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- **National Report: Germany -**

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I. GENERAL PART: CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS[2]

I.I. International catalogues of human rights (ECHR, UDHR and ICCPR)

In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?

The adoption of an act of approval in the form of a federal statute (Art. 59(2) of the Basic Law, *Grundgesetz* – GG) is required to ratify international treaties, including international human rights conventions, at the domestic level. A treaty is thus incorporated into domestic law; as a consequence, it holds the same rank as an ordinary federal statute in the hierarchy of laws and thus ranks below the Basic Law. In principle, the relationship with federal laws adopted later on in time is governed by the *lex posterior* principle (this principle only comes into play, however, if the relevant treaty rules are not considered *leges speciales*).[3] According to this principle, a more recent federal law contradicting the contents of the incorporated international treaty could indeed override the statute by which the treaty was incorporated ("treaty override").[4] Not least in view of the commitment in Art. 1(2) GG to "inviolable and inalienable human rights as the basis of every community", the applicability of the *lex posterior* principle to human rights treaties might, however, be excluded. Regardless, a treaty override would in any case only be conceivable if the legislature expressly stated its intent to breach international law. It is generally presumed that the legislature does not intend to act in breach of its obligations under international law.[5] With regards to human rights treaties, such a scenario of an explicitly intended breach of international law can probably be ruled out from the outset.

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[3] Decisions of the Federal Constitutional Court, Entscheidungen des Bundesverfassungsgerichts – BVerfGE 141, 1 <21 para. 50>; see also, e.g., Nettesheim, in: Maunz/Dürig, Grundgesetz-Kommentar, 88th supplement August 2019, Art. 59, para. 187.

[4] BVerfGE 141, 1, <21 *et seq*. para. 51 *et seq*.> for discussion of dissenting views in academia. *Contra* separate opinion of Justice König, *ibid*. <44 *et seq*.>, according to which, the principle of democracy, from which the *lex posterior* principle is derived, and the principle of the rule of law (*Rechtsstaat*), which prescribes the adherence to legal obligations, must be balanced in the individual case in a way that retains an ideally wide scope for both principles.

[5] BVerfGE 74, 358 <370>; 141, 1, <23 and 24, para. 58>, see also, e.g., Nettesheim, in: Maunz/Dürig, Grundgesetz-Kommentar, 88th supplement August 2019, Art. 59, para. 187.

The federal structure of the Federal Republic of Germany (Art. 20(1) GG) gives rise to one special circumstance: as they hold the same rank as a federal statute (*lex superior* principle), international treaties incorporated into German law by way of Art. 59(2) GG always prevail over legislation enacted by the *Länder*.[6]

Beyond that, according to Art. 25 GG, the general rules of international law are an integral part of federal law (first sentence) and take precedence over the laws (second sentence, first half-sentence), including federal statutes. German constitutional law recognises customary international law as part of the general rules of international law [7] (cf. Art. 38(1) lit. b of the Statute of the International Court of Justice). These include basic human rights standards in particular which have frequently attained the status of peremptory norms of international law (*ius cogens*), e.g. the prohibition of torture and the prohibition of discrimination on the grounds of race.[8] Despite taking precedence over the laws, however, provisions of international law which have been incorporated into domestic law by way of Art. 25 GG rank below constitutional law in the hierarchy of laws in what is called an "in-between" rank (*Zwischenrang*). According to Art. 25 second sentence, second half-sentence GG, the human rights standards incorporated into domestic law by way of Art. 25 GG directly create rights and duties for the inhabitants of the federal territory. Owing to the direct applicability of peremptory human rights standards according to Art. 25 first sentence GG and the fact that under international law these are considered to directly confer individual rights, it is assumed within academia that Art. 25 second sentence, second half-sentence GG has a merely declaratory effect.[9]

The importance of the Universal Declaration of Human Rights (UDHR) as a reference point for the interpretation of domestic law diminishes given that the UDHR is non-binding, insofar as its protections have not attained the status of customary international law, and given the codification of human rights in legally binding UN human rights treaties (ICCPR and ICESCR).

<u>What mechanism is used to invoke the international treaties in national court decision-making?</u>

Given that international treaties acquire the same rank as a federal statute pursuant to Art. 59(2) GG, incorporation into domestic law means that all delegated legal acts (delegated legislation like ordinances for example, but also individual decisions like administrative acts)

[6] Heun, in: Dreier, Grundgesetz-Kommentar, 3rd ed., 2015, Art. 59, para. 47.
[7] BVerfGE 15, 25 <32 and 33>; 16, 27 <33>; 23, 288 <317>; 94, 315 <328>; 96, 68 <86 and 87>; 109, 13 <27 and 28>; 118, 124 <134>.
[8] e.g. Herdegen, in: Maunz/Dürig, Grundgesetz-Kommentar, 88th supplement August 2019, Art. 25, para. 62 with further examples.
[9] *ibid*., para. 85 with further references.

must be in accordance with human rights conventions, provided the rights contained therein are directly applicable. Delegated legislation found to be in breach of these can be declared void or repealed by the courts. For example, the deportation of a foreign citizen cannot be upheld if it is in violation of Art. 8 of the European Convention on Human Rights (ECHR). Holding the same rank as a federal statute also means that, within the framework of methodically tenable legal interpretation, German courts are obligated to consider and apply applicable and sufficiently specific international treaty law as they would any other federal law.

Insofar as human rights protections guaranteed by customary international law are concerned, direct applicability follows from Art. 25 first sentence GG in conjunction with international law or from Art. 25 second sentence, second half-sentence GG. As a consequence, the guarantee of legal protection in Art. 19(4) first sentence GG extends to these human rights protections; this means that all individuals affected by acts of public authority can, in principle, have the courts review the compatibility of these acts with such human rights protections. If a court is unsure of the scope of a specific human rights protection in international law, under Art. 100(2) GG it can and must submit its question of law to the Federal Constitutional Court. The Federal Constitutional Court then makes a binding decision whether a general rule of international law within the meaning of Art. 25 GG is concerned or whether it directly creates rights and duties for the individual. A constitutional complaint against a statutory provision that contravenes peremptory human rights norms or a legal act that results in the application of domestic law in a manner that violates international law can also be lodged with the Federal Constitutional Court, provided that the complainant is directly affected by the provision. While general rules of international law concerning human rights are not fundamental rights that can form the basis of a constitutional complaint within the meaning of Art. 93(1) no. 4a GG, the complaint can be based on the general freedom of action guaranteed by Art. 2(1) GG (as long as a more specific fundamental right is not applicable to the specific case), since any interference with this fundamental right is only permissible if it is done by or pursuant to a law originating from within the constitutional order, which does not include laws violating Art. 25 GG.[10]

Moreover, the Constitution's openness to international law gives rise to a constitutional duty on the part of the Federal Constitutional Court to use international treaties, namely human rights conventions, as guidelines for interpretation of the Basic Law and especially of fundamental rights.[11] This primarily concerns the ECHR,[12] which is subject to enhanced

[10] Herdegen, in: Maunz/Dürig, Grundgesetz-Kommentar, 88th supplement August 2019, Art. 25, para. 97 with further references.

[11] BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <316 and 317, 329>; 120, 180 <200 and 201>; 128, 326 <367 and 368>; 142, 313 <345 para. 88>; BVerfGE 148, 296 <351 para.128>; Federal Constitutional Court,

consideration owing to its close interconnection with the fundamental rights of the European Union and the integration objective set out in Art. 23(1) GG.[13] Yet it is also relevant with regards to the UN Convention on the Rights of Persons with Disabilities (CRPD) for example, which is a guideline for the interpretation of the constitutional prohibition of disadvantaging on the grounds of disability (Art. 3(3) second sentence GG)[14] among others.[15] Even though from the perspective of the Federal Constitutional Court there is no direct procedural connection with the European Court of Human Rights (ECtHR) when it comes to the ECHR, both courts are indirectly connected by the availability of individual applications to the ECtHR against German legal acts, which can only be made once all methods of legal recourse have been exhausted (Art. 35(1) ECHR), including unsuccessful constitutional complaints where available. In substance, the protection of fundamental rights in German law is generally tied to the protections afforded by the Convention, as was set out in the *Görgülü* case in 2004[16] and the decision on preventive detention[17]. Despite the ECHR holding the same rank as ordinary statutory law (cf. Art. 59(2) GG), the Federal Constitutional Court has afforded it constitutional significance with reference to the importance of the inalienable human rights in Art. 1(2) GG and the Constitution's openness to international law. The ECtHR's interpretation of the ECHR is to be used as a guideline for interpretation when determining the contents and scope of fundamental rights and rule-of-law principles found in the Basic Law.[18] Additionally, ordinary courts dealing with a protection afforded by the ECHR are obligated to apply the ECHR itself and the ECtHR's case-law when applying and interpreting German law,[19] as this falls under the duty to be bound by law and justice under Art. 20(3) GG.[20] If this duty is violated, a complaint can be lodged invoking the specific fundamental right that has been affected in conjunction with the principle of the rule of law (*Rechtsstaat*).[21] The Federal Constitutional Court and the ordinary courts have to consider the ECHR as interpreted by the ECtHR; this duty at first only applies to decisions in which Germany is directly involved as a party to the proceedings and thus is required under Art. 46 ECHR to redress the violation that has been identified insofar as is possible within the

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Bundesverfassungsgericht – BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 –, para. 62. On the following cf. already Langenfeld, EuGH-EGMR-BVerfG: Von der Multipolarität zum Verbund der Gerichtsbarkeiten im Bereich des Menschenrechtsschutzes, in: Heusel/Rageade, The Authority of EU Law, p. 87 *et seq*. <101 and 102>.

[12] BVerfGE 111, 307 <317 and 318>; 128, 326 <370>.

[13] Herdegen, in: Maunz/Dürig, Grundgesetz-Kommentar, 88th supplement August 2019, Art. 1(2) para. 48.

[14] On the following cf. already Langenfeld, in: Maunz/Dürig, Grundgesetz-Kommentar, 88th supplement August 2019, Art. 3(3) para. 105.

[15] BVerfGE 142, 313 <345>.

[16] BVerfGE 111, 307 <315 *et seq*.>.

[17] BVerfGE 128, 326 <368 *et seq*.>.

[18] BVerfGE 111, 307 <317>; 128, 326 <370>.

[19] *ibid.* <317>; see also BVerfGE 128, 326 <370 *et seq*.>.

[20] BVerfGE 111, 307 <315 and 316>).

[21] *ibid*. <323 and 324>).

context of the domestic legal order. This is recognised in Art. 41 ECHR, which provides that just satisfaction for the consequences of a violation be afforded to the injured party in cases where only partial reparation can be made.[22] Beyond the scope of Art. 46 ECHR, the ECtHR's case-law provides direction and guidance.[23] To put this into context, however, the specific circumstances of the case must be taken into account. The principle of the Constitution's openness to international law "does not require that the domestic legal order be schematically aligned in parallel to international law. Rather, the substantive values of international law [as they have been specified by the ECtHR] must be received in domestic law as comprehensively as possible, provided that this is both methodologically tenable and compatible with the requirements of the Basic Law".[24] The direction and guidance provided by the ECtHR's case-law have a particularly strong impact if parallel cases within the same legal order are at issue, i.e. if (other) proceedings in the state affected by the initial decision of the ECtHR are concerned.[25]

In answering the question whether the ECHR and the relevant Strasbourg case-law may be taken into consideration, the decisive factor is to what extent "German courts have latitude for interpreting and balancing within the scope of recognised methods of the interpretation of laws"[26] since "consideration means acknowledging the provisions of the Convention as they have been interpreted by the ECtHR and applying them to the specific case to the extent that their application does not contravene higher-ranking law, especially constitutional law."[27] If, exceptionally, a court wishes to depart from a judgment of the ECtHR when applying these standards, it has to provide plausible reasoning. Finally, in cases of conflicting provisions, legislature and judiciary, including the Federal Constitutional Court, may exceptionally disregard the ECtHR's interpretation of the Convention if this interpretation contravenes fundamental constitutional principles.[28]

The situation is different if a human rights convention does not include a mechanism for resolving such a conflict comparable to that of the ECHR. Unlike the decisions of the ECtHR, statements issued by human rights committees, e.g. reports, guidelines, or recommendations by the UN Committee on the Rights of Persons with Disabilities (Art. 34 UN Convention on the Rights of Persons with Disabilities), do not bind national or

[22] BVerfG, Order of the Three-Justice Committee (*Dreierausschuss*) [in 1986 the committee system was replaced by chambers] of the Second Senate of 11 October 1985 – 2 BvR 336/85 –-, para. 5; BVerfGE 111, 307 <321 and 322>.
[23] BVerfGE 111, 307 <320>; 128, 326 <368 and 369>; see also Voßkuhle, Der europäische Verfassungsgerichtsverbund*, Neue Zeitschrift für Verwaltungsrecht* – NVwZ 2010, p. 1 <4>.
[24] BVerfGE 141, 1 <30 para. 72>.
[25] BVerfGE 148, 296, <headnote 3 b)>.
[26] BVerfGE 111, 307 <329>.
[27] *ibid*.
[28] BVerfGE 111, 307 <319>.

international courts.[29] Accordingly, the courts do not have to take on their conclusions or line of reasoning, however, they do have to acknowledge and thus discuss them.[30]

Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.

International treaties, which either have been ratified by an act of approval and thus hold the same rank as a federal statute or include provisions taking precedence over these laws under Art. 25 GG, may be directly applicable on the condition that the provision in question is sufficiently specific. If this is the case, no further legislation implementing them is required; they are directly applied by administrative bodies and courts.[31] These provisions may be called "self-executing".[32] Thus, the question of whether treaty provisions are directly applicable is to be determined through interpretation in the individual case.[33] A directly applicable treaty provision may, if interpreted accordingly, give rise to subjective rights and duties.[34] For this purpose "a congruent will of the contracting parties to create specific legal obligations may only be inferred if and insofar as the wording of the treaty expresses this unambiguously. If this already applies to duties placed upon the contracting parties themselves, it consequently has to apply even more so to legal obligations directly imposed on the individual citizen, since the creation of legal duties for private individuals in international treaties is an exception that cannot be deemed to have been agreed upon by the parties without clear indication in the text."[35] The same holds true for rights of private individuals derived from international treaties. Subjective rights routinely are afforded within the human rights context, for the purposes of the ECHR this is set out in Art. 1 ECHR.

I.II. Supranational catalogues of human rights (the Charter)

Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by "radiating" through the national catalogues (a substantive point of reference in other states)?

[29] BVerfGE 142, 313 <345 and 346>; BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 –, para. 65.
[30] BVerfGE 142, 313 <346 and 347>; BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 –, para. 65.
[31] BVerfG, Order of the First Chamber of the Second Senate of 19 September 2006 – 2 BvR 2115/01 and others –, paras. 53 and 54.
[32] *ibid.*, para. 54.
[33] Geiger, Staatsrecht III, 7th ed. 2018, p. 160.
[34] *ibid*., pp. 161 and 162.
[35] BVerfGE 40, 141 <164 and 165>; see also BVerfGE 43, 203 <209>.

Initially, the Federal Constitutional Court held in 1974 (*Solange I* case) that no human rights catalogue equivalent to the Basic Law's fundamental rights catalogue existed at European Community level, which meant that German fundamental rights were the standard against which German legal acts determined by European Community law (secondary Community law) had to be measured.[36] In 1986, however, the Federal Constitutional Court decided (*Solange II* case) that the general legal principles developed by the Court of Justice of the European Union (CJEU) to ensure the protection of fundamental rights were indeed adequate. Therefore, as long as the European level of protection generally corresponds to that afforded by the Basic Law, German fundamental rights must stand back.[37] The Federal Constitutional Court recently restated this reservation and clarified (*Recht auf Vergessen II* case) that "a general examination relating to the relevant fundamental right" is required to assess the adequacy of the fundamental rights protection by European Union law.[38]

The former two decisions were both characterised by a bipolar view of the relationship between European and German fundamental rights:[39] either one or the other catalogue is applicable. In its more recent case-law, however, the Federal Constitutional Court has emphasised the "interrelationship" between the Constitution and the Charter, as well as the ECHR as a common foundation.[40] Here the idea of multi-level fundamental rights protection (*Grundrechtsverbund*) emerges.[41] This becomes relevant particularly where domestic law is not entirely but only in part determined by EU law.[42] Up until now, the decisive factor was the amount of leeway to design that a directive, for example, affords the German legislature in its implementation; entirely pre-determined provisions take precedence over German fundamental rights.[43] According to the CJEU's case-law, however, even where national law is not entirely determined by Union law, the corresponding state measures are to be regarded as measures for the implementation of European Union law for the purpose of Art. 51(1) of the Charter of Fundamental Rights of the European Union (CFREU).[44] The scope of EU

[36] BVerfGE 37, 217 <285>.
[37] BVerfGE 73, 339 <387>.
[38] BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 276/17 –, para. 47. The right reserved by the Federal Constitutional Court to carry out an identity review or an ultra vires review remain unaffected as well, *ibid*. para. 49, even though they potentially limit the Charter's precedence.
[39] For more details Langenfeld, in: Heusel/Rageade, The Authority of EU Law, p. 89 *et seq*.
[40] BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 16/13 –, para. 56 *et seq*., in particular para. 59.
[41] For more details cf. already Langenfeld, in: Heusel/Rageade, The Authority of EU Law, p. 89 *et seq*.
[42] cf. BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 16/13 –, headnote 1.a).
[43] BVerfGE 118, 79 <95 and 96>; 121, 1 <15>; 125, 260 <306 and 307>.
[44] CJEU, Judgment of 26. Februar 2013, Åklargen v. Åkerberg Fransson, C-617/10, para. *28 et seq*.

fundamental rights also extends to opening clauses within secondary legislation allowing for national provisions.[45]

Where EU law allows for leeway to design its implementation, it is to be assumed that some diversity among fundamental rights is also intended. This is the case even if the national legislation in question is implementing EU law (Art. 51(1) first sentence CFREU) and if EU law provides the national legislature with some leeway to design yet also provides for a sufficiently substantial framework and it is ascertainable that this framework is intended to be specified having regard to EU fundamental rights (*Right to be Forgotten I*).[46] In such cases, EU fundamental rights add on to the Basic Law's fundamental rights protections. The review exercised by the Federal Constitutional Court in this regard is also primarily guided by the standard set by the fundamental rights of the Basic Law.[47] This is because it can be assumed that, where ordinary law provides for leeway, the level of protection demanded by the CFREU is guaranteed by domestic fundamental rights.[48] Accordingly, legislation that is not entirely pre-determined by EU law (EU law that leaves leeway to design, *gestaltungsoffenes Unionsrecht*) is to be measured primarily against the fundamental rights of the Basic Law, which in turn are to be interpreted using the CFREU as a guideline.[49] Where ordinary EU law affords leeway to design, it entails the presumption that fundamental rights protections are already guaranteed by the Member States, giving rise to a diversity of fundamental rights that leaves space for domestic fundamental rights and consequently for the protections afforded by the Basic Law.[50] This presumption is based on "overarching ties between the Basic Law and the Charter shaped by a common European fundamental rights tradition" which is most notably expressed in the ECHR, the fundamental rights foundation common both to Member States and to the Union itself.[51] The presumption can, however, be rebutted if there is specific and sufficient indication that EU law that leaves leeway to design, as an exception, does not aim for fundamental rights diversity and that domestic fundamental rights do not satisfy the level of protection required by EU law.[52]

If, however, a legal area is fully harmonised under EU law, the fundamental rights of the Basic Law stand back and national acts determined by EU law are measured exclusively

[45] CJEU, Judgment of 21 Dezember 2016. Joined cases Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson, Peter Brice, Geoffrey Lewis, C-203/15 and C-698/15 –, para. 71 *et seq*.
[46] BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 16/13 –, paras. 44, 50.
[47] *ibid*, para. 45 *et seq*.
[48] *ibid*, para. 55 *et seq*.
[49] *ibid*, paras. 61 and 62.
[50] *ibid*, para. 50 *et seq.*
[51] *ibid*, para. 56.
[52] *ibid*, para. 63 *et seq*.

against the Charter.[53] The Charter can also be applied by the Federal Constitutional Court in cases that do not question the validity of an EU legal act but only the application of provisions by state bodies, namely ordinary courts, in conformity with EU law.[54] A constitutional complaint based on EU fundamental rights can be lodged with the Federal Constitutional Court against a judgment delivered by an ordinary court of last instance. Art. 93(1) no. 4a GG is to be interpreted to the effect that, in such cases as well, it allows for recourse to the Federal Constitutional Court on the basis of the claim that fundamental rights have been violated by state authority.[55] Thus, the Federal Constitutional Court fulfils its purpose to provide comprehensive and effective fundamental rights protection in cases where there is no other legal possibility to review whether the ordinary court of last instance adhered to EU fundamental rights.[56] The fact that ordinary courts' can (Art. 267(2) TFEU) or must (Art. 267(3) TFEU) obtain a preliminary ruling from the CJEU in itself cannot replace the subsequent legal protection by the Federal Constitutional Court.[57] If the standard for review set out by EU fundamental rights is neither inherently clear (*acte clair*) nor clarified by the CJEU (*acte éclairé*), the Federal Constitutional Court is obligated to bring the matter before the CJEU under Art. 267(3) TFEU.[58]

Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?

When applying domestic legislation that is determined by EU law as well as EU legislation itself, ordinary courts first have to establish whether the relevant provision is (based on) EU law that is fully predetermined or EU law that leaves leeway to design.[59] In case of the former, the courts must exclusively apply EU fundamental rights, in the latter, they must primarily apply German fundamental rights (see above). Courts may leave the differentiation undetermined if this turns out to be particularly difficult and if the two fundamental rights systems do not lead to different conclusions.[60] Where EU law leaves leeway to design, the fundamental rights of the Basic Law must be applied primarily but are to be interpreted in light of the CFREU.[61] As both fundamental rights spheres trace back to the common European fundamental rights traditions and have a common foundation provided by the ECHR, the Constitution's openness to European law does not call into question the

[53] BVerfG, Order of the First Senate of 6 November 2019 - 1 BvR 276/17 -, para. 42 *et seq*.
[54] *ibid*, para. 50 *et seq*.
[55] *ibid*, paras. 53 *et seq*., 58 *et seq*.
[56] *ibid*, para. 57 *et seq*.
[57] *ibid*, para. 62 *et seq*.
[58] *ibid*, para. 69 *et seq*.
[59] *ibid*, para. 81.
[60] *ibid*.
[61] BVerfG, Order of the First Senate of 6 November 2019 - 1 BvR 16/13 -, para. 60 *et seq*.

independence of German fundamental rights any more than the Constitution's openness to international law (see above).[62]

Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is it conditioned by making a request for preliminary ruling with the Court of Justice of the EU?

Both German and EU fundamental rights (as part of the current law) have to be observed equally by all courts and administrative bodies since all state authority is bound by justice and law (Art. 20(3) GG). Without reducing the impact of EU fundamental rights in Germany, for German fundamental rights this also arises out of Art. 1(3) GG. If a court concludes that a piece of statutory legislation on the validity of which its decision depends is incompatible with the Basic Law, it must suspend the proceedings and submit the question to the Federal Constitutional Court (Art. 100(1) GG). The courts are entitled to simply disregard the law considered to be unconstitutional for the dispute at hand, only where purely delegated legislation is concerned, i.e. ordinances or bylaws issued by the executive or self-governing bodies (delegated legislation). It is only for the Federal Constitutional Court to bindingly declare legislation to be void *erga omnes*; in this respect its decisions have force of law (§ 31(2) of the Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz* – BVerfGG).

If an ordinary court doubts the validity of an EU legal act that is directly applicable or underlies a German legal act due to a potential violation of EU fundamental rights, it is not only entitled but obligated, going beyond the wording of Art. 267(2) TFEU, to submit the question to the CJEU. Yet such a court is not authorised to declare actions of the EU institutions void itself.[63] An incomprehensible and manifestly untenable breach of the duty to request a preliminary ruling in Art. 267(3) TFEU can constitute a breach of the right to one's lawful judge under Art. 101(1) second sentence GG, which is equivalent to a fundamental right, and lead to a successful constitutional complaint.[64] The court cannot base its decision on an EU legal act that has been declared void by the CJEU, just as it cannot base it on a domestic law that has been declared unconstitutional by the Federal Constitutional Court. If an ordinary court incorrectly applies the fundamental rights, domestic or EU, relevant to the dispute at hand and its decision is based on this incorrect application, the disadvantaged party can lodge a constitutional complaint with the Federal Constitutional Court, provided the requirements in Art. 90 *et seq*. BVerfGG are satisfied (*Urteilsverfassungsbeschwerde*). According to the Federal Constitutional Court's most recent

[62] *ibid*, paras. 61 and 62, 57.
[63] CJEU, Judgment of 22 October 1987, Foto-Frost v. Hauptzollamt Lübeck-Ost, 314/85, para. 15 *et seq.*
[64] BVerfGE 147, 364 <378 *et seq*. para. 37 *et seq*.>.

case-law (*Recht auf Vergessen II*), such constitutional complaints can also be lodged claiming a violation of EU fundamental rights – which then apply exclusively – where areas of law that are fully determined by EU law are concerned.[65] Thus, a mechanism for protection by the Federal Constitutional Court that is of equal value is now guaranteed.

I.III National human rights catalogues

Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?

In Germany, fundamental rights are a component of the Basic Law of the Federal Republic of Germany and thus are included in the national Constitution. The Basic Law's fundamental rights catalogue is contained in Articles 1 to 19 GG. This position at the beginning of the Constitution already demonstrates the great importance afforded to fundamental rights by the Basic Law. Rights that are equivalent to fundamental rights can be found beyond the first 19 Articles, e.g. the right to one's lawful judge (Art. 101(1) second sentence GG) or the right to be heard (Art. 103(1) GG).[66] Art. 1 GG is the starting point for German fundamental rights doctrine; its three sections provide that human dignity is inviolable, that the German people acknowledge inviolable and inalienable human rights, and that all state authority is bound by the fundamental rights as directly applicable law. These important foundational statements in Art. 1 GG are covered by the eternity clause in Art. 79(3) GG and are thus part of the unchanging core constitutional identity.

The Basic Law's fundamental rights (as well as the rights that are equivalent to fundamental rights) are public rights of the individual vis-à-vis state authority (subjective rights). The constitutional complaint as a remedy ensures their justiciability.[67] Anyone who claims that an act of state authority has violated their fundamental rights can lodge such a constitutional complaint with the Federal Constitutional Court once recourse to the ordinary courts has been exhausted. In terms of legal doctrine, this is based on the premise that any interference with a fundamental right or with its scope of protection must be justified.[68] There are different justifications for interferences with different fundamental rights that depend on whether restrictions of the fundamental right require an ordinary, a qualified, or no statutory provision.[69] In case no requirement for a statutory provision is set out in the

[65] BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 276/17 –, para. 50 *et seq*.
[66] cf. Art. 20(4), Art. 33, Art. 38 GG, Art. 101, Art. 103 and Art. 104 GG.
[67] According to the wording of Art. 93(1) no. 4a GG, a constitutional complaint can also be lodged on the basis of a violation of the rights that are equivalent to fundamental rights mentioned above.
[68] Jarass, in: Jarass/Pieroth, Grundgesetz-Kommentar, 15th ed. 2018, introductory remarks before Art. 1, para. 37.
[69] *ibid*., para. 38; Kingreen/Poscher, Grundrechte, Staatsrecht II, 35th ed. 2019, para. 304 *et seq*.

Basic Law, a fundamental right can only be restricted on the basis of limitations inherent in the Basic Law, which means that it must be balanced against other legal interests with constitutional status. The question of who can hold a fundamental right is also significant, as the Basic Law distinguishes between fundamental rights afforded to anyone and those afforded only to Germans. Where EU law prohibits discrimination, however, citizens of EU Member States have to be treated like Germans. Furthermore, the exclusion of foreign legal entities from the legal ability to hold fundamental rights set out in Art. 19(3) GG does not extend to legal entities based inside the EU insofar as the scope of EU law is concerned.[70] In all other cases, foreigners may only invoke fundamental rights afforded to anyone and on a subsidiary basis assert a violation of their general freedom of action that is protected as a fundamental right.[71]

Given their subjective dimension and the diversity of their contents, fundamental rights serve various functions. Primarily, they are defensive rights of the citizen against the state, allowing for the exercise of individual freedoms. In addition, fundamental rights can also entail obligations for the state to take positive measures (*Leistungsfunktion*), provide protection (*Schutzfunktion*) and entail obligations for the state to facilitate the exercise of fundamental rights (*Ausgestaltungsfunktion*). The objective dimension of fundamental rights is also relevant in this context, since they are not only subjective rights but also constitute an objective order of values for the entire German legal order.[72] With regard to fundamental rights, this objective dimension primarily becomes relevant through the indirect horizontal effects (*mittelbare Drittwirkung*) by which fundamental rights affect legal relationships between private actors: ordinary courts must give effect to fundamental rights in their interpretation of ordinary law, in particular by means of general clauses contained in private law provisions and legal concepts that are not precisely defined in statutory law. Where this results in conflicting fundamental rights positions, these must be considered in terms of how they interact and must be balanced in accordance with the principle of practical concordance (*praktische Konkordanz*), taking into account the circumstances of the individual case.[73]

What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?

[70] cf. on the various doctrinal approaches through which this should be achieved: Sachs, GG, 8th ed. 2018, before Art. 1, para. 73; BVerfGE 129, 78, 96 *et seq*. on legal entities.
[71] BVerfGE 78, 179 <196 and 197>; 104, 337 <346>; on the treatment of legal entities based in the EU in the context of the prohibition of discrimination in Art. 18 TFEU see BVerfGE 129, 78 <94 *et seq*.>. On the fundamental rights protection for EU citizens as natural persons cf. Dreier, in: Dreier, Grundgesetz-Kommentar, 3rd ed. 2013, introductory remarks before Art. 1 GG, para. 115 *et seq*. with further references
[72] BVerfGE 7, 198 <205 *et seq*.>.
[73] BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 16/13 –, para. 76 with further references.

Technically, the historical creation of the Basic Law's fundamental rights catalogue came along with the adoption and coming into force of the Basic Law in May 1949 as well as prior deliberations on the Constitution by the Parliamentary Council (*Parlamentarischer Rat*). That does not mean, however, that the development of fundamental rights in the German legal sphere or fundamental rights traditions in other legal systems did not influence deliberations in the Parliamentary Council. Thus, the Basic Law's fundamental rights catalogue draws on Western traditions influenced by the English, French, and US legal systems as well as the German history of fundamental rights, e.g. the fundamental rights provided for by the 1849 Frankfurt Constitution (known as the *Paulskirchenverfassung*).[74] One of the focal points of the Parliamentary Council's deliberations was the discussion on how to deal with the fundamental rights contained within the 1919 Weimar Constitution (*Weimarer Reichsverfassung*).[75] In comparison, the Basic Law's fundamental rights were to be developed further and strengthened; restrictions of fundamental rights were not to be permissible simply on the basis of ordinary statutes (*allgemeiner Gesetzesvorbehalt*).[76] These fundamental rights were to confer rights upon individuals that bind all state authority and be actionable by individuals. This is expressed in Art. 1(3) GG, according to which "[t]he following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." For the purposes of post-World War II constitutional law-making, the emphasis on human dignity in Art. 1(1) GG, as an explicit antithesis to the Nazi dictatorship, formed the foundation for the Basic Law and put the individual at the centre of the new societal and state order.[77] The draft of the Basic Law produced at Herrenchiemsee read: "The state exists for the sake of the individual; the individual does not exist for the sake of the state." [original quote in German][78] Numerous fundamental rights guarantees were created in light of the Nazi reign of terror, e.g. the constitutional protection from expatriation as a reaction to the deprivation of citizenship imposed on Jewish citizens in the Third Reich, which is now guaranteed by the prohibition of discrimination in Art. 3(3) first sentence GG.

What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?

In Germany, fundamental rights are part of the Constitution and thus, in principle, they can only be amended in accordance with the rules on constitutional amendments (Art. 79 GG).

[74] On this topic Pieroth, Die Grundrechte des Grundgesetzes in der Verfassungstradition, in: Handbuch der Grundrechte, vol. 2, § 25, paras. 25-58.
[75] cf. in this respect *ibid*, para. 24.
[76] *ibid*, para 24.
[77] *ibid*, para. 59.
[78] Dreier, in: Dreier, Grundgesetz-Kommentar, 3rd ed. 2013, Art. 1(1) GG, para. 23.

Whilst the eternity clause in Art. 79(3) GG directly protects only Art. 1 GG,[79] the latter is the starting point for the understanding of fundamental rights in Germany; thus, any amendments to fundamental rights are generally subject to narrow limits. At any rate, amendments to fundamental rights that encroach on the human dignity dimension of the respective fundamental right are incompatible with Art. 79(3) GG in conjunction with Art. 1(1) GG.[80] Of the numerous constitutional amendments, few concerned fundamental rights. The amendments of 1956 in the context of rearmament (*Wiederbewaffnung*) and the constitutional provisions on emergencies (so-called *Notstandsverfassung*) led to a restriction of fundamental rights in the context of military and alternative service and enabled certain activities of constitutional protection (*Verfassungsschutz*) and intelligence services. The introduction of Art. 16a GG in 1993 replaced the unconditional right to asylum with the heavily restricted right of asylum for persons persecuted on political grounds. The fundamental right to inviolability of the home in Art. 13 GG was amended to allow for the so-called "major eavesdropping" of 1998 (*Großer Lauschangriff*). The reunification of Germany in 1990 also did not fundamentally change the character of the Basic Law. The desire expressed in the Unification Treaty (*Einigungsvertrag*) to create social fundamental rights was not acted upon. Yet equality rights were developed further, so as to implement suggestions made by the Joint Constitutional Commission (*Gemeinsame Verfassungskommission*). In 1994, a duty to promote the actual implementation of equal rights for men and women as well as the prohibition of disadvantaging persons with disabilities were added to the prohibition of discrimination in Art. 3 GG. The Federal Constitutional Court's case-law has shaped and advanced the implementation of fundamental rights to a far greater extent than the rather few formal amendments to the fundamental rights catalogue. The Federal Constitutional Court favours a dynamic interpretation of the fundamental rights, guided by their wording, which attempts to account for changes in society. Most prominently, these include the diversification of lifestyles, digitalisation and new forms of communication arising from it, as well as Europeanisation accompanied by the partial overlapping of fundamental rights, all of which demand the internationalisation of fundamental rights and an adjustment of their scope of protection.[81]

I.IV The mutual relationship between different catalogues of human rights

[79] BVerfGE 30, 1 <26>.

[80] BVerfGE 30, 1 <25 and 26>; Murswiek, Zu den Grenzen der Abänderbarkeit von Grundrechten, in: Handbuch der Grundrechte, vol. 2, § 28, para. 32 *et seq*.

[81] Kingreen/Poscher, Grundrechte, Staatsrecht II, 35th ed. 2019, para. 43 *et seq*.; see also Murswiek, Zu den Grenzen der Abänderbarkeit von Grundrechten, in: Handbuch der Grundrechte, vol. 2, § 28, para. 85.

Can you give examples from the case law of your court related to the use of any of the international catalogues?

International human rights treaties, particularly the ECHR and the ECtHR's applicable case-law (see I.1 above), increasingly influence the interpretation of the fundamental rights by ordinary courts as well as by the Federal Constitutional Court. The fundamental rights provided for in the Basic Law are the starting point for the interpretation of constitutional law and, according to the Constitution's openness to international law, they are to be understood in accordance with international human rights protections as far as possible. An interpretation that is open to international law serves as a connection to international human rights developments, which in turn may provide guidance for a "deeper understanding of fundamental rights and, potentially, the remedying of a judiciary stuck in its ways (...)" [original quote in German].[82]

The following key decisions delivered by the Federal Constitutional Court concern the relationship between the system of fundamental rights and international human rights treaties and should be noted as particularly instructive and important examples. In the 2004 *Görgülü* case, the Federal Constitutional Court (for the first time) held that a violation of Art. 6 GG (parental rights) in conjunction with Art. 20(3) GG had occurred when a German family law court disregarded a prior decision of the ECtHR (in the same case) to afford the father of a minor access to his son under Art. 8 ECHR.[83] In a judgment from 2011, the Federal Constitutional Court reaffirmed that the ECtHR's interpretation of the ECHR serves as guideline for the interpretation of fundamental rights.[84] It held that it is no longer possible to interpret fundamental rights in a manner open to the Convention (only) where such an interpretation no longer appears tenable according to the recognised methods of interpretation of statutes and of the Constitution.[85] The Federal Constitutional Court decided that individual domestic provisions on retrospective decisions to impose preventive detention (*nachträgliche Sicherungsverwahrung*) on convicted offenders who are deemed to be permanently dangerous even after they have served their sentence violated German fundamental rights.[86] The Federal Constitutional Court referred to value judgements made by Art. 5 and Art. 7(1) ECHR which strengthen the considerations pertaining to the protection of legitimate expectations and took into account an ECtHR decision delivered against Germany in a similar case.[87] In a 2018 judgment concerning the ban on strike action

[82] Dreier, in: Dreier, Grundgesetz-Kommentar, 3rd ed. 2013, Art. 1(2) GG, para. 21 with further references on case-law.
[83] BVerfGE 111, 307.
[84] BVerfGE 128, 326 <367 *et seq*.>.
[85] cf. BVerfGE 128, 326 <371>.
[86] BVerfGE 128, 326.
[87] cf. BVerfGE 128, 326 <375 and 376, 380, 391 *et seq*.>.

for civil servants in Art. 33(5) GG, the Federal Constitutional Court emphasised the Basic Law's openness to international law.[88] It held that the impact of the direction and guidance provided by the ECHR is particularly strong where the ECtHR has already decided similar cases in relation to the same state. Beyond this impact on similar cases, the direction and guidance must also be reflected by reviewing one's own legal order and by adopting the principal value judgements formulated by the ECtHR.[89] In the following, the Federal Constitutional Court examined extensively why the ban on strike action for civil servants is compatible with Art. 11(1) ECHR and the applicable ECtHR case-law, and carried out an in-depth analysis of the reasons for justification in Art. 11(2) ECHR.

Beyond this, the Federal Constitutional Court's case-law is influenced by other international human rights treaties as well. Notably, it has relied on the Convention on the Rights of Persons with Disabilities (CRPD) especially in more recent decisions. In 2019, the Federal Constitutional Court held that the provisions excluding persons from voting rights who are placed under full guardianship or who are confined in a psychiatric hospital after committing an offence were unconstitutional, as they violated the fundamental right to equal suffrage (Art. 38(1) first sentence GG) and the prohibition of discrimination on the grounds of disability (Art. 3(3) second sentence GG). Yet it also held that the exclusion from voting rights of persons of whom it is certain that they are incapable of participating in political communication processes may be justified under constitutional law and thus permissible.[90] The Court continued that, in this respect, international human rights treaties by which Germany is bound do not create restrictions going beyond those of the Basic Law.[91] With reference to the CRPD, including the English and French versions,[92] the Federal Constitutional Court analysed Art. 29 lit. a CRPD and Art. 12 CRPD. The Court opposed the view held by the Committee on the Rights of Persons with Disabilities that it is generally not permissible to restrict the voting rights of persons with disabilities regardless of the persons' decision-making abilities and did not follow this view in its decision. While statements issued by such treaty bodies have significant weight, these bodies lack the mandate to issue statements regarding the interpretation of treaties that bind international or domestic courts.[93] The Court held that the corresponding provision in Art. 25 ICCPR did not require any tightening of the constitutional standards for exclusions from voting rights either.[94]

[88] BVerfGE 148, 296 <350 *et seq*. para. 126 *et seq*.>.
[89] BVerfGE 148, 296 <380 para. 173>.
[90] BVerfG, Order of the Second Senate of 29 Januar 2019 – 2 BvC 62/14 –.
[91] *ibid*, para. 63.
[92] *ibid*, para. 72.
[93] *ibid*, para. 75 *et seq*.
[94] cf. in depth *ibid*, para. 68.

Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?

In principle, fundamental rights of the CFREU have precedence of application (*Anwendungsvorrang*) over domestic fundamental rights in cases that fall within the scope of the Charter.[95] Only where EU law allows for leeway to design in its implementation, may the primary application of German fundamental rights in light of fundamental rights of the European Union (see I.II. above), and thus a tilting of the balance from precedence of application towards an interplay of both fundamental rights spheres, be considered. The precedence of application is recognised subject to the requirement that the national constitutional identity be retained; with regards to fundamental rights, the relevant element of the constitutional identity is the guarantee of human dignity. In individual cases, human dignity may also come into play against legal acts in areas of Union law that are fully harmonised, unless a violation of the constitutional identity can be avoided by interpreting the act in light of the EU fundamental rights.[96] It is also conceivable that an act is held to be *ultra vires* if interpretation of the EU fundamental rights leads to an extension of the CFREU's scope that is not covered by the underlying treaties.[97]

The protections afforded by the ECHR rank below the Constitution as they have been incorporated by a federal statute (see above I.I.). The Constitution's openness to international law demands that ECHR rights, as interpreted by the ECtHR, are taken into account when interpreting the content and scope of fundamental rights and rule-of-law principles, as long as this does not restrict or diminish the basic protection offered by the Basic Law, which would not be the intent of the Convention itself (Art. 53 ECHR).[98]

Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary.)

A distinction is drawn between areas which are determined entirely, partially, or not at all by EU law so that, respectively, only EU fundamental rights, primarily German fundamental rights, or exclusively German fundamental rights are applicable. The ordinary courts must determine this when applying the relevant law[99] or otherwise submit the question to the

[95] Most recently confirmed in BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 276/17 –, para. 47.
[96] cf. BVerfGE 140, 317 <334 *et seq*. para. 36 *et seq*.>; BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 276/17 –, para. 91.
[97] cf. BVerfGE 133, 277 <316 para. 91>.
[98] BVerfGE 111, 307 <317>.
[99] The question whether an area of implementation of EU law is concerned, with the consequence that the Charter is applied in principle, may remain unanswered, however, if EU law does leave room for the application

CJEU. Following a decision in an ordinary court of last instance, the losing party can lodge a constitutional complaint based on the substantiated claim that the decision caused a violation of a domestic or an EU fundamental right. The complainant merely has to present the facts of the violation, naming the 'correct' fundamental rights catalogue is not required.[100] If it becomes apparent during the constitutional complaint proceedings that the ordinary court was wrong to presume that there was no scope for the application of German fundamental rights, this in itself constitutes a violation of fundamental rights.[101] The Federal Constitutional Court is competent to review this without restrictions and is not limited to reviewing whether the court's decision was arbitrary.[102]

As set out above, regarding the ECHR there is a duty to interpret domestic fundamental rights in a way that is compatible with the Convention. There is no need to delimit their respective scope of application from the outset. Germany and all its official bodies applying the law are always bound by the ECHR and the ECtHR's applicable case-law, which of course only set a minimum standard. The standards set out in the ECHR take effect in the domestic legal order through the interpretation of German fundamental rights in conformity with the Convention - within the boundaries set out above. Thereby, conflicts can usually be avoided.

II. SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS[103]

II.I Right to life

What is the original wording of the provision protecting this right in your national catalogue?

The central provision of the Basic Law is **Art. 2(2) first sentence GG**:

Every person shall have the right to life and physical integrity.

Is it possible to restrict the right? If so, how and under what conditions?

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of domestic fundamental rights, BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 16/13 –, para. 71. Furthermore, according to general procedural law provisions, it does not have to be determined whether an area of EU law is fully harmonised or allows leeway to design either, if the application of the different fundamental rights does not lead to differing results, BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 276/17 –, para. 81.

[100] BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 276/17 –, para. 84.

[101] *ibid*, para. 82.

[102] *ibid*.

[103] The special part of this report was prepared by Prof. Dr. Henning Radtke.

The right to life may be restricted only on the basis of statutory law (requirement of a statutory provision – *einfacher Gesetzesvorbehalt*). This right may thus be restricted by a formally adopted act of parliament[104].

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The Federal Constitutional Court has dealt with several aspects of the right to life. When the Court reviewed the constitutionality of statutory provisions on the termination of pregnancy[105], it made a decision as to the point in time at which human life begins and held that, in any case, human life exists at the 14th day after conception given that foetal development is an "ongoing process" without "distinct stages".[106] Therefore, the foetus is already entitled to the right to life from the 14th day after conception.[107]

Another aspect addressed in the case-law of the Federal Constitutional Court concerns the relationship between the right to life and human dignity (Art. 1(1) GG); the Court considers these to be closely linked, holding that where human life exists, it is afforded human dignity[108]. The Court emphasised this close relationship in its judgment on the Aviation Security Act (*Luftsicherheitsgesetz*)[109]. In this judgment, the Court reviewed a statutory authorisation to shoot down aircrafts being used against human lives. It found that such an authorisation was incompatible with the Basic Law and thus void given that it "objectified" and "disenfranchised" passengers.[110]

A Federal Constitutional Court decision regarding a provision criminalising assisted suicide services (§ 217 of the Criminal Code, *Strafgesetzbuch* – StGB) is currently pending.[111]

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The Federal Constitutional Court and the European Court of Human Rights emphasise that the right to life is of paramount value[112] and "ranks as one of the most fundamental

[104] BVerfGE 22, 180 <219>.
[105] BVerfGE 39, 1.
[106] BVerfGE 39, 1 <37>; largely confirmed in BVerfGE 88, 203 <251 and 252>.
[107] Regarding Austrian constitutional law, a different view is held by the Austrian Constitutional Court (*Österreichischer Verfassungsgerichtshof* – VerfGH) G 8/74 of 11 October 1974, *Europäische Grundrechtezeitschrift* – EuGRZ 1975, 74 <77 and 78>.
[108] BVerfGE, 39, 1 <41>; 88, 203, <251>.
[109] BVerfGE, 115, 118.
[110] BVerfGE, 115, 118 <154>.
[111] This concerns several constitutional complaint proceedings, including 2 BvR 2347/15.
[112] BVerfGE 39, 1 <42>; 49, 24 <53>; 46, 160 <164>.

provisions" [113].[114] There appear to be no differences as to what is protected by this right.[115] The European Court of Human Rights left unanswered the question of whether a foetus may qualify for protection under Art. 2 ECHR given that the contracting parties have a margin of appreciation in this respect.[116]

II.II Freedom of expression

What is the original wording of the provision protecting this right in your national catalogue?

The central provisions of the Basic Law are **Art. 5(1) first sentence and Art. 5(2) GG**:

(1) **[1]Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources.** [2]… [3]…

(2) **These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour.**

Is it possible to restrict the right? If so, how and under what conditions?

Pursuant to Art. 5(2) GG, freedom of expression can be restricted in three constellations: on the basis of "general laws", "provisions for the protection of young persons" or "the right to personal honour".

Art. 5(2) first alternative GG – "general laws" as limitation:

According to the Federal Constitutional Court's case-law, "general laws" are laws that do not prohibit a specific opinion as such and are not directed against expressing this opinion as such, but that serve to protect a legal interest that must be protected in its own right, without regard to any specific opinion.[117] This legal interest must be universally protected in the legal order regardless of whether it can be violated by expressions of opinions or in any other manner.[118]

The relevant criterion for a "general law" is whether it is based on the content of an opinion. If the law addresses a certain conduct without having regard to the content of the expression of an opinion, it is evidently a "general law". If, however, the law in question

[113] ECtHR (GC), McCann and others v. United Kingdom, Judgment of 27 September 1995, No. 18984/91, § 147.
[114] Alleweldt, in: Dörr/Grote/Marauhn, EMRK/GG Konkordanzkommentar, 2nd ed. 2013, Chapter 10, para. 7.
[115] *ibid*.
[116] ECtHR, Boso v. Italy, Judgment of 5 September 2002, No. 50490/99, Case Reports 2002-VII, § 441 (458 and 459), ECtHR (GC) Vo v. France, Judgment of 8 July 2004, No. 53924/00, Case Reports 2004-VIII, §§ 82–85.
[117] cf. BVerfGE 7, 198 <209 and 210>; 28, 282 <292>; 71, 162 <175 and 176>; 93, 266 <291>; 124, 300 <321 and 322>.
[118] cf. BVerfGE 111, 147 <155>; 117, 244 <260>.

addresses the content of an opinion, it will be relevant whether it protects a legal interest that is protected as such within the legal order. If the legal interest is protected as such, it can be presumed that the law is not directed against a specific opinion, but is neutral and general. Accordingly, the Federal Constitutional Court held that various provisions are indeed general laws, such as the provisions on the duty of political restraint incumbent upon soldiers and civil servants,[119] the criminalisation of disparagement of the state and its symbols pursuant to § 90a StGB,[120] and the criminalisation of insult pursuant to § 185 StGB.[121]

Whether a law is "general" cannot be assessed schematically. Rather, it must be assessed from an overall perspective. Such an assessment depends on the extent to which a law is limited to abstract and content-related criteria that can be applied to various attitudes, and the extent to which it is based on distinctions specifically related to an attitude, in particular distinctions related to ideology.[122] At the same time, a "general law" authorising interferences with freedom of expression must reflect the prohibition of disadvantaging or favouring someone on the basis of political opinions (Art. 3(3) first sentence GG) , which gives rise to a specific and strict prohibition of discrimination against specific opinions.

Nevertheless, in light of the history of Germany and the legislative history of the Basic Law, the Federal Constitutional Court allows one single exception to the prohibition of special laws: this exception applies to provisions that are specifically directed against the expression of the approval of the Nazi reign of violence and tyranny.[123] For instance, pursuant to § 130(4) StGB, it is a criminal offence to, publicly or in an assembly, disturb the public peace in a manner that violates the dignity of victims of the Nazi regime by approving of, glorifying or justifying the Nazi reign of violence and tyranny. This criminal-law provision is clearly directed against a specific opinion and is thus not a "general law" within the meaning of Art. 5(2) of the Basic Law. § 130(4) StGB and the interference with freedom of expression linked to it is constitutional nonetheless, given that propaganda for and approval of the historic Nazi reign of violence and tyranny have an impact that goes far beyond general tensions in public debate and given that it is not covered by general rules regarding the limitations of freedom of expression. In Germany, approval of the Nazi regime is an inward attack on the identity of the community with the potential to threaten peace. Therefore, it is not comparable to other expressions of opinion and may also be a cause for profound concern, not least in other countries. Given this unique constellation that concerns the identity of the Federal Republic of Germany shaped by its own history and that cannot be

[119] cf. BVerfGE 28, 282 <292>; 39, 334 <367>.
[120] cf. BVerfGE 47, 198 <232>; 69, 257 <268 and 269>.
[121] cf. BVerfGE 93, 266 <291>.
[122] cf. BVerfGE 124, 300 <324>.
[123] cf. BVerfGE 124, 300.

applied to other conflicts, the prohibition of special laws deriving from Art. 5(2) GG is not applicable.[124]

Art. 5(2) second alternative GG – "provisions on the protection of young persons" as limitation:

Print, audio or visual media products can jeopardise the undisturbed development of young persons, for example if they glorify violence or crime, incite racist hatred, glorify war or portray sexual practices in a grossly indecent manner. The legislature may take measures to prevent young persons from freely accessing such media products. However, statutory provisions designed to protect young people must observe the fundamental significance of the rights guaranteed in Art. 5(1) GG for the free democratic state order and satisfy the principle of proportionality. Whether a limitation of freedom of expression is permissible must be determined in a balancing of interests between comprehensive fundamental rights protection on the one hand and the interest in effective protection of young persons, which is accorded high standing under the Constitution, on the other.[125] In particular, the legislature is barred from creating special laws (*Sonderrecht*)[126] to protect young persons, which disregard the neutrality of the state.

Art. 5(2) third alternative GG – "provisions on the protection of personal honour" as limitation:

The Federal Constitutional Court merges the right to "personal honour" with the limitations imposed by "general laws";[127] thus, the standards set out in relation to this limitation generally also apply here.

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

As set out in the previous part of the text, the Federal Constitutional Court has extensively dealt with the limitations of freedom of expression. In addition, the Court extended the scope of the fundamental right to freedom of expression in its *Lüth* case[128]. Going beyond the traditional liberal concept of fundamental rights as mere defensive rights of citizens against state interference, the Court has since held that fundamental rights have an indirect horizontal effect: the fundamental rights of the Basic Law are decisions on objective constitutional values which permeate ordinary law, with the consequence that fundamental

[124] cf. *ibid*. <329>.
[125] cf. BVerfGE 30, 336 <347 and 348>.
[126] In this regard, the standards explained with respect to "general laws" apply; cf. BVerfGE 124, 300 <326 and 327>.
[127] cf. BVerfGE 124, 300 <326 and 327>; Grabenwarter, in: Maunz/Dürig, Grundgesetz-Kommentar, 88th supplement August 2019, Art. 5 para. 195.
[128] BVerfGE 7, 198.

rights, while they do not apply directly between private actors, have a bearing on relationships under private law, in particular through blanket provisions within private law. With regard to freedom of expression, this permeating effect on private law follows from the fundamental significance of this freedom for a liberal democratic state.[129] The Federal Constitutional Court addressed the relationship between freedom of expression and the protection of personal honour in numerous decisions, including in the *Soldiers Are Murderers* case[130].

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The scope of protection of Art. 5(1) of the Basic Law extends to assertions of fact only to the extent that these are required to form an opinion. Manifestly incorrect information and deliberately false assertions of fact are not protected by freedom of expression.[131] By contrast, in the case-law of the ECtHR, the scope of protection of freedom of expression is defined more broadly. In principle, Art. 10 ECHR extends to any human behaviour that includes communication. There are no differentiations based on the content of an opinion or the form in which it is conveyed.[132] Freedom of expression is almost exclusively restricted through detailed determination of the specific limitations set out in Art. 10(2) ECHR, in exceptional cases through the general prohibition of abuse of rights laid down in Art. 17 ECHR. Furthermore, the structure of the limitations is different. Art. 10(2) ECHR entails a detailed and exhaustive enumeration of aims and any state measure interfering with freedom of expression must further the realisation of those aims. In structural terms, these only partially correspond to the limitations of protection of young people and personal honour set out in Art. 5(2) GG.[133] The other aims for which state interference is permissible under Art. 10(2) ECHR have to be included in the term "general laws" in the system of limitations under Art. 5(2) GG.

II.III Right to privacy/right to respect for private life/right to private life

What is the original wording of the provision protecting this right in your national catalogue?

[129] *ibid*. <208>.
[130] BVerfGE 93, 266.
[131] cf. BVerfGE 54, 208 <219>; 61, 1 <8>; 85, 1 <15>; 90, 241 <247>.
[132] cf. ECtHR, Prager and Oberschlick v. Austria, Judgment of 26 April 1995, No. 15974/90; Oberschlick v. Austria, Judgment of 1 July 1997, No. 20834/92; Standard Verlags GmbH and Krawagna-Pfeifer v. Austria, Judgment of 2 November 2006, No. 19710/02; Grote/Wenzel, in: Dörr/Grote/Marauhn, EMRK/GG Konkordanzkommentar, 2nd ed. 2013, Part II, Chapter 18, para. 25.
[133] cf. Grote/Wenzel, in: Dörr/Grote/Marauhn, EMRK/GG Konkordanzkommentar, 2nd ed. 2013, Part II, Chapter 18, para. 76.

Under the Basic Law, the right to private life is not subject to one single fundamental right. The activities protected by Art. 8 ECHR according to the ECtHR's case-law are protected by various fundamental rights, primarily by the general freedom of action (Art. 2(1) GG), the right to life and physical integrity (Art. 2(2) first sentence GG), the right to liberty of the person (Art. 2(2) second sentence GG), the protection of marriage and the family (Art. 6(1) GG), the right of parents to care for and bring up their children (Art. 6(2) GG), the right to inviolability of the privacy of correspondence and telecommunications (Art. 10 GG) and the right to inviolability of the home (Art. 13 GG). According to the Federal Constitutional Court, Art. 2(1) GG in conjunction with Art. 1(1) GG forms the basis of the general right of personality, which is a distinct fundamental right protecting a broad domain of private life that is inviolable.

With regard to the protection of family life, **the greatest overlap with the protections afforded by Art. 8 ECHR exists with Art. 6 GG**.

> **Article 6 of the Basic Law**
>
> **(1) Marriage and the family shall enjoy the special protection of the state.**
> **(2) [1]The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. [2]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.**
> **(4) Every mother shall be entitled to the protection and care of the community.**
>
> **(5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.**

Is it possible to restrict the right? If so, how and under what conditions?

The limitations of the various guarantees – listed above – are set out differently.

Pursuant to Art. 2(1) GG, the general right of personality may be restricted only on the basis of statutory law.[134] In this respect, the principle of proportionality is particularly important as a limitation on limitations; when the general right of personality is concerned, the principle of proportionality is applied more strictly than in the case of the general freedom of action[135]

The protection of marriage and the family under Art. 6(1) GG is guaranteed without explicit reservation.[136] Restrictions can only be justified on the basis of conflicting constitutional

[134] cf. BVerfGE 97, 228 <269>; 99, 185 <195>; 120, 180 <201>.
[135] Jarass, in: Jarass/Pieroth, Grundgesetz Kommentar, 13th ed. 2014, Art. 2 paras. 58 and 62.
[136] BVerfGE 31, 58 <68 and 69>.

provisions, in particular, fundamental rights of other persons. The parental right pursuant to Art. 6(2) first sentence GG is designed as both a right and a duty (*Pflichtrecht*); parents must be guided by the best interests of the child.[137] Under Art. 6(2) second sentence GG, it is incumbent upon the state to watch over the parents in the performance of this duty. Interferences with the constitutionally guaranteed parental right can be justified by the state's function as a guardian.[138] Pursuant to Art. 6(3) GG, it is permissible for the state to order the separation of a child from its parents only pursuant to statutory law and only if the best interests of the child is seriously jeopardised and the principle of proportionality is strictly observed.[139] In addition, according to German fundamental rights doctrine, Art. 6(1) and (2) GG entail so-called institutional guarantees. According to these guarantees, the legislature is not entirely free in shaping the – constitutionally guaranteed – legal institutions of marriage and parenthood, but must observe the structural principles arising from the Constitution itself.[140]

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The Federal Constitutional Court has extensively addressed the different protections set out in the Basic Law corresponding to the right to respect for private and family life. In individual cases, the Court has additionally referred to comparable protections in other human rights catalogues.[141]

In its 1973 *Lebach* decision, the Federal Constitutional Court established the general right of personality[142] as follows, and further differentiated this right in subsequent decisions:

"The right to the free development of one's personality and human dignity guarantee everyone an autonomous domain of private life in which they can develop and preserve their individuality."

In the *Census* case from 1983, the Court derived the right to informational self-determination from the general right of personality[143]:

"The different dimensions of the right of personality as outlined in the Court's case-law do not exhaustively define the content of the right. It encompasses [...], based on the notion of

[137] BVerfGE 60, 79 <88>; 107, 104 <117>; 121, 69 <92>.
[138] BVerfGE 107, 104 <117 and 118>.
[139] cf. BVerfGE 60, 79 <89 and 90>; 107, 104 <118>.
[140] cf. BVerfGE 62, 323 <330>; 105, 313 <345>; 108, 351 <364>.
[141] Reference to Art. 8 ECHR: BVerfGE 76, 1 <79 and 80>; 111, 307 <330 and 331>; 120, 180 <200 and 201>; 141, 186 <218 *et seq*.>; 142, 313 <348>); Reference to Art. 12 UDHR: BVerfGE 141, 220 <335>; Reference to Art. 17 ICCPR: BVerfGE, 76, 1 <81 and 82>.
[142] BVerfGE 35, 202 <220>.
[143] BVerfGE 65, 1 <41 and 42>.

self-determination, the authority of the individual to, in principle, decide themselves whether and to what extent to disclose aspects of their personal life."

The protection of private life has repeatedly been at issue in the review of so-called security laws by the Federal Constitutional Court.[144] Specifying the principle of proportionality, the Federal Constitutional Court has developed detailed requirements, in both substantive and procedural terms, for the collection, exploitation and sharing of data by the state.

The protection of gender identity derived from the general right of personality has repeatedly been at issue in Federal Constitutional Court decisions on the rights of transgender[145] and intersex[146] persons.

The scope of the protection of marriage and the family was at issue, for example, in a decision by the Federal Constitutional Court from 1987. It held that the prerequisite of having been married for at least three years applicable to certain cases of family reunification was disproportionate given that the public interests pursued by this prerequisite could not justify such a far-reaching disregard of family interests protected under Art. 6(1) and (2) first sentence GG.[147]

In the 2004 *Görgülü* case, which has already been mentioned in the General Part, the Federal Constitutional Court emphasised that a father's parental right under Art. 6 GG had been violated, when ordinary courts disregarded a prior decision of the ECtHR granting the same father such a right, on the one hand, and the interpretation of the complementary guarantee under Art. 8 ECHR put forward in that ECtHR decision, on the other hand.[148]

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The different system of limitations in the Basic Law on the one hand and the ECHR on the other hand result in differences in terms of legal doctrine; however, these differences often do not affect the actual court decisions, which have many parallels.[149] Under the Basic Law, the legislature has, given the theory of institutional guarantees, limited latitude to set out marriage and parenthood, particularly since the ECtHR adopts a limited standard of review in this area so as to respect the different concepts in contracting states.[150] While the ECtHR does not see any problem in also applying Art. 8 ECHR to biological parents, who are not the child's legal parents, the Federal Constitutional Court differentiates between the inclusion of

[144] BVerfGE 115, 320; 120, 274; 120, 378; 133, 277; 141, 220.
[145] BVerfGE 115, 1; 121, 175; 128, 109.
[146] BVerfGE 147, 1.
[147] BVerfGE 76, 1 <57 *et seq*.>.
[148] BVerfGE 111, 307 <330>.
[149] Marauhn/Thorn, in: Dörr/Grote/Marauhn, EMRK/GG Konkordanzkommentar, 2nd ed. 2013, Chapter 16: Privat- und Familienleben, para. 25.
[150] *ibid*.

biological parents who are not the legal parents under the scope of protection of Art. 6(2) GG and actually holding this fundamental right, which is reserved for legal parents.[151]

The outcome of decisions differs in cases where the ECtHR held that the domestic legal situation was incompatible with the Convention and the Federal Constitutional Court had not objected to the legal situation until the finding of the ECtHR. This concerned, for example, the possibility of an unmarried father to exercise custody[152], the right of access of a biological father who is not the legal father[153], effective legal protection against excessive length of proceedings in parent and child matters[154] as well as inheritance claims of children born outside of marriage[155]. However, the only case in which a different Federal Constitutional Court decision was rendered prior to the ECtHR decision was a case concerning parental custody of unmarried fathers, which the Federal Constitutional Court rendered in 2003.[156] In all other cases, the constitutional complaints were not admitted for decision by unanimous order of a Chamber of the Federal Constitutional Court. In a second decision concerning parental custody of unmarried fathers in 2010 the Federal Constitutional Court followed the decision of the ECtHR; it based that decision on new empirical findings disproving the assumptions which the legislature had used as the basis for the provisions applicable until then.[157]

The Federal Constitutional Court's case-law concerning the right of access, in particular the exclusion from access to one's children without any time limit, focusses on other aspects than the ECtHR's case-law. The ECtHR tends to emphasise the right of the parent who is entitled to have access to their children and the resulting positive obligations placed on the state to ensure the effective enforcement of the right of access that are also reflected in decisions on compulsory enforcement and requirements regarding the length of proceedings.[158] The case-law of the Chambers of the Federal Constitutional Court tends to accept that there is no access where it is in the best interest of the child, regardless of how it came about that access is against the best interest of the child.

II.IV Freedom of religion

[151] cf. BVerfGE 108, 82 <106 and 107>.
[152] ECtHR (GC), Zaunegger v. Germany, Judgment of 3 December 2009, No. 22028/04.
[153] ECtHR (GC), Anayo v. Germany, Judgment of 21 December 2010, No. 20578/07; Schneider v. Germany, Judgment of 15 September 2011, No. 17080/07.
[154] ECtHR (GC), Kuppinger v. Germany, Judgment of 15 January 2015, No. 62198/11.
[155] ECtHR (GC), Brauer v. Germany, Judgment of 28 Mai 2009, No. 3545/04; Mitzinger v. Germany, Judgment of 9 February 2017, No. 29762/10.
[156] BVerfGE 107, 150.
[157] BVerfGE 127, 132 <157 *et seq*.>.
[158] cf. ECtHR (GC), Moog v. Germany, Judgment of 6 October 2016, No. 23280/08 and others; Kuppinger v. Germany, Judgment of 15 January 2015, No. 62198/11; Tsikakis v. Germany, Judgment of 10 February 2011, No. 1521/06.

What is the original wording of the provision protecting this right in your national catalogue?

Article 4 GG reads as follows:

(1) Freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviolable.
(2) The undisturbed practice of religion shall be guaranteed.
(3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

Is it possible to restrict the right? If so, how and under what conditions?

The Basic Law does not entail any express limitation of freedom of faith and of conscience. Given that the Basic Law does not set out a requirement of a statutory provision to limit these freedoms, they may be restricted only by constitutional law that is in conflict with the exercise of the freedom in the individual case. Where the freedoms set out in Art. 4 GG and those in the conflicting constitutional-law provision cannot both be fully exercised, the principle of unity and consistency of the Constitution (*Einheit der Verfassung*) requires finding a careful balance between both constitutional rights by way of practical concordance.[159] Accordingly, interferences can be justified under constitutional law insofar as they serve to implement the constitutional interest conflicting with freedom of religion and are proportionate.

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Freedom of religion – which is part of the fundamental right to freedom of faith and freedom to profess a belief – is interpreted broadly by the Federal Constitutional Court.[160] Regardless of whether a religious or a non-religious belief is at issue, this fundamental right protects not only the inner freedom to believe or not believe, i.e. to profess a belief, to keep it private, to renounce one's previous belief and turn to another belief, but also the freedom to worship and to advocate and propagate one's belief. The undisturbed practice of one's religion forms part of freedom of faith and freedom to profess a belief, which is afforded both individuals and religious or ideological groups. The practice of one's religion includes not only any act of worship and observation of religious rituals such as church services, church collection, prayer, the reception of sacraments, procession, the display of church flags and the tolling of church bells, but also religious education, alternative religious and atheist ceremonies as well as other expressions of religious or ideological life.

[159] cf. BVerfGE 32, 98 <107 and 108>; 44, 37 <49 and 50>; 52, 223 <246 and 247>; 108, 282 <297>.
[160] cf. BVerfGE 24, 236 *et seq*.

The Federal Constitutional Court has repeatedly addressed the question whether barring teachers from wearing headscarves in class violates Art. 4(1) and (2) GG.[161] The Court attempts to find an appropriate balance of the interests protected by the Constitution – freedom of faith on the part of teachers, negative freedom of faith and freedom to profess a belief on the part of students and parents, the constitutionally guaranteed parental right and the state's educational mandate. The protection afforded by the fundamental right to freedom of faith and freedom to profess a belief guarantees teaching staff at interdenominational state schools the freedom to cover their head in compliance with a rule that is considered imperative in their religion, as may be the case for an Islamic headscarf.[162] A statutory ban at *Land* level on the expression of religious beliefs by outer appearance in an interdenominational state school merely because of the abstract potential of endangering a peaceful school environment or the neutrality of the state is disproportionate if such conduct can be plausibly attributed to a religious duty that is considered imperative. Rather, the constitutional guarantees require a restrictive interpretation of the ban to the effect that there must at least be a sufficiently specific danger to the protected interests. If there is a sufficiently specific risk or impairment of the peaceful school environment or the neutrality of the state in a considerable number of cases, there may be a need that must be acknowledged under constitutional law to generally ban expressions of religious beliefs by outer appearance not only in a specific case, but more generally in certain schools or school districts for a certain period. However, such a ban must then apply to all religious and ideological beliefs, and must in principle be indiscriminate.[163]

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Art. 4 GG and Art. 9 ECHR provide for different limitations. Unlike Art. 4 GG, Art. 9(2) ECHR expressly provides for limitations on the basis of statutory law. However, this difference is not very relevant in practice for two reasons: Firstly, according to German fundamental rights doctrine, it is possible to and the courts do restrict freedom of religion in order to protect other constitutional values that are in conflict with it. Secondly, the limitation provided for in Art. 9(2) ECHR is less relevant given that considerable limitations are assumed to be inherent in the scope of protection of Art. 9 ECHR, which make it unnecessary to directly apply Art. 9(2) ECHR.

[161] BVerfGE 108, 282 (Headscarf I); BVerfGE 138, 296 (Headscarf II); BVerfG, Order of the Second Chamber of the First Senate of 18 October 2016 – 1 BvR 354/11.
[162] cf. BVerfGE 138, 296 <328 para. 83>.
[163] cf. BVerfGE 138, 296 <340 *et seq.*, paras. 112 to 114>.

However, some differences remain. While the Federal Constitutional Court held that the displaying of crosses in the classrooms of compulsory state schools amounted to a violation of Art. 4(1) GG,[164] the ECtHR[165] granted the contracting states a wide margin of appreciation when it comes to the decision whether or not to perpetuate a tradition and to display a crucifix in a classroom, provided that it does not amount to indoctrination.[166] Furthermore, the ECtHR held that the ban on wearing a headscarf in class directed at Muslim teaching staff in state institutions was compatible with the freedom of religion.[167] The ECtHR held that such a ban pursued legitimate aims, namely the protection of the fundamental rights of others, public safety and the protection of public order. The ECtHR stated that the Islamic headscarf is a "powerful external symbol" and it cannot be denied outright that the wearing of a headscarf might have a "proselytising effect", and is thus difficult to reconcile with the principles of tolerance and equality.[168]

II.V Prohibition of discrimination

What is the original wording of the provision protecting this right in your national catalogue?

The central provision of the Basic Law is **Art. 3 GG**, which reads as follows:

> **(1) All persons shall be equal before the law.**
>
> **(2) [1]Men and women shall have equal rights. [2]The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.**
>
> **(3) [1]No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. [2]No person shall be disfavoured because of disability.**

Art. 6(5), Art. 28(1) second sentence, Art. 33(1) to (3) and Art. 38(1) first sentence GG contain specific prohibitions, which cannot be addressed in more detail here.

Is it possible to restrict the right? If so, how and under what conditions?

Art. 3 GG does not expressly provide for limitations. The limitations permissible under constitutional law and the prerequisites for applying such limitations differ with respect to the individual guarantees; they range from a prohibition of arbitrariness to a strict

[164] BVerfGE 93, 1.
[165] ECtHR (GC), Lautsi and others v. Italy, Judgment of 18 March 2011, No. 30814/06.
[166] cf. *ibid*.
[167] ECtHR, Dahlab v. Switzerland, Judgment of 15 February 2001, No. 42393/98.
[168] cf. *ibid*.

proportionality assessment. The details will be explained in light of the Federal Constitutional Court's relevant case-law in the following paragraphs.

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The Federal Constitutional Court has dealt with the interpretation and application of the fundamental rights provided for in Art. 3 GG in numerous decisions. Art. 3 GG entails several different requirements of equal treatment and prohibitions of differentiation that stand alone and – in contrast to the prohibition of discrimination of Art. 14 ECHR[169] – are not of an ancillary nature.

The general principle of equal treatment laid down in Art. 3(1) GG is a fundamental constitutive principle of the Basic Law,[170] whose essential elements are covered by the eternity clause under Art. 79(3) GG,[171] which means that it must not even be amended by the legislature competent to amend the Constitution. Art. 3(1) GG requires that the law accord equal treatment to matters that are essentially alike, and unequal treatment to matters that are essentially different.[172] Unequal treatment requires grounds justifying it. Such grounds exist where differences between the groups that are treated differently are of such significance or weight that they may justify unequal treatment.[173] Unequal treatment is particularly significant if it affects freedoms that are guaranteed by fundamental rights.[174] This has an impact on the requirements for justifying unequal treatment, ranging from more lenient requirements such as a mere prohibition of arbitrariness to strict proportionality requirements,[175] and thus on the standard of review adopted by the Federal Constitutional Court. When these requirements are applied in practice, a review on the basis of the principle of equal treatment demands, in particular, the establishing of reference groups and an assessment whether equal or unequal treatment of these groups is justified.

This interpretation of the principle of equality for the most part corresponds to the approach of the Court of Justice of the European Union (when it applies Art. 20 CFREU)[176] and the ECtHR.[177]

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[169] cf. ECtHR, Mitzinger v. Germany, Judgment of 9 February 2017, No. 29762/10, § 30.
[170] cf. BVerfGE 6, 257 <265>.
[171] cf. BVerfGE 84, 90 <121>; 94, 12 <34>.
[172] cf. BVerfGE 129, 49 <68> with further references.
[173] cf. BVerfGE 82, 126 <146>; 110, 412 <432>; 129, 49 <69>; 139, 285 <309> with further references.
[174] cf. BVerfGE 82, 126 <146>; 110, 412 <432>; 139, 285 <309> with further references.
[175] cf. BVerfGE 129, 49 <68>; 139, 285 <309> with further references.
[176] cf. CJEU, Judgment of 7 March 2017, Rzecznik Praw Obywatelskich (RPO), C-390/15, *Das deutsche Steuerrecht* – DStRE 2017, p. 1183, p. 1187, para. 53.
[177] cf. ECtHR, Mitzinger v. Germany, Judgment of 9 February 2017, Nr. 29762/10, § 10.

According to the Federal Constitutional Court's case-law, the requirement of equal treatment of men and women pursuant to Art. 3(2) GG generally corresponds to the prohibition of discrimination on the grounds of sex or gender laid down in Art. 3(3) first sentence GG.[178] As a fundamental national objective, Art. 3(2) GG entails an explicit requirement to treat men and women equally (Art. 3(2) second sentence GG), which goes beyond the prohibition of discrimination under Art. 3(3) GG.[179] Differentiating on the grounds of sex or gender is permissible in exceptional cases and only where it is absolutely necessary either to solve problems which can, by their nature, arise solely for men or women,[180] or where it is justified on the basis of a balancing with conflicting constitutional law.[181] In addition, the requirement of equal treatment entitles the legislature to compensate for factual (including indirect) disadvantages[182], which typically affect women, by enacting provisions that favour women.[183]

With respect to the criteria other than sex or gender listed in Art. 3(3) first sentence GG, it is disputed whether, pursuant to this provision, differentiation is only prohibited where it is directly tied to the respective criterion or whether indirect discrimination is prohibited as well.[184] In its Senate' case-law, the Federal Constitutional Court interprets Art. 3(3) first sentence GG to the effect that it prohibits tying a provision to the criteria listed in Art. 3(3) GG; accordingly, it solely concerns direct discrimination. Indirect discrimination must be measured against the general guarantee of the right to equality under Art. 3(1) GG.[185] As in cases of disadvantaging on the grounds of sex or gender, direct disadvantaging on the grounds of one of the other criteria listed in Art. 3(3) first sentence GG, can be justified by constitutional law that is in conflict with it or compelling reasons if proportionality is strictly observed.[186] Individual Chambers of the Federal Constitutional Court have held that indirect discrimination is also prohibited.[187]

[178] cf. BVerfGE 74, 163 <179>; 92, 91 <109>.
[179] cf. BVerfGE 92, 91 <109>.
[180] cf. *ibid*.;BVerfGE 114, 357 <367> with further references.
[181] cf. BVerfGE 92, 91 <109> with further references.
[182] cf. BVerfGE 113, 1 <16>; 138, 296 <354>.
[183] cf. BVerfGE 92, 91 <109> with further references.
[184] cf. Langenfeld, in: Maunz/Dürig, Grundgesetz Kommentar, Art. 3(3), para. 37 *et seq.* with further references, last updated: August 2019; *contra* Baer/Markard, in: v. Mangoldt/Klein/Starck, Grundgesetz Kommentar, 7th ed. 2018, Art. 3, para. 430.
[185] cf. BVerfGE 107, 257 <268>.
[186] cf. Langenfeld, in: Maunz/Dürig, Grundgesetz Kommentar, Art. 3(3), para. 72 with further references, last updated: August 2019.
[187] cf. Chamber Decisions of the Federal Constitutional Court, Kammerentscheidungen des Bundesverfassungsgerichts – BVerfGK 2, 36 <39>, however, the case at issue here could in fact also be considered to be direct discrimination.

Similarly, according to the CJEU's case-law, each of the prohibitions of discrimination set out in Art. 21(2) CFREU also extends to indirect or factual disadvantaging.[188] Therefore, the standards for justifying disadvantaging are less strict in the CJEU's case-law[189] than the standards for justifying direct disadvantaging set out by the Federal Constitutional Court. Yet conflicting decisions concerning the same case constellations cannot be found.

According to prevailing opinion, the prohibition of disadvantaging on the basis of disability pursuant to Art. 3(3) second sentence GG also extends to factual and indirect discrimination.[190] A disadvantaging of persons with disabilities can only be justified by compelling reasons, if at all.[191]

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Given the different legal assessments of the various prohibitions of discrimination, the similarities and differences between the case-law of the CJEU, the ECtHR and the Federal Constitutional Court have already been set out above in the context of the individual prohibitions.

II.VI Right to liberty

What is the original wording of the provision protecting this right in your national catalogue?

The central provision of the Basic Law is **Art. 2(2) second and third sentence GG**:

> **(2) [2]Freedom of the person shall be inviolable. [3]These rights may be interfered with only pursuant to a law.**

In addition, **Art. 104 GG** protects personal liberty through procedural safeguards:

> **(1) [1]Liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. [2]Persons in custody may not be subjected to mental or physical mistreatment.**
> **(2) [1]Only a judge may rule upon the permissibility or continuation of any deprivation of liberty. [2]If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. [3]The police may hold no one in custody on their own authority beyond the end of the day following that of the arrest. [4]Details shall be regulated by a law.**

[188] cf. CJEU, Judgment of 7 February 2019 Escribano Vindel, C-49/18, *Neue Zeitschrift für Arbeitsrecht* – NZA 2019, 241, p. 243, paras. 39, 41.
[189] cf. CJEU, Judgment of 22 May 2014, Glatzel, C-356/12, paras. 50, 52.
[190] cf. Baer/Markard, in: v. Mangoldt/Klein/Starck, Grundgesetz Kommentar, 7th ed. 2018, Art. 3, para. 537.
[191] cf. BVerfGE 99, 341 <357>.

(3) [1]Any person provisionally detained on suspicion of having committed a criminal offence shall be brought before a judge no later than the day following that of his arrest; the judge shall inform him of the reasons for the arrest, examine him and give him an opportunity to raise objections. [2]The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefor or order his release.
(4) A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of liberty.

Is it possible to restrict the right? If so, how and under what conditions?

Under Art. 104(1) first sentence GG, personal liberty, which is guaranteed by Art. 2(2) second sentence GG, may only be restricted pursuant to a formal statutory provision and only if the particular requirements set out in Art. 104(1) first sentence GG are satisfied.[192] In this regard, special requirements regarding the specificity and proportionality of such provisions apply.[193] Due to the high standing of the right to liberty, any restrictions require weighty reasons.[194]

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

According to the extensive case-law of the Federal Constitutional Court in this respect, the formal guarantees of Art. 104 GG are inextricably linked to the substantive guarantee of liberty under Art. 2(2) second sentence GG.[195] In this respect, the Federal Constitutional Court distinguishes between the terms "restriction of liberty" and "deprivation of liberty", with the latter being the most severe kind of liberty restriction. [196] This distinction has a significant impact on the extent to which liberty is protected.

In a judgment from 2018[197] concerning the use of physical restraints on patients in psychiatric hospitals, the Federal Constitutional Court held that the use of five-point or seven-point restraints qualifies as a (separate) act of deprivation of liberty[198]; requiring a judicial order.[199]This type of restraint is not covered by a judicial order of confinement in a psychiatric hospital and thus requires a separate judicial decision. Thus, the procedural safeguards guaranteed by fundamental rights require that a judicial on-call duty must be

[192] BVerfGE 58, 208 <220>; 105, 239 <247>.
[193] BVerfGE 149, 293 <324 *et seq.*>.
[194] BVerfGE 22, 180 <219>; 45, 187 <223>; 70, 297 <307>; 86, 288 <326>; 90, 145 <172>; 130, 372 <388>; 149, 293 <323 *et seq.*>.
[195] BVerfGE 10, 302 <322>; 58, 208 <220>; 105, 239 <247>; 149, 293 <323>.
[196] BVerfGE 94, 166 <198>.
[197] BVerfGE 149, 293.
[198] *ibid*. <318 *et seq*.>.
[199] *ibid* <320>.

established covering the time period from 6:00 a.m. to 9:00 p.m. in order to enable prior judicial review of the use of restraints.[200] The Federal Constitutional Court considers these requirements to be in accordance with the requirements of Art. 3 ECHR and the UN Convention on the Rights of Persons with Disabilities (in particular Art. 12 CRPD).[201]

A significant share of measures of deprivation of liberty is made up of measures imposing and executing prison sentences and measures of prevention and correction.[202] In this respect, significant weight is attached to the principle of proportionality.[203] In 2011, the Federal Constitutional Court declared unconstitutional all court decisions concerning preventive detention. In particular, the Court held that these decisions were not in accordance with the requirement, entailed by the right to liberty, of differentiating between imprisonment and preventive detention (*Abstandsgebot*), i.e. differentiating between the punishment for a crime and its execution on the one hand and prevention and correction measures involving deprivation of liberty (including their execution) on the other. In consideration of Art. 7(1) ECHR, the Federal Constitutional Court derived the "requirement of differentiating between imprisonment and preventive detention" from their differing legitimations under constitutional law.[204] Apart from that, the Federal Constitutional Court held that the reservation of preventive detention [in the initial court decision] does not violate the Basic Law and is in accordance with Art. 5(1) ECHR.[205]

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Art. 5 ECHR does not distinguish between restriction of liberty and deprivation of liberty the way the Basic Law does in Art. 104 GG. According to the Federal Constitutional Court, this distinction determines, *inter alia*, whether the procedural safeguards set out in Art. 104(2) to (4) are applicable, which is only the case for deprivation of liberty.[206] In terms of substance, the guarantees of personal liberty under the Basic Law and under the ECHR do not differ considerably. In its established case-law[207], the ECtHR differentiates between interference

[200] *ibid* <335>.
[201] *ibid* <328 *et seq*.>.
[202] cf. BVerfGE 86, 288 <326>.
[203] BVerfGE 149, 293 <325 *et seq*.>.
[204] BVerfGE 128, 326 <378 *et seq*.>; Dörr, in: Dörr/Grote/Marauhn, EMRK/GG Konkordanzkommentar, 2nd ed. 2013, Chapter 13, para. 161a.
[205] BVerfGE, 131, 268 *et seq*.
[206] Dörr, in: Dörr/Grote/Marauhn, EMRK/GG Konkordanzkommentar, 2nd ed. 2013, Chapter 13, para. 119.
[207] e.g. ECtHR, Engel v. Netherlands, Judgment of 8 June 1976, No. 5100/71, end of § 59; Guzzardi v. Italy, Judgment of 6 November 1980, No. 7367/76, § 92; Ashingdane v. United Kingdom, Judgment of 28 May 1985, No. 8225/78, § 41; Nielsen v. Denmark, Judgment of 28 November 1988, No. 10929/84, § 67; Amur v. France, Judgment of 25 June 1996, No. 19776/92, Case Reports 1996-III, § 42; H.M. v. Switzerland, Judgment of 26 May 2002, No. 39187/98, Case Reports 2002-II, § 42; Lavents v. Latvia, Judgment of 28 November 2002, No. 58442/00, § 62; Storck v. Germany, Judgment of 16 June 2005, No. 61603/00, Case Reports 2005-V, § 70;

and non-interference through an overall assessment of degree and intensity of the specific measure.[208] Generally, this corresponds to the Federal Constitutional Court's approach, which also distinguishes between restriction and deprivation of liberty on the basis of the intensity of the measure in question.[209] The application of procedural safeguardsis also handled similarly by both courts. While Art. 5 ECHR, unlike Art. 104 GG, does not provide for the requirement of prior judicial authorisation (*Richtervorbehalt*), the ECtHR assumes in its established case-law that deprivation of liberty is, in principle, lawful if it is based on a court order.[210] Thus, there is an overall tendency of the courts to harmonise their respective jurisprudence.[211] It is likely that this is mainly due to the fact that the Federal Constitutional Court uses the provisions of the ECHR as a guideline for interpretation when determining the content and scope of fundamental rights.[212]

Abdolkhani and Karimnia v. Turkey, Judgment of 22 September 2009, No. 30471/08, § 125; Medvedyev et al. v. France, Judgment of 29 March 2010, No. 3394/03, § 73; Rantsev v. Cyprus and Russia, Judgment of 7 January 2010, No. 25965/04, § 314; Gillan and Quinton v. United Kingdom, Judgment of 12 January 2010, No. 4158/05, § 56; Shimovolos v. Russia, Judgment of 21 June 2011, No. 30194/09, § 48; Creanga v. Romania, Judgment of 23 February 2012, No. 29226/03, § 91; Austin et al. v. United Kingdom, Judgment of 15 March 2012, No. 39692/09 and others., § 57; Nada v. Switzerland, Judgment of 12 September 2012, No. 10593/08, § 225.

[208] Dörr, in: Dörr/Grote/Marauhn, EMRK/GG Konkordanzkommentar, 2nd ed. 2013, Chapter 13, para. 120.

[209] BVerfGE 10, 302 <322>; 58, 208 <220>; 105, 239 <247>; 149, 293 <319 and 320>.

[210] established case-law, e.g. ECtHR, Douiyeb v. Netherlands, Judgment of 4 August 1999, No. 31464/96, § 45; Jecius v. Lithuania, Judgment of 31 July 2000, No. 34578/97, Case Reports 2000-IX, § 68; Laumont v. France, Judgment of 8 November 2001, No. 43626/98, Case Reports 2001-XI, § 44; Nowicka v. Poland, Judgment of 3 December 2002, No. 30218/96, § 58; Ladent v. Poland, Judgment of 18 March 2008, No. 11036/03, § 47; Mooren v. Germany, Judgment of 9 July 2009, No. 11364/03, § 74; Khodorkovskiy v. Russia, Judgment of 31 May 2011, No. 5829/04, § 156.

[211] cf. Dörr, in: Dörr/Grote/Marauhn, EMRK/GG Konkordanzkommentar, 2nd ed. 2013, Chapter 13, para. 214

[212] BVerfGE 111, 307 <317 and 318>; 142, 313 <345>.