German Basic Rights Refined by the Case Law of the European Court of Human Rights - The Development of Privacy and Self-Determination in German Jurisprudence

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Abstract

The relationship between the European Constitutional Courts and the European Court of Human Rights in the multilevel system of human rights protection has been discussed intensively. In fact, the ECtHR has a strong influence on the German Constitutional Court and vice versa the ECtHR has been strongly paid attention to the German jurisprudence. Gradually, a steady cooperation between the courts has been developed. The article will explain how German Basic Rights were redefined by the case law of the ECtHR. The development of the right of privacy and the right of self-determination under Article 8 ECHR and the corresponding general right of personality in German law will illustrate the impact of the ECtHR's jurisprudence in German law. In this respect, the article will discuss the cases *Von Hannover v. Germany* in order to show privacy protection against the media. Then, the case *Koch v. Germany* will clarify the scope of self-determination regarding the right to die in dignity. Finally, the article will argue that the ECtHR's case law and the domestic jurisprudence are interwoven in a complex system of human rights protection and that the cooperation of the courts is substantial for an effective protection system of human rights in Europe.

Key words: ECtHR's Case Law, Right to Privacy uder Article 8 ECHR, German Law, The General Right of Personality, Self-determination, Right to Die in Dignity, Cooperation of Constitutional Courts, Margin of Appreciation

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Manuscript received: December 13, 2019; review completed: April 15, 2020; Accepted: May 7, 2020

I. Introduction

This article deals with the relationship between German national basic rights and European human rights protection. In the last decade, the influence of the ECHR in domestic law became more relevant, especially in Germany. In many aspects, the German basic rights were refined and developed by the ECtHR's case law, particularly the general right of personality under Article 2(1) in combination with Article 1(1) of the Basic Law which corresponds with Article 8 of ECHR (right to private life). The legal terms "privacy" and "personality" have to be distinguished. In international law such as the European Convention of Human Rights, the term "privacy" is frequently used. Under Article 8(1) of ECHR, the term "privacy" comprises all aspects regarding the protection of private life. In German law, the term "personality" is used as a general term, which covers all aspects of an individual's private life and with it the privacy in general. Insofar, both "privacy" and "personality" concern the protection of the private sphere. The term "personality" is used when concerning the perspective from German law.

Due to this background, this article will reflect on the relationship between the jurisprudence of the German Constitutional court and the ECtHR. It concerns the development and the scope of the ECtHR's case law on Article 8 of ECHR in German jurisprudence. This article will clarify that an impact can especially occur when the ECtHR provides argumentation for the weighting of conflicting interests in the balancing test of two conflicting interests. The balancing test will be illustrated for two case constellations: most relevant under Article 8 of ECHR are cases concerning the multipolar constellation of two conflicting basic rights. This is highly relevant for cases involving the protection of personality rights in conflict with freedom of speech. Then, the article will discuss the classical case constellation in which the domestic authorities violate an individual's right, like it is the case regarding the right to die in dignity and the doctor assisted suicide.

After this introduction, the article will explain the multilevel system of Human Rights Protection in Europe (II.) and will provide an overview of the development of personality protection under Article 8 of ECHR (III.). Then, it will illustrate the German Jurisprudence on privacy in the light of the ECtHR's rulings and discuss the famous case *von Hannover v. Germany*[1] from 2004 (IV.).

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1 *Von Hannover v. Germany (No. 1)*, 2004-VI Eur. Ct. H.R.

In the following, the German Jurisprudence on Self-Determination in the light of the ECtHR's rulings and *Koch v. Germany*[2] will be explained and discussed (V.). Finally, the article will end with a critical conclusion by reflecting upon the cooperation between the German Constitutional Court and the ECtHR (VI.).

II. The Multilevel System of Human Rights Protection in Europe

In Europe, the protection of human rights is realized in a multilevel system of national law and the European Convention of Human Rights (ECHR). The latter is an important part within the framework of international law. The German Constitution and the ECHR provide similar rights and freedoms, which get obvious by referring to the wording and the scope of these both codified catalogues. The interpretation of these rights is one of the main functions of the jurisprudence. Insofar, the European Court of Human Rights provides various case law, which is influencing the domestic jurisprudence.

In 2019, the German Constitution, the basic law (*Grundgesetz*), celebrated its 70th anniversary.[3] While this law was enacted in 1949, the European Convention of Human Rights (ECHR) was only drafted one year later in 1950 by the then newly formed Council of Europe. It entered into force in 1953. The ECHR is an international convention to protect human rights in Europe. Its idea was strongly shaped by the time of World War II and the goal to create a supranational system to keep the peace in Europe and protect human rights.

If a basic right or a convention right is violated, both levels provide remedies to the individual. In Germany, the Constitutional Court introduces rules how the ordinary courts have to balance conflicting basic rights under the principle of proportionality. If the courts fail to carry out the balancing test properly, a constitutional complaint will be granted. It is the role of the Federal Constitutional Court to ensure that constitutional rights and values are respected, thus also to leave the final decision to the ordinary courts.[4] The ECHR provides a sepa-

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2 *Koch v. Germany,* 2012-III Eur. Ct. H.R.

3 For the history of the German Constitution, *see* Christoph Möllers, *Das Grundgesetz – Geschichte und Inhalt* (2nd ed., C. H. Beck 2019).

4 Eric Barendt (ed.), Freedom of Speech, 218 (2nd ed., Oxford University Press 2005); *see also* Klaus Schlaich & Stefan Korioth (eds.), *Das Bundesverfassungsgericht* notes 361-363 (11th ed., C. H. Beck 2018).

rate protection system insofar that an individual application under Article 34 of ECHR is subsidiary to the domestic legal system. For both remedies, the admissibility of applications requires that the person submitting it can substantiate that the conduct in question has impacted him or her personally. In fact, the catalogue and the wording of basic rights in the German Constitution and human rights in the European Convention of Human Rights is quite similar. The main goal of both laws is to protect individuals from the arbitrary interference with their rights and freedoms by intrusive governments. Both laws provide several individual rights and freedoms, the latter especially for its importance in a democratic society. As the German Constitution, the basic law is of the highest rank whereas the ECHR is formally merely accepted on the level of federal ordinary law within the German legal system. Since the relevance of the ECHR in Germany increased strongly in the last 15 years, the protection of German basic rights cannot be examined without regarding the system of European Human Rights protection. In *Görgülü v. Germany*, a higher regional court has deliberately refused to take the ECtHR's ruling into account, which forced the German Constitutional Court to lay down the basic principles of the ECtHR's binding force.[5] This leading decision is interpreted to have no direct binding in German jurisprudence by the ECtHR. However, the constitutional court made clear that there is an obligation for domestic authorities, including courts, to transform the ECtHR ruling into domestic law and also to integrate into national jurisprudence.[6] By this decision of the German Constitutional Court from 2004, a remarkable development of German jurisprudence under the influence of the ECtHR is noticed.

III. The scope of Article 8 of the ECHR – Personality Rights and Self-Determination

At first, the protection of privacy under Article 8 of ECHR was recognized as a classical negative right, which provides the individual protection from unlawful and arbitrary interference by the State with his privacy and family life, home and private communication. However, during the last decades, the ECtHR developed this right and broadened its scope in its jurisprudence. Due to its broad scope, a precise definition of what is protected to be private is not possible and

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5 BVerfGE, 2 BvR 1481/04, Oct. 14, 2004, https://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104.html.

6 *Id.*

moreover not helpful.[7] Referring to the courts' jurisprudence, many case constellations developed various protected rights. These are, for example, the protection of sexual life,[8] exemption from punishment for homosexuals,[9] the right of minorities and their various forms of lifestyle,[10] right of informational self-determination[11] but also the protection against environmental pollution.[12]

The right of self-determination is also one of the highly relevant aspects under Article 8 of ECHR, which will be discussed later in the context of the right to doctor assisted suicide. The right of privacy under the Convention basically protects the physical and psychical integrity. In this respect, the personal autonomy and the right to decide about the one's life is one of the core aspects of the protection of self-determination.[13] In *Pretty v. United Kingdom* (2002), the ECtHR had to deal with assisted suicide for the first time.[14] In this case, the claimant was suffering from a disease with the effect that she was paralyzed from the neck down, only had little decipherable speech and was fed by a tube. Actually, she was not even able to commit suicide by herself. Therefore, she wanted her husband to assist her with the suicide but this was a crime in England. Although the court stated that there was no violation of the Convention, it emphasized the importance of a person's self-determination at several points.

Moreover, the ECHR protects various personality rights. Typical cases of personality protection rights are the protection of the private sphere, image rights, reputation and defamation.[15] By these rights, it gets obvious that the court developed a further dimension of Article 8 of ECHR. Besides a classical negative right against interferences of the State, Article 8 of ECHR also guarantees positive ob-

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7 *See Niemietz v. Germany,* 251 B Eur. Ct. H.R. (ser. A) (1992).

8 Stephan Breitenmoser (ed.), Der Schutz der Privatsphäre gemäß Art. 8 EMRK: Das Recht auf Achtung des Privat- und Familienlebens, der Wohnung und des Briefverkehrs 88 (Helbing and Lichtenhahn 1986).

9 *Dudgeon v. United Kingdom,* 45 Eur. Ct. H.R. (ser. A) (1981).; *Christine Goodwin v. United Kingdom,* App. No. 28957/95, 35 Eur. Ct. H.R. 18 (2002). Incidentally, the development of rights of homosexuals and also transsexuals has become of the very relevant guarantees under Article 8 of ECHR.

10 *G and E v. Norway,* App. Nos. 9278/81 and 9415/81, 35 Eur. Comm'n H.R. Dec. & Rep. 30, 35 (1984).

11 *See Leander v. Sweden,* 116 Eur. Ct. H.R. (ser. A) (1987).

12 *Powell and Rayner v. United Kingdom,* 172 Eur. Ct. H.R. (ser. A) (1990).; *see also Jens Meyer-Ladewig & Martin Nettesheim* (eds.), Article 8 no. 7, *EMRK*, (4th ed., Nomos 2017).

13 *Pretty v. United Kingdom,* App. No. 2346/02, 35 Eur. H.R. Rep. para. 61 (2002). "Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."

14 *Id.*

15 *See* Meyer-Ladewig & Nettesheim (eds.), *supra* note 12, no. 31, *EMRK*.

ligations. This means that a State is obliged to engage in an activity to guarantee and secure the effective enjoyment of a fundamental right under the Convention in the same respect as it does in respect to its classical negative obligation.[16] In fact, these positive obligations are not guaranteed by the wording of Article 8 of ECHR like it is in other provisions. The positive obligations of Article 8 of ECHR were rather developed by the case law of the ECtHR. In *Webster, James und Young v. United Kingdom*, the ECtHR recognized these positive obligations, especially for the case constellation of conflict between private persons.[17] This usually occurs in conflicts between personality rights and freedom of speech, which is protected under Article 10 of ECHR. Due to the recognition of positive obligations under the protection of Article 8 of ECHR, the dimension of personality protection rights under the Convention grew strongly.

As a result, Article 8 of ECHR has been transformed from a classic privacy right to a kind of personality right, providing several aspects of protection to the individual development and lifestyle of citizens. Especially the various aspects of personality protection were strongly influenced by the growing importance of media, social media and big data. Most relevant decisions are *von Hannover v. Germany (No. 1)* (2004) as well as the following decision *von Hannover v. Germany (No. 2)* (2012), concerning the protection of personality rights against the tabloid press. Recently, in *Zu Guttenberg v. Germany* (2019), the court also had to deal with this matter.[18]

In its jurisprudence, the ECtHR applies the *doctrine of the margin of appreciation*.[19] This is a well-known legal doctrine in international human rights law.[20] It was developed by the court in order to judge whether a Contracting State is violating its obligations under the Convention. In fact, this term refers to the space of action that the court grants national authorities, in fulfilling their obligations under the Convention. In 1976, the court recognized this doctrine in the

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16 *See* Matthias Klatt, Positive Obligations under the European Convention of Human Rights, 691 (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 2011).

17 *Webster, James and Young v. United Kingdom,* 44 Eur. Ct. H.R. (ser. A) para. 49 (1981).

18 *Zu Guttenberg v. Germany,* App. No. 14047/16, Eur. Ct. H.R. (2019).

19 *See* George Letsas, *Two Concepts of the Margin of Appreciation*, 26. 4 Oxford J. Legal Stud. 705 (2006); Michael R. Hutchinson, *The Margin of Appreciation in the European Court of Human Rights*, 48.3 Int'l & Comp. L.Q. 638-650 (1999).

20 *See* Constance Grewe, Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofes für Menschenrechte, 459 (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 2001); Carla M. Zoethout, The Dilemma of Constitutional Comparativism, 787 (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 2011).

decision *Handyside v. United Kingdom*[21] for the first time. The size of the space depends on the fact whether there is a European consensus on how to interpret a certain convention right. Since in *Handyside v. United Kingdom*, concerning a case on public moral, there was no common ground of interpretation between the Contracting States, the ECtHR decided to grant a wide space for various interpretations by the States. By this, the interpretation of the Convention was left to the States themselves.[22] Since the right to private life under Article 8 of ECHR is differing between European States, caused by their various cultural backgrounds, the court basically recognizes wide interpretation under this guarantee.

IV. German Jurisprudence on Privacy in the Light of the ECtHR's Rulings

A. Privacy Protection in German Law

The right to privacy is interpreted as a right to keep one's personal matters and relationships secret or the *right to be left alone.*[23] This right is one of the core human rights guarantees in modern democratic societies. Accordingly, the protection of the individual's privacy has always been a value to be protected by the law in German and European society.

In German domestic law, there is no specifically codified regulation of the right to privacy. In fact, this right has rather been developed by the domestic jurisprudence, both in private law and constitutional law. Although both rights refer to the same value of privacy, there is a strict distinction between these two rights. Regulations in private law can constitute a claim, whereas constitutional basic rights offer the protection under the constitution.

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21 *See Handyside v. United Kingdom,* 24 Eur. Ct. H.R. (ser. A) para. 57 (1976).

22 *See Wingrove v. United Kingdom,* App. No. 17419/90, 1996-V Eur. Ct. H.R. Rep. para. 58; *X., Y. and Z v. United Kingdom,* 1997-II Eur. Ct. H.R. para. 44; *Murphy v. Ireland,* 2003-IX Eur. Ct. H.R. para 67; *see also* Kanstantsin Dzehtsiarou, European Consensus and the Legitimacy of the European Court of Human Rights, 132 (Cambridge Univ. Press 2015).

23 Samuel D. Warran & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

The protection of privacy in German private law, is grounded on several ordinary statute laws. The most relevant statute law, arising from tort law, is Section 823 of the German Civil Code (*Bürgerliches Gesetzbuch*):

Liability in damages

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

By the wording, it gets obvious that the regulation did not mention privacy as one of the selected goods underSection 823 para. 1 of the German Civil Code. Under this regulation, privacy is considered as a so-called "another right." In this context, privacy is considered as a part of the general right of personality (*allgemeines Persönlichkeitsrecht*) which is in its interpretation strongly influenced by the constitutional general right of personality. However, primarily, the general right of personality was developed by the domestic civil courts.[24] Closely linked, to the protection of Section 823 of the German Civil Code are the regulations of Sections 22 and 23 of the Art Copyright Act since these regulations refer to the protection of a person's image. The docmatic examination on the constitutional level will be explained below.

The constitutional right of personality was developed by the jurisprudence of the German Federal Constitutional Court[25] based on Article 2(1) in combination with Article 1(1) of the Basic Law (*Grundgesetz*).

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24 *See* early decisions of the German Federal Court, BGHZ 24, 72 (*Krankenpapiere*); BGHZ 26, 349 (*Herrenreiter*); BGHZ 27, 284 (*Tonband*); BGHZ 30, 7 (*Caterina Valentine*); BGHZ 35, 363 (*Ginseng-Wurzel*).

25 *See* BVerfGE 27, 1 (*Mikrozensus*); BVerfGE 27, 344 (*Scheidungsakten*); BVerfGE 32, 373 (*Patientenkartei*) (Ger.).

Article 1

[Human dignity – Human rights – Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Article 2

[Personal freedoms]

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Whereas Article 1 guarantees the human dignity, Article 2 of the Basic Law implies the constitutional right to free development of personality. The scope of the protection sphere has been developed over the decades. Besides different aspects such as the protection of the private sphere, the right to one's image and the protection of the personal honour, the general right of personality guarantees the right of self-determination (*Recht auf Selbstbestimmung*).[26] While the first mentioned aspects are rather relevant in conflict scenarios with freedom of speech, the latter becomes relevant if the State violates the personal delelopment and self-determination by applying measures which restrict this freedom.

Due to the broad understanding of what is "private," the German Federal Constitutional Court has consequently developed the scope of the constitutional protection of privacy. In its jurisprudence, the court worked out that the protection of a person's private life comprises cases of confidential communication among

26 P. Klaus Schäfer, *Das Selbstbestimmungsrecht*, 381 (Neue Justiz – Zeitschrift für Rechtsentwicklung und Rechtsprechung 2019).

spouses, socially extraordinary behaviour or manners of a person, information written down in a diary, a person's health status and illnesses such other situations which can be typically evaluated as private.[27] There is also a special protection of the spatial sphere, in which an individual can recover and let himself or herself go.[28] This is closely connected to the right of one's own image which guarantees that every person may decide whether and under which circumstances others can take a picture of that person.[29]

B. Basic Rights in Conflict with Privacy

The guarantee of Article 5 of the Basic Law protects the freedom of expression and thereby, it comprises particular categories of protected expression.[30] In contrast to other law systems, these particular categories are mentioned explicitly in the law text. Then, Article 5(2) of the Basic Law states that the guarantee of free expression is constricted by contrasting interests, namely provisions for the protection of young persons and the right to personal honor such as by the provisions in general laws.[31] Insofar, the general laws can be the justification for interference. In this context, the term general laws means those regulations which are not directed against the expression of a specific opinion but rather aim to protect a legal good.[32] These goods have to be interpreted in the context of the importance of freedom of expression.

In fact, personality rights often get into conflict with freedom of exspression. As explained above, the personal honour is protected by the criminal law of defamation and by other provisions of the German Civil Code. Besides the specific provisions in the general law, such as Section 22 of the Art Copyright Act granting a right to one's image, Section 823 of the Civil Code covers the scope of the constitutional right of personality.

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27 *See* Peter Badura, Staatsrecht – Systematische Erläuterung des Grundgesetzes, 151-154 (7th ed., C. H. Beck 2018); Hans-Joachim Cremer, Human rights and the Protection of Privacy in Tort Law: A Comparison between English and German Law, 61 (Routledge-Cavendish 2011).

28 BVerfGE 101, 361, 380-381 (*Caroline von Monaco*) (Ger.).

29 *Id.*

30 Ansgar Ohly et al., Artistic Freedom Versus Privacy – A Delicate Balance. The Esra Case Analysed from a Comparative Law Perspective, 526, 529 (ICC 2008).

31 Barendt, *supra* note 4, at 213; *see also* Joachim Detjen, Die Werteordnung des Grundgesetzes, 218 (VS Verlag für Sozialwissenschaften 2013).

32 BVerfGE 7, 198, 209 (*Lüth*) (Ger.).

Caused by the extensive use of images in the mass media and especially in the tabloid press, the provision Section 22 of the Art Copyright Act requires a closer look: Section 22(1) of the Art Copyright Act functions as a general rule by stating that pictures of a person can merely published with his or her expressed approval.[33] Though, taking contrasting interests into account, Section 23(1) of the Art Copyright Act provides exceptions. Under this clause, it is allowed to publish images portraying an aspect of contemporary society.[34] For a long time, this criteria was described by the "figure of contemporary history" in German jurisprudence.[35] However, due to the regulation of Section 23(2) of the Art Copyright, this right of dissemination or public display does not cover a publication violating a legitimate interest of the person concerned.[36]

By the interpretation of these laws, a scheme of variable protection was created which allowed a fair balance between the individual's wich to be protected against unauthorized publications of his or her photograph and the interest of the media in that publication. Consequently, both basic rights, the general right of personality and freedom of expression, are taken into account by this law.

A conflict between two persons, in which one of them exercises his freedom of expression is typically a conflict of private law.[37] The basic right of one of the parties suffers an intrusion resulting from the other party's exercise of a basic right. Even though the collision of interests applies to private law, the lower courts decisions always root in the indirect horizontal effect of the conflicting rights guaranteed by the German basic rights such as the convention rights.[38] As a result, the domestic legal instruments of privacy protection are obliged to provide the right of free expression as a legal defence. Therewith, the public's interest in being informed has to be assessed by balancing against the protection of privacy.[39]

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33 Cremer, *supra* note 27, at 43.

34 *Id.*

35 German courts distinguished between absolute and relative figures of contemporary history, *see* Horst Neumann-Duesberg, *Berichterstattung* über *absolute und relative Personen der Zeitgeschichte*, 114 (Juristen Zeitung 1960).

36 Judith Janna Märten, *Personality Rights and Freedom of Expression – A Journey through the Development of German Jurispridence under the Influence of the European Court of Human Rights*, 2 J. Media L. 333, 335 (2012).

37 Märten, *supra* note 36, at 336.

38 *See* Gavin Phillipson & Alexander Williams, *Horizontal Effect and the Constitutional Constraint*, 74.6 Mod. L. Rev. 878 (2011).

39 Märten, *supra* note 36, at 336.

Under the regulation of Article 1(3) of the Basic Law, the conflicting basic rights bind domestic State authorities. Due to the wording of this regulation, private actors are not directly bound by German basic rights. Nevertheless, as a part of the State power ordinary courts are obliged to interpret and apply private law in accordance with principles and values embodied by the basic law.[40] Regarding the relationship between private law and constitutional rights, by highlighting the duties to protect basic rights, the German Federal Constitutional Court very early stated that basic rights as objective norms "radiate" (see "radiating effect") into private law.[41] In this case, the Constitutional Court established the balancing test in order to achieve a fair and proportional decision. According to this balancing test, lower courts must weigh the competing interests of freedom of expression and of personality rights in the light of all relevant facts in the case.[42] This is the most relevant part within balancing test the court established in its jurisprudence referring to the principle of proportionality.[43] Since the beginning of its jurisprudence, the German Constitutional Court had to deal with several cases concerning the conflict between personality rights and freedom of expression. By that, it provided rulings the ordninary courts refer to for their argumentation. In its early decision *Soraya*, from 1973, regarding a fictitious interview with the Iranian Princess Soraya, the German Constitutional Court had to decide upon the conflict between media and personality rights for the first time.[44] In conclusion, the court decided in her favour since the balancing between her general right of personality and the freedom of press was dominated by the fact that a fictitious interview could not be a matter of public interest in society.[45]

In later decisions, the German Constitutional Court referred to its earlier jurisprudence. Especially, the cases involving *Princess Caroline von Hannover* illustrate that the court argued on the gorunds of its former jurisdiction; however, it opened its decisions to adapt the jurisprudence of the ECtHR. This will be explained in detail in the following point.

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40 BVerfGE 84, 192, 194 (Ger.).

41 BVerfGE, *supra* note 32.

42 BVerfGE, *supra* note 40, at 212.

43 Märten, *supra* note 36, at 336.

44 BVerfGE 34, 269 (*Soraya*) (Ger.).

45 Märten, *supra* note 36, at 336.

C. *Von Hannover v. Germany* Cases

1. The Constellation of the Case

In this case, German journals published various pictures of Princess Caroline von Hannover, while she was in private situations, together with her children and sitting with a famous actor at the far end of a restaurant courtyard.[46] The Federal Court argued that she as an "absolute figure of contemporary history" would have to accept photographs showing her in public places.[47] This would also apply to private and ordinary situations of her daily life.[48] These so-called absolute figures of contemporary history were persons with a public function or relevance in society.[49] In fact, all celebrities are classified as these figures due to their high profile in public. The court ruled that under Section 23 of the Art Copyright Act, an absolute person of contemporary history can merely exspect protection of the private life in a secluded place which was the case in the picture showing the claimant sitting in the far end of a restaurant.[50]

Later in 1999, the German Federal Constitution Court had to balance the conflicting rights of the general right of personality and freedom of press.[51] In its decision, the court basically confirmed the argumentation of the Federal Court, but it saw the complainant's basic rights infringed by the refusal of the claim concerning the pictures with of the claimant together with her children.[52] Insofar, the German Federal Constitution Court emphasized the protective content of the general right of personality of parents being strengthened by Article 6 of the Basic Law.

In the following time, the German jurisdiction has constantly developed its balancing between the constitutional right of personality and freedom of expression. The Constitutional Court has established several guidelines for the balancing test which has to be carried out by the lower courts. Libel cases have so far provided an approach, under which a number of different factors are taken

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46 Märten, *supra* note 36, at 339.

47 BGHZ 131, 332 (Ger.).

48 *Id.*

49 *See* Neumann-Duesberg, *supra* note 35.

50 Märten, *supra* note 36, at 340.

51 BVerfGE, *supra* note 28.

52 Märten, *supra* note 36, at 340.

into account before determining whether the freedom of expression overweighs the personality right in its protection of reputation. Since its early judgements, the Constitutional Court has consequently pursued a broad understanding of the freedom of expression.[53] In that regard, the presumption in favour of freedom of expression in the balancing of two rights is a characteristic of the German jurisprudence. In this respect, also the principle of proportionality has always ensured a fair balance with conflicting personality rights. Decisions have always been made on an individual basis.

With respect to the protection of the tabloid press, when reporting about celebrities' private lives, such as in the case of Princess Caroline, the Constitutional Court has stated that under the second sentence of Article 5(1) of the Basic Law, the press has the autonomy to decide what is printed and how contents are presented.[54] The Court has always emphasized that the contribution of the press to a debate of public interest is not restricted to political issues but also includes entertainment. In fact, the Court also indicated that sometimes the forming of opinions can be affected by a combination of information and entertainment ("infotainment").[55] This broad interpretation of freedom of press is concerning the importance of the values in a democratic society. In the Court's view even mere entertainment can be relevant for the formation of opinions.[56] Especially celebrities, who represent certain values or attitudes, serve as role models or contrasting negative examples.[57] For this reason, public figures and the various dimensions of their lives are in general of public interest.[58]

2. The ECtHR's Balancing of Freedom of Press and Privacy

Caroline von Hannover submitted her application under Article 34 of ECHR and claimed before the ECtHR that the German courts, referring to the decisions discussed above, infringed her right to private life under Article 8(1) of ECHR. In contrast to the German jurisprudence, the ECtHR, in 2004, finally de-

53 *See* BVerfGE, *supra* note 40.

54 *See also* for the wide scope of freedom of press Michael Sachs (ed.), *Grundgesetz,* art. 5 no. 65 (8th ed., C. H. Beck 2018).

55 *See* BVerfGE, *supra* note 28, at 389-390.

56 *Id*. at 390.

57 *Id.*

58 Cremer, *supra* note 27, at 66.

cided that the right to respect for her private life had been violated under German law.[59] With that ruling, the court reached a different result on the balance to be drawn between freedom of press and privacy. Even though the ECtHR had to balance Article 8(1) of ECHR and Article 10(1) of ECHR in several cases before, it never had to decide about press releases on mere entertainment and the protection of the privacy of celebrities without an official function like in this case.[60] In its decision making, the court focused on the content of the press releases critically. It explicitly argued that the deciding aspect in the balancing should lie in the contribution that the content of the publication makes to a debate of public interest.[61] Then, the court argued that the claimant had no official function within the State of Monaco.[62] All information published was exclusively about the details of her private life and her family life.[63] Hence, the ECtHR held that the photos and articles did not contain any issue of general interest since it saw the sole purpose of publishing was merely to "satisfy the curiosity of a particular readership".[64] The court explained that under these circumstances "freedom of expression calls for a narrower interpretation."[65]

With this argumentation, the ECtHR showed a different approach compared to domestic German jurisprudence since the German Constitutional Court states that the press can report on public figures merely on grounds of their status. In contrast to that, the ECtHR's approach is asking for a legitimate public interest in that particular information. Besides the criterion of the public interest, the ECtHR took into account that the pictures had been taken without the appellants knowledge or consent.[66]

Then, by studying the approach of the German jurisprudence, the ECtHR regarded the scheme of variable protection comprising the absolute figure of contemporary history and the criterion of "secluded places out of the public eye" under Section 23 of the Art Copyright Act as deficient and too vague to provide

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59 Eur. Ct. H.R., *supra* note 1, para. 79-80.

60 Märten, *supra* note 36, at 342.

61 Eur. Ct. H.R., *supra* note 1, para. 76.

62 *Id*. para. 65.

63 *Id.*

64 *Id.*

65 *Id.* para. 66.

66 Barendt, *supra* note 4, at 243.

an entire protection of the private life.[67]

Since the German jurisprudence was highly developed at this point compared to other European countries, the ECtHR's ruling in this decision was criticized for not only devaluating the freedom of press but also for omitting the domestic characterstics of national law.[68]Because of the different interpretations of the protection of privacy, a lack of European consensus regarding the positive obligations under Article 8 of ECHR is recognized. Accordingly, also the ECtHR in its earlier judgements made clear that the domestic courts have a wide margin of appreciation when balancing the right to privacy against the right of freedom of expression.[69]

3. The Following Procedure before German Courts

Following the ECtHR's criticism of German jurisprudence, the domestic courts were under the obligation of the Court's interpretation of Article 8 of ECHR and had to deal with the courts ruling.[70] However, at the same time, the courts were bound by the Federal Constitutional Court's ruling. This was a challenging situation for the judges. In *Görgülü* case (2004), the German Federal Constitutional Court provided guidelines on how to handle the conflict between the ECtHR's interpretations and domestic law.[71] In this leading decision, the Federal Constitutional Court stated that domestic courts are obliged to implement the jurisprudence of the ECtHR[72] unless they intefere with domestic constitutional law. In order to avoid the latter situation, domestic courts may disregard the argumentation of the ECtHR by obeying to German constitutional law.[73] With this decision, the German jurisprudence had precise guideline how to cope with the ECtHR's rulings, especially in cases of divergent interpretations.

Some years later, *Caroline von Hannover* brought up further claims before German courts. These claims concerned a few media reports in so-called peo-

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67 Eur. Ct. H.R., *supra* note 1, para. 73-75.

68 *See* Christoph Grabenwarter, *Schutz der Privatsphäre versus Pressefreiheit: Europäische Korrektur eines Sonderweges?* 309 (Archiv für Presserecht 2004).

69 Märten, *supra* note 36, at 343.

70 *Id.*

71 BVerfGE, *supra* note 5.

72 *Id.* at 329.

73 BVerfGE 74, 358, 370; BVerfGE 83, 119, 128 (Ger.).

ple-magazines in Germany. They were reporting on the health status of her father, a ski-holiday with the familiy and the commercial letting of one of the claimant's residences.[74] All articles were illustrated with photographs of her and her familiy.

In 2007, the German Federal Court revised its ruling relating to the decision of the ECtHR from 2004. In its new landmark decision, the Federal Court gave up the legal figure of the absolute person of contemporary history and applied instead a new scheme of variable protection, examining the content of an illustrated article as to its contemporary historical relevance.[75] The term "person of contemporary history" was completely replaced by this new approach.[76] Instead of examining whether the claimant was a person of contemporary history or not, the court asks whether that person illustrates an aspect of "contemporary society."[77] By considering the public interest in a contribution, the balancing test between the basic rights occurs dogmatically already at this early point of examination.[78] Moreover, the German Federal Court asked for an information value[79] as an approach, which is now normative, in order to evaluate the content of an article. Regarding the case of *Caroline von Hannover*, the Federal Court accepted an information value referring to the article about the father's health status while it saw a violation of her general right of personality in the other illustrated articles.

This decision was confirmed by the German Constitutional Court in 2008.[80] In this decision, the court ruled that the media reports informing about the illness of the claimant's father were not an infringement of her basic rights. In particular, the Federal Court as well as lower courts were legitimated to assess the reported health status of the claimant's father as an event of contemporary historical relevance since the ruling family of Monaco was concerned.[81] Regarding the com-

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74 Nadine Klass, *Der Schutz der Privatsphäre durch den EGMR im Rahmen von Medienberichterstattungen*, 261 (Zeitschrift für Urheber- und Medienrecht 2014).

75 Märten, *supra* note 36, at 344.

76 Christoph Teichmann, *Abschied von der absoluten Person der Zeitgeschichte*, 1917 (Neue Juristische Wochenschrift 2007).

77 Bundesgerichtshof [BGH] [Federal Court of Justice], Neue Juristische Wochenschrift [NJW] 2007, 1977, 1979 (Ger.).

78 Cremer, *supra* note 27, at 84.

79 Federal Court, *supra* note 55, at 1980.

80 BVerfGE 120, 180, 201-204 (*Caroline von Hannover*) (Ger.).

81 *See* Märten, *supra* note 36, at 344.

plaint concerning the illustrated article on the letting of a residence, the Constitutional Court argued that the previous decisions failed to examine the information content of the report properly.[82] It argued that this contribution could give readers a source for criticism and reflection on the modern lifestyle of famous people.[83] The court further clarified that there was no further infringement grounded in the concrete circumstances in which the pictures had been taken nor any intimidate moment or any situation which was typically linked with a need to relax.[84] In conclusion, the revised interpretation of Sections 22, 23 of the Art Copyright Act has enlarged the protected sphere of privacy in public places beyond places of seclusion.

In an overall view, not only the overriding ruling of the German Constitutional Court but also the revised protection concept by the German Federal Court illustrate that German courts intensively took into account the ECtHR's decision and criticism on the domestic law.[85] However, it is important to point out that by this development, the German jurisprudence did not break with domestic legal tradition. The revised guidelines for the balancing test were still in a line with costumarily constitutional law and its strong acceptance of tabloid press.[86]

In the following years, Princess Caroline and her husband brought up further claims before the ECtHR regarding the violation of Article 8(1) of ECHR by domestic law. This was unexpected since in German law, the protection of private life had been improved significantly by the time. In 2012, the ECtHR explained in *Von Hannover v. Germany (No 2)* that the further developed German jurisprudence elaborates on the interpretation of the constitutional right to privacy in conformity with Article 8(1) of ECHR.[87] Again, the court excercised a comprehensive balancing between the collision of rights. Besides the criteria of public interest,[88] as well as the circumstances in which the pictures were taken,[89]

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82 BVerfGE, *supra* note 80, at 220-223.

83 *Id.* at 220-223.

84 *Id.* at 207.

85 Märten, *supra* note 36, at 345.

86 BVerfGE, *supra* note 80, at 208-209.

87 *Von Hannover v. Germany (No. 2),* App. Nos. 40660/08 & 60641/08, Eur. Ct. H.R. (2012).

88 *Id.* para. 110.

89 *Id.* para. 113.

the court paid attention to the prior conduct of the person concerned[90] and the scope of dissemination[91] in order to evaluate the infringement to the full extent.[92]

D. The ECtHR's Impact on German Jurisprudence and the Cooporation between the Courts

Overall, the ECtHR had a strong influence on German jurisprudence. This impact is very obvious in the field of personality rights under Article 8 of ECHR in conflicts with the media under Article 10 of ECHR. However, also the ECtHR was taking notice and arguing with the German jurisprudence as well.[93] Since the last two decades, the both courts, the ECtHR and the German Constitutional Court developed their jurisprudence to expand the protection sphere of European Human Rights. Also, in academia, the scholars are debating the relationship between the ECtHR and the domestic constitutional courts intensively. Moreover, the judges of the German Constitutional Court address this topic. Very early, in 2010, *Andreas Voßkuhle*, president of the German Constitutional Court, explained the concept of multilevel cooperation of the European Constitutional Courts, which he describes as a complex relationship of the courts in Europe containing unique involvements.[94] It is a well-known fact that the courts realized this relationship and especially its necessity to provide a high standard of human rights protection in Europe. Since this is not exclusively a national goal but rather a value in Europe, all actors in this complex multilevel system have to act and decide in a coherent manner.

90 *Id.* para. 111.

91 *Id.* para. 112.

92 Märten, *supra* note 36, at 345.

93 *See* Axel Springer v. Germany, App. No. 39954/08, Eur. Ct. H.R. 34 (2012).

94 Andreas Voßkuhle, *Multilevel cooperation of the European constitutional courts*, 6 Eur. Const. L. Rev. 175, 183 (2010).

V. German Jurisprudence on Self-Determination in the Light of the ECtHR's Rulings

A. The Right of Self-Determination in German Law

At first, in Germany, the term "self-determination" was used in the context of informational self-determination as an aspect of the general right of personality under Article 2(1) in combination with Article 1(1) of the Basic Law. This right was first acknowledged in the constitutional ruling relating to personal information collected during the census in the year 1983.[95] Later, the right was further developed by the German Constitutional Court. By the jurisprudence defined as "the authority of the individual to decide himself, on the basis of the idea of self-determination, when and within what limits information about his private life should be communicated to others."[96] In fact, the protection of privacy, the right to a self-determined private life, the right to education, the protection of personal data, and other aspects are protected under the scope of informational self-determination. However, the right of informational self-determination has to be distinguished from the right of self-determination about one's own life. In fact, under the right of self-determination, any kind of self-expression of one's own life and the individual lifestyle is protected by the basic law. Since the protection of self-determination has a wide scope that comprises various aspects of individual interests. Therefore, the sexual orientation of an individual is also protected by self-determination. Recently, the court ruled on gender self-determination and explained that under the general right of personality, intersexual people are fully accepted as the third gender. In its decision from 2017, the court stated that the legislator is obliged to create a third gender category, especially in the public birth register, for people who do not identify as either male or female or were born with ambiguous sexual traits.[97] While some scholars see the basis for this aspect in the human dignity, the German Constitutional Court again refers to the general right of personality in the combination of Article 2(1) in combination with Article 1(1) of the Basic Law.[98] Another important aspect is the right to make decisions

95 BVerfGE 65, 1 (*Volkszählung*) (Ger.).

96 *See* Sachs (ed.), *supra* note 54, art. 2, notes 72-73b.

97 BVerfG [Federal Constitutional Court], 1 BvR 2019/16, Oct. 10, 2017, Neue Juristische Wochenschrift [NJW] 2017, 3643 (*Das dritte Geschlecht*) (Ger.).

98 Matthias Herdegen, in: Theodor Maunz & Günter Dürig (eds.), *Grundgesetz,* art. 1 para. 1 n. 87, (C. H. Beck, Nov. 2018).

of one's own health treatments and moreover the right to end up one's own life. This aspect of self-determination under Article 2(1) in combination with Article 1(1) of the Basic Law is recognized as the *right to die with dignity*. Basically, the right to die with dignity refers to an ill person's own and self-determined will to end the own life.[99] In fact, the guarantee of Human Dignity under Article 1(1) of the Basic Law is the core aspect of this right and provides the right to decide about ending the medical treatment, which keeps the terminally ill patient alive. However, this right does not cover any active treatment of medical professionals, which directly causes the death of the terminally ill patient.[100]

The recent jurisprudence and scholars in Germany have been dealing with the cases of patients wishing to control their death by using a lethal dose of a drug prescribed by a doctor. In legal terms, this is considered as doctor assisted suicide, which corresponds to the right to die in dignity. In Germany, a controversial discussion is held in public. The main question is whether such a case of an actively assisted suicide can be basically prohibited under German Law. The latest development will be discussed later in this article.

Basically, committing suicide autonomously is not a crime in German Criminal Law and subsequently, also an attempted suicide is not punishable. Nevertheless, there are a few relevant regulations, which concern assisted suicide in general. Firstly, under Section 216 of the German Criminal Code (*Tötung auf Verlangen*), killing at the request of the victim is punished as a felony and therefore the attempt is punishable. As a felony, the penalty shall be imprisonment from six months up to five years. However, the act of assisting an autonomous suicide is not comprised by the scope of Section 216 of the German Criminal Code.

Secondly, the doctor-assisted suicide is relevant under Section 217 of the German Criminal Code (*Geschäftsmäßige Förderung der Selbsttötung*), which was recently classified as unconstitutional and consequently void by the German Constitutional Court. In its recent decision from the 26th of February in 2020, the court explained that under the general right of personality, each individual has a right to a self-determined death.[101] Even before this ruling, the criminalisation of

99 *See also* J. David Vellemann (ed.), A Right of Self-Determination *Beyond Price – Essays on Birth and Death*, 21 (Open Book Publishers 2015).

100 Maunz & Dürig (eds.), *supra* note 98, no. 89.

101 BverfG [Federal Constitutional Court] 2 BvR 2347/15, Feb. 26, 2020; *see also* Wolfgang Janisch, *Dem Staat die Herrschaft über den Tod genommen*, Süddeutsche Zeitung, https://www.sueddeutsche.de/politik/sterbehilfe-urteil-meinung-1.4821470 (last visited Mar. 29, 2020).

assisted suicide services was debated very critically in Germany. Although Section 217 of the German Criminal Code is now void, until this decision, it was of high relevance when discussing the legal frame of the right to die and especially the doctor-assisted suicide. Once, this regulation was enacted in November, 2015 in order to prevent suicide assistance becoming a regular service in the national health care system in Germany. Due to its wording, Section 217 of the German Criminal Code threatens up to three years in prison or a monetary fine for anyone who offers suicide to someone else on *business* terms.[102] That applied to the third parties like all professional persons or organisations offering suicide assistance on a regularly and usually on a commercial basis. The regulation also required that the concerned person or organisation acts repeatedly. However, assisted suicide for altruistic reasons was not subject to Section 217 of the German Criminal Code. As a consequence, this regulation did not apply to friends and family members but only to actors of professional assistance as mentioned above. Interestingly, there has not been even one case in which the authorities were investigating on the grounds of this regulation.[103]

Besides the scope of the German Criminal Code, a person assisting another person's suicide can be held criminally responsible under the domestic Narcotics Act. This can be relevant for persons having provided a lethal drug to someone who is planning to end the own life. For example, under Section 4(1)(3a) of Narcotics Act, it is permissible to receive certain types of drugs if they are prescribed by a medical practitioner.[104] However, an additional authorisation from the Federal Institute for Drugs and Medical Devices in Germany is required. Section 3(1)(1) of Narcotics Act describes this requirement precisely and also refers to a list of several drugs listed in the annex of this act.[105] The list is mentioning the range of drugs completely. Finally, Section 5(1)(6) of Narcotics Act states that no such authorisation can be granted if the intention of the proposed use of the drug contravenes the purposes of the Narcotics Act which is to secure the necessary medical care of the population, to eliminate drug abuse and to prevent drug

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102 Carsten Gaede, *Die Strafbarkeit der geschäftsmäßigen* Förderung des Suizids – *§ 217 StGB,* 385 (Juristische Schulung 2016).

103 Pia Lorenz, *BVerfG verhandelt über § 217 StGB: Es bleibt an den Ärzten hängen*, Legal Tribune Online, https://www.lto.de/recht/hintergruende/h/bverfg-2bvr-2347-15-suizid-verwirklichen-assistenz-verhandlung-sterbehilfe-aerzte-grundrecht-freiheit-moral/ (last visited Mar. 29, 2020).

104 *Id.*

105 *Id.*

addiction.[106] Due to this background, *Koch v. Germany*[107] before the ECtHR in 2012 will illustrate the application and interpretation of these laws in the light of self-determination under Article 8 of ECHR. The case will be discussed in the next point.

B. The ECtHR's Jurisprudence on Self-Determination and the Right to Die with Dignity

1. The *Koch v. Germany* case

Regarding the right to die in dignity, in *Koch v. Germany* from the 19th of July in 2012, the ECtHR decided on the right to assisted suicide under the scope of Article 8 of ECHR. The applicant Mr. Koch and his wife were German citizens. After an accident in 2002, his wife was suffering from a complete quadriplegia and needed constant care such as artificial ventilation.[108] Two years later, she applied to the Federal Institute for Pharmaceutical and Medical Products to receive the authorisation to obtain a lethal dose of a drug (*15 grams of pentobarbital of sodium*) so that she could take her own life.[109] On the grounds of Section 5(1)(6) of the German Narcotics Act, domestic authorities argued that her wish to commit suicide was opposed to the function of the Narcotics Act, which aims to secure the necessary medical care for the persons concerned.[110] Therefore, an authorisation could only be granted for life-supporting or life-sustaining purposes and not for the purpose of assisting a person to end the own life.[111] In February 2005, the applicant's wife committed suicide in Switzerland with the assistance of an organisation named Dignitas.[112] This organisation is specialised in doctor-assisted suicide since in contrast to German law at this time, this has always been legal under the domestic law of Switzerland.[113] Later in 2005, the applicant unsuccessfully

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106 *Id.*

107 Eur. Ct. H.R., *supra* note 2.

108 *Id.* para. 8.

109 *Id.* para. 9.

110 *Id.* para. 10.

111 *Id.*

112 *Id.* para. 12.

113 *See* Siobhán O'Grady, *Dutch Doctor who euthanized Alzheimer's patient cleared of criminal charges*, Washington Post, https://www.washingtonpost.com/world/2019/09/11/dutch-doctor-who-euthanized-alzheimers-patient-cleared-criminal-charges/ (last visited Mar. 29, 2020).

brought an action to obtain a decision that the Federal Institute's rulings had been unlawful.[114] In addition, the appeals to the administrative court[115] and the administrative court of appeal[116] were declared as inadmissible since the applicant was not able to claim that he was the victim of an infringement of his own rights.[117] The decisions in question did not interfere with the appellant's own right to respect for family life protected by Article 6(1) of the German Basic Law such as by Article 8(1) ECHR as their way of living together was not affected by the acts of German authorities.[118] Unlike the Convention, comprising the right to private life and family life under one single article, the German basic law refers to two different legal basics. Under the German Constitution, the family life is protected under Article 6(1) of the Basic Law while, as explained above, the protection of a person's private life is guaranteed under the general right of personality under Article 2(1) in combination with Article 1(1) of the Basic Law. Later, the applicant brought a constitutional claim to the German Federal Constitutional Court. However, this was as inadmissible since he was not in the legal position to claim the violation of another person's basic rights since these constitutional guarantees are non-transferable rights.[119] Later, the applicant brought a claim to the ECtHR asserting that their case had not been properly heard before the domestic courts in Germany. Substantially, he argued that the German courts' refusal to examine the merits of his complaint had violated his own right to respect for private and family life under Article 8(1) of ECHR.[120] The applicant pointed out that his wife had been prevented from ending her life within the privacy of their family home, as originally planned by the couple, and instead he had been forced to travel to Switzerland to enable his wife to commit suicide.[121] Even before this decision, the ECtHR already considered the closest family members to be victims within the meaning of Article 34 of the Convention because of their close relationship to the person mainly concerned, if the interference had implications for the family

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114 Eur. Ct. H.R., *supra* note 2, para. 15.

115 Admin. Ct. Cologne, Feb. 21, 2006, 7 K 2040/05, 1673-1677 (Zeitschrift für das gesamte Familienrecht 2006) (Ger.).

116 Higher Admin. Ct. Münster, Jun. 22, 2007, 13 A 1504/06, 3016-1317 (Neue Juristische Wochenschrift 2007) (Ger.).

117 Eur. Ct. H.R., *supra* note 2, para. 16.

118 *See* Admin. Ct. Cologne, *supra* note 115.

119 BVerfG [German Constitutional Court] 1 BvR 1832/07, 979-980, Nov. 4, 2008, Neue Juristische Wochenschrift [NJW] (2009) (Ger.).

120 Eur. Ct. H.R., *supra* note 2, para. 35.

121 *Id.* para. 36.

member lodging the application.[122] In the case of *Koch*, the applicant and his wife had found themselves in a terrible situation, which also concerned the applicant as a compassionate husband and devoted caretaker.[123] As the relationship between husband and wife was extremely close, any infringement directed against the rights and liberties of one partner was directed against the rights that were shared by both partners.[124] The applicant held the view that each partner in the marriage was entitled to defend the joint rights and freedoms of both spouses and that the applicant was himself a victim of a violation of his Convention rights.[125] In respect to his wife's situation, the applicant argued that the decision taken by the Federal Institute for Pharmaceutical and Medical Products in Germany failed to pursue a legitimate aim and was not necessary within the meaning of Article 8(2) of ECHR.[126] The lethal dose of drug requested by his wife through the Federal Institute would have been necessary in order to allow the ending of her own life by a painless and dignified death in her own family home.[127] Concerning this argumentation, the ECtHR stated:

"The decision taken by the Federal Institute failed to pursue a legitimate aim and was not necessary within the meaning of paragraph 2 of Article 8. The lethal dose of medication requested by the applicant's wife would have been necessary in order to allow ending her life by a painless and dignified death in her own family home. There were no other means available which would have allowed her to end her life in her family home. In particular, the pertinent rules would not have allowed her to end her life by interrupting life-supporting treatment in a medically assisted way, as she was not terminally ill at the time she decided to put an end to her life. The pertinent law in this area was and remained unclear and only allowed the interruption of life-support for patients suffering from a life-threatening illness."[128]

Finally, the ECtHR ruled in the claimant's favour. Interestingly, the close partnership of the couple was a crucial point of argumentation in this decision. In fact, the court was also convinced that due to the extremely close relationship

122 *Id.* para. 36.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* para. 61.

127 *Id.*

128 *Id.*

between the spouses, any infringement directed against the rights and freedoms of one partner was directed against the rights that were shared by both partners.[129] Having regard to this exceptional situation and to his involvement in the fulfilment of her wish to commit suicide, the ECtHR explained that his claim has been directly affected by the authorities' refusal to grant an authorisation to receive a lethal dose of the medication.[130] Insofar, the court held that referring to the German courts' refusal to examine the merits of his complaint, there had been a violation of the applicant's procedural rights to respect his private and family life under Article of 8(1) ECHR.[131]

Additionally, the ECtHR made clear that due to the lack of a European consensus regarding the right to die in dignity, there is no positive obligation for Germany to accept a general right to doctor assisted suicide. Even before this decision, in *Haas v. Switzerland*, the ECtHR stated that the Contracting States have not reached a European consensus yet with regard to the right to die in dignity.[132] In some European countries, like Switzerland, the doctor-assisted suicide is legal, while in others, it is strictly banned under the domestic Criminal Law. By referring to a wide *margin of appreciation*, the ECtHR provides all Contracting States the freedom to decide upon their domestic laws on assisted suicide. Accordingly, the court considers that it is exclusively the matter of the States to decide whether to allow or not to allow any form of assisted suicide in domestic law.

C. The ECtHR's Impact on German Jurisprudence

In the following point, the impact of the ECtHR judgement on the German jurisdiction will be reflected in detail. After the ECtHR's decision, the claimant, Mr. Koch, continued the case at the national level and claimed before domestic courts again. He aimed to let the courts clarify that in his case German authorities were once obliged to authorize his wife to obtain a lethal dose of the requested drug. In fact, the administrative courts in the first and second instances again refused his claim but finally, the German Federal Administrative Court ruled in his favour. In March 2017, the German Federal Administrative Court rules that

129 *Id.* para. 36.

130 *Id.* para. 50.

131 *Id.* para. 72.

132 *Haas v. Switzerland,* App No. 31322/07, 53 Eur. H.R. Rep. 33 para. 55; Eur. Ct. H.R., *supra* note 2, para. 70.

in *extreme situations*, the authorities cannot deny an individual access to medication that would allow a painless and self-determined suicide.[133] Primarily, the court argued on the basis of German basic rights. Basically, the court referred to the guarantee of the constitutional general right of personality based on Article 2(1) in combination with Article 1(1) of the German Basic Law. As explained above, under this right, the German jurisdiction recognizes several aspects of personality protection such as privacy[134] and self-determination[135] and developed a wide ambit of these guarantees. Insofar, the right of self-determination under German constitutional law also comprises a person's individual decision of how to live and to end the own life.[136] But, according to the regulations of the Narcotics Act and the State's positive obligations under the German constitution to protect human life, it is unjustifiable to permit in general to receive medical drugs for the purpose of suicide.[137] For these reasons, the court ruled that in the light of German basic rights, merely in *extreme and exceptional cases* an exception to Section 5(1)(6) of Narcotics Act should be made.[138] In order to avoid any vagueness, this should merely apply to individuals who are seriously and incurably ill and secondly, if they have determined autonomously to end up their own lives due to their unbearable situation.[139] A prescription of that kind of medical drug may only be justified if their case meets these criteria. Under these conditions, individuals can practice their right to control the timing and manner of the own death. In the claimant's case, the court held the opinion that German authorities did not examine properly whether the claimants' wife suffered by such extreme and exceptional circumstances.[140] This is a significant decision since it was the first time in Germany that a federal court ruled clearly in favour of a claimant regarding the right of assisted suicide. However, the Federal Administrative Court's argumentation did not affect that assisted suicide became legal in Germany. The meaning of this decision is rather the strong impact the ECtHR's rulings have on domestic jurisprudence on a single case basis.

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133 BVerwGE 158, 142, *emphasized by the author* (Ger.).

134 BVerfGE, *supra* note 28.

135 BVerfGE, *supra* note 95, at 41.

136 BVerfGE 49, 286, 298 (Ger.).

137 BVerwGE, *supra* note 133 para. 29.

138 BVerwGE, *supra* note 133 para. 28 (*emphasized by the author)*.

139 *Id.*, *supra* note 133 para. 31.

140 *Id.*, *supra* note 133 para. 43.

D. Recent Developments on Self-Determination in German Law

The above-explained decision of the German Federal Administrative Court on the right to die with dignity was critically discussed in public in Germany. The argumentation of the German Federal Administrative Court has been evaluated as incomplete for leaving out aspects regarding different case constellations, for example, cases in which a patient is not capable of making autonomous decisions.[141] Furthermore, for decades, there has been an ongoing controversial debate whether to completely legalize the so-called doctor-assisted suicide like in the situation of the *Koch* case.[142] In fact, the decision of the German Federal Administrative Court made clear that there was no abrupt change in domestic jurisprudence. For example, in a case in May 2019, the German Federal Administrative Court refused to allow the claimants access to certain kind of drugs in order to end up their own life.[143]

A significant change of law was brought by the recent decision of the German Federal Constitutional Court in February 2020.[144] In fact, this judgement can be seen as landmark decision since the court ruled that the prohibition of assisted suicide services under Section 217 of the Criminal Code violates German basic law. First of all, the Federal Constitutional Court explained that the general right of personality under Article 2(1) in combination with Article 1(1) of the Basic Law comprises a right to a self-determinated death which also includes the freedom to take one's own life.[145] Accordingly, a person's decision to end the own life has to be respected as an act of autonomous self-determination.[146] On the ground of these arguments, the court held that the ban of assisted suicide services set out in Section 217 of the Criminal Code violates the Basic Law and is therefore void.[147] The Federal Constitutional Court especially concerned the argument that, in practice, the ban effectively averts the access to doctor-assisted suicide for any person concerned.[148]

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141 Michael Sachs, *Grundrechte: Grundrechtsschutz für Selbsttötung*, 800, 802 (Juristische Schulung 2017).

142 *See* Christian Hillgruber, *Die Erlaubnis zum Erwerb eines Betäubungsmittels in tödlicher Dosis für Sterbenskranke – grundrechtlich gebotener Zugang zu einer Therapie "im weiteren Sinne*, 777 (Juristenzeitung 2017).

143 BVerwG, May 28, 2019, Neue Juristische Wochenschrift [NJW] 2019, 2789 (Ger.).

144 BVerfG, *supra* note 101.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

The legislator may now enact new regulations on this matter by reflecting the constitutional ruling.[149] However, the court made clear that the legislator is still free to impose any other regulation on suicide assistance within the frame of constitutional law. So, when enacting new laws, the legislator has to ensure that still sufficient freedom remains for the individuals to exercise their right to a self-determined death.[150] Due to a critical debate on the former legal situation regarding doctor-assisted suicide in Germany and the hearing before the court in this case,[151] the outcome of this decision was foreseen. The liberalization of the domestic law can be seen in the light of the Convention regarding Article 8(1) of ECHR. Nevertheless, the decision was also criticised[152] and it is likely that the discussion will continue.

VI. Conclusion

This article has illustrated that there was a significant development of German jurisprudence in the field of personality protection in the light of Article 8 of ECHR. The case constellation of the collision between press and privacy showed that there was a stepwise development in the balancing of these two rights. Both, the German Constitutional Court and the ECtHR, worked on to refine the jurisprudence in the light of the most effective protection of European human rights. In this respect, there was a strong influence of the ECHR on domestic law. Although, as explained that the Convention has merely the rank of federal ordinary law within the German legal system, the jurisprudence of the German Constitutional Court has graded up its rank by complying with the ECtHR's argumentation when examining the concrete facts of the case.[153]

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149 *See* Josef Franz Lindner, *Sterbehilfe in Deutschland – Mögliche Regelungsoptionen*, 66 (Zeitschrift für Rechtspolitik 2020).

150 BVerfG, *supra* note 101.

151 *See* Der Spiegel, https://www.spiegel.de/panorama/gesellschaft/geschaeftsmaessige-sterbehilfe-warum-das-verfassungsgericht-sie-wohl-wieder-erlauben-wird-a-1263522.html. (last visited Mar. 29, 2020).

152 Christopher F. Schuetze, *German Court Overturns Ban on Assisted Suicide*, N.Y. Times, Feb. 26, 2020, https://www.nytimes.com/2020/02/26/world/europe/germany-assisted-suicide.html.

153 *See* Birgit Daiber, *Der Einfluss der EGMR-Rechtsprechung auf die Rechtsprechung des Bundesverfassungsgerichts* 957 (Die Öffentliche Verwaltung 2018).

Then, regarding the right to die in dignity as concerned to be protected as self-determination, Article 8(1) of ECHR in the interpretation of the ECtHR also had a strong impact on German law. By the case study in this article, it gets obvious that German courts take the jurisprudence of the ECtHR very seriously. Moreover, it has been illustrated that the ECtHR's case law and the domestic jurisprudence are interwoven in a complex system of human rights protection. In this context, in the last fifteen years, not only the German domestic law has been strongly influenced by the ECtHR case law, but also the ECtHR reveals the importance to grant a margin of appreciation when the European States rule in domestic jurisprudence. In fact, harmonization of law should not be the goal of the ECtHR as an international court but rather to set the minimum standard of protection and moreover to "help" that human rights protection can improve in domestic law. Against the background of these aspects, the article argued that there is a cooperation between the German Constitutional Court and the ECtHR. This occurs in a dialogue and exchange of arguments between the domestic federal constitutional courts and the ECtHR as an international court.[154] In fact, it took time to develop this interaction between international law and domestic jurisprudence. But since the cooperation of the courts is so substantial for an effective protection system of human rights in Europe, it has to be seen as a great effort.

154 *See* Rike U. Krämer & Judith Janna Märten, *Der Dialog der Gerichte - Die Fortentwicklung des Persönlichkeitsschutzes im europäischen Mehrebenenverbund,* 2 Europarecht 169-188 (2015).

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