



**IN THE NAME OF THE PEOPLE**

**In the proceedings  
on  
the constitutional complaint**

of publishing group H(...), represented by its managing director

authorised representative: Rechtsanwälte Jürgen Krumland und Dr. Andreas  
Jerusalem, Königsallee 30, Düsseldorf –

against the order of the Düsseldorf Higher Regional Court (*Oberlandesgericht*) of  
12 June 1991 – 3 Wx 195/91 –

the First Chamber of the First Senate of the Federal Constitutional

with the participation of Justices:

Vice-President Papier,

Steiner,

Hoffmann-Riem

unanimously held on 28 August 2000:

**The order of the Düsseldorf Higher Regional Court (*Oberlandesgericht*) of 12 June 1991 – 3 Wx 195/91 – violates the complainant’s fundamental right under Art. 5(1) second sentence of the Basic Law (*Grundgesetz* – GG). The decision is reversed. The matter is remanded to the Düsseldorf Higher Regional Court.**

**[Facts:** The constitutional complaint related to the question of the preconditions under which representatives of the press are to be granted inspection of the land register. In the initial proceedings, a corresponding application by the complainant, a publishing group, was rejected by the impugned decision of the Higher Regional Court (*Oberlandesgericht*) (see *Der Deutsche Rechtspfleger – Rpfleger* 1992, pp. 18-19): The Higher Regional Court found that the press could also have a right to inspect land registers since a public interest was also to be recognised as a justified interest and the press defends public interests. It, however, took the view that whether the appli-

cant had adequately shown a justified interest need ultimately not be decided since the complainant had explicitly rejected a hearing of the owner of the plot of land and a weighing of interests. The complainant’s constitutional complaint, which mainly challenged a violation of its fundamental right to freedom of the press, was successful.]

**Reasons:**

[...] 1

**I.**

[...] 2-9

**II.**

[...] 10

1. The constitutional complaint is admissible. Should the occasion causing the complainant to have requested inspection of the land register no longer be topical following the passage of time, and hence have ceased to apply, this would not remove the legal protection requirement of obtaining a constitutional-court ruling. According to the case-law of the Federal Constitutional Court (*Bundesverfassungsgericht*) in the event of the request pursued with the constitutional complaint being disposed of, the legal protection requirement may continue to apply amongst other reasons if a repeat of the impugned measure is feared (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 81, 138 (140)). In the instant case, the complainant must anticipate a repeat of decisions analogous to the impugned ruling in light of the case-law of Düsseldorf and Hamm Higher Regional Courts in any future requests to inspect. 11

2. The impugned ruling is in contravention of Article 5.1 sentence 2 of the Basic Law (*Grundgesetz – GG*). 12

a) The examination standard is the fundamental right of the freedom of the press according to Article 5.1 sentence 2 of the Basic Law, the area of protection of which is affected by the impugned order. The freedom of the press guaranteed in Article 5.1 sentence 2 of the Basic Law guarantees not only the freedom to disseminate news and opinions; rather, it also protects the entire area of journalistic preparatory work, including in particular the acquisition of information. Only fundamentally unhindered access to information enables the press to effectively pursue the role opened up to it in a democracy based on freedom (see BVerfGE 50, 234 (240)). The Federal Constitutional Court has stressed this for the protection of the source of information or of the informant (see BVerfGE 20, 162 (176, 187); 36, 193 (204)), but also already for access to public court hearings (see BVerfGE 50, 234 (240)). In the same way, an interest of the press that is fundamentally worthy of protection may exist in access to collections of data or registers – in this case the land register – which are only accessible to a restricted degree. 13

It need not be decided whether in addition to the fundamental right of the freedom of the press the fundamental right to freedom of information according to Article 5.1 sentence 2 of the Basic Law is also affected by the impugned order. The land register is a source of information open to all, albeit only under certain preconditions. A source of information is generally accessible if it is technically suited and designed to provide information to the public, the latter referring to a group of persons not individually determined (see BVerfGE 27, 71 (83)). Where in the Land Register Code (*Grundbuchordnung – GBO*) the state creates conditions under which an inspection can take place, accessibility is granted, but not restricted in the legal sense. The right to inspect depends on the preconditions specified in the Land Register Code, namely on the presentation of a justified interest, and in this framework also on state rulings as to the application of the law. Whether this counters qualification as a generally accessible source of information is debatable, but this question does not need to be clarified here since the right of the press to receive information is also ensured by the freedom of the press. 14

There is no question of censorship according to Article 5.1 sentence 3 of the Basic Law. The publication of information is not made to depend on a prior check by the state. Rather, the issue is about the preliminary question of whether something may become the content of press information. 15

b) It has been recognised that the fundamental right of the freedom of the press also shows objective legal contents which the Higher Regional Court has taken as an occasion for a broader interpretation of § 12 of the Land Register Code. Independently of individuals' subjective entitlements, the state is obliged to accommodate the postulate of their freedom (see BVerfGE 20, 162 (175)) in its legal order in all instances in which the area of application of a provision affects the press. For their part, the courts must take account of this value decision contained in the Basic Law in interpreting such provisions of non-constitutional law and their concrete application in individual cases. § 12 of the Land Register Code relates to access to information in the knowledge of which the press may in principle also have an interest worthy of protection. The area of application of § 12 of the Land Register Code hence also affects the freedom of the press. 16

According to § 12.1 of the Land Register Code, inspection of the land register is permitted to all who present a justified interest. As the Federal Constitutional Court has already determined in another context, there are no reservations against the constitutionality of this provision (see BVerfGE 64, 229 (238)). The provision is also unobjectionable from the point of view of the freedom of the press since the use of the undefined legal term "justified interest" leaves the courts sufficient scope to adequately accommodate the value-defining significance of the freedom of the press in interpreting and applying the provision. 17

c) The freedom of the press has been violated by the Higher Regional Court in its interpretation and application of § 12.1 of the Land Register Code. 18

aa) As the starting point, the Higher Regional Court has interpreted the provision in a constitutionally unobjectionable manner such that the press may also have a right to inspect land registers on principle in the exercise of public interests (see in this sense also Hamm Higher Regional Court, *Neue Juristische Wochenschrift – NJW* 1988, pp. 24822483; Mosbach Regional Court (*Landgericht – LG*), *Der Deutsche Rechtspfleger* 1990, p. 60; Stuttgart Regional Court, *Archiv für Presserecht – AfP* 1984, p. 171; Frankfurt Regional Court, *Der Deutsche Rechtspfleger* 1978, p. 316; Demharter, *Grundbuchordnung*, 23rd ed., marginal no. 10 re § 12 of the Land Register Code; Schöner/Stöber/Limmer, *Grundbuchrecht*, 11th ed., marginal no. 525; Böhringer, *Der Deutsche Rechtspfleger* 1987, 181, 189; another view for instance in Melchers, *Der Deutsche Rechtspfleger* 1993, 309, 312 -313; Grziwotz, *Mitteilungen des Bayerischen Notarvereins – MittbayNot* 1995, 97, 102). The Federal Constitutional Court must proceed on the basis of this interpretation. The relevance of the Higher Regional Court's interpretation of § 12 of the Land Register Code is not countered by the fact that according to its genesis (see *Kammergericht, Die Rechtsprechung der Oberlandesgerichte auf dem Gebiete des Zivilrechts – KG, OLGRspr. 29, 391 = Jahrbuch für Entscheidungen des Kammergerichts in Sachen der freiwilligen Gerichtsbarkeit in Kosten-, Stempel- und Strafsachen – KGJ* 45, 198 et seq.) and the original regulatory purpose of the provision a right to inspect should only be facilitated because of anticipated participation in legal transactions in connection with legal circumstances documented in the land register. After the adoption of the Land Register Code, a legal development took place concerning the function of the press in a democracy which cannot remain unconsidered in the interpretation of § 12 of the Land Register Code. The special role of the press for the process of formation of public opinion has also been accommodated in non-constitutional law. Thus, for instance, in the press statutes of the *Länder* (states) the exercise of public tasks by the press in connection with the acquisition and dissemination of news is emphasised, and it is accorded a fundamental entitlement to information from authorities (see for instance §§ 3 and 4 of the North Rhine-Westphalia Press Act (*Pressegesetz NRW*)).

However, this does not include a right to inspect the information contained in public registers on the personal circumstances of private individuals. The interest of the press in information may however also be safeguarded via provisions other than the press statutes. The Düsseldorf Higher Regional Court interpreted § 12 of the Land Register Code within this meaning.

That the broader interpretation of § 12.1 of the Land Register Code expands the area of application of the provision beyond its original regulatory purpose does not mean that the traditional objective of regulation is irrelevant. The limitation of the right to inspect serves – in modern terminology – the protection of the right of personality of those entered. If, in contradistinction to what applies to classical instances of inspection, this protection is not provided by restricting the right to inspection to participation in legal transactions related to the land register, it must be accommodated elsewhere in structuring the right to inspection.

bb) Accommodation of the right to protection of the right of personality of those entered as against the freedom of the press is effected by the Land Register Code. § 12 of the Land Register Code is a general statute according to Article 5.2 of the Basic Law which serves the protection of a general legal interest embedded in the legal order without respecting a specific opinion which is also to be protected if a violation is to be anticipated by virtue of communication, here by press information. The restriction of the freedom of the press by § 12 of the Land Register Code is lawful, even though the latter must take second place, taking into account the principle of proportionality to the protection of the right of personality set out in the Land Register Code. 22

The legal position of those entered in the land register enjoys protection as a fundamental right. Where it relates to private individuals, the general right of personality guaranteed in Article 2.1 in conjunction with Article 1.1 of the Basic Law gives rise to the empowerment of the individual on principle to decide for themselves when and within what boundaries personal circumstances are disclosed (see BVerfGE 65, 1 (42 and 43)). The land register and the land files contain a large volume of personal data from the personal, family, social and economic areas. If third parties are permitted to inspect land registers, this constitutes an encroachment on the right to informational self-determination related to these data. 23

Legal persons also enjoy protection of their fundamental rights relating to an entry in the land register without it being a matter of whether the general right of personality or the right to informational self-determination is applicable to legal persons according to its nature(Article 19.3 of the Basic Law). When inspection of land registers is permitted regarding legal persons, this affects the freedom to carry out economic transactions that is protected by Article 2.1 of the Basic Law as an element of the general freedom of action. Legal persons may also claim a violation of Article 2.1 of the Basic Law in this respect where their right to free development within the meaning of economic activities is concerned (see BVerfGE 10, 221 (225); 66, 116 (130); BVerfG, First Chamber of the First Senate, *Neue Juristische Wochenschrift* 1994, p. 1784). 24

cc) Having said that, the fundamental rights emerging from Article 2.1 of the Basic Law are also not guaranteed without restriction, rather they are restricted by the constitutional order, including the rights of others. These rights include the fundamental right of the freedom of the press according to Article 5.1 sentence 2 of the Basic Law. In legislating and in applying the law, the conflicting fundamental right positions are to be appropriately balanced. None of the two legal positions protected by fundamental rights can be afforded priority in the framework of § 12 of the Land Register Code on principle. In essence, this concerns on the one hand the interest in information (here of the public) and on the other hand the interest in confidentiality of those entered in the land register who are concerned by the search. For the usual case of the inspection of land registers, the legislature has created an appropriate balance in that when private individuals for instance request to inspect because of an interest in coercive execution, the request is granted when they present a justified interest. This interest in inspection is kept within the framework of the abstract purpose determined by 25

statute that is fulfilled by the land register. Private individuals require the inspection of land registers in connection with events of legal transactions. The impact of the law on interests in (real) property as rights affecting all gives rise to those participating in legal transactions also gaining knowledge of these legal positions, which may also affect them. Those entered in the land register can also make arrangements to accommodate this.

By contrast, inspection by the press on the basis of a public interest is another situation. Inspection of the data which have been entered in the land register by the press and their use for publication is outside the original purpose for which the data were collected and stored. When it comes to the publication of data to a group of individuals of an undetermined size, the need for protection of those entered is different to the “normal case” of the inspection of the land register. The Higher Regional Court has however recognised by confirming the right of the press to inspect that the interest in protection of those entered may take second place to the public’s interest in information, but required the adequate presentation of a justified interest, as well as the prior hearing of the owner.

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dd) The restrictions on the right of personality on the one hand and on the freedom of the press on the other are only lawful in each case if they are proportionate. The regulatory goals as such – protection of the freedom of the press on the one hand and protection of the right of personality on the other – are constitutionally legitimate. The restrictions of the right of privacy may be suitable, necessary and appropriate to satisfy the journalistic purpose, and conversely restrictions of the right to inspect may be suitable, necessary and appropriate to protect the right to privacy. Both restrictions on which the impugned decision is based, namely substantively the presentation of the special interest of the press in information, and procedurally the hearing of those entered, which is to be carried out in a standard case, as the decision affirms, are to be measured against these standards.

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(1) The Higher Regional Court made the right to inspection dependent on a presentation of the interest in inspection which is also provided for according to § 12 of the Land Register Code in a standard case of inspection. Here, it has not specified the content requirements as to the public interest, but has expressed doubts as to whether the complainant had provided an adequate presentation of its interest. The assessment however left this open because the Court held that the complainant had rejected a hearing of those entered, but this, however, was required because it was otherwise impossible to weigh the opposing interests.

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The requirement of a presentation of the justified interest, presentation being less strong than making a plausible case (see Demharter, loc. cit., marginal no. 13 re § 12), is constitutionally unobjectionable where it is restricted to the presentation of an interest in information of the press. Since § 12 of the Land Register Code does not grant a general right of inspection, the requirement to present a justified (but not a “legal”) interest in inspection for the purpose of legal transactions is consistent and also

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applies if the right of inspection is opened to the press in a broader interpretation for journalistic purposes. In the latter case, however, the requirements placed on the justified interest itself and on its presentation must accommodate the particularity of a free press. The interest of the press in information is constitutionally founded and linked to its public task. It would not be compatible with the constitutional protection of the press if the implementation of the interest in information were to depend on a state evaluation of the request for information. The press must be able to decide by journalistic criteria what it considers worthy of the public interest and what not. Protection does not depend on the special characteristics and level of the press product or reporting (see BVerfGE 101, 361 (389)). Rather, the interest expressed by the press in information from the land registry as such – in other words after examining its existence and without carrying out its own evaluation – must be used as a basis for further action.

(2) If § 12 of the Land Register Code is opened for a right of the press to inspect, the examination competence of the land registry refers to the determination of this interest in information. It is on this line that the literature refers to parallels with the press law provisions of the general right to information (see Demharter, loc. cit., marginal no. 10 re § 12). The freedom of the press also impacts the requirements placed on the presentation of the interest in information [which is at the root] of inspection. It is only possible to require details that are significant to the examination, which is restricted in content, of the interest in information by the land registry. It should be borne in mind here that the press as a rule also investigates a mere suspicion, even if it is only a weak one, indeed that it is a concern of such investigation to follow up suspicion. Mere presumptions are frequently the starting point of the discovery of relevant facts. If information suitable for publication is to be expected if the presumption proves to be true, the interest in information is also sufficiently demonstrated with the presentation of this presumption.

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(3) The land registry must furthermore examine whether the inspection is suitable to take account of the interest in information. This includes examining whether the interest in information relates to rights of those entered in the land register for whom inspection is requested. The examination programme also includes whether the press restricts itself in inspection to what is necessary for the investigation, and whether it could use other means without difficulty in order to obtain the information it desires whilst encroaching less on the right to protection of the right of personality of those entered. Here too, the land registry must adhere to the principle of state neutrality with regard to content. For instance, it may not prescribe to the press how a certain event in the land register is to be evaluated. It must also be taken into account that the freedom of the press in its manifestation as freedom of investigation grants scope to the press in deciding on the nature of its investigation.

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(4) A weighing with the interest of those entered in the non-accessibility of the data can hence not be considered in the examination of suitability and necessity. By contrast, the intended use of the data can become significant in the context of the exami-

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nation of appropriateness. For instance, the Federal Constitutional Court has found several times that when a weighing with colliding rights of personality is performed it may be a matter of 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 (see BVerfGE 101, 361 (391)). These viewpoints can hence also become significant when weighing the interest in information and the right of personality when inspecting land registers. Here, the interest of the press in access takes priority when it comes to matters which essentially concern the public, and if the investigation serves to prepare a serious and fact-related debate. This does not disproportionately impair the interests of the owner.

(5) The Higher Regional Court moreover considers it to be necessary – in agreement with the Hamm Higher Regional Court – to hear the owner of the plot of land. This right to be heard is justified by making reference to the owner’s “right to informational self-determination” (Hamm Higher Regional Court, *Neue Juristische Wochenschrift* 1988, p. 2482 (2483)) and — from the need to weigh up interests, as the Higher Regional Court did in the impugned decision. In doing so, the courts are aware of the fact that the Land Register Code does not provide for such a right to be heard for the regular case of inspection, and indeed rejects the owner’s right to complain. The Federal Court of Justice (*Bundesgerichtshof*) gives as grounds for this that the Land Register Code permits inspection where there is a justified interest without providing for a weighing against opposing interests of those entered in the land register (Decisions of the Federal Court of Justice in Civil Matters (*Entscheidungen des Bundesgerichtshofes in Zivilsachen* – BGHZ) 80, 126 (128-129)).

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That in the case of inspection by the press a right of the owner to be heard is nevertheless to exist cannot already be founded on the fact that the land registry must examine the justified interest in inspection. This it must examine on its own responsibility on the basis of the presentations of the requests to inspect, as well as the requirements placed on proportionality. This also takes place in the normal case of inspection without the owner being heard. The owner’s interests are accommodated in an abstract and general manner, in other words without concentrating on individual particularities. A right to be heard cannot also aim to grant the owner the right to evaluate the interest in information of the press and to make a statement on the concern of the investigation. It is also not the job of the owner, but of the land registry to examine the suitability and necessity of the inspection. A hearing can at best serve to articulate the contrary interests of the owner where exceptionally they may be significant in the framework of the examination of appropriateness. The subject matter of the hearing however can be in this case only interests which are relevant to the weighing. These are by the system of the Land Register Code general interests of those entered, but not those following from their specific personal situation. For the normal case of inspection, the legislature fundamentally decided that there are no opposing owner interests if the person requesting to inspect has a justified interest in inspection; a weighing in the individual case should therefore not take place. That this basic

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ruling is not to apply to the case of a broader interpretation of § 12 of the Land Register Code is not apparent. The legislature has not regulated on this eventuality, and in particular has not specified criteria as to which interests of those entered are allegedly relevant here, in contrast to what is the case with general inspection.

Against the direct derivation of a right to hear from the constitution there is the point that without more specific statutory instructions a risk exists of frustrating the interest of the press in information. In its investigation, the press is frequently dependent on combining, as in a mosaic, individual particles of information in various fields, and it requires scope and time to achieve this. If it were to pursue suspicion of disapproved conduct, and if the land registry were to be obliged to inform the addressee of the suspicion of their investigation, the success of the investigation could be strongly placed in jeopardy since the addressee of their investigation could take countermeasures, in particular to destroy evidence, etc. This could not reverse the entry in the land register, but could become significant for related and other circumstances. A hearing implemented by the state would hence become a means not limited to the protection of those entered if the data entered were accessible, but would warn them of press investigation, and as a consequence could jeopardise the fulfilment of the press' public mandate.

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In light of the risks entailed by such collisions, it is impossible to derive from the constitution a fundamental power to be heard of those who are entered without being given concrete form in statute. In the above context, no decision is needed as to whether situations are conceivable in which a hearing is exceptionally necessary, and whether this can also be derived directly from the constitution without a statutory basis. Such an exception, however, at any rate does not apply when the party interested in inspections is looking into a suspicion against the party entered in a question which essentially concerns the public, and it is not ruled out that the success of the overall investigation is placed in jeopardy if those entered are informed early. However, the complainant put forward that such a situation existed without the court having explored this in greater detail.

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d) The Higher Regional Court has misjudged the requirements following from the fundamental right of the freedom of the press on application of § 12 of the Land Register Code by regarding a hearing of the owner of the plot of land to be obligatory and interpreting the resistance of the complainant against this as forgoing the further pursuance of the request. Subsequently, it did not examine further whether the complainant had sufficiently presented its interest in information. This is however a precondition for a constitutionally unobjectionable decision on inspection. The impugned decision is based on the violation of the constitution, and is hence to be overturned.

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Papier

Steiner

Hoffmann-Riem

**Bundesverfassungsgericht, Beschluss der 1. Kammer des Ersten Kammer vom  
28. August 2000 - 1 BvR 1307/91**

**Zitiervorschlag** BVerfG, Beschluss der 1. Kammer des Ersten Kammer vom 28. August 2000 - 1 BvR 1307/91 - Rn. (1 - 38-39), [http://www.bverfg.de/e/rk20000828\\_1bvr130791en.html](http://www.bverfg.de/e/rk20000828_1bvr130791en.html)

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