Germany

Bundesverfassungsgericht on the Status of the European Convention of Human Rights and ECHR Decisions in the German Legal Order. Decision of 14 October 2004.[1]

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Introduction

On 14 October 2004 the German Federal Constitutional Court, the *Bundesverfassungsgericht,* delivered a decision of principal character regarding the status of the European Convention on Human Rights (Convention) and the rulings of the European Court of Human Rights in the German legal order. It is the first time the *Bundesverfassungsgericht* has so fundamentally dealt with this topic, moreover in the composition of the complete (second) Senate (not just a chamber of the court).[2] That the constitutional court itself attaches high importance to its decision and expected international interest is witnessed by the fact that the court has made an English translation of the decision available.[3] This is something that does not happen very often, at least until now.

In fact, the decision has attracted the expected attention among legal experts and media, also from abroad. The reactions are far from being only positive. The decision is often criticised for being unclear, inconsistent, misleading and even dangerous; the *Bundesverfassungsgericht* is said to weaken the protection of the fundamental rights guaranteed in the Convention and the meaning of European

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[1] *Bundesverfassungsgericht* (BVerfG), 2 BvR 1481/04 v. 14.10.2004. The decision, as all other decisions of the BVerfG starting from 1998, can be found on <www.bverfg.de>. A printed version can be found, *inter alia*, in the Official Collection of decisions of the court, *BVerfGE* 111, p. 307. The decision is cited hereafter with the paragraphs in the internet version.

[2] *See* also Cremer, 'Zur Bindungswirkung von EGMR-Urteilen – Anmerkung zum Görgülü-Beschluss des BVerfG vom 14.10.2004', *Europäische Grundrechte-Zeitschrift* (EuGRZ) (2004), at p. 683; Breuer, 'Karlsruhe und die Gretchenfrage: Wie hast du's mit Straßburg?', *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) (2005), at p. 412.

[3] Accessible on <www.bverfg.de>.

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Court of Human Rights decisions in Germany.[4] The constitutional court itself, on the other hand, seems to evaluate its decision as strengthening the status of the Convention and the decisions of the European Court in the German legal order. This follows from a noteworthy interview in which the President of the *Bundesverfassungsgericht* stresses in particular that the constitutional court, with its decision, has recognised for the first time the general possibility of claiming violations of the Convention, including rulings of the European Court of Human Rights, by constitutional complaints.[5] However, the interview can be interpreted the other way around, just like the decision itself, because the President also criticises the European Court, for instance, for its lack of self-restraint.[6] In the conclusion we will come back to this to assess which of the contrary interpretations seems to be correct.

The decision in a nutshell

The general considerations of the *Bundesverfassungsgericht*, i.e., the considerations that are detached from the case itself, take up much more space (34 paragraphs) than their application to the case in question (8 paragraphs).

The case is actually of minor importance, although it illustrates the difficulties of enforcing the fundamental rights of the Convention before German national courts, even after a decision of the European Court of Human Rights. The case deals with the rights of a father of custody for and access to his illegitimate son. Directly after giving birth the mother gave up the baby for foster care and adoption. Even after the father had been awarded a right to access in Strasbourg in the *Görgülü*-case, it was very difficult for the complainant to enforce it.[7] In addition to the constitutional complaint that lies at the basis of the decision of 14 October, two other constitutional complaints were necessary. Following the decision of 14 October there has been a chain of decisions of the court of first instance in favour of the rights of custody or access of the complainant, which however have been reversed and suspended in second instance. There has been a temporary injunction of the *Bundesverfassungsgericht* as well as the rejection of an objection against this injunction. Finally, decisions were delivered concerning the additional two

[4] Overview of the reactions at Meyer-Ladewig/Petzold, 'Die Bindung deutscher Gerichte an Urteile des ECMR', *Neue Juristische Wochenschrift* (NJW) (2005), at p. 16, 17, 22; Cremer, *supra* n. 2, at p. 683 f., 694; Grupp/Stelkens, 'Zur Berücksichtigung der Gewährleistungen der Europäischen Menschenrechtskonvention bei der Auslegung des deutschen Rechts', *Deutsches Verwaltungsblatt* (DVBl) (2005), at p. 133, 143; Breuer, *supra* n. 2, at p. 412.

[5] *Frankfurter Allgemeine Zeitung* (FAZ), 9 Dec. 2004, at p. 5.

[6] Cremer, *supra* n. 2, at p. 683, 699; Grupp/Stelkens, *supra* n. 4, at p. 143.

[7] ECtHR 26 Febr. 2004, Appl. No. 74969/01; *Neue Juristische Wochenschrift* (NJW) (2004), p. 3397.

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constitutional complaints.[8] As far as the constitutional complaints were permissible, they were decided in favour of the complainant. Whether or not this is the end of the story remains to be seen.

The court summarises its major considerations in the decision as follows:

> The authorities and courts of the Federal Republic of Germany are obliged, under certain conditions, to take account of the European Convention on Human Rights as interpreted by the ECHR in making their decisions. [...] In the German legal system, the European Convention on Human Rights has the status of a federal statute, and it must be taken into account in the interpretation of domestic law, including fundamental rights and constitutional guarantees. The binding effect of a decision of the ECHR extends to all state bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention. The nature of the binding effect depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law. A complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law. (paragraph 29 f)

These statements resulted in two headings:

> 1. Being bound by statute and law (Article 20.3 of the Basic Law (Grundgesetz – GG)) includes taking into account the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights (ECHR) as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECHR and the "enforcement" of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law.
> 2. In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights.

[8] BVerfG 12 Dec. 2004, 1 BvR 2790/04 (temporary injunction), 1 Feb. 2005 (non-acceptance of an objection against the temporary injunction), and 10 June 2005 (decision on the constitutional complaint); 15 April 2005 BvR 1664/04 (decision on the constitutional complaint). For the facts of the case *see* also Stackmann, 'Richterliche Selbstkontrolle und Verfahrenswirklichkeit im Zivilprozess', *Juristische Schulung* (JuS) (2005), at p. 495 f.

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Legal basis

Status and significance of the Convention

According to the general German rules on legal transposition of international treaties into domestic law, the Convention has been granted the status of a federal statute in Germany.[9] It is standing case-law of the *Bundesverfassungsgericht* that the fundamental rights of the Convention therefore have the status of simple statutory law.[10] The Convention ranks below the German constitution. Suggestions in German literature to give the Convention constitutional ranking, or even to grant it a higher rank, have not been accepted by the *Bundesverfassungsgericht*.[11]

However, the significance of the infra-constitutional rank has to be put in perspective, because the Convention influences the interpretation of the Basic Law, including the fundamental rights. One could say that the shortcomings of the Convention, which result from its infra-constitutional status, are compensated:

> The text of the Convention and the case law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law – and this the Convention itself does not desire (see Article 53 of the Convention). (paragraph 32)

The reasoning given above is not new,[12] but nevertheless unusual, at least in Germany, because here a lower-ranking rule influences the interpretation of a higher-ranking rule, whereas it is normally the other way around. The *Bundesverfassungsgericht* justifies this unusual situation by pointing to the Basic Law's openness towards international law (paragraph 33). Therefore, the Convention constitutes more than an ordinary statutory law, although technically it enjoys this rank only: it is not constitutional law but it has constitutional importance. This comes very close to technically giving it constitutional ranking,[13] with the difference

[9] *See* Jarass, in Jarass/Pieroth, *GG*, 7th edn. (Munich, C.H. Beck 2004), Art. 25, at para. 10.

[10] BVerfG, *supra* n. 1, para. 31; 2 BvR 254, 1343/88 from 29 May 1990, *BVerfGE* 82, 106, at p. 120; 2 BvR 589/79 a.o. from 26 March 1987, *BVerfGE* 74, 358, at p. 370.

[11] For some ideas in German literature, *see* Grabenwarter, *EMRK*, 2nd edn. (Munich, C.H. Beck 2005), § 3, at para. 7. A list of further reading can be found at Cremer, *supra* n. 2, at p. 686 (fn. 27).

[12] BVerfG, 2 BvR 1190/84 from 17 July 1985, *Neue Juristische Wochenschrift* (NJW) 1986, p. 1485; *BVerfGE* 74, at p. 370; *BVverfGE* 82, at p. 115; Jarass, *supra* n. 9, Einl. at para. 9; Cremer, *supra* n. 2, at p. 685.

[13] German literature also uses the term 'quasi-constitutional ranking'; *see* Ehlers, in Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten* (Berlin, de Gruyter 2002), § 2 at para. 3.

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that at present the constitution automatically prevails in case of a collision with the Convention, which cannot be prevented or solved by interpreting the Basic Law in the light of the Convention.[14] If the Convention simply was an ordinary statutory law, the *Bundesverfassungsgericht* could not have used it as a means of interpreting the constitution, because it is only allowed to use constitutional law for that.[15] Altogether, the Convention enjoys a status that is insufficiently described by the technical ranking as ordinary statutory law.

Referring to those contents of the Convention that influence the interpretation of the Basic Law, one could also say that they can be classified as constitutional law.[16] Additionally, the contents of certain Articles of the Convention, e.g., the prohibition of slavery, can have a ranking higher than statutory law according to Article 25 of the Basic Law.[17] According to this Article, general rules of international law have priority over federal law but are infra-constitutional law, i.e., their rank is between constitutional and statutory law.[18] Leaving this aside, it is not likely that the *Bundesverfassungsgericht* will ever give higher ranking to the Convention as a whole, as will be explained hereunder. Nevertheless, the Convention's ranking as ordinary statutory law has fewer consequences than expected. It would be interesting to know whether the practical significance of the Convention in Germany is less than in states which assign it a higher ranking.

The reasons for the *Bundesverfassungsgericht* to assign to the Convention no higher technical ranking are to be found in the German constitution itself:

> However, the Basic Law did not take the greatest possible steps in opening itself to international law connections. On the domestic level, the law of international agreements is not to be treated directly as applicable law, that is, without an Act subject to the consent of the German parliament under Article 59.2 of the Basic Law, and – like customary international law (see Article 25 of the Basic Law) – not endowed with the status of constitutional law. The Basic Law is clearly based on the classic idea that the relationship of public international law and domestic law is a relationship between two different legal spheres and that the nature of this relationship can be determined from the viewpoint of domestic law only by domestic law itself; this is shown by the existence and the wording of Article 25 and Article 59.2 of the Basic Law. The commitment to international law takes effect only within the democratic and constitutional system of the Basic Law. The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the

[14] *See infra*, text after n. 38. However, if the Constitution and the Convention would have the same ranking, the Convention would not automatically prevail either; *see* Cremer, *supra* n. 2, at p. 686

[15] In detail, *see infra* after n. 44.

[16] Jarass, *supra* n. 9, Art. 25 at para. 10.

[17] Ibid; Ehlers, *supra* n. 13, § 2 at para. 3.

[18] Jarass, *supra* n. 9, Art. 25 at para. 12.

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> German constitution. (...) The Basic Law is intended to achieve comprehensive commitment to international law, cross-border cooperation and political integration in a gradually developing international community of democratic states under the rule of law. However, it does not seek a submission to non-German acts of sovereignty that is removed from every constitutional limit and control. Even the far-reaching supranational integration of Europe, which accepts the order to apply a norm, when this order originates from Community law and has direct domestic effect, is subject to a reservation of sovereignty, albeit one that is greatly reduced (see Article 23.1 of the Basic Law). (paragraphs 34-36)

In other words, to give the Convention higher ranking would require a change of the Basic Law.[19]

Legal effect of decisions of the European Court of Human Rights

Beyond the domestic status of the text of the Convention as such, the question of the binding effect of the rulings of the European Court of Human Rights arises. According to the *Bundesverfassungsgericht,* interpretations of the text of the Convention can be regarded as part of the text: '… they reflect the current state of development of the Convention and its protocols' (paragraph 38). In other words, the Convention is 'the European Convention on Human Rights as interpreted by the ECtHR' (paragraph 29).[20] The decisions of the European Court share the rank and significance of the text itself.

Over and above that, the decisions of the European Court entail procedural consequences:

> The legal effect of the decisions of an international court that was brought into existence under an international agreement is determined according to the content of the incorporated international agreement and the relevant provisions of the Basic Law as to its applicability. If the Convention law of the European Convention on Human Rights, and with it the federal legislature on the basis of Article 59.2 of the Basic Law, has provided that the legal decisions are directly applicable, then they have this effect below the level of constitutional law. (paragraph 37)

It follows from Article 46 of the Convention – which requires the states to abide by the relevant final judgments of the European Court in all legal matters to which they are party – that the judgments are binding on the *parties to the proceedings* (paragraph 38). But also parties that are not involved in the process are urged to examine their legal situation (paragraph 39). This duty is also based on Article

[19] As recommended by Cremer, *supra* n. 2, at p. 689.
[20] *See* also Meyer-Ladewig/Petzold, *supra* n. 4, at p. 18.

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1 of the Convention (paragraph 43).[21] As a result the Convention has a general binding legal effect because every state is bound to the Convention as it is interpreted by the European Court. For the party involved in a judgment of the Court, it has additional binding effects with regard to the particular matter disputed. This binding effect is restricted however by the personal, material and temporal limits of the disputed matter (paragraph 39). The *Bundesverfassungsgericht* had already pointed to this before (although in a chamber decision).[22] These limits are of significance, because the factual and legal position may change decisively in new domestic proceedings and also because the parties of the proceedings at the European Court need not be identical to those in domestic court proceedings (paragraphs 41, 50, 59, 62).[23]

The European Court of Human Rights pronounces declaratory judgments, i.e., it only states that a measure infringes the Convention; it does not quash it. The consequence of such a judgment is however that the relevant state is no longer allowed to hold the view that the measure is in compliance with the Convention. If the violation found is still continuing, the state has the obligation to put an end to it (paragraph 40 f). With regard to the correction of decisions that have already been made and that are non-appealable, the *Bundesverfassungsgericht* assumes that the Convention allows the state some latitude (paragraphs 42, 52).[24]

'Taking into account' the convention and the jurisdiction of the European Court of Human Rights

Contents and consequences of the obligation

The above – the rank of the text of the Convention in German law, the effects of the Convention on the interpretation of the German fundamental rights and also the fact that national bodies are bound by decisions of the European Court of Human Rights – leads to the obligation of all domestic bodies to take into account the Convention and decisions of the European Court of Human Rights.[25] This obligation also includes the authorisation to do so, which is accessory to the obligation: if there is no obligation, the Convention neither *needs* to be accounted for nor is it *allowed* to be taken into account.

[21] *See* also Meyer-Ladewig/Petzold, *supra* n. 4, at p. 18 f.

[22] BVerfG, 2 BvR 1190/84 from 17 July 1985, *Neue Juristische Wochenschrift* (NJW) (1986) p. 1485 at p. 1427; Meyer-Ladewig/Petzold, *supra* n. 4, at p. 16.

[23] *See* also *infra*, text after n. 41.

[24] *See* also *infra,* text after n. 34.

[25] Regarding the addressees of the obligation, *see* also *infra* after n. 35.

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In earlier case-law the *Bundesverfassungsgericht* already emphasised that the Convention has 'to be considered' when interpreting the Basic Law.[26] What this exactly implies was not comprehensively explained until 14 October. It means first of all that notice has to be taken of the Convention and the case-law of the European Court (paragraph 48 f). These have to become part of an informed opinion of the court that has to make a decision or that of the competent authority or of the legislature. It also means that the aspects that were taken into account by the European Court of Human Rights in its decision must be accounted for when the matter is considered from the point of view of constitutional law, particularly when proportionality is examined. This has not been said before by the *Bundesverfassungsgericht* in such a general way and not regarding all fundamental rights of the Convention.[27]

Domestic law must, if possible, be interpreted in harmony with public international law, regardless of when it comes into force (paragraph 48). The 'lex posterior-rule' (the later rule repeals the earlier one) does not apply. But if the federal legislature wants to deviate from the Convention, it could theoretically do so by using the 'lex posterior' rule,[28] which would result in a position contrary to the Convention. Therefore, such a situation is unlikely. Usually one can assume that the German legislature does not intend to act contrary to international obligations as long as this intention has not been made explicit.[29]

If, in concrete proceedings in which Germany is involved, the European Court has established that there has been a violation of the Convention, the obligation of taking the Convention into account goes further. In that case the responsible authorities and courts must consider the decision discernibly and, if necessary, justify in an understandable way why they do not follow the international-law interpretation (paragraph 50). These somewhat higher requirements are a consequence of the above-mentioned differences between the general binding effects and additional binding effects for the parties of a decision.

For the time being, we do not know precisely what the *Bundesverfassungsgericht* requires with respect to the understandable justification of non-compliance. The level of requirements might not be low;[30] on the contrary it might well be very high, in which case the non-compliance with the Convention is more or less theoretical, as is the case with claims of violation of domestic fundamental rights by

[26] *BVerfGE* 74, at p. 370; *BVerfGE* 82, at p. 115; Jarass, *supra* n. 9, Einl. at para. 9.

[27] However, *some* aspects can be found in BVerfG, 2 BvR 1570/03 from 1 March 2004, para. 13.

[28] Ehlers, *supra* n. 13, § 2 at para. 3.

[29] *BVerfGE* 74, at p. 370. This assumption is still in force; for the sake of clarity, the BVerfG could have mentioned it in its decision of 14 Oct.; *see* Cremer, *supra* n. 2, p. 697.

[30] Though this is assumed by Cremer, *supra* n. 2, at p. 694.

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European Community law.[31] But even if the Convention and Community law are not comparable in this respect and the *Bundesverfassungsgericht* would be less demanding when it comes to the Convention, standards might be high enough to make such deviation exceptional. The first decisions of the *Bundesverfassungsgericht* in this context confirm that the court is not willing to accept any explanation whatsoever.[32]

The *consequences* of finding a domestic provision violating the Convention or decisions of the European Court of Human Rights differ. They depend on who is the addressee of the obligation to take the Convention into account (paragraph 51). The legislature has the possibility of altering the provision in question. If it *must* do so is, however, unclear. When applied in practice, the provision has to be interpreted in conformity with public international law. An administrative act can be cancelled, an administrative practice amended. It should be noted that the *Bundesverfassungsgericht* does not state that German laws that are contrary to the Convention are *inapplicable.* In this respect there is a difference between the Convention, which is pure international law, and supranational Community law. The latter can, as such, lead to inapplicability of German law, whereas 'normal' international law only has this potential when domestic law stipulates this.[33] However, a German law should be inapplicable when it contravenes a Convention right which (at the same time) is a general rule of international law for, according to Article 25 Basic Law, these have priority over ordinary federal law.[34]

The *res judicata* of an individual domestic decision is not abated. If rules of procedure allow for resumption of proceedings, as is the case in the German law of criminal procedure, the *res judicata* can be overcome.

> In other rules of procedure, there is no conclusive answer to the question as to how the Federal Republic of Germany, if the ECHR rules against it, is to react, if national court proceedings have been completed and are non-appealable. There may be facts and circumstances in which German courts may make a new decision, not about the res judicata, but about the matter on which the ECHR has established that there has been a violation of the Convention on the part of the Federal Republic of Germany. This may be the case, for example, when the court is intended to consider the matter again on the basis of a new application or

[31] *See* BVerfG, 2 BvL 1/97 from 7 June 2000, paras. 61 f; Jarass/Beljin*, Casebook – Grundlagen des EG-Rechts* (Baden-Baden, Nomos 2003), p. 104 f.

[32] *See* BVerfG, 1 BvR 2790/04 from 28 Dec. 2004, paras. 28 f; 1 BvR 1664/04 from 5 April 2005, para. 26–30; 1 BvR 2790/04 from 10 June 2005, para. 38.

[33] Regarding the supremacy of Community law, *see* Jarass/Beljin, 'Die Bedeutung von Vorrang und Durchführung des EG-rechts für die nationale Rechtsetzung und Rechtsanwendung', *Neue Zeitschrift für Verwaltungsrecht* (NVwZ)(2004) p. 1 ff.

[34] Ehlers, *supra* n. 13, § 2 at para. 3.

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> changed circumstances, or the court in another constellation is still dealing with the matter. In the last instance, it is decisive whether a court, within the scope of the applicable law of procedure, has the possibility of making a new decision in which it can take account of the relevant decision of the ECHR. In such case constellations, it would not be acceptable merely to refer the complainant to money damages, although restoration would fail neither for factual nor for legal reasons. (paragraph 55)

However, domestic rules of procedure probably also fall under the obligation to interpret national law in compliance with the Convention.[35]

The range of addressees of the obligation

A highly important aspect concerns the range of addressees of the obligation to take account of the Convention. In earlier case-law the *Bundesverfassungsgericht* already pointed out that all German courts have to consider the *res judicata* of decisions of the European Court.[36] With its decision of 14 October 2004, it has clarified this requirement: *all* domestic bodies, i.e., the legislature as well as all those who apply the law, i.e., public authorities and courts:

> The legal effect of a decision of the ECHR, under the principles of public international law, is directed in the first instance to the State party as such. In principle, the Convention takes a neutral attitude towards the domestic legal system, and, unlike the law of a supranational organisation, it is not intended to intervene directly in the domestic legal system. On the domestic level, appropriate Convention provisions in conjunction with the consent Act and constitutional requirements (Article 20.3, Article 59.2 of the Basic Law in conjunction with Article 19.4 of the Basic Law) bind all organisations responsible for German public authority in principle to the decisions of the ECHR. (paragraph 45) (…) The obligation created by the consent Act to take into account the guarantees of the European Convention on Human Rights and the decisions of the ECHR at least demands that notice is taken of the relevant texts and case-law and that they are part of the process of developing an informed opinion of the *court* appointed to make a decision, of the competent *authority* or of the *legislature.* (paragraph 48; italics added by the author)

In this respect, the *Bundesverfassungsgericht* possibly exceeds what is required by the Convention.[37] Anyway, on this account a German court in the future can no

[35] *See* also Cremer, *supra* n. 2, at p. 699.

[36] BVerfG, 2 BvR 1190/84 from 17 July 1985, *Neue Juristische Wochenschrift* (NJW)(1986) p. 1425, at p. 1427; Meyer-Ladewig/Petzold, *supra* n. 4, at p. 17.

[37] Cremer, *supra* n. 2, at p. 692.

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longer refuse to consider decisions of the European Court by pointing out that the decisions only bind states. This is precisely what the court of second instance did when it disregarded the decision of the European Court's *Görgülü* case*:* it stated that the judgment only bound the Federal Republic of Germany for future legislative acts.[38]

Requirements and Restrictions

The *Bundesverfassungsgericht* emphasises that domestic bodies may not do enough, but could also do too much. If the Convention and the case-law of the European Court have not been considered, the domestic body has violated its obligation of taking account of the Convention. Too much is done if the Convention provisions and the case-law of the European Court are executed without thought and, for instance, prior-ranking law is violated. In the commented decision, the *Bundesverfassungsgericht* discusses the requirements and restrictions to the obligation (and the authorisation) to take the Convention into account. They partly vary according to the addressee concerned.

In general, only state bodies that are competent to do so have the obligation (paragraph 47). Furthermore, prior-ranking law has to be protected. The *Bundesverfassungsgericht* however does not make it totally clear whether this means that every violation of the constitution suffices to deviate from the Convention, or whether there must be a violation of fundamental principles of the constitution, which of course would leave far less room for manoeuvre.[39] On the one hand it states that the legislature may disregard international agreements without breaching Germany's constitutional commitment to international law if that is the only way to avert a violation of fundamental constitutional principles (paragraph 35). On the other hand, when discussing those who apply the law, this restriction does not appear (paragraph 62). This is why one may conclude that every constitutional provision seems to have priority over the Convention. In both cases, however, from the international law point of view, international law is violated. If there is no other way to undo the violation of the Convention, international law demands that the constitution is amended.[40]

Moreover, those applying the law in the domestic sphere must only apply a methodologically justifiable interpretation of the law (paragraph 32). In other words the Convention cannot lead to interpretations that are too far away from

[38] OLG Naumburg, Order from 30. June 2004, Case No. 14 WF 64/04, *Zeitschrift für das gesamte Familienrecht* (FamRZ)(2004) p. 1510. Also summarised at BVerfG, *supra* n. 1, at para. 17 f.

[39] Meyer-Ladewig/Petzold, *supra* n. 4, at p. 16, 19; more cautiously Cremer, *supra* n. 2, at p. 689.

[40] Meyer-Ladewig/Petzold, *supra* n. 4, at p. 17.

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the national provision in question. There is no automatic priority of the Convention with regard to laws which hold equal status, at least not if the relevant case has not yet been the object of a decision of the European Court (paragraph 62). In this context, the restrictions set by the *res judicata* of a domestic decision can become relevant, too.[41] Furthermore, they must for instance take into consideration the effects on the domestic legal system, and, as said before, when taking account of decisions of the European Court, their personal, material and temporal limits must be considered. As a result of this, a non-compliance is imaginable in the end:

> Precisely in cases in which national courts, as in private law, have to structure multipolar fundamental rights situations, it is always important that various subjective legal positions are sensitively weighed against each other, and if there is a change in the persons involved in the dispute or a change in the actual or legal circumstances, this weighing up may lead to a different result. There may therefore be constitutional problems if one of the subjects of fundamental rights in conflict with another obtains an ECHR judgment in his or her favour against the Federal Republic of Germany and German courts schematically apply this decision to the private-law relationship, with the result that the holder of fundamental rights who has 'lost' in this case and was possibly not involved in the proceedings at the ECHR would no longer be able to take an effective part in the proceedings as a party. (paragraph 50)[42]

The restrictions will certainly raise questions in future. This may be particularly true for the restriction that the effects for the domestic legal order must be considered. The *Bundesverfassungsgericht* demands this in particular with regard to a partial system of domestic law whose legal consequences are balanced and which is intended to achieve an equilibrium between differing fundamental rights (paragraph 57). It also gives the rationale for this restriction and certain guidelines for its application:

> Individual application proceedings under Article 34 of the Convention before the ECHR are intended to decide specific individual cases in the two-party relationship between the complainant and the State party, by the measure of the European Convention on Human Rights and its protocols. The decisions of the ECHR 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

[41] *See supra,* text after n. 34.

[42] One may doubt if this is convincing, because the same is true for the constitutional complaint in Germany; *see* Breuer, *supra* n. 2, at p. 414; Cremer, *supra* n. 2, at p. 695 f.

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> – 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 ECHR 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 ECHR for the ECHR 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 ECHR, 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 ECHR 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. (paragraph 58 f)

Despite all this, it is far from clear at present how to evaluate in a concrete case whether or not the effects of taking the Convention into account are acceptable for the domestic legal order.

Judicial enforcement

Legal situation before the Bundesverfassungsgericht

Very good news concerns procedural enforcement. From now on, individuals can generally claim before the *Bundesverfassungsgericht* a violation of the obligation to take into account the Convention's fundamental rights as interpreted by the European Court. However, they must not rely on the relevant fundamental right of the Convention solely, for it is standing practice that the *Bundesverfassungsgericht* dismisses such a complaint as inadmissible, as it did in fact a few days before 14 October.[43] Claimants rather have to claim a violation of the corresponding *domestic* fundamental right in connection with the principle of the rule of law (paragraphs 60-63). Because of the fundamental right of general freedom of action in Article 2.1 of the Basic Law, which serves as point of reception, there is no danger that any fundamental right of the Convention cannot be claimed.

In earlier decisions the *Bundesverfassungsgericht* already hinted at the possibility of invoking the Convention's rights via domestic fundamental rights. However,

[43] BVerfG, 1 BvR 414/04 from 6 Oct. 2004, para. 10; for former case-law *see* BVerfG, 2 BvR 2042/02 from 5 May 2003, para. 5; Cremer, *supra* n. 2, at p. 686 (incl. fn. 32); Pieroth, in: Jarass/Pieroth, *supra* n. 9, Art. 93, at para. 72.

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this has happened only sporadically, not in a general and comprehensible way.[44] That the *Bundesverfassungsgericht* can only admit claims concerning a violation of the Convention via a claim that a national fundamental law is violated is due to the fact that the court's standard of review is limited to (national) constitutional law. For constitutional complaints this follows from Article 93.1 no. 4.a of the Basic Law and § 90.1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*). The Convention is not included in the fundamental rights listed in these provisions.

That the *Bundesverfassungsgericht* takes the Convention as a standard of review, be it by detour of domestic fundamental rights, implies an extension of the standard of review stipulated in German constitutional law. Therefore, the general assumption in literature that there has been further development in this respect is only too true.[45]

Legal situation before non constitutional courts

The restriction of the standard of review to constitutional law has naturally no validity for the non constitutional courts. Here, there are no obstacles that impede a direct claim of the Convention's fundamental rights as ordinary statutory law. However, the described restrictions concerning the consideration of the Convention and the case-law of the European Court apply accordingly. In the end, the standard of taking account of the fundamental rights of the Convention and the case-law of the European Court is the same before all German courts. Only the 'key' to procedural enforcement is different because of the restricted standard of control for the *Bundesverfassungsgericht.*

Assessment and outlook

All in all, the decision indicates a strengthening of the domestic significance of the Convention and the case-law of the European Court of Human Rights compared to former case-law. Until the decision of 14 October, the *Bundesverfassungsgericht* repeatedly mentioned that the Convention must be considered when interpreting German law but did not specify the details of this obligation. One result was that domestic courts did not always consider themselves bound by European Court

[44] Overview in BVerfG, 2 BvR 1570/03 from 1 March 2004, paras. 11-13. Furthermore, Meyer-Ladewig/Petzold, *supra* n. 4, at p. 19; *Breuer, supra* n. 2, at p. 412.

[45] Meyer-Ladewig/Petzold, *supra* n. 4, at p. 19; Klein, Case note, *Juristen Zeitung* (JZ)(2004) at p. 1178; Breuer*, supra* n. 2, at p. 412. Even Cremer*, supra* n. 2, at p. 684, 698; apart from that point criticism clearly prevails. The *Bundesverfassungsgericht* might claim the same competence when it comes to European Union Rights. This is doubted in literature however; *see* Jarass, *EU-Grundrechte* (Munich, C.H. Beck 2005), § 7 at para. 20.

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decisions. With this decision, the *Bundesverfassungsgericht* has clarified that all domestic bodies are bound. It further specifies what the obligation to take the Convention, including European Court's decisions, into account implies. Although it also establishes restrictions for this obligation, it allows a constitutional complaint on a violation of the obligation, thereby paving the path for a control regarding the compliance with the Convention and the case-law of the European Court. Compared to former case-law the *Bundesverfassungsgericht* strengthens, not weakens, the place of the Convention in the German legal order, although perhaps not as much as some hoped for.

However, to reach this conclusion one must not one-sidedly stress the restrictions placed on the obligation by the *Bundesverfassungsgericht*. Then, all the other elements of the decision disappear. Even if one holds the subtle view that, although the intention of the decision is to improve the protection of the Convention's fundamental rights, it also contains restrictions which did not exist until now (or at least have not been expressed in such a way), one can still reach a positive overall conclusion, as a detailed analysis here shows. The multiple criticisms of the decision are unfounded.[46]

The intention of the judges of the *Bundesverfassungsgericht* involved in the decision was certainly to strengthen rather than to weaken and restrict the significance of the Convention's fundamental rights. The interview with the President of the *Bundesverfassungsgericht* mentioned in the introduction can be and has to be understood in this way, even if one does not share all statements made in this interview. These concern legal policy and the *Bundesverfassungsgericht*'s desire that the European Court of Human Rights practice more judicial self-restraint. Nevertheless, the President makes it perfectly clear that, once a decision is delivered by the European Court, it will entail the described consequences. Especially *because* the *Bundesverfassungsgericht* sometimes wishes for more judicial self-restraint of the European Court of Human Rights, it makes sense to participate more in applying the Convention.

That the *Bundesverfassungsgericht* keeps its eyes on the limits for international law stipulated in the German constitution does not alter the fact that it is ready to intensify the control on the observance of the Convention and oblige all German state bodies to take the Convention into account. The case-law of the *Bundesverfassungsgericht* will have to show whether this changes legal practice in Germany and the Convention and the case-law of the European Court will gain – or lose – in weight. In the end, this depends on an interpretation of the conditions and

[46] *See* Meyer-Ladewig/Petzold, *supra* n. 4, at p. 20; Grupp/Stelkens, *supra* n. 4, at p. 134; Breuer, *supra* n. 2, at p. 414; Klein, *supra* n. 45, at p. 1178; Bergmann, 'Das Bundesverfassungsgericht in Europa', *Europäische Grundrechte-Zeitschrift* (EuGRZ) (2004), at p. 620. In contrast, mostly very critical, Cremer, *supra* n. 2, at p. 683.

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limits to the obligation of German bodies to take into account the Convention. In another context – that of European Community law – there has been a lengthy discussion in Germany on the constitutional limits with regard to Community acts.[47] The discussion on this issue has nearly faded since the *Bundesverfassungsgericht* has made its position clear. One could wonder if it will not do the same with the Convention. To do so, it does not have to restrict the possibilities of non-compliance with the Convention as far as it does with regard to Community law. Even lower demands could probably lead to a situation in which non-compliance is absolutely an exceptional case.

The decisive question for the future therefore is how the conditions and limits will be handled. That is an open question.[48] What conditions exactly justify a deviation from the Convention? How does the domestic legal practitioner establish whether the effects of the case-law of the European Court are bearable in the German legal order? And when do we have a balanced partial system of domestic law?[49] Such uncertainties however are inherent in the nature of a decision that marks the beginning of an opened and intensified review.

[47] The *BVerfG* itself has mentioned these limits in its decision of 14 Oct.; BVerfG, *supra* n. 1, para. 36.

[48] *See* also Breuer, *supra* n. 2, at p. 413 f.

[49] For first considerations concerning this matter *see* Grupp/Stelkens, *supra* n. 4, at p. 141.

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