[DE] Constitutional Court strengthens press freedom in two judgments

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The *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) strengthened the freedom of the press in two judgments issued on 23 June 2020. Although the cases dealt with very different issues, in both decisions the BVerfG highlighted the importance of protecting a free press in the context of democratic opinion-forming.

In the first case (no. 1 BvR 1716/17), a constitutional complaint had been filed against a criminal conviction imposed after an unpixelated image of a dark-skinned patient in a university hospital waiting room was forwarded to a newspaper. The photographer had ignored requests from the person pictured and hospital staff to delete the image, which had been published in unpixelated form in the online edition of a major German daily newspaper with a report documenting the hospital's inadequate safety precautions when dealing with suspected Ebola patients – a subject that had drawn a high level of public attention at the time. The photographer was fined by the relevant criminal courts for disseminating an image without permission under Articles 33 and 22 *et seq*. of the *Kunsturhebergesetz* (Artistic Copyright Act – KUG). The courts held that, although the image illustrated a newsworthy event, it should have been modified and the patient's identity disguised because the way it had been presented, together with the newspaper's high circulation figure, meant its publication was likely to leave the patient open to significant public abuse. The photographer was held responsible for the publication of the unpixelated image because he had initiated the report himself. He therefore should have ensured that the patient's identity was suitably disguised. However, the BVerfG ruled that this judgment infringed the freedom of the press and upheld the photographer's constitutional complaint. It was true that press photographers and journalists had a certain duty of care and could face criminal penalties if they breached it. They should also not try to hide from newspaper editors the circumstances in which the photographs had been taken. Nevertheless, the BVerfG thought that the criminal courts had not taken sufficient account of fundamental rights. In particular, the need to distinguish between the forwarding and the publication of images had not been met, while the working and accountability structures of the press and preparatory research had not been sufficiently taken into account. The images had not, therefore, been carelessly forwarded in a way that infringed the patient's rights, which would have been unlawful. The photographer's failure to pixelate the

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images before forwarding them to the newspaper could not be considered a breach of his duty of care. Press photographers and journalists should be able to send unpixelated images to newspaper editors without fear of punishment. The situation would only be different if the person forwarding the images had deliberately concealed circumstances that would be significant for the editor's decision on whether to disguise the person pictured. However, in this case, the criminal courts had not found this to be the case.

The second case (no. 1 BvR 1240/14) concerned the admissibility of a report about indiscretions committed by public figures in the distant past. The dispute focused on an article, published in mid-2011, about the chief executive of a well-known company, which not only reported on the company and its staff, development and liquidity from an economic perspective, but also described its chief executive's attempt to cheat in his first state law examination and a criminal trial relating to the bribery of an expert. At the chief executive's request, the civil courts ruled that the attempt to cheat should not be mentioned in the report. Although people should generally accept the reporting of true facts about their social life, the chief executive had been portrayed as a dishonest person. Since there had been no real reason to bring up his attempt to cheat, he should not have been pilloried for a misdemeanour committed many years previously. However, the BVerfG disagreed and upheld the newspaper publisher's constitutional complaint against these rulings. The chief executive should accept truthful reporting about his social and professional life. The "right to be forgotten", which was guaranteed by the *Grundgesetz* (Basic Law), should not limit the right of the press to refer to past transgressions in its reporting. The right to report did not automatically lapse over time, but should be judged according to the individual case. Such an evaluation was largely the responsibility of the press itself, in particular the assessment of which circumstances and details were significant enough to be reported. The BVerfG thought this also applied to reports published on the Internet.

BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 23. Juni 2020 - 1 BvR 1716/17 -

https://www.bverfg.de/e/rk20200623_1bvr171617.html

Federal Constitutional Court, decision of the 2nd chamber of the First Senate, 23 June 2020, 1 BvR 1716/17

BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 23. Juni 2020, - 1 BvR 1240/14.

https://www.bverfg.de/e/rk20200623_1bvr124014.html

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Federal Constitutional Court, decision of the 2nd chamber of the First Senate, 23 June 2020, 1 BvR 1240/14.

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