DEVELOPMENTS

Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights

By Matthias Hartwig[*]

A. Introduction

On October 14, 2004 the *Bundesverfassungsgericht* (BVerfG – German Federal Constitutional Court)[1] delivered a judgment which gave rise to vivid reactions in the mass media[2] and to a dispute between the European Court of Human Rights (ECtHR) and the German Federal Constitutional Court. In interviews, members of the Strasbourg court spoke about their disappointment in the German Court's unwillingness to implement decisions of the ECtHR[3] while members of the German court referred to the necessity to respect national particularities.[4] Whereas, normally, the ECtHR

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[1] Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin).

[2] *See*, *e.g.*, articles in the FRANKFURTER ALLGEMEINE ZEITUNG, October 23, 2004, at 1; SÜDDEUTSCHE ZEITUNG, October 20, 2004, at 4; NEUE ZÜRICHER ZEITUNG, October 20, 2004, at 3; BERLINER ZEITUNG, October 20, 2004, at 2; DIE WELT, October 20, 2004, at 5.

[3] *See*, *e.g.*, *Interview with President (ECtHR) Luzius Wildhaber*, DER SPIEGEL (November 15, 2004), at 52 (President Wildhaber expressed concerns about the decision of the Federal Constitutional Court, remarking that it might set a bad example for other Member States). *See also* the comments of the Deputy Secretary General of the Council of Europe, underlining the binding force of the decisions of the ECtHR, see press release of the Council of Europe of October 21, 2004 – http://press.coe.int/cp/2004/516a(2004).htm, where she is quoted: "As Deputy Secretary General of the Council of Europe, I wish unequivocally to reaffirm that this discussion in no way puts into question the binding nature of the European Human Rights Court's judgments under Article 46 of the Convention and the obligation of States Parties to abide by such judgments." *See also* SÜDDEUTSCHE ZEITUNG, October 23, 2004, at 4.

[4] *See Interview with President (BVerfG) Hans-Jürgen Papier*, FRANKFURTER ALLGEMEINE ZEITUNG, December 9, 2004, at 5; *Interview with Judge (ECtHR) Renate Jaeger*, DIE TAGESZEITUNG (TAZ), October, 28, 2004, at 10 (defending the position of the Federal Constitutional Court in stating that the ECtHR shall be very prudent in intervening in matters not concerning the relationship between the State and an individual, but between individuals, as is the case in conflicts concerning the parental custody) (Judge Jaeger's

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and the constitutional courts of the Member States of the Council of Europe are fighting side by side for human rights and, therefore, consider themselves as natural allies, this time their decisions, which seem to be incompatible, led to a dispute which attracted as much public interest as a film or theatre premiere.

B. The Background of the Decision

In 1999, a woman gave birth to a child. The child's mother and father put an end to their relationship several months before that date. The mother gave the child up for adoption. The child lived with foster parents from four days after its birth. These persons were willing to adopt the child. The father learned of his child's birth and release for adoption only in October 1999. He tried to adopt the child but met difficulties as his paternity was not recognized.[5] He obtained parental custody by order of the Wittenberg Local Court in 2001.[6] The foster parents and the Wittenberg Youth Welfare Office, serving as the child's official guardian, lodged an appeal upon which the Naumburg Higher Regional Court dismissed the father's application for transfer of custody and excluded rights of access between the father and the child until 2002 on the ground of the best interest of the child.[7] The Federal Constitutional Court found the father's 2001 constitutional complaint inadmissible.[8] Further attempts by the father to obtain custody and rights of access – among them an application for a temporary injunction before the Naumburg Higher Regional Court - did not succeed.[9] The foster parents applied for the adoption of the child, and the father's objections were overcome by the substituting the father's consent

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comments were particularily delicate as she was, at that time, still a Justice at the Federal Constituional Court, but had been elected to the ECtHR).

[5] *See* Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin).

[6] Decision of Wittenberg Local Court, (March 9, 2001) (cited in Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin)).

[7] Decision of Naumburg Higher Regional Court, (June 20, 2001) (cited in Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin)).

[8] Decision of the Federal Constitutional Court, 1 BvR 1174/01 of July 31, 2001 (cited in Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin)).

[9] Decision of the Naumburg Higher Regional Court, (September 30, 2003) (cited in Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin)).

by the Local Court.[10] The father's application for adoption proceedings were suspended by the Dessau Regional Court until the final decision in the access and custody proceedings pending before the Naumburg Higher Regional Court.[11] The Naumburg Higher Regional Court reversed the decision of the Dessau Regional Court, but refused to suspend the adoption proceedings until the ECtHR issued a judgment in the case; however, it suspended the appeal proceedings in the adoption case until the final decision in the new custody proceedings.[12]

The father lodged an individual application in 2001 with the ECtHR; he especially complained that a forced adoption against the will of the father was a violation of the protection of family rights secured by the European Convention on Human Rights (ECHR). The ECtHR found a violation of art. 8 ECHR from the German courts' rejection of the father's claim for parental custody without adequately investigating whether it really would be unacceptable for the child to be separated from the family in which it lived.[13] The ECtHR also declared that denying the father access to his child constituted a violation of art. 8 ECHR, and the Court ordered that the father be granted access to the child.[14]

At the same time, parallel proceedings were conducted before the Wittenberg Local Court which led to the transfer of parental custody to the father.[15] Additionally, it issued a temporary injunction on its own motion granting the right to have access

[10] Decision of the Wittenberg Local Cout, (December 28, 2001) (cited in Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin)).

[11] Decision of the Dessau Regional Court, (October 30, 2002) (cited in Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin)).

[12] Decision of the Naumburg Higher Regional Court, (July 24, 2003) (cited in Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin)).

[13] Görgülü v. Germany, Eur. Ct. H. R. (February 26, 2004), *at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=2250242&skin=hudoc-en.

[14] *Id*.

[15] Decision of the Wittenberg Local Court, (March 19, 2004) (cited in Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin)). As for the possibility of initiating new proceedings concerning parental custody even after a final decisions, see below.

to the child for two hours a week.[16] The Wittenberg Local Court ordered that its injunction should remain in force until final proceedings in the custody issue.[17]

This injunction, in turn, was subject to an appeal by the official guardian and the child's guardian. The Naumburg Higher Regional Court declared that the lower court order requiring that the father be given access was not possible on the court's own motion, i.e. without an application by the father.[18] The Naumburg Higher Regional Court found that the lower court could have granted access to the child only if it had been in the child's best interest, which the Naumburg Higher Regional Court held was not the case.[19] The father's interests could not justify such a decision.[20] Furthermore, the Naumburg Higher Regional Court held that there was no need for a temporary injunction, as the proceedings had been underway for almost two years and thus the urgency required for such an injunction was lacking.[21] The Naumburg Higher Regional Court also found that the decision of the ECtHR did not establish the urgency necessary for such injunctive measures.[22] The Naumburg Higher Regional Court reasoned that the decision of the ECtHR finding that the Federal Republic of Germany was under the obligation to grant the father access to the child is binding the Federal Republic as subject of international law, but not "its bodies, authorities and the bodies responsible for the administration of justice, which are independent under Article 97.1 of the Basic Law." [23] Thus, the Naumburg Higher Regional Court concluded that the decision of the ECtHR could not authorize a German court (in this instance the Wittenberg Local Court) to avoid the legal force of a final decision by a superior domestic court.[24] The Naumburg Higher Regional Court explained that, the European Convention on Human Rights being ordinary law, its principal organ, the ECtHR does not have a higher rank than domestic judicial organs.[25]

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[16] *Id*.

[17] *Id*.

[18] *See* Higher Regional Court of Naumburg, EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT (EuGRZ), (June 30, 2004), p. 749, 750.

[19] *Id*. at 750

[20] *Id*. at 751

[21] *Id*. at 751

[22] *Id*. at 751

[23] *Id*. at 751

[24] *Id*. at 751

[25] *Id*. at 751

The father lodged a constitutional complaint with the Federal Constitutional Court against the decision of the Naumburg Higher Regional Court, which vacated the lower court's injunction granting him access to his child. The father especially claimed a violation of art.6 of the *Grundgesetz* (GG – Basic Law), which protects marriages and family life.[26] The Federal Constitutional Court credited the father's complaint, quashed the decision of the Naumburg Higher Regional Court, and referred the case back to the Naumburg Higher Regional Court.[27]

The following analysis will deal with the Federal Constitutional Court's fundamental statements on the relationship between the domestic legal order and the international obligations deriving from the ECHR. In a second part, this analysis will consider the character and the extent of the binding force of the judgments of the ECHR and their impact on the domestic decisions in a given case. Finally, this analysis will explain how the Federal Constitutional Court's decision developed new jurisprudential mechanisms to provide for the enforcement and respect of the ECHR by national courts.

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[26] Article 6 of the Basic Law reads:

> **Article 6 [Marriage and the family; children born outside of marriage]**
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> (1) Marriage and the family shall enjoy the special protection of the state.
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> (2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.
>
> (3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.
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[27] Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin)).

C. Analysis of the decision

I. Sovereignty vs. International Obligations

1. Conflict of Norms

The Federal Constitutional Court took a very fundamental approach in order to decide the question at stake. It did not limit itself to dealing with technical problems of procedural character, but instead made some principal remarks on the relationship between international law, especially as laid down in the ECHR, and state sovereignty.

The Federal Constitutional Court underscored that the ECHR - a treaty of international law – leaves it up to its member States how to guarantee respect for the obligations established by the treaty.[28] The Court explained that the convention was introduced into the German legal order by an ordinary law and thus has the status of an ordinary law.[29] The Court found that the Federal Republic of Germany, as such, is bound by the terms of the convention under international law; it also concluded that all German authorities and courts are obliged to observe and to apply the convention.[30] With this statement the Federal Constitutional Court rejected all proposals seeking to minimize the effects of the Convention, for example by declaring that it binds only the State internationally and not its organs internally. This was precisely the view taken by the Higher Regional Court of Naumburg.[31] However, the Federal Constitutional Court found that the convention does not enjoy the rank of constitutional law within the German system and therefore does not prevail over other ordinary statutes.[32] For this reason, the Federal Constitutional Court

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[28] Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, paragraph 31, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin).

[29] *Id.* This reflects the undisputed qualification of the ECHR in internal law. *See* Hans-Joachim Cremer, *Zur Bindungswirkung von EGMR-Urteilen /Anmerkung zum* Görgülü-Beschluß *des BVerfGE vom 14. 10. 2004*, EUROPÄISCHE GRUNDRECHT ZEITSCHRIFT (EuGRZ) 686 (2004). *See also* Christian Walter, *Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß*, ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT (ZaöRV) (1999) (analyzing the possibilities for attaching a constitutional rank to the European Convention on Human Rights).

[30] Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, paragraph 46, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin).

[31] Higher Regional Court of Naumburg, EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT, (June 30, 2004), p. 751.

[32] Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, paragraph 31, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin).

held that violations of the convention cannot serve as the basis for an individual constitutional complaint before the FCC.[33]

In its decision, the Federal Constitutional Court reiterated the openness of the Basic Law towards international law, on the one hand, while holding that the Basic Law is linked to the dualistic concept of international law and thus of distinct legal supremacy within Germany, on the other hand. In this dualist perspective international law and municipal law form a relationship of two different legal spheres, and it is municipal law that defines the position of international law within the domestic field.[34] This means that the validity of international law within the internal legal order is susceptible to a constitutional reservation. In its decision, the Federal Constitutional Court for the first time clearly committed Germany to the dualist theory.[35] This seems astonishing because, during more than fifty years of constitutional jurisprudence, there was no necessity to make such an unequivocal declaration on this point. The theoretical explanations are not a *l'art pour l'art*, but they entail practical consequences. The Federal Constitutional Court interpreted the openness of the Basic Law to international law in the sense that this openness does not mean that the Federal Republic waives its sovereignty. And sovereignty is traditionally understood as the exercise of supreme power.[36] This predetermines the solution of a conflict between international law and domestic law of a higher rank, which forms the basic principles of the legal order. The Federal Constitutional Court went so far as to state that the legislature may deviate from the requirements of international law, if it is the only way to avoid a violation of fundamental principles of the constitution.[37] Germany does not submit itself to non-German sovereign acts which are beyond constitutional control and, with reference to art. 23 para. 1 of the Basic

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[33] Firm case-law of the Federal Constitutional Court. *See* BVerfGE 34, 384 (395); BVerfGE 41, 126 (141); BVerGE 64, 135 (157). There has been a long discussion regarding how the Federal Constitutional Court can enforce the respect of the ECHR. *See* F. Hoffmeister, *Die Europäische Menschrechtskonvention als Grundrechtsverfassung und ihre Bedeutung für Deutschland*, DER STAAT 365 (2001); J. Abr. Frowein, *Das Bundesverfassungsgericht und die Europäische Menschenrechtskonvention*, *in* 2 FESTSCHRIFT FÜR WOLFGANG ZEIDLER 1770 (W. Fürst *et al*. eds., 1987).

[34] As for dualist and monist theories, *see* Karl Josef Partsch, *International Law and Municipal Law*, *in* II ENCYCLPEDIA OF PUBLIC INTERNATIONAL LAW 1183, 1184 (R. Bernhardt ed. 1995).

[35] INGO PERNICE, BVERFG, EGMR UND DIE RECHTSGEMEINSCHAFT, EUROIPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 705 (2004); Cremer, *supra* note 29 at 687.

[36] As for sovereignty as an international law concept, *see* Helmut Steinberger, *Sovereignty*, *in* IV ENCYCLPEDIA OF PUBLIC INTERNATIONAL LAW 500 (R. Bernhardt ed. 2000).

[37] Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, paragraph 35, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin).

Law, the Federal Constitutional Court emphasized that this is also true for the supranational law of the European Community.[38]

2. The Distribution of Competences Between the ECtHR and the National Judiciary

The Court's definition of the relationship between the national and the international legal order was supplemented by a delimitation of the competences between the ECtHR and the domestic judiciary. While recognizing the competence of the Strasbourg Court in general, the Federal Constitutional Court attributed the competence to integrate the Strasbourg Court's judgments into the national legal order to the domestic judiciary.[39] But this integration is not a mechanical transformation. On the one hand, the domestic courts have to judge whether the provisions of the ECHR in the interpretation of the ECtHR are in line with higher norms, especially norms of a constitutional character. On the other hand, theFederal Constitutional Court declared that the international judgment requires a special adaptation if the matter at stake concerns a conflict between individuals.[40] The ECtHR normally has to decide on bipolar relations between an individual and a Member State; therefore, it does not have to weigh individual interests because its jurisdiction focuses on evaluating whether the Member State has violated the ECHR. However, a case may concern conflicting individual interests which are balanced by specific national legal sub-systems as shaped by detailed case-law. The Federal Constitutional Court gave, as examples of such a circumstance, family law, the law on aliens, and the law concerning the protection of the personality.[41] The Federal Constitutional Court conveyed the task of adapting a decision of the ECtHR into such a system to the national judiciary, because it is closer to the specific problems and more familiar with weighing conflicting individual rights.[42] This means that the decisions of the ECtHR will not be implemented summarily in the national legal order. It will be up to the national courts to decide the extent to which the judgments of the ECtHR will have effect. The Federal Constitutional Court seemed to assume that such a necessity of adaptation will be an exception, and therefore, the qualification of the legal effects of the European Court's judgments will not be too important. However, situations where individual interests and rights are conflicting are much more fre-

[38] *Id*. at para. 36.

[39] *Id*. at paras. 52 and 58.

[40] *Id*. at para. 62.

[41] *Id*. at para. 58.

[42] *Id*.

quent than the Federal Constitutional Court admits in the examples it offers. One should bear in mind, for example, the relationship between owners and tenant s[43] or even cases of freedom of religion, in which the conflict between positive and negative freedoms implies conflicting fundamental rights. If one starts to single out such fields of possible conflicts between fundamental rights, one will see that there will be no end. And if, in all these fields, the national courts will have to decide how to integrate the decision of the ECtHR, the effects of the European Court's decisions will lose much of their domestic impact.[44]

Besides this critique, the reasoning of the Federal Constitutional Court does not pay sufficient attention to the fact that the ECtHR itself very often has to decide on cases in which conflicting individual interest are involved;[45] one could mention the ECtHR's decisions on anonymous birth and the right to information about one's identity,[46] or concerning the freedom of speech and the protection of privacy.[47] This conflict between individual interests in fundamental rights litigation is not unique to national legal orders. Even in the case at hand, the ECtHR was not only focusing on the father's rights, but questioned if these rights might be restricted with view to the child's best interests.[48]

3. Evaluation of the Fundamental Statements by the FCC

One may be puzzled in a way when reading the fundamental statements of the Federal Constitutional Court because the statements were not necessary in order to guide the further resolution of the case. And it was exactly these parts of the Federal Constitutional Court's decision that provoked an outcry and led to the criticism that Germany will set a bad example by referring to its sovereignty in this excessive

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[43] *See*, e.g., BVerfGE 89, 1.

[44] As it will be shown below, the question concerning the impact of the decisions of the ECtHR does not depend on the matter of the judgment, but on the procedural situation.

[45] *See*, *e.g.*, BVerfGE 93, 1 (22).

[46] Odi èvre v. France, Eur. Ct. H. R. (February 13, 2003), *at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Odi%E8vre%20%7C%20France&sessionid=2250292&skin=hudoc-en.

[47] von Hannover v. Germany, Eur. Ct. H. R. (June 24, 2004), *at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=speech%20%7C%20privacy&sessionid=2250292&skin=hudoc-en.

[48] Görgülü v. Germany, Eur. Ct. H. R. (February 26, 2004), para. 45, *at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=2250242&skin=hudoc-en.

way.[49] This criticism expressed concern that Germany might be suggesting that under given conditions sovereignty might justify a violation of international obligations. However, it is telling that the Federal Constitutional Court made these pronouncements at a moment when the State is increasingly undertaking international obligations which influence more and more the internal legal order. In this context, the Federal Constitutional Court's decision can be read as a warning: as long as there is such a norm as the German constitution, it will be used in the last instance as a criterium of guidance and of control for any act issued or executed by German organs, even when implementing international norms.[50] The Federal Constitutional Court, appointed as the guardian of the constitution, definitively is not the organ most appropriate to favour a development which, in the long run, would somehow make it a guardian of the back door which nobody uses anymore. In this respect, the Federal Constitutional Court will defend its monopoly in the "check-in procedure." One observes its resistance in a similar constellation when the question regarding the extent to which European Community law would prevail over national law.[51]

During the last fifty years the relationship between the ECtHR and the German Constitutional Court had been running very smoothly; there had been no "clash of judicial civilizations."[52] It was generally recognized that both courts were pursuing the same goal, i.e. the protection of fundamental rights.[53] And in a way they established a good cooperation, as the German Federal Constitutional Court had to screen all cases before they were lodged with the ECtHR and offer remedies that had to be exhausted before the cases were admissible in Strasbourg.[54] This work was done quite efficiently; many conflicts could be settled in Karlsruhe as part of this exhaustion requirement, and if the parties nevertheless continued the dispute

[49] *Interview with President (ECtHR) Luzius Wildhaber*, DER SPIEGEL (November 15, 2004), at 52; Cremer, *supra* note 29 at 684.

[50] It is in this line that the Federal Constitutional Court recently issued a temporary injunction to stop an extradition proceeding based on a European arrest warrant that had been issued by Spain. The Court explained that a German organ must have the possibility to check if the request of extradition is justified. Decision of the Federal Constitutional Court, 2 BvR 2236/04 of November 24, 2004, *at* http://www.bverfg.de/entscheidungen/rs20041124_2bvr223604.html.

[51] *See* BVerfGE 37, 271; BVerfGE 73, 339; BVerfGE 88, 155.

[52] This expression is borrowed from SAMUEL P. HUNTINGTON , THE CLASH OF CIVILIZATIONS (1993).

[53] *See* Jutta Limbach, *Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur*, ** EUROPÄISCHE GRUNDRECHT ZEITSCHRIFT (EuGRZ) 417 (2000).

[54] The individual constitutional complainant before the Federal Constitutional Court is qualified as a remedy in the sense of art. 35 ECHR. *See* §§ 90 *Bundesverfassungsgerichtsgesetz* (BVerfGG – Federal Constitutional Court Act).

on to Strasbourg, Germany was very rarely deemed to have violated the convention by the ECtHR.[55]

But the given case, like the *Caroline case* of 2004,[56] shows that the relationship between the ECtHR and the Federal Constitutional Court is not necessarily permanently harmonious. The real question, however, is whether, in cases of conflicting jurisprudence, the respective courts should make such fundamental statements that might jeopardize future cooperation and shed doubts on the role of the ECtHR in other legal systems.

The given case could have been resolved with the same outcome without the controversial fundamental statements. With the reference to the procedural law the Constitutional Court could and must have reached the same result without overshadowing some revolutionary steps, which also might be found in the decision.

II. The Solution of the Case Based on the Procedure

1. The Binding Force of Judgements of the ECtHR and Their Implementation

a) The Binding Force of the Judgments of the ECtHR and its Limits

In a first step, the effects of the decisions of the ECtHR will be analyzed. Second, the national approaches to implementing these decisions will be investigated. Finally the procedural situation in the given case will be explained, in order to understand the relationship between the domestic proceedings and the judgment of the ECtHR.

There is no doubt, neither in the doctrine nor in the case-law, that the decisions of the ECtHR have binding effect. This follows from art. 46 ECHR: "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties." This is an obligation accepted by the Member States under inter-

[55] Through 2002, covering almost 50 years, there have been only 57 cases against Germany before the ECtHR. Germany was found to be in violation of the ECHR in 31 cases. *See* OLAF KIESCHKE, DIE PRAXIS DES EUROPÄISCHEN GERICHTSHOFS FÜR MENSCHENRECHTE UND IHRE AUSWIRKUNGEN AUF DAS DEUTSCHE STRAFVERFAHRENSRECHT 246 (2003).

[56] The case concerned the obligation of the State to protect the privacy and freedom of information. *See* von Hannover v. Germany, Eur. Ct. H. R. (June 24, 2004), *at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=speech%20%7C%20privacy&sessionid=2250292&skin=hudoc-en.

national law. The Federal Constitutional Court, in its decision, was far from questioning this obligation.[57]

The extent of this obligation depends on the range of a decision. It is not put into doubt that decisions of the ECtHR have material legal force (materielle Rechtskraft); i.e. the legal statements are binding for the parties involved in the proceedings. However, the material legal force is limited *ratione personae*, *ratione materiae* and *ratione temporis*.[58] "The binding effect of final judgments is limited to the High Contracting Parties which are, at the same time parties to the case decided by the court." [59] Other Member States are not bound by the decision. Further on, the binding effect of the final judgment is limited by the *matter* and does not extend to another *matter*. The notion of the *matter* has always been under discussion. However it is clear that the *matter* is not identical if, for example, a person whose first request has been rejected lodges a new request to the same end at a later moment, when the time lapse has an impact on the matter.[60] With respect to the *time*, the legal force of the final decision is limited to the *time* before this judgment; it does not extend to events which take place after the judgment.

b) The Implementation of the Binding Judgments of the ECtHR

aa) The obligation of the State Organs to Implement the Judgments of the ECtHR

The question remains, how the States will fulfill their obligation as established by the European Court's decision. The ECtHR has neither the competence to declare a national norm null and void nor to quash a decision not in line with the European Convention. The European Court is limited to the statement that a national act is a violation of the European Convention; its judgments have only declaratory effect.[61] It is up to the national organs of the member States to draw the necessary conclu-

[57] Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, para. 38, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin).

[58] Eckart Klein, *Should the Binding Effect of the Judgment of the European Court of Human Rights be Extended*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 706 (Paul Mahoney et al. 2000).

[59] *Id*.

[60] *See* Peter Gottwald, *in* ZIVILPROZESSRECHT 953 (Rosenberg/Schwab/Gottwald eds. 1993).

[61] Decision of October 14, 2004 para. 40; JÖRG POLAKIEWICZ, DIE VERPFLICHTUNGEN DER STAATEN AUS DEN URTEILEN DES EUROPÄISCHEN GERICHTSHOFS FÜR MENSCHENRECHTE 217 (1993); Helmut Steinberger, HUMAN RIGHTS LAW JOURNAL 402, 407 (1985); *Art. 53*, EUROPÄISCHE MENSCHENRECHTSKONVENTION 725 (Frowein/Peukert, 2nd ed., 1985).

sions from such a decision. They must not contest a violation of the Convention which has been declared by the ECtHR; and they must terminate an ongoing violation.[62] In this sense the legislature has to amend a law which has been declared incompatible with the ECHR; the administration has to revoke an act which, according to the European Court, violates the Convention in order to terminate a situation not in line with the ECHR.[63]

bb) The Obligation of the Domestic Judiciary to Implement the Judgments of the ECtHR

The most critical point in this context is the treatment of national court decisions, which, according to a judgment of the European Court, do not meet the requirements of the European Convention. The situation can be redressed only by the national judiciary because, due to the separation of powers, only courts can review court decisions. Within the national legal system courts are authorized to review a decision only if and as far as they are empowered to do so by the legislation on procedure and jurisdiction. In this sense, the procedural legislation provides for the procedures of appeal in order to have a decision reviewed by a higher instance. Final decisions, and this follows from the notion itself, are not subject to a remedy, with very few exceptions, in which the proceedings can be reopened. The principle of legal certainty as part of the rule of law[64] requires that, after a certain point, a judicial decision cannot be questioned anymore. The national decisions which are brought before the ECtHR are, as a rule, final in this sense. This is due to the fact that an individual application in Strasbourg is admissible only if all domestic remedies are exhausted;[65] and this means a national decision has to be final before reaching the ECtHR. If the European Court holds that such a decision violates the European Convention two principles are in conflict: on the one hand, the Member State, through its organs (here through its judiciary), has to repair the violation; on the other hand, the judiciary has to respect the principal of certainty, i.e. it cannot set aside the finality of a decision in order to remedy the violation. There must be an authorization for such review by the procedural system.

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[62] Cremer, *supra* note 29 at 690.

[63] This has also been pointed out by the Federal Constitutional Court. *See* Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, para. 51, *at* http://www.bverfg.de/ entscheidungen/rs20041014_2bvr148104e.html (English translatioin).

[64] R. Herzog, *Art. 20*, *in* GRUNDGESETZKOMMENTAR (Maunz/Dürig eds.).

[65] Art. 35 ECHR.

As far as is known, there is only one case of a constitutional court requiring national courts to reopen criminal proceedings which had been declared incompatible with the European Convention on Human Rights, even in the absence of a provision for reopening the proceedings in the criminal procedural code. The Spanish Tribunal Constitucional declared in the *Barbera case* that national criminal courts have to take up a case if the European Court comes to the conclusion that the national decision is not in line with the ECHR.[66] Here, the Spanish Constitutional Court held that an obligation to reopen the proceedings cannot be derived from the ECHR; the Spanish ordinary courts would be correct if they refuse to apply the national provision of the criminal procedural code on reopening proceedings in the case that the ECtHR declared a national decision incompatible with the ECHR. However, the Spanish Constitutional Court recalled that, according to art. 10 para. 2 of the Spanish constitution the fundamental rights of the Spanish constitution must be interpreted in conformity with the human rights of international instruments ratified by Spain.[67] The Spanish Constitutional Court conceded that the interpretation of such human rights is determined by international courts such as the ECtHR.[68] From this perspective, a violation of art. 6 ECHR also constitutes a violation of the respective provision of the Spanish constitution, here art. 24 para. 4. The execution of a decision of a criminal court (imprisonment) in breach of art. 6 ECHR constitutes a violation of the guarantee of freedom as laid down in the Spanish constitution. Therefore, the Spanish Tribunal Constitucional quashed the decisions of the ordinary courts and sent the case back for a new trial. Formally spoken, the decision was taken within an "amparo" – procedure, and the Spanish Constitutional Court opened the way for new proceedings by stating the ongoing unconstitutionality of the decision to be reviewed, which it quashed. This cannot be qualified as a reopening of the case in the sense of the Criminal Procedural Code; but d*e facto* it is nothing but that.

However, the reasoning of the Spanish Constitutional Court has not been copied by other constitutional courts. If there is no procedural provision permitting it, a proceeding cannot be reopened. Recently, in February 2004, the French Conseil d'Etat decided in an administrative case that the declaration of a violation of the European Convention does not automatically authorize the administrative courts to review administrative proceedings;[69] and it expressly pointed out the difference with the

[66] Decision of the Spanish Constitutional Court, Case Nr. 245/91, BOLETIN DE JURISPRUDENCIA CONSTITUCIONAL, (December 16, 1991), p. 86.

[67] *Id*. at 93.

[68] *Id*.

[69] Decsions of the *Conseil d'Etat*, Case Nr. 257682, ACTUALITÉS JURIDIQUE DU DROIT ADMINISTRATIVE, (February 11, 2004), p. 439.

situation in French criminal procedural law, which provides the possibility to reopen a proceeding. It follows from this decision that the French Conseil d'Etat requires an authorization by the national legislature, otherwise the national courts cannot remedy a violation of the European Convention. The Court of Appeal of the United Kingdom declared: "...even if the failure to reopen the appellant's convictions might give rise to violation of Article 46, domestic law precludes reliance on any such violation in the circumstances of this case."[70]

More and more legal orders have introduced special provisions which allow the review of such cases, recognizing that otherwise the national courts will not be able to respond to and remove the violation of the ECHR identified by the ECtHR.[71] Most of these provisions exclusively refer to criminal proceedings. Only a few national legal orders allow for the possibility to reopen cases of civil or administrative law.[72] In this respect, the German parliament amended the criminal procedural code (only in 1998 - almost half a century after the ratification of the European Convention by Germany) by inserting § 359 no. 6 of the Strafprozessordnung (StPO – criminal procedure code).[73] According to this provision an ordinary court has to review a criminal decision if the ECtHR stated a violation of the ECHR and the decision is based on this violation. This means that not all criminal cases, which might be based on a violation of the ECHR can be reviewed; for example, in case of a violation of the convention by a provision of the criminal code not all decisions based on this provision can be reviewed, but only the case which has been brought before the European Court, although all other cases in which the provision in question has been applied are also affected.[74] And secondly, not all violations of the

[70] Court of Appeal, (September 19, 2000) (cited in Lyons vs. United Kingdom, Eur. Ct. H. R. (July 8, 2003), p. 4).

[71] §§ 33 and 363 a Criminal Procedural Code of Austria; France, § 359 sec. 6 of the German Criminal Procedural Code, Art. 525 sec. 5 of the Greek criminal procedural code; Art. 413 sec. 4 No. 2 of the Russian Criminal Precedural Code; art. 540 sec. 3 of the Polish Criminal Constitutional Code; art. 626-1 to 626-7 of the French Criminal Procedural Code; as for the application of the reopening procedure, Régis de Gouttes, La procedure de réexamen des decisions pénales après un arrêt de condamnation de la cour européenne des droits de l'homme, in: Libertés, justice, tolerance, Mélanges en homage au Doyen Gérard Cohen-Jonathan, p. 563 ss.; art. 443 of the Criminal Procedural Code of Luxemburg; Section 6 of the European Convention Act of August 19, 1987; § 391 No. 2 of the Criminal Procedural Code of Norway and § 407 para. 1 No. 7 of the Civil Procedural Code of Norway; § 406 of the Criminal Procedural Code of Hungary

[72] § 407 para. 1 No. 7 of the Civil Procedural Code of Norway; Section 6 of the European Convention Act 1987 (Act. No. XIV) of Malta which refers to all cases in which a decision of the ECtHR declared that a national decision is violating the ECHR.

[73] 1998 (BGBl. I S. 1802).

[74] One may observe an interesting difference with the respective situation in constitutional law. *See* § 79 para. 1 BVerfGG (allowing the reopening of all criminal matters in which a person has been convicted on

ECHR will permit the reopening of the proceedings, but only those which influenced the result of the decision. If, even in the field of criminal law, not all violations of the ECHR can be repaired within the terms of German criminal procedure code, it is clear that in other fields – administrative law or in civil law – a reopening of the proceedings will be excluded as long as the legislature does not provide it.

The tension between the requirements which follow from the European Convention on Human Rights, i.e. the necessity to remedy the violation, and the principle of legal certainty, as laid down in the national legal orders which prohibits the review of final decisions is not solved; and if there is no construction of the constitution, as it is the case of Spain,[75] which may overcome the gap between the contradicting requirements, there is no way out that can be developed by the judiciary. It is quite remarkable that the ECtHR has tolerated this situation; as far as it is known, it never criticized the fact that the domestic legal orders do not provide for remedies which bring their judicial decision-making in line with the requirements of the ECtHR;[76] on the contrary the ECtHR stated: "The Court notes that the Convention does not give it jurisdiction to direct the French State to open a new trial." [77] Later it added that the Convention neither requires that a decision incompatible with the Convention must be quashed. And the ECtHR continues: "It follows that it cannot find a State to be in breach of the Convention on account of its failure to take either of these courses of action when faced with the execution of one of its judgments." [78]

The Committee of Ministers of the Council of Europe issued a Recommendation on January 19, 2000, in which it recognized that there might be exceptional circumstances in which "the re-examination of a case or a reopening of proceedings has

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the basis of a law later declared unconstitutional by the Federal Constitutional Court; thus, the possibility of reopening one's case is not limited to the persons who lodged an individual constitutional complaint before the Federal Constitutional Court).

[75] But it is really remarkable that the Spanish parliament did not implement the decisions of the Spanish Constitutional Court by introducing a legally based procedure for the review of cases declared incompatible with the European Convention on Human Rights. In Spain the possibility of review is exclusively based on the case-law of the Constitutional Court.

[76] Domestic courts concluded from these circumstances, that no obligation to this end can be derived from the ECHR: "In any event, we doubt whether Article 46 requires the re-opening of convictions." Lyons vs. United Kingdom, Eur. Ct. H. R., (July 8, 2003), p. 4.

[77] Saidi v. France, 261-C Eur. Ct. H. R. (ser. A) at para 46; ECtHR Lyons v. United Kingdom, Eur. Ct. H. R. , (July 8, 2003); Pelladoah v. the Netherlands, Eur. Ct. H. R., (September 20, 1994), para. 44. In the same sense, see the European Commission on Human Rights DR 83-A, 48 (55), (Kremzow case).

[78] Lyons vs. United Kingdom, Eur. Ct. H. R., (July 8, 2003), p. 10.

proved the most efficient, if not the only, means of achieving *restitutio in integrum*. The Committee therefore "(e)ncourage(d) the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of these case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:

> (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and
>
> (ii) the judgment of the Court leads to the conclusion that
> (a) the impugned domestic decision is on the merits contrary to the Convention, or
> (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of." [79]

The Committee of Ministers was well aware of the problem that, sometimes, the reopening procedure is the only solution to redress a violation of the ECHR and it suggested that the Member States should introduce procedures which would allow for such a reopening. However, it is just a Recommendation and not a binding act, therefore by now a direct obligation of the Member States to open the possibility for a reopening procedure has not yet been established by the organs of the ECHR.

This opinion is shared by the doctrine.[80] It means that the European Convention has to put up with the internal legal orders of the member States. However, if the procedure of reopening is considered to be the only way to overcome final decisions of

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[79] Recommendation No. R (2000) 2, https://wcd.coe.int/ViewDoc.jsp?id=334147&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

[80] Jens Meyer-Ladewig/Hans Petzold, *Die Bindung deutscher Gerichte an Urteile des EGMR*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 18 (2005); Cremer, *supra* note 29 at 691; Frowein, ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT (ZaöRV) 286 (1986) (suggesting a political change; but he does not think that *de lege lata* an obligation to introduce a procedure to reopen a case can be derived from the ECHR).

national courts, and there are good grounds for such an assumption,[81] and if the introduction of such a remedy is not mandatory under the European Convention, the continuation of the legal force of a national decision declared incompatible with the ECHR is accepted. But this also means that the violation of the ECHR will be eternalized. It has been argued that art. 41 ECHR, which provides compensation in cases when the national legal order allows only a partial reparation, is intended to overcome the tension between the continuity of the domestic decision and the ongoing violation. Instead of a *restitutio in integrum* the person, violated in his rights gets a compensation.[82] However, the ECtHR correctly points out, that a sum paid by way of just satisfaction will not always fulfill the requirements of a *restitutio in integrum*.[83]

If it is accepted that the reparation of a violation by a domestic court decision can be done only within the frame of the national legal order,[84] it is clear that this does not refer only to the possibility of reopening proceedings after a final decision has been taken, but it has to be respected also in situations when a national court can deal with a case again, but only under certain conditions or to a certain extent. It will depend on the national order to decide to what extent a decision of the ECtHR can be taken into consideration by the national courts. And if there is no room to enforce the decision of the ECtHR, the domestic *courts* cannot be blamed for it.

Another question is whether it is really wise to exclude any obligation to introduce legal remedies into the national legal order, which will enable the courts to enforce the decisions of the ECtHR. In many decisions, the ECtHR required a Member State to amend its legislation in order to bring it in line with the ECHR; therefore, it would not be a too heavy infringement on the domestic legislature's competences if the ECtHR could oblige the Member States also with respect to the enforcement of ECtHR's decisions.

In case of a possible reopening of a proceeding, or a re-examination of the case, the national courts are of course obliged to respect the decision of the ECtHR. They must not repeat the violation which has been criticized by the ECtHR. Insofar as

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[81] The Committee of Ministers says that the reopening of the proceedings will be the only possibility to redress the effects of a violation only in exceptional circumstances. *See* Recommendation of January 19, 2000. This discounts the possibility that a violation of the ECHR by a domestic court decision is ongoing.

[82] The argumentation can be found in the decision of the Federal Constitutional Court in the *Pakelli* case, NJW 1986, 1425; see Christian Walter, *Nationale Durchsetzung*, *in* KONKORDANZKOMMENTAR para. 50 (Grote/Marauhn eds., forthcoming).

[83] Lyons vs. United Kingdom, Eur. Ct. H. R., (July 8, 2003), p. 11.

[84] This has been again confirmed. *See* Lyons vs. United Kingdom, Eur. Ct. H. R., (July 8, 2003), p. 10.

they are bound, the decision of the European Court enjoys material legal force (*materielle Rechtskraft*). However, this does not mean that the national court in the end has to come to another result than in the former decision. One has to keep in mind the limitations of the material legal force. If, for example, a certain provision, having been applied by the national courts in a first trial has been declared incompatible with the ECHR, it is not excluded that a conviction can be based on another provision. In a reopened proceeding the national court might also have to take into consideration a change of factual circumstances in the meantime, which are relevant to a conviction. In this sense, in France in all cases in which the French courts reopened a crimininal proceeding after a decision of the European Court the result of the decision remained unchanged.[85] This is not a violation of the European Convention, but attributable to the fact that reopened proceedings are not necessarily limited to the grounds which required the reopening.

2. The Procedural Situation under German Law in the Given Case

If the consequences of the decision of the ECtHR can be enforced only within the domestic legal order, it must be examined to what extent the provisions of civil procedure give the possibility to implement such decisions.

As I explained above, in German law a reopening procedure is provided only by the criminal procedural law, not by the civil procedural law. Therefore, a violation of the ECHR, which has been stated by the ECtHR, cannot be corrected in such a collateral procedure. The decisions of the Naumburg Higher Regional Court regarding the right to access and parental custody, which the ECtHR found t be a violation of the ECHR, were final.[86] How could the German courts again deal with these problems?

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[85] Régis de Gouttes, *La procédure de réexamen des décisions pénales apr`s un arret de condamnation de la Cour européene des droits de l'homme*, *in* I LIBERTES, JUSTICE, TOLERANCE, MELANGES EN HOMAGE AU DOYEN GERARD 568 (Cohen-Jonathan ed. 2004). Since 2001 when the criminal procedural code was amended, 20 requests for collateral proceedings were lodged and 11 were declared admissible. In no case was the result of the final decision more favourable than the decision declared incompatible with the ECHR by the ECtHR.

[86] There is a certain discussion in the doctrine of civil procedural law concerned with whether decisions in this field can ever be final in a material sense, because, as will be shown later, they can be reversed at any time if the child's best interest so requires. *See* Uwe Diederichsen, *§ 1696 para. 1*, *in* BÜRGERLICHES GESETZBUCH (Palandt ed.); Decision of the Federal Court of Justice, NEUE JURISTISCHES WOCHENSCHRIFT RECHTSPRECHUNG REPORT (NJW-RR), (1986), 1130. However, these decisions are final in a formal sense, *i.e.* they are not subject to an ordinary remedy.

a) The Right to Access

With respect to the father's right to access, it should be noted that the national decision, which had been impugned in Strasbourg, excluded the access only temporarily, that is, until June 30, 2002. To the degree that the German courts dealt with the question of access after this date, it was a new proceeding and not related to the former. The matter was not identical to the matter at stake in the proceeding that was subject to review before the ECtHR. Therefore, the material legal force (*materielle Rechtskraft*) of the European Court's decision did not extend to this decision. Furthermore, such an extension is also excluded due to the limitation of the material legal force *ratione temporis*. The ECtHR could only decide if the exclusion of access in 2001 was incompatible with the ECHR. Now, it had to be decided if such access could be granted in 2004; only the lapse of time could constitute an essential change of the situation justifying the new decision because there might be a difference if access is granted from an early age of the child or if the child must get used to such contacts later. The ECtHR itself stated in its judgment that it is more and more difficult to establish contacts between the child and the father or the mother if the time period grows during which no contacts exist.[87]

However, when deciding the new request concerning the access to the child, the German courts also had to apply the ECHR, here art. 8, and, of course, they had to take into consideration the interpretation of this article, as given by the ECtHR, also in the decision of February 26, 2004. But it is important to state that this could not be the only aspect to be considered.

b) Prerequisites for a Review on a Decision According to § 1696 Civil Code

With respect to the parental custody, § 1696 of the German Civil Code permits a change to a decision on parental custody at any moment if a court considers it to be appropriate in the child's interest. Therefore, the father could initiate such a proceeding for a change in custody. However, the only criteria which allows the change is the "best interest of the child," not the interest of the father or of the mother.[88] Under these circumstances it seems difficult to insert the decision and standards of the ECtHR into the process provided by the German rules of civil procedure. For, even if the ECtHR expressly stated that it does not violate the child's

[87] Görgülü v. Germany, Eur. Ct. H. R. (February 26, 2004), para. 46, *at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=2250242&skin=hudoc-en.

[88] Diederichsen, *supra* note 86. This is the case because the possibility of changing a decision on parental custody is disruptive of legal certainty, and only overwhelming interests can justify such a measure. Therefore, the parent's interest cannot overcome the binding force of a decision on custody.

best interests if the father gets parental custody,[89] it did not come to the conclusion that the child's best interests require such a change in the custody; the child's best interests were only subject of the procedure before the ECtHR insofar as they could have excluded the father's custody. However, the requirements of the child's best interest is a prerequisite for the application of § 1696 of the German Civil Code. If these conditions are not met, a change of parental custody is not admissible.

Even if one leaves aside the question whether the father's interests could have given ground in order to take up proceedings pursuant to § 1696 of the German Civil Code, by setting aside a final decision, it has to be underlined that the ECtHR's decision could not predetermine the outcome of such proceedings. For, even if the father's interests had to be taken into account, to the degree that the father's interests were given material force by the decision of the ECtHR, they still would have to be weighed against the child's best interests.

The European Court's decision focuses on the father's rights; it does not deal with the same matter as a proceeding under § 1696 of the German Civil Code, which exclusively is aiming at the child's best interests; *ratione materiae*, the European Court's decision is not directly binding on the German civil court. *Ratione temporis* the decision is linked to the situation when the impugned decision was handed down, whereas the proceeding under § 1696 of the German Civil Code has to take into consideration further developments.

The limited effect the Federal Constitutional Court gives to the binding force of the decisions of the ECtHR is not a sign of disrespect for international jurisprudence, but is a consequence of the specific procedural situation out of which the case arose. The binding effect of a ruling of the ECtHR ends where a new matter is at stake. It would be no different if the decision had not been taken by the ECtHR but by the Federal Constitutional Court. The judgments of the Federal Constitutional Court also are limited by the extent of the binding force. A new decision of an ordinary court would be predetermined by the Constitutional Court's decision only insofar as the matter is the same, which is not the case if the finding of a decision depends on new developments or the passage of time [90].

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[89] Görgülü v. Germany, Eur. Ct. H. R. (February 26, 2004), paras. 44 to 46, *at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=2250242&skin=hudoc-en.

[90] *See*, *e.g.*, Decision of the Federal Constitutional Court, 1 BvR 2790/04 of December 28, 2004, para. 33, *at* http://www.bverfg.de/entscheidungen/rk20041228_1bvr279004.html (the Court expressly pointed out that, if access to the child has been granted to the father by an ordinary court and the Federal Constitutional Count later comes to the conclusion that this decision violated the rights of the child at the time when the decision was taken, the ordinary court would not be bound by its previous decision if it has to decide again on whether a continuation of contact with the father is in the best interest of the child).

c) The Interpretation of the Domestic Provisions in the Light of the ECHR

However, the Federal Constitutional Court gave a new turn to the interpretation of domestic provisions when declaring that the family courts must carefully consider whether the child's best interest is to be in the father's custody, especially in light of the ECtHR's decision that the denial of custody violates the father's rights.[91] This is an interesting interpretation because the content of the child's best interest has not depended on an interpretation of the father's rights. However, one must see in this approach the attempt to harmonize the requirements of civil law concerned with the respect owed to the child's best interest and the requirements of the ECHR concerned with the respect owed to the father's rights. Even if there is no collateral procedure, the national courts must take into consideration the decisions of the ECtHR as far as possible; and if a question on which the ECtHR rendered a judgment, can be dealt with in a new proceeding, the ECtHR's decision must be involved in the decision making process. Whenever a domestic court touches upon questions related to guarantees of the ECHR it has to try to interpret the national rule in conformity with the ECHR, and if it cannot reach such as result, it has at least to give good grounds for the departure. But even this approach means an adaptation of the domestic law to the ECHR, not an enforcement of a decision of the ECtHR one by one.

D. The Revolutionary Step: The Federal Constitutional Court as Guardian of the Due Respect of ECtHR's Decisions

I. The Guarantees of the ECHR Under the Perspective of the Fundamental Rights of the Basic Law

The Federal Constitutional Court could have stopped at that point where it held the ordinary courts obliged to take into consideration the ECtHR's decisions. However, it went a step further, and here the real revolution began. The Federal Constitutional Court went on to declare that it has a special responsibility in the enforcement of international law in the internal legal order.[92] Whereas, as a rule the construction and application of ordinary law falls within the competence of the ordinary courts, the constitutional court claims a somehow extended competence as far

[91] Decision of the Federal Constitutional Court, 2 BvR 1481/04 of October 14, 2004, para. 66, *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html (English translatioin).

[92] *Id*. at para. 61.

as the interpretation of international treaties are concerned. The Federal Constitutional Court thus asserted its jurisdiction even though these treaties enjoy only the rank of ordinary law. The reason the Federal Constitutional Court gave for this exceptional jurisdiction is that disrespect of international law may entail consequences on an international level.[93] The Federal Constitutional Court assumed a particular role with respect to the European Convention on Human Rights "which contributes to promoting a common European evolution of human rights."[94] In its catalogue of fundamental rights, the Basic Law protects rights which form the very core of the international human rights. This guarantee and the acceptance of treaty obligations according to art. 59 para. 2 of the Basic Law obliges the German organs to refer to the European Convention on Human Rights when interpreting the German fundamental rights. Pursuant to this reasoning the "German" fundamental rights are supplemented by the human rights of the European Convention; they get an international touch. At the same time the European human rights become "constitutionalized," i.e. by being taken into consideration in the interpretation of fundamental rights, they will be raised to the rank constitutional protections subject to the Federal Constitutional Court's distinct jurisdiction. For, if the fundamental rights must be seen in the light of the European rights, the domestic rights somehow integrate the European rights.

The obligation of consideration is not limited to European Court decisions closely related to the matter to be decided by the national court, but to the European Convention on Human Rights *in toto*. The Federal Constitutional Court went beyond the very problem at stake in the given case, which concerns exclusively the question to what extent the national courts are bound by a European Court's decision. But, as it has been shown, the implementation of the binding force of European Court decisions with respect to national judicial decisions does not derive from a specific effect attached to the decisions by the European Convention, it cannot quash national decisions,[95] nor *via* specific provisions in the national legal orders, after all, the provisions on reopening cases, although increasing in number, still are the exception. The binding force of European Court decisions is based on the binding force of the European Convention on Human Rights in general. Therefore, it is logical that the Federal Constitutional Court broadened the perspective towards the European convention instead of focusing exclusively on the binding force of the European Court's decisions. The obligation of the national courts to take into con-

[93] *Id*.

[94] *Id*. at para. 62.

[95] In the actual interpretation, art. 46 ECHR attaches binding force to the decisions of the ECtHR only in general terms, without giving a solution to the problem of how final domestic decisions can be reviewed.

sideration the European Court's decision is implied in their obligation to respect the ECHR. For, what these human rights mean is determined by the European Court's jurisprudence. This approach, of course, entails respect not only of European Court decisions closely related to the case decided by the national court, for example, concerning the same matter, but all decisions have to be taken into consideration. There is no special binding force of privileged decisions. The only difference might be of a factual nature; the closer the facts on which the ECtHR had to decide are to the facts on which the domestic court must decide the easier it might be if there is a deviation.

The decisions of the ECtHR will be taken into consideration only within the frame of the national procedural law; i.e. the respective obligation does not entail the obligation to overcome the legal force of binding national decisions, as far as no procedure of reopening or other form to take up the matter is provided. Likewise, the Federal Constitutional Court declared that it will not be a violation of the obligation to take into consideration a decision of the ECtHR if, in new proceedings before national courts, new facts lead to a decision the outcome of which will not be the same as the result of the ECtHR's decision. This should go without saying, because, if there are new facts, the matters of the decisions are not identical, and therefore the results of the decision could differ. The Federal Constitutional Court further did not require the "application" of a European Court decision if it violated higher ranking law. This statement could give rise to some astonishment. For it seems to insinuate that a European Court decision could be contrary to the guarantees of the Basic Law. This will not fit to the former declaration that the guarantees of the Basic Law protect the core of international fundamental rights, i.e. also the fundamental rights as laid down in the European Convention. However, it means nothing else but the very simple truth that a judicial decision can be handed down within the procedural context which is constituted also by the Basic Law. As far as there is no collateral procedure expressly dedicated to the enforcement of European Court's decision, but only other procedures which give leeway for the consideration of the European Court decisions, it is inavoidable that these court decisions will not gain decisive power within the procedure, if the legal order and especially the Basic law requires the weighing of other aspects.

But as far as such proceedings are possible, the national courts have to take into consideration the European Convention on Human Rights in the construction by the European Court. Even if they come to the conclusion that a relevant provision of the ECHR cannot prevail in a case, the court has to give grounds; otherwise it would violate the constitutional obligation to pay due respect to the ECHR.

II. The Control of the Due Respect of the ECHR by the Federal Constitutional Court

As any other constitutional obligation the respect of this obligation is subject to control by the Federal Constitutional Court. If a domestic court does not take into consideration a relevant provision of the ECHR, it violates the respective fundamental right of the Basic Law. This can be impugned by an individual constitutional complaint. In this way, an individual gets a remedy by which he or she can demand respect of the European Convention on Human Rights, especially in the interpretation by the ECtHR. This is a very unique approach to the enforcement of the European Convention on Human Rights, because it links a sort of constitutionalization of the guarantees of the ECHR with the very far-reaching remedy of the individual constitutional complaint.[96] In a way, the protection goes even farther than in Austria where the ECHR enjoys constitutional rank.[97] In Austria, however, an individual cannot lodge a constitutional complaint against court decisions; therefore if a national court does not take into consideration the decision of the ECtHR, it is impossible in Austria to have such a decision reviewed by the constitutional court.[98]

E. Conclusion

If one does not want to praise the decision of the Federal Constitutional Court, one should not bury its real meaning,[99] which will have a bearing on the future relationship between the constitutional court and the European Court, more in a sense of cooperation in the implementation of the decisions of the ECtHR, than in conflicting competition of the two jurisdiction. If such statement required proof, one could read the interim injunction which the Federal Constitutional Court handed down in continuation of the matter on December 28, 2004,[100] in which the Court

[96] One can compare this approach to a certain extent with the approach of the Spanish Constitutional Court. *See* Decision of the Spanish Constitutional Court, Case Nr. 245/91, BOLETIN DE JURISPRUDENCIA CONSTITUCIONAL, (December 16, 1991).

[97] *See* Verfassungsnovelle Bundesgesetzblatt 1964/59. Pursuant to this act, the ECHR has the rank of constitutional law. *See also* Manfred Nowak, *Allgemeine Bemerkungen zur Europäischen Menschenrechtskonvention aus völkerrechtlicher und innerstaatlicher Sicht*, *in* DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION IN DER RECHTSPRECHUNG DER ÖSTERREICHISCHEN HÖCHSTGERICHTE 49 (Ermacora/Nowak/Tretter eds., 1983); Jochen Frowein, *Einleitung*, *in* EUROPÄISCHE MENSCHENRECHTSKONVENTION 4 (Frowein/Peukert eds., 1985).

[98] As explained above, Austria only provides a collateral procedure in criminal matters.

[99] WILLIAM SHAKESPEARE, JULIUS CESAR, Act III Scene 2.

[100] Decision of the Federal Constitutional Court, 1 BvR 2790/04 of December 28, 2004, *at* http://www.bverfg.de/entscheidungen/rk20041228_1bvr279004.html.

deviated from long-standing case law according to which the Court decides on a request of an interim injunction only by weighing the consequences of granting the award and rejecting it, without taking into consideration, if the complaint (or request) in the main proceedings will succeed.[101] In the given case the Federal Constitutional Court granted the interim injunction after stating that the impugned decision of the Regional Court of Appeal constituted a significant violation of German law. The Federal Constitutional Court added that the decision of the ECtHR in the precedent case was of decisive importance for granting the request for an injunction. This statement was somehow astonishing, because, in the criticized decision of October 14, 2004, it held that a decision of the ECtHR is only one point to be considered, when deciding questions concerning the interests of the child. From a legal viewpoint, it might be difficult to see, how this change of the jurisprudence can be justified. But exactly these difficulties show that the Federal Constitutional Court is willing to help the ECtHR with implementing its decisions.

The practical consequences of the decision of October 14, 2004, will prevail over the ideological suprastructure which proved to be useless and not helpful in the given case. One can rely on the citizens who are always eager to claim their rights; they will take advantage of the possibility of bringing before the Federal Constitutional Court cases in which they feel their fundamental rights have been violated because the ordinary courts did not pay sufficient attention to the ECHR, especially as interpreted by the ECtHR. The Federal Constitutional Court blocked itself from rejecting such individual complaints. It will now lend its arm to the ECtHR to implement the decisions of the European Court, as far as it is possible. So, the decision should be read as a milestone on the long way to the "enforcement" of ECtHR's decisions in the domestic legal order.

The tension between the binding force of judgments of the ECtHR and the finality of domestic decisions will not be settled once and forever. In the end, a solution can be found only if the ECHR is amended – or interpreted - in the sense that the Member States are obliged to introduce a collateral procedure for all cases in which the ECtHR finds a violation of the ECHR by a domestic court decision.

[101] Jörg, Berkemann, *§ 32 para. 173*, *in* BUNDESVERFASSUNGSGERICHTSGESETZ (Umbach/Clemens eds.). *See* BVerfGE 6, 1 (4); BVerfGE 27, 179 (182); BVerfGE 80, 360 (364); BVerfGE 82, 54 (57).