H e a d n o t e s

to the judgement of the First Senate of 15 December 1999

- 1 BvR 653/96 -

1. **Privacy, which is protected by the general right of personality under Article 2.1 in conjunction with Article 1.1 of the *Grundgesetz* (Basic Law), is not restricted to the domestic sphere. It must, in principle, be possible for an individual to move in other places that are recognisably secluded without being disturbed by the activities of photojournalists.**

2. **The general right of personality is not is not meant to serve the interest of the commercialisation of the person of an individual. The protection of privacy from being portrayed comes second to the extent that someone declares his or her consent that specified matters that are usually regarded as private are made public.**

3. **The scope of protection provided by the general right of personality of parents is enhanced by Articles 6.1 and 6.2 of the Basic Law to the extent that the publication of images is concerned the subject of which is the specifically parental care of their children.**

4. **The guarantee of the freedom of the press provided by Article 5.1(2) of the Basic Law also covers entertaining publications and articles as well as the images that they contain. In principle, this applies as well to the publication of images that show persons with roles in public life in everyday or private contexts.**

FEDERAL CONSTITUTIONAL COURT

Pronounced 15 December 1999 Krenitz Regierungsobersekretärin Registrar of the Court Registry

- 1 BvR 653/96 -

IN THE NAME OF THE PEOPLE

In the proceedings

on

the constitutional complaint

of Princess Caroline of Monaco,
Monaco Palace, Monaco,

- authorised representatives: Lawyers Dr. Matthias Prinz und Partner, Tesdorpfstraße 16, Hamburg -

against a) the judgement of the *Bundesgerichtshof* (Federal Court of Justice) of 19 December 1995 - VI ZR 15/95 -,

b) the judgement of the *Hanseatisches Oberlandesgericht* (Hanseatic Higher Regional Court) of Hamburg of 8 December 1994 - 3 U 64/94 -,

c) the judgement of the *Landgericht* (Regional Court) of Hamburg of 4 February 1994 - 324 O 537/93 -

the First Senate of the *Bundesverfassungsgericht* (Federal Constitutional Court), with the participation of

Judges Papier (Vice-President),

Grimm,

Kühling,

Jaeger,

Haas,

Hömig

Steiner, and

Hohmann-Dennhardt,

issued the following

J u d g e m e n t

on account of the oral argument of 9 November 1999:

The judgements of the *Bundesgerichtshof* of 19 December 1995 - VI ZR 15/95 -, of the *Hanseatisches Oberlandesgericht* of Hamburg of 8 December 1994

- 3 U 64/94 - and of the *Landgericht* of Hamburg of 4 February 1994 - 324 O 537/93 - violate the complainant's fundamental right under Article 2.1 in conjunction with Article 1.1 of the Basic Law to the extent that the relief sought by her had also been rejected as regards three photographs published in the magazine "Bunte" in its numbers 32, of 5 August 1993, and 34, of 19 August 1993, which show the complainant and her children. To this extent and concerning the court order as to costs, the judgement of the Federal Court of Justice is reversed and remanded.

As regards all other points of the constitutional complaint, they are rejected as being unfounded.

The Federal Republic of Germany shall reimburse the complainant a third of the necessary expenses.

Extract from grounds :

A.

The constitutional complaint concerns the publication of photographs from the daily and private life of prominent persons. 1

I.

1. The defendant in the original proceedings, the company Burda GmbH, publishes the magazines "Freizeit Revue" and "Bunte". Photographs of the complainant, Princess Caroline of Monaco, were published in these magazines to illustrate various articles. The photographs gave rise to the original proceedings, seeking to block their publication. 2

The original proceedings also dealt with five photographs that were published in the "Freizeit Revue", number 30, on 22 July 1993. In these photographs, the complainant can be seen with the actor Vincent Lindon during an evening together at a table in a garden restaurant in Saint-Rémi (France). On the title page, the photographs are introduced as "Die zärtlichsten Fotos ihrer Romanze mit Vincent" ("The most tender photographs of her romance with Vincent") and they show Vincent Lindon kissing the complainant's hand. These photographs are not at issue in the constitutional complaint because the complainant succeeded in having the Federal Court of Justice 3

block their publication.

Further, on 5 August 1993, the defendant published in the magazine "Bunte", number 32, an article with the title "Caroline: 'Ich glaube nicht, daß ich die ideale Frau für einen Mann sein kann'" ("Caroline: 'I do not believe that I can be the ideal woman for a man.'"). The article mostly employs indirect speech and partially reproduces a book about the complainant that had been published in Spain. The article was illustrated with many photographs. One photograph on page 88 shows the complainant riding a horse in a paddock. No other people can be seen in the photograph. It bears the caption "Caroline und die Melancholie. Ihr Leben ist ein Roman mit unzähligen Unglücken, sagt Autor Roig" ("Caroline and melancholy: her life is a novel with countless misfortunes, says author Roig."). Page 89 contains a photograph of the complainant with her children Pierre and Andrea, bearing the caption "Caroline mit Pierre und Andrea, ihren Kindern" (“Caroline with Pierre and Andrea, her children."). In the photograph the three people are visible in the foreground, and automobiles can be seen in the background. The complainant is wearing sunglasses. 4

In the magazine "Bunte", number 34, of 19 August 1993, an article appears on pages 44 to 52 under the title "Vom einfachen Glück" ("Simple happiness") with several photographs. On the first page of the article is a close-up of the complainant together with her daughter in a paddleboat. The caption at the side of the photograph reads: "Es ist ein heißer Tag in diesem Sommer. Prinzessin Caroline paddelt mit ihrer Tochter Charlotte auf der Sorgues. Das ist ein kleiner Fluß unweit von St-Rémi, dem Dorf in der Provence, wo Caroline lebt. Von New York bis London flüstern die Schönen und Reichen von Le Style Caroline. Kanu statt Jacht. Sandwich statt Kaviar". ("It is a hot day in this summer. Princess Caroline paddles with her daughter on the Sorgues. That is a small river not far from St-Rémy, the Provence village in which Caroline lives. From New York to London, the rich and beautiful people whisper about Le Style of Caroline. Canoe instead of yacht. Sandwich instead of caviar.") 5

Another photograph shows the complainant with a basket-shaped bag hanging from her shoulder on the way to the market. On the photograph, there is a fine-print caption: "Hausfrau Caroline Casiraghi. Sie liebt es, selbst einzukaufen" ("The housewife Caroline Casiraghi. She loves to do her own shopping.") The caption, in larger print, at the side of the photograph reads: "Am Mittwoch ist Markttag. Le Style Caroline wird weltweit kopiert. Ihre Riemchen-Sandalen, mit denen sie zum Blumenmarkt geht, ihr Pareo, den sie als Rock trägt." ("Wednesday is market day. Le Style of Caroline is copied world-wide. The strap sandals that she wears when going to the flower market, the pareo that she wears as a skirt."). Other photographs in this context, which are not covered by the complaint, show two shops in which the complainant allegedly does her shopping, the bistro in which she usually has her coffee, and her country house. 6

The next photograph that is covered by the constitutional complaint shows the complainant and the actor Vincent Lindon sitting near one another in a cafe surrounded 7

by other patrons. The fine-print text in the lower right corner reads as follows: "Jeden Samstagabend ist hier Tisch Nr. 3 rechts vom Eingang für Caroline reserviert" ("Every Saturday evening table number 3, on the right of the entrance, is reserved here for Caroline.") The larger-format text accompanying the photograph says: "Abends, man sitzt im 'Sous les Micocouliers' und trinkt den leichten Sommer-Rotwein. Caroline und Vincent Lindon sind Gäste wie der Bäcker, der Olivenbauer oder Pfarrer Philippe von der Kirche St. Martin" ("In the evening, people sit in 'Sous les Micocouliers' and drink the light, summer red wine. Caroline and Vincent Lindon are patrons just like the baker, the olive farmer or Father Philippe from the church of St. Martin.")

Further, a photograph shows the complainant alone on a bicycle ride on a path through a field. The fine-print text for this photograph reads as follows: "Caroline radelt nach Hause. Ihr 'Mas' liegt am Ende des holprigen Feldwegs 'Chemin de Pilou'" (Caroline rides towards home. Her 'Mas' is situated at the end of the bumpy path 'Chemin de Pilou.'") This text is complemented by the larger accompanying text: "Das Ende der Einsamkeit naht. Le Style Caroline lockt die Schönen und Reichen an. Lady Di soll einen Makler beauftragt haben, ein Grundstück zu finden. Julio Iglesias sucht auch" ("The end of the solitude approaches. Lady Di is said to have commissioned a real estate agent to find a piece of property. Julio Iglesias is also looking.") 8

The photo on page 51 shows the complainant together with Vincent Lindon, her son Pierre and another child. It is a close-up photograph that captures the identified people from behind or from the side as they turn towards the child. The fine-print text reads as follows: "Carolines Jüngster, Pierre, 6, hat sich gestoßen. Vincent und Caroline trösten ihn" ("Caroline's youngest son, Pierre, 6, hurt himself. Vincent and Caroline comfort him.") 9

The last photo shows the complainant, wearing sunglasses, with a companion near a flower stand at the market. The text accompanying the photo says: "Carolines Bodyguard ist eine Frau. Sie sieht der Prinzessin sogar ähnlich. Meistens gehen sie gemeinsam auf den Markt" (Caroline's bodyguard is a woman. She even looks like the Princess. Most of the time they go to the market together.") 10

2. For the assessment of these photos the civil courts have mainly been guided by § 22 and § 23 of the *Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie* (Act concerning the copyright of works of visual art and photographic works), of 9 January 1907 (*Reichsgesetzblatt* [RGBl, Reich Law Gazette] p. 7, hereinafter referred to as *Kunsturhebergesetz* [KUG, Art Copyright Act]). These regulations have the following wording: 11

a) The Regional Court granted the complaint to the extent that it dealt with photos published in magazines that are distributed in France. Otherwise, it rejected the complaint. 21

[…] 22-23

b) The Higher Regional Court rejected the complainant's appeal and, pursuant to the respondent's cross-appeal, it altered the judgement of the lower court, rejecting the complaint to the extent that it had been granted by the regional court (cf. NJW [*Neue Juristische Wochenschrift*]-RR 1995, p. 790). 24

3. The Federal Court of Justice reversed, in part, the judgement of the Higher Regional Court. The Federal Court of Justice also altered, in part, the judgement of the Regional Court so that the defendant in the original proceedings would be prohibited from again publishing the photographs containing the complainant's image, which had been printed in the magazine „Freizeit Revue." The more expansive claims in the appeal were rejected. . . . 25

[…] 26-38

II.

The complainant claims that the collective decisions of the civil courts constituted, to the extent that they do not disallow the future distribution of the photos, a violation of Article 2.1 in conjunction with Article 1.1 of the Basic Law, especially to the extent that these articles concern the right to control over one's own image and the right to enjoy the respect of one's privacy. According to the complainant, the challenged decisions, in applying ordinary statutory (as opposed to constitutional) law to the matter, misjudged the meaning and scope of the fundamental rights. With their classification of the complainant as an "absolute person of contemporary history" the decisions, according to the complainant, abridged the mandatory weighing in an impermissible manner or applied standards that do not stand up to constitutional review when judging the legitimate interests that are to be taken into consideration pursuant to § 23.2 of the KUG. 39

[…] 40-63

IV.

[. . .] 64

B.

The constitutional complaint is partly founded. 65

I.

The challenged judgements affect the complainant's general right of personality that follows from Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law. 66

1. The constitutional safeguard of the protection of the general right of personality also extends to images of an individual made by third parties. 67

a) The fundamental right that safeguards the legal protection of the general right of 68

personality has the objective of safeguarding elements of an individual's personality that are not the subject of the freedoms that are especially guaranteed by the Basic Law but do not come second to these freedoms as concerns their importance for the formation of the personality (cf. BVerfGE [Decisions of the Federal Constitutional Court] 54, p. 148 [at p. 153]; BVerfGE 99, p. 185 [at p. 193]). The necessity of such a safeguard for filling gaps in the legislation exists in particular as regards new threats to the free development of one's personality that mostly occur in the wake of scientific and technical progress (cf. BVerfGE 54, p. 148 [at p. 153]; BVerfGE 65, p. 1 [at p. 41]). The standard for ascertaining whether, in the framework of a specific legal action, the general right of personality is affected and if so, which manifestation thereof, is, first and foremost, a question of the threat to one's personality. This must be inferred from the concrete situation.

b) The authority to publish photographs that show individuals in private or everyday contexts depends on the right to one's own image and on the guarantee of privacy that characterise the right to develop one's personality. 69

aa) Contrary to the complainant's opinion, Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law does not establish a general and comprehensive individual right to determine the manner in which one is portrayed. To the extent that the complainant would like to infer such a right from former decisions of the Federal Constitutional Court (cf. BVerfGE 35, p. 202 [at p. 220]; BVerfGE 54, p. 148 [at pp. 155-156]; BVerfGE 63, p. 131 [at p. 142]), this is an incorrect generalisation of the scope of protection of the guarantee provided by the fundamental right, which was formulated in the Court’s consideration of the concrete cases. As the Federal Constitutional Court has emphasised on several occasions already, the general right of personality does not confer to the individual the right to be portrayed by others only as he or she views him- or herself or only as he or she wants to be perceived (cf. BVerfGE 82, p. 236 [at p. 269]; BVerfGE 97, p. 125 [at p. 149]; BVerfGE 97, p. 391 [at p. 403]; BVerfGE 99, p. 185 [at p. 194]). Such a broad protection would not only exceed the aim of protection, *i.e.* to avoid risks to the development of an individual's personality, but would also extend far into third parties' sphere of freedom. 70

The complainant does not criticise the way in which she is portrayed in the photographs at issue, which had been regarded as altogether positive by the civil courts that dealt with the case. Rather, the question with which she is concerned is whether images of her may be made and published at all if she does not move in public in an official function but as a private individual or in everyday contexts. The answer to this question can be ascertained from those aspects of the general right of personality that protect the right to control over one's own image as well as privacy. 71

bb) The right to control over one's own image (cf. BVerfGE 34, p. 238 [at p. 246]; BVerfGE 35, p. 202 [at p. 220]; BVerfGE 87, p. 334 [at p. 340]; BVerfGE 97, p. 228 [at pp. 268-269]) ensures that the individual has the opportunity to influence and decide the taking and the use of photographs or recordings of his or her own person. In 72

principle, it is of no importance whether the photographs or recordings show the individual in private or public contexts. The protection required for the right to control over one's own image is similar to, and developed after, the protection required for the right to control over one's own words. Both find support in constitutional jurisprudence (cf. BVerfGE 34, p. 238 [at p. 246]). The need for protection, in the case of the right to control over one's own image, results from the fact that it is possible to detach the image of an individual in a specific situation from this individual, to record the image in a data format and to reproduce it at any time for an immeasurable audience. The progress in recording technology, which permits the taking of images from a great distance, most recently even by satellite and under bad lighting conditions, has considerably expanded this possibility.

73 The existing technology of image and sound reproduction make it possible to change (1) the public setting in which one appears, and (2) the breadth of the public by which one may be observed. In particular, the limited public, in which an individual moves under normal circumstances, can be substituted by a public that is created by the media. The audience that is present in a courtroom, for instance, is the feature that distinguishes the public in court proceedings from the public created by television, because the public in the courtroom witnesses the events itself and can, in turn, be perceived and assessed by the parties to the legal action (cf. BVerfGE, 3rd Chamber of the First Senate, NJW [*Neue Juristische Wochenschrift*] 1996, p. 581 [at p. 583]). Apart from that, the change of the context in which an image is reproduced can also change, unintentionally or intentionally, the sense of the message that the image conveys.

74 Among the different aspects of the protection of the right to control over one's own image, only the aspect that concerns the production of specified photographs and their transfer to a broader public is of importance in this context. The proceedings do not deal with manipulated photographs or distortions by a change of context, with which the protection is particularly concerned. The complainant, on the contrary, assumes that the photographs that are at issue in the proceedings and the accompanying text, which is also relevant for the message conveyed by the photographs, correctly depict situations from her life in a way in which observers, had they been present at the occasion when the pictures were taken, could have perceived them. The complainant simply does not want these situations to be captured in photographs and presented to a broader public as these situations, in her opinion, are part of her privacy.

75 cc) As distinguished from the right to control over one's own image, the protection of privacy, which also flows from the general right of personality, does not refer to images in particular but is determined by the subjects of the images and the places in which they are taken. On the one hand, the protection of privacy comprises matters that, due to the information conveyed, are typically regarded as "private", because their public discussion or display is regarded as unseemly, because they are regarded as embarrassing if they become known, or if they provoke adverse reactions from

the environment. This applies *e.g.* to reflections about oneself in diaries (BVerfGE 80, p. 367); to confidential communication between husband and wife (BVerfGE 27, p. 344); to the sphere of sexuality (BVerfGE 47, p. 46); in the case of socially deviant behaviour (BVerfGE 44, p. 353) and in the case of diseases (BVerfGE 32, p. 373). If such matters were not protected from others taking note of them, the reflection about oneself, the uninhibited communication among individuals who are close to each other, the development of one's sexuality and the resort to medical aid could be impaired or made impossible even though these types of behaviour are protected by fundamental rights.

On the other hand, protection extends to a physical space in which the individual can recover, relax and also let him- or herself go (cf. BVerfGE 27, p. 1 [at p. 6]). It is true that such a space also provides the possibility to behave in a way that is not meant for the public and the observation and display of which by outside observers would be embarrassing or detrimental for the individual affected. In essence, this is a space in which it is possible for the individual to be free from public observation, and thus free from the self-control imposed by the public even if the individual affected does not necessarily behave differently in this space than he or she would in public. If such a possibility of retreating no longer existed, this could overstrain the individual psychically because he or she would always have to be aware of the effect he or she has on others and would always have to consider whether he or she is behaving correctly. This would deprive the individual of phases in which he or she can be alone and recover; such phases are necessary for the development of one's personality, and without them the development of one's personality would be seriously impaired. 76

Such need for protection also exists in the case of individuals who, on account of their rank or reputation, of their position or influence or of their abilities or actions are the subject of particular public attention. The fact that someone, whether wanted or unwanted, has become a person upon whom the public focuses, does not mean that this person has lost his or her right to a sphere of privacy that is withdrawn from the observation of the public. This also applies to democratically elected office holders. They are certainly accountable to the public for the way in which they administrate their office, and they have to tolerate public attention in this context. They do not, however, have to tolerate the same extent of public attention regarding their private life in so far as their private life does not affect the administration of their office. 77

By common consent, the domestic sphere constitutes such a protected area. Due to its connection with the free development of one's personality, the area of withdrawal must not, from the outset, be restricted exclusively to the domestic sphere. This holds true if only for the reason that the functions that the area of withdrawal serve do not end at the walls of one's house or at the boundaries of one's property. The free development of an individual's personality would be seriously impaired if the individual could only evade public curiosity in his or her own home. In many cases, it is only possible in the seclusion of a natural environment, *e.g.* in a holiday resort, for an individual to recover from being a part of the public, which is characterised by compulsions 78

to function in a certain way and by the presence of the media. This is why the individual must also have, in principle, the possibility to move in the open country, although it is secluded, and in places that are recognisably secluded from the broad public in a manner that is free from public observation. This especially applies with regard to technologies of imaging that overcome physical seclusion without the person affected being able to recognise this.

79 The physical boundaries of privacy outside the home cannot be determined in a general and abstract manner. Rather, they can be determined only from the particular characteristics of the place visited by the concerned person. The decisive standard is whether the individual finds or creates a situation in which he or she can reasonably, *i.e.* in a way that is also recognisable for others, assume that he or she is not exposed to the observation of the public.

80 Whether the prerequisites of seclusion are fulfilled can only be ascertained for each particular situation. In one and the same place, there may be a time in which an individual can, with good reasons, feel unobserved, whereas this is not the case at other points in time. Nor does the fact that an individual stays in a closed room always mean that this place is secluded. The decisive question is whether the individual has good reasons to expect that he or she is unobserved or whether the individual visits places in which he or she moves under the eyes of the public. Therefore, seclusion, which is the prerequisite for the protection of privacy outside the domestic sphere, can be lacking in closed rooms as well.

81 Places in which the individual is among many people, lack, from the outset, the prerequisites of the protection of privacy within the meaning of Article 2.1 in conjunction with Article 1.1 of the Basic Law. Such places cannot cater to an individual's need of withdrawal, and they therefore do not justify the protection of fundamental rights that this need deserves for reasons of the free development of one's personality. Neither can the individual, by showing a behaviour that would not usually be displayed in public, redefine these places in such a way that they become part of his or her sphere of privacy. It is not the individual's behaviour, whether alone or with others, that constitutes the sphere of privacy but the objective characteristics of the place at the time in question. Thus, if an individual behaves, in places that do not show the characteristics of seclusion, in the manner he or she would behave if he or she were not under observation, this individual eliminates the need for protection of behaviour that is of no concern to the public.

82 The protection of privacy, over and against the public’s observation, is also eliminated if someone declares his or her agreement with the fact that certain matters that are usually regarded as private are made public, *e.g.* if someone enters into exclusive contracts concerning media coverage of his or her private sphere. The constitutional protection of privacy provided by Article 2.1 in conjunction with Article 1.1 of the Basic Law is not meant to serve the interest of the commercialisation of the person of an individual. Certainly no one is prohibited from opening his or her private sphere in such

a manner. When doing so, however, one cannot claim protection of privacy, because privacy is the status of being removed from the observation of the public. Therefore, someone who expects that others may only to a limited extent or not at all observe matters or behaviour that take place in an area that normally serves for the withdrawal from the observation of the public, must express this expectation in a consistent manner that is not bound to a particular situation. This also applies if someone revokes his or her decision to permit or tolerate reporting about certain issues in his or her private sphere.

dd) There is no previous Federal Constitutional Court case law about the meaning of the protection of privacy with respect to the family relationship, especially between parents and children. It has been acknowledged, however, that children need special protection because they still have to develop into responsible persons (cf. BVerfGE 24, p. 119 [at p. 144]; BVerfGE 57, p. 361 [at p. 383]). This need for protection extends as well to the protection of children from threats posed by the interest of the media and the consumers of media images of children. This interest can constitute a more severe interference with the development of a child's personality than it does for the development of an adult's personality. The sphere in which children can feel free from observation by the public and develop free from such observation must therefore be protected in a more comprehensive way than in the case of adults. 83

It is the parents who are first of all responsible for the development of a child's personality. To the extent that education depends on an undisturbed relationship between parents and their children, the special protection of the children's fundamental rights does not have a merely automatic impact in favour of the father or the mother (also cf. BVerfGE 76, p. 1 [at pp. 44 *et seq.*]; BVerfGE 80, p. 81 [at pp. 91- 92]). Rather, the specifically parental care of their children, in principle, also falls into the sphere of protection provided by Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law. In this case, the scope of protection provided by the general right of personality is enhanced by Articles 6.1 and 6.2 of the Basic Law, which oblige the State to secure the living conditions that are necessary for a child to grow up in a healthy way. Of these conditions, parental care is particularly important (cf. BVerfGE 56, p. 363 [at p. 384]; BVerfGE 57, p. 361 [at p. 382-383]; BVerfGE 80, p. 81 [at pp. 90 *et seq.*]). 84

Article 6 of the Basic Law, thus, enhances the protection to which children are entitled in order to enjoy the general right of personality. The impact that this enhancement has in particular cases cannot be determined in a general and abstract way. As a general rule, there will certainly be no need for protection in cases in which parents deliberately turn towards the public with their children, *e.g.* if they participate in public functions together or even are the centre of such functions. In such cases, they assent to the conditions of public appearances. As regards all other cases, the protection of the general right of personality as enhanced by the specific relationship between parents and children can, in principle, arise in contexts in which the prerequisite of seclusion is not otherwise fulfilled. 85

2. The challenged decisions impair the complainant's general right of personality. As the contexts in which the images were made enjoy the protection provided by this fundamental right; the courts' finding that they may be published against the complainant's will diminish the required protection, which the courts in private-law litigation are also obligated to extend to the complainant (cf. BVerfGE 7, p. 198 [at p. 207]). 86

II.

The challenged judgements do not fully meet the requirements stipulated by Article 2.1 in conjunction with Article 1.1. of the Basic Law. 87

1. However, the provisions of § 22 and § 23 of the Art Copyright Act, on which the civil courts based their decisions, are consistent with the Basic Law. 88

Pursuant to Article 2.1 of the Basic Law, the general right of personality is only guaranteed in the framework of the constitutional order. This also includes the provisions about the publication of photographic images of persons in § 22 and § 23 of the Art Copyright Act. The provision can be traced back to an offensive incident (images of Bismarck on his deathbed, cf. *Entscheidungen des Reichsgerichts in Zivilsachen* [RGZ, Decisions of the Supreme Court of the German Reich in Civil Cases] 45, p. 170) and the subsequent discussion on legal policy (cf. *Verhandlungen des 27. DJT,* 1904, 4th volume, pp. 27 *et seq*.). The provision seeks to achieve an equitable balance between the respect of an individual's personality and the interest of the general public in being informed (cf. *Verhandlungen des Reichstages, 11. Legislaturperiode, II. Session, 1. Sessionsabschnitt* 1905/1906, No. 30 p. 1526 [at pp. 1540-1541]). 89

Pursuant to § 22.1 of the Art Copyright Act, images may be distributed or presented for public display only with the consent of the subject. § 23.1 of the Art Copyright Act exempts, *inter alia*, images from the sphere of contemporary history (no. 1) from this principle. Pursuant to § 23.1 of the Art Copyright Act, this exemption does not, however, extend to a distribution by which the subject suffers an injury to a legitimate interest. As this concept of protection consists of several stages, the provision sufficiently takes into account the depicted person's need for protection as well as the public's wish of being informed and the interests of the media that satisfy these wishes. This has already been established by the Federal Constitutional Court on earlier occasions (cf. BVerfGE 35, p. 202 [at pp. 224-225]). 90

The respondents' opinion that the regulation violates the freedom of the press as it, in their opinion, amounts to a *Verbot mit Erlaubnisvorbehalt, i.e.* a prohibition of publication, with each publication requiring permission in advance, does not lead to a different assessment. That there is no such prohibition can already be discerned from the fact that the provisions only conciliate different, legally protected interests of individuals. Neither does the regulation favour the protection of an individual's rights to protection of his or her general right of personality in a one-sided manner. It is true that on the first and third stages (§ 22.[1] and § 23.2 of the Art Copyright Act), the reg- 91

ulation is primarily concerned with the depicted person's need for protection. In the second stage (§ 23.1 of the Art Copyright Act), however, the interests of the freedom of the press and of the freedom to form one's own opinion, which is at the background of this fundamental right, are sufficiently taken into account. At the same time, the open wording of the regulation provides enough room for an interpretation and application that is in conformity with the fundamental rights.

2. The interpretation and application of the provisions, however, do not in all respects comply with the requirements established by the fundamental rights. 92

a) The interpretation and application of constitutional civil-law provisions is the task of the civil courts. In doing so, the civil courts must observe the meaning and the scope of the fundamental rights that are affected by their decisions to assure that their normative content be preserved at the level of judicial application of the law as well (cf. BVerfGE 7, p. 198 [at pp. 205 *et seq*.]; established case law). This requires a balancing between the conflicting interests that are protected by fundamental rights. This balancing is to take place in the framework of the elements of civil-law provisions that may be interpreted, and it must take the special circumstances of the case into account (cf. BVerfGE 99, p. 185 [at p. 196]; established case law). Irrespective of the influence of the fundamental rights, the litigation remains a private-law action that finds its solution in private law, the interpretation of which is guided by the fundamental rights. The mission of the Federal Constitutional Court is therefore restricted to reviewing whether the civil courts have sufficiently taken into account the influence of the fundamental rights (cf. BVerfGE 18, p. 85 [at pp. 92-93]). It is, however, not the task of the Federal Constitutional Court to prescribe to the civil courts the outcome of their decision in the litigation (cf. BVerfGE 94, p. 1 [at pp. 9-10]). 93

A violation of fundamental rights that leads to an objection to the challenged decisions only exists (1) if, in the interpretation and application of constitutional provisions of private law, the fact has been overlooked that fundamental rights were to be respected; or (2) if the scope of protection provided by the fundamental rights that are to be respected has not been determined correctly or completely, or (3) if the weight of the fundamental rights that are to be respected has been misjudged in such a way that the balancing of the legal positions of the parties in the framework of the private-law settlement suffers (cf. BVerfGE 95, p. 28 [at p. 37]; BVerfGE 97, p. 391 [at p. 401]), and the decision is based on this mistake. 94

b) In the present case, the interpretation and application of §§ 22 and 23 of the Art Copyright Act does not only have to consider the general right of personality but also the freedom of the press, which is affected by these provisions as well. 95

The right to freely determine the nature and tendency, contents and form of an organ of the press is in the centre of the guarantee of the fundamental right of the freedom of the press (cf. BVerfGE 20, p. 162 [at pp. 174 *et seq*.]; BVerfGE 52, p. 283 [at p. 296]; BVerfGE 66, p. 116 [at p. 133]; BVerfGE 80, p. 124 [at pp. 133-134]; BVerfGE 95, p. 28 [at p. 35]). This includes, *inter alia*, the decision whether and how to il- 96

lustrate an organ of the press. The protection is not restricted to specified subjects of illustrations. It also comprises the depiction of persons. The protection does not depend on the nature or the level of the organ of the press (cf. BVerfGE 34, p. 269 [at p. 283]; BVerfGE 50, p. 234 [at p. 240]). Any distinction of this kind would ultimately amount to public authorities assessing and controlling the press, a fact that would plainly contradict this fundamental right (BVerfGE 35, p. 202 [at p. 222]).

97 The freedom of the press serves to facilitate, for individuals and the public, the free formation of opinions (cf. BVerfGE 57, p. 295 [at p. 319]). Such formation of opinions can only be successful under the condition that free reporting, *i.e.* reporting without any prescribed or precluded subjects or manners of presentation, is possible. In particular, the formation of opinions is not restricted to the political sphere. In the interest of a functioning democracy, the formation of opinions with regard to the political sphere is certainly of special importance. The formation of opinions in the political sphere, however, is embedded in a comprehensive, highly interconnected communication process that can neither under the aspect of the development of one's personality nor from the point of view of democratic governance, be split up into relevant and irrelevant areas (cf. BVerfGE 97, p. 228 [at p. 257]). The press must be allowed to decide according to its own publishing standards what it regards as being worthy of the public interest and what it does not deem to be worthy of such interest.

98 The fact that the press has to fulfil an opinion-forming mission does not exclude entertainment from the constitutional free press guarantee. The formation of opinions does not stand in opposition to entertainment. Entertaining articles can also contribute to the formation of opinions. Such articles can, under certain circumstances, stimulate or influence the formation of opinions in a more sustainable way than information that is exclusively fact-related. Moreover, in the media, an increasing tendency toward the elimination of the distinction between information and entertainment can be observed both with respect to specific organs of the press as a whole as well as with regard to individual articles, *i.e.*, to disseminate information in an entertaining manner or to mix information and entertainment ("infotainment"). This means that many readers obtain the information that they regard as important or interesting exactly from entertaining articles (cf. Berg/Kiefer [eds.], *Massenkommunikation*, volume V, 1996).

99 Nor can it be denied from the outset that mere entertainment has an influence on the formation of opinions. It would be a narrow view to assume that entertainment only satisfies wishes for amusement, relaxation, distraction and escape from reality. Entertainment can also convey images of reality and provides topics for conversation that can be followed by processes of discussion and integration that refer to views on life, to standpoints concerning values and patterns of behaviour, and in this respect, it fulfils important functions in society (cf. BVerfGE 97, p. 228 [at p. 257]; furthermore: Pürer/Raabe, *Medien in Deutschland*, volume 1, 2nd edition 1996, pp. 309-310). For this reason, entertainment in the press cannot be neglected or even be regarded as worthless in the context of the freedom of the press, for which constitutional protec-

tion is intended; entertainment is, therefore, also covered by the protection that this fundamental right provides (cf. BVerfGE 35, p. 202, [at p. 222]).

This also applies to reporting about individuals. Personalising a theme is an important journalistic means for attracting attention. Personalising a theme often awakens the interest in certain problems in the first place and is the basis of the wish for factual information. Sympathy for events and situations is often conveyed by personalising the theme. Moreover, prominent persons also stand for certain ethical positions and views of life. Therefore, prominent persons provide orientation for their own concepts of life to many people. Prominent persons become focuses for approval or rejection and thus fulfil the function of role-models or of examples of life-styles from which people want to detach themselves. This is the reason for the public interest in the most varied aspects of the lives of prominent persons. 100

As regards persons from political life, the public's interest has always been recognised as legitimate from the point of view of democratic transparency and control. In principle, however, it cannot be denied that such interest also exists concerning other persons with roles in public life. In this respect, the depiction of individuals that is not restricted to specified functions or events complies with the tasks of the press and therefore also falls under the scope of protection provided by the freedom of the press. Only when a balance is established between the freedom of the press and colliding rights of personality, can it be of importance whether questions that essentially concern the public are discussed in a serious, fact-related manner or whether merely private matters that only satisfy curiosity are divulged (cf. BVerfGE 34, p. 269 [at p. 283]). 101

c) The judgement of the Federal Court of Justice mainly stands up to the review of constitutionality. 102

aa) It is not objectionable from the constitutional point of view that, in order to determine the elements of § 23.1(1) of the Art Copyright Act, the Federal Court of Justice has taken as its controlling standard the general public's interest in being informed, and that the Federal Court of Justice, for this reason, has regarded the publication of images of the complainant that show her outside her representative function in the principality of Monaco as permissible. 103

§ 23.1.(1) of the Art Copyright Act establishes that the publication of images from the sphere of contemporary history does not require the subject's consent, as otherwise required by § 22 of the Art Copyright Act. As concerns the parliament's intention when establishing this provision (cf. *Verhandlungen des Reichstages*, *loc. cit.*, pp. 1540-1541) and as regards the purpose of the regulation, it shows consideration for the general public's interest in being informed as well as for the freedom of the press. Therefore, the interest of the public is to be taken into account especially when interpreting the element "images from the sphere of contemporary history", as the public must not be granted free access to images of persons who are not deemed important in the context of contemporary history; such images instead require the sub- 104

ject's consent for publication. The other element of the Art Copyright Act that is open to the influence of fundamental rights, *i.e.* the "legitimate interest" in § 23.2, refers from the outset only to persons who are of importance in the context of contemporary history and therefore cannot sufficiently take the interests of the freedom of the press into consideration if such interests have before been disregarded when delimiting the group of persons who are considered to be persons of importance in the context of contemporary history.

105 The concept of contemporary history in § 23.3(1) of the Art Copyright Act is not linked to the proviso of a judicial definition of its contents, by which its coverage might, for instance, be limited to events of historical or political importance; rather, it is determined by the public's interest in being informed (cf. RGZ 125, p. 80 [at p. 82] already). This takes the importance and the scope of the freedom of the press into account without disproportionately restricting the protection of the general right of personality. The core of the freedom of the press and the freedom of opinion includes that the press has sufficient room to manoeuvre, within the boundaries of the law, so that it may decide, according to its publishing standards, which facts claim public interest, and that it becomes apparent in the process of formation of public opinion which matters are matters of public interest. As has been stated, entertaining articles are not exempt from this.

106 Moreover, it is not objectionable that the Federal Court of Justice has also assigned to the "sphere of contemporary history" pursuant to § 23.1(1) of the Art Copyright Act images of persons who have not attracted public attention at a certain point through their involvement with a specific event of contemporary history but instead encounter general public attention, independently of single events, on account of their status and their importance. In this context, the increased importance that photojournalism has acquired today in comparison with the time in which the Art Copyright Act was enacted carries weight as well. Certainly, the concept of an "absolute person of contemporary history", to which reference is frequently made in scholarly literature and jurisprudence in this context, imperatively follows neither from the law nor from the Constitution. If this concept is understood, as the Higher Regional Court and the Federal Court of Justice present it, as describing, in an abridged manner, persons whose images the public deems worthy of notice for the depicted person's sake, it is unobjectionable from the constitutional point of view. It is important, however, that a balancing take place, in each individual case, between the public's interest in being informed and the legitimate interest of the depicted person.

107 The general right of personality does not require that the publication of images of persons who are of importance in contemporary history without the consent of the depicted person, must be limited to images that show them when exercising the function that they discharge in society. Frequently, the public interest that such persons claim is characterised exactly by the fact that it is not restricted to the exercise of this person's public function in the narrower sense. Due to the person's exposed function and to the effect of the function, the interest can also extend to information about how the

persons generally move in public, *i.e.* when they are not exercising their respective public function. The public has a legitimate interest in learning whether such persons, who are often regarded as a role-model or as an example, convincingly bring into agreement the behaviour that they show in their public function and their personal behaviour.

If the publishing of images was limited to the function of a person who is of importance to contemporary history, this would, however, fail to adequately take into account the interest that such persons legitimately arouse in the public. Moreover, this would encourage a selective manner of representation which would deny the public the required opportunity to assess persons from social and political life on account of their functions as role-models and on account of their influence. This does not open the press unlimited access to images of persons of contemporary history. Rather, § 23.2 of the Art Copyright Act provides the courts with sufficient possibilities to bring the requirements of protection to bear that are stipulated by Article 2.1 in conjunction with Article 1.1 of the Basic Law (cf. BVerfGE 35, 202 [at p. 225]). 108

bb) In principle, the standards that the Federal Court of Justice has developed when interpreting the element of a "legitimate interest" in § 23.2 of the Art Copyright Act are not objectionable from the constitutional point of view. 109

Pursuant to the challenged judgement, the privacy that is worthy of protection, to which the so-called absolute persons of contemporary history are also entitled, requires (1) a local seclusion to which someone has withdrawn to be alone; (2) that this wish to be alone is recognisable by an objective person; and (3) that the person, confiding in the seclusion, behaves in a manner in which he or she would not behave in the broad public. The Federal Court of Justice assumes that a violation of §§ 22 and 23 of the Art Copyright Act exists if images of the person affected are published that, in such a situation, were taken secretly or by catching the person unawares. 110

The standard of physical seclusion, on the one hand, takes the sense of the general right to privacy into account, *i.e.* to secure to individuals a sphere outside their home in which they are aware that they are not under constant public observation and therefore do not have to control their behaviour in view of such observation but find it possible to relax and to recover. On the other hand, the standard of physical seclusion does not excessively restrict the freedom of the press, as it does not completely withdraw the daily and private life of persons of contemporary history from photojournalism but makes it accessible to pictorial representation to the extent that it takes place in public. In the case of an outstanding public interest in being informed, the freedom of the press can, pursuant to these rulings, also prevail over the protection of privacy (cf. BGH, JZ [Juristenzeitung] 1965, p. 411 [at p. 413]; *Oberlandesgericht* [OLG, Higher Regional Court] Hamburg, *Archiv für Urheber-, Film-, Funk- und Theaterrecht* [UFITA, Archive of Copyright, Film, Broadcasting and Theatre Law] 1977, p. 252 [at p. 257]; OLG Munich, UFITA 1964, p. 322 [at p. 324]). 111

It is also not objectionable that in its ruling, the Federal Court of Justice took the indi- 112

vidual's behaviour in a specific situation as an indicator that he or she is recognisably in a situation of seclusion. The protection against pictorial representations in this sphere, however, is not triggered only if the person affected shows a behaviour in this sphere that he or she would avoid under the eyes of the public. Rather, physical seclusion can fulfil its protective function with respect to its role in the development of someone's personality only if the seclusion ensures the individual, irrespective of the behaviour in which he or she engages in a given moment, a space for relaxation in which he or she need not constantly expect the presence of photographers or camera teams. This, however, is not the decisive question in this case, as pursuant to the findings of the Federal Court of Justice, the first prerequisite for the protection of privacy was lacking in the first place.

Finally, it is not objectionable from the constitutional point of view that the method of obtaining information is regarded as important when balancing the public interest in information and the protection of privacy (cf. BVerfGE 66, p. 116 [at p. 136]). There are, however, doubts about whether images that are taken secretly or by catching the subject unawares, without more, violate the privacy that exists outside the depicted individual's home. With regard to the function that the Constitution assigns to this sphere, and in view of the circumstance that one often cannot tell whether an image was taken secretly or by catching the subject unawares, an impermissible encroachment upon privacy can, in any case, not only be assumed if these characteristics exist. As the Federal Court of Justice, as concerns the photographs in dispute in these proceedings, denied in the first instance that the context in which the photos were made constituted a sphere of seclusion, the doubts about the manner in which the photographs were taken do not affect the result of its decision. 113

cc) The constitutional requirements, however, are not met to the extent that the challenged decisions disregarded the circumstance that the complainant's legal position concerning the protection of her right to personality is enhanced by Article 6 of the Basic Law in situations in which she cares for her children. 114

dd) As regards the different images, this leads to the following conclusions: 115

The decision of the Federal Court of Justice gives no reason for objection from the constitutional point of view as regards the images that show the complainant on her way to the market, accompanied by a bodyguard at the market and with a companion in a frequented restaurant. In the first two cases, the locations that are shown are not secluded, but are visited by the broad public. Certainly, the location of the third image is a bounded location, the complainant, however, finds herself in this location under the eyes of the public that is present. For this reason, the Federal Court of Justice does not, with its judgement to permit the publication of these photos, act in contradiction to the ban on the photos made at the garden restaurant. This ban is the subject of the challenged decisions but was not raised as part of the constitutional complaint. The seat that the complainant took at the garden restaurant with her companion showed all characteristics of seclusion. The circumstance that the pho- 116

tographs at the garden restaurant were obviously taken from a great distance additionally indicates that the complainant could assume that she was not exposed to the observation of the public.

Neither are there objections to the decision to the extent that it deals with the photos in which the complainant is shown alone, on horseback or riding her bicycle. On the basis of its views, the Federal Court of Justice also did not assign these photographs to the sphere of physical seclusion but to the public sphere. This is not objectionable from the constitutional point of view. The complainant herself also assigns the images to the secluded sphere of privacy only because, in her opinion, they indicate her wish to be left alone. However, according to the criteria that have been explained, the mere subjective wish is not decisive in this context. 117

Contrary to this, the three photos that show the complainant together with her children require a new examination under the constitutional standards that were described above. It cannot be excluded that the examination according to these standards leads to a different result as concerns some of the images or all of them. To this extent, the judgement of the Federal Constitutional Court is therefore to be reversed and remanded. 118

d) As concerns the challenged judgements of the Regional Court and the Higher Regional Court, the violation of a fundamental right already follows from the fact that they - in conformity, however, with case law at that time - restricted the privacy that is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law to the domestic sphere. However, it is not required to reverse the decisions because the violation concerning this point was remedied by the Federal Court of Justice and because, with regard to the other points, the case was remanded. 119

III.

[. . .] 120

Papier Grimm Kühling

Jaeger Haas Hömig

Steiner Hohmann-Dennhardt

Bundesverfassungsgericht, Urteil des Ersten Senats vom 15. Dezember 1999 - 1 BvR 653/96

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