

German privacy law after *von Hannover*

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1. *Hanover v Germany* ECHR 24 June 2004

In *Hanover v Germany* the ECHR held that three judgements of the German Constitutional Court (*Bundesverfassungsgericht*) of 4 April 2000, 13 April 2000 and in particular the landmark decision of 15 December 1999, violated Article 8 of the European Convention On Human Rights (“ the Convention”).

The major subject of the judgements was so called paparazzi - photos taken of the Princess Caroline of Hanover (formerly Caroline of Monaco) published in German magazines showing scenes from her daily life, although in public, such as riding, leaving a restaurant or on holiday.

In its landmark decision of 15 December 1999 the German Constitutional Court held:

... Within the centre of the guarantee of freedom of the press is the unrestrained right to define kind and scope, content and form of a publication. This also covers the decision of if and how to illustrate a publication ... This guarantee is neither subject to the character nor to the standard of the publication or a report in detail. Every distinction of this kind would in the end result in judging and steering through the State, which would be inconsistent with the nature of this human right.

Freedom of the press serves the purpose of free creation of individual and public opinion. Such can only be successful under conditions which neither dictate nor withhold certain subjects or ways of presentation of information. In

particular the creation of opinion is not limited to the political area. It is true that in this area it has specific meaning in the interests of a well functioning democracy. However, the creation of political opinion is embedded in a comprehensive process of communication which may not be split into relevant and irrelevant areas ... It is up to the press to decide what is of public interest and what is not.

... Nor can mere entertainment be denied any role in the creation of opinions. That would amount to unilaterally presuming that entertainment merely satisfies a desire for amusement, relaxation, escapism or diversion. Entertainment can also convey images of reality and propose subjects for debate that spark a process of discussion and assimilation relating to philosophies of life, values and behaviour models. In that respect it fulfils important social functions When measured against the aim of protecting freedom of the press, entertainment in the press is neither negligible nor entirely worthless and therefore falls within the scope of protection of this human right

The same is true of information about people. Personalisation is an important journalistic means of attracting attention. Very often it is this which first arouses interest in a problem and stimulates a desire for factual information. Similarly, interest in a particular event or situation is usually stimulated by personalised accounts. Additionally, celebrities embody certain moral values and lifestyles. Many people base their choice of lifestyle on their examples. They become points of crystallisation for adoption or rejection and act as examples or counter-examples. This is what explains the public interest in the various ups and downs occurring in their lives.

As regards politicians this public interest has always been deemed to be legitimate from the point of view of transparency and democratic control. Nor can it in principle be disputed that it exists in respect of other public figures. To that extent it is the function of the press to show people in situations that are not limited to specific functions or events and this also falls within the sphere of protection of freedom of the press. It is only when a balancing exercise has to be done between competing personality rights that an issue arises as to whether matters of essential interest to the public are at issue and treated seriously and objectively, or whether private matters designed merely to satisfy the public's curiosity, are being disseminated

... Privacy does not require that publications that are not subject to prior consent are limited to pictures of figures of contemporary public interest in the exercise of their function in society. Very often the public interest aroused by such figures does not relate exclusively to the exercise of their function in the

strict sense. It can, on the contrary, by virtue of the particular function and its impact, extend to information about the way in which these figures behave generally – that is, also outside their function – in public. The public has a legitimate interest in being allowed to judge whether the personal behaviour of the individuals in question, who are often regarded as idols or role models, convincingly tallies with their behaviour on their official engagements.

Contrary to this the ECHR ruled in its *Hanover v Germany* judgment:

Para 63: “The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of “watchdog” in a democracy by contributing to “impart[ing] information and ideas on matters of public interest (*Observer and Guardian*, cited above, *ibid.*) it does not do so in the latter case.

...

Para 66: In these conditions freedom of expression calls for a narrower interpretation (see *Prisma Presse*, cited above, and, by converse implication, *Krone Verlag*, cited above, § 37).

Against this background it cannot be denied that the interpretation of the human right of freedom of expression by the ECHR is narrower than that of the German Constitutional Court. This raises the question of which interpretation has to be followed in Germany.

2. The legal impact of the judgement of the ECHR in Germany

At first glance the answer seems simple: According to Art. 46 para 2 of the Convention

“the High Contracting Parties undertake to abide by the final judgement of the Court in any case to which they are parties.”

As the German government has decided to let the judgement become final it has the obligation under international law to abide by this decision.

However, the German Constitutional Court is not an instrument of the German government. Under German law, contrary to the Anglo-American system, we do not know the “doctrine of stare decises”. Art. 97 of the German Constitution guarantees that the judiciary is independent with the consequence that lower courts are not bound by decisions of superior courts. With one exception:

According to sec. 31 of the Act on the Constitutional Court
(*Bundesverfassungsgerichtsgesetz*)

“all constitutional organs of the federation and the states and all courts and offices are bound by judgements of the Constitutional Court.”

Needless to say the German government is also a “constitutional organ” in this respect. Whereas the binding effect is not limited to the operative provisions of a judgement, it also covers the reasoning.

This results in a problem for the German government: On one hand it is obliged under international law to abide by the judgement of the ECHR; on the other hand it is still bound by the judgement of the German Constitutional Court of 1999, which does not become null and void by a decision of the ECHR (*German Constitutional Court - BVerfG 11 November 1985, 2 BvR 336/85, NJW 1986, 1425*).

Also the courts have a problem: According to the Constitutional Court (*German Constitutional Court - BVerfG 14 October 2004, 2 BvR 1481/04, NJW 2004, 3407 confirmed by the decision of 5 April 2005 1 BvR 1664/04, NJW 2005, 1765*)

“it is the duty of the national courts to carefully implement any judgement of the ECHR into the affected part of the German legal system”

by interpreting – where possible - the national law in accordance with international law.

However, the Constitutional Court also made very clear in this decision, which was handed down after the *Hanover v Germany* decision of the ECHR, that the effect of a judgement of the ECHR is limited to the boundaries set by the German constitutional framework. Quote:

“The German Constitution is aiming to fit Germany into the legal community of peaceful and liberal states, however, this does not waive sovereignty as established by the right of the last word of the German Constitution.”

And:

“If a violation of basic principles of the Constitution cannot be avoided, it is not contrary to the principle of being interpreted in accordance with international law, if the legislator does not observe international law.”

As the German Constitutional Court reserves the right of the last word for itself and as the freedom of the press is a “fundamental element of each liberal state” (*German Constitutional Court – BVerfG 5 August 1966, 1 BvR 586/62, NJW 1966, 1603*) it is quite clear that it is only up to the German Constitutional Court itself to decide whether it will follow the narrower interpretation of the freedom of expression by the ECHR in its *Hanover v Germany* decision.

3. Court decisions in Germany after the “Caroline decision” of the ECHR

With a view to the legal situation as described in para 2 above, German courts have developed a very sophisticated way of finding differences in their cases to the “Caroline case” of the ECHR and the decision of the German Constitutional Court, very similar to the skill of minor courts in the Anglo-American system, where they do not want to follow judgements of superior courts. Whenever possible they try to avoid a clear statement to the binding effect of either decision.

However, in a decision of 29 October 2004 the Berlin Court of Appeal (ninth senate) (*Kammergericht*) decided differently (*KG 29 October 2004, 9 W 128/04, NJW 2005, 605*):

The facts are brief: A nationally well-known German singer was photographed while shopping with his girlfriend in Rome.

According to German standards before the “Caroline decision”, the singer is a public figure. His girlfriend accompanying him is a public figure in this context. Thus, the photo could be legally published in Germany before *Hanover v Germany*. Consequently, only weeks before, the Berlin Court of Appeal had held that photos of the couple, taken while they were having a coffee in a London café, were not violating their privacy (*KG 22 June 2004, 9 U 53/04, NJW 2005, 603*).

After the Caroline-decision the Berlin Court of Appeal held:

“Hence, the judgement of 24 June 2004 (i.e. *Hanover v Germany*) has to be observed and to be implemented in the German privacy law. This is not easy, since the ECHR considers exactly those decisions of the superior German courts as violation of Art 8 of the Convention, i.a. the aforementioned judgement of the *Bundesverfassungsgericht* of 15 December 1999, which reasoning is binding according to sec 31 of the Act on the Constitutional Court (*Bundesverfassungsgerichtsgesetz*). From the point of view of this senate, this dilemma has to be resolved as follows:

It has to be adhered to the existing constitutional principles ... This includes that also the entertainment press may invoke freedom of the press, that privacy is reduced once a person has commercialised its privacy, and ... if they perform intimate behaviour in public. The senate also sees no reason to refrain from the legal term “figure of absolute public interest” (*absolute Person der Zeitgeschichte*), meaning that the general public interest in the lifestyle of such people should not be considered – or to be reduced to people who hold a political office ...

On the other hand it does comply with the importance of human dignity (Art 1 sec 1 German Constitution) and the right of freedom of personality (Art 2 sec 1 German Constitution) if the ECHR intends to protect celebrities from being stalked when doing purely private things in their everyday life. As said before, if possible, the German Constitution has to be interpreted in such a way as to avoid Germany violating its obligations arising from international law. In the light of the decided and convincing considerations of the ECHR regarding this point, it does comply with the freedom of the press to extend the protection of privacy of celebrities and their regular companions In this respect the binding effect of the judgement of the Bundesverfassungsgericht of 15 December 1999 is loosened with a view to the principle of being interpreted in accordance with international law.”

It is most remarkable that there is no reasoning whatsoever for this fundamental position.

On this basis the Berlin Court of Appeal ruled regarding the specific photos:

“... in the present case the interest of the plaintiff and her friend to spend their holiday in Rome unobserved and to be left alone by the media is prevailing ...

It is out of the question that there is no contribution to a debate of general public interest, even if one considers the importance of a famous artist as a figure of identification for others ...”

This decision is even more remarkable against the background of a more recent decision of the tenth senate of the Berlin Court of Appeal. This senate took a

completely different attitude with a view to the effect of ECHR decisions and held in a decision of 14 April 2005 (*KG 14 April 2004, 10 U 103/04, NJW 2005, 2320*):

“The question whether publications with mere entertainment character fall within the scope of the freedom of the press has been decided by the decision of the *Bundesverfassungsgericht* of 15 December 1999 with binding effect for all German courts. In this respect there is no room for interpretation. Decisions of the *Bundesverfassungsgericht* are binding for all courts, sec. 31 of the Act on the Constitutional Court (*Bundesverfassungsgerichtsgesetz*). ... Also the aforementioned decision of the *Bundesverfassungsgericht* is still binding, where the court held that the freedom of the press as guaranteed in Art 5 sec 1 German Constitution (*Grundgesetz*) does also cover entertainment publications This is also valid for the publication of photos showing public figures in their everyday or private lives.”

In the meantime the Hamburg Court of Appeal has adapted this point of view in two decisions of 31 January 2006 (OLG Hamburg 31 January 2006, 7 U 81/05 and 7 U 82/05, AfP 2006, 180).

It is most remarkable, however, that the minor district courts (*Landgerichte*) in Hamburg and Berlin still follow the lines of the early decision of the ninth senate of the Berlin Court of Appeal and issue injunctions against photos of celebrities showing them in situations of their everyday life on public streets, like shopping etc on the basis of the von Hanover decision. This is only understandable against the background of the fact that under German law lower courts are not bound by decisions of superior courts. The higher courts are only able to overrule the decisions of lower courts.

The German Superior Court for Civil Law (*Bundesgerichtshof*) has, up to now, been more cautious when it comes to the implementation of the “Caroline decision” of the ECHR into German law. The competent VI. senate first mentioned the decision in *BGH 28.09.2004, VI ZR 302/03, NJW 2005, 594*:

The facts of the respective case are also quickly told: Charlotte Casiraghi (then 15 years old), daughter of Caroline of Hanover, was photographed riding a horse on the occasion of a riding competition in Monaco. The accompanying text did not mention the riding competition but only the appearance and beauty of the girl.

Even on the basis of “pre-Caroline law”, the publication of the photos in question in this context was violating the rights of the girl:

A possible consent in the publication was limited to reports about the riding contest. The daughter of Caroline is not a public figure. Only in this context did the Superior Court mention, in an affirmative way, the “Caroline decision”:

“The interest of the public and of the press in reporting about the plaintiff, using photographs, needs less protection in such cases where it is only supported by belonging to a royal family, while the person shown does not serve any official function even if she has been introduced into “international society” (jet set) (see ECHR NJW 2004, 2647, 2650, sec 72).”

Even if the riding contest was of public interest, in the specific context, the Superior Court held that the publication of the photos was illegal, because the accompanying text was not about the riding competition, but only about the appearance of the girl.

In the meantime the Superior Court also mentioned *Von Hannover* in another precedent regarding reports about offences (BGH 15.11.2005, VI ZR 286/04, NJW 2006, 599):

This time it was a report about *Ernst August von Hannover* who had exceeded the maximum speed limit on a French motorway by more than 80 km/h. He had to pay a fine of EUR 728.00 in a French court. This was reported in a German newspaper, which resulted in litigation of *Ernst August* against the publisher.

The German Superior Court ruled that the report about this traffic offence of *Ernst August von Hannover* was no violation of his privacy. The court mentioned the ECHR decision saying that

“by committing this serious traffic offence (the prince) had left the area of private activities and made himself a subject of public interest. It cannot be taken from the decision of the ECHR, which was dealing with a different case, that the present report would not be admissible.”

The German Constitutional Court itself has not yet declared its position with a view to the ECHR judgement. In a most unusual interview on 9 December 2004 in the “Frankfurter Allgemeine Zeitung”, the president of the Constitutional Court, Hans-Juergen Papier, underlined “one cannot accuse German courts of a lack of balance of interest.” And ... he appealed to the ECHR to exercise more judicial self-restraint with regard to such decisions which are already the result of several stages of appeal including judicial review.

Hamburg, 30 May 2006