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The External Effects of National ECHR Judgments

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THE EXTERNAL EFFECTS OF NATIONAL ECHR JUDGMENTS

By Mads Andenas* and Eirik Bjorge⁺

Abstract

In their jurisprudence on the rights flowing from the European Convention on Human Rights (ECHR), national courts in Europe define their relationship with the Convention system and its authoritative arbiter, the European Court of Human Rights at Strasbourg. This is, however, more than a bilateral relationship. Increasingly national courts in Europe, in their ECHR jurisprudence, consider the external effects of their judgments, as their judgments may be used by national courts from other jurisdictions. A supreme or constitutional court cannot claim that their national system represent such high standards of democracy and rule of law that it need not abide by a ruling by the European Court, considering that this argument may be followed in jurisdictions of lower standards and threaten the convention system. Courts increasingly take into account what could be called a Kantian element: the extent to which their ruling may be universalized, and applied by other courts in *their* relation to the ECHR. The article argues that this universalist approach is correct in normative terms, and that national courts ought to go even further in taking this Kantian element onboard in their ECHR jurisprudence.

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“Das eigentlich Neue, dessen Joseph auf Reisen gewahr wurde, was wohl gar dies, daß er und seine Art nicht allein auf der Welt, nicht ganz unvergleichlich waren.”

Thomas Mann, *Joseph und Seine Brüder*

1. Introduction

The implementation of the rights enumerated in the European Convention on Human Rights and developed in the judgments of the European Court of Human Rights has become a party of daily life for national supreme and constitutional courts. Joseph Weiler has referred to the ECHR as an example of “constitutionalism [which] extends beyond the unitary state”, “where the I becomes collective”:

At the transnational level one sees a perfect manifestation of this in the regime of the ECHR (European Convention on Human Rights)—which simultaneously celebrates a form of pluralism through the doctrine of the margin of appreciation and insists on hierarchy in stipulating a binding minimal norm.¹

It has in this regard become trite to point out that their effectiveness depends on national implementation. The focus of research into these matters is usually on the relationship between one national jurisdiction and the judgments of the European Court. Sometimes the perspective compares the relation of different national systems to the European Court.² It may, however, be that these types of perspectives are too narrow if the aim is to understand the European system of human rights protection. In this article, we therefore turn to how the national implementation of the ECHR in one jurisdiction may affect the relationship of other jurisdictions to the European Court; we look at the “external effects” of national implementation. By

¹ J.H.H. Weiler, *Prologue: Global and Pluralist Constitutionalism—Some Doubts*, in THE WORLDS OF EUROPEAN CONSTITUTIONALISM 17 (Gráinne de Búrca & J.H.H. Weiler eds., 2012).

² See, for example, ALEC STONE SWEET & HELEN KELLER, A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (2008); Mads Andenas & Eirik Bjorge, *Juge national et interprétation évolutive de la Convention européenne des droits de l’homme* [2011] REVUE DU DROIT PUBLIC 997; *Giudici nazionali e interpretazione evolutiva della Convenzione europea dei diritti umani: La prospettiva inglese, francese e tedesca*, 4 DIRITTI UMANI E DIRITTO INTERNAZIONALE 471 (2010); Eirik Bjorge, *National Supreme Courts and the Development of ECHR Rights* 9 INT’L J. CON. L. 5 (2011).

external effects we mean the possible effects—in cases where the judgment from the one system is used as inspiration, or as an excuse, in another system—which a judgment given in one national system may have in other systems.³ Our focus is the effect of non-compliance by national authorities with the ECHR.⁴ The examples which we use stem from the Czech Republic, Germany, Norway, Russia, and the United Kingdom. The optics through which we analyze this material takes its inspiration from Kant’s categorical imperative and the concept of universalizability. In this paper we want to test a proposition which has received some support in the jurisprudence of national courts. Is this, then, a normative or a descriptive undertaking? Pierre Bourdieu has argued how it is nearly impossible neatly to divide the normative and the descriptive.⁵ This paper is based on a normative proposition to which we give flesh by analyzing descriptive materials, mainly cases from national courts. Our aim is not to give a final answer to the questions to which universalizability give rise; the aim is rather, in this exploratory essay, to pursue these issues and point to new possible avenues of research.

This type of perspective goes against the grain of the by now large literature that defends different types of pluralism or dialogic exchanges between the two levels of national courts and supranational courts. In this regard we agree with Georg Letsas who, making the case against pluralism, in the context of EU law argues that “pluralism” and “dialogue” should not be allowed to replace the objective principles of political morality.⁶

³ This is therefore different from issues related to extraterritoriality, on which see KJETIL MUJEZINOVIC LARSEN, *THE HUMAN RIGHTS TREATY OBLIGATIONS OF PEACEKEEPERS* (2012) and Mads Andenas & Eirik Borge, *Human Rights and Acts by Troops Abroad: Rights and Jurisdictional Restrictions* 18 *EUR. P. L.* 473 (2012).

⁴ There is a rich literature on reciprocal borrowing in developing legal principles and more specific legal rules, both in national, European and international courts, see, for example, M CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* (1989); BA MARKESINIS, *RECHTSVERGLEICHUNG IN THEORIE UND PRAXIS* (2004); Mads Andenas & Duncan Fairgrieve ‘Intent on Making Mischief: Seven Ways of Using Comparative Law’, in *Methods of Comparative Law* (Pier Giuseppe Monateri ed, 2012). This borrowing is not our primary concern here.

⁵ Pierre Bourdieu, *Décrire et prescrire* 38 *ACTES DE LA RECHERCHE EN SCIENCES SOCIALES* 69 (1981).

⁶ Georg Letsas, *The Case Against Pluralism*, in *PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW* 105 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

This leads us to universality and universalizability. The notion of universality, as opposed to local exceptionalism,⁷ has been conceptualized in Kantian terms. Jürgen Habermas has argued for a “cosmopolitan juridical condition” in what he calls the contemporary, revised Kantian sense; he defends the extension of “collective political identities beyond the borders of nation-states.”⁸ Habermas’s development of Kant’s cosmopolitan law and *Weltbürgerrecht* moves freely over the boundaries of constitutional law or international law that divide rights and individuals, and explain the universality of rights. Rights are held not only by citizens against their own state, but against other states, and horizontally, between citizens. Within the framework of international law and a wider institutional pluralism the further development in the form of formation of identity and political, beyond national boundaries, will take place.

We then return to our topic of external effects of the application of rights in one national system: the possible effects of decisions in one system on the decisions in another. The compliance of one state with the international human rights of its citizens can affect the compliance of other states with rights of their citizens. As mentioned, the judgment from the one system may be used as inspiration, or as an excuse, in another system. A cosmopolitan solidarity that takes account of external effects is a natural extension in a Kantian-Habermasian system.

But in legal systems that still build on traditional categorizations, courts struggle to take account of the external effects of their judgments when they only formally affect their own jurisdiction.⁹

Armin von Bogdandy brings into focus not only the universality of judicial solutions but also their *universalizability*.¹⁰ He, in his criticism of the

⁷ See generally MADS ANDENAS, *Tradizioni giuridiche locali come ostacoli a una Costituzione per l'Europa*, in PRIMIZIE E MEMORIE D'EUROPA 137–70 (Paolo Prodi ed., 2005).

⁸ Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights* 41 METAPHILOSOPHY 475 (2010).

⁹ See Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 258 (Jeffrey L. Dunhoff & Joel P. Trachtmann eds., 2009).

¹⁰ Armin von Bogdandy, *Prinzipien der Rechtsfortbildung im europäischen Rechtsraum: Überlegungen zum Lissabon-Urteil des BVerfGE*, 63 NEUE JURISTISCHE WOCHENZEITUNG 1

Lissabon-Urteil of the Bundesverfassungsgericht,¹¹ makes the point that the formation of European law is not only the task of politics but equally that of lawyers, who in their work not only have recourse to law but develop it. It is, on this view, imperative not to lose sight of one's role and responsibility in a wider European context: "Ein herausragendes Kriterium bei der Entwicklung und Prüfung jeder Rechtserzeugung, gerade auch einer gerichtlichen Rechtsfortbildung, ist deren Verallgemeinerungsfähigkeit. Es findet moraltheoretisch seine paradigmatische Ausformulierung in Kants kategorischem Imperativ."¹²

This is where von Bogdandy points to Kant's categorical imperative: "act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction."¹³ On this view the national judge deciding in a case touching on European law must not lose sight of their decision's *Verallgemeinerungsfähigkeit*—its universalizability. This means that for example German judges, when adjudicating in cases bearing on European human rights law, must see themselves in relation to others, and bear in mind the extent to which the maxim on which they base their ruling may be universalized and used by other courts. Von Bogdandy's interest in this regard is EU law; we apply the same optics on ECHR law.

Christopher McCrudden has taken this idea of duties beyond borders further and looked at the external effects of constitutional debates. To him

(2010). See also, for a similar use of this Kantian perspective, Gráinne de Búrca, *The ECJ and the International Legal Order: A Re-Evaluation*, in THE WORLDS OF EUROPEAN CONSTITUTIONALISM 105 (Gráinne de Búrca & J.H.H. Weiler eds., 2012); Miguel Póiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism* 1 EUROPEAN JOURNAL OF LEGAL STUDIES 11 (2007): "EU Treaties frequently appeal to broad universal principles. This is so because the member states trusted on the universalisability potential of such principles both as mechanisms of self-discipline imposed on themselves and as instruments for the development of a legal order that would be, at once, dynamic and principled based. Both the nature of the project of European integration (increased integration) and the incomplete character of its political and legal instruments required the formulation of universal principles."

¹¹ BverfG, NJW 2009, 2267—*Lissabon*.

¹² See von Bogdandy, *supra* note 10, at 1–2. Translation: "An excellent criterion for the development and examination of legal developments, not least judicial developments, is the universalizability of the legal development. This finds in moral theory its paradigmatic expression in Kant's categorical imperative." See on these issues with respect to distributive justice, Andreas Føllesdal, *Global Distributive Justice? State Boundaries as a Normative Problem* 1 GLOBAL CONSTITUTIONALISM 261 (2012).

¹³ IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 30 (1785) (trans. by J.W. Ellington).

“the sight of the House of Commons defying the Court has potentially damaging effects on the authority and legitimacy of the Court and the Convention in other states.” He points out that “it is one thing for the robust UK debate to be picked up in other stable constitutional democracies with good human rights records [and] another thing entirely where the British debate is transmitted to barely democratic European states with a debatable human rights record, and a weak commitment to constitutionalism.”¹⁴

This perspective is a pendant to the literature on constitutional pluralism. As Gráinne de Búrca and Joseph Weiler have stated: “[t]he language of constitutional pluralism is increasingly being used both to describe the existence of and the relationship between the many different kinds of normative authority—functional, regional, territorial and global—in the transnational context.”¹⁵ Alec Stone Sweet has focused on how Europe possesses an overarching constitutional structure, comprised of fundamental rights and the shared authority of judges to adjudicate individual claims, where, on his view, no single organ possesses the “final word” when it comes to a conflict between conflicting interpretations of rights; instead, the system develops through inter-court dialogue, both cooperative and competitive.¹⁶

The much-debated *Lissabon-Urteil* of the Bundesverfassungsgericht was read in this light and with great interest in courts all over Europe. There is little doubt that arguments by Germany—intermittently the proverbial engine of Europe and of Europeanization—in favor of splendid isolation would be in some demand by those in other European jurisdictions wishing to close the national political and legal systems. Thus the relationship between Russian law and the European Convention has raised questions similar to those

¹⁴ CHRISTOPHER MCCRUDDEN, “Duties beyond borders: the external effects of our constitutional debates,” (*UK Constitutional Law Group Blog*, May 30, 2011) <<http://ukconstitutionallaw.org/blog/>> accessed June 2, 2011.

¹⁵ Gráinne de Búrca & J.H.H. Weiler, *Introduction*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM* 3 (Gráinne de Búrca & J.H.H. Weiler eds., 2012).

¹⁶ Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 *GLOBAL CONSTITUTIONALISM* 53 (2012)
Armin von Bogdandy, *Prinzipien der Rechtsfortbildung im europäischen Rechtsraum: Überlegungen zum Lissabon-Urteil des BVerfGE*, 63 *NEUE JURISTISCHE WOCHENZEITUNG* 1 (2010)

addressed by the Bundesverfassungsgericht.¹⁷ In the slipstream of the *Lissabon-Urteil*, the President of the Russian Constitutional Court, Valery Zorkin, in public speeches criticized several of the judgments against Russia by the European Court.¹⁸ He singled out the complaint made by the Russian opposition about the course of the parliamentary elections held in 2003 (criticised by OSCE observers) and the European Court's decision in favor of the Russian military who were striving for three years' paid child care leave for single parents (in Russia women only are granted this right). The European Court had been subject to political and press criticism, and the President may also be seen as warning the European Court about consequences of further adverse findings against Russia in the case about Mikhail Khodorkovsky's detention and despoilment, *Yukos v. Russia*,¹⁹ and the on-going case about the Katyn massacre, *Wolk-Jeziarska v. Russia*.²⁰

The Czech Constitutional Court throws light on another aspect of the issues raised by a Kantian perspective. In a comparative law survey looking at German law, the Czech court did not follow the German approach, but rather criticized it from an integration perspective. Challenges to the parliamentary ratification of the EU Treaty of Lisbon made the Czech Republic one of the final Member States to ratify this Treaty. The Czech Constitutional Court refused to establish the clear limitations on transfers of powers that the German court had done.²¹ Under the poignant heading: 'Limiting the Possibility of Unconstitutional Abuse of the Proceeding pursuant to Article 87(2) of the Constitution and Permissibility of Supplementing the Petition' the Constitutional Court robustly rejected the attempt of the President and Senators to use the constitutional review procedure to delay ratification. Under the equally poignant heading, 'Democracy in the European Union', the Court expressly addressed the German *Lissabon-Urteil*.²² It is mistaken, held

¹⁷ See Mads Andenas & Malgosia Fitzmaurice, *The Federal Russian Law on Foreign Treaties*, in CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE (Rein Mullersohn, Mads Andenas, and Malgosia Fitzmaurice eds., 1998) 259–65.

¹⁸ Notably in a widely reported intervention in St. Petersburg, November 18, 2010, at The International Forum of Constitutional Justice.

¹⁹ *OAO Neftyanaya Kompaniya Yukos v. Russia* Judgment September 20, 2011 (Appl.no. 14902/04).

²⁰ *Witomila Wolk-Jeziarska & Others v. Russia* (Appl.no. 29520/09).

²¹ Decision of November 3, 2009, [111]–[112].

²² *Id.*, sub section VC of the judgment, in particular at [280].

the Court, to claim that ‘representative democracy can exist only within states, within sovereign subjects’. To further refute the German court’s decision, the Czech court cited Advocate General Maduro of the European Court of Justice:

European democracy also involves a delicate balance between national and European dimensions of democracy, without one necessarily outweighing the other.²³

In the human rights field this balancing has its constitutional foundation in *jus cogens*, customary international law and UN and regional human rights treaty obligations.²⁴ Our starting point is this is not a horizontal dialogue: international law obligations require compliance, augmented by doctrines of primacy or supremacy and effectiveness.²⁵ But the tension with claims to national constitutional autonomy or supremacy is felt in all legal systems. An interesting display is found in the evidence by the President of the UK Supreme Court, Lord Phillips of Worth Matravers, and the Lord Chief Justice of England and Wales, Lord Judge, to the House of Lords and House of Commons Joint Committee on Human Rights at the end of 2011.²⁶ First Lord Phillips:

The question “Who is supreme?” is not a very easy question to answer, because it depends on what you mean by supreme. In as much as we are not obliged to follow, as a matter of law, the Strasbourg jurisprudence domestically, we are supreme as a Supreme Court. But if you ask, at the end of the day, what really matters, I would say it is what the Strasbourg court says about the meaning of the European Convention on Human Rights. I say “at the end of the day” because there is scope for dialogue between our court, or any other domestic court, and the Strasbourg court before the end of the day is reached.

²³ *Id.* at [138]. The court cites a longer passage from the Opinion of AG Maduro in C–411/06 [2009] ECR *Commission v. Parliament and Council* I–7585.

²⁴ See JAN KLABBERS, ANNE PETERS, AND GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009); JEFFREY L. DUNHOFF & JOEL P. TRACHTMANN, *RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* (2009).

²⁵ The European Court of Justice’s judgment in *CILFIT Srl and Others v Ministro della Sanità* [1982] ECR 3415, and the doctrine associated with it, on one level only expresses a general principle of international law, on another operationalize the procedural consequences in the EU system of its preliminary references from national courts to the ECJ. Hailed as part of a new legal order, see for instance, *Opinion 1/91, First EEA Case* [1991] ECR I–06079 and *Opinion 1/92, Second EEA Case* [1992] ECR I–2821, and adopted as part of EU lawyers’ orthodox view on EU law, it is not clear to us that this is anything but an application of general principles of public international law.

²⁶ November 15, 2011, HC 873–ii.

Lord Judge had another emphasis:

We have the European Court of Justice that we are bound by; whatever happens, you have told us we are stuck with it. We have the European Convention on Human Rights, which, if I am right, we take account of.

How best to make sense of these developments in the implementation of the ECHR in national law? The opening up of national and international legal systems is a complex process, where “dialogues” may turn from ways of taking due account of Strasbourg jurisprudence to strategies of national resistance against the implementation of international human rights standards.

We shall explore in this article one aspect of this process through our choice of Kant’s categorical imperative and the external effects of not complying as the starting point for an analysis of the reception, application and development of the European Human Rights Convention.

2. Universalizability in Practice

It is plain, as Alec Stone Sweet and Helen Keller have put it in a more general context, that sometimes it happens that national courts “decide to ignore the [European] Court’s interpretation of the Convention even when on point, and even where Convention rights have been domesticated through incorporation.”²⁷ One example of this was at play in the saga of the reception in German law of the European Court’s adverse ruling in *M. v. Germany*.²⁸

This necessitates a short excursus into the conceptual place of the Convention rights in German law. The leading constitutional case in this regard has been the 2004 *Görgülü* judgment.²⁹ The balance which *Görgülü* tries to strike is well summarized by the following dictum by Constitutional Court: “The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty encapsulated in the last instance in the German constitution.”³⁰ This was later cited with

²⁷ ALEC STONE SWEET & HELEN KELLER, *Introduction: The Reception of the ECHR in National Legal Order*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 14 (Alec Stone Sweet & Helen Keller eds., 2008).

²⁸ *M v. Germany* (Appl.no. 19359/04) judgment December 17, 2009.

²⁹ BVerfG 111, 307.

³⁰ BVerfG 111, 307 (319).

approval in the *Lissabon-Urteil* of 2009, where the passage was used to bring out that there would be instances in which the legislator, without breaching the principle of “openness of the Basic Law towards international law,” did not have to take into account international legal obligations, to the extent that they could fall foul of one of the fundamental rights provisions of the Basic Law.³¹

To sum up this is what *Görgülü* says about the relationship between German law and the Convention rights. The ECHR is incorporated in German law by way not of constitutional law but of statute, and this is to be taken seriously. If the European Court has held against Germany, finding a breach of the Convention rights, and the breach of the Convention is a continuing one, then the German courts must take into account the judgments (*berücksichtigen*). Taking into account, however, means only that comprehensive reasons must be given if the national courts find that they are unable to follow the Strasbourg decision at issue. If the European Court has held that a German statute is in breach of the Convention rights then this may either be interpreted in conformity with the apposite Convention right, or the legislator may change the legislation. The legislation at issue may be interpreted in conformity with Convention rights only to the extent that the interpretation follows the exigencies of rational statute interpretation (*im Rahmen methodisch vertretbarer Gesetzesauslegung*); the language may not be strained beyond comprehension.

We now return to the *M* case. The European Court in *M* held that the continued preventive detention beyond the ten-year period which had been the maximum for such detention under the legal provisions applicable at the time of the applicant’s offence and conviction was in breach of art 5(1) of the Convention, and that the retrospective extension of the preventive detention to an effectively unlimited period of time was in breach of art 7(1). The Court held that preventive detention as practiced in Germany was to be qualified as a ‘penalty’ and not merely a measure of correction and prevention. As the scheme had not been considered to be a penalty in German law, principles such as the prohibition of retroactive sentences and the *ne bis in idem* rule

³¹ *Lissabon-Urteil*, BVerfG 123, 267 (340).

were not considered by the German judges adjudicating in the case to apply. The German courts, in the application of s 2(6) of the German criminal code, explicitly allowed the retroactive application of a statute intensifying the ‘measures of correction and prevention’, including preventive detention. After this scheme was introduced in German law in 1998 the courts extended the confinement of inmates in preventive detention beyond the ten-year restriction, even if the inmates in issue had been put under the prevention detention scheme before the promulgation of the restriction in 1998.

In *Preventive Detention*,³² the Bundesverfassungsgericht ruled on the compatibility with the European Convention for the ECHR of the German legislation on preventive detention. The case concerned the constitutional complaints lodged by four detainees who challenged the retrospective prolongation of their preventive detention beyond the former ten-year maximum and the retrospective imposition of preventive detention under criminal law relating to adult and juvenile offenders. The Court reviewed the provisions of the Criminal Code (*Strafgesetzbuch*) and the Juvenile Court Act (*Jugendgerichtsgesetz*) on the imposition and duration of preventive detention and found them incompatible with the fundamental right to liberty under Article 2(2), sentence 2,³³ in conjunction with Article 104(1),³⁴ of the German Constitution (*Grundgesetz* or Basic Law). The Court ordered that the unconstitutional provisions shall continue to be applicable until the entry into force of new legislation.

As the statutory provisions at issue failed to satisfy the constitutional requirement of establishing a “distance” between preventive detention and prison sentences (*Abstandsgebot*), those provisions fell afoul of the

³² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 4, 2011, No. 2 BvR 2365/09 (Ger.) (“Preventive Detention”). The basic documents, press releases, and related materials for the judgments of the Constitutional Court cited herein are available on the Court’s Web site, <http://www.bundesverfassungsgericht.de>. Unless otherwise noted, translations from the German are by the authors.

³³ GRUNDGESETZ [GG] [Basic Law], May 23, 1949, BGBL. 1. GG Article 2(2) provides: “Everyone has the right to life and to physical integrity. The freedom of the person is inviolable. Intrusion on these rights may be made only pursuant to a statute.”

³⁴ GG Article 104(1) provides: “The liberty of the individual may be restricted only by virtue of a formal statute and only in compliance with the forms prescribed therein. Detained persons may not be subjected to mental or to physical ill treatment.”

fundamental right to liberty.³⁵ The Court also ruled that the legislation failed to comply with the constitutional protection of legitimate expectations guaranteed in a state governed by the rule of law, as read together with the constitutional right to liberty. According to the Court, the protection of legitimate expectations under Article 2(2), in conjunction with Article 20(3) of the Basic Law,³⁶ is an expression of the rule-of-law precept.

The *Preventive Detention* judgment, crucially, was the response of the Constitutional Court to a spate of adverse judgments against Germany by the European Court of Human Rights on the highly controversial issue of preventive detention, mainly of sexual offenders.³⁷ The European Court had held in the first of these cases, *M v. Germany*,³⁸ that continued preventive detention beyond ten years, which was the maximum under the applicable law at the time of the applicant's offense and conviction, was in breach of Article 5(1) of the European Convention, and that the retrospective extension of the preventive detention to an effectively unlimited period of time was in breach of Article 7(1). The European Court further found that preventive detention as practiced in Germany "is to be qualified as a 'penalty,'" and not merely a measure of correction and prevention. As the scheme had not been considered to be a penalty in German law, the German judges had not believed that such principles as the prohibition of retroactive sentences and the *ne bis in idem* rule were applicable.

When M—the claimant both in *M* in 2009 and in *Preventive Detention* in 2011—was sentenced in 1986, he could be kept in preventive detention for no more than ten years, in accordance with section 67d(1) of the Criminal Code. This rule was amended in 1998 and made applicable in its new form to the preventive detention orders that had been issued prior to the amendment's entry into force. Without that change in the law, the courts

³⁵ The Court first enunciated the requirement of *Abstandsgebot* in an earlier decision in this case. See *infra* note 22 and corresponding text.

³⁶ GG Article 20(3) provides: "The legislature is bound by the constitutional order; the executive and the judiciary are bound by law and justice."

³⁷ *Schummer v. Germany*, App. Nos. 27360/04, 42225/07 (Eur. Ct. H.R. Jan. 13, 2011); *Mauts v. Germany*, App. No. 20008/07 (Eur. Ct. H.R. Jan. 13, 2011); *Kallweit v. Germany*, App. No. 17792/07 (Eur. Ct. H.R. Jan. 13, 2011).

³⁸ *M v. Germany*, App. No. 19359/04 (Eur. Ct. H.R. Dec. 17, 2009).

responsible for the execution of sentences would not have had the authority to extend the duration of the claimant's preventive detention.

Initially, the German courts did not respond in unison to the adverse judgment in *M*. Some decisions held that the German courts are bound by German law and that the Convention is effectively the handmaiden of national law. Others held that the apposite German statutes were amenable to being interpreted in conformity with the European Court's ruling in *M*.³⁹

After the European Court's decision was handed down, M filed a constitutional complaint before the German Constitutional Court, arguing that he ought to be discharged from detention by way of a temporary injunction since the European Court had said his continued detention was in breach of his rights under the Convention. The Constitutional Court, in the face of the European Court's decision, by a temporary injunction of December 22, 2009, ordered that M remain in detention.⁴⁰

In the temporary injunction, the Constitutional Court tersely pointed out the dangers of holding an individual in detention who, it might later be shown, ought not to have been so held; the continued deprivation of his liberty, were it to be found unwarranted in a subsequent constitutional judgment, would be a grave injustice.⁴¹ In its conclusion, however, the Court determined that the detrimental effects of freeing an individual whom the German lower courts had demonstrated by plausible reasoning to be dangerous would outweigh the hazards of keeping the claimant in preventive detention.⁴²

The tenor of the Constitutional Court's decision seems to have served as an exemplar for the many cases like *M* that were working their way up the

³⁹ See Christoph Grabenwarter, *Wirkungen eines Urteils des Europäischen Gerichtshofs für Menschenrechte—am Beispiel des Falls M. gegen Deutschland*, 65 JURISTEN ZEITUNG 857 (2010); Anette Greger, *Herausforderung Sicherungsverwahrung—Wie die Praxis mit der Entscheidung des EGMR (M. gegen Deutschland) umgehen kann*, 2010 NEUE ZEITSCHRIFT FÜR STRAFRECHT 676; Grischa Merkel, *Incompatible Contrasts?—Preventive Detention in Germany and the European Convention on Human Rights*, 11 GERMAN L.J. 1046 (2010).

⁴⁰ BVerfG, Dec. 22, 2009, No. 2 BvR 2365/09.

⁴¹ *Id.*, para. 3.

⁴² *Id.*, para. 4.

German curial hierarchy.⁴³ This line of authority resulted in January 2011 in the adverse judgments by the European Court mentioned above: in *Schummer*, *Mautes*, and *Kallweit*, the Court could do little but reaffirm its decision in *M* and point out that German law was still in breach of ECHR Articles 5 and 7.⁴⁴ The German courts largely responded by digging in and refusing to give effect in national law to the European Court's holding in *M*.

Yet at the same time, some German courts had begun to shift, proving more receptive to accommodating the European Court's *M* decision.⁴⁵ The Federal Court of Justice (Bundesgerichtshof)—the highest German court in matters of criminal and civil law—ruled, for example, in a case also bearing on preventive detention,⁴⁶ that it was not bound by ECHR law to follow the holding in *M*. In addition, however, the Court of Justice held that its decision must pass a discretionary test balancing the interests of the convicted and the right of the public to protection. In this balancing exercise, the courts must give a central role to the constitutional principle of proportionality.⁴⁷ This balancing must furthermore be directed by the ECHR rights; in this way the constitutional principle of proportionality brings the exigencies of the ECHR rights to bear on the national law after all.⁴⁸ Though the solution espoused by the Court of Justice was in accordance with the Strasbourg jurisprudence, confusion still prevailed over how best to accommodate *M* in German law, so that the Constitutional Court could definitely no longer stay above the fray—hence the May 2011 decision in *Preventive Detention*.

As adumbrated above, the Constitutional Court held the statutes in issue to be unconstitutional. This result may come as a surprise, and in more than one respect. The main issue was that the preventive detention scheme was in breach of the German Basic Law—even though the Constitutional Court

⁴³ See, e.g., Oberlandesgericht [OLG] [higher regional court] Celle, May 25, 2010, No. 2 Ws 169–70/10; OLG Stuttgart, June 1, 2010, No. 1 Ws 57/10; OLG Koblenz, June 7, 2010, No. 1 Ws 108/10; OLG Nuremberg, June 24, 2010, No. 1 Ws 315/10; OLG Cologne, July 14, 2010, No. 2 Ws 428/10.

⁴⁴ *Schummer v. Germany*, App. Nos. 27360/04, 42225/07 (Eur. Ct. H.R. Jan. 13, 2011); *Mautes v. Germany*, App. No. 20008/07 (Eur. Ct. H.R. Jan. 13, 2011); *Kallweit v. Germany*, App. No. 17792/07 (Eur. Ct. H.R. Jan. 13, 2011).

⁴⁵ See Greger, *supra* note 12, at 676–77.

⁴⁶ Bundesgerichtshof [Federal Court of Justice] July 21, 2010, No. 5 StR 60/10.

⁴⁷ *Id.*, para. 17.

⁴⁸ *Id.*, para. 18.

in 2004 had held that the selfsame scheme was constitutional, and even though what was really in issue were the exigencies of the European Convention. What, then, had changed in seven years? The Constitutional Court explained in *Preventive Detention* that rulings by the European Court containing new considerations for the interpretation of the Basic Law are equivalent to legally relevant changes (*rechtserhebliche Änderungen*), which may lead to the supersession of the final and binding effect of a Federal Constitutional Court decision.⁴⁹ In a 2004 decision in *M*,⁵⁰ the Court had declared constitutional the elimination of the ten-year maximum period for preventive detention that had applied previously and the application of the new legislation to the so-called old cases. However, the Court had also ruled in that earlier decision that preventive detention did not fall afoul of any of the human rights guarantees in the Basic Law but, without going into detail, that there had to be some “distance” between preventive detention and prison sentences. The final and binding effect of the Constitutional Court’s 2004 decision therefore did not constitute a procedural bar to the admissibility of the present constitutional complaints.

What *Preventive Detention* says about prisoners’ rights and the German legislation on preventive detention is important for several reasons. By departing from its own 2004 decision, the Constitutional Court resolved a fundamental conflict between the German constitutional order and the European system of human rights protection. It gave the reasons for this change as follows.

The starting point is that the Convention is incorporated into German law by way of statute only; at the national level, the Convention ranks below the Basic Law.⁵¹ The ECHR does, however, serve as an “aid to interpretation” (*Auslegungshilfe*) of German fundamental rights and the rule-of-law principles of the Basic Law. The provisions of the Basic Law are to be construed in a manner that is open to international law (*völkerrechtsfreundlich*) (paras. 86, 89).

⁴⁹ *Preventive Detention* para. 82

⁵⁰ BVerfG, Feb. 5, 2004, 109 BVerfGE 133.

⁵¹ *Preventive Detention* paras. 86–87.

Similarly, the Strasbourg jurisprudence will influence the interpretation of the German constitutional precepts. As Constitutional Court president Andreas Voßkuhle had explained on earlier occasions, and the *Preventive Detention* judgment echoes, the Court has effectively raised the ECHR and the Strasbourg jurisprudence “to the level of constitutional law” as aids to interpretation for determining the content and scope of the fundamental rights and rule-of-law guarantees of the Basic Law.⁵² An interpretation that is open to international law does not require the Basic Law’s exigencies to be schematically aligned with those of the Convention,⁵³ but it does require the ECHR values to be taken into consideration to the extent that is methodologically justifiable and compatible with the Basic Law’s standards.⁵⁴

The issue before the Court undoubtedly stirred a great deal of controversy in Germany at the time. Ministers and police, at both the state and the federal levels, warned of the potential consequences of following *M v. Germany*, and in the days before *Preventive Detention* was handed down, those officials made public how in Freiburg—a neighboring city to Karlsruhe, where the Constitutional Court is based—the allocation of twenty-five police officers to surveil each one of the prisoners released from preventive detention heavily drained police resources.⁵⁵

It is a happy circumstance indeed when, in the words of the German Romantic poet Friedrich Hölderlin, the danger itself fosters the rescuing power.⁵⁶ That is precisely what happened in the *Preventive Detention* case. The Court not only followed the Strasbourg jurisprudence; it took the occasion, in this challenging proceeding, to develop its doctrine on the openness of German law to the European Convention and the jurisprudence of the European Court.

The Court underscored the crucial importance of the role played by

⁵² *Id.* paras. 82, 88.

⁵³ *Id.* para. 91.

⁵⁴ *Id.* para. 93. The Court used the term “methodologically justifiable interpretation” in the *Görgülü* judgment.

⁵⁵ See, e.g., *Ex-Sicherungsverwahrte unter Dauerbewachung*, RHEIN-ZEITUNG, May 4, 2011, at <http://www.rhein-zeitung.de/>.

⁵⁶ FRIEDRICH HÖLDERLIN, *Patmos*, in *HYPERION AND SELECTED POEMS* 245 (1990).

human rights in the Basic Law: “The prominent position that human rights enjoy in the Basic Law is given expression particularly in the attachment of the German people to inviolable and inalienable human rights in Art. 1(2) of the Basic Law” (para. 90). Notably, the Court had adverted to the position of human rights in the Basic Law before, in the 2004 *Görgülü* case,⁵⁷ but had never explicitly referenced Article 1(2). The Constitutional Court seems to have given its imprimatur to the approach advocated by Professor Jochen von Bernstorff—that one must take seriously the constitutional fact that the Basic Law itself, in Articles 1(1) and (2) and 19(2), requires public organs to respect categorical limits on state interference in civil liberties derived not only from national human rights, but also from the international human rights conventions.⁵⁸ This significant development goes a long way toward grounding respect for European and international human rights law in the German Constitution.

Another point has to do with the tone of the ruling and its terminology. The Constitutional Court in *Görgülü* had held that “[t]he authorities and courts of the Federal Republic of Germany are obliged, under certain conditions, to take account of the European Convention on Human Rights as interpreted by the [European Court of Human Rights]” and had been criticized for this weak choice of words by Professors Christian Tomuschat and Armin von Bogdandy.⁵⁹ The Court in *Preventive Detention* ruled that the duty to apply the Convention in national law amounted to much more: it was “not . . . a duty only to take into account, for the Basic Law aims . . . to avoid conflict between international obligations of the Federal Republic of Germany and national law.”⁶⁰ “The openness of the Basic Law,” the Court continued, “thus expresses an understanding of sovereignty which not only not opposes

⁵⁷ BVerfG, Oct. 14, 2004, 111 BVerfGE 289 (“Görgülü”).

⁵⁸ See Jochen von Bernstorff, *Pflichtenkollision und Menschenwürdegarantie: Zum Vorrang staatlicher Achtungspflichten im Normbereich von Art. 1 GG*, 47 DER STAAT 21 (2008); see also JOCHEN VON BERNSTORFF, KERNGEHALTE IM GRUND- UND MENSCHENRECHTSSCHUTZ (forthcoming 2012).

⁵⁹ Christian Tomuschat, *The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court*, 11 GERMAN L.J. 513, 522–23 (2010) (quoting 111 BVerfGE 289 (315), Eng. trans. para. 29, at <http://www.bundesverfassungsgericht.de/>); Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT’L J. CONST. L. 397, 403 (2008).

⁶⁰ *Preventive Detention* para. 89.

international and supranational integration; it presupposes and expects it.”⁶¹

The overarching question is this: does *Preventive Detention* represent a transformation in German law as compared to *Görgülü*? While it probably does not, one should not underestimate how far the Constitutional Court went to avoid a clash with the Convention and the European Court on this highly vexing and politically sensitive matter. As discussed above, the influence of the Convention and the Strasbourg jurisprudence will extend only so far as it may be supported by established German legal methods and principles. German constitutional doctrine had maintained for many decades that preventive detention was not wrong and that it was not “punishment” (*Strafe*); the German legal method in the field was very clear.

It is therefore difficult to see what kind of restriction, if any, is posed by the words “methodologically justifiable” (*methodisch vertretbar*), and in that light, too, the decision is remarkable. The question could be asked whether this test of methodological justifiability is really a coherent check on the incorporation of international law in the national legal order. In reality the test may have no substance, as *Preventive Detention* shows that the extent to which the Basic Law can be interpreted in light of the European Convention is very great; no constitutional problem is posed because the prominent position of human rights in the Basic Law is explicitly expressed in its Article 1(2).

The approach of the Constitutional Court in *Preventive Detention* duly received the imprimatur of the European Court, which in *Schmitz v. Germany* took note of

the reversal of the Federal Constitutional Court’s case-law concerning preventive detention in its leading judgment of 4 May 2011. It welcomes the Federal Constitutional Court’s approach of interpreting the provisions of the Basic Law also in the light of the Convention and this Court’s case-law, which demonstrates that court’s continuing commitment to the protection of fundamental rights not only on national, but also on European level.⁶²

Since the Constitutional Court ordered that the unconstitutional provisions

⁶¹ *Id.*

⁶² *Schmitz v. Germany*, App. No. 30493/04, para. 41 (Eur. Ct. H.R. June 9, 2011) (citation omitted).

would continue to apply until they were cured by the entry into force of appropriate new legislation, the affected prisoners would effectively be kept under lock and key pending those legislative changes. Consequently, more cases will surely reach the European Court, and the dialogue on preventive detention will just as surely continue.

In any event, the Voßkuhle Court went a long way in charting a course that responds to the exigencies of universalizability. In a broader sense, this approach marks a change from the general stance of Voßkuhle's predecessor, Hans-Jürgen Papier, who consistently put a thumb on the scale in favor of national law.⁶³ Though it may be somewhat of a vulgarization, one may argue that what the Constitutional Court did in its sovereignty-based *Lisbon* judgment in 2009,⁶⁴ the Voßkuhle Court undid in *Honeywell* in 2010.⁶⁵ It is plain that with the two-chamber set up of the Bundesverfassungsgericht, with the president as the head of one of the chambers and the vice president as the head of the other, the direct power and influence of the court's president is different from that of for example the president of the US Supreme Court and of the UK Supreme Court. Nonetheless with the opening up of the German legal order which Voßkuhle has heralded in, both judicially and extra-judicially, it seems to us to make plenty sense to talk of the "Voßkuhle Court," and to use it as a badge of honor. The jurisprudence of the Constitutional Court is now clearly trending toward openness to international and European law, particularly, it seems, in rights cases.

The German Court accordingly follows the example of the French Constitutional Court of many years. In 2008 the French Court even declared unconstitutional a similar statute on preventive detention, on the basis of the

⁶³ Hans-Jürgen Papier was president of the Court in the period April 10, 2002–March 16, 2010, during which the *Görgülü* ruling was handed down. Andreas Voßkuhle took over on March 16, 2010.

⁶⁴ BVerfG, June 30, 2009, 123 BVerfGE 267 (holding that the Constitutional Court is competent to review whether EU legal acts are compatible with the constitutional identity of the German constitution—constitutional identity review).

⁶⁵ BVerfG, July 6, 2010, 2 BvR 2661/06 (holding that while the Constitutional Court is competent to carry out *ultra vires* review of EU legal acts, the Court's competence to declare an act of the EU institutions to be *ultra vires* is very restricted, which effectively makes that contingency remote); see Mehrdad Payandeh, *Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice*, 48 COMMON MKT. L. REV. 9 (2011).

exigencies of the Convention as well as those of French constitutional law,⁶⁶ and the European Court in *M* explicitly cited the French position.⁶⁷ The strength of this French view was corroborated by former president of the Constitutional Court Robert Badinter, who, looking back in 2011 over his legal career, asserted that since the 1980s “the best defense of our liberties resided in the control by the European Court of the conformity of our statutes and judgments with the European Convention on Human Rights.”⁶⁸ This sentiment now seems to have been endorsed by Andreas Voßkuhle, who has promoted, both extrajudicially and in his capacity as president of the German Constitutional Court, the concept of national constitutional courts as components of the “multilevel cooperation of European Constitutional Courts.”⁶⁹

The Russian approach, too, evinces certain structural similarities with the German approach. Angelika Nußberger, now the German judge in the European Court, has compared the approach of the Russian Constitutional Court with that of the German court. Her comparison may support our observation about the openness in the use of authority by the Russian Court in its making no distinction between the domestic sources and the European sources.⁷⁰ Her argument provides support for the Russian Court turning this method from ways of taking due account of Strasbourg jurisprudence to a strategy of national resistance against the implementation of international human rights standards.⁷¹ On her view, the Russian Court has a “much more

⁶⁶ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2008-562DC, Feb. 21, 2008, JOURNAL OFFICIEL [J.O.], Feb. 26, 2008, p. 3272; see BERNARD STIRN, LES SOURCES CONSTITUTIONNELLES DU DROIT ADMINISTRATIF: INTRODUCTION AU DROIT PUBLIC 17–18 (6th ed. 2008); Eirik Bjorge, *National Supreme Courts and the Development of ECHR Rights*, 9 INT’L J. CONST. L. (2011).

⁶⁷ See BERNARD STIRN, LES LIBERTÉS EN QUESTIONS 73 (7th ed. 2010).

⁶⁸ ROBERT BADINTER, LES ÉPINES ET LES ROSES 240–41 (2011) (trans. by authors); see, e.g., CC decision No. 95-360DC, Feb. 2, 1995, J.O., Feb. 7, 1995, p. 2097; CC decision No. 2006-540DC, July 27, 2006, J.O., Aug. 3, 2006, p. 11,541; *Constitutional Court Judges’ Roundtable*, Olivier Dutheil de Lamothe, [untitled], 3 INT’L J. CONST. L. 543, 550 (2005); Mads Andenas & Eirik Bjorge, *Juge national et interprétation évolutive de la Convention européenne des droits de l’homme*, 2011 REVUE DU DROIT PUBLIC 997.

⁶⁹ See Andreas Voßkuhle, *Multilevel Cooperation of the European Constitutional Courts: Der europäische Verfassungsgerichtsverbund*, 6 EUR. CONST. L. REV. 175 (2010); Andreas Voßkuhle, *Die Landesverfassungsgerichtsbarkeit im föderalen und europäischen Verfassungsgerichtsverbund*, 59 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 215 (2011).

⁷⁰ See above, under section 2.

⁷¹ See above, under section 1.

restrictive” approach than the German, in the sense of further limiting the effect of the decisions of the European Court in national law.⁷² The Constitutional Court Justices Vitruk, Zimnenko and Marchenko have, in three important article from 2006, explained the Russian court’s approach to the case law of the European Court. Vitruk was generally critical to the role of case law which, on his view, “can seriously weaken the Constitution,” and also to giving the European Court’s decisions any binding precedential effect.⁷³ Zimnenko argued that states are not bound by decisions from the European Court.⁷⁴ Marchenko explained “precedent” from the European Court as “a helpful example.”⁷⁵

On President Zorkin’s view, judgments “involving issues of sovereignty” would not be binding for Russia. Zorkin further indicated that Russia could denounce the European Convention of Human Rights. A declaration was made at the forum about the introduction of “a mechanism for defending national sovereignty” which would allow the Russian government not to respect judgments issued by the ECHR which are contrary to judgments reached by the Russian Constitutional Court. At the same time, however, President Zorkin in the same speech advocated an increased “role of the judiciary in the strengthening of interaction between the national and international legal systems, and in more and more active integration of Russia into the international legal space, including the European one.”⁷⁶

Article 15(4) of the Russian Constitution of 1993 provides that generally recognised principles and norms of international law and international

⁷² ANGELIKA NÜBBERGER, *The Reception Process in Russia and Ukraine*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 603 (Alec Stone Sweet & Helen Keller eds., 2008), and Yury Tikhomirov ‘Russia’, in *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, 517-525 (Dinah Shelton ed, 2011).

⁷³ N.V. Vitruk, *O nekotorykh osobennostyakh ispol’zovaniya resheniy Evropeyskogo Suda po pravam cheloveka v. pratike Konstitutsionnogo Suda Rossiyskoy Federatsii i inykh sudov* 1 SRAVNITEL’NOE KONSITUTSIONNOE OBOZRENIYE 83 (2006).

⁷⁴ B.L. ZIMNENKO, *MEZHDUNARODNOE PRAVO IN PRAVOVAYA SISTEMA ROSSIYSKOY FEDERATSII* (2006).

⁷⁵ M.N. Marchenko, *Yuridicheskaya priroda i karakter resheny Evropeyskogo Suda po pralam cheloveka* 2 GUSODARSTVO I PRAVO 11 (2006).

⁷⁶ See Valery Zorkin, “Constitutional Justice of the New Democracies in the Conditions of Modern Challenges and Threats” at the Conference on the Occasion of the Twenty Year Anniversary of the Hungarian Constitutional Court in 2009, available at http://www.mkab.hu/index.php?id=twenty_years_of_the_constitutional_court.

treaties form “part of its *legal system*.” In case of conflict between federal law and treaties, the latter apply as *lex superior* even if the domestic legislation is *lex posterior*. In *Bogdanov* the Constitutional Court said that the Convention

is ratified by the Russian Federation and in force in all its territory, and part of domestic law. The Russian Federation has accepted the jurisdiction of the European Court of Human Rights undertaking to comply, also in its judicial functions, fully with the obligations following from the Convention and the Protocols. ... It follows that the [Russian legislative provisions under challenge] should be considered and then consistently applied in normative unity with the Convention provisions.⁷⁷

This was amplified in a 2007 ruling directly addressing the status of European Court judgments:⁷⁸

Judgments of the European Court of Human Rights—in that part, in which they, proceeding from the generally recognized principles and norms of international law, give interpretation of the content of the rights and freedoms provided by of the Convention—form part of the Russian legal system and should be taken into account by the federal legislator during regulation of the social relations and by the law enforcement bodies.

The Supreme Court of the Russian Federation in 1995 passed a resolution (*postanovleniia*) on the application of the Constitution in the general courts, instructing lower courts to apply international law.⁷⁹ The Supreme Court in 2003 passed another resolution developing the role of international law in Russian courts.⁸⁰ The Supreme Court underlined the duty to apply international treaties and in particular the ECHR. It repeated that international treaties, including the ECHR, take priority over national law. What is of particular interest to us is how the Supreme Court, referring to ‘article 31(3)(b) of the Vienna Convention on the Law of Treaties’ on

⁷⁷ *IV Bogdanov & Others* at [6].

⁷⁸ Judgment of the Constitution Court of the Russian Federation N 2 of February 5, 2007, *Cabinet of Ministers of the Republic of Tatarstan, applications of Open Stock Companies “Nizhneftkamskneftekhim” and “Khakasenergo”* at [2.1]. We are grateful to Vera Rusinova for her kind assistance on this point.

⁷⁹ “On Some Questions Concerning the Application of the Constitution of the Russian Federation by Courts,” adopted by the Plenum of the Supreme Court, November 31, 1995, ROSSIYASKAYA GAZETA 244, December 8, 1995.

⁸⁰ “On the Application by Courts of General Jurisdiction of the Generally-recognized Principles and Norms of International Law and the International Treaties of the Russian Federation” adopted by the Plenum of the Supreme Court, November 10, 2003, ROSSIYASKAYA GAZETA 244, December 2, 2003.

subsequent treaty practice, made clear that courts must take account of the practice of treaty bodies.⁸¹ This means that the Russian courts must keep pace with the development of ECHR law. Failure to apply international obligations could lead to cassation (quashing) or revision of judgments. A brief review was also provided of the European Court's case law on arts 3, 5, 6, and 13 of the Convention, without expressly referring to any individual decisions. In the parallel commercial court system, there is a circular by the Chief Justice of the Supreme Court of Arbitration on the protection of private property under the ECHR.⁸²

This is not much different from the approach of the UK Supreme Court post-*Horncastle*.⁸³ *Horncastle* suggested that where a decision from the European Court does not “sufficiently appreciate[] or accommodate[] particular aspects of our domestic process” the Supreme Court might decline to follow the rulings of the European Court.⁸⁴ The Supreme Court in *Cadder v. Her Majesty's Advocate* opted for another approach—one which took seriously the possible external effects as well as internal ones.⁸⁵ The question in *Cadder* was whether a person who has been detained by the police in Scotland on suspicion of having committed an offence has the right of access to a solicitor prior to being interviewed. Sections 14–15 of the Criminal Procedure (Scotland) Act 1995, as amended, allow the police to detain for up to six hours a person whom they have reasonable grounds for suspecting has

⁸¹ The year here refers to the ratification and publication in the official gazette, ROSSIYASKAYA GAZETA.

⁸² “On the Main Provisions Applied by the European Court of Human Rights for the Protection of Property Rights and Right to Justice” December 20, 1995, no. C1–7/CMP1341 VESTNIK VIYSSHEGO ARBITRAZHNOGO SUDA ROSSIYSKOY FEDERATSII (BULLETIN OF THE SUPREME COURT OF ARBITRATION) no. 2 2000. Yury Tikhomirov “Russia,” in *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, 517–25 at 525 (Dinah Shelton ed., 2011) expresses the conflicting current views within the prevailing framework in Russia, more than reminiscent of the United Kingdom:

The Russian Federation recognizes as compulsory the jurisdiction of European Court of Human Rights on questions of interpreting and application of Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols, in case of alleged violation of their provisions by the Russian Federation. Decisions of the European Court of Human Rights in relation to the Russian Federation are legally binding for all authorities including courts. In jurisprudence the question of the place of a decision of the European Court of Human Rights in the legal system is debatable. When some jurists consider that decisions of the European Court of Human Rights are the source of Russian law, others criticize such a position and hold a different opinion.

⁸³ *R v. Horncastle (Michael Christopher)* [2009] UKSC 14, [2010] 2 AC 373.

⁸⁴ *Horncastle* at [11].

⁸⁵ *Cadder (Peter) v HM Advocate* [2010] UKSC 43, [2010] WLR 268.

committed or is committing an offence punishable by imprisonment. During this detention the police may put questions to the detainee. The detainee is entitled to have a solicitor informed of their detention. In terms of the statute, however, the detainee has no right of access to a solicitor. The question was whether that was a breach of the right to a fair trial guarantee in arts 6(1) and 6(3)(c) of the Convention. The notion that there should be anything wrong with Scots law on this point was quite novel, and could have far-reaching implications, said the Court:

Countless cases have gone through the courts, and decades have passed, without any challenge having been made [against the Scottish procedure]. Many more are ongoing or awaiting trial—figures were provided to the court which indicate there are about 76,000 such cases—or are being held in the system pending the hearing of an appeal although not all of them may be affected by the decision in this case. There is no doubt that a ruling that the assumption was erroneous will have profound consequences.⁸⁶

As this decision landed in the docket of the Supreme Court just after *Horncastle*, it would be a deaf ear that did not detect the direction in which the decision would, normally, be headed. The challenge posed by the ECHR to the common law of England in *Horncastle* led the Supreme Court to hand down a ringing defense of English procedural idiosyncrasy. The challenge posed by the ECHR to characterizing features of Scots law in *Cadder*, however, led a unanimous Supreme Court, in judgments written by the two Scots Justices—Lords Hope and Rodger—to hand down a decision which marries very ill indeed with the criticism which has been levelled against the HRA in the last years.⁸⁷ There was, on the Court's own admission, no room in the situation which faced the Court for a decision that would favor the status quo simply on grounds of expediency. The issue was a difficult one but “[i]t must be faced up to, whatever the consequences,” said the Court in unambiguous terms.⁸⁸ In no way did the decision sound in deference or a national species of the margin of appreciation which could blunt the impact of the Convention rights.

⁸⁶ *Cadder* at [4].

⁸⁷ K.D. Ewing, 'The Futility of the Human Right Act' [2004] PUBLIC LAW 829; KD Ewing & Joo-Cheong Tham, 'The Continuing Futility of the Human Rights Act' [2008] PUBLIC LAW 668.

⁸⁸ *Cadder* at [4].

The Grand Chamber of the European Court in *Salduz v. Turkey*⁸⁹ had unanimously held that there had been a violation of arts 6(1) and 6(3)(c) of the Convention because the claimant had not had the benefit of legal advice while in police custody. Notwithstanding the European Court's decision in the *Salduz* judgment, a seven judges strong panel of the High Court of Justiciary had held in *Her Majesty's Advocate v. McLean* that it was not a violation of Articles 6(1) and 6(3)(c) for the Crown at trial to rely on admissions made by a detainee while being interviewed without having had access to a solicitor.⁹⁰ This was because otherwise available guarantees under Scots law, particularly the requirement that there be corroborated evidence for a conviction to be in order, were sufficient to provide for a fair trial.

It was perfectly clear that the High Court of Justiciary's judgment in *McLean* was in line with previous domestic authority.⁹¹ It was equally clear to a unanimous Supreme Court, however, that *Salduz* required a detainee to have had access to a lawyer from the time of the first interview unless there are compelling reasons, in light of particular circumstances of the case, to restrict that right.⁹² The exception applies in particular circumstances only; it does not allow a systematic departure from the rule such as that set up by the 1995 Act.⁹³ The majority of those Member States which prior to *Salduz* did not afford a right to legal representation at interview—Belgium, France, Ireland, and the Netherlands—had initiated reforms to their laws with a view to bringing their law into line with the precepts of the Convention.⁹⁴

Did the Supreme Court have to follow *Salduz*—or could it instead go down the exceptionalist route of *Horncastle*? To answer this question the Supreme Court took as its starting point section 2(1) of the HRA which provides that a court which is determining a question which has arisen in connection with a Convention right must “take into account” any decision of the European Court. The Supreme Court pointed out that ‘the United Kingdom was not a party to the decision in *Salduz* nor did it seek to intervene

⁸⁹ *Salduz v. Turkey* (2008) 49 EHRR 421.

⁹⁰ *Her Majesty's Advocate v. McLean* [2009] HCJAC 97, 2010 SLT 73.

⁹¹ *Paton v. Richie* 2000 JC 271; *Dickson v. HM Advocate* 2001 JC 203.

⁹² *Cadder* at [35]–[36], [38] and [70].

⁹³ *Id.* at [41].

⁹⁴ *Id.* at [49].

in the proceedings'.⁹⁵ As, crucially, the Lord Justice General had observed in *McLean*⁹⁶ the implications for Scots law could not be said to have been carefully considered. Had the *Cadder* Court here been singing from the same hymn sheet as the *Horncastle* Court, this would perhaps have settled the issue. But the Court went on instead to cite the words of Lord Slynn in *Alconbury*,⁹⁷ that the Court should follow any clear and constant jurisprudence of the European Court, and Lord Bingham's exhortation in *R (Anderson)*,⁹⁸ that the Court will not without good reason depart from the principles laid down in a carefully considered judgment of the European Court sitting as a Grand Chamber.⁹⁹ The Supreme Court then referred to *R v Spear & Others*,¹⁰⁰ before going on to say:

And in *R v Horncastle* [2009] UKSC 14, [2010] 2 WLR 47 this court declined to follow a line of cases in the Strasbourg court culminating in a decision of the Fourth Section because, as Lord Phillips explained in para 107, its case law appeared to have been developed largely in cases relating to the civil law without full consideration of the safeguards against an unfair trial that exist under the common law procedure.¹⁰¹

As the Court said, *Salduz* was a unanimous decision of the Grand Chamber, in itself "a formidable reason for thinking that we should follow it."¹⁰² The judgment has moreover been followed repeatedly in subsequent cases.¹⁰³ There were, in the other hand, two judgments, one of them by the Grand Chamber, which "should be noted,"¹⁰⁴ presumably as they could handily have been used to make the point, if one were so inclined, that the Strasbourg jurisprudence was not all that "clear and constant" after all. In *Gäfgen v. Germany*,¹⁰⁵ there is a dissenting opinion by Judge Rozakis and five others indicating that in their opinion the approach of the Grand Chamber in *Gäfgen*

⁹⁵ *Id.* at [45].

⁹⁶ *Her Majesty's Advocate v. McLean* [2009] HCJAC 97, 2010 SLT 73 [29].

⁹⁷ *R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 [26].

⁹⁸ *R (Anderson) v. Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 at [18].

⁹⁹ *Cadder* at [45].

¹⁰⁰ *R v. Spear (John)* [2002] UKHL 31, [2003] 1 AC 734.

¹⁰¹ *Cadder* at [45].

¹⁰² *Id.* at [46].

¹⁰³ See the extensive list of Strasbourg authority marshalled in *Cadder* (n 76) [48].

¹⁰⁴ *Id.* at [46].

¹⁰⁵ *Gäfgen v. Germany* (2010) ECHR 759.

was very difficult to reconcile with *Salduz*. After *Gäfgen* the *Salduz* judgment was applied in the Chamber judgment *Brusco v France*.¹⁰⁶ On balance, therefore, it would have been conceivable—as conceivable as it was in *Horncastle*—to say in *Cadder* that the Strasbourg jurisprudence fell somewhat short of being “clear and constant,” and at all events that the Court had—as it had in *Horncastle*—“concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process.”¹⁰⁷ This Lords Hope and Rodger, both former Lords Justice General,¹⁰⁸ were in their powerful judgments not minded to do. The way in which they conceived of the question to be solved was markedly different from what the Court did in *Horncastle*. The practice of the Scottish system could not be saved by “any guarantees otherwise in place there”:

There is no room ... for, as it were, one rule for the countries in Eastern Europe such as Turkey on the one hand and those on its Western fringes such as Scotland on the other.¹⁰⁹

By approaching the system of the Convention rights not as if though the relationship between Strasbourg and the Supreme Court were a bilateral one, but rather conceiving of the ECHR scheme as an international system providing “principled solutions that are universally applicable in all the contracting states,” the Supreme Court in *Cadder* took an important step towards a universal approach, away from the exceptionalist approach on display in *Horncastle*.

A ruling in a similar case was rendered by the Norwegian Supreme Court in the same month as the UK Supreme Court handed down its judgment in *Cadder*. The Norwegian case bore on the reopening of old criminal cases in which the process had breached international human rights.¹¹⁰ The Norwegian Supreme Court, unanimously adopting the opinion of Justice Gjølstad, held that the international human rights obligations required reopening, with potentially several thousand more cases to be reopened. It is clear that the Norwegian Supreme Court in doing so did not see itself in a bilateral

¹⁰⁶ *Brusco v. France*, appl.no. 1466/07, October 14, 2010.

¹⁰⁷ *Horncastle* at [11].

¹⁰⁸ The most senior judge of Scotland.

¹⁰⁹ *Cadder* at [40].

¹¹⁰ Decision HR–2010–01703–S, 12 October 2010.

relationship with the international human rights organs. The arguments of the government attorneys that one ought instead to opt for Norwegian exceptionalism were thus roundly rejected.¹¹¹ In the face of high stakes, the Norwegian Supreme Court's exemplary ruling chose instead to take seriously the universal exigencies that apply to national judges when they are adjudicating on human rights issues.

3. Conclusion

"Courts have taken the lead in incorporating the Convention," as Alec Stone Sweet and Helen Keller have said.¹¹² By taking as a starting point for the analysis von Bogdandy's use of Kant's categorical imperative, directed to national courts, this article has brought out not only the relationship between on the one hand a national court and the European Court on the other. The point has also been to look at the relationship between national courts as they relate to the European Court. Such an approach is in keeping with the reflection by the President of the Federal Constitutional Court, Andreas Voßkuhle, that the effects of internationalization and Europeanization have given the vocation of comparative constitutional law "eine neue quantitative und qualitative Dimension."¹¹³

The European Court held in 1998 in its decision in *Osman* that English law on tort liability for the police was not in conformity with the Convention rights.¹¹⁴ The Court considered that English law provided an immunity against liability for police negligence in operational decisions. *Osman* provoked a strongly critical reaction from, among others, two House of Lords justices, Lords Browne-Wilkinson and Hoffmann.¹¹⁵ A.W. Brian Simpson analyzed the British reception of *Osman*. He pointed out that the hostility to the adverse

¹¹¹ See MADS ANDENAS & EIRIK BJORGE, *MENNESKERETTENE OG OSS* 93–96 (2012).

¹¹² ALEC STONE SWEET & HELEN KELLER, *Assessing the Impact of the ECHR on National Legal Systems*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 687 (Alec Stone Sweet & Helen Keller eds., 2008).

¹¹³ Andreas Voßkuhle, *Europa als Gegenstand wissenschaftlicher Reflexion—eine thematische Annäherung in 12 Thesen*, in *STRUKTURFRAGEN DER EUROPÄISCHEN UNION* 44–45 (Claudio Franzius, Franz C. Mayer & Jürgen Neyer eds., 2010): "a new qualitative and quantitative dimension".

¹¹⁴ *Osman v. United Kingdom* (1998) 5 EHRR 293.

¹¹⁵ See generally A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* 7–8 (2001). See for criticism of the decision, *Barrett v. Enfield LBC* [2001] 2 AC 550 (Lord Browne-Wilkinson); Lord Hoffmann, *Human Rights and the House of Lords* 62 *MODERN L.R.* 159 (1999).

Strasbourg ruling arose because of difficulty in adjusting to the existence of a superior European body of law, developed by a court whose members mostly come from alien legal cultures, and which can be driven by concerns which do not seem important from an insular British perspective. He continued:

None of the English critics of *Osman* adopted a European perspective, or seemed aware of the importance of establishing police accountability in many of the countries now governed by the convention, where the history of policing is not happy.¹¹⁶

This brings out what we believe must be the right perspective on the Convention: a perspective which sees a national court not in a bilateral relationship to the European Court but rather in a multilateral relationship with the other national courts as well as the European Court.

The *M* saga is an object lesson here. When on February 7–8, 2011, the Bundesverfassungsgericht heard the constitutional complaint by *M*, the challenge for the German court was to find a solution which was satisfactory both in terms of national constitutional law and in terms of the European Court's ruling in *M*, clearly complying with the latter. This is, as we showed above, exactly what the Bundesverfassungsgericht did in its ruling; it reached the only solution capable of being universalized. It stands to reason that if the German court had decided not to follow Strasbourg, then other European courts, with less happy histories of rights protection than the Bundesverfassungsgericht, could have interpreted this as a *carte blanche* not to follow the decisions of Strasbourg. If, the argument could conceivably have gone, the German courts can turn a blind eye to what Strasbourg says about *M*'s detention in *M v. Germany*, then surely the Russian courts can do the same with regard to Mikhail Khodorkovsky's detention in *Yukos*?¹¹⁷

As Judge Myjer stated in his concurring opinion in *Sanoma Uitgevers B.V. v. Netherlands*, a unanimous Grand Chamber ruling on police searches against journalists, against the state in respect of which he was himself a judge:

¹¹⁶ Simpson, *supra* note 115, 7–8.

¹¹⁷ OAO *Neftyanaya Kompaniya Yukos v. Russia* Judgment September 20, 2011 (Appl.no. 14902/04).

“What would your answer have been if a similar case, with a comparable show of force by the police and the prosecution service, had been brought before us from one of the new democracies?” is a question which I have been asked by a colleague from one of those countries. “Would you still have allowed yourself to be satisfied by the involvement, at the eleventh hour, of a judge who has no legal competence in the matter?” A remark of similar purport was made in the dissenting opinion appended to the Chamber judgment: In finding no violation, the majority merely wags a judicial finger in the direction of the Netherlands authorities but sends out a dangerous signal to police forces throughout Europe, some of whose members may, at times, be tempted to display a similar ‘regrettable lack of moderation’. That was ultimately the push I needed to be persuaded to cross the line and espouse an opinion opposite to that which I held earlier.¹¹⁸

On the Kantian perspective presented in this article, the matter is plain. For the ECHR system to work, the national courts must interact with Strasbourg only in ways which are capable of being universalized and applied also by other European courts.¹¹⁹ Joseph Weiler has referred to the ECHR as an example of constitutionalism extending beyond the unitary state; it is on his reading the perfect manifestation of a legal order “where the I becomes collective.”¹²⁰ This is true; under the ECHR the I is indeed collective. That insight, discovered too by Thomas Mann’s character Joseph on his travels, of not being unique and of not being the only one in the world to face a certain set of difficulties, is as this article has shown one of which European courts are becoming increasingly aware.

¹¹⁸ Concurring Opinion of Judge Myjer in *Sanoma Uitgevers B.V v Netherlands* (app. no. 38224/03) at para. 5.

¹¹⁹ In our view, this also applies to the external effects of our constitutional debates: see the reference to McCrudden, *supra* note 8.

¹²⁰ J.H.H. Weiler, *Prologue: Global and Pluralist Constitutionalism—Some Doubts*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM 17* (Gráinne de Búrca & J.H.H. Weiler eds., 2012).