[DE] Federal Constitutional Court Arbitrating between Artistic Freedom and Right to Privacy

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In a recently published ruling of 13 July 2007 (Az. 1 BvR 1783/05), the Federal Constitutional Court (BVerfG) took a decision on the issue of the limits of artistic freedom, a right guaranteed under the constitution.

In the case before the court, a novel ("Esra") depicted intimate details of a love relationship between the Esra character and the first-person narrator, a writer, together with the associated family surroundings. The sometime girlfriend of the author and her mother have recognised themselves in the characters portrayed in the novel and instituted proceedings against the publication and circulation of the work. Subsequently the Federal High Court confirmed the prohibition issued by the lower court against the publisher. The BVerfG found for the constitutional complaint in relation to certain aspects of the case.

The Court began by confirming that the novel was indeed a work protected in terms of artistic freedom under Art.5 §3 S.1 GG, referring at the same time to the fact that the protection enjoyed by artistic freedom was not unlimited and that the boundaries were to be found in the other provisions of the constitution, including the general right to privacy enshrined in Art. 2 § 1 in conjunction with Art. 1 § 1 GG. However, whether artistic freedom should give way to other rights needed to be judged in relation to the degree of invasion of the general right to privacy.

In its arbitration the BverfG emphasised that a literary work was firstly to be seen as fiction without laying claim to being based on factual reality, although artistic freedom included the use of real persons as models. The more real the representation of persons and events, however, the more heavily the impairment of the privacy of those represented would weigh.

In the context of assessing these principles, the Court regretted the fact that the civil court dealing with the case, in its decision on the mother's suit, had focused only on the negative representation of the person in the novel as grounds for the invasion of privacy. Far more crucial was the evidence that the reader was urged to assume these portrayals to be factual. The BVerfG assessed the pleadings related to the suit of the author's former girlfriend differently, she being clearly recognisable as the actual intimate partner of the author. Her right to privacy had

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been particularly seriously invaded by the realistic and detailed portrayal of events. In particular, the portrayal of the most intimate details represented an invasion of her right to privacy, indeed an area of personal privacy constituting the inviolable core of human dignity. In view of the special protection for children and the mother-child relationship, the BVerfG confirmed the assessment of the lower court that the depiction of the actual life-threatening illness of the main character's young daughter, also unambiguously identifiable to those around her in real life, alongside the fact that the relationship between mother and child was highlighted in this way, did not belong in the public domain.

Although the constitutional complaint was found to be only partially justified, the complete prohibition of the novel in its present form was nonetheless confirmed.

Beschluss des BVerfG vom 13. Juni 2007 (Az. 1 BvR 1783/05)

http://www.bundesverfassungsgericht.de/entscheidungen/rs20070613_1bvr178305.html

Ruling of the BVerfG of 13 June 2007 (Az. 1 BvR 1783/05)

Pressemitteilung des BVerfG Nr. 99/2007 vom 12. Oktober 2007

http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg07-099.html

Press release from the BverfG No. 99/2007 dated 12 October 2007

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