Developments

The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court

By Christian Tomuschat[*]

A. Introduction

The Federal Republic of Germany counts among the earliest States parties to the European Convention on Human Rights (ECHR). It ratified the ECHR on 5 December 1952, three years ahead of Italy, and hence found itself among the original members of the treaty system when the ECHR entered into force on 3 September 1953. For the new democratic Government, it was a decision of principle to affirm its willingness to cooperate peacefully within the group of European States, submitting to an international review mechanism with regard to all of its activities. Therefore, very shortly afterwards, it accepted also the individual application under Article 25 ECHR,[1] which at that time was not yet compulsory for all States parties. For many years under the Nazi dictatorship, Germany had brought death and destruction to its neighbours. Now, organized under a democratic and liberal constitution, the Basic Law (BL), it wanted to manifest its newfound identity as a civilized State abiding by the rule of law.

For many decades, the territorial scope of the ECHR was confined to the Western part of Germany, the Federal Republic of Germany, which was originally made up of the zones of occupation of the three Western Powers who had defeated the Nazi regime. The German Democratic Republic (GDR), which had seen its birth in 1949 under the control of the Soviet Union, enjoyed no international mechanism for the protection of human rights, and even domestically human rights, although proclaimed in a Constitution permeated by the socialist doctrine, had almost no real meaning, given that any independent judicial control was lacking. Proudly, the GDR authorities manifested their attachment to "socialist legality," which meant the predominance of the Socialist Party of Unity in all politically

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[1] Its declaration under Article 25 ECHR was made on 5 July 1955. On that day, the individual application came into force since the applicable threshold of six States had been reached (Sweden, Ireland, Denmark, Iceland, Belgium, and the Federal Republic of Germany).

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sensitive matters.[2] The ECHR was somewhat contemptuously labelled a "Western European" Convention on Human Rights that only protected "bourgeois," outdated rights and freedoms.[3]

When Germany was reunited, informally since the fall of the wall on 9 November 1989, formally on 3 October 1990, no specific legal transactions were necessary to bring the territory of the former GDR within the scope of the GDR. All actors involved simply followed the rule laid down in Article 29 of the Vienna Convention on the Law of Treaties[4] according to which "a treaty is binding upon each party in respect of its entire territory," which reflects the principle of moving treaty frontiers.[5] Since the territory of the former GDR had been absorbed by the western German State, the Federal Republic of Germany, the ECHR applied now automatically to these new components of Germany.[6] For the first time in their lives, the Germans in the eastern part of their country could bring their grievances first to the Federal Constitutional Court (hereinafter Constitutional Court) and thereafter to the Strasbourg Commission and Court.

Summarily speaking, Germany has never had any great difficulties in complying with its obligations under the ECHR. In the first place, the human rights and fundamental freedoms set forth in the German Basic Law run largely parallel to the guarantees contained in the ECHR.[7] Both instruments were largely influenced by the work on human rights carried out by the UN Human Rights Commission immediately after the establishment of the world organization. The texts elaborated at world level were well known to the Europeans when they convened to draft their regional instrument.[8] Likewise, the Parliamentary Council, which in West Germany elaborated the Basic Law, relied to a great extent on those materials.[9] Thus, the structure of the (first!) chapter of

[2] For a detailed analysis of the concept, see MICHAEL STOLLEIS, SOZIALISTISCHE GESETZLICHKEIT: STAATS- UND VERWALTUNGSRECHTSWISSENSCHAFT IN DER DDR (2009).

[3] *See* BERNHARD GRAEFRATH, MENSCHENRECHTE UND INTERNATIONALE KOOPERATION: 10 JAHRE PRAXIS DES INTERNATIONALEN MENSCHENRECHTSKOMITEES 46 (1988).

[4] Vienna Convention on the Law of Treaties art. 29, May 23, 1969, 1155 U.N.T.S. 331.

[5] This principle was not included in the Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 17 I.L.M. 1488.

[6] *See* Christian Tomuschat, *A United Germany within the European Community*, 27 COMMON MKT. L. REV. 415, 418-23 (1990).

[7] *See* Paul Kirchhof, *Verfassungsrechtlicher Schutz und internationaler Schutz der Menschenrechte: Konkurrenz oder Ergänzung?*, 20 EUROPAISCHE GRUNDRECHTE-ZEITSCHRIFT 16, 21 (1994).

[8] *See* KARL JOSEF PARTSCH, DIE RECHTE UND FREIHEITEN DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION 11 (1966).

[9] *See* Klaus-Berto von Doemming, Rudolf Werner Füsslein & Werner Matz, *Entstehungsgeschichte der Artikel des Grundgesetzes*, *in* 1 JAHRBUCH DES ÖFFENTLICHEN RECHTS, NEUE FOLGE 50, 56, 74 (Gerhard Liebholz ed., 1951).

the Basic Law dealing with fundamental rights (Articles 1 to 19) resembles very closely the ECHR. Even the language has many similarities, a fact which does not appear so openly since the Basic Law was obviously drafted in German while the work of the United Nations bodies and later that of the relevant Council of Europe bodies was couched in the official languages of the two organizations.

A second factor which contributes greatly to the positive balance sheet of Germany before the European Court of Human Rights in Strasbourg (hereinafter Strasbourg Court or ECtHR)[10] is the existence of the constitutional complaint. Everyone who feels that his/her fundamental rights under the Basic Law have been infringed by an act of public authorities can eventually take his/her case to the Constitutional Court, provided that beforehand the available ordinary remedies have been exhausted.[11] Most of the time, this mechanism ensures that any major legal encroachments or mishaps are already remedied at national level. Normally, little is left for correction by the Strasbourg Court.

However, from time to time discrepancies arise between the jurisprudence of the Constitutional Court and the Strasbourg Court which concern not just accidental occurrences, but matters of principle. Four examples should be given. In 1995, a German schoolteacher who had been dismissed from public service because of her involvement with the German Communist Party in the former western part of Germany in the 1970s and 1980s, i.e. before reunification, filed an application with the Strasbourg Court, alleging that her rights under Articles 10 and 11 ECHR had been violated. The Court, by a narrow margin of ten to nine votes, held that the application was well-founded.[12] A case that had an enormous international resonance was the application of *Caroline von Hannover against Germany* which centred on the protection of privacy of public figures against the publication of photos in the entertainment press. Contrary to the opinion of the German civil courts, which had been approved by the Constitutional Court,[13] the European judges

[10] The number of violations found was eighteen in 2009 as compared to sixt-one for Italy. During the fifty-year period from 1959 to 2009 the Federal Republic of Germany was "convicted" in ninety-nine cases whereas Italy accounted for 1,556 "convictions".

[11] The jurisprudence of the Constitutional Court is by now reflected in 123 volumes. Most of the decisions relate to constitutional complaints. The names of private parties are never mentioned as is generally the case in German law reports. It is therefore not easy to make short-hand references, in particular when trying to check the identity of a decision published in a legal periodical with the same decision published in the official reports. In order to be on the safe side, the official registration number must be given—which is a clumsy method. The decisions of the Constitutional Court published on the internet are divided into small paragraphs by margin numbers hereinafter: mn). This also applies to the official translations established by the Court's services of decisions deemed to be of extraordinary importance. Unfortunately, in the bound volumes, these margin numbers are not reprinted.

[12] Vogt v. Germany, App. No. 17851/91, Eur. Ct. H.R. (1995). The constitutional complaint had been dismissed by a panel of three judges of the Constitutional Court on 7 August 1990.

[13] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 15 Dec. 1999, 101, 361.

found that Germany's legal regime as shaped by the relevant case law did not provide sufficient protection to persons who, although they were prominent figures of contemporary society, were in need of seeing their privacy respected.[14] While in this case the legal position had been shaped by judicial precedent, the recent case of *Brauer v. Germany*[15] concerned a legislative act which refused equality in inheritance matters to children born out of wedlock before a specific date in 1949. Although on the basis of the non-discrimination clause of the Basic Law Germany had progressively introduced equality of children without any regard for their birth status, the controversial time clause was maintained on account of alleged evidentiary difficulties: the official justification was that after decades the family relationship of a child born out of wedlock could almost never be proved in an uncontroversial manner. The last case that deserves particular attention is the judgment rendered a few months ago in *M. v. Germany*.[16] This case concerned a person who, because of many criminal offences, was held in preventive detention after having served the sentences imposed upon him. However, preventive detention, which had originally been confined to ten years, was retrospectively extended in his case for an unlimited period of time after a corresponding amendment of the relevant statute. The Strasbourg Court considered that this extension of preventive detention amounted to a retrospective imposition of a punishment and was therefore incompatible with Article 7 ECHR. At an earlier stage on the national level, a panel of eight judges of the Constitutional Court had held that the measure was irreproachable since preventive detention was not a criminal sanction in the sense of Article 103 (2) BL.

The particularly delicate feature of all these cases was that indeed, prior to arriving at Strasbourg, they had all been scrutinized by the Constitutional Court. In accordance with the requirement of exhaustion of local remedies (Article 35 (1) ECHR), it is necessary for any applicant to submit a constitutional complaint to the Constitutional Court to open the way to Strasbourg.[17] Since, as just pointed out, the fundamental rights under the Basic Law correspond to a large extent to the rights and freedoms enunciated in the ECHR, generally the same arguments can be invoked in proceedings before the Constitutional Court and before the Strasbourg Court. This means, in other words, that the judges on the other side of the Rhine sit, broadly speaking, as appeals judges scrutinizing the correctness of the decisions taken by the constitutional judges in Karlsruhe. Most of the time, their assessment of a given case is the same. But the few instances where divergences of opinion appear may cause irritations. The Constitutional Court, whose judges for many decades believed to control the legal universe under their jurisdiction, does not occupy that position any longer. Like a *juge de paix* or a *pretore*, they can be censured for errors

[14] Von Hannover v. Germany, App. No. 59320/00, Eur. Ct. H.R. (2004).

[15] Brauer v. Germany, App. No. 3545/04, Eur. Ct. H.R. (2009).

[16] M v. Germany, App. No. 19359/04, Eur. Ct. H.R. (2009).

[17] *See* CHRISTOPH GRABENWARTER, EUROPÄISCHE MENSCHENRECHTSKONVENTION 63 nn. 117, 118 (2nd. ed. 2005).

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of law although not directly, but at least indirectly for mishandling issues of human rights protection. This is for them all the more unpleasant since they have to defend their position also vis-à-vis the Court of Justice of the European Union, another competitor for jurisdictional power.

One should also mention the cases where the Strasbourg Court found that the Constitutional Court had not respected the right to a speedy trial under Article 6 (1), first clause, ECHR. Indeed, many constitutional complaints have remained stuck for many years in Karlsruhe—for whatever reasons.[18] The Basic Law does not acknowledge that right, and on account of its complex judicial system Germany is particularly prone to producing long delays in proceedings. In *Sürmeli*, Germany was reminded by the Court that it had to organize its judicial system in such a way that litigant parties could see their rights under Article 6 ECHR effectively implemented.[19] As just hinted, not even the Constitutional Court has succeeded in becoming a model institution that could show the way for all the other judicial branches. Cases where Strasbourg has to blame the constitutional judges on the other side of the Rhine on account of long delays in settling a dispute also contribute to a kind of latent tension which is visible from time to time in decisions of the Constitutional Court.

B. The Effect of the ECHR within the Domestic Legal Order of Germany

Of course, being a party to the ECHR, Germany is bound to respect the obligations deriving therefrom. *Pacta sunt servanda* is a self-evident and fundamental proposition, now codified in Article 26 of the Vienna Convention on the Law of Treaties. This rule, however, does not automatically answer the question as to the binding effect of the decisions of a body established under a treaty within the domestic legal order of the parties to that treaty.[20] According to general principles of international law, which also apply to the

[18] Probstmeier v. Germany, App. No. 20950/92, Eur. Ct. H.R. (1997) (seven years); Klein v. Germany, App. No. 33379/96, Eur. Ct. H.R. (2000) (nine years); Becker v. Germany, App. No. 45448/99, Eur. Ct. H.R. (2002) (thirteen years); Trippel v. Germany, App. No. 68103/01, Eur. Ct. H.R. (2003) (five years and eight months); Voggenreiter v. Germany, App. No. 47196/99, Eur. Ct. H.R. (2004) (seven years); Kaemena and Thöneböhn v. Germany, Applications 45749/06 and 51115/06, Eur. Ct. H.R. (2009) (more than five years).

[19] Sürmeli v. Germany, App. No. 75529/01, Eur. Ct. H.R. at §§ 136–137 (2006). After many years, the Ministry of Justice on 8 April 2010 presented to the public a bill providing for protection against excessive length of proceedings, Bundeministerium der Justiz [Federal Ministry of Justice], *Referentenentwurf: Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren* [Draft Legislation: Law for Excessive Legal and Criminal Proceedings], http://www.bmj.bund.de/files/5bc6c6f3463ae4546c4110e72f1f340c/4467/RefE_Rechtsschutz_ueberlange_verfahren.pdf. This bill still has to be approved by the cabinet as a whole—and thereafter to be enacted as law by the parliamentary bodies.

[20] However, Article 28 (1) (b) as amended by Protocol No. 14 makes reference to a "well-established case-law of the Court."

ECHR, the method of implementation of commitments under international law is left to discretionary decisions of every individual State, provided that such commitments are effectively fulfilled. It is the result, not the path to that result, which matters.[21]

In Germany, treaties that have legislative substance, in particular treaties that seek to create rights or obligations for individuals, must be approved by a parliamentary statute (Article 59 (2) BL). This procedure, which is founded on the dualist model of the relationship between international and domestic law, was accordingly also followed with regard to the ECHR.[22] Logically, judicial practice has drawn the conclusion from this legal mechanism that international treaties have the rank of an ordinary statute within the German domestic legal order.[23] In the case of human rights treaties, this systemic approach carries with it the disadvantage that any later domestic statute may derogate from the relevant human rights guarantees, pursuant to the simple proposition: *lex posterior derogat legi priori*. Attempts have been made to avoid this undesirable result. Some writers have argued that because of the particular importance which the Basic Law attributes to human rights, the relevant international treaties, in particular the ECHR, should be acknowledged as instruments enjoying constitutional authority.[24] The Constitutional Court has never accepted this thesis. In a constant line of pronouncements, it has held that the general approach applied to international treaties cannot be departed from with regard to human rights instruments.[25] Accordingly, no constitutional complaint can be based solely on an alleged violation of the ECHR. On the other hand, however, the Constitutional Court has invariably applied the axiom that the rules of German law should be interpreted in harmony with the requirements resulting from the ECHR.[26] Accordingly,

[21] Swedish Engine Drivers' Union v. Sweden, App. No. 5614/72, Eur. Ct. H.R. at § 50 (1976), James et al. v. UK, App. No. 8793/79, Eur. Ct. H.R. at § 84 (1986); Observer and Guardian v. UK, App. No. 13585/88, Eur. Ct. H.R. at § 76 (1991).

[22] Original Act of Approval of 7 August 1952, *Bundesgesetzblatt* [Register of German Federal Law] BGBl. II at 685.

[23] BVerfGE 74, 358 (370); BVerfGE 82, 106 (114); BVerfGE 111, 307 (316 n.) (*Görgülü* case); BVerfGE 120, 180 (200) (*Caroline von Hannover* case); and most recently the decision of 4 Feb. 2010, *available at* http://www.bverfg.de/entscheidungen/rk20100204_2bvr230706.html, margin number 21.

[24] This view is defended in particular by Albert Bleckmann, *Verfassungsrang der Europäischen Menschenrechtskonvention?*, 21 EUROPAISCHE GRUNDRECHTE-ZEITSCHRIFT 149, 153 (1994). *See also* Frank Hoffmeister, *Die Europäische Menschenrechtskonvention als Grundrechtsverfassung und ihre Bedeutung in Deutschland*, 40 DER STAAT 349, 367 *et seq*. (2001), Georg Ress, *Verfassungsrechtliche Auswirkungen der Fortentwicklung völkerrechtlicher Verträge*, *in* FESTSCHRIFT FÜR WOLFGANG ZEIDLER 1775, 1789–96 (Walther Fürst, Roman Herzog & Dieter C. Umbach eds., 1987), Christian Walter, *Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozess*, 59 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 961, 974–77 (1999). These authors suggest that the Strasbourg system for the protection of human rights should be considered as a supranational organization pursuant to Article 24 (1) BL the decisions of which might therefore partake of the same precedence as that granted to the decisions of the system of European integration.

[25] BVerfGE 74, 358 (370); BVerfGE 120, 180 (200).

[26] BVerfGE 74, 358 (370); BVerfGE 111, 307 (317).

as it appears, there has not been in practice a single case where the rude *lex posterior* principle was resorted to the detriment of the ECHR.

Going even further in an effort to strengthen the general concept of *Völkerrechtsfreundlichkeit* of the BL,[27] the Constitutional Court has taken the view that to the extent possible Germany's fundamental rights should be construed in light of the ECHR in order to fill in certain lacunae which a comparison between the two instruments may reveal. The first case in point was decided by the Constitutional Court in 1987 at a time when a well-known international lawyer, Helmut Steinberger, sat on the bench of the second senate of the Court. The judges found that to terminate a criminal proceeding without a final determination on the merits, but to mention in the legal grounds of such an order that it was convinced of the guilt of the indicted person, was incompatible with the presumption of innocence. The Basic Law does not list the presumption of innocence as an individual right. However, the Court held that in conjunction with Article 6 (2) ECHR the principle of the rule of law, a key element of Germany's constitutional order, had to be construed as encompassing the presumption of innocence.[28] Generally, in interpreting the Basic Law, the substance and the later development of the ECHR had to be taken into account, provided that such complementary means of interpretation did not reduce or restrict the protection provided by the fundamental rights under the Basic Law.[29] This line of reasoning has been consistently continued. Thus, in a 1990 case the Constitutional Court resorted both to the ECHR and the International Covenant on Civil and Political Rights (ICCPR) in order to define the notion of forced labor under Article 12 (2) and (3) BL.[30] The protection of the family, a command explicitly set forth in the Basic Law (Article 6 (1)), had a corresponding guarantee in Article 8 ECHR and was therefore to be applied in harmony with this latter provision.[31] The Constitutional Court has thus devised an intelligent method to anticipate the review which its decisions might undergo at a later stage. Since no mechanism of preliminary rulings exists within the system of the ECHR, it is certainly much wiser on the part of a national court to carry out such a control of its own instead of

[27] For the latest affirmations of this principle, see BVerfGE 111, 307 (317) (referring at mn 33 to "commitment to international law") (official English translation available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html); BVerfGE 123, 267 (347) (referring at mn 225 to the Lisbon Treaty and the "principle of openness towards international law") (official English translation available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

[28] BVerfGE 74, 358 (370).

[29] *Id*.

[30] BVerfGE 83, 119 (128).

[31] BVerfGE 111, 307 (317); BVerfGE 120, 180 (200).

exposing itself to the risk of being criticized by the international judges in Strasbourg at a later stage after the person concerned has filed an application under the ECHR.[32]

In one case from the more recent past, where expropriations in the former GDR were at issue, the Constitutional Court even resorted directly to the ECHR without indicating that the European instrument served only as a stepping stone to reach a well-balanced interpretation of the guarantee of property laid down in Article 14 BL. In fact, the last section of the judgment starts out with the words, "Finally, the decision does not conflict with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights."[33] Obviously, this passage was written in anticipation of the expected application to the Strasbourg Court. But no applications seem to have been filed.

C. The *Görgülü* Case

In the *Görgülü* case,[34] the Constitutional Court expressed itself at great length about the consequences which a judgment of the Strasbourg Court entails for the institutions of the Federal Republic of Germany. Essentially, it is the only decision which openly discusses the follow-up which the finding of a violation by the guardian of the ECHR entails. In most of the other cases, the pronouncement by the European judges was not followed by a response of their counterparts in the Constitutional Court. Generally, after Strasbourg has spoken, the ball is in the court of the executive branch of government which has to make determinations on the case at hand and also to reflect on whether the inconsistency found requires general measures suitable to bring the legal position into harmony with the interpretive result found by the international review body.

The *Görgülü* case was in a way unique in that the Constitutional Court had an opportunity to assess the case several times since the lower German authorities were reluctant to abide by the judgment of the Strasbourg Court. Essentially, the facts were simple.[35] A Turkish national living in Germany had fathered a child that was born out of wedlock by the mother. Since she had ceased any contact with the father, she gave the child up for adoption immediately after its birth. The child was thereupon received in a foster family. After having learned about these occurrences, the father attempted to obtain custody of

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[32] *See* decision of 4 Feb. 2010, *supra* note 23 (concerning the obligations entailed by a violation of the right to life).

[33] BVerfGE 112, 1, mn 139 (41) (English translation available at http://www.bverfg.de/entscheidungen/rs20041026_2bvr095500en.html).

[34] Görgülü v. Germany, Application 74969/01, Eur. Ct. H.R. (2004); BVerfGE 111, 307 (English translation available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html).

[35] *See id.* at 308–13 (giving a detailed account of the facts by the Constitutional Court).

the child and to be granted access to him, but after a first decision favorable to him the responsible appeal court refused these requests, contending that it was in the child's best interest to remain in the foster family and to be separated from his father. Even a panel of three judges of the Constitutional Court refused to entertain his constitutional complaint (on 31 July 2001).[36] Thereupon, adoption proceedings were initiated by the foster parents. On the other hand, the father instituted new proceedings with a view to obtain custody of his child. Given the obstacles raised against the acknowledgement of his parental rights, he eventually filed an application under the ECHR. The Strasbourg Court came to the conclusion that the series of decisions and measures by the German authorities amounted to a clear violation of Article 8 ECHR. The relationship between the father and his son enjoyed protection under that provision. No legitimate grounds could be perceived which might justify such a drastic curtailment of the rights of Mr. Görgülü.

An impartial observer might have believed that the decision of the Strasbourg Court meant the end of the dispute about the right of custody over Mr. Görgülü's son. This was not the case, however. The lower court, the *Amtsgericht* Wittenberg, responded positively to the Strasbourg judgment. But the competent Court of Appeal, the *Oberlandesgericht* Naumburg, raised a series of procedural and substantive objections. It stated *inter alia*, in an amazingly self-righteous and ignorant manner, that:

> [T]he judgment bound only the Federal Republic of Germany as a subject of public international law, but not its bodies, authorities and the bodies responsible for the administration of justice, which are independent under Article 97.1 of the Basic Law. The effect of the judgment, therefore, subject to a change of domestic law, was limited as a matter of law and as a matter of fact to establishing the sanctioning of what in the opinion of the ECtHR was a past violation of law. The judgment of the ECtHR remained a judgment that at all events for the domestic courts was not binding, without any influence on the finality and non-appealability of the decision appealed against. Where a decision of the ECtHR established that a sovereign German act was contrary to the Convention, neither the European Convention on Human Rights nor the Basic Law created an obligation to accord to that decision the power to reverse finality and non-appealability.
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> As a result of the status of the European Convention on Human Rights as ordinary statutory law below the level of the constitution, the ECtHR was not functionally a higher-ranking court in relation to the courts of the States parties. For this reason, neither in interpreting the European

[36] *See* 1 BvR 1174/01, BVerfGE 111, 307. No grounds were given.

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> Convention on Human Rights nor in interpreting national fundamental rights could domestic courts be bound by the decisions of the ECtHR.[37]

This decision prompted Mr. Görgülü to return to the Constitutional Court, complaining this time not only that his right to protection of the family under Article 6 (1) BL had been violated, but that the light-handed treatment of the judgment of the Strasbourg Court was contrary to his right to see the rule of law respected.

The examination of the grounds set out by the Constitutional Court to affirm the well-foundedness of the constitutional complaint must take into account the fact that shortly before, in *Caroline von Hannover v. Germany*,[38] the Constitutional Court had suffered a rebuff from Strasbourg in matters of protection of personality rights against the publication of photos invading the private sphere of a celebrity. It appears from comments published by members of the Constitutional Court[39] that the Court had serious reservations with regard to that judgment. They emphasize that the drawing of demarcation lines between protected rights, on the one hand, and public interests which also involved private interests of third parties on the other hand, should be handled by the Strasbourg Court with great care and circumspection, leaving wide room to national perceptions. The Constitutional Court therefore seized the opportunity provided by the *Görgülü* case to manifest its understanding of the mutual relationship between the two systems of protection and their main guarantors.

It is therefore not the concrete outcome of the proceedings before the Constitutional Court which gave and may still give rise to concern. In the case at hand, the controversial decision of the *Oberlandesgericht* Naumburg was set aside. However, the observations of the Constitutional Court were found by most observers to take a stance that was seemingly at variance with the *Völkerrechtsfreundlichkeit*, which was emphasized at the same time.

The misgivings one must have when reading the Constitutional Court's *Görgülü* decision commence in the first lines of the observations on the merits of the case. The Court deliberately abstains from stating that a judgment of the Strasbourg Court must simply be executed, but confines itself to observing that "the authorities and courts of the Federal Republic of Germany are obliged, under certain conditions, to take account of the

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[37] Summary given by the Constitutional Court. *See* BVerfGE 111, 307 (312–13) (official English translation at mn 17-18).

[38] Von Hannover v. Germany, App. No. 59320/00, Eur. Ct. H.R. (2004). For approving comment, *see* John Rolf Stürner, *Case Note*, 59 JURISTENZEITUNG 1018–21 (2004); Peter J. Tettinger, *Steine aus dem Glashaus*, 59 JURISTENZEITUNG 1144–46 (2004).

[39] *See* Hoffman-Riem, *infra* note 46, Papier, *infra* note 47.

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European Convention on Human Rights as interpreted by the ECtHR in making their decisions."[40]

The concept of "taking account" is much weaker than the usual terminology which would use words such as "comply with" and "abide by." In fact, the distancing from the usual model of compliance is underlined particularly in a later passage where the Court clearly indicates that it deems non-execution of a judgment of the Strasbourg Court justifiable in certain circumstances. It only requires that in such instances the competent national bodies disclose the reasons why they feel that such departure is admissible:

> If . . . the ECtHR establishes that there has been a violation of the Convention, and if this is a continuing violation, the decision of the ECtHR must be taken into account in the domestic sphere, that is the responsible authorities or courts must discernibly consider the decision and, if necessary, justify understandably why they nevertheless do not follow the international-law interpretation of the law.[41]

This is an unfortunate passage, which has no legitimate right of abode when consideration is to be given to the implementation of a Strasbourg judgment in an individual case.[42] In our view, the Constitutional Court had quite another factual configuration in mind when drafting these sentences, namely the circumstances of the *Caroline von Hannover* case. It is true that when on the basis of an individual application the European judges have come to a specific result, it may well turn out that a generalization of their views needs careful reflection and cannot be extended in an automatic fashion to entire classes of identical or similar cases. But after Strasbourg has spoken the final word in an individual case, the national authorities have no license to dispose of such a pronouncement according to their own discretion, except if new circumstances have emerged that could not have been foreseen by the European judges. Therefore, the conclusion drawn at the end of the legal grounds to the effect that the relevant domestic court, the *Oberlandesgericht* Naumburg, "is not bound regarding the actual outcome" of the further proceedings,[43] fails grossly in reflecting the correct legal position.

Two main reasons are adduced by the Karlsruhe judges to support the eventuality of non-respect of judgments of the Strasbourg court. The primary reason invoked is presented like an original juridical discovery, namely the existence of "multipolar fundamental rights

[40] BVerfGE 111, 289 (315) (English translation at mn 29).

[41] *Id*. at 324 (English translation at mn. 50).

[42] This was not perceived by André Nollkaemper. *See* André Nollkaemper, *Rethinking the Supremacy of International Law*, 65 J. PUB. L. 65, 77 (2010).

[43] BVerfGE 111, 307 (332) (English translation at mn 69).

situations,"[44] i.e. situations where the challenged governmental measure was intended to protect rights of third persons. Obviously, in *Caroline von Hannover* such a situation was present. The rules on protection of privacy demarcate the borderline between personality rights on the one hand and freedom of the press on the other. Likewise, in *Görgülü*, to a much lesser extent, the rights of a child, the interests of a foster family and the rights of a father had to be weighed and balanced. But it seems fairly odd to read in the judgment of the Constitutional Court that in such instances of "multipolar situations" it is important that:

> [V]arious subjective legal positions are sensitively weighed against each other . . . . There may therefore be constitutional problems if one of the subjects of fundamental right in conflict with one another obtains an ECtHR judgment in his or her favour against the Federal Republic of Germany and German courts schematically apply this decision to the private-law relationship.[45]

The Court's observations sound as if "multipolar situations" were rare birds whereas in real life such situations are a daily reality. And it is self-evident that in a judgment of the Strasbourg Court the interests of the third parties involved are invariably duly taken into account. Therefore, the eventuality that a judgment of the Strasbourg Court might infringe fundamental rights of third persons under German law is to be dismissed out of hand as a chimera beyond any realistic imagination.[46] It may well be true that the procedural situation of such third parties leaves something to be desired. But the relevant observations of the Constitutional Court read as if after a decision of the European judges the field was still open for introducing the most diverse considerations. This is simply an error, and the Constitutional Court itself had to endure the consequences of its inconsiderate speculations.[47] In fact, the civil courts that had to regulate the dispute on the ground felt encouraged to give again their subjective feelings paramountcy, still

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[44] *Id*. at 324 (English translation at mn 50).

[45] *Id*.

[46] Jochen Abr. Frowein, *Die traurigen Missverständnisse. Bundesverfassungsgericht und Europäischer Gerichtshof für Menschenrechte*, *in* WELTINNENRECHT: LIBER AMICORUM JOST DELBRÜCK 279, 286 (Klaus Dicke et al. eds., 2005), rightly points out that an infringement of substantive norms of constitutional law by implementing a decision of the Strasbourg Court is "inconceivable." Hardly persuasive is the defence by Wolfgang Hoffmann-Riem, *Kontrolldichte und Kontrollfolgen beim nationalen und europäischen Schutz von Freiheitsrechten in mehrpoligen Rechtsverhältnissen*, 33 EUROPAISCHE GRUNDRECHTE-ZEITSCHRIFT 492, 497–99 (2006).

[47] Unfortunately, the former President of the Constitutional Court, Hans-Jürgen Papier, strongly supported the less than felicitous holdings of the Court. *See Umsetzung und Wirkung der Entscheidungen des Europäischen Gerichtshofes für Menschenrechte aus der Perspektive der nationalen deutschen Gerichte*, 33 EUROPAISCHE GRUNDRECHTE-ZEITSCHRIFT 1, 3 (2006). See also his interview in FRANKFURTER ALLGEMEINE ZEITUNG, Dec. 9, 2004, at 5.

denying the father a right of access to his child.[48] The Constitutional Court had to issue an injunction against the *Oberlandesgericht* Naumburg,[49] and in a later decision of 10 June 2005[50] it had to remind the *Oberlandesgericht* that it was on the brink of committing deliberate miscarriage of justice.

The central argument relied upon by the Constitutional Court can be found in a passage of the grounds where a reservation is made for German sovereignty: "The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty encapsulated in the last instance in the German constitution."[51]

It is certainly true that the ECHR is subordinated, in terms of domestic law, to the Basic Law, the German constitution. However, there was no reason whatsoever to insist on this truism, which had no relevance for the case at hand.[52] Indeed, lawyers from other countries saw the holdings of the Constitutional Court as an encouragement to handle their obligations under the ECHR in a cavalier manner.[53] The Constitutional Court should acknowledge that its emphasis on the peculiarity of "multipolar situations" lacks solid foundations and that the relevant doctrine is suitable only for instances where general regimes are to be established by way of legislation, but not with respect to the execution of judgments in individual cases. In a new decision on several constitutional complaints filed by Caroline von Hannover, the Constitutional Court attempted indeed to draw the attention of the Strasbourg Court to the function of a free press with a mandate to provide information not only with regard to "high politics," but also in other fields of societal life.[54] In a constructive manner, it wished to show that also in the jurisprudence of the Strasbourg Court itself aspects of entertainment were not dismissed as irrelevant in the requisite balancing process.

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[48] For a detailed account of the complex facts, see the decision of the Constitutional Court of 10 June, 2005, 32 EUROPAISCHE GRUNDRECHTE-ZEITSCHRIFT 426 (2005)

[49] Order of 28 December 2004, 31 EUROPAISCHE GRUNDRECHTE-ZEITSCHRIFT 809 (2004).

[50] Decision of the Constitutional Court, *supra* note 48.

[51] BVerfGE 111, 307 (319) (English translation at mn 35).

[52] We agree with the criticisms expressed by Frowein, *supra* note 46, at 281, 284 n.; and Luzius Wildhaber, *Bemerkungen zum Vortrag von BVerfG-Präsident Dr. H.-J. Papier auf dem Europäischen Juristentag 2005 in Genf*, 32 EUROPAISCHE GRUNDRECHTE-ZEITSCHRIFT 743–44 (2005).

[53] *See* Wildhaber, *supra* note 52, at 744.

[54] BVerfGE 120, 180 (English translation available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20080226_1bvr160207en.html). The Constitutional Court refers explicitly to the judgment of the ECtHR in Gourguenidze v. Georgia, App. No. 71678/01, Eur. Ct. H.R. (2006). *See also* comments by Wolfgang Hoffmann-Riem, *Die Caroline II-Entscheidung des Bundesverfassungsgerichts*, 62 NEUE JURISTISCHE WOCHENSCHRIFT 20–26 (2009).

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Notwithstanding the misgivings one cannot suppress when analyzing the *Görgülü* decision of the Constitutional Court, one must also recognize that the judgment has many positive aspects. The Constitutional Court proclaims quite resolutely that it understands its role as that of a guardian of the international commitments of Germany. Therefore, it admits that non-respect of the judgments of the Strasbourg Court can be challenged through a constitutional complaint. This was confirmed in the second *Caroline von Hannover* decision just mentioned. In the long run, therefore, one may expect that the positive features of the *Görgülü* case will largely outweigh its negative aspects.

D. Concluding Observations

The Constitutional Court was not conceived as the supreme control body in respect of the commitments of Germany under international law. Through its *Görgülü* decision, the Constitutional Court has now assumed this function. It must be hoped that it will not stigmatize any discrepancy between the domestic German human rights standard and the standard guaranteed by the ECHR as an assault on German sovereignty.[55] The judgment on the Treaty of Lisbon[56] had originally stirred up fears that the Court might embark on a German *Sonderweg*, in disregard of the bonds of international solidarity which have been tied in decades of loyal cooperation with the European neighbours.[57] However, the most recent jurisprudence of the Court[58] confirms its willingness to integrate its own jurisprudence with that of the ECtHR to form a consolidated instrument for the defence of human rights with two pillars, the Basic Law and the ECHR.

[55] Oliver Dörr, *Rechtsprechungskonkurrenz zwischen nationalen und europäischen Verfassungsgerichten*, *in* DEUTSCHES VERWALTUNGSBLATT 1088, 1097 (2006) (suggesting that the sovereignty reservation claimed by the Constitutional Court will remain without any great practical relevance).

[56] BVerfGE 123, 267.

[57] *See, e.g.,* Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht's Epigones at Sea*, 10 GERM. L.J. 1201–18 (2009), Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 COMMON MKT. L. REV. 1795–822 (2009), Christian Tomuschat, *Lisbon: Terminal of the European Integration Process?,* 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (forthcoming 2010).

[58] *Especially* Chamber decision of 4 February 2010, *supra* note 23, which faithfully implements the doctrine of the ECtHR on the procedural obligations entailed by a violation of the right to life.

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