Judiciary has to be able to apply the ECHR to avoid an international liability of the Convention State and a potential breach of national law.

To do so, these authorities have to understand the scope of application of the Convention and therefore, the relevant legal national and international framework. Independently of the way how the ECHR is incorporated into the national legal system Contracting States' authorities have the obligation to take the ECHR into account. If they don't apply the ECHR and if the Convention's rights are violated there will be a breach of the Convention. This may also lead at least to an international liability of the Contracting State. In some cases, one can sue the Contracting State and seeks for compensation, e.g. in accordance to Art. 5.5 of the Convention.

By using the example of the German legal system and by referring to the judgements of the German Constitutional Court this article will show that it requires some steps to determine the scope of the Convention's application. On the one hand

the legal status of the Convention in the national legal system has to be analyzed to understand how the Convention's rights effect the national human rights in general. On the other hand, by spectating certain categories the specific relation between the scopes of the relevant human rights has to be discussed. Taking this into account it can be understood how the Convention has to be applied and how the Convention influences the interpretation of the specific (national) human rights as well as how the Convention's rights can be enforced. Therefore, it will be necessary to differ between the international and national level.

### C. ECHR in Domestic National Laws

The ECHR is incorporated into national law in different ways, since the international law does not affect directly the national legal authority, so Convention States are free to decide how they implement international obligations in their national legal system, as long as a Convention State fulfills its obligations. Only some countries implemented the ECHR on a constitutional level. Those which didn't, e.g. Germany, have to find a way how the rights of the ECHR can be ensured and enforced. To understand the incorporation of the ECHR the first step is to understand how the Convention rights are applied, because the recognition of the legal status leads to the relevant question how the Convention has to be taken into account in a specific Convention State.

#### I. Implementation Models in Europe

In principal, some countries in Europe follow the concept of monism and some the concept of dualism. These concepts describe the relationship between national and international law. Based on the theory of monism the national and international legal systems form a unity. The dualist countries differ between the national law and international law and require in general a translation of the international agreement into the national law.[89] However, regardless of the way how a constitution sees and constructs the relationship between the international and national law, every constitution has provisions how to agree on and how to incorporate international agreements. These provisions often clarify the legal status of the (incorporated) international agreements. Therefore, in different Convention States the ECHR or the adequate national acts are on different legal levels.

##### 1. Constitutional Law

In some countries, e.g. in Austria[90], the Convention has the legal status of a constitutional statute. The Human Rights of the ECHR are directly applicable as constitutional law and are therefore, on the same legal level than the national Human Rights. Thus, Human Rights can directly be addressed as constitutional law and may affect national Human Rights directly.

[89] See *Hobe*, Einführung in das Völkerrecht, pages 239-243; *Sauer*, Staatsrecht III, § 6 paragraphs 5-12.
[90] Austrian Bundesverfassungsgesetz vom 4. März 1964, mit den Bestimmungen des Bundes-Verfassungsgesetzes in der Fassung von 1929 über Staatsverträge abgeändert und ergänzt worden, 6 April 1964, BGBl. Nr. 59/1964.

**2. Status between Constitutional Law and Ordinary Federal Laws**

In other countries within the national law system the ECHR has a legal status between the constitution and ordinary laws. This might already lead to the fact that in principle the national Human Rights have a higher position in the national legal hierarchy as the human rights laid down in the Convention. However, ordinary (federal and state) laws and any other acts based on ordinary federal laws have to comply with the ECHR due to the legal hierarchy.

**3. Ordinary Federal Law (Federal Statute)**

In the third group of countries, e.g. in Germany, the Convention in principle only has a legal status of an ordinary federal statute within the national law system. In these countries is has to be legally discussed how ordinary laws may affect other ordinary laws and how national human rights might be affected. It has to be taken into consideration that in these countries the Convention itself cannot affect the national constitutional Human Rights directly due to its legal status. Additionally, the relationship between the other ordinary laws and the Convention has to be discussed, esp. general principles such as "lex posterior derogat legi priori" or "lex specialis derogate legi generali". By using the example of Germany it will be demonstrated that other constitutional principles may help to overcome the legal status under certain conditions and that the convention may become an interpretation aid under certain conditions.

**II. Implementation of the ECHR in Germany**

In Germany, as mentioned above, the ECHR is implemented as ordinary federal law. However, some other provisions have to be analyzed.

**1. Legal Basis, Art. 59.2 Basic Law**

Art. 59.2 of the Basic Law constitutes that *"[t]reaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law"*.

The Basic Law includes other provisions for Germany's integration into the international community and thus, for the implementation of international treaties, too. These are namely Arts. 23, 24 of the Basic Law. Though, these provisions require a transfer of sovereign powers to an international organization. Since this requirement is understood as the ability of an international organization to rule directly in the national legal system (without any other participation of a German authority) and due to the fact that decisions of the European Court on Human Rights cannot declare void a challenged German legal act nor addresses others than Germany (as a Convention State) itself and therefore, only has a declaratory effect,[91] the German Constitutional Court ruled that the ECHR is not incorporated on the Basis of Art. 24.1 Basic Law.[92]

[91] Therefore, the decisions are only so-called declaratory cases-law, see inter alia BVerfG, Judgment of the Second Senate of 04 May 2011 - 2 BvR 2365/09 -, paragraph 82 – Preventive Detention II.
[92] Arguing that the "legal effect of a decision […] is directed in the first instance to the State party as such" and that the Convention "is not intended to intervene directly in the domestic legal system", BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 45 – Görgülü.

In conclusion only Art. 59.2 Basic Law is the legal basis for the incorporation of the ECHR.[93]

**2. Legal Status of the ECHR in Germany**

By its wording Art. 59.2 Basic Law states that the transformation is *"in the form of a federal law"*. The legal status of the transformation act is connected to the agreeing legislative act. In case of the ECHR the German parliament, called the German Bundestag, agreed on the ECHR in form of federal (ordinary) law. Thus, the ECHR has in principle only the legal status of an ordinary statute.[94]

Other authors follow another approach. They argue that the wording of Art. 59.2 Basic Law, *"in form of a federal law"*, does only describe the procedure of the incorporation and does not determine the legal status. Furthermore, the Basic Law is committed to the international law and therefore, the legal status of ECHR is higher.

One might also argue that the protection of Human Rights and thus the Convention is meanwhile considered as (partial European) general rules of the international law. In this case due to Art. 25 of the Basic Law the Convention would had a legal status between the constitution and the (ordinary) federal laws.

However, the opinion of the German Constitutional Court is convincing: Beside the mentioned effect of decisions of the European Court of Human Rights, the clear wording of Art. 59.2 Basic Law supports the opinion of the Constitutional Court. Additionally, in contrast to Arts. 23, 24 Basic Law an incorporation based on Art. 59.2 Basic Law does not affect the sovereignty power of Germany and thus, the constitutional order. Furthermore, due to the disponible character of the Protocols and due to the fact that the ECHR is not a general agreement which is unilaterally accepted by the international community the ECHR cannot be subsumed under the constituent element of Art. 25 Basic Law, *"general rules of international law"*.[95]

In conclusion, the ECHR has the status of an (ordinary) federal statute.[96]

**D. Interpretation of German Laws in the light of the Convention's guarantees**

Since the Convention in principle has only a legal status of an ordinary federal law subsequently some legal issues have to be discussed concerning the legal hierarchy: Is a so-called treaty override possible by other subsequent ordinary federal laws? Is there a way how the Convention may affect the interpretation of the constitutional national rights? Is there a way how the Convention can be enforced by the German Constitutional Court?

[93] Directly stated by the BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 33 – Görgülü; see about this discussion *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, § 9 paragraph 9.
[94] BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 31, 32 – Görgülü, stating that, therefore, the Convention as (ordinary) national federal law is not a constitutional standard.
[95] Heineg BeckOK GG, Art. 25 paragraph 20; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, § 9 paragraph 9.
[96] BVerfG, Judgment of the Second Senate of 04 May 2011 - 2 BvR 2365/09 -, paragraph 87 – Preventive Detention II.

**I. Basic Law's Commitment to International Law**

The Basic Law constitutes Germany as a state which is willing to integrate itself into the international community to ensure freedom and peace. This decision finds its legal basis in the Basic Law's Preamble and in several other provisions of the Basic Law which expressis verbis states that Germany is open towards the integration into the international community. Therefore, this explicitly constitute a constitutional principle, the so-called Basic Law's *"commitment to international law"*.[97]

Although the nature and the specific content of this principle is discussed,[98] it is generally accepted that this principle states that the lawmaker and the national legal system does normally not aim to differ from its international obligations. Therefore, if possible, law shall be interpreted in compliance with the international obligations.[99] The principle is only provided within the Basic Law's democracy principle and rule of law as stated by Art. 20 of the Basic Law.[100]

**II. No general Application of the "lex posterior" and "lex specialis" principle**

Taking this constitutional principle into account in general the lex posterior and lex specialis principles shall not be applied due to the constitutional presumption that in general the lawmaker does not aim to violate its international obligations.[101] Therefore, on a federal law level in principle all laws shall be interpreted in a way which is under the chapeau of the Convention. The only exception is made in a case in which the lawmaker may expressis verbis decide and aim to differ from the Convention as long as the new law is constitutional.

Due to the fact that even a constitutional principle, such as the Basic Law's commitment to the international law, cannot completely overcome the legal status set out directly Art. 59.2 of the Basic Law and especially the lex posterior principle. In conclusion, a so-called treaty override of the Convention is possible by subsequent ordinary federal laws, but it requires the explicit will of the (national) lawmaker.[102]

**III. Scope of Implementation**

Due to Art. 20.3 Basic Law which codifies the rule of law, the primacy of law and "as an expression of"[103] the constitutional's commitment to international law as a constitutional obligation all authorities have to take the Convention's Human Rights and the decision of the ECtHR into account when they apply German laws independently of their legal status. If a national German body do not sufficiently take the guarantees of the Convention and the decisions of the European

[97] BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 33 – Görgülü; see *Zippelius/Würtenberger*, Deutsches Staatsrecht, § 54 paragraph 12. The principle is based on the Preamble as well as on Arts. 1.2, 23-26 of the Basic Law.
[98] See *Sauer*, Staatsrecht III, § 6 paragraphs 38-40b.
[99] BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 33-36 – Görgülü; Bverfge 58,1,34 Eurocontrol I, 59, 63, 89 Eurocontrol II; *Sauer*, Staatsrecht III, § 6 paragraph 38a.
[100] BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 34 – Görgülü; BVerfG, Judgment of the Second Senate of 12 June 2018 - 2 BvR 1738/12 -, paragraph 134, Ban on Strike Action for Civil Servants.
[101] BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 48 – Görgülü.
[102] *Sauer*, Staatsrecht III, § 6 paragraph 38b.
[103] BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 32 – Görgülü

Court of Human Rights into account, this will be a violation of Art. 20.3 of the Basic Law and the constitutional's commitment to international law and therefore a violation of constitutional rights.

The German Constitutional Court ruled expressis verbis that "[t]he principle that the judge is bound by statute and law […] includes taking into account the guarantees of the Convention […] and the decisions of the European Court of Human Rights as part of a methodologically justifiable interpretation of the law."[104]

Thus, every German Law, even the fundamental rights of the Basic Law, shall be interpreted in the light of the guarantees of the Convention within the constitutional limits.[105] If the guarantees of the Convention are wider than the fundamentals rights the national body has to take this interpretation for the determination of the scope of the national fundamental right into account within the constitutional frame. Thus, in general they shall interpret the national fundamental rights in the light of the guarantees of the Convention.

Decisions of the European Court of Human Rights have in principal only a direct effect for the Contracting States which are parties of the case, see Art. 46.1 of the Convention. A Convention State which was found violating the guarantees of the Convention has to bring this violation to an end due to Art. 46.1 of the Convention. Generally, it is left to the Convention States to decide how to comply with this international obligation.[106] However, for Convention States which weren't a party to a case, decisions of the European Court have a guideline function for similar cases since the European Court specify the interpretation of the Convention's provisions. Thus, the guarantees of the Convention have to be taken into account in the light of the European Court's interpretation to avoid a violation of the guarantees of the Convention. On the (German) national level, the decisions of the European Court have to be taken into consideration in a similar way as the guarantees of the Convention. Since the Courts decisions are also an interpretation of the Convention, they indirectly affect the Convention States (so-called de facto function), because the Convention States have to respect the interpretation of the Court to avoid a violation of the guarantees of the Conventions and thus, to avoid a breach of their own constitutional obligations.[107]

However, the German Constitutional Court does not state that the Convention and the judgements are legally binding in every case. The guarantees of the Convention and the decisions of the Court are (only) "part of a methodologically justifiable interpretation of the law"[108]. Thus, a national authority or a German national court may abide from the Convention under

[104] BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, first headnote – Görgülü.
[105] These limits derives from the Basic Law especially in the light of Art. 20 of the Basic Law (democracy principle and rule of law), see BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 34 – Görgülü; BVerfG, Judgment of the Second Senate of 04 May 2011 - 2 BvR 2365/09 -, paragraph 88 – Preventive Detention II; BVerfG, Judgment of the Second Senate of 12 June 2018 - 2 BvR 1738/12 -, paragraph 134, Ban on Strike Action for Civil Servants.
[106] In special cases the European Court of Human Rights already decided special measurements, f.e. to release an imprisoned person. The European Court of Human Rights also may set a deadline.
[107] BVerfG, Judgment of the Second Senate of 04 May 2011 - 2 BvR 2365/09 -, paragraph 89 – Preventive Detention II
[108] BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 47 – Görgülü

the conditions that they have considered the guarantees and ECTHR's decisions in a sufficient way and that they can reasonably argue and justify why they don't comply with an international-law interpretation of the (challenged) law.[109]

One of the most important constitutional restriction for the interpretation is given in the situation when the scope of the national human right is wider than the adequate Convention's human right or the indispensable part of a national fundamental right is violated. Already from an international perspective, Art. 53 of the Convention states that in these cases the wider guarantees of the national Human Rights are not affected by the Convention. However, from a national German point of view an ordinary law is not able to limit a constitutional human right due to the legal hierarchy. Thus, the guarantees of the national fundamental rights cannot be restricted. This has also been understood as a limit of the Basic Law's commitment to international law.

In conclusion, under the conditions as described above, the Convention and the decisions of the European Court of Justice are an "interpretation aid"[110] of the national fundamental rights and laws and thus, have a heavy impact on the national law. Therefore, by granting the guarantees of the Convention and the national fundamental rights in general a so-called dual protection of human rights is established.[111] Additionally, the lex posterior and lex specialis principle is only applied under restrictive conditions due to the Basic Law's commitment to international law. Thus, some legal opinions state that de-facto the Convention has a higher legal status than formally given by Art. 59.2 of the Basic Law.[112] As shown, only by the examination of the implementation of the Convention in the national legal framework national authorities can determine the scope of application.

### E. Cooperation between the ECtHR and National Bodies: Margin of Appreciation Doctrine

Without restricting the foregoing, every interpretation of the Convention is a question of the material scope of the Convention's rights and in a lot of cases the Court has to balance different rights and interests. However, in special cases on the one hand the material scope of the application of human rights might be questionable concerning the various opinions of the Convention States, inter alia, due to their different cultural and social views. On the other especially when an authority or a court has to balance different rights and interests, in other word in cases of the appreciation of values, there might be different reasonable different results.

The German constitutional court stated that national fundamental rights shall not be restricted by the Convention and added that "this obstacle to the reception of law may become relevant above all in multi-polar fundamental rights relationships in which the increase of liberty for one subject of a fundamental right at the same time means a decrease of liberty for the other".[113]

[109] BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 50 – Görgülü
[110] BVerfG, Judgment of the Second Senate of 04 May 2011 - 2 BvR 2365/09 -, paragraph 90 – Preventive Detention II
[111] *Sauer*, Staatsrecht III, § 7 paragraph 14.
[112] *Sauer*, Staatsrecht III, § 6 paragraph 38a, § 7 paragraph 15 et seq.
[113] BVerfG, Judgment of the Second Senate of 04 May 2011 - 2 BvR 2365/09 -, paragraph 94 – Preventive Detention II.

## I. The ECtHR between Uniform and Consistent Interpretation and National Sovereignty

In these situations, on the one hand the European Court wants to ensure the cultural pluralism and the sovereignty of the Conventions States.[114] On the other hand, it has to ensure a unified and consistent application of the Convention's rights. The question arises if in these situations the Court should insist on its competence to rule on these legal issues or if the Court should recognize an area between unity and sovereignty which refers to the cultural divergences in the opinions of the Convention States.

For example: Is an unborn life protected by Art. 2.1 of the Convention? As Art. 2.1 of the Convention only use the term "life" without clarifying when "life" legally begins it is doubtful whether or not unborn life can be subsumed under the term "life". Since, there are also different opinions among the Convention States, there is no room left for an interpretation by a so-called "European consensus".

Hence, in the given example, the question arises if the European Court of Human Rights should decide in this case. If the Court decided that unborn life is protected by Art. 2.1 of the Convention, it would have set a huge barrier for a termination of pregnancy in contrast to the current laws in some Convention States which are also reasonable, inter alia, due to the rights of the pregnant women, since Art. 2.1 of the Convention can only be restricted under the conditions set out by Art. 2.2 of the Convention.[115]

## II. Margin-of-Appreciation Doctrine

Considering inter alia the foregoing, the European Court decided to grant in some cases the national bodies a margin of appreciation (so called margin of appreciation doctrine), as the initial responsibility for securing the rights and freedoms of the Convention is first of all in their hands.[116] In these cases, by its own will the extent of the European Court's jurisdiction is in inverse proportion to the extent to which the national constitutional courts may decide within a legally reasonable margin of appreciation. Nevertheless, the "court […] is empowered to give the final ruling on whether a restriction […] is reconcilable with" the guarantees of the Convention. "The domestic margin of appreciation thus goes hand in hand with a European supervision which covers not only the basic legislation but also the decision applying it, even one given by an independent court".[117] Therefore, the Court reviews in general the decision made by a national court. But it does not take the place of the competent national court.[118]

[114] With regard to this argument see *Eva Brems*, ZaöRV Vol. 56, 240, 298-230.
[115] See *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, § 20 paragraphs 2-4.
[116] ECtHR, Sunday Times v. United Kingdom, 26.4.1979, 6538/74, paragraph 59; see also *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, § 18 paragraphs 20; *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights, pages 14-17.
[117] ECtHR, Handyside v. United Kingdom, 7.12.1976, 5493/72, paragraph 49; considering this *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights, pages 14-15.
[118] ECtHR, Sunday Times v. United Kingdom, 26.4.1979, 6538/74, paragraph 59.

### 1. Application of the Margin

Beside the given example first of all the Court applied the doctrine in case of emergency situation, Art. 15 of the Convention, and non-discrimination cases (Art. 14 of the Convention). Additionally, in principal the European Court mostly applies the doctrine when applying the proportionality test.[119] The application of the doctrine depends on the relevant, restricted human right and is applied on specific rights, while on others it isn't.[120] However, the doctrine is often applied when the Convention itself provides the opportunity to restrict its rights under certain conditions which rely on national assessments (e.g. Arts. 8.2, 9.2, 10.2, 11.2 of the Convention). The exemplary provisions state that a lawful interference of the Convention's rights needs to have an aim or aims that is or are legitimate under the relevant provision and that it has to be necessary in a democratic society for the aim or aims which is the legal basis for the proportional test and which opens often the room for the application of the margin of appreciation.[121] The Court especially applies the doctrine to certain provisions which have similar open clauses and requirements.[122] In conclusion, it is right to apply the doctrine in general and to consider it as a general principle to determine the Court's control density.[123]

But it has to be understood, in its decision the Court reviews the whole application of the margin of appreciation as well as the proportionality test and decides in every individual case the specific width of the margin of appreciation.

### 2. The Width of the Margin of Appreciation

The determination of the width of the margin of appreciation is based on some general criteria. Additionally, there are also specific criteria regarding to the specific reviewed provision of the Convention. In the following some general factors will be shown[124]:

Firstly, the European consensus is an important basis for the Convention, and it is also a basis for the Court's decision, if a specific national act is necessary in a democratic society.

Therefore, an important criterion to determine the width of the margin of appreciation is the absence or the existence of a common ground of the Convention States (the so-called "European consensus").[125] In general, the more inconsistent the national perspectives are the more a state needs to argue why it differs from the common perspective. In some cases, as seen by the given example, the criterion is applied in defining the material scope of a fundamental right. If there is no common ground, national states may also have a wider margin of appreciation. In this context, the European Court additionally refers to other conventions to investigate the existence of an international consensus.

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[119] *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, § 18 paragraph 20; *Rasilla del Moral*, GLJ 2006, 611 (613).
[120] See *Rasilla del Moral*, GLJ 2006, 611, 613.
[121] With regard to Art. 10 para. 2 of the Convention, ECtHR, Handyside v. United Kingdom, 7.12.1976, 5493/72, paragraph 48.
[122] An overview and the field of application presenting *Eva Brems*, ZaöRV Vol. 56, 240. 242-256.
[123] *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, § 18 paragraph 20.
[124] For a complete analysis see *Eva Brems*, ZaöRV Vol. 56, 240, 256-293.
[125] "Where, however, there is no consensus within the member States of the Council of Europe either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider.", ECtHR, Dickson v. United Kingdom, 4.12.2007, 44362/04, paragraph 78; *Rasilla del Moral*, GLJ 2006, 611, 617, who also shows the risk of dilution of standards.

Secondly, as already mentioned Arts. 8-11 of the Convention are often discussed, since these provisions allows the limitation of their rights under certain conditions. Additionally, the limitation has to follow certain legitimate aims. The European Court showed that the doctrine is not applied to every legitimate aim equally. It argued that some legitimate aims like "moral"[126] depends more on the national (social and cultural) interpretation than others, e.g. "maintaining the authority and impartiality of the judiciary" which can be interpreted more objectively.[127]

Thirdly, connected to the latter criterion is the international consensus. To determine if there is a national consensus the European Court of Justice considers additionally international agreements. In cases of an international consensus the width of the margin is narrower.

Fourthly, another important criterion to determine the width of the margin is the importance of the restricted right for the democratic society in general. In general, there is already a hierarchy of rights itself. For example, nearly no margin is granted for the restriction of life as protected by Art. 2 of the Convention, since the right of life has a high importance for the democratic society and the individuals living in this society.[128] Additionally, there is also a hierarchy of importance within a specific right itself, for example in the freedom of speech. In cases of restriction of news about the state authorities the European Court mostly grants no margin, because news about the state and the independence of the media are essential for a democratic society. In contrast to this, a margin for setting limits to the press is granted for news and reports about ordinary commercial activities and people.

Fifthly, the width will be narrower in cases of an inconsistent practice within a Convention State. If a state does not apply a rule similar as some authorities already consider a restriction of guarantees of the convention the state cannot clearly argue that national interests shall be protected and that the Court has to consider a margin.

Sixthly, in some situation the national bodies can better appreciate a situation than the European Court, especially when a national authority has to consider national moral or cultural perspectives or has to analyze a national political situation. An important example is an appreciation referring to the "national security" which is clearly related to the national sovereignty. In the James and others judgement the ECtHR decided that "the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one".[129]

In conclusion, by granting a margin of appreciation the European Court on Human Rights guarantees that the national constitutional courts can still consider their different national legal and especially their cultural background and grants the Convention Parties the right "to derogate from the obligations laid down in the Convention".[130] Furthermore, the doctrine ensures that the Convention States can balance human rights with reasonable, legal national interests. National authorities

[126] ECtHR, Handyside v. United Kingdom, 7.12.1976, 5493/72, paragraph 42 et. seq.
[127] ECtHR, Sunday Times v. United Kingdom, 26.4.1979, 6538/74, paragraph 54-56.
[128] See above.
[129] ECtHR, James and others v. United Kingdom, 21.2.1986, 8793/79, paragraph 46.
[130] ECtHR, Greece v. United Kingdom and Northern Island, 21.2.1986, 176/56, 2 Yearbook of the European Convention 1958-1959, paragraph 176.

can therefore still consider national matters and concerns. In a first step they have to evaluate the existence and the width of the margin. Secondly, they can reasonable argue why national sovereignty must be respected in certain cases.

**F. Procedural Requirements and Merits of a Constitutional Appeal in front of the German (Constitutional) Courts**

Taking into account that the Convention in Germany has only the legal status of a federal statute but on the other hand, all laws shall in general be interpreted in a way that they are in line with the Convention, it is the duty of the non-constitutional courts to judge about violations, since, in Germany, it is only possible to review the violation of constitutional rights in front of the German Constitutional Court. Due to this fact it is not directly possible for a complainant to challenge the violation of the Convention's human rights in front of the German Constitutional Court. However, ss stated before, the guarantees of the Convention have to be taken into account by the interpretation of the laws and of the fundamental rights, too, due to Art. 20. 3 of the Basic Law.[131] Hence, as long as the ECHR grants more rights than the national human right, the national fundamental rights has principally to be interpreted in the way of the adequate right as stated by the ECHR.

In conclusion the complainant is able to challenge the violation of a national fundamental right arguing that the defendant which is mostly an executive body does not taken into account the ECHR and thus, violated a constitutional obligation.

[131] BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -, paragraph 32 – Görgülü; BVerfG, Judgment of the Second Senate of 04 May 2011 - 2 BvR 2365/09 -, paragraph 87-88 – Preventive Detention II

# Interrelation between the case law of ECtHR and CCG

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**The Relevance of Foreign Legal Materials in U.S. Constitutional Cases:**

**A Conversation between Justice Antonin Scalia and Justice Stephen Breyer**

*3 Int'lJ. Const. L. (I·CON) 519, 521-531 (2005)*

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[Justice] ScALIA: ***I do not use foreign law in the interpretation of the United States Constitution. I will use it in the interpretation of a treaty. *** [T]he object of a treaty being to come up with a text that is the same for all the countries, we should defer to the views of other signatories, much as we defer to the views of agencies - that is to say defer if it's within the ballpark, if it's a reasonable interpretation, though not necessarily the very best.

But you are talking about using foreign law to determine the content of American constitutional law - to be sure that we're on the right track, that we have the same moral and legal framework as the rest of the world. But we don't have the same moral and legal framework as the rest of the world, and never have. If you told the framers of the Constitution that we're to be just like Europe, they would have been appalled. If you read the Federalist Papers, they are full of statements that make very clear the framers didn't have a whole lot of respect for many of the rules in European countries. Madison, for example, speaks contemptuously of the countries of continental Europe, "who are afraid to let their people bear arms." ***

Should we say. "Oh my, we're out of step"? Or, take our abortion jurisprudence: we are one' of only six countries in the world that allows abortion on demand at any time prior to viability. Should we change that because other countries feel differently? Or, maybe a more pertinent question: Why haven't we changed that, if indeed the Court thinks we should be persuaded by foreign law? Or do we just use foreign law selectively? When it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it. Thus, we cited foreign law in Lawrence, the case on homosexual sodomy (though not all foreign law, just the foreign law of countries that agreed with the disposition of the case). But we said not a whisper about foreign law in the series of abortion cases.

What's going on here? Do you want it to be authoritative? I doubt whether anybody would say, "Yes, we want to be governed by the views of foreigners." Well if you don't want it to be authoritative, then what is the criterion for citing it? That it agrees with you? I don't know any other criterion to bring forward. In many respects Justice Scalia and I will agree about how foreign law can and should influence judicial holdings in the United States Supreme Court and in the other courts as well. ***But let me describe the more controversial instances, where we likely do not agree. ***

*** [W]hen I refer to foreign law in cases involving a constitutional issue. I realize full well that the decisions of foreign courts do not bind American courts. Of course they do not. But those cases sometimes involve a human being working as

a judge concerned with a legal problem, often similar to problems that arise here, which problem involves the application of a legal text, often similar to the text of our own Constitution, seeking to protect certain basic human rights, often similar to the rights that our own Constitution seeks to protect. To an ever greater extent, foreign nations have become democratic; to an ever greater extent, they have sought to protect basic human rights; to an ever greater extent they have embodied that protection in legal documents enforced through judicial decision making. Judges abroad thus face not only legal questions with obvious answers, e.g., is torture an affront to human dignity, but also difficult questions without obvious answers, where much is to be said on both sides of the issue.

If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something. ***

***In some foreign countries, people are struggling to establish institutions that will help them protect democracy and human rights despite earlier undemocratic or oppressive governmental traditions. They want to demonstrate the importance of having independent judges enforce constitutionally protected human rights. The United States Supreme Court has prestige in this area. Foreign courts refer to our decisions. And if we sometimes refer to their decisions, the references may help those struggling institutions. The references show that we read, and are interested in, their reactions to similar legal problems. ***

*** Justice Scalia [does have a point]. Once we start to refer to foreign opinions, how do we know we can keep matters under control? How do we know we have referred to opinions on both sides of the issue? How do we know we have found all that might be relevant? The answers to these questions lie in the nature of the judicial process. We must rely upon counsel to find relevant citations. We must rely upon judicial integrity to assure a fair and comprehensive reading of any relevant foreign materials. Lack of either, of course, would mean faulty references, not just to foreign decisions, but to far more relevant domestic legal materials as well.

Of course. I hope that I, or any other judge, would refer to materials that support positions that the judge disfavors as well as those that he favors. For example, in a case where I took the position that the Establishment Clause prohibited extensive use of school vouchers,[132] I had to face the fact that in countries with somewhat similar traditions of church/state separation, governments subsidized religious school education. And most citizens of those countries, for example Britain and France, believed that doing so caused no relevant harm. Referring to such cases, practices, and views means extra work, even though a majority of our Court does so only occasionally. We understand that we are not experts in such matters. But we believe it is worthwhile, for doing so sometimes opens our eyes. And that is what I would say to those who wonder about the validity

[132] The Establishment Clause, which is in Amendment I to the US Constitution, states "Con-gress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Supreme Court ruled in 2002 that it was constitutional for state governments to institute voucher systems that would use taxpayer money to help fund private or parochial schools. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

of the practice. The practice involves opening your eyes to what is going on elsewhere, taking what you learn for what it is worth, and using it as a point of comparison where doing so will prove helpful.

The European Human Rights Court, for example, decided a case called *Bowman*,[133] which involved a law limiting campaign contributions and a charter provision protecting freedom of expression. Both sides referred to this opinion (in amicus briefs) filed in a campaign finance case in the Supreme Court. I read the case. I am not certain which side it helped. But I am pleased the lawyers referred to it because I learned something from reading it. Could I read many foreign cases in my work? Not too many, for doing so is time consuming. Should I be aware of the existence of foreign cases involving issues very similar to the issue at hand? I believe so. Do I believe concern about the use of my time is driving the opposition to the use of such materials? No. I do not. Some cases in which members of our Court have referred to foreign law have involved the death penalty; others have involved the constitutional rights of homosexuals. These subject matters, I believe, have fed the foreign law controversy. But they raise other issues as well. Reference to foreign law does not lie at the heart of those issues.***

*ScALIA:* I don't know what it means to express confidence that judges will do what they ought to do after having read the foreign law. My problem is I don't know what they ought to do. What is it that they ought to do? Why is it that foreign law would be relevant to what an American judge does when he interprets-interprets, not writes the Constitution? Of course the founders used a lot of foreign law. If you read the Federalist Papers, it's full of discussions of the Swiss system, the German system, etc. It's full of that because comparison with the practices of other countries is very useful in devising a constitution. But why is it useful in interpreting one?

Now, my theory of what to do when interpreting the American Constitution is to try to understand what it meant, what it was understood by the society to mean when it was adopted. And I don't think it has changed since then. That approach used to be orthodoxy until about sixty years ago. Every judge would have told you that's what we do. If you have that philosophy, obviously foreign law is irrelevant with one exception: old English law because phrases like "due process," and the "right of confrontation" were taken from English law, and were understood to mean what they meant there. So the reality is I use foreign law more than anybody on the Court. But it's all old English law.
lt should be easy to understand why, for someone who has my theory of interpretation, why foreign law is irrelevant. So Justice Breyer will never convert me. ***

*** But let me continue. That's my approach to interpreting the Constitution. Justice Breyer doesn't have my approach. He applies the principle that the Court adopted about sixty years or so ago first in the Eighth Amendment area (cruel and unusual punishments) and then elsewhere the notion that the Constitution is not static. lt doesn't mean what the people voted for when it was ratified. Rather, it changes from era to era to comport with and this is a quote from our cases, "the evolving standards of decency that mark the prog-ress of a maturing society." I detest that phrase, because I'm afraid that

[133] Bowman v. United Kingdom, 26 Eur. Ct. H.R. Rep. 1 (1998).

societies don't always mature. Sometimes they rot. What makes you think that human history is one upwardly inclined plane: every day, in every way, we get better and better? lt seems to me that the purpose of the Bill of Rights was to prevent change, not to foster change and have it written into a Constitution. Anyway, let's assume you buy into the evolving Constitution. Still and all, what you're looking for as a judge using that theory is what? The standards of decency of American society not the standards of decency of the world, not the standards of decency of other countries that don't have our background, that don't have our culture, that don't have our moral views.***

*** [I]t is quite impossible for French practice to be useful in determining the evolving standards of decency of American society. The only way in which it makes sense to use foreign law is if you have a third approach to the interpretation of the Constitution, to wit: "I as a judge am not looking for the original meaning of the Constitution, nor for the current standards of decency of American society; I'm looking for what is the best answer to this social question in my judgment as an intelligent person. And for that purpose I take into account the views of other judges, throughout the world."

Let me ask the law students here [the conversation between the justices excerpted here took place at a law school and the vast majority of the audience were law students]: Do you think you're representative of American society? Do you not realize you are a small layer of cream at the top of the educational sys-tem, and that your views on innumerable things are not the views of America at large? And doesn't it seem somewhat arrogant for you to say, when you later become judges, I can make up what the moral values of America should be on all sorts of issues, such as penology, the death penalty, abortion, whatever? Yet that' s the only context in which the use of foreign law makes sense when what we're doing is not looking to history, as I do, and not looking to the mores of con-temporary American society, which we did for a while. ***

*BREYER:* That is a good answer. Indeed. I think you have identified something that understandably worries many people. Still, judges are trying not to decide cases subjectively. And they understand the temptation, in difficult cases with open questions of constitutional law, to identify a general public view, or even a founder's view, with their own. Robert Braucher, one of my law professors and later a Massachusetts Supreme Judicial Court justice, used to say 'When I want to know what the common man thinks, I ask myself what I think, and I'm right every time." The judge in such cases looks, not to impose his own moral views, but for a more objective standard. ***

I wrote a dissent from a denial of a petition for certiorari in a case raising the question: Is it a "cruel and unusual punishment," hence a violation of the Eighth Amendment, for the government to force a person convicted of murder to remain on death row for more than twenty years before his eventual execution? I believed we should hear the case; and my dissent implied that the answer to the question could well be "yes." In referring to relevant cases, I included a decision by the Privy Council in England (overturning a Jamaica case) ***

*** I referred to a decision by the Supreme Court of India and one by the Supreme Court of Canada. I referred to certain United Nations determinations - those that I thought useful. But I did not limit myself to decisions supporting my own position. I referred to decisions that went the other way as well. I may have made what one might call a tactical error in

referring to a case from Zimbabwe-not the human rights capital of the world. But that case, written by a good judge, Judge Gubbay, was interesting and from an earlier time. I did not believe any of these foreign decisions were controlling. But I did think that the issue is not technically legal, but rather a law-related human question, and all concerned, American and foreign judges alike are human beings using similar legal texts, dealing with a somewhat similar human problem. Reaching out to those other nations, reading their decisions, seems useful, even though they cannot determine the outcome of a question that arises under the American Constitution.

Justice Thomas - disagreeing with me - wrote his own brief opinion arguing that I could not find American precedent supporting my view, so I must have looked to Zimbabwe out of desperation. He had a certain point. But still, with all the uncertainties involved, I would rather have the judge read perti-nent foreign cases while understanding that the foreign cases are not controlling. I would rather have the judge treat those cases cautiously, using them with care, than simply to ignore them. I would rather hope that judges will exercise proper control, taking the cases for what they are worth, than have an absolute rule that says judges may never look at foreign decisions. The fact that I cannot find any absolute legal prohibition-not even in the laws of King Arthur-gives me cause for hope.

*ScALIA:* But let's talk about the precise case you brought up.
*BREYER*: I brought up a case that illustrated the difficulties of my own approach.
*ScALIA:* That case presented the claim that it was cruel and unusual punishment to wait too long between pronouncing the death penalty and execution. We haven't decided that question yet; we have just denied cert.
*BREYER:* Right.
*ScAI.JA:* One of the difficulties of using foreign law is that you don't understand what the surrounding jurisprudence is.***

And you can say every other country of the world thinks that holding somebody for twelve years under sentence of death is cruel and unusual, but you don't know that these other countries don't have habeas corpus systems which allow repeated applications to state and federal court, so that the reason it takes twelve years here is because the convicted murderer himself con-tinues to file appeals that are continuously rejected.

In England, before they abolished the death penalty - and by the way, every public opinion poll in England suggests that the people would like to retain it, but maybe the judges and lawyers and law students feel differently about it before they abolished the death penalty, whenever it was pronounced the judge pronouncing it would don a little skullcap. When you saw him reach for the skullcap you knew he was about to pronounce a sentence of death. And that sentence would be carried out within two weeks. So that's the reason twelve years seems extraordinary to them. It's extraordinary because we've been so sensitive to the problem of an erroneous execution that we allow repeated habeas corpus applications. I just don't think it's comparable. It's just not fair to compare the two. But most of all, what does the opinion of a wise Zimbabwe judge or a wise member of a House of Lords law committee - what does that have to do with what Americans believe? It is irrelevant unless you really think it's been given to you to make this moral judgment, a very difficult moral judgment. And so in

making it for yourself and for the whole country, you consult whatever authorities you want. Unless you have that philosophy, I don't see how it's relevant at all.

*BREYER:* Well, it's relevant in the sense I described. A similar kind of person, a judge, with similar training, tries to apply a similar document with similar language ("cruel and unusual punishment" or the like), in a society that is somewhat similarly democratic and protective of basic human rights. England is not the moon, nor is India. Neither is a question of "cruel and unusual punishment" an arcane matter of contract law where differences in legal systems are more likely to make a major difference. In fact, ironically in those more specifically legal areas - areas where differences in legal systems are more likely tied to the details of a different legal environment-references to foreign decisions are likely to prove less controversial. Indeed, we frequently look at foreign law in such cases, i.e., technical cases. If in a "cruel and unusual punishment" case the fact that everyone in the world thinks one thing is at least worth finding out, for I doubt that Americans are so very different from people elsewhere in the world in respect to such matters. And, if my having the legal power to do so adds some uncertainty to the law, I believe the legal system can adjust. That is because the law is filled with uncertainty. Its answers in difficult cases can rarely be deduced only by means of legal logic from clear legal rules and a history book. Were the latter possible, I would be more tempted to agree with your view that a system without reference to foreign law would better control subjective judicial tendencies. But it is not. ***

*ScALIA:* ***In my dissent in Lawrence, the homosexual sodomy case, I observed that the court cited only European law; it pointed out that every European country has said you cannot prohibit homosexual sodomy.

Of course, they said it not as a consequence of some democratic ballot but by decree of the European Court of Human Rights, which was using the same theory that we lawyers and judges and law students know what's moral and what isn't. lt had not been done democratically. Nonetheless, it was1 true that throughout Europe, it was unlawful to prohibit homosexual sodomy. The court did not cite the rest of the world. lt was easy to find out what the rest of the world thought about it. I cited it in my dissent. The rest of the world was equally divided.

*BREYER:* But the reason that the majority referred to foreign cases in Lawrence is that the Court, in its earlier decision of Bowers v. Hardwick,8 had said that homosexual sodomy is almost universally forbidden. And I think that Lawrence, through its references, simply wanted to show that this was wrong.

*ScALIA:* Well, I understand. For whatever reason, we said universally, yes, it's not universally. But don't just talk about Europe; let's look at the rest of the world. ***

*** I mean, it lends itself to manipulation. lt invites manipulation. You know, I want to do this thing; I have to think of some reason for it. I have to write something that-you know, that sounds like a lawyer. I have to cite something. I can't cite a prior American opinion because I'm overruling two centu-ries of practice. So my goodness, what am I going to use?

*** I have a decision by an intelligent man in Zimbabwe or anywhere else and you put it in there and you give the citation. By God, it looks lawyerly! And it lends itself to manipulation. lt just does.

**[extract]**

# Constitutional Court of Georgia

## The First Chamber

## Judgement

**N1/3/393,397** **Tbilisi, December 15, 2006**

**Composition of the Chamber**

Konstantine Vardzelashvili – Chairman of Hearing

Vakhtang Gvaramia – Member

Ketevan Eremadze – Member, Rapporteur Judge

Besarion Zoidze – Member

Secretary of the Hearing: Lili Skhirtladze

**Title of the Case: Citizens of Georgia – Vakhtang Masurashvili and Onise Mebonia v. The Parliament of Georgia.**

**Subject of the Dispute:** Constitutionality of a) article 208.6 (completely) and part of article 208.7 (the part concerning arrest for manifest and gross disrespect for court) of the Criminal Procedure Code of Georgia and 2) article 212.5 (completely) and part of article 212.6 (the part concerning arrest for manifest and gross disrespect for court) of the Civil Procedure Code of Georgia with respect to article 18.1, 18.2 and 42.1 and 42.3 of the Constitution of Georgia.

Citizen of Georgia Vakhtang Masurashvili lodged a constitutional complaint with the Constitutional Court of Georgia on June 30, 2006 (Registration no. 393) and Citizen of Georgia Onise Mebonia lodged a constitutional complaint with the Constitutional Court of Georgia on July 11, 2006 (Registration no. 397). Pursuant to recording notice dated July 20, 2006 (No.1/4/393,397) the First Chamber of the Constitutional Court of Georgia admitted the complaints for examination on the merits and united them into one case.

…

**II.** The Constitutional Court of Georgia States, that article 208.7 (the part concerning arrest for manifest and gross disrespect for court) of the Criminal Procedure Code of Georgia and article 212.6 (the part concerning arrest for manifest and gross disrespect for court) is incompatible with article 42.1 and 42.3 and article 18.1 of the Constitution of Georgia due to the following findings:

**1.** Under article 42.1 of the Constitution of Georgia: “1. everyone has the right to apply to a court for the protection of his/her rights and freedoms.” This article sets forth the right to a fair trial, the scope of which is determined in the Constitution and in international legal instruments. This rights encompasses not only right to apply to a court (bring a complaint), but it also ensures comprehensive legal protection of a person. In the first place, right to fair trial means that all the decisions of the state officials, which violate human rights, may be challenged in the court and legally assessed.

Moreover, in order to achieve a fair hearing of a specific case and adopt an objective decision, the following minimum rights are included here: rights of a person to apply a court, to demand fair public hearing of its case, express his opinions and defend himself in person or through legal assistance, have one's case heard in reasonable time frame and a case be considered independent and impartial tribunal.

The Constitutional Court has defined in several judgments the substance and scope of fair trial on the basis of relevant provisions of the European Convention for Protection of Human Rights and Fundamental Freedoms and its case-law. In the judgment of December 2, 2004 in case of LLC Uniservice v. The Parliament of Georgia, the Constitutional Court of Georgia stated, that "Convention of the European Council for Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (entered into force in Georgia on May 20, 1999) fully authorizes the parties to support their arguments before the Constitutional Court with the provisions of European Convention. The same rule is applied in respect of case-law of the European Commission of Human Rights and European Court of Human Rights, which specify the substance and scope of the rights enshrined in the European Convention."

In the present case, when ascertaining constitutionality of the impugned norms, the Constitutional Court of Georgia will also assess their relation to the relevant provisions of the Convention. The constitutional right to fair trial is expounded by article 6.1 of the Convention for Protection of Human Rights and Fundamental Freedoms, which states: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Constitutional Court considers it is necessary to construe whether the relationships regulated by the impugned norms are encompassed by constitutional right to apply to a court to the extent, as it is defined by article 6 of the Convention for Protection of Human Rights and Fundamental Freedoms.

The Constitutional Court points out, that European Court of Human Rights and European Commission for Human Rights before it, widely constructed article 6 of the Convention on the ground of its fundamental meaning for the functioning of democracy, "in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision." (see, inter alia, the Delcourt judgment of 17th January 1970, "As to the Law" paragraph 25).

Article 6 ensures fair trial in determination of a criminal charge against a person. However, "criminal charge" is autonomous concept for the Convention purposes and its application does not depend on definition of this term in the national legislation. Inter alia, the European Court stated in the Judgment of February 27, 1980, in the case of Deweer v. Belgium, that "substantive", rather than a "formal", conception of the "charge" shall be preferred and the Court shall look behind the appearances and investigate the realities of the procedure in question (par. 44). Autonomous meaning of the term is underscored in several judgements. (see, inter alia, the Judgements of August 29, 1997 in the cases of A.P., M.P. and T.P. v. Switzerland, par. 39; E.L., R.L., and J.O.-L v. Switzerland, par. 44).

If the offence is classified as “criminal” under national law of the respondent state, article 6 will be applied to the proceedings. However, classification in domestic law is not decisive for applicability of fair trial guarantees under article 6. In the Judgement of June 8, 1976 in the Case of Engel and Others v. The Netherlands, the European Court declared: “If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention.” (par. 81).

It was decided in the same judgement, that in a society subscribing to the rule of law, an act for which deprivation of liberty is imposed as punishment belong to the "criminal" sphere (par.82). In the Judgment of March 23, 1994, in Case of Ravnsborg v. Sweden the European Court stated, “Notwithstanding the non-criminal character of the proscribed misconduct, the nature and degree of severity of the penalty that the person concerned risked incurring ...may bring the matter into the "criminal" sphere”. (par.35).

Taking into consideration all the above mentioned, for the purposes of the constitutional complaints, the Constitutional Court shares the approach of the European Court and considers, that, article 6 of the Convention shall be applied to the impugned norms, as they prescribe deprivation of liberty (arrest up to 30 days) as penalty.

Right to apply to a court is not absolute. The European Court stated in this respect, that the right of access calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals. Moreover, inter alia, in the case of Ashingdane v. the United Kingdom, the European Court defined the general scope of limitation of this right: “a limitation will be compatible with Article 6 para. 1 (art. 6-1) a. if it pursues a legitimate aim and b. if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. These preconditions shall be met in order the limitations applied not to restrict the access left to the individual to such an extent that the very essence of the right is impaired.”

…

The legitimate aim of the impugned norms is to achieve efficient and fast justice, to ensure order in court, to prevent demonstration of gross and manifest disrespect for the court and protection of its authority.

To achieve this goal, the legislator chose adoption of a resolution with deliberations in the courtroom and without oral hearing by the chairman of the hearing (judge) or chairman of a court on imposition of up to 30 days arrest on a person, demonstrating gross and manifest disrespect for court. The resolution may not be appealed.

In order to ascertain, whether there is a reasonable proportionality between the abovementioned aim and the means employed here, and thus to ascertain whether the impugned norms guarantee right to fair trial, the Constitutional Court will assess only those facets of fair trial, in respect of which the Claimants allege that the impugned norms are incompatible. These are 1. right to be informed promptly of any charge against him and right to defend himself in person or through a

legal assistance, when the issue of deprivation of his liberty is being decided; 2. right to be heard by an impartial court; 3. right of appeal against a judicial decision.

**2.** The Constitutional Court of Georgia considers that the impugned norms are incompatible with article 42.3 of the Constitution of Georgia, which states, "3. The right to defence shall be guaranteed."

Right to defence is essential part of the right to fair trial and in general, it implies that a person is able to defend himself in person or through legal assistance of his choosing.
The Claimants allege that article 208.7 of the Criminal Procedure Code of Georgia and article 212.6 of the Civil Procedure Code of Georgia are incompatible with article 42.3 of the Constitution of Georgia due to the fact, that a resolution on deprivation of liberty is adopted without oral hearing (Only article 208.7 of the Criminal Procedure Code regulates oral hearing issue) and with deliberations in the courtroom (both impugned norms regulated this issue), which deprives a person possibility to have a counsel, to have adequate time and facilities for the effective defence in person or through a legal assistance of his choosing. Moreover, a person is not informed on his constitutional rights at the moment of arrest.

The Constitutional Court will not share the argument of the Respondent that the impugned norms do not conflict with "right of defence as the right of defence emerges from the moment when a person is arrested, not when the issue of his arrest is being decided."

Right to defence enshrined in article 42.3 of the Constitution of Georgia is not circumscribed with the preconditions set forth in article 18.5 of the Constitution of Georgia, which states. "5. An arrested or detained person shall be informed about his/her rights and the grounds for restriction of his/her liberty upon his/her arrest or detention. The arrested or detained person may request for the assistance of a defender upon his/her arrest or detention, the request shall be met." It is true to state, that right to defence emerges under this article from the moment of the arrest or detention of a person. However, it does not exclude right of a person to defend himself in the proceedings when the deprivation of liberty is being imposed, the right guaranteed under article 42.3 of the Constitution of Georgia and article 6, paragraph 3 of the European Convention for Protection of Human Rights and Fundamental Freedoms, which states:
"3 Everyone charged with a criminal offence has the following minimum rights:
a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b. to have adequate time and facilities for the preparation of his defence;
c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;".

The Constitutional Court will not share another argument of the Respondent that if person is granted the right to appeal against the Resolution, the problem will be solved, as a person will be granted possibility to defend himself from the moment of arrest, as it is guaranteed in article 18.5 of the Constitution of Georgia.

The Constitutional Court of Georgia states in this respect, that even if the impugned norms provided for appeal against a resolution, access to legal assistance after being arrested would not meet the requirements under article 42.3 of the Constitution, as the latter provision guarantees right to defense from the moments when a court judges his liability for an offense.

Thus article 42.3 of the Constitution of Georgia includes article 18.5, though its scope is not circumscribed with article 18.5 requirements, and it is much wider and provides a person with right to defense in cases, when a court imposes on him deprivation of liberty.

The Constitutional Court considers, that the deprivation of liberty without oral hearing under the impugned norm (article 208.7 of the Criminal Procedure Code of Georgia) limits a person to be present at the proceedings and have a say in it, which is basic element of fair trial. Moreover, it shall be noted, that in certain cases, right to oral hearing may be restricted. For example, criminal trial in absence of the defender may be permitted under exclusive conditions, if the authorities acted with due efficiency, but could not notify a person on the court hearing (Judgment in the case of Colossa v. Italy, February 12, 1985). Trial in absence of a defender may also be in the interest of justice in certain cases of sickness. (Opinion of the European Commission of Human Rights in the case of Eslin and Others v. Germany, July 8, 1978). Person can waive this right, but all events of such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. (Case of Poitrimol v. France, November 23, 1993). Moreover, if an offender denies attending the proceeding, he shall be entitled to defend himself through legal assistance. (See the case of Pelladoah v. The Netherlands; The European Court found violations of article 6, par. 1 and par. 3, clause “c” of the Convention.)

Trial in upper instance without oral hearing will not always be considered to be violation of constitutional rights, if the right to defense was guaranteed in the proceedings which entailed deprivation of liberty. It is noteworthy, that European Court of Human Rights does not consider the presence of an offender at the appeal proceedings as important as his presence at the first instance trial. If the appellate instance court merely examines questions of law, it is not necessary to hold an oral hearing with participation of a defendant. The distinction shall be drawn between this case and when an appellate court examines questions of both fact and law. To ascertain whether a person is entitled to attend the hearing, the European Court will assess whether an appellate court needs presence of defendant in order to ascertain the facts.

Finally, the Constitutional Court of Georgia considers, that under article 42.3 of the Constitution of Georgia, a person who is being imposed deprivation of liberty, shall be entitled to express his opinion or have a legal counsel for his defense, which is mostly not feasible, when the case is tried without oral hearing, or with deliberations in the courtroom. It is true, that there are cases, when it is not necessary to hold an oral hearing (we mentioned above these cases.). It is also possible, that deliberations in the courtroom do not violate right to defense, when for example, a party to the litigation, who is being imposed deprivation of liberty for demonstration of disrespect for court is present in the courtroom together with his legal counsel. However, the following precondition shall be considered: guaranteeing right to defense requires not merely having

a legal counsel in physical sense, but also being provided with adequate facilities to prepare one's defense. Therefore, the legislator shall provide minimal, reasonably sufficient time for a person to have adequate possibility to defend himself in persons or through legal assistance.

In the case of Citizens of Georgia Firuz Beriashvili, Revaz Jimsherishvili and the Public Defender of Georgia v. The Parliament of Georgia, January 29, 2003, the Constitutional Court of Georgia noted that defending party shall be granted reasonable, sufficient time and facilities to exercise full right of defense, which presupposes the time and the facility, which would guarantee full possibility for preparation of the defense according to the degree of complicacy of a particular criminal case.

…

Article 208.7 of the Criminal Procedure Code of Georgia and article 212.6 of the Civil Procedure Code of Georgia do not meet these requirements and conflict with article 42.3 of the Constitution of Georgia.

It is constitutional obligation of the state in Georgia to protect fundamental human rights.

**3.** The Chamber notes, that members of the Chamber took different opinions in respect of constitutionality of the impugned norms from the perspective of judicial impartiality principle.

In the opinion of the part of the members of the Chamber – Justice Ketevan Eremadze and Justice Konstantine Vardzelashvili, the impugned norms do not conflict with one of the basic principles of right to fair trial – impartiality of the court due to the following circumstances:

The Justices do not agree with the argument of the Claimant, that the Judge, who was addressee of gross and manifest disrespect in court, will necessarily be biased when adopting the resolution on deprivation of liberty, as he is a victim, a prosecutor and an arbiter simultaneously.

Access to right to fair trial is mainly determined by the impartiality of court.

In general, impartiality of court is crucial in democratic, rule of law state and this is the criterion on which turns the confidence of public in judiciary. For this reason, article 42.1 and article 6, par. 1 of the European Convention for Protection of Human Rights and Fundamental Freedoms command that the judiciary shall be impartial.

To determine the impartiality of national courts, the European court applies subjective and objective impartiality test. (See, inter alia, Case of Haushildt v. Denmark, may 24, 1989, par. 46; see also Case of Piersack v. Belgium, October 1, 1982, par. 30). The content of both tests were specified in case-law. The subjective test refers to the personal conviction of a particular judge in a given case. Generally the personal impartiality of a judge must be presumed until there is proof to the contrary. (See, inter alia, Case of Haushildt v. Denmark, may 24, 1989, par. 47) Thus the proof shall be presented, which

would confirm that the judge was biased, acted to disadvantage of the applicant, expressed non-favorable opinions or was involved in the trial for personal purposes.

Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. (Case of Fay v. Austria, February 24, 1993, par.30). To determine objective impartiality of the court, the suspicions of an applicant is important, though not decisive. Whether the suspicions may be objectively justified is crucial in this case.

We consider that generally determining the issue of impartiality of the court under subjective and objective tests is crucial in each given case. However, this finding cannot serve as criterion for determining constitutionality of any given norm.

…

As it was stated above, legitimate aim of the impugned norms is to effect full and efficient justice, to ensure holding of hearing, which finally, serves to protect authority of judiciary. The same aim is pursued in preventing of disrespect against any subject and naturally, it shall be decisive also in case, when the disrespect for court is addressed against dignity and honour of a judge, as a person. Naturally, the presumption of impartiality of a judge shall still be ruling, as in the process of judging he constitutes the court and thus he has no right to be biased and to pronounce faulty, unfair judgement. First of all, this is necessary for his authority and authority of the whole judiciary.

From the abovementioned, it is incorrect to state unequivocally, that a judge will be biased in each case regulated by the impugned norms. …

A judge is not and shall not be merely a highly qualified lawyer; much more is expected from him. Even the most refined and precise legislation cannot serve as guarantee for impartiality of a judge. The legislation cannot relieve a judge from bearing extremely heavy responsibility – to assess the facts of a case fairly, impartially and adequately; it cannot substitute the personal qualities which would enable a judge to perform the functions of fair and impartial arbiter. A judge is guided by his inner conviction in taking a decision. Thorough knowledge of legislation is by all means necessary for structuring the inner conviction, though this is only foundation, which shall be duly used and at this point come to the forefront the personal qualities of a judge – his ability to give fair and unbiased evaluation to the facts of the case. Without such ability, a judge will always be tempted to misuse the law, even if he properly knows it. Thus taking objective decision based on inner conviction will always cause suspicions.

It is evident from the above-mentioned that in each case a judge (court) is in a better position to evaluate gravity of disrespect for court and whether the disrespect is addressed towards his person. Therefore the judge shall be entitled to assess in each given case whether he is able to be impartial and to take a decision adequate to the offence. A judge is obliged to be impartial in evaluation at the same time. However, whether a judge was actually unbiased and impartial shall be assessed by a higher instance court (Case of De Cubber v. Belgium, October 26, 1984).

…

From this perspective case of Kyprianou v. Cyprus, December 15, 2005 is of particular importance. The Grand Chamber found violation of impartiality under both subjective and objective tests. The following aspects raised the issue under the subjective test of impartiality: the same judges tried and imposed arrest for the offence of contempt of court, to who personally the offence was addressed. The European Court of Human Rights considered that conduct of the applicant was personally insulting for judges and they sentenced him acknowledging being insulted as persons by the applicant.

However, it is noteworthy, that the Grand Chamber of the European Court examined the facts of the given case in order to find violation of impartiality principle and did not review generally the Cyprus law on contempt of court.

It is interesting, that court of Ireland found in relevant cases that disrespect for court is not an offence aimed at personal dignity of a judge; it obstructs due implementation of justice. Power to evaluate this conduct and impose punishments is considered as indispensable element of functioning of rule of law state and entailed by authority of judiciary. It ensures the effective and due implementation of justice.

Due to above considerations, we deem that the impugned norms are not in conflict with the principal requirement of fair trial – the impartiality of court.

**4.** The Chamber finds persuasive the argument of the Claimant that article 208.7 (the part concerning arrest for manifest and gross disrespect for court) of the Criminal Procedure Code of Georgia and article 212.6 (the part concerning arrest for manifest and gross disrespect for court) of the Civil Procedure Code of Georgia are unconstitutional due to deprivation of ability to appeal against the resolution.

…

In the case of Oleg Svintradze v. Parliament of Georgia, March 17, 2005 the Constitutional Court stated, that article 42.1 of the Constitution of Georgia, comprises not merely right to trial by first instance court, but it also extends to right of appeal to the higher instances. This article constitutes a guarantee of access to justice. The Court considers that any deprivation of liberty, even based on legal grounds, shall be accompanied with right to appeal to a higher instance." In case of LLC Uniservice v. The Parliament of Georgia, December 21, 2004, the Court noted, "Challenging a court decision before the higher instance court, a person exercises his right enshrined in article 42.1 of the Constitution of Georgia."

The impugned norms provide for imposition on an offender punishment as harsh as arrest is. The Constitutional Court of Georgia considers, that deprivation of right to challenge the court resolution essentially violates right of an arrested person to fair trial. Conditions of an arrested person are not changed due to the fact, whether his liberty was deprived on the basis of ruling, order or resolution. Thus he shall be entitled to have reviewed the legality of deprivation of liberty, no matter what the ground of its deprivation is.

From this standpoint, the position of the Federal Constitutional Court of Germany is interesting, "Right to judicial protection implies: right to apply to court, right to equality of arms and right to have judicial
decisions reviewed" (1 PbvU 1/02- Decision of the Plenary Meeting of the Federal Constitutional Court of Germany, April 30, 2003, 1 1/02, part C.I.16).

It is true, that the Federal Constitutional Court of Germany notes in number of its decisions, that right to judicial protection is not unlimited (BVerfGE 1, 433 <437>- Decision of the Federal Constitutional Court of Germany 1, 433 <437), and the procedural boundaries of a dispute is determined by law (BVerfGE 54, 277 <291> - Decision of the Federal Constitutional Court of Germany 54, 277 <291>). It is also stated, that it is prerogative of the legislator to determine according to the interest of parties, how many instances would be available to exercise right to apply to court (BVerfGE 54, 277 <291> - Decision of the Federal Constitutional Court of Germany, 54, 277 <291>); the Court also underscored several times necessity to control acts of judiciary, as "right to appeal provides possibility to remedy the possible defects that took place in the proceedings." (Decision of the Plenary Meeting of the Federal Constitutional Court of Germany, April 30, 2003, 1 1/02, part C.II.44).

In the same decision (1 PbvU 1/02- Decision of the Plenary Meeting of the Federal Constitutional Court of Germany, April 30, 2003, 1 1/02) it is stated, that "inability to appeal to the higher instance would violate right to apply to court" (1 PbvU 1/02- Decision of the Plenary Meeting of the Federal Constitutional Court of Germany, April 30, 2003, 1 1/02, C.II.44).

The Constitutional Court of Georgia shares the position of the Claimant in respect of incompatibility of the impugned norms with article 6 and article 5.4 of the European Convention for Protection of Human Rights and Fundamental Freedoms and article 2 of its Protocol No. 7.

Generally, article 6 does not provide the right to appeal against a judicial decision. However, the European Commission for Democracy through Law (Venice Commission) noted in its opinion N277/2004, 2004, that inability to challenge a decision may cause violation of right to access to court provided in article 6. Right to liberty and security, provided in article 5 of the Convention is fundamental human right. It is noteworthy, that article 5 encompasses the relationships regulated by the impugned norms, as no matter what is the nature of an offence, they are punished with deprivation of liberty.

The deprivation of liberty shall be considered as exclusionary measure and shall be allowed exclusively when there is convincing arguments for it. Restrictions shall not be applied merely on the ground that initiatives of the government are necessary and appropriate. Hence, besides the exhaustive list of the cases when the person may be deprived of his liberty, article 5 of the Convention also provides the right of an arrested person to have decided the lawfulness of his detention or arrest by a court and to be released immediately if the detention is not lawful. Article 5.4 states, "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

In order to determine the relation of the impugned norms to the aforementioned article of the Convention, the Constitutional Court finds it important to determine the purpose, content and scope of this article: 1. the article is extended to all persons who were deprived of the liberty due to arrest or detention; 2. pursuant to this norm all the detained or arrested people are entitled to apply to court; 3. court shall decide speedily legality of detention, which implies both, the speedy access of the detained person to the court for review of legality of detention and carrying out the judicial control in reasonable terms.

In this respect the Constitutional Court deems it necessary to state, that efficient and active mechanism for appeal shall be installed, which would make it actually possible to speedily review legality of a resolution and redress of the rights of an arrested person, if the detention is found illegal by the court.

It is also noteworthy, that article 5.4 of the Convention is of separate importance. In the case of De Wilde, Ooms and Versyp v. Belgium, June 18, 1971, the European Court stated, "everyone who is deprived of his liberty, lawfully or not, is entitled to a supervision of lawfulness by a court." (par.73). …

…

The Constitutional Court of Georgia considers that in this respect article 42.1 of the Constitution of Georgia shall be constructed in the light of article 6 and article 5.4 of the Convention and also article 2 of its Protocol No. 7.

Article 2 of the Protocol No. 7 states,

"**1.** Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

**2.** This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

From this perspective, the Judgement of European Court of September 6, 2005 in the case of Gurepka v. Ukraine is interesting. The applicant was imposed 7-days arrest for contempt of court, which he could not challenge under the legislation in force. The European Court admitted the case in respect of article 2 of Protocol No. 7 and examined its merits as follows: in the light of its settled case-law, there was no doubt that, by virtue of the severity of the sanction, the present case was criminal in nature and the purported administrative offence was in fact of a criminal character attracting the full guarantees of Article 6 of the Convention and, consequently, those of Article 2 of Protocol No. 7.

The Constitutional Court of Georgia considers, that the impugned norms violate also article 2 of the Protocol No. 7, as offence which is punished with arrest of up to 30 days, may not be considered for the Convention purposes, as exception permitted under par. 2 of this article.

Finally it shall be stated that deprivation of right of appeal under the impugned norms conflicts with article 42.1 of the Constitution of Georgia, the content of which in the present case is constructed in the light of afore-mentioned articles of the Convention.

…

Adoption of decision on imposition of arrest without oral hearing and with deliberations in the courtroom, if a person is not provided with right to defence and it there is no possibility to review the legality of the decision, and hence when the legislator does not guarantee the minimum of entitlements constituting the essence of right, violates the principle of proportionality. Therefore, the Constitutional Court considers that restrictions of right to security and right to fair trial set forth in the impugned norms are not proportional to the legitimate aim pursued by these norms.