

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 758/97 -
- 1 BvR 1857/98 -
- 1 BvR 1918/98 -
- 1 BvR 2109/99 -
- 1 BvR 182/00 -



IN THE NAME OF THE PEOPLE

**In the proceedings
on
the constitutional complaint**

1. of Heinrich Bauer Verlag GmbH, represented by its partner B(...),

authorised representatives: Rechtsanwälte Boesebeck und Koll.,
Warburgstraße 50, 20354 Hamburg –

against a) the judgment of the Hamburg Higher Regional Court
(*Hanseatisches Oberlandesgericht*) of 11 March 1997 – 7 U 251/96 –,

b) the judgment of the Hamburg Regional Court (*Landgericht*)
of 18 October 1996 – 324 O 377/96 –,

– 1 BvR 758/97 –,

2. of Frankfurter Allgemeine Zeitung GmbH,
represented by its managing directors B(...), Dr M(...), R(...),
Hellerhofstraße 2-4, 60267 Frankfurt am Main

authorised representative: Rechtsanwälte Professor Dr. Konrad Redeker und Koll.,
Mozartstraße 4-10, 53115 Bonn –

against a) the judgment of the Hamburg Higher Regional Court
of 8 September 1998 – 7 U 48/98 –,

b) the judgment of the Hamburg Regional Court
of 6 February 1998 – 324 O 697/97 –,

– 1 BvR 1857/98 –

3. of Axel Springer Verlag AG, represented by its managing board,
F(...) et al., Axel Springer Platz 1, 20355 Hamburg

authorised representative: Rechtsanwälte Professor Dr. Karl Egbert Wenzel
und Koll., Königstraße 1 a, 70173 Stuttgart –

- against a) the judgment of the Hamburg Higher Regional Court
of 8 September 1998 – 7 U 82/98 –,
b) the judgment of the Hamburg Regional Court
of 29 May 1998 – 324 O 137/98 –,

– 1 BvR 1918/98 –

4. of Focus Magazin Verlag GmbH,
represented by its managing director M(...),
Arabellastraße 23, 81925 München,

authorised representative: Rechtsanwälte Professor Dr. Robert Schweizer
und Koll., Arabellastraße 21, 81925 München –

- against a) the judgment of the Hamburg Higher Regional Court
of 26 October 1999 – 7 U 48/99 –,
b) the judgment of the Hamburg Regional Court
of 19 May 1999 – 324 O 521/98 –,

– 1 BvR 2109/99 –

5. of Heinrich Bauer Spezialzeitschriften Verlag KG,
represented by its partner B(...), Burchardstraße 11, 20095 Hamburg,

authorised representatives: 1. Professor Dr. Thomas Vesting,
Habsburger Straße 3, 80801 München,
2. Dr. Wolfgang Schulz,
Bismarckstraße 4, 20259 Hamburg –

- against a) the judgment of the Hamburg Higher Regional Court
of 7 December 1999 – 7 U 111/99 –,
b) the judgment of the Hamburg Regional Court
of 25 June 1999 – 324 O 169/99 –,

with the participation of Justices:

Vice-President Papier,
Steiner,
Hoffmann-Riem

on the basis of § 93b in conjunction with § 93a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*) in the version published on 11 August 1993 (Federal Law Gazette, *Bundesgesetzblatt – BGBl I* p. 1473) unanimously held on 26 April 2001:

The constitutional complaints are rejected.

[Facts: The constitutional complaints related to questions of the protection of privacy as against press photographic reporting. The applicants are press publishers which were ordered by the impugned decisions to discontinue the publication of photographs of Prince Ernst August of Hanover – the plaintiff in all sets of initial proceedings. With the constitutional complaints, the applicants primarily claimed violations of the fundamental right of the freedom of the press and of opinion. Four of the total of five constitutional complaints were successful.]

Reasons:

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| [...] | I. | 1-14 |
| [...] | II. | 15 |
| | 1.[...] | 16 |
| 2. The impugned decisions regarding the applicants re 2 to 5 are in violation of Art. 5.1 sentence 2 of the Basic Law (<i>Grundgesetz – GG</i>). | | 17 |
| a) The prohibition of the publication of the photographs forming the subject-matter of the dispute affects the area protected by the freedom of the press. At the heart of the guarantee of the freedom of the press in terms of fundamental rights is the right to freely determine the nature and orientation, content and form of the publishing body. This includes the decision as to whether and how a press product is illustrated. Protection of the freedom of the press also covers the portrayal of persons (see Decisions of the Federal Constitutional Court (<i>Entscheidungen des Bundesverfassungsgerichts – BVerfGE</i>)101, 361 <389>). Whether, additionally, the fundamental right to freedom of opinion in accordance with Art. 5.1 sentence 1 of the Basic Law is affected does not require a decision since no derogating evaluation would emerge here. | | 18 |
| b) The freedom of the press is not guaranteed without reservation. In accordance with Art. 5.2 of the Basic Law, it is subject to limitations in the provisions of general statutes. These include §§ 22 et seqq. of the Act on Copyright in Works of the Plastic | | 19 |

Arts and Photography – Act on Authors of Artistic Works (*Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie - Kunsturhebergesetz - KUG*). The courts based all impugned decisions on it – in conjunction with §§ 823 and 1004 of the Civil Code (*BGB*). The interpretation and application of these provisions is a matter for the civil courts. In doing so, however, they must take account of the significance and scope of the fundamental rights affected by their decisions, so that their significance in defining values is also afforded at the level of legal application. If, as here, it is a matter of publication of photographs, as careful a balance as possible is to be achieved between the fundamental right of the freedom of the press on the one hand and the general right to privacy of the person portrayed on the other. To this end, there must be a weighing up between the opposing interests protected by fundamental rights which is to be carried out in the framework of those elements of the civil law provisions that are open to interpretation, and which must accommodate the special circumstances of the case. Since however irrespective of its influence on fundamental rights the legal dispute remains a private law one and its solution is found in private law, which is interpreted on the basis of fundamental rights, the Federal Constitutional Court (*Bundesverfassungsgericht*) is restricted to examining whether the civil courts have sufficiently accommodated the influence of fundamental rights. A violation of fundamental rights leading to a complaint against the impugned decisions applies in particular if the protected area of the fundamental rights to be upheld has been incorrectly or incompletely determined, or its weight has been incorrectly estimated, so that the weighing up of the respective legal positions in the framework of the private-law provision suffers (see BVerfGE 101, 361 <388>; established case-law).

c) Hamburg Regional Court (*Landgericht*) and the Hanseatic Higher Regional Court (*Oberlandesgericht*) presume in established case-law that Princess Caroline of Monaco is an absolute person of contemporary history and that the plaintiff as her companion is to be regarded as a relative person of contemporary history if he appears in public together with her. The courts evaluate such companionship as an event of contemporary history within the meaning of § 23.1 No. 1 of the Act on Authors of Artistic Works which may justify the publication of pictures of (also) the companion without consent. It is in essence constitutionally unobjectionable that the courts have given grounds for their decisions by drawing on the arguments regarding the legal figures of the so-called absolute and relative persons of contemporary history, and have placed the legal evaluation of the companionship situation in this context.

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aa) In particular, there are no constitutional objections against the fact that the courts have not regarded the plaintiff of the initial proceedings as an “absolute person of contemporary history”. This term explicitly emerges neither from § 23.1 No. 1 of the Act on Authors of Artistic Works, nor from the constitution. Understood as an abbreviating expression for persons who attract general public attention as a result of their status or of their significance independently of any specific contemporary event, and

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whose photograph the public hence finds worthy of attention because of the person portrayed, its use is constitutionally fundamentally unobjectionable, but is only sound in an individual case if the weighing up between the public interest in information and the justified interests of the person portrayed is carried out in applying the law (see BVerfGE 101, 361 <392>).

In the case at hand, the courts have taken as an orientation the public's interest in information, and have not doubted a high degree of recognisability of the plaintiff. The degree of recognisability of a person is however only one indication of a contemporary interest amongst several possibilities which per se is not authoritative because recognisability may also be linked to a one-off event. By no means is it constitutionally required to orientate oneself solely by the level of recognisability of a person. For this reason – in contradistinction to the view taken by the applicant in proceedings 1 BvR 182/00 – the results of opinion polls are not an adequate indication for the evaluation. In other respects, the fact of public recognisability may not yet lead to an interest in comprehensive information on the person concerned that is worthy of legal protection. The freedom of the press covers the right of the press to decide by journalistic criteria what is the object of the public interest. This right of self-determination of the press however also does not encompass the decision as to how the interest in information is to be established in comparing colliding legal interests and balancing out the legal interests in question. For this reason, it is not solely a matter of the assessment of the press if – as with categorisation as an absolute person of contemporary history – the stage is set at the same time to weigh up between the freedom of the press and the general right to privacy.

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By the courts relevantly taking the “significance”, the status or performance of the person concerned as an indication of a “justified” interest in information, and in this respect permitting a statutory standard to flow into the judgment to be reached, they take account of the freedom of the press, and can at the same time accommodate the protection of privacy without one-sidedly affording preference to press-law interests. Whether the assessment in the case at hand could have been taken differently does not require a decision. Saying yes or – as here – no to a special contemporary interest in the person of the plaintiff is on principle a question of evaluation of the facts by the specialist courts. Here, it is a matter of the time of the decisions taken by the courts. Secondary priority hence also attaches to the question of whether the weighing up would now lead to confirmation of his status as an absolute person of contemporary history because of past events in connection with the plaintiff that have been the subject of intensive public discussion.

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bb) In the initial point, also the category of the so-called relative person of contemporary history further used by the rulings is constitutional. This is also solely about an abbreviating expression for a weighing up of interests only carried out in fundamental cases, but always to be examined in individual cases, between the public interest in information and the general right to privacy of the person portrayed. Accordingly, the public need for information justifying the publication of a picture is recognised not

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generally, as with the absolute person of contemporary history, but only in connection with a certain contemporary event. In the case-law on this matter, the trusted companion of an absolute person of contemporary history in public is also regarded as participating in a contemporary event within the meaning of § 23.1 No. 1 of the Act on Authors of Artistic Works (so-called companion case-law, see Hamburg Higher Regional Court (*OLG*), ZUM 1990, pp. 244 and 245; Hamburg Regional Court (*LG*), ZUM 1998, pp. 852 <858>; Soehring, *Presserecht*, 3rd. ed., 2000, marginal no. 21.7 b with further references; Prinz/Peters, *Medienrecht*, 1999, marginal no. 850 with further references). This is constitutionally unobjectionable. Pictures of the companion may accordingly be disseminated if this person appears in public together with the partner in question, or if they represent them in public, either together with them or in their stead (see Soehring, *Presserecht*, 3rd ed., 2000, marginal no. 21.7 b). The case at hand relates to a derived interest of the public which exists not for the sake of the portrayed person, but because of the interest in the absolute person of contemporary history, but which disseminates onto the person by whom they are accompanied in public.

Having said that, the conduct of the companion may cause the companionship situation to develop such that a recognisable interest also emerges in reporting on this conduct, and hence independently of the companion. Since the terms absolute and relative person of contemporary history are only simplifying abbreviations, but do not describe legally clearly-defined elements, there are no absolute boundary markings, but also transitional zones, such as in situations in which the interest in reporting on the companion takes on its own right.

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d) According to the system followed by the Act on Authors of Artistic Works, the interests in information of the public in interpreting the element “Pictures from the area of contemporary history” are to be adhered to (see BVerfGE 101, 361 <391>). The still unresolved element affecting fundamental rights of the “justified interest” in § 23.2 of the Act on Authors of Artistic Works refers from the outset only to persons of contemporary significance, and hence can no longer adequately include the interests of the freedom of the press if the latter previously have been disregarded in defining the group of persons (see BVerfG, loc. cit., pp. 391 and 392). It should therefore be ensured that the required accommodation of the freedom of the press is not spoiled by the formal use of the legal figures of the absolute and relative person of contemporary history and related strict boundaries.

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The significance and scope of the freedom of the press is accommodated if the term contemporary history is understood in § 23.1 No. 1 of the Act on Authors of Artistic Works not in relation to an object, such as solely related to events of historical or political significance, but to the public interest in information (for instance explicitly BVerfGE 101, 361 <392>). Nor is entertainment excluded from this from the outset (see BVerfGE 101, 361 <392>). The question as to whether a media report has a special relationship with the democratic process or is only entertaining in nature is not decided via the constitutional protection of the interest in information. It may however be-

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come significant in weighing up with colliding legal interests (see BVerfGE 34, 269 <283>; established case-law). It should be taken into account here that particularly with entertaining contributions, personalisation is an important means to arouse reader attention (see BVerfGE 101, 361 <390>).

Recognition of a public interest in information however does not mean that the press has limitless access to pictures of persons of contemporary history. Rather, § 23.2 of the Act on Authors of Artistic Works affords the courts sufficient opportunity to assert the requirements of Art. 2.1 in conjunction with Art. 1.1 of the Basic Law with regard to the protection of privacy in the framework of the weighing up of legal interests if they have presumed an event of contemporary history within the meaning of § 23.1 No. 1 of the Act on Authors of Artistic Works in a constitutionally sound manner (see also in this respect explicitly BVerfGE 101, 361 <393>). §§ 22 and 23 of the Act on Authors of Artistic Works serve the protection of privacy of those portrayed, but not for instance the protection of the copyright of the portraying party. In particular, they are effective towards the press by protecting the person portrayed against the publication of their image, in other words against the dissemination of a visual impression of the person who is being reported on.

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e) The decisions impugned in the proceedings re 2 to 5 do not meet the requirement embedded in the Act on Authors of Artistic Works of a weighing up related to individual cases between the public interest in information and the justified interests of the person portrayed.

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aa) In the decision impugned in proceedings 1 BvR 182/00, the specialist courts confirmed the right to discontinuation of the publication of the image because the plaintiff is not to be regarded as an absolute person of contemporary history, and hence did not have to accept publication without consent. The image had allegedly not shown actual events of contemporary significance, and did not illustrate any written reporting on a contemporary event. This assessment by the specialist courts is only to be examined by the Federal Constitutional Court as to whether it contains errors based on a fundamentally incorrect view of the significance of the fundamental right, in particular of the scope of his/her protected area, or on an incorrect assessment of the weight of the different legal positions to be balanced out (see BVerfGE 42, 163 <169>; 101, 361 <388>).

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Whether the subject-matter of the reporting enjoys the special protection of the freedom of the press as a contemporary event within the meaning of § 23 of the Act on Authors of Artistic Works, can be examined by the constitutional court. The courts have initially examined and refuted whether the plaintiff is an absolute person of contemporary history. The result is constitutionally unobjectionable. The courts have however not gone on to examine whether a justified interest in information should nevertheless be presumed. They have refused to accept the existence of an “actual event of contemporary significance” with no further grounds, and evidently in the erroneous view that entertaining magazine articles are not of contemporary significance.

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If a court carries out an examination of whether an event has contemporary significance in a manner not sufficing the scope of the freedom of the press, it does not do justice to the protected area of the freedom of the press. Since the report was about the skiing holiday taken on the plaintiff's honeymoon with Princess Caroline of Monaco – an event certainly arousing a sustained interest in information among the entertainment press and its readers – it should have been further examined on the basis of the established case-law of these courts whether this interest in information would also have to be confirmed with regard to the plaintiff on the basis of the situation in which he was the trusted companion of Princess Caroline of Monaco. The applicant's report and the photographs complementing it undisputedly related to such a companionship situation, and clearly stemmed from this context. The plaintiff has hence also not at all complained about the publication of the other photographs published in the report, but has alleged a violation of privacy exclusively with regard to one individual photograph, on which Princess Caroline of Monaco was not also shown, so that – seen in isolation and in formal terms – no companionship situation was portrayed. From the companionship situation that can be recognised on this photograph, and which emerges in connection with the companionship situation in the report, as well as the other photographs, it however emerges that it is an event-related photograph of a situation in which someone appeared as a trusted companion of an absolute person of contemporary history (see in this respect also Hamburg Regional Court, ZUM 1998, pp. 852 <858>). As can certainly be recognised by any observer by comparing it with the other pictures, it forms part of the series of photographs which was taken during the plaintiff's honeymoon with Princess Caroline of Monaco.

In accordance with the special courts' companion case-law, the plaintiff's right to privacy would not have been violated if the published photograph of the plaintiff's public appearance with Princess Caroline of Monaco had also portrayed the latter. Constitutionally, however, it is not comprehensible why a violation of privacy is solely constituted by a photograph only of the plaintiff being shown which in other respects is identical with regard to a companionship situation. No reasons relating to this can be found in the impugned decisions. The Higher Regional Court rejects the right of the applicant to portray by placing the photograph in the category "random" images showing the plaintiff without even taking account of the fact that it comes from the context of the event which is being reported on. That it portrays the plaintiff alone does not suggest per se that his right to privacy is differently affected, and is hence more strongly impaired, than when portrayed together with Princess Caroline of Monaco.

Different treatment of such context-related photographs depending on whether the absolute person of contemporary history is together with the companion on the photograph, or only a section with the companion alone has been selected, is based on the finding of a formal circumstance which does not necessarily influence the intensity of an impairment of privacy, and which bars the path to the weighing up of the different legal interests which is always necessary. If there is no weighing up adequate to the

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constitutional requirements, there is no sufficient justification of the encroachment on the freedom of the press.

bb) Also in proceedings 1 BvR 1918/98, the courts have not adequately accommodated the weight of the fundamental right of the freedom of the press in balancing out with the plaintiff's right to privacy. They recognised a public interest in reporting on the companionship situation. However, in agreement with their established case-law, they presume that here only such portrayals of the companion may be published which are exclusively connected with this situation (see Hamburg Higher Regional Court, ZUM 1990, pp. 244 and 245; Hamburg Regional Court, ZUM 1998, pp. 852 <858>). This too is a highly formal view which does not adequately accommodate the justified interests of the press in illustrating their reports, and from the outset bars the possibility of a weighing up of the interest in information with the right to privacy in the individual case.

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(1) If the weighing up between the freedom of the press and the protection of privacy reveals in a constitutionally unobjectionable manner that the press may report on a companionship situation, and in doing so may select the person of the companion as a subject of the report, and equally may publish an image of the companion, the right to privacy of the companion is correspondingly restricted. Here, the right to privacy is affected by the portrayal of the person, in other words, their visual accessibility for the public without the intensity of the possible impairment of privacy necessarily being influenced by whether and how the photograph specifically selected for the portrayal came about. A restriction on the press publication to photographs stemming from the concrete companionship situation and at the same time portraying the accompanied person would only be justified if the impairment of the right to privacy of the accompanied person could only be restricted by these means to the constitutionally-standard minimum measure without at the same time reducing the justified interest of the freedom of the press. This would be conditional on the encroachment on privacy constituted by the photographic reporting which is on principle permissible becoming lesser by the accompanied person also being portrayed and the photograph stemming from the companionship event itself. However, the courts did not find on this. Rather, they set the boundary of what is legally permissible in both general and formal terms such that the lack of a portrayal of the companionship situation with the accompanied person is decisive to the unlawfulness. Hence, they have denied the need for a weighing up related to the case in question.

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(2) In weighing up between the protection of privacy and the freedom of the press, one should take account of the fact that the general right to privacy can be impaired in various ways in connection with the publication of images: For instance, a concrete portrayal as such may already have an injuring effect in its own right, for instance because the person concerned is portrayed in a particularly unfortunate situation or to a particular disadvantage, or it is a picture from the intimate sphere. Furthermore, the general right to privacy may be impaired by an image being taken out of its context and placed in another, if for example by changing the context the meaning of the im-

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age is considerably changed (see BVerfGE 101, 361 <381 and 382>), for instance because it is removed from the companionship situation and placed in another. Such a change of the statement must not always, but can in a concrete case impair the right to privacy, the protection of which is only restricted in the context of the companionship situation. Additionally, however, such a change of statement may also impact the protective effects of the freedom of the press. A photograph distorting the meaning of the statement, which in other words misleads the reader of the newspaper or magazine, does not enjoy protection as a means to visualise an event.

(3) Such aspects however do not come into play if the original context from which the portrayal originates was not at all recognisable, or if it is so neutral that it does not influence the statement of the photograph in the new context, or at least does not distort it. In this sense, the publication of context-neutral images as such should not as a rule give rise to greater impairment of privacy than a photograph reflecting the companionship context.

This, as a rule, should be the case with the publication of classical portrait photographs the use of which was complained about in proceedings 1 BvR 1918/98. If such a photograph is placed in a context without additional reporting, and in this sense hence context-neutral, and if over and above this the meaning of the photograph is not altered by being used in the context of other press reporting, its publication will not impair the right to privacy of the companion portrayed on principle any more than a photograph also portraying the accompanied person from the companionship situation. In particular, with regard to the intensity of a possible impairment of privacy, it is not relevant as a rule whether the photograph – as a passport photograph – is concentrated on the head and shoulders, or whether other parts of the body are also depicted. From a constitutional point of view, it is also not relevant for what reason the photograph was taken. It is decisive, rather, whether it is context-neutral in the sense that its use in another context does not lead to additional impairments of the right to privacy which are not justified by the companionship situation. This is already partly recognised in the case-law. For instance, the press is entitled with a written report on a contemporary event to present the persons participating in the event in the picture – in the shape of a neutral portrait photograph – even if the photograph used for this was taken on another occasion and the contemporary event itself is not depicted on the photograph (see Hamburg Regional Court, AfP 1999, pp. 523 <524> with further references; see also Frömming/Peters, NJW 1996, pp. 958 <961>).

The possibility to use context-neutral or contextual depictions may also accommodate the protection of privacy of the persons portrayed on the one hand, and the freedom of the press on the other, by reducing the reasons for the press to constantly take new photographs of reported events. With regard to the pressure on the press to provide visual images in competing with other media publishers, the previous case-law leads to a situation in which press photographers must constantly strive to obtain new photographs of potentially reportable events where a companion is present. The

considerable nuisance caused to famous persons by press photographers which has frequently been the subject of complaint will not cease altogether, but may be alleviated if the press may use photographs that have been taken previously to illustrate reports including companions. Hence, the concern of the protection of privacy and the freedom of the press are equally accommodated.

(4) Taking account of these principles, the courts should have examined in the individual case whether the plaintiff's right to privacy has been impaired in a manner no longer covered by the freedom of the press despite selecting a context-neutral photograph. The circumstance that only the plaintiff was portrayed had not had a decisive significance (see above aa). In the evaluation of the intensity of the encroachment, the courts should also have taken account of the fact that the photograph was used in the context of a report on an event at which the plaintiff had not only accompanied Princess Caroline of Monaco, but had caused him to commit an act worthy of note himself, namely an "assault" on a cameraman. Beyond merely accompanying, he himself had hence created an event affording the press an independent interest in publication. This event was accordingly reported on inside the magazine, and the cover title – also by using the name of "Fighting Prince" – referred to the conduct of the plaintiff which was discussed in a broader context in the inside pages of the magazine. If the Regional Court regarded the publication of the neutral photograph to be unlawful, but stated that reporting in the title on the punishable acts of the plaintiff – in other words information with a considerably more intensive encroachment on the right to privacy – would have been permissible, then this makes it clear that there was a fault in the assessment (see on such conflicts also Frömming/Peters, NJW 1996, pp. 958 <961>). In a formal view, greater injurious weight attaches to the mere fact that the plaintiff was portrayed without the accompanied person than is the explicit reference to a criminal offence.

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(5) The examination related to an individual case of a breach of privacy has not become unnecessary simply because of the need to rule on a special problem, namely on the question of whether publication of a portrait photograph is permissible if this specific photograph appears not in the article itself, but separately on the title page. In this sense, the courts have focused on the illustrated text while the title page did not have an explicit link with the written report that both would only be perceived in context. Rather, many interested parties at a kiosk would have seen only the cover page, which as such took on a significance of its own. It was not an event which was reported on that page. This view does not sufficiently accommodate the independence of press activities.

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Title pages have the function of attracting attention and of arousing curiosity (see on the particular significance of the title page also BVerfGE 97, 125 <144>). They naturally cannot publish the article itself on the title page. The cover page announcement and the article are interlinked. The written report recognises a corresponding overall view of at least the headline and the linked newspaper report (see only Cologne Higher Regional Court (*Oberlandesgericht – OLG*), AfP 1985, pp. 295 <296>). Nothing

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else can apply to the title page and the text in the inside pages of a magazine (see BVerfG, 1st Chamber of the First Senate, NJW 2001, pp. 61 et seqq.). Certainly if – as here – the main person and the companion are portrayed equally on the cover page, albeit on separate pictures, and, as is customary with covers, reference is made to an article linking the two, a sufficient link exists between the photograph and the report on the event in connection with the companionship situation if this link expressed in the text is also expressed in the headline (“Caroline and her fighting prince – Are brutal men loved more?”). If one confirms such a link between the cover and the report, even the physical attack by the plaintiff on a cameraman is also to be regarded as an event of contemporary history within the meaning of § 23.1 No. 1 of the Act on Authors of Artistic Works in addition to the companionship situation, hence also justifying a visualisation, at least in the shape of a portrait photograph. The courts have not explained that an additional violation of the right to privacy took place solely through the use of the context-neutral photograph.

cc) The courts have also not adequately accommodated the freedom of the press in proceedings 1 BvR 2109/99. 43

The subject of the reporting was the same event as in proceedings 1 BvR 1918/98, namely the physical attack on a cameraman. Reporting using the image of the plaintiff reflected not only an interest of the press in information because of the general companionship situation, but also because of the punishable violence committed by the plaintiff. Here too, the applicant was not restricted to using a photograph of this event. The courts did not reason constitutionally why the publication of the plaintiff’s image taken on another occasion impaired his right to privacy more than that of a photograph of the concrete situation. 44

If there are context-related photographs of a reportable event, they may be published. The same thing however applies to photographs from another context with a statement that is adequate to the new context if no additional breach of privacy is effected by these means. The Basic Law protects against distorting portrayals by the press, but does not afford individuals a right to be portrayed in a certain manner in public (see BVerfGE 99, 185 <194>). Individuals certainly do not have a right to influence the framework details of a portrayal if their right to privacy cannot be separately violated by it. It is hence also permissible to use contextual photographs stemming from another context. This cannot be relevant where in proceedings 1 BvR 2109/98 the courts have relied on the photograph not portraying the contemporary event within the meaning of § 23.1 sentence 1 of the Act on Authors of Artistic Works, which the photograph served to illustrate, namely the physical conflict between the plaintiff and a cameraman whom he considered to be a nuisance. It is decisive whether the concrete photographic reporting effects a violation of the right to privacy over and above the permissible portrayal. This is unlikely to be the case as a rule if the picture used is context-neutral or contextual, in other words does not distort the portrayal. The courts should hence have explained the cause of the violation of privacy if the photograph of the plaintiff forming the subject-matter of the dispute – by no means showing him at a 45

disadvantage – shows him in a dinner-jacket, and the event reported on by the article took place after a celebratory event (gala event). In particular, it should have been considered why this photograph more incisively impaired the plaintiff than for instance the photograph which shows the plaintiff in the context of the physical dispute with the cameraman (against which no complaint was made), and hence clearly portrays the connection with the criminal offence.

dd) The courts have also failed to accommodate the constitutional requirements of the weighing up of the freedom of the press and the protection of privacy in proceedings 1 BvR 1857/98. 46

In these proceedings, the particular question arose of whether the said principles apply to the use of context-neutral photographs, even with portrayals which link together real events and fictitious ones made in imitation of reality to become a satirical commentary and illustrate these with a photograph only showing the companion. The case relates to a neutral portrait photograph of the plaintiff illustrating a commentary relating to him and Princess Caroline of Monaco. The Higher Regional Court states that it does not report on an event since the commentary was allegedly a satire on “relationship stories” in the entertainment press. 47

In contradistinction to the other cases, the report does not constitute reporting on an event within the narrow meaning of the word. It contains an event-related commentary on the plaintiff and the Princess. This by itself however may not constitutionally justify a differing assessment. The press may decide for itself on the nature of the portrayal (see BVerfGE 101, 361 <389>). Also the form of the commentary is a portrayal that is typical of the press, the use of which is hence to be measured against the standard of the freedom of the press. A satirical commentary on events which have been previously reported on in the press also enjoys protection from the point of view of the freedom of the press as normal reporting on events. If the interest of the press in illustrating events is to be recognised on principle, there is a need to justify why this is to be different with an event-related commentary. The decision of the Higher Regional Court could be understandable in that the event character was denied because the object was only related to entertainment. This would not be constitutionally-sound. If however the applicability of §§ 22 and 23 of the Act on Authors of Artistic Works were to be confirmed on principle, in accordance with the principles developed above, the publication of a portrait photograph of the plaintiff would be constitutionally unobjectionable. 48

3. By contrast, the constitutional complaints of the applicant re 1 in proceedings 1 BvR 758/97 cannot be accepted. The prohibition of the publication of the portrait photograph mentioned here does not violate the applicant’s freedom as a member of the press, irrespective of the context from which the photograph stems. 49

In line with the above information, the freedom of the press should be taken into account in particular within the meaning of § 23.1 No. 1 of the Act on Authors of Artistic Works with the interpretation of “images portraying contemporary history”. The term 50

contemporary history is determined by the public interest in information. Against this background, it is constitutionally unobjectionable in this case too that the courts refuse to regard the plaintiff as an absolute person of contemporary history.

Unlike the cases of the applicants re 2 to 5, it is also constitutionally unobjectionable that the plaintiff was not treated as a relative person of contemporary history and that the publication of the image has been regarded as unlawful. Entitlement to publish images in the cases dealt with by the specialist courts' companion case-law is conditional on a report relating to the event in which the subject is a trusted companion of an absolute person of contemporary history. In the instant case, the photograph of the plaintiff was part of a magazine article which merely contained speculation on whether Princess Caroline of Monaco and the plaintiff had perhaps been in Asia discretely and had stayed overnight in hotels in Bangkok and Rangoon. The link between the two was evidently not yet publicly known at the time of publication. At least, the applicant himself did not claim in the article to have spoken of an event. Mere speculation that an absolute person of contemporary history could have brought about a specific event however does not justify illustrating with the photograph of a person whose participation in the event there is also the subject of speculation. At the same time, in such cases illustration with an image of the absolute person of contemporary history is not ruled out from the outset. However, the fundamental right of the freedom of the press does not give rise to a right of the press to derive consent-free publication of the image of a person whose contemporary significance had not yet been determined at the time of publication according to the state of press research and by the content of the report. The press report is not an event of contemporary history within the meaning of § 23.1 No. 1 of the Act on Authors of Artistic Works, but only the subject of the report. If this is purely speculative in nature, it does not justify impairing the right of an image of a person in whom there is otherwise no adequate interest in information.

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[...]

52-54

Papier

Steiner

Hoffmann-Riem

**Bundesverfassungsgericht, Beschluss des vom 26. April 2001 - 1 BvR 758/97,
1 BvR 182/00, 1 BvR 2109/99, 1 BvR 1918/98, 1 BvR 1857/98**

Zitiervorschlag BVerfG, Beschluss des vom 26. April 2001 - 1 BvR 758/97, 1 BvR 182/
00, 1 BvR 2109/99, 1 BvR 1918/98, 1 BvR 1857/98 - Rn. (1 - 52-54),
http://www.bverfg.de/e/rs20010426_1bvr075897en.html

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