
Human Rights Protection in Multipolar Legal Relationships

SOPHIE-CHARLOTTE LENSKI

I. Introduction

Human rights protection in Germany is of a quite different nature in private law than in administrative and criminal law.¹ Criminal law and administrative law are determined by the principle of direct vertical application of fundamental rights. In these areas of law the state on the one hand and the individual on the other hand face each other in a relationship of super- and subordination. The fundamental rights situation here is clear: the individual is protected by the fundamental rights, while according to Article 1(3) Basic Law the state is bound by them, whether it acts as legislature, executive or judiciary.²

More complex to answer, however, is the question how fundamental rights affect private law, for in private law a relationship of super- and subordination does not exist. Instead, private law is determined by individuals acting on a level of co-equality. Both of the individuals in this relationship can rely on their fundamental rights. So in this relationship it is a debatable point against whom the fundamental rights have an effect or who is restricted by them.

According to prevailing legal doctrine and established jurisprudence, fundamental rights do not restrict the individual, as it is the individual who is protected

¹ This binary division regarding the effect of fundamental rights, however, does not change the fact that in general, fundamental rights bind the three branches of law, see H Jarass, 'Grundrechte als Wertentscheidungen bzw. objektivrechtliche Prinzipien in der Rechtsprechung des Bundesverfassungsgerichts' 110 *Archiv des öffentlichen Rechts* 363, 378, who distinguishes this general effect from the indirect horizontal effect. K Schlaich and S Koriath, *Das Bundesverfassungsgericht*, 7th edn (Munich, C.H Beck, 2007) para 322, seem to be right when assuming that the effect of fundamental rights is even stronger in public law than in private law.

² Nevertheless in criminal law there may be cases in which, apart from the relationship of super- and subordination from the state to the delinquent, fundamental rights positions of an individual (especially the victim) may be of importance, see Zimmermann, ch 2 of this volume. These effects, however, only influence the duty to protect of the state but do not change the basic vertical direct effect of fundamental rights.

by them. Therefore a direct horizontal effect of fundamental rights in private law does not exist.³

However, private law is not an area of law where individuals face each other without any link to the state. When relations between individuals become subject to private law, the state engages in this relationship, either through legislation which regulates the legal relationships on an abstract level, or civil courts which adjudicate specific disputes. When legislating or adjudicating in this way, the state is bound by fundamental rights. Therefore the fundamental rights have an indirect horizontal effect on private law.⁴

In the so-called *Görgülü* decision, however, the Federal Constitutional Court contrasted the concept of multipolar fundamental rights situations with the conventional idea of indirect horizontal effect. To a certain extent it thereby changed the perspective on that concept.

In the following sections the concept of multipolarity will be contrasted with the idea of indirect horizontal effect in order to determine whether the term 'multipolarity' describes a sustainable concept to deal with the effect of fundamental rights on private law according to German constitutional law.

II. Indirect Horizontal Effect of Fundamental Rights

Currently, the doctrine of indirect horizontal effect of fundamental rights is, despite the numerous modifications of explanation in detail,⁵ the prevailing model to describe how fundamental rights affect private law. Individuals are not bound by fundamental rights, but the state is restricted by them when legislating in the area of private law or applying private law through the courts.

³ See W Rübner, 'Grundrechtsadressaten' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol 5 (Heidelberg, CF Müller, 1992) § 117 para 59; K Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th edn (Heidelberg, CF Müller, 1995) para 355; H Dreier, 'Vorbemerkung' in H Dreier (ed), *Grundgesetz*, vol 1, 2nd edn (Tübingen, Mohr Siebeck, 2004) para 98; this opinion is not shared by the Federal Labour Court [*Bundesarbeitsgericht*, BAG], BAGE 1, 185, 193 f, which, however, later dissociated itself from this point of view, see BAGE 48, 122, 138 f; 52, 88, 97 f.

⁴ See K Stern, *Das Staatsrecht der Bundesrepublik Deutschland* vol III/1 (Munich, CH Beck, 1988) 153 f; H-J Papier, 'Drittwirkung der Grundrechte' in D Merten and J-J Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol 2 (Heidelberg, CF Müller, 2006) § 55, para 27. For a critical review of what was then a new development of fundamental rights' direct and indirect horizontal effect, see E Forsthoff, 'Die Umbildung des Verfassungsgesetzes' in H Barian, E Forsthoff and W Weber (eds), *Festschrift für Carl Schmitt* (Berlin, Duncker & Humblot, 1959) 35, 45 f.

⁵ See for the different models, which, however, mostly lead to identical results, Dreier (n 3) para 99.

A. Fundamental Rights Protection when Legislating and Adjudicating Private Law

When legislating in the area of private law, the state is bound by fundamental rights in the same way it always is when acting as legislator. The laws it enacts have to be in accordance with fundamental rights, and the laws may impair the fundamental rights only to the extent to which the impairment can be justified under the Basic Law. They particularly have to be in accordance with the principle of proportionality.

With regard to legislation one has to distinguish between specific rules with relevance for the fundamental rights on the one hand and so-called 'general clauses' on the other.⁶ On the one hand, when enacting specific rules, the legislature defines the factual requirements and the legal consequence of one specific legal issue. One example for this kind of legislation can be found in family law. According to Article 1626a of the German Civil Code, only the mother has the right of parental custody for a child if the parents are not married and do not agree to joint custody. In this case the legislature balances the unmarried mother's parental right, the unmarried father's parental right and the best interest of the child on an abstract level by law. Factual conditions and legal consequence are clearly defined.⁷

So-called general clauses, on the other hand, are not characterised by such clearly defined factual prerequisites and legal consequences. General clauses are rules which are highly in need of interpretation, for example when the law attaches legal consequences to terms like 'illegitimacy', 'unlawfulness' or 'legitimate legal interest'.

The protection of privacy in German private law provides examples of such general clauses. If an individual wants to intervene against publications interfering with his privacy, he can only refer to an analogous application of section 1004 of the German Civil Code. The provision contains a claim for a prohibitory injunction for the owner of movable things or immovable property but is also applied by analogy to infringements of other rights than property, for example the right of privacy. If property or another right is interfered with, the right holder may require the disturber to remove the interference. If further interferences are to be feared, the right holder may seek a prohibitory injunction. The legislature does not define the term 'interference'. Moreover, the term has to be interpreted by the courts for every single case. But in any case, when interpreting and applying the term, the courts are bound by fundamental rights.

These different instances of fundamental rights affecting legislation and adjudication are reflected in constitutional review by the Federal Constitutional Court.

⁶ See Jarass (n 1) 377.

⁷ For the constitutionality of this balancing see Decisions of the Federal Constitutional Court [*Bundesverfassungsgericht*, BVerfG], BVerfGE 107, 150.

Regarding specific rules the Federal Constitutional Court normally reviews whether the rule itself is in accordance with fundamental rights. Regarding general clauses, in contrast, the Federal Constitutional Court reviews whether the rule has been interpreted and applied in accordance with the Basic Law.⁸

B. Fundamental Rights as an Objective System of Values

Despite the fact that the legislature and the courts are bound by fundamental rights, the legal relations in private law remain legal relations between two individuals, and individuals are not the addressees of fundamental rights. Therefore, the question arises in which way the legislature and the courts have to consider the fundamental rights.

The Federal Constitutional Court derived the obligation to consider fundamental rights from the principle that fundamental rights do not have direct effect in private law, but that they shape it because fundamental rights establish an objective system of values. The Federal Constitutional Court held that

far from being a value-free system the Constitution establishes an objective system of values in its section on fundamental rights, and thus expresses and reinforces the value of the fundamental rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decisions. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.⁹

Therefore, the Federal Constitutional Court traces the fundamental rights' indirect horizontal effect back to the objective dimension of fundamental rights. As fundamental rights establish an objective system of values, the legislator and the judge also have to obey them in the area of private law. With this idea the Federal Constitutional Court, on the one hand, avoids the problem that fundamental rights are not binding between individuals. At the same time the Court does not alienate the fundamental rights in private law from their subjective roots. If a court does not interpret a general clause in the manner required by fundamental rights, it does not only objectively violate the law. The civil court – in the words of the Federal Constitutional Court – ‘contravenes not only objective constitutional law by misconceiving the content of the objective norm underlying the basic law, but also, by its judgment, in its capacity as a public authority, contravenes the Constitution itself, which the citizen is constitutionally entitled to have respected by the judiciary’.¹⁰

⁸ According to a consistent line of jurisprudence, the Federal Constitutional Court examines whether there has been a ‘Verletzung spezifischen Verfassungsrechts’, a violation of specific constitutional law, not whether laws other than constitutional ones have been violated, see BVerfGE 18, 85, 92; S Koriath, ‘Bundesverfassungsgericht und Rechtsprechung (“Fachgerichte”)’ in P Badura and H Dreier (eds), *Festschrift 50 Jahre BVerfG*, vol 1 (Tübingen, Mohr Siebeck, 2001) 55, 81; E Benda and E Klein, *Verfassungsprozessrecht*, 2nd edn (Heidelberg, CF Müller, 2001) para 654.

⁹ BVerfGE 7, 198, 205 (translation by the author).

¹⁰ BVerfGE 7, 198, 206 f; BVerfGE 89, 214, 229 f.

To a certain extent these considerations of the Federal Constitutional Court appear contradictory. Fundamental rights as subjective rights appear as an objective system of values, because they cannot have a direct effect on private law. At the same time the Court establishes a new subjective right to have the fundamental rights recognised as an objective system of values. Both parties in a private law legal relationship can refer to this right.

This possibility of both parties laying an equal claim to fundamental rights, however, is not fully realised in the Federal Constitutional Court's jurisprudence. The affected party can invoke the Federal Constitutional Court by means of a constitutional complaint if the civil court infringed the party's fundamental rights, and the Constitutional Court can review the judgment. However, only the party which was unsuccessful in the civil proceeding can lodge a constitutional complaint. Therefore, only the infringement of the claimant's rights is examined from a subjective point of view. The other party's fundamental rights are only taken into account as far as they are part of the objective system of values established by the fundamental rights. The perspective from which the Federal Constitutional Court reviews a case therefore depends on the question of which party prevailed in the civil litigation.

Trying to resolve these random effects, the Federal Constitutional Court in such cases modifies its way of examining the fundamental rights infringement compared to constellations of direct vertical fundamental rights effect. When applying fundamental rights on the basis of indirect horizontal effect, the Federal Constitutional Court first invokes the traditional doctrinal system of fundamental rights as defensive rights against the state. It examines whether a measure is within the scope of protection of a fundamental right, whether there is an interference and, as part of the justification, which restrictions on the specific fundamental right are permissible. When applying the proportionality test, however, it does not apply the criteria of proportionality in the narrow sense as it does in vertical fundamental rights situations. It does not examine whether one individual's use of fundamental rights can justify the interference with another individual's fundamental rights, but balances the conflicting fundamental rights, a process which in German is called ‘practical concordance’. The court brings the conflicting fundamental rights into proportionate balance on an equal level so that none of the conflicting fundamental rights can claim more importance than the other.¹¹ However, in the end this concept cannot explain exactly how the subjective and the objective dimension of fundamental rights protection intertwine.

¹¹ Hesse (n 3) para 317 f; H Maurer, *Staatsrecht I*, 6th edn (Munich, CH Beck, 2010) para 60.

III. Multipolar Fundamental Rights Situations

A few years ago, the Federal Constitutional Court introduced a new legal term to this settled legal doctrine of indirect horizontal effect: the multipolar fundamental rights situation. Originally it developed this legal term in its so-called *Görgülü* decision in the context of human rights protection in multi-level systems. However, it has carefully begun to use it in other contexts.

A. The *Görgülü* Decision

The *Görgülü* decision is based on the following facts: the complainant, Mr Görgülü, was the father of a child born outside of marriage. The mother gave the child up for adoption one day after the birth and declared her prior consent to adoption by the foster parents, with whom the child had been living since its birth. For five years Mr Görgülü brought a number of judicial proceedings, including a constitutional complaint, which ultimately were unsuccessful, to obtain custody and to be granted a right of access. In response to his individual application, the European Court of Human Rights (ECtHR) held unanimously that the decision on custody and the exclusion of the right of access by the German courts violated Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It held that in cases in which the family connections to a child demonstrably existed, the state had a duty to work towards uniting a natural parent and his or her child. It stated that, at the very least, the complainant must be given access to his child.¹²

Implementing this ruling, the local German court granted custody to Mr Görgülü and granted him a right of access by way of a temporary injunction of the court's own motion. The Higher Regional Court overturned the temporary injunction on the complainant's right of access. In his constitutional complaint against this decision, the complainant alleged the violation of his fundamental rights because the Higher Regional Court disregarded international law and failed to recognise the binding effect of the decision of the ECtHR.

This chapter will not explain all aspects of the controversial ruling of the Federal Constitutional Court concerning the binding effect of judgments of the ECtHR; most of them are without relevance in this context. Instead only the Court's considerations concerning the concept of multipolar fundamental rights situations will be examined. The Federal Constitutional Court held:

If, in concrete application proceedings in which the Federal Republic of Germany is involved, 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

¹² *Görgülü v Germany* App no 74969/01 [2004] ECHR 89; also reported in (2004) 57 *Neue Juristische Wochenschrift* 3397, 3399.

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. 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 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, 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.¹³

B. The Case of *Caroline von Hannover*

At first glance the problem of multipolarity according to the Federal Constitutional Court seems to be a speciality of human rights protection in multi-level systems.¹⁴ The Federal Constitutional Court held that as the ECtHR is not integrated into the national legal system, it can only declare a violation or non-violation of the ECHR. If the Court finds that there has been a violation of the Convention it can provide a remedy to the injured party; however, it is not entitled to refer the case to a national court. Therefore, so argues the Federal Constitutional Court, the ECtHR's decision could in a given case be one sided, not considering the conflicting human rights in a multipolar legal relationship in a balanced way.

These considerations, however, are only relevant for the question of how far the judgments of the ECtHR are binding for national courts. They are irrelevant in deciding how convincing the concept of multipolar fundamental rights situations is. With good reason, the Federal Constitutional Court therefore used the term in other decisions in totally different contexts.¹⁵ However, it did not clarify which dogmatic relevance it attributes to the concept and in which relation it stands to the idea of indirect horizontal effect.

¹³ (2003) 56 *Neue Juristische Wochenschrift* 3407, 3410.

¹⁴ In the scholarly literature as well the term is adopted mainly in this context, see AD Luch, *Das Medienpersönlichkeitsrecht – Schranke der 'vierten Gewalt' Der Grundrechtsschutz in der Europäischen Union* (Munich, Herbert Utz, 2008) 260 f; G Ziegenhorn, *Der Einfluss der EMRK im Recht der EU-Grundrechtecharta* (Berlin, Duncker & Humblot, 2009) 233 f; C Grabenwarter, 'Das mehrpolige Grundrechtsverhältnis im Spannungsfeld zwischen europäischem Menschenrechtsschutz und Verfassungsgerichtsbarkeit' (eds) *Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat* (Kehl, Engel, 2006) 193 f; W Hoffmann-Riem, 'Kontrolldichte und Kontrollfolgen beim nationalen und europäischen Schutz von Freiheitsrechten in mehrpoligen Rechtsverhältnissen' (2006) 33 *Europäische Grundrechte Zeitschrift*; M Pelonpää, 'Kontrolldichte des Grund- und Menschenrechtsschutzes in mehrpoligen Rechtsverhältnissen' (2006) 33 *Europäische Grundrechte Zeitschrift* 483 f.

¹⁵ BVerfG (2009) 28 *Neue Zeitschrift für Verwaltungsrecht* 240, 241; BVerfG, 1 BvR 2532/07 of 12 December 2007 (not reported, available at www.bundesverfassungsgericht.de); BVerfGE 115, 205, 232; BVerfGE 114, 1, 61.

In fact, the ECtHR's intervention into the German system of fundamental rights protection did have an impact in the field of private law; it caused a change of perspective towards a multipolar point of view. This can be demonstrated with another example, which originally put on the agenda the question of how far decisions of the ECtHR are binding for German courts: the case of *Caroline von Hannover*, a case concerning the conflict between the right of privacy and freedom of expression.¹⁶ In this case, the ECtHR rendered a judgment which declared that a prior decision of the Federal Constitutional Court violated Caroline von Hannover's right to protection of her private life laid down in Article 8 ECHR. Since then the Federal Constitutional Court's jurisprudence has changed. A recent decision seized on the concept of multipolar fundamental rights situations.

i. The ECtHR's Judgment

Since the beginning of the 1990s, Princess Caroline von Hannover has been campaigning in various European countries to prevent photographs about her private life from being published in the tabloid press. She has on several occasions unsuccessfully applied to the German courts for an injunction preventing any further publication of a series of photographs which had appeared in the 1990s in German magazines, claiming that they infringed her right to protection of her private life and her right to control the use of her image.

In a landmark decision of 1999,¹⁷ the Federal Constitutional Court granted the applicant's request for an injunction regarding the photographs in which she appeared with her children on the ground that their need for protection of their privacy was greater than that of adults.¹⁸ However, the Court considered that the applicant had to tolerate the publication of photographs of her taken in public places, even if they showed her in scenes from her daily life rather than engaged in her official duties. In its decision the Court referred to the freedom of the press and to the public's legitimate interest in knowing how such a person generally behaved in public.¹⁹

The ECtHR declared that the Federal Constitutional Court's decision violated Article 8 ECHR. The ECtHR considered the decisive factor in balancing the protection of private life against freedom of expression was that the published photographs and articles contributed to a debate of general interest. While the general public might have a right to information, including, in special circumstances, information about the private life of public figures, they did not have such a right in this instance. The ECtHR concluded that the general public did not have a legitimate interest in knowing Caroline von Hannover's whereabouts or how she behaved generally in her private life, even if she appeared in places that could not

¹⁶ See KS Ziegler, 'The Princess and the Press: Privacy after Caroline von Hannover v. Germany' in KS Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Oxford, Hart Publishing, 2007) 189 f.

¹⁷ BVerfGE 101, 361.

¹⁸ BVerfGE 101, 361, 385 f.

¹⁹ BVerfGE 101, 361, 391 f.

always be described as secluded and were easily accessible to the public. Even if such a public interest existed, just as there was a commercial interest for the magazines to publish the photographs and articles, those interests had to yield to the applicant's right to the effective protection of her private life.²⁰

This decision has been very controversial in Germany.²¹ The interesting point about this is that the decisive factors for balancing the conflicting fundamental rights laid down by the ECtHR on an abstract level in fact hardly differ from those factors laid down by the Federal Constitutional Court.²² For example, the Federal Constitutional Court also stated that in balancing the freedom of expression against conflicting personality rights, it has to be determined whether there is a serious and relevant discussion of questions which substantially concern the public or whether there is merely a dissemination of private matters which only satisfy curiosity.²³

The difference between the ECtHR and the Federal Constitutional Court therefore lies on a specific, not on an abstract level, because the Federal Constitutional Court always avoided taking into consideration whether a publication made a contribution to a debate of general interest or not.²⁴

ii. The Federal Constitutional Court's New Caroline Decision

After the ECtHR's judgment, the German civil courts did not implement the new guidelines set by the Strasbourg judges in a uniform way.²⁵ In 2007 the Federal Court of Justice rendered a landmark decision concerning the conflict between the freedom of the press and the right of privacy.²⁶ This decision again arose from a dispute between Caroline von Hannover and the tabloid press. Again the princess wanted to prevent any further publication of a series of photographs.

On this occasion the Federal Court of Justice modified its jurisprudence and adjusted it to that of the ECtHR. It therefore interdicted the further publication of most, but not all, of the photographs that were the subject of the dispute. Consequently the publisher as well as the princess lodged a constitutional complaint. On the occasion of these complaints the Federal Constitutional Court

²⁰ (2004) 57 *Neue Juristische Wochenschrift* 2647, 2649 f.

²¹ See F Gersdorf, 'Caroline-Urteil des EGMR—Bedrohung der nationalen Medienordnung' (2005) 50 *Archiv für Presserecht* 221 f; C Grabenwarter, 'Caroline-Urteil des EGMR—Bedrohung der nationalen Medienordnung' (2004) 49 *Archiv für Presserecht* 309 f; A Halfmeier, 'Privatleben und Pressefreiheit—Rechtsvereinheitlichung par ordre de Strasbourg' (2004) 49 *Archiv für Presserecht* 417 f; R Vetter and N Warneke, 'Zur Abgrenzung von Pressefreiheit und Schutz der Privatsphäre' (2004) 119 *Deutsches Verwaltungsblatt* 1226 f.

²² See A Heldrich, 'Persönlichkeitsschutz und Pressefreiheit nach der Europäischen Menschenrechtskonvention' (2004) 57 *Neue Juristische Wochenschrift* 2634, 2636; S-C Lenski, 'Der Persönlichkeitsschutz Prominenter unter EMRK und Grundgesetz' (2005) 24 *Neue Zeitschrift für Verwaltungsrecht* 50, 51.

²³ BVerfGE 34, 269, 283; 101, 361, 391.

²⁴ See Lenski (n 22) 51.

²⁵ See K-N Peifer, 'Zur Reichweite des Persönlichkeitsschutzes Prominenter in Bezug auf die Veröffentlichung von Fotos aus dem Privat- und Alltagsleben' (2008) 111 *Gewerblicher Rechtsschutz und Urheberrecht* 547, 548.

²⁶ BGHZ 171, 275.

could now set new constitutional measures, taking into account the ECtHR's case law. In doing so the Federal Constitutional Court again used the term of multipolar fundamental rights situations,²⁷ although in comparison to the *Görgülü* decision this aspect was not a central point. On the whole, however, one can find distinct differences concerning the argumentation after the ECtHR's decision.

The first difference concerns the decisive factors in balancing the conflicting fundamental rights. In this new *Caroline* decision, the Federal Constitutional Court for the first time answers the question how far a publication makes a contribution to a serious and relevant discussion of questions which substantially concern the public.²⁸ For the first time the Court, in balancing the freedom of the press and the right of privacy, not only decides the question of how seriously the individual's privacy is interfered with, but also considers the interest the public has in information when weighing the freedom of the press.

The question how to balance the conflicting rights raises a more conceptual question, which appears at another point of the judgment. In the new *Caroline* decision, the Federal Constitutional Court does not only examine the scope of protection of, the interference with, and the constitutional justification for, each fundamental right separately. Rather, it combines the examination of the fundamental rights of the publisher on the one hand and the fundamental rights of the princess on the other. By doing so, the Court connects the examination of the freedom of the press and the right of privacy when balancing the conflicting fundamental rights. Therefore, the conflict between the fundamental rights is not just discussed within the proportionality test in a narrow sense. The Court instead examines the scope of protection, and the interference with and restrictions of the fundamental right in a parallel way for both fundamental rights. Only within the proportionality test does the Court again combine the examination of the two fundamental rights by balancing them on an equal level. In doing so the Federal Constitutional Court applies the idea of multipolar legal relationships – it not only examines one fundamental right in an isolated way, but combines the examination of both fundamental rights without having to refer to the objective dimension of fundamental rights.

IV. Conclusions

Against the background of this decision one has to ask how far the concept of multipolar fundamental rights situations is able to replace the idea of indirect horizontal effect. The decision of the Federal Constitutional Court in the case *Caroline von Hannover* seems to imply this development. But how generalisable are the Court's findings in this case?

If one wanted to hold on to the objective reasoning of the horizontal effect of fundamental rights, the generalisability would be denied and the specific procedural constellation emphasised. The specific constellation of the case lies in the fact that both parties to the civil litigation – the publisher and Caroline von Hannover – lodged constitutional complaints against the judgment of the Federal Court of Justice. The Federal Constitutional Court joined the two constitutional complaints procedures. Due to the fact that the two cases were joined, the parallel examination of the two fundamental rights appears the logical consequence.

However, the fact that the cases were joined is not the cause but rather the consequence of the new perspective on fundamental rights in private law as multipolar fundamental rights situations. The Federal Constitutional Court is free to decide which complaints to join. Neither the Basic Law nor the Federal Constitutional Court Act imposes an obligation to join constitutional complaints under certain circumstances. It is the Federal Constitutional Court's decision whether to do so or not. Additionally, in the new *Caroline* decision there was no logical need to join the cases. In each of the original complaints, different publications and different photographs were subject to the constitutional complaints. Moreover, by consolidating the complaints the Federal Constitutional Court carried out its change of perspective towards the multipolar fundamental rights situation.

The new perspective of multipolar fundamental rights situations facilitates a view that locates the conflicting fundamental rights at the same level without having to refer to the objective dimension of fundamental rights. This enables courts to balance the conflicting fundamental rights on an equal basis. This new approach is applied in the *Caroline* decision, where the Federal Constitutional Court not only weighs the importance of the right of privacy on a concrete level but also considers the importance of the freedom of the press by examining how far a publication contributes to a debate of general interest. We will see if the Federal Constitutional Court will follow up this idea in its future jurisprudence.

²⁷ BVerfGE 120, 180, 212.

²⁸ BVerfGE 120, 180, 215 f.