Journal of Siberian Federal University. Humanities & Social Sciences 6 (2017 10) 851-858
~ ~ ~

УДК 341.215.4

Implementing ECtHR Judgments in So-Called "Multipolar Fundamental Rights Situations"

Marten Breuer*
University of Konstanz
10 Universitätsstraße, Konstanz, 78457, Germany

Received 11.05.2017, received in revised form 30.05.2017, accepted 5.06.2017

The implementation of ECtHR judgments may be particularly difficult in cases where the concerns of two or more private litigants must be weighed against each other. The Strasbourg proceedings are unilateral in that only one of them (the party having lost the case at the national level) will be directly represented. If the ECtHR finds in favour of this party, implementing the judgment might raise fundamental rights concerns of the party previously having won the case before German courts. The article analyses the approach taken by the German Federal Constitutional Court, in particular in its famous Görgülü decision. It also evaluates the relevance of the "multipolar fundamental rights" argument in the jurisprudence of German courts.

Keywords: multipolar fundamental rights situation, positive obligations, level of fundamental rights protection, Görgülü decision, von Hannover case.

DOI: 10.17516/1997-1370-0092.

Research area: law.

I. Introduction

In recent years, implementing ECtHR judgments has become more and more an issue in Germany. The present article does not deal with implementation of ECtHR judgments in general but concentrates on a particular set of proceedings, namely, "multipolar fundamental rights situations". This term needs further clarification as it is not common to fundamental rights theory.[1]

Multipolar fundamental rights situations have to be distinguished from bipolar State-citizen situations. Such State-citizen situations are characterised by the fact that only the State and individual citizens are confronted with one another. The State interferes with the liberties protected under fundamental rights. Thus, the bipolar fundamental rights situation is typical for the understanding of fundamental rights as liberal rights and as a defence (*Abwehrrecht*) against the State. The individual's autonomy is protected against State interference. Third persons' fundamental rights are irrelevant in that context: Thus, the fundamental rights situation is bipolar as it is restricted to the concerns of the State and a particular individual.

Multipolar fundamental rights situations, by contrast, have a different functioning. Here, not

* Corresponding author E-mail address: marten.breuer@uni-konstanz.de

only the State and one particular individual face each other. Rather, the State must strike a fair balance between fundamental rights of several citizens. This is typically so in civil law cases: In such cases, it is not the State which is alleged having breached an obligation but rather a private individual. The State, through its courts, has to decide the case as a neutral arbiter.

In the following sections, regard will be had to the substantive impact of ECtHR jurisprudence in multipolar fundamental rights situations. Implementing ECtHR judgments in these situations might also have procedural ramifications, in particular where national law allows for the reopening of national court proceedings following a Strasburg judgment, as is the case under German civil procedural law (section 580 para 8 Code of Civil Procedure). This might create problems because the reopening might take effect some ten years or so after the case has been finally decided at the national level. The legitimate expectations of the civil law party that had won the case might be affected thereby.[2] But these questions are of a different nature, compared to the substantive impact which will form the centre of the following considerations.

II. Multipolar fundamental rights situations under the ECHR

The ECHR has been strongly influenced by the classical idea of fundamental rights being liberal rights. Consequently, the bipolar State-citizen situation is predominant. This can be shown by a number of Convention guarantees: Article 3 ECHR contains, *inter alia*, the prohibition of torture. Under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[3] to which the ECtHR refers,[4] the term "torture" is confined to acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (Article 1).[5] Under Article 13 ECHR, there must be an effective remedy before a national authority on account of alleged violations of Convention guarantees "notwithstanding that the violation has been committed by persons acting in an official capacity". Again, the bipolar State-citizen situation is at stake. Finally, one might think of the restriction clause to be found in para 2 of Articles 8 to 11 ECHR. Under Article 8 § 2 ECHR, the right to respect for private and family life may be restricted, *inter alia*, "in the interest of … the economic well-being of the country". This is a clearly bipolar State-citizen situation where restrictions are not permitted in order to safeguard the fundamental rights of third persons but in the purely State interest of the country's economic prosperity. On the other hand, Article 8 § 2 ECHR is cognisant of multipolar fundamental rights situations. This can be shown by the fact that restrictions are equally permissible "for the protection of the rights and freedoms of others", *i.e.* in a clearly multipolar fundamental rights situation.

Originally, the ECHR might have been construed as allowing for such multipolar fundamental rights situations only exceptionally. Today, the situation has changed significantly, due to the ECtHR's jurisprudence on "positive obligations".[6] This jurisprudence reflects the fact that the Convention would have been of a little impact if it had been construed solely in terms of liberal rights, *i.e.* of protecting against State interference. In particular, it would not have applied to violations stemming from private individuals rather than from State authorities. Arguing that, *e.g.*, Article 8 ECHR "does not merely compel the State to abstain from … interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life",[7] the ECtHR broadened the Convention's applicability, covering civil law cases as well.

Such cases, it may be noted, are dominated by multipolar fundamental rights situations.

This creates problems, in particular, as regards the relationship between the Convention and the national constitutions. Principally, the position of the ECHR is clear: According to Article 53 ECHR, a higher level of fundamental rights protection under national constitutional law shall not be impeded by the Convention. This is unproblematic as far as the position of only one particular individual is concerned, since national law may grant more liberties than the Convention.[8] Multipolar fundamental rights situations, however, do not fit easily into this line of reasoning.[9] For, granting more liberties to one individual automatically and inevitably leads to restricting liberties of another.[10] The crucial question in those situations is what may be meant by a "higher level" of fundamental rights protection. Again, the sheer existence of Article 53 ECHR can be seen as indicating that originally, the Convention was construed primarily (though not exclusively) as addressing State-citizen situations. This leads to problems for the implementation of ECtHR judgments in multipolar fundamental rights situations.

III. The perspective of German constitutional law

As far as the implementation of ECtHR judgments in multipolar fundamental rights situations is concerned, the position of German law has been mainly influenced by the Federal Constitutional Court's (FCC's) *Görgülü* decision. The Court held as follows:[11]

"The decisions of the [ECtHR] may encounter national partial systems of law shaped by a complex system of case-law. In the German legal system, this may happen in particular in family law and the law concerning aliens, and also in the law on the protection of personality (on this, see, recently, ECHR, No. 59320/00, Judgment of 24 June 2004 – von Hannover v. Germany, *Europäische Grundrechte-Zeitschrift* 2004, pp. 404 ff.), in which conflicting fundamental rights are balanced by the creation of groups of cases and graduated legal consequences. It is the task of the domestic courts to integrate a decision of the [ECtHR] into the relevant partial legal area of the national legal system, because it cannot be the desired result of the international-law basis nor express the will of the [ECtHR] for the [Court] through its decisions itself to undertake directly any necessary adjustments within a domestic partial legal system.

In this respect, it is necessary for the national courts to evaluate the decision when taking it into account; in this process, account may also be taken of the fact that the individual application proceedings before the [ECtHR], in particular where the original proceedings were in civil law, possibly does not give a complete picture of the legal positions and interests involved. The only party to the proceedings before the [ECtHR] apart from the complainant is the State party affected; the possibility for third parties to take part in the application proceedings (see Article 36.2 of the European Convention on Human Rights) is not an institutional equivalent to the rights and duties as a party to proceedings or another person involved in the original national proceedings."

The FCC's findings raise a number of questions. First, it is unclear[12] in which respect national courts are meant to be bound by an ECtHR judgment. According to the FCC, it is for the domestic courts to "integrate" a decision of the ECtHR into the relevant partial legal area of the national legal system. But does this give a national court the power to disobey, if need be, an ECtHR judgment? The term "integrate" can be understood as describing a national judge's task to "translate", so to speak, a judgment into the categories of national law. Such a reading would mean that the national judge is bound by

the result without restrictions, having to integrate the ECtHR judgment only in terms of legal technicalities.[13]

A different reading of *Görgülü*, however, would be that the FCC intended to empower the national judges to disobey the ECtHR, though under certain circumstances only.[14] Such a reading may be corroborated by two observations: First, the FCC maintains that it could not be the will of the ECtHR for the Court "through its decisions itself to undertake directly any necessary adjustments within a domestic partial legal system". Admittedly, the notions embodied in the ECHR are of a high level of abstraction. Under such circumstances, it may be difficult, or even impossible, to strike the correct balance between competing fundamental rights. Typically, such balancing is done by the respective branch of national law. On the other hand, the very same argument may be applied to the FCC, too: For, the notions embodied in the Basic Law are no less abstract than those of the Convention. This did not prevent the FCC from deducing clear criteria and overturning even firmly-established jurisprudence of other courts, such as the Federal Court of Justice. Thus, the level of abstraction as such cannot be an argument for empowering national judges to disobey ECtHR judgments.

Second, and more pertinently, the FCC criticises that in civil law cases, the complaint procedure before the ECtHR might reflect the fundamental rights concerned only insufficiently, since only one party (the applicant) has direct access to the ECtHR, while the other party to the original proceedings has not. Again, this argument may be applied to the FCC itself:[15] For, the constitutional complaint, too, is "unilateral" insofar as it allows only one party to access the FCC. Furthermore, such an "inequality of arms" argument could not be used for allowing national judges to disobey the ECtHR indifferently. What would be necessary, rather, is to demonstrate that the fundamental rights of the party not represented in the Strasbourg proceedings have actually been neglected. In the end, therefore, the second argument does not prevail either.

IV. Application of the doctrine to individual cases

Having dealt with the general contours of the doctrine of "multipolar fundamental rights situations", it is now time to have a look at its application to individual cases. When starting research for the present contribution, I was convinced that the "multipolar fundamental rights situations" argument must have played a central role in a number of (mainly civil law) cases in Germany. The result came as a surprise: I could not identify even one court judgment where the doctrine had been applied. If I see it correctly, not a single German court refused to follow the ECtHR, arguing that there is a "multipolar fundamental rights situation".

A particularly problematic case in this context concerned Princess Caroline von Hannover.[16] In the centre of the case was the unauthorised publication of photographs of the Monegasque princess by the German yellow press. Under the respective German legislation, the magazine publishers did not need prior authorisation of the princess, since she was regarded a "figure of contemporary society 'par excellence'" (*eine* '*absolute*' *Person der Zeitgeschichte*).[17] Such figures are in the centre of public interest irrespective of a particular incident, and this is typically the case with members of nobility. Princess Caroline sued the press in German courts, claiming damages for the unauthorised publication of photographs. The Federal Court of Justice, *i.e.* the highest civil court in Germany, upheld her claim for some of the photographs where the princess had retired "to a secluded place – away from the public eye (*in eine örtliche Abgeschiedenheit*) – where it was objectively

clear to everyone that they wanted to be alone and where, confident of being away from prying eyes, they behaved in a given situation in a manner in which they would not behave in a public place".[18] The rest of the claim, however, was dismissed.[19] Subsequently, the princess lodged a constitutional complaint with the FCC. This Court criticised some of the photo publications where the princess was accompanied by her children. But the rest of the photographs were not objected to.[20] The ECtHR to which the princess took recourse criticised the jurisprudence concerning "figures of contemporary society 'par excellence'" as a matter of principle. The ECtHR argued that the princess "might be photographed at almost any time, systematically, and that the photos are then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life".[21] Hence, there was a violation of Article 8 ECHR (right to private life).

Before looking at the way in which German courts responded to this judgment, it might be useful to clarify to what extent a "multipolar fundamental rights situation" was underlying the case. On the one hand, the princess's right to control the use of her image (*Recht am eigenen Bild*) was at stake, in Convention terms: the right to private life (Article 8 ECHR). On the other hand, the press could rely on the Convention as well since the publications of the said photographs were generally protected by the freedom of the press (Article 10 ECHR). Such scenario is typical for multipolar fundamental rights situations: Granting more protection to the princess inevitably led to a lowering of the freedom of the press.[22] Hence, the question if and to what extent German courts would be ready to take account of the Strasbourg jurisprudence.

This question came up in a new set of court proceedings, concerning once more the unauthorised publication of photographs of the Princess of Hannover by the German press.[23] Taking into account what the FCC had held in the *Görgülü* decision, one could have expected that German courts were inclined to disobey the ECtHR. For, was this not a classical example of a "national partial system of law shaped by a complex system of case-law"? Had not the conflict between, on the one hand, the right to privacy of prominent individuals and, on the other hand, the freedom of the press been settled by the jurisprudence of German civil courts? Did not this result in the necessity to "integrate" the ECtHR judgment into the relevant partial legal area of the national legal system? The Federal Court of Justice responded to all these questions in a laconic way: Without addressing the problem directly, the Federal Court, at least *de facto*, gave up its previous jurisprudence concerning "figures of contemporary society 'par excellence'" and replaced it by another, more case-by-case oriented approach.[24] This allowed integrating the concerns expressed by the ECtHR into the new concept.

The judgment was brought before the FCC by the respective newspaper publishers. The FCC decision is worth being reproduced verbatim:[25] "Just as the Federal Constitutional Court in its landmark judgment of 15 December 1999 (BVerfGE 101, 361) merely examined whether the concept of protection applied at the time kept within the boundaries of constitutional law, the court, with regard to the amended concept of protection, is limited to examining the violation of constitutional prescriptions from the Federal Court of Justice. The fact that the criteria applied by the Federal Court of Justice were not questioned by the Federal Constitutional Court at the time meant only that they satisfied constitutional standards; this does not mean, however, that a modified concept of protection could not also satisfy the constitutional requirements."

In other words: The expected conflict between Karlsruhe and Strasbourg did not

materialise. The first FCC decision was only related to the then-employed concept of the Federal Court of Justice. This did not mean that this concept was the only possible way of balancing rights in a multipolar fundamental rights situation. This is another typical feature of such situations: Normally, there are many ways how to strike a balance between competing fundamental rights. This is called a "corridor" in legal literature.[26] Where several concepts are within the boundaries of the corridor established by the Constitution, an ECtHR judgment may be implemented without problems. A conflict might arise only where the balance struck by the ECtHR is beyond the boundaries of German constitutional law (or *vice versa*).[27] So far, this has not happened in the German legal system.

For the sake of completeness, it should be noted that this case, too, came before the ECtHR (known as "*Von Hannover v Germany No. 2*"). Unlike in the first case, the ECtHR observed that "the national courts explicitly took account of the Court's relevant case-law. Whilst the Federal Court of Justice had changed its approach following the *Von Hannover* judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law." Consequently, the ECtHR found that there had been no violation of Article 8 ECHR.[28] On the same day, the ECtHR decided another case, *Axel Springer AG*, which had been brought by a newspaper publisher on account of the interdiction by German courts to publish certain newspaper articles.[29] Originally, the two cases had been joined but they were later disjoined by a decision of the Grand Chamber.[30] The simultaneous scrutiny of these two cases had as a result that the balancing of the right to privacy and the freedom of the press was looked at by the ECtHR from both perspectives: In *Von Hannover No. 2*, the application was based on Article 8 ECHR, while in *Axel Springer AG*, the applicant relied on Article 10 ECHR. The "unilateral character" of the ECtHR proceedings, which had been criticised by the FCC in *Görgülü*,[31] thus did not produce effect.

V. Conclusion

The above findings may be summarised as follows:

(1) Multipolar fundamental rights situations do not concern the bipolar State-citizen relationship; by contrast, such situations are characterised by the fact that the fundamental rights of several individuals must be balanced.

(2) It is not entirely clear whether or not the FCC, in its *Görgülü* decision, intended to grant the national judges leeway to disobey an ECtHR judgment with particular respect to multipolar fundamental rights situations. If understood this way, the decision is not convincing.

(3) So far, there has been no conflict between German courts and the ECtHR on account of multipolar fundamental rights situations. The expected clash in the Caroline cases was prevented by the Federal Court of Justice applying a new concept which took account of the ECtHR jurisprudence. At the same time, it remained within the corridor of German constitutional law.

This does not necessarily mean that all conflicts can be avoided for the future. So far, however, German courts have been remarkably open towards the ECtHR.

---

[1] For the following, see Hoffmann-Riem, W. (2006). "*Kontrolldichte und Kontrollfolgen beim nationalen und europäischen Schutz von Freiheitsrechten in mehrpoligen Rechtsverhältnissen*". Europäische Grundrechte-Zeitschrift, 492-499.

[2] See *Bochan v Ukraine (No. 2)* [GC] Appl. No. 22251/08 (ECtHR, 5 February 2015), para 57 where the Court held that 'it is for the Contracting States to decide how best to implement the Court's judgments without unduly upsetting the principles of *res iudicata* or legal certainty in civil litigation, in particular where such litigation concerns third parties with their own legitimate interests to be protected'.

[3] UNTS vol. 1465, p. 85.

[4] See, e.g., *Gäfgen v Germany* [GC] Appl. No. 22978/05 (ECtHR, 1 June 2010), paras 90, 108.

[5] It should be noted, though, that this did not prevent the ECtHR from deducing "positive obligations" from Article 3 ECHR, see Grabenwarter, C. (2014). *European Convention on Human Rights. Commentary*, 'Art 3', MN 8; Schabas, W.A. (2015). *The European Convention on Human Rights. A Commentary*, pp. 191 et seq.

[6] See generally Dimitris, X. (2012). *The Positive Obligations Under the European Convention of Human Rights*; Dröge, C. (2003). *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*; Mowbray, A. (2004). *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*; Ress, G. (2000). "The Duty to Protect and to Ensure Human Rights Under the European Convention on Human Rights" in *E. Klein* (ed), *The Duty to Protect and Ensure Human Rights*, 165-205.

[7] Locus classicus: *Marckx v Belgium*Appl. No. 6833/74 (ECtHR, 13 June 1979), para 31.

[8] See on this point Hong, M. (2012). "Caroline von Hannover und die Folgen – Meinungsfreiheit im Mehrebenensystem zwischen Konflikt und Kohärenz" in N Matz-Lück & M Hong (eds), *Grundrechte und Grundfreiheiten. Konkurrenzen und Interferenzen im Mehrebenensystem*, p. 264.

[9] See Klein, O. (2010). "Straßburger Wolken am Karlsruher Himmel. Zum geänderten Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte seit 1998" Neue Zeitschrift für Verwaltungsrecht pp. 221-225, at 223; Thienel, T. (2015). "Art *53*" *in U. Karpenstein/FC Mayer* (eds), *EMRK. Kommentar* (2nd edn 2015), MN 5.

[10] See Breuer, M. (2005)."Karlsruhe und die Gretchenfrage: Wie hast du's mit Straßburg?" Neue Zeitschrift für Verwaltungsrecht, 412-414, at 414; Cremer, H-J. (2011). *Human Rights and the Protection of Privacy in Tort Law. A Comparison Between English and German Law*, p. 39; Grabenwarter, C. (2006). "Kontrolldichte des Grund- und Menschenrechtsschutzes in mehrpoligen Rechtsverhältnissen" Europäische Grundrechte-Zeitschrift pp. 487-491, at 489; Hong, "Caroline" (fn 8), p. 265.

[11] FCC, order of 14 October 2004, No. 2 BvR 1481/04, BVerfGE 111, 307. Available at: <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html>

[12] See Hong, M. (2011). "Caroline von Hannover und die Folgen – Meinungsfreiheit im Mehrebenensystem zwischen Konflikt und Kohärenz" EuropäischeGrundrechte-Zeitschrift, pp. 214-218, at 215: "partly enigmatic".

[13] Similarly, Hong, "Caroline" (fn 8), p. 262.

[14] In this sense, *e.g.*, Breuer (fn 10), 414; Klein, E. (2004). "Anmerkung". Juristenzeitung, pp. 1176-1178, at 1177.

[15] Breuer (fn 10), p. 414.

[16] For a detailed analysis, see Cremer (fn 10), pp. 42 et seq.

[17] Cremer (fn 10), p. 44.

[18] Quotation taken from *Von Hannover v Germany* Appl. No. 59320/00 (ECtHR, 24 June 2004), para 23.

[19] Federal Court of Justice, judgment of 19 December 1995, No. VI ZR 15/95, BGHZ 131, 346.

[20] Federal Constitutional Court, judgment of 15 December 1999, No. 1 BvR 653/96, BVerfGE 101, 361.

[21] *Von Hannover v Germany* Appl. No. 59320/00 (ECtHR, 24 June 2004), para 74.

[22] See above fn 10.

[23] See also Cremer (fn 10), pp. 82 et seq.

[24] Federal Court of Justice, judgment of 6 March 2007, No. VI ZR 51/06, BGHZ 171, 275.

[25] FCC, order of 26 February 2008, Nos 1 BvR 1602, 1606, 1626/07, BVerfGE 120, 180. Available at: <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2008/02/rs20080226_1bvr160207en.html>

[26] See, among others, Lübbe-Wolff, G. (2010). "Der Grundrechtsschutz nach der Europäischen Menschenrechtskonvention bei konfligierenden Individualrechten – Plädoyer für eine Korridorlösung", *in Hochhut, M.* (ed), *Nachdenken über Staat und Recht. Kolloquium zum 60. Geburtstag von Dietrich Murswiek*, pp. 193 et seq.; Sauer, H. (2011). "Bausteine eines Grundrechtskollisionsrechts für das europäische Mehrebenensystem" Europäische Grundrechte-Zeitschrift, pp. 195-199, at 198-199.

[27] See Hong (fn 12). (2011). Europäische Grundrechte-Zeitschrift pp. 214-218, at 218.

[28] *Von Hannover v Germany* (No. 2) [GC] Appl. Nos 40660/08 60641/08 (ECtHR, 7 February 2012), paras 125-126.

[29] *Axel Springer AG v Germany* [GC] Appl. No. 39954/08 (ECtHR, 7 February 2012).

[30] *Von Hannover v Germany* (No. 2) [GC] Appl. Nos 40660/08 60641/08 (ECtHR, 7 February 2012), para 73; *Axel Springer AG v Germany* [GC] App. No. 39954/08 (ECtHR, 7 February 2012), para 52.

[31] See above fn 15.

Внедрение решений Европейского суда по правам человека в так называемых ситуациях многополярных фундаментальных прав

М. Брейер
Констанцский университет
Германия, 78457, Констанц,
Университетсштрассе, 10

Реализация решений ЕСПЧ может быть особенно сложной в тех случаях, когда интересы двух или более частных сторон должны быть оценены в сопоставлении. Страсбургские разбирательства являются односторонними, так как только одна из сторон (сторона, проигравшая дело на национальном уровне) будет непосредственно представлена. Если ЕСПЧ примет решение в ее пользу, выполнение решения может поднять вопросы фундаментальных прав стороны, ранее выигравшей дело в немецких судах. В статье анализируется подход, принятый Федеральным конституционным судом Германии, в частности относительно его нашумевшего решения по делу Гёргюлю. В статье также оценивается актуальность устного состязания сторон на основании «многополярных фундаментальных прав» в судебной практике немецких судов.

Ключевые слова: ситуация многополярных фундаментальных прав, позитивные обязательства, уровень защиты фундаментальных прав, решение суда по делу Гёргюлю, дело фон Ганновера.

Научная специальность: 12.00.00 – юридические науки.