The Independent Human Rights Act Review

Meeting with the Justice Paulus (German Constitutional Court)

Date: 4 June 2021

Attendees

IHRAR Panel and UK Officials	**German Constitutional Court**
Sir Peter Gross	Justice Professor Dr Paulus
Lisa Giovannetti QC	Nina Prötzel (Legal Officer for Matters Relating to the European Court of Human Rights, Federal Constitutional Court)
Alan Bates	
Dr John Sorabji	
Kate Stevenson	

[References have been added retrospectively]

Sir Peter Gross first introduced the nature and role of IHRAR.

Theme One of IHRAR's ToR was the key issue for discussion. The approach taken in Germany to the role and place, within the German legal system, of the European Convention on Human Rights (the Convention) was of particular interest to IHRAR. It was, however, important to note that the UK, unlike Germany, did not have a codified constitution or a Basic Law. The UK did, however, have the common law. IHRAR was looking to see if more could be made to rely on the common law in respect of rights protection.

It was also noteworthy that there was an apparent feeling amongst some parts of the public in the UK that the Convention was not 'owned' by them. IHRAR wondered if the German approach to the Convention might be helpful in that respect.

Justice Professor Dr Paulus went on to outline the following issues.

The first point to note is that the justices of the UKSC and those of the German Constitutional Court have a good relationship. We have, for instance, discussed our respective approaches to the Convention and the European Court of Human Rights (ECtHR).

It is also worth noting that the common law has been enshrined in the Convention from its inception. We have learned from it and thus we have learned from the common law. This is particularly the case in respect of articles 5 (the right to liberty and security) and 6 (the right to a fair trial) of the Convention. These two articles have been of particular importance when applied to the German Criminal Procedure Code and in the respective judicial practice.

The second point to note is that the Constitutional Court, as such, has an extra-ordinary jurisdiction. It is narrower than that of the UKSC, and only covers constitutional law. As a consequence, its use of the Convention is sometimes different from that taken, for example, by the German Federal Supreme Court or the Federal Administrative Court. Federal Supreme Courts do not always specify the rights that they are relying on, e.g., constitutional rights, Convention rights, or EU fundamental rights.[1]

The Constitutional Court's first point of reference, by contrast, is the German Basic Law and it primarily refers to the German Basic Law (the Grundgesetz).[2] Where it deals with the Convention, it does so by reference to the Basic Law, in particular due to art. 1(2) of the Basic Law[3]. That provision requires the Basic Law to be applied consistently with universal human rights, at the time enshrined in the UN Universal Declaration of Human Rights. It has, however, been interpreted as applying more widely such that art. 1(2) also requires the Constitutional Court to apply the Basic Law consistently with other Human Rights instruments, such as the Convention and the International Covenant on Civil and Political Rights (IPCCR). Even though the German legal order shows a great openness towards international law, the German legislator may derogate from international treaties through legislation. However, it must specify that it is doing so in the legislative act or the materials thereto.[4] It is rare for the legislator to do so, although one example where it did was the Double Taxation Case[5].

As a consequence of art. 1(2), when the Constitutional Court interprets the German Constitution, it does so in the light of the Convention, as that is required by the Constitution itself. In doing so, the Court also takes account of the human rights practice of other jurisdictions. As a corollary to the Court's taking into account the Convention jurisprudence, the Constitutional Court regularly cites relevant ECtHR judgments in its own decisions.

The Constitutional Court does, however, also interpret the Constitution in the light of other human rights conventions. The Constitutional Court has not, as yet, determined which international rights conventions fall within the scope of art. 1(2), nor has it determined if so, then what hierarchy there is between such conventions. What is clear, though, is that for a convention to fall within art. 1(2), it must be comparable in universality and authority to the Universal Declaration or the ICCPR.

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[1] Albeit, recently, the Second Senate of the Federal Constitutional Court has also adopted such a "mixed approach", see BVerfG, Beschluss des Zweiten Senats vom 27. April 2021 - 2 BvR 206/14 -, paras. 67, 70, 81, 110, http://www.bverfg.de/e/rs20210427_2bvr020614.html, English press release No. 45/2021 of 1 June 2021, para. 4.

[2] EU fundamental rights might be referred to where legal issues fully determined by EU law are at issue, see, for example, BVerfG, Order of the Second Senate of 1 December 2020 - 2 BvR 1845/18 -, available in English at http://www.bverfg.de/e/rs20201201_2bvr184518en.html.

[3] The provision reads "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.", translated by: Professor Christian Tomuschat, Professor David P. Currie, Professor Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag, available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019.

[4] BVerfG, Order of the Second Senate of 26 March 1987 - 2 BvR 589/79 -, para. 39 – Presumption of Innocence, available in German at https://www.servat.unibe.ch/dfr/bv074358.html.

[5] BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvL 1/12 – Treaty Override, English version available at http://www.bverfg.de/e/ls20151215_2bvl000112en.html.

In addition to its application via art. 1(2) of the Basic Law, the Convention also has the status of a statute in Germany as it has been ratified with the legislator's consent in accordance with art. 59 of the Basic Law[6]. Due to art. 1(2), in practice, the Convention is of a higher authority than it would be by virtue of its status as a federal statute.

When the Constitutional Court is interpreting the Constitution in the light of the Convention jurisprudence and if it is not possible to interpret German constitutional human rights protection consistently with Convention jurisprudence, then the court can part company with the Convention. In other words, the court is not bound by Convention jurisprudence. It need only take it into account (along with other international rights conventions), i.e. give (Constitution-based) reasons for an eventual divergence – which is hard to do, though. There are a number of reasons behind this approach.

First, it would be inappropriate to treat Convention jurisprudence in isolated cases as final when it is not possible to know the ECtHR's future jurisprudence on the matter. Different considerations apply when faced with consistent Grand Chamber jurisprudence, in particular in the so-called pilot-judgment cases.[7]

Secondly, such an approach would be contrary to developing an effective dialogue between the courts, which could result in changes to the ECtHR's jurisprudence. In fact, the dialogue between the Constitutional Court and the ECtHR is a good one. An example of this, analogous to the UKSC's dialogue with the ECtHR over prisoners' votes, was the Preventive Detention case.[8] Its latest judgment in a long line of German Preventive Detention cases[9] demonstrates that the ECtHR takes account of the Constitutional Court's decisions. In this regard, the Constitutional Court tries to ensure that its judgments are capable of fostering their understandability within the ECtHR.

Thirdly, the Constitutional Court can, after giving judgment, re-consider issues heard before it where, for instance, the matter has been decided by the ECtHR in the meantime. It can only do so, however, if it has the power to change its judgment through (re-)interpretation and application of the Constitution.[10] In some cases, it will either not have the power (competence) to do so or it will

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[6] The first sentence of that provision reads: "Treaties 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.", translated by: Professor Christian Tomuschat, Professor David P. Currie, Professor Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag, available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019.

[7] ECtHR (GC), *Broniowski v. Poland*, judgment of 22 April 2004, no. 31443/96, paras. 188 et seqq.; ECtHR (GC), *Rumpf v. Germany*, judgment of 2 September 2010, no. 46344/06.

[8] BVerfG, Judgment of the Second Senate of 4 May 2011 - 2 BvR 2365/09 -, Preventive Detention. This judgment is available in English at http://www.bverfg.de/e/rs20110504_2bvr236509en.html. Note: The Federal Constitutional Court and the European Court of Human Rights translate the German *Sicherungsverwahrung* as preventive detention, while others would rather speak of security detention.

[9] ECtHR (GC), Ilnseher v. Germany, judgment of 4 December 2018, nos. 10211/12 and 27505/14, §§ 194, 224.

[10] Some examples are the Preventive Detention case, see above, or a change with regard to custody rights of fathers, BVerfG, Order of the First Senate of 21 July 2010 - 1 BvR 420/09 -, available in English at http://www.bverfg.de/e/rs20100721_1bvr042009en.html, which was decided after ECtHR, Zaunegger v. Germany, judgment of 3 December 2009, no. 22028/04.

be a matter for the legislator to deal with the issue. The Constitutional Court thus takes care to act consistently with the separation of powers as guaranteed under the Basic Law.

Essentially, the Constitutional Court will not implement an ECtHR decision without further consideration. There is no proper basis to adopt such a decision. The ECtHR's jurisprudence must be considered and translated, consistently with its spirit, into the German legal order. Such implementation requires consideration of the ECtHR jurisprudence in the light of the facts applicable to any specific case. The Constitution does not permit the Court to act as if the Convention were superior to the Constitution; this is a consequence of art. 1(2) of the Basic Law.

It should also be noted that there is no doctrine of Parliamentary Sovereignty in Germany as there is in the UK. The Constitutional Court can, in certain circumstances, mandate the legislator to change the law. It cannot, however, do so merely on Convention grounds. It may only do so where there is a constitutional basis for such action. In this way, the Constitutional Court can go beyond the approach permitted under the Human Rights Act 1998, which provides for mere declarations of incompatibility to be issued rather than the possibility to change or void legislation.

If it is not possible to interpret a constitutional right compatibly with the Convention then it remains in place. It is for the constitutional legislator to change the Constitution. If the ECtHR finds Germany to have violated the Convention, then it is a matter for the constitutional legislator to decide whether to change the Constitution or to remain in violation of the Convention. The Constitutional Court has no role to play in this respect. Its primary role is to enforce the Constitution, not the Convention.

Where the Federal Courts are concerned, if they do not follow decisions of the ECtHR, their decisions are likely to be challenged before the Constitutional Court. Consequently, Federal Courts have to give reasons why they do not follow the ECtHR. They are thus, as the UK courts do – albeit not to the same developed extent – adopting an approach where they distinguish ECtHR jurisprudence from the case before them. Generally, the ordinary courts as well as the Federal courts try to ensure that they follow ECtHR jurisprudence.

Where the ECtHR finds a human rights violation in Germany, it is for the competent executive branch (either the Federation or a Land) to execute the judgment (cf. Art. 46 ECHR). Thus, if the ECtHR awards just satisfaction because internal reparation proves impossible (cf. Art. 41 ECHR), the executive branch has to pay damages (within the respective budget approved by the legislator). The legal basis for the executive branch doing so is that the Convention has the status of a statute in Germany; hence the Convention is directly applicable in German law. Should just satisfaction awarded by the ECtHR not be paid, the person in whose favour the ECtHR judgment was given can sue in the regular (civil) courts.[11]

In one sense then the ECtHR can, in practice, operate as an appellate court. While the ECtHR applies Convention law and the German courts apply German law, if the ECtHR finds that the approach of the German courts was wrong, then as the Convention forms part of German law, the ECtHR

[11] Cf. § 40 sec. 2 sentence 1 VwGO (German Code of Administrative Procedure); BGH (Federal Supreme Court), Judgment of 24 March 2011, IX ZR 180/10, para. 17.

decision provides the lawful basis for the executive to pay damages. Theoretically, the domestic court judgment remains in effect, but the law[12] provides for the re-opening of cases under specific circumstances [This information was added, as agreed beforehand.].

The IHRAR Panel, following the meeting, and drawing from the points made by Justice Professor Dr Paulus summarise the position as follows.

Germany has a strong enforcement mechanism for Convention rights because it has effectively incorporated the Convention into domestic law and treats it as very much part of domestic law. The German ordinary courts regard Convention rights as part of their domestic law in a very real and powerful way, so that individuals regularly rely directly on a breach of their Convention rights when claiming damages and other remedies in German ordinary courts and can do so even if the treatment that is said to have violated Convention rights is prima facie authorised by domestic legislation. This seems likely to be the reason why there are few cases decided against Germany in Strasbourg.

The Constitutional Court effectively takes a 'living instrument' approach to interpreting the Basic Law and is influenced by the Convention: the Court seeks to 'do what we can' to ensure compatibility. Likewise, the ordinary courts follow ECtHR jurisprudence when interpreting Convention rights. So German constitutional law and ordinary domestic law in practice lean strongly towards maintaining compatibility with the Convention rights as interpreted by Strasbourg. This is arguably a more 'pro-compatibility' approach than in the UK.

If there were a *conflict* between the Basic Law and a Convention right as interpreted by the ECtHR, then the German courts would follow the Basic Law given that this is a higher law within its domestic legal system. In some cases, the application of the Convention has led to tensions with the interpretation and application of the Basic Law by domestic courts, including the Federal Constitutional Court. Until now, such conflicts have been rare and have been resolved amicably.

[12] Section 359 No 6 of the German Code of Criminal Procedure, applicable to criminal law cases, reads: "The reopening of proceedings concluded by a final judgment shall be admissible for the convicted person's benefit […] 6. if the European Court of Human Rights has held that there has been a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms or of its Protocols and the judgment was based on that violation.", Original translation by Brian Duffett and Monika Ebinger, updated by Kathleen Müller-Rostin and Iyamide Mahdi, translation completely revised and regularly updated by Ute Reusch, availabe at https://www.gesetze-im-internet.de/englisch_stpo/index.html.
Similarly, Section 580 No. 8 of the Code of Civil Procedure reads: "An action for retrial of the case may be brought: 8. Where the European Court of Human Rights has established that the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols have been violated, and where the judgment is based on this violation.", Translation provided by Samson-Übersetzungen GmbH, Dr. Carmen von Schöning, available at https://www.gesetze-im-internet.de/englisch_zpo/index.html. In other areas of law, the relevant legislation usually refers to Section 580 No. 8 of the Code of Civil Procedure.