Part 6
Ethics and Fundamental Rights

Chapter 20
The Constitutional Protection of Images

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I. Preliminaries

1. What "images" are we talking about?

Talking on an abstract level about the constitutional protection of images is not an easy task. To be honest, constitutional law scholarship has not come very far in this regard. Although (constitutional) law and images are interrelated in many ways[1], images have hardly been made an explicit subject of (constitutional) jurisprudence or (constitutional) law scholarship so far.[2] In particular, constitutional law does – unlike (cultural) philosophy[3], psychology[4], media- and image studies[5] – not (yet) know a theory of images. This finding is not directly surprising for a text-oriented discipline like jurisprudence. But it is in some ways remarkable *how* little attention jurisprudence, and especially constitutional jurisprudence, has actually paid to images so far compared to other "media of law."[6]

Certainly, copyright law, trademark law or, in part, data protection law deal with non-textual visual objects (such as photos, logos, etc.) on an ongoing basis. Here, however, the legal sciences' access usually appears to be *object*-related rather than *media*-related. Hereby I mean that an image becomes a copyright, trademark, or data protection issue not because it belongs to the media type "image", but because of the *object* it depicts

1 To give just one example: on the one hand, law can be the object of images (e.g. images of Justitia), on the other hand, images can be media of law (e.g. traffic signs).
2 See, however, for the first attempts in German-speaking countries Vismann (2007); Boehme-Neßler (2010); Dreier (2019); On the specific aspect of the "staging" of law, see Münkler/Stenzel (2019).
3 See, e.g., the contributions by Boehm, Pichler and Weising in: Seitz/Graneß/Stenger (2018) 21 et seq., 39 et seq. and 55 et seq.
4 See, e.g., Beach (1993).
5 See, e.g., Mitchell (1994); Belting (2001); Bredekamp (2010).
6 See Vesting (2011–2015).

(e.g., a copyrighted photograph, a trademark-protected logo, or an image of a person that meets the requirement of a personal data).[7] Apparently, images are so commonplace to us due to their ubiquity that we always (subconsciously) "think" about them but have hardly ever made them the subject of a media-specific jurisprudential consideration.[8]

The present text cannot possibly tackle the Herculean task to develop a constitutional theory of images on its own, but it aims to make at least a modest contribution. The starting point is a conceptual sharpening. So, what are we talking about when we speak of "images"? Only when these conceptual foundations are clarified, it is promising to abstractly consider its constitutional status or how constitutional law affords them protection. In the following, I would like to propose a terminological and phenomenological distinction between "inner" and "outer" images on the one hand, and "self" and "foreign" images on the other (I.3.). Starting from this distinction, we will then examine how constitutional law deals with these types of images. The article then aims to show (II.), in a rather associative way, where "inner" and "outer", as well as "self images" and "foreign images", are dealt with in Italian and German constitutional law (with respect to our Italo-German cooperation). Following on from this, the article devotes itself to dealing with these types of images by means of a comparative case study (III.). With regard to our Italian-German cooperation, I have chosen one Italian and one German case, whereby the latter has even involved the European Court of Human Rights (ECtHR). Both cases concern media reports about celebrities, namely Princess *Soraya of Persia* (Italian case) and Princess *Caroline of Hanover* (formerly *Monaco*) (German case). Since both cases date back some time, the question of whether and, if so, what effects digitalization will have on this case law, will have to be examined under a specific section (IV.). The article will then conclude with some remarks on the constitutional requirements for dealing with digital images (V.).

7 In copyright law, however, not only the object but also the image itself can constitute a protected work.

8 See, however, Dreier (2019), 13 et seq., who refers to the discipline of "law and images" practiced in the UK and in the USA.

2. *Depictions, illustrations, data, information, metaphors, imaginations: the multiformity of the concept of image*

The concept of the image must be distinguished from both the depiction and the object depicted. While the depicted object represents a person or an item that was either found in the real world (as in the case of photography and paintings of real life objects) or originated in the imagination of the creator (as in the case of paintings of objects which merely existed in the phantasy of the painter), the depiction is the result of the process of image creation (e.g., the photograph or portrait). Images, on the other hand, represent an intermediate stage between the object and its image, so to say the idea of the picture, which arises in the viewer through the contemplation of the image.[9]

In the sense of illustrations, images (or pictures[10]) are furthermore used to illustrate a certain fact. In the visual arts, images occur as paintings, drawings or graphics. In photography, an image usually refers to the optical reproduction of an object. And in film, an image is a single component, the juxtaposition of which creates the (moving) film (a movie). In this respect, it seems as if images were always the result of artistic creation, which would assign them to the freedom of art[11] from the perspective of constitutional law. However, images extend far beyond the artistic context. One might think of images that are shown in the press, on broadcasting media or in advertising – or how they are posted billions of times on social networks, at the latest since the invention of the smartphone. In this respect, too, a common denominator seems to be identifiable from a constitutional point of view: images always appear to be subject to the freedoms of communication.[12]

9 See on this Dreier (2019), 30 ed. seq., 191.

10 Following, I understand both terms as synonyms.

11 This freedom is, for instance, guaranteed by Article 13 of the Charter of Fundamental Rights in the European Union (CFR): "The arts and scientific freedom shall be free of constraint (…)".

12 One can think, for example, of Article 10 of the European Convention on Human Rights (ECHR) on the "Freedom of Expression". For the protection of images under the ECHR see Neukamm (2007).

Against this background, it would seem logical to adopt a purely technical viewpoint and treat images as special forms of data[13] or information[14], which, as such, can form the basis of communication[15]. Constitutional law is familiar with dealing both with information and communication. For example, German constitutional law recognizes a right to informational self-determination, while European constitutional law recognizes a fundamental right to data protection (Art. 8 CFR). Beyond that, however, information is omnipresent in constitutional law (as well as in law in general): it could even be said that law is all about information processing. Then, however, it is hardly possible to make general statements about the relationship between data, information and (constitutional) law. If, then, the same does not apply to the relationship between (constitutional) law and images as to the relationship between (constitutional) law and data or information, we must now look for the properties that distinguish images from other information.

Such a differentiation from other information could start on a semantic[16], a semiotic and a syntactic level.[17] The most obvious difference might be the syntactic one: pictures do not transport information by means of text, but by means of other data (e.g., color spots, etc.), i.e., pictorially. Probably even more significant – and this is what makes them so interesting for (constitutional) law – is their semantic richness. Pictures are often used as legal rules to clearly indicate a certain rule as, which, for example, even small children or illiterate people can understand (e.g., standing traffic light = stop, walking traffic light = walk). However, the semantic content of images is likely to be even higher than that of texts, since images are linked to an even greater extent to cognitive dispositions, prior knowledge,

13 For the term "data" see, e.g., the definition to be found at https://www.encyclopedia.com/science-and-technology/computers-and-electrical-engineering/computers-and-computing/data. Images can also constitute personal data if they can be used to identify a person (such as in the case of passport photographs); see the legal definition of personal data in Article 4 No. 1 of the General Data Protection Regulation (GDPR). For the classification of portraits as either images or personal as personal data, or both, see Müller-Tamm (2022).

14 On the difference between data and information, see for example https://www.encyclopedia.com/social-sciences-and-law/law/law/information.

15 On the concept of communication, see for example https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/communication-philosophy.

16 See for example Boehm (2015).

17 See Zech (2012); for a summary see Raue (2022).

prior understanding, and prior cultural imprints.[18] Therefore, images can, on the one hand, condense information, but on the other hand, distribute it like a fan and set communication processes in motion that a text can never achieve due to its relative "unambiguousness".

At this point, another meaning of images must be mentioned. Images cannot be reduced to this feature as ambiguous carriers of information embodied in an object. Rather, in linguistics, images are synonymous with metaphors[19], i.e., expressions that bring a word into a different context of meaning. This also includes the so-called "guiding images" (in German: "Leitbilder"), which will be discussed in a moment (II.1.b)). Finally, psychology teaches us that there are also images in the inner world of humans. This also distinguishes them from other information carriers in the outer world. They are also called conceptions (imagination). Apart from the fact that thinking in general is, to a large extent, pictorial[20], human consciousness also functions in such a way that it collects images from the outside world and processes them into its own images. In this way, "self-images", i.e., ideas of one's own self (personal identity), are created. This is essentially based on self-perception, as well as the feedback of external perception. By measuring an actual condition against a target condition (the ideal image), it greatly controls how a person thinks, feels, and behaves.

3. *Wording in the following: "inner" and "outer" images, "self-images" and "foreign images"*

Despite these diverse meanings – which are expressed especially in the German language[21] – some general characteristics of images can be sum-

18 See for example Seitz/Graneß/Stenger (2018), who emphasize that images are "never purely epistemic or aesthetic objects, but always carry ethical as well as political implications and may even exercise agency." (Translation by the author; in the original: "Bilder können niemals rein epistemische oder ästhetische Gegenstände darstellen, sondern immer auch ethische sowie politische Implikationen mit sich führen und womöglich gar Handlungsmacht ausüben..."). The autonomy of the image is also the guiding thesis of Bredekamp (2010).

19 On this, see Münkler (2016).

20 For the "image of thinking" see Deleuze (1968/1972).

21 Here the word "image" is a component of numerous nouns, such as "Selbstbild" ("self-image"), "Weltbild" ("worldview"), "Leitbild" ("mission statement"/"guiding principles/images"), "Vorbild" ("role model"), "Bildung" ("education"), "Abbildung" ("illustration"), "Ausbildung" ("education"), "Einbildung" ("imagina-

marized: an image is a semiotically,[22] often artfully composed source of information of great semantic value. In this context, it is always to be regarded as something "holistic", as a unity, which cannot be broken down into individual parts, without a loss of information. However, this does not contradict the fact that images can be sub-divided into meaningful individual parts or even bits of information.[23] A further result of the previous considerations is apparent in the fact that images can be understood both as objectified data and information carriers of the physical or "outside world" (in the following: "outer" images) and as conceptions in the "internal world" of a human being (in the following: "inner" images). Furthermore, a distinction can be made between images of oneself and images of others or of objects ("foreign" images).[24] Accordingly, one can identify four different variations of images (Table 1):

	Self-image	**Foreign image**
Inner image	Imagination of oneself or a community one belongs to	Imagination of others or of objects
Outer image	Depiction of oneself (e.g., self-portrait, selfie) or a community one belongs to	Depiction of others or of objects

Table 1: Four variations of images

When "outer" images, which means images located in the "outside world", speak to us and thereby evoke "inner" images, such as ideas, one could speak of the "internalization of the outside". Conversely, when "inner" images leave the inner world and enter the outer world, as is the case, for example, with self-portraits or "selfies", an "externalization of the inner" is achieved. These crudely formed categories are undoubtedly no more than

tion") and verbs, such as, "bilden" ("(to) build, form") in the sense of building/producing an object, but also an intellectual achievement, such as an opinion, a judgment, etc. Perhaps this is the reason why, in particular, Germans are interested in the general relationship between image and law.

22 For a socioethics of image fakes built upon semiotics see Leone (2022).

23 For the example of information contained in the parts of a map stored in the form of a database see CJEU, case C- 490/14 of 29 October 2015, ECLI:EU:C:2015:735- *Verlag Esterbauer*.

24 See Dreier (2019) 71.

heuristics of a (constitutional) jurist, that do not even come close to achieving the complexity of contemporary image theory. Image theorists may forgive it. For the further course of the article, however, the author hopes that some interesting insights can be generated based on these distinctions.

II. Points of Reference

Constitutional law encompasses several norms and figures to which the typology of images just proposed can be linked. For a better overview, a distinction will be made here between state organization law (1.), i.e., those constitutional norms, which regulate the actions of state organs (e.g. the Parliament, the Government, or the Constitutional Court), and fundamental rights (2.).[25]

1. State organization law

a) State symbols

The law of state organization, also regarded as an ensemble of norms for the self-regulation of a state community, is familiar with both "inner" and "outer" images, "self-images" and "foreign images". Relevant "inner" images in this context are individual people's ideas about one's own role in the community or the community as a whole. They can be "self-images" (e.g., images of a "good citizen") or "foreign images", i.e., external attributions of the community as a whole or of its individual organs (in themselves already an image in the sense of a metaphor), procedures or sections of community life. If these "inner" images have been "externalized" and thus have become "outer" images, they can in turn influence the individual viewer – and, for example, trigger a feeling of belonging to a collective identity of such a community. Examples of these kinds of externalized "inner images" are national symbols, such as national emblems or flags,

25 This distinction is quite common in German constitutional law, whereas the Author is aware that other Countries follow a different pattern to differentiate constitutional law.

which are the subject of separate constitutional articles in, for example, the Italian[26] or the German[27] constitution.

b) *"Guiding images" of the state or individual state organs*

While the legal content of such state symbols as externalized collective self-attributions is rather limited[28], there are other forms of externalized inner images, which can have considerable normative effects. We are talking about the so-called "guiding principles" or "images" (in German: "Leitbilder"). These are not usually externalized through images, but through language. But even through their linguistic externalization, guiding images appear as objects of the external world. They are perceptible to the senses and can contribute to generating internal ideas. As objects of the "outside world" they can in turn – by way of constitutional interpretation – generate quite considerable normative effects.[29] For example, the guiding image of a "lean state" articulates the normative demand for de-regulation, i.e., the reduction of public duties with a simultaneous reduction in taxes. Similarly, the guiding image of the "night watchman state" (in German: "Nachtwächterstaat") expressed the idea that the state must limit its intervention in the societal self-determination to a minimum. Often, these kinds of "guiding images" are also formulated for specific state organs[30] or their members, which can then establish further normative specifications beyond the competences and duties written into the constitution. An example from German Constitutional law is the guiding image for every Member of Parliament.[31]

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26 Article 12 of the Italian Constitution of December 27, 1947 states: "La bandiera della Repubblica è il tricolore italiano: verde, bianco e rosso, a tre bande verticali di eguali dimensioni." ("The flag of the Republic is the Italian tricolor: green, white and red, with three vertical bands of equal size.").

27 Article 22 (2) of the German Constitution ("Basic Law") of May 23, 1949 states: "Die Bundesflagge ist schwarz-rot-gold." ("The federal flag is black-red-gold.").

28 For the federal flag see, e.g., Classen (2018) notes 23 et seq. Here, the first issue is the competence to design the federal flag, as well as the flag management. The second issue is the protection of the federal flag.

29 See Volkmann (2009). On guiding principles in administrative law, see, e.g., Baer (2004).

30 On the origin and meaning of this metaphor see Münkler (2016).

31 BVerfG ruling 2 BvE 1–4/06 of 11 October 2006 = BVerfGE 118 277, paras 214 et seq.; for additional examples, see Volkmann (2009) 159 et seq.

"Guiding images" are insofar problematic as they evoke (pre-legal) ideas of justice and order of society that have not been "juridified". As such, although they are not the subject of constitutional law, they can influence constitutional law and – by way of interpretation by the constitutional courts – become applicable constitutional law.[32] On the other hand, precisely because they appeal to supra-legal notions of justice, they can also provide beneficial orientation in the often difficult interpretation of abstract constitutional norms.

c) Dealing with "outer" images beyond states symbols and guiding principles ("image regimes")

A question to be distinguished from constitutional symbols (1.a) and "guiding images" (1.b) is that of the visibility and invisibility of images in law[33] or of "image regimes"[34]. Here, the question is to which extent a state is entitled to express its own collectively formed values through outer (self-) images – and to which extent individuals are entitled to defend themselves against these images. This rather abstract question has become very concrete in a German law case of the permissibility on the hanging of crosses (crucifixes) in schools or other public buildings. Although the German Constitutional Court ("Bundesverfassungsgericht", in the following: BVerfG) held[35] that such an exposure of religious symbols is prohibited because it violates the pupils' and teachers' religious freedom, in 2018, the Bavarian state government required crosses to be displayed in official buildings.[36] The Bavarian Constitutional Court rejected the decision's appeal due to a lack of legal standing.[37] Particularly in the judiciary, this kind of externalized "self-images" of a state (in the sense of the crucifix: as a Christian state) can have the effect of a "performative practice".[38] The resulting regulatory effect is difficult to determine under constitutional law. Although the overall disappearance of images and symbols as an element

32 For German law, see § 31 (1) of the Law on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz).
33 See Damler (2019) 97.
34 See Vismann (2007).
35 BVerfG ruling 1 BvR 1087/91 of 16 May 1995 = BVerfGE 93, 1.
36 General Rules of Procedure of the authorities of the Free State of Bavaria para. 28.
37 See BayVerfGH, Vf. 8-VII-18 of 3 April 2020.
38 See Müller-Mall (2012) 173 et seq.

of the state's self-representation is clear[39], the question of its admissibility is still of high constitutional relevance. It expresses a fundamental conflict between the democratic self-determination of the majority and the rights of a (cultural) minority. However, the resolution of this conflict is not a question of state organization law, but of fundamental rights.[40]

2. *Fundamental rights*

Images are the subject of fundamental rights provisions in many respects. "Outer" images such as portraits, photographs or other sorts of pictures, or more precise, their usage, can be protected by freedom of opinion, freedom of the press or freedom of broadcasting. This includes circumstances where they are used to express an opinion or are printed in a press product of broadcast on the radio, TV or the web. If they are the result of an artistic-creative process, both the process and the presentation / dissemination of the images are protected by artistic freedom.[41] The economic value of a work of art is protected by the fundamental right to property. While for collectors and dealers a picture is treated like any other asset according to constitutional standards, there is a special legal regime of intellectual property for authors in the form of copyright law.[42]

However, not only "outer", but also "inner" images are subject to fundamental rights. It must be assumed that the entire inner life, i.e., the formation of thoughts and feelingsis not accessible to the law.[43] The production of "inner" (be they "foreign" or "self-") images typically becomes legally relevant and in need of regulation only when an action derives from them. For example, when the thought of killing someone else is actually put into action. Then this action (the act of killing) must be regulated (forbidden or

39 See for the example of the courts: Behrmann (2019) 87: "Die moderne Justiz versteht sich als bilderloser Ort der Neutralität und Unabhängigkeit." ("The modern judiciary sees itself as an imageless place of neutrality and independence").

40 In BverfG 1 BvR 1087/91 of 16 May 1995, the negative freedom of religion of the pupils guaranteed by Article 4 (1) GG was opposed to the freedom of the school guaranteed by Article 7 GG in connection with the positive freedom of religion.

41 The first dimension is referred to in German law as the "work area" ("Werkbereich"), the second as the "effective area" ("Wirkbereich"); see, e.g., BVerfG ruling 1 BvR 435/68 of 24 February 1971 = BVerfGE 30, 173 (189); BVerfG ruling 1 BvR 712/68 of 5 March 1974 = BVerfGE 36, 321 (331); BVerfG ruling 1 BvR 816/82 = BverfGE 67, 213 (224).

42 Instructive about this Goldhammer (2012).

43 See Gusy (2003) 104.

prevented in the case of killing). Furthermore, many constitutions of European states and on the intra-European level recognize a fundamental right to self-presentation[44]. This grants everyone the right to defend themselves against the dissemination of images of others if they contradict their own self-image.

3. *Prospect on the further argumentation*

In the following section, this article will focus precisely on this right to self-presentation. A constitutional law scholar has far more to say about its development, its scope, and its balancing with competing fundamental rights (such as freedom of expression, freedom of the press, and freedom of broadcasting) than, for example, about the intricacies of copyright law. This is because the latter is largely left to the parliamentary legislature, so that copyright law is determined by constitutional law only through a relatively little extent.[45] Instead, the most important statements are found in statutory law[46] (and increasingly in European secondary law). Furthermore, focusing on the right to self-presentation and the conflicting fundamental rights allows to illustrate a conflict between inner self-images and outer foreign images. In other words, except for "outer self-images" (e.g., selfies), all forms of images are included.

This article seeks to illustrate this conflict between the right of self-representation and the freedoms of communication, between "self" and "foreign" images, based on two famous court cases, one Italian and one German. The aim is to show how the Italian and German courts resolved this conflict and what can be learned from it regarding the relationship between "self" and "foreign" images. Both cases are likely to be well-known beyond their respective national borders. The plaintiffs, Princess *Soraya Esfandiary* of Persia, and Princess *Caroline* of Monaco (and Hanover, respectively), are not only particularly famous but also persistent ones. Both plaintiffs repeatedly commenced legal action against the media coverage

44 For an in-depth analysis of German Constitutional law, see Britz (2008).

45 See, however, Geiger (2022); Depenheuer/Froese (2018) notes 148 et seq. For the importance of the Charter of Fundamental Rights of the EU see the recent decisions by the CJEU of 29 July 2019, cases C-476/17, ECLI:EU:C:2019:624 – *Pelham et al.*; C-469/17, ECLI:EU:C:2019:623 – *Funke Medien NRW* and C-516/17, ECLI:EU:C:2019:625 – *Spiegel Online*. On U.S. Constitutional Law, see Goldhammer (2012).

46 Comprehensive on German copyright law, e.g., Dreier/Schulze (2022).

of their private lives. *Soraya* eventually appealed at the Italian Supreme Court (Corte di Cassazione[47]), and *Caroline*, even twice to the European Court of Human Rights (ECHR). The decisions issued in this regard are undoubtedly among the "classics" of privacy protection in general. After all, they have set a new fundamental course.

Thus, in the *Soraya* ruling, the Italian Constitutional Court recognized for the first time a fundamental right to privacy ("*diritto alla riservatezza*") that clearly went beyond the right to one's own image ("*diritto all'immagine*") already codified by law (see III.1. below). While the first *Caroline* case still concerned rather detailed aspects of the right to a counterstatement[48], the second Caroline ruling[49] of the German Constitutional Court (Bundesverfassungsgericht, BVerfG) is well known to many German jurists because it is one of the very few cases in which a complainant was filed against a decision of the BVerfG before the European Court of Human Rights (ECtHR). In its first decision of 2004, the BVerfG adjusted the relationship between freedom of the press and private life significantly more in favor of the plaintiff, so that the first BVerfG decision was declared contrary to the Convention in this respect.[50] In a second proceeding[51], however, the ECtHR upheld the decision of the BVerfG and thus dismissed Caroline of Monaco's complaint (III.2.).

III. Case Study: Soraya vs. Caroline – A Legal Comparison Between Italy, Germany and Europe

1. Soraya before the Italian courts

Before the *Soraya* decision is discussed, a few remarks on Italian law should be noted. Since 1941, Italian legislation on the protection of copyright and related rights, provides for special portrait rights ("diritti relativi al ritratto") which include the right to one's own image.[52] According to

47 Cass., 27.5.1975, n. 2129, *Giust. Civ.* 1975, I, 1686, 1696.
48 BVerfG ruling 1 BvR 1861/93, 1864/96, 2073/97 of 14 January 1998 = BVerfGE 97, 125 – *Caroline von Monaco I*.
49 BVerfG ruling 1 BvR 653/96 of 15 December 1999 = BVerfGE 101, 361 – *Caroline von Monaco II*.
50 ECtHR, 24.6.2004, No. 59320/00 – *Caroline von Hannover I*.
51 ECtHR (Grand Chamber), 7.2.2012, No. 40660/08 – *Caroline von Hannover II*.
52 See the law of April 22, 1941, No. 633 on the protection of copyright and related rights, Part II.

Art. 96, the likeness of a person may not be exhibited, reproduced or placed on the market without that person's consent. Exceptions are regulated by Art. 97, p. 1 which states that consent is not required if the reproduction of the image is justified. This can encompass the fame of the person depicted or from the exercise of a public office. Further, Art. 21 of the Italian Constitution postulates a fundamental right to freedom of expression and freedom of the press[53], while also failing to include neither a written fundamental right to privacy ("riservatezza") nor a general right of personality. Following the U.S. role model[54], various methodological approaches to standardizing such a (fundamental) right have been discussed in Italian legal literature since the 1950s. There was agreement that the simple "diritto all'immagine" left various gaps in protection that needed to be closed with the right to privacy. As will be shown in a moment, such a gap existed in the case Princess *Soraya Esfandiary-Bakhtiary* of Persia (1932–2001).

The princess, born in Berlin to a Persian father and a German mother, became the Queen of Persia after marrying the Persian Shah *Mohammed Reza Pahlavi* in 1951. The couple divorced in 1958 most likely because *Soraya* was infertile. But even after the divorce, *Soraya* remained a favorite subject of the tabloids as she continued to lead an eventful life. Against this background, the case was ideally suited for the recognition of a general fundamental right to privacy. In contrast to the Court of Appeal in Rome[55], the *Corte di Cassazione*[56] had expressly refrained from taking this step in an earlier decision concerning the broadcast of a feature film about the now deceased opera singer *Enrico Caruso* (1873–1921). In the meantime, however, after the majority of doctrine[57] and the courts[58] favored

53 This provision states: "Tutti hanno diritto di manifestare liberamente il proprio pensiero con la parola, lo scritto e ogni altro mezzo di diffusione. La stampa non può essere soggetta ad autorizzazioni o censure." (Translation by the author: "Everyone has the right to express his or her thoughts freely by word, writing and any other means of communication. The press cannot be subject to authorization or censorship.").

54 In particular, the decisions of the U.S. Supreme Court in the proceedings *Olmstead v. United States* 1928, 277 US 438, 473 et seq. and *Katz v United States* 1967, 389 U.S. 347, 361, were fundamental in this regard.

55 App. Roma, 17.5.1955, Foro it. 1956, I, 793, 797 et seq.

56 Cass., 22.12.1956, n. 4487, *Giust. Civ*. 1957, I, 5 et seq.; 7.12.29160, n. 3199, *Foro it.* 1961, I, 43, 44 et seq.; skeptical on the other hand already Pugliese (1954).

57 See for example Franceschelli (1960) 2.

58 App. Napoli, 20.8.1958, *Giust. Civ.* 1959, I, 1811, 181 et seq.; App. Milano, 5.1.21958, *Giust. Civ.* 1959, I, 1811, 1812 et seq.; 26.8.1960, *Foro it.* 1961, I, 43,

recognizing a right to privacy (*riservatezza*), the *Corte di Cassazione* now expressly concurred for the first time in its *Soraya* decision of 1975.[59]

The facts of this decision can be told comparatively quickly. Repeatedly, Princess *Soraya* was subjected to tabloid media coverage that was devoted in detail to her private life and sometimes concerned the most intimate issues, such as the princess's ability to give birth. The *Corte di cassazione* then recognized a comprehensive right to privacy that not only encompassed the domestic sphere (*intimità domestica*), corresponding to the *right to be let alone*,[60] but also protected acts occurring outside this domestic sphere if they had a clearly private or personal character.[61] The fact that persons in whom there is a public interest could also invoke this right was not seriously doubted by the case law. At most, something else should apply when matters have ceased to be "private" and the work falls within the scope of protection of the right to historical reconstruction (*diritto alla ricostruzione storica*).[62] The right to confidentiality could thus protect broad parts of the personality. It is intended to protect its holders from such interference as is not by lawful means, is not for exclusively speculative purposes, is not contrary to honor, reputation or decency, and is not justified by overriding public interests. Nevertheless, the right to privacy was not conceptualized as a comprehensive right of control, as previously proposed in the literature.[63] This is because the right to privacy only guaranteed an injunction claim, but not a comprehensive entitlement to control one's "own" data.[64]

47 f.; Pret. Forlì, 23.10.1970, *Giur. It.* 1971, I, 2, 113; Pret. Roma, 20.2.1971, *Dir. Aut.* 1971, 330.

59 Cass., 27.5.1975, n. 2129, *Giust. Civ.* 1975, I, 1686, 1696.

60 Vicari (2007) 61; Ubertazzi (2004) 57.

61 Corte cass. 27.5.1975, n. 2129, *Giust. Civ.* 1975, I, 1686: "… il diritto alla riservatezza consiste nella tutela di quelle situazioni e vicende strettamente personali e familiari le quali, anche se verificatesi fuori dal domicilio domestico, non hanno per i terzi un interesse socialmente apprezzabile." ("… the right to privacy consists in the protection of those situations and events that are strictly personal and familiar and which, even if occurring outside the home, have no socially appreciable interest for third parties.").

62 Vicari (2007) 86.

63 Ubertazzi (2004) 62.

64 Ibid.

2. Caroline before the German courts

As in Italy, Germany also provides a simple legal regulation for the use of images that is much older than the German Constitution (the so-called Basic Law = Grundgesetz, in the following: GG). According to Section 22 of the Art Copyright Act of 1907 ("Kunsturhebergesetz") images may – as in Italian law – only be disseminated or publicly displayed with the consent of the person depicted. However, Section 23 (1) provides for exceptions to this principle. This includes when the person depicted is a person of "contemporary history". Since both Princess *Caroline*, born in 1957 as the eldest child of Prince Rainier III of Monaco and the famous US-American actress Grace Kelly, who spent almost her entire life under the observation of the mass media[65], was classified as such a person by the Federal Court of Justice[66], images of her may be taken and disseminated even without her consent. However, Section 23(2) allows an exception if the dissemination or display of the image violates a legitimate interest of the person depicted. This conception, repeatedly confirmed as constitutional by the BVerfG[67], is intended to take account of the fundamental rights of communication guaranteed in Article 5 (1) GG – i.e., freedom of expression, information, the press and broadcasting – on the one hand, and the "general right of personality" guaranteed by Article 2 (1) in conjunction with Article 1 (1) GG on the other.

This fundamental right, developed by the BVerfG[68], guarantees, in the terminology of *Thorsten Kingreen* and *Ralf Poscher*[69], a right to self-*determination*, to self-*preservation* and to self-*presentation*. While the first dimension involves the freedom to determine one's own identity (for example, to choose a name[70] or to live according to one's sexual orientation[71]), the second dimension contains the freedom to withdraw from the public sphere. To specify this legal position, the BVerfG has developed a three-level protection concept that distinguishes between an inviolable intimate sphere, a

65 Her father had already sold the rights to broadcast his wedding with actress Grace Kelly to the production company MGM and arranged for a picture of his just-born first daughter to appear on the cover of "Life" magazine.

66 BGH, 19.12.1995, VI ZR 15/95.

67 BVerfGE 35, 202 (224 f.) – *Lebach*; BVerfG ruling 1 BvR 653/96 of 15 December 1999 = BVerfGE 101, 361 – *Caroline von Monaco II* (para. 90).

68 BVerfGE 7, 198 – *Lüth*; E 54, 148 (153) – *Eppler*.

69 See Kingreen/Poscher (2020), notes 391 et seq.

70 BVerfGE 78, 38 (49) – *Gemeinsamer Familienname*; 109, 256 (266 et seq.) – *Vor(Ehename)*.

71 BVerfGE 47, 46 (73) – *Sexualkundeunterricht*; 121, 175 (190) – *Transsexuelle V*.

private sphere that can only be restricted under strict requirements, and a social sphere that is only weakly protected.[72] Finally, the third dimension, the right to self-*presentation*, includes the protection of personal honour[73], the right to one's own name[74], one's own word[75] and one's own image.[76] Others[77] view the right to one's own image as a subcategory of the right to informational self-*determination*, since it determines what informational value others can derive from an information carrier.[78] A distinction must be made between these legal positions and the constitutional protection against *statements* that are likely to detrimentally effect the individual's public image.[79] Additionally, in these cases the beneficiary requests that the creation of certain (inner) images be prevented. However, these "inner" images, which emerge in the statement recipient's mind, are not created by using "outer images" (e.g., photos) as information carriers, but by written or oral utterances, which give rise to the mental images in our imagination.

The numerous court cases that Princess Caroline of *Monaco*[80] conducted before the German courts, however, concerned not only the written statements about her, i.e., the textual reporting, but also the images that were published to illustrate these texts, in the Boulevard press. The first court case that *Caroline* commenced at the ECtHR concerned the publication of pictures in German tabloids showing the princess with her children and/or a male acquaintance in recognizably private situations in public (such as sporting activities, a visit to a restaurant or a market). While the lower courts approved the publication of the pictures, remarking that Caroline was a person of "contemporary history", the German Federal Court of Justice[81] ("Bundesgerichtshof", BGH) prohibited the publication of a picture showing the princess together with her male acquaintance exchanging inti-

72 BVerfGE 6, 32 – *Elfes*; 32, 373 (379) – *Ärztliche Schweigepflicht*; see, Gusy (2003) 104.
73 BVerfGE 54, 208 (217) – *Böll*.
74 BVerfGE 104, 373 (387) – *Ausschluss von Doppelnamen*.
75 BVerfGE 54, 148 (155) – *Böll*.
76 BVerfGE 35, 202 (220) – *Lebach*.
77 See, e.g., Britz (2008) 71.
78 This is a recognizable continuation of the view mentioned above (I.2.), according to which (external) images are to be treated like other data or information.
79 BVerfGE 99, 185 (193) – *Scientology*; 114, 339 (346) – *Mehrdeutige Meinungsäußerungen*.
80 Who since her (third) marriage with Prince Ernst August of Hanover in 1999 is known as Caroline of *Hanover*.
81 BGH, 19.12.1995 = BGHZ 131, 332.

macies on the terrace of a garden restaurant. Although the terrace was public, the princess had recognizably withdrawn to the "local seclusion" and thus expressed her desire for privacy and her trust that this expectation of being left alone would be respected by third parties. The remaining images, however, could be published. The constitutional complaint filed against this judgment was only successful insofar as the BVerfG[82] upheld the decision of the BGH and additionally prohibited the publication of images showing the children of the princess. In addition to the general right of personality, the right to family (Art. 6 (1) GG) was affected.[83] The publication of the other images, on the other hand, was – according to the BVerfG – covered by freedom of the press.

3. *Caroline before the European Court of Human Rights (ECtHR)*

Caroline then filed an individual appeal against this decision with the ECtHR, arguing that it violated her right to respect for private life under Art. 8 of the ECHR. For the ECtHR, such a case was uncharted territory as there was only one previous case on video recordings of unknown persons in public spaces.[84] With *Caroline* of Hanover, however, the ECtHR were dealing, for the first time, with a prominent complainant who simultaneously held no public office. This is significant because in previous decisions, the Court was inclined to recognize a legitimate interest in reporting on such public officials, such as members of government,[85] because the transparency of their actions is an important element of democracy. In contrast, reporting on a private person – albeit a famous one – who does not exercise sovereignty could only be recognized under very strict conditions.[86] In doing so, the ECtHR clarified that the social status of a person, except for sovereign activity, had no effect on whether the scope of Art. 8 ECHR is affected.[87] However, a person's celebrity may be a consideration

82 BVerfG ruling 1 BvR 653/96 of 15 December 1999 = BVerfGE 101, 361 – *Caroline von Monaco II*.
83 Ibid. 385 et seq.
84 See for instance ECtHR, 17.07.2003, No. 63737/00 para. 37 – *Perry*; ECtHR, 4 May 2000, No. 28341/95 para. 43 et seq. – *Rotaru*; ECtHR, 28 January 2003, No. 44647/98 para. 53. – *Peck*.
85 See for instance ECtHR, 23 April1992, No. 11798/85 para. 46 – Castells; ECtHR, 25 June 2002, No. 51279/99 para. 56 – *Colombani (King of Morocco)*; Neukamm (2007) 228 et seq.
86 ECtHR, 24 June 2004, No. 59320/00 para. 72. – *Caroline von Hannover I*.
87 Ibid. paras. 50–53; EGMR, 21 February 2002, Nr. 42409/98 – *Schüssel*.

in weighing the freedom of the press.[88] Furthermore, the ECtHR made it unmistakably clear that the right to privacy protects not only conduct within a spatially secluded private sphere, but also activities in public[89], if a person may reasonably trust that this will be respected, which was the case here.[90]

Regarding the balance between *Caroline's* private life and the freedom of expression and freedom of the press (Art. 10 ECHR), the ECtHR held that since Caroline did not exercise sovereign powers, she was not a public figure and therefore enjoyed the same protection of privacy as all other private persons.[91] There was hence no general public interest in the private life of such a private person. This merely served one single purpose, namely "... to satisfy the curiosity of a particular readership regarding the details of the applicant's private life"[92]. Consequently, both the text and the photo coverage of *Caroline's* private life had to be prohibited.

The case clarified that it must be taken into account to what extent the person concerned actively shields himself or herself from photojournalism or, on the contrary, may have "attracted" the photojournalism in the first place through correspondingly permissive behavior.[93] In general, the circumstances under which the pictures are taken must also be considered. The more it becomes apparent that the taking of the photographs was perceived as a nuisance for those depicted, the more priority is to be given to the protection of privacy.[94] Furthermore, the intention with which the images are used is also important. If the pictures only serve to satisfy the curiosity of uninvolved third parties[95] (e.g., the readers of a newspaper) and thus to achieve an economic profit[96], priority is to be given to private

88 ECtHR, 24 June 2004, No. 59320/00 paras. 54 et seq. and 61 et seq. – *Caroline von Hannover I*.
89 Ibid. para. 69.
90 Ibid. paras. 51, 53, 69.
91 ECtHR, 24 June 2004, No. 59320/00 para. 62 – *Caroline von Hannover I*.
92 Ibid. para. 65. – Contrary to the German BVerfG, the EctHR thus limited the legitimacy of reporting on individuals' private lives to the private life of politicians, ibid., para. 63 (only in the case of politicians "the press exercises its vital role of 'watchdog' in a democracy by contributing to 'impart[ing] information and ideas on matters of public interest'").
93 According to BVerfG ruling 1 BvR 653/96 of 15 December 1999 = BVerfGE 101, 361 (385) – *Caroline von Monaco II* the person who actively seeks the public has lost his protection of privacy.
94 ECtHR, 24.06.2004, No. 59320/00 paras. 59, 68 – *Caroline von Hannover I*.
95 Ibid. paras. 65, 68.
96 Ibid. para. 77.

life. And finally, it also depends on the range of effects of the dissemination. The wider this range is, the more privacy is to be protected.

4. Comparison between the three decisions

All these decisions have granted the famous complainants protection of privacy outside their own four walls and thus a right to "privacy in public". Here the ECtHR went significantly further than the BVerfG which merely required an active effort to ensure privacy. Simultaneously, the ECtHR set higher standards for photojournalism than, for example, the BVerfG, by stating that a legitimate interest in persons who are not politically active "cannot in principle be denied".[97] The importance of the information should only be taken into account in the process of balancing the right to privacy with other rights such as the freedom of the press or other legitimate interests under Art. 8 (2) ECHR.[98] Under Italian law, the legitimate interest must in turn be checked to ensure that it does not harm the reputation, honor or standing of the person depicted. The decisions of the three courts are therefore quite close in terms of their analysis.

However, the legal construction of the acknowledged right to "privacy in public" is different. The Italian *Corte di Cassazione* was comparatively brief in its general comments, as the right to privacy ("*riservatezza*") primarily serves as a barrier to the conflicting fundamental rights of communication. This construction makes the protection of the privacy of the person depicted more of a concern to be weighed up than an independent fundamental right. This legal construction of a "right to privacy" as a barrier of other rights has prevailed until today.[99] The ECtHR likewise tends to respect the specific needs for privacy protection by balancing the right to a private life (Art. 8 ECHR) with and other human rights. However, the ECtHR also provides a more detailed instruction on how to execute the balancing. For example, one can consider the negative effects of (adverse) image reporting on the private life of the person depicted, which can result both from making (keyword: harassment) and publishing the images. German constitutional law however has more extensive requirements on the use of images. The general right of personality protects, in the form of the

97 BVerfG ruling 1 BvR 653/96 of 15 December 1999 = BVerfGE 101, 361, para. 101 – *Caroline von Monaco II*.
98 Ibid.; BVerfGE 34, 269 (283) – *Soraya*.
99 Ubertazzi (2004) 72–79.

right to self-*determination* and self-*presentation*, not only the right to create one's own "self-image", but also to communicate and maintain this image to the outside world. The result can be a right to suppress "outer" images that deviate from the "self-image" and are embodied in photographs, to suppress the emergence of certain foreign images that contradict the self-image.

It is recognized, however, that there is not and cannot be a general claim to suppress "foreign images", may they be "outer" (e.g., photos) or "inner" (e.g., imaginations) images[100], since "foreign images" are not only an important prerequisite of all communication; they are ultimately unavoidable, true to Paul Watzlawick's saying, "You cannot not communicate."[101] A legal system can therefore only be concerned with suppressing *certain* images of others. For example, because they were obtained under circumstances that violate the private (as in the case of *Caroline*), the intimate sphere of the person depicted, or because they are linked to characteristics that should not be linked based on the prohibition of discrimination so that racist or misogynistic images of others are not created.[102] It is therefore not a question of guaranteeing the *identity* of the "self-image" and the "foreign images". This would indeed be incompatible with the communication freedoms of third parties. Rather, the aim is to suppress such images of others that are based on the unlawful acquisition or transmission of information. As a result, constitutional law, and statutory law, which together decide the illegality of the acquisition and transmission of information, become the decisive medium for conveying the claims to "self-images" and "foreign images".

IV. Soraya and Caroline 2.0: The Impact of Digitalization

It is no coincidence that the two princesses, *Soraya* and *Caroline*, sued major tabloid newspapers with their lawsuits. After all, these tabloids were particularly capable of distorting the plaintiffs' "self-image". This is probably due not only to the high circulation of tabloid newspapers, but because they make extensive use of "outer images" (in this case: photos) to support their reports. And these *outer* images are particularly suitable for creating or changing "inner" images (imaginations) in the recipient

100 Britz (2008) 62.
101 http://www.ciando.com/img/books/extract/3456956002_lp.pdf.
102 See on this Britz (2008) 62 et seq.

about the person depicted, hence they modify their "foreign images" in the public. Here, it is exposed to a principally unlimited communication, during which it can take on constant new meanings. The release of this communicative force in turn may explain why a "turn to the image" has been noticeable in mass and individual communication for several decades. This is essentially due to two developments: first, to an increased use of "outer" images in communication (photos, movies, but also new forms like emojis), and second, to an increasing penetration of more and more areas of social life by images. Against this background – especially in philosophy and cultural studies – the desideratum of an "image science" has been formulated. This desire is expressed in the (more or less, strongly) programmatically intended buzzwords "imagic turn" (*Ferdinand Fellmann*[103]), "pictorial turn" (*W.J.T. Mitchell*[104]), "iconic turn" (*Gottfried Boehm*[105]) or "visualistic turn" (*Klaus Sachs-Hombach*[106]). In the following, it will be shown to what extent digitalization additionally promotes and accelerates these developments. In doing so, the paper intends to focus on the effects of digitalization on "outer" (1.), "inner" (2.) and the relationship between outer and inner images (3.).

1. Impact on "outer" images

Digitalization and especially Internet-based information and communication technology (ICT) creates entirely new possibilities for creating and disseminating "outer" images. Nowadays, practically everyone carries a smartphone and thus a photo camera around with them to use it at any time. The "outer" images obtained in the process are made accessible to certain third parties or a basically unlimited public via the numerous channels provided by the Internet. This has resulted in a veritable "flood of

103 Fellmann (1991), who sees images no longer merely as systems of symbols, but as relational structures that can provide an adequate foundation for a theory of mind.

104 Mitchell (1994) 11 et seq., and (1997). Mitchell is concerned with an analysis of the use of images in everyday culture and in the sciences with the aim of rehabilitating thinking in images.

105 Boehm (1994) who is more concerned with immunizing the "aura" (Walter Benjamin) of artworks against the inflationary use of images.

106 Sachs-Hombach (2009) who is skeptical about the term "turn", at least if it is supposed to refer to a similar upheaval as the "linguistic turn" initiated by Wittgenstein and others, which at least resulted in a turn of philosophy away from the philosophy of consciousness towards linguistics.

images"[107], the evaluation of which probably depends on the perspective. For professional photographers and other creators, the insight that digital photography makes it possible for every user to become a photo artist without further ado[108] could be described on the one hand as the "democratization" of art, but on the other hand also as its "banalization". For recipients, the increasing visualization of communication – for example, through photos, videos, emojis or memes – can be perceived as either a gain in information, or a sensory overload. And finally, the evaluation of the increasing communication of *outer* images (e.g., photos of individuals published online) from the perspective of those portrayed probably depends decisively on the extent to which the communicated image of others is compatible with self-images.

Analysing this phenomenon a little further, let us first turn to the effects of digitalization on outer *foreign* images. Much of what has been said could also apply to outer *self-images* which have gained astonishing popularity in the age of digitalization in the form of the "selfie"[109]. Regardless of whether they are foreign or self-images, digital images are always "outer" images in the sense of digitally encoded data or information. As such, they are accessible via the World Wide Web within a very short time to an audience of hitherto unknown dimensions all over the world – and at any time. What represents a phenomenal progress from the point of view of communication freedoms is an enormous problem from the perspective of protecting personality and privacy (see IV.2 below).

In relation to the individual ("outer") image, the conclusion seems obvious that it is in danger of being lost in the flood of images. This is likely to lead to an even greater loss of the "aura" of the image than *Walter Benjamin* stated at the beginning of the age of photography.[110] Indeed, as a data and information carrier, each digital image is a set of data without an embodied potentially accessible by any computer connected to the Internet. At the same time, the modern technology of digital image processing offers numerous possibilities for image manipulation[111] which may once again contribute to discrediting the aura of images even more. Finally, images – especially because of their emotional resonance – can be commer-

107 Dreier (2019) 36 and 313 ("Bilderflut"); see also Ullrich (2022).
108 Ohashi (2018) 241 et seq.
109 This is emphasized, e.g., by Wulf (2018), 196 et seq; see also Ullrich (2019).
110 Benjamin (1935/1996) 11 et seq.
111 See the contribution by Hägle (2022), as well as the various contributions in: Dreier/Jehle (2020); Baudrillard (1991), 112 points out the danger of a "hyperreality" in this context.

cialized[112] through various online channels to an even greater extent than previously. On the other hand, precisely because of their ubiquity, digital images are also able to achieve effects that "analogue" images can only achieve with difficulty. Because they can be transmitted and retrieved globally, they easily cross not only national borders, but also cultural contexts. Also, it is typically no longer individual people who "steer" the "fate" of an image, but at best emergent collectives of people.[113] However, one could also formulate the assumption that images are increasingly taking on a life of their own in the age of digitalization.[114]

2. *Impact on "inner" images*

The ubiquity of ("outer") images described above is likely to have an impact in many respects on the emergence of "inner" (foreign and self-) images. What exactly these effects are is a question that should be answered by (media) psychologists or cultural scientists. A (constitutional) analysis of these effects must limit itself to some tentative assumptions[115]: first, it is conceivable that the ubiquity of "outer" images leads to a loss of "inner" images, for example in the form of a lack of imagination. Incidentally, something similar could be said for the reduction of other mental performances, such as those of memory: if the Internet, due to the circumstances just outlined (Section 4.1), really does not forget[116], it functions as an externalized collective memory whose reservoir of outer images can then be accessed on an occasion-related basis.

The information value of images, as already stated above[117], is to be judged as ambivalent. On the one hand, images seem to be suitable to simplify complex issues and to communicate information independently of the medium language. This is likely to be an invaluable advantage, especially in a globally networked world. However, this could also entail the danger of reducing the ambiguity inherent in the language of the text and thus contributing to a "unification of the world"[118]. On the other hand,

112 Dreier (2019) 185.
113 See, e.g., Münker (2009).
114 To that effect already Bredekamp (2010).
115 For a summary of the argument developed in this article from a constitutional see Chapter V.
116 Dreier (2019), 44.
117 See I.2.
118 See Bauer (2018).

there are many indications that images can convey far more information than text, so that a global discourse on images could perhaps even enable entirely new sensory horizons and forms of communication.[119]

3. *Impact on the relationship between the "inner" and "outer image"*

While one may only speculate about the effects of digitalization on the emergence of "inner" images from the perspective of (constitutional) jurisprudence, it is at least possible to make somewhat more substantial statements about the effects of digitalization on the relationship between "inner" and "outer" images. First, the Internet, with its unimaginably large quantity of (outer) images, leads to their increasing internalization, i.e., their reception by a previously unknown quantity of people. At the same time, inner images can also be digitally externalized (e.g., selfie) making them accessible again for internalization in this form. Digitalization thus offers the fundamental rights of communication – both those of the "sender" and those of the "recipient" – previously unimagined potential for development. The use of digital image technology poses a threat above all to the fundamental rights of those who are depicted in foreign (third-party) or self-images or whose (intellectual) property owns the outer images, namely if third parties use these images against the consent of the holders of the fundamental rights. Clear and effective rules for dealing with digital images are needed to protect the fundamental rights to privacy, general personal rights and property that are affected in this respect, and these rules must be outlined in the following concluding section.

V. *In the End: Constitutional Requirements for the Dissemination of Digital Images*

Constitutional law protects both the use of "outer" and "inner" images. "Outer" images can be an important medium of fundamental communication rights (e.g., freedom of expression, freedom of the press or freedom of art), while the formation of "inner" images falls under the constitutional protection of privacy. This fundamental right, which – with varying scope

119 See in this respect, e.g., the attempts of an intercultural theory of images by Seitz/Graneß/Stenger, Bildtheorie und Interkulturalität (2018) 1 et seq.

and based on different legal constructions – is recognized in German, Italian and European law, also protects the freedom to form an (inner) "self-image". At the same time, this freedom does not extend so far as to interfere with the freedom of others to form a foreign image of others. There is therefore no constitutional claim to the identity of self-image and image of the other. However, the right to privacy does offer protection, as the *Caroline* case in particular demonstrates, against extremely distorting images of others. For example, against extreme deviations from self-image and image of others, whereby the conflicting fundamental rights of communication must also be observed in this respect. Thus, it is not the case that the European and the Member States' (fundamental) legal systems do not yet have rules for resolving these conflicts of fundamental rights. On the contrary, the comparative case study (IV.) has just shown that the Italian, the German, and the European constitutional law have found dogmatic ways to resolve the conflict between private life and the protection of personality with fundamental rights of communication. Despite all the disruptions, it has caused, digitalization does not directly give cause to reject the aforementioned models of balancing the affected interests. The need to use "outer" images as a means of communication has remained just as relevant in the digital age as the need to create "inner" ("self" and "foreign") images. At most, it would be worth considering making certain adjustments where digitization has shifted the "balance of power" between privacy or protection of personality and communication freedoms.

One such attempt is the "right to be forgotten" developed in the literature[120], adopted by the CJEU[121] and now codified in Article 17 of the General Data Protection Regulation (GDPR). This right responds to the fact that information (may they be text or images) circulating on the Internet is typically stored not only on one web server, but several servers or end devices. This information can also be shared again from these sources at any time. This is to be expressed with the sentence that the Internet "does not forget". In this respect, the right to be forgotten is not just a conventional right to delete a digital image (or other sorts of information) on a website from the respective content provider. Rather, the right to be forgotten also obliges service providers such as search engines to delete the corresponding links, thus making it more difficult to access these images. Thus, to find a corresponding digital image, one must firstly know of its existence and secondly, the website on which it was published.

120 Mayer-Schönberger (2011).
121 ECJ, Case C-131/12 of 13.5.2014 – *Google Spain*.

The extent to which further requirements for dealing with digital images arise from European or member state constitutional law on the protection of private life or personality protection depends on the respective constitutional legal system. The higher the requirements are, the greater the need for action. If – as in Italian law, for example – only the dissemination of degrading or defamatory images is to be prohibited, such a rule is easier to achieve than the high standard of "image sovereignty"[122] that underlies the German right to informational self-determination. As far as can be seen, German, Italian and – except for the "right to be forgotten" – European constitutional law has so far relied on the balancing models developed for the "analogue world" and lack standards that would respond specifically to the changing digital "reality of images" (IV.). If further standards were applied by the courts, it would make sense, in the opinion of the author, to closely review the intention for which the image was published or disseminated. If, for example, an image is only used to harm others, as it happens often in the context of "hate speech", this should weigh in favour of the privacy of the person depicted. This applies above all – evidently – to manipulated images. In contrast, the dynamic and rapid dissemination of images on the Internet means that it is probably only possible to determine the target group of an image ex post, i.e., at a point in time when it is already too late. Finally, the standards of (image) ethics could provide orientation. Here, the authenticity / genuineness of the image would come to mind, which would be expressed in the current consideration model at best under the aspect of intention. Thus, if an image is recognizably manipulated, for example to use it for "hate speech" or "fake news" purposes, then this intention must be utilized in favour of privacy when weighing it against freedom of expression. For other aspects, the (legally non-binding) press code for print journalists (NPPA Code of Ethics) could serve as a model. Ultimately, however, it is solely up to the constitutional courts, the ECtHR and the CJEU to establish these rules.

122 Critical on this Belting (2001) 50: "... der Mensch" sei "nicht als Herr seiner Bilder" anzusehen, "sondern als Ort der Bilder, die seinen Körper besitzen." (quoted from Dreier (2019) 32). ("… man (is not to be regarded) as the master of his images, but as the locus of the images that possess his body").

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