

HEADNOTES

to the Order of the Second Senate of 31 January 1973
2 BvR 454/71

1. The fundamental right under Article 2(1) of the Basic Law also protects legal interests that are essential to the development of one's personality. Subject to certain limitations, this fundamental right also includes the right to one's own speech, just as it includes the right to one's own image. Therefore, every person may, in principle, determine for themselves who may record their speech, and for whom, if at all, their voice recorded on a sound recording device may be played.
2. However, this does not rule out that in cases where overriding public interests imperatively require it, the interest – meriting protection – of the accused to have secret tape recordings excluded from use as evidence at trial must stand back.

FEDERAL CONSTITUTIONAL COURT - 2 BvR 454/71 -

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaint of

Mr V...,

– authorised representative: ...

against the Order of the Osnabrück Regional Court of 3 May 1971 - 12 Qs
 86/71 -

the Federal Constitutional Court – Second Senate –
with the participation of Justices

Vice-President Seuffert,
Rupp,
Geiger,
Hirsch,
Rinck,
Rottmann,
Wand

held on 31 January 1973:

The Order of the Osnabrück Regional Court of 3 May 1971 - 12 Qs 86/71 - violates the complainant's fundamental right under Article 2(1) in conjunction with Article 1(1) of the Basic Law. The decision is reversed insofar as the court dismissed the complaint

against the judicial order to use the tape recording handed over to the police as evidence (record entry no. 10319/70). To this extent, the matter is remanded to the Osnabrück Regional Court.

[...]

REASONS:

A.

I.

The constitutional complaint concerns the admissibility as evidence of a secretly made private tape recording in the criminal investigation of the complainant on suspicion of tax evasion, fraud and the falsification of documents. 1

1. In essence, the facts of the case are as follows: 2

a) On 11 May 1970, Mr and Mrs B. sold to the complainant a residential and commercial building in the city of Osnabrück. [...] 3

b) On 14 December 1970, Mr B. brought criminal charges against the complainant. He explained that the parties had verbally agreed on a sales price of DM 495,000 for the building and DM 20,000 for fixtures. At the complainant's request, in order to reduce the amount of real property transfer tax due, a sales price of only DM 425,000 had been attested by the notary. On 11 May 1970, at 6:45 p.m. and before the attestation of the sales contract, the complainant had paid him the difference of DM 70,000 in cash 'under the table', and had asked him and his wife to sign a prepared receipt. According to Mr B., this document stated the following: 4

Receipt 5

We hereby confirm having received an interest-free loan of DM 70,000 – seventy thousand – in cash from Herbert V. 6

Mr B. said that he was the only one to sign this receipt. They had agreed that the complainant would destroy it upon conclusion of the notarised contract. On the evening of 11 May 1970, the complainant had, in his presence, torn a document to pieces. But Mr B. was not sure whether it had been the original receipt. There were fragments of the receipt's text on the scraps of paper that the complainant had handed him, but not his signature. 7

The day the last instalment was due, the complainant showed him a receipt for a loan of DM 70,000 and said he would set off this sum against the remaining balance of DM 70,000. This receipt, which is included in the case file, reads as follows: 8

Receipt 9

We hereby confirm having received an interest-free loan of DM 70,000 – seventy thousand – in cash from Herbert V. The loan can be terminated with 3 months' notice. Set-off = upon payment of balance of sales price/fixtures at the latest. 10

Next to the date, 11 May 1970, it bears the signatures “Erwin B.” and “Anni B.”.	11
However, Mr B. claims that neither he nor his wife signed a loan document in this form and that the document is a forgery.	12
During his interrogation by the police, the complainant stated that the sales price attested by the notary was the price the parties had in fact agreed upon. He claimed not to know anything about a verbal agreement on a payment ‘under the table’. At the request of Mr B., he had supposedly granted him an interest-free loan of DM 70,000 in cash on 11 May 1970, at 8:00 p.m. in Mr B.’s flat. The receipt on file was issued in this context, he claimed.	13
c) The relevance of the tape recording mentioned above is as follows:	14
Purportedly, the tape recording is of a conversation between the complainant and Mr and Mrs B. in August 1970, i.e. after the attestation of the building purchase, and was made without the complainant’s knowledge. Mr B. claims that at the time of the recording, he was not yet aware of the existence of the loan receipt that was presented to him later. The recorded conversation had taken place because the complainant had indicated that he wanted to pay a lower price due to a mortgage rate increase. In the recorded conversation, they had, among other things, discussed the adequacy of the sales price, ‘under the table’ payments and a corresponding receipt.	15
On 23 February 1971, Mr B. handed the tape recording over to the police for investigation. [...]	16
2. On 10 March 1971, at the request of the public prosecution office, the Osnabrück Regional Court ordered, pursuant to §§ 94, 98 and 110 of the Code of Criminal Procedure, the seizure of some of the documents secured during a search of the complainant’s flat on 3 March 1971. In addition, it ordered the use of the tape recording handed over to the police as evidence, on the grounds that it might be of significance for the investigation.	17
The complaint filed by the complainant against that order was only partially successful. [...] In its order, the Regional Court observed the following on the admissibility of the tape recording as evidence:	18
While the use of a secretly made tape recording as evidence is, in principle, impermissible because the secret nature of the recording violates the speaker’s right to the free development of their personality (Art. 2(1) of the Basic Law), [...] in the absence of other appropriate evidence, the recording is potentially the only proof that the complainant has committed a criminal offence. [...]	19
II.	
1. The constitutional complaint is directed against this order. The complainant claims a violation of his fundamental right under Art. 2(1) of the Basic Law [...].	20
[...]	21-22
	23

2. The Federal Minister of Justice, who submitted a statement on behalf of the Federal Government, considers the constitutional complaint to be admissible and well-founded.

[...] 24

B.

I.

The constitutional complaint, lodged within the statutory time limit, is admissible. 25

[...] 26-27

II.

The constitutional complaint is well-founded. 28

By allowing, without the complainant’s consent, the use of the secret tape recording in the criminal proceedings against him, the challenged order violates the complainant’s fundamental right under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 29

1. In its established case-law, the Federal Constitutional Court has affirmed that the Basic Law recognises, for each citizen, an inviolable part of private life which is beyond the reach of public authority (BVerfGE 6, 32 <41>, 389 <433>; 27, 1 <6>; 27, 344 <350 and 351>; 32, 373 <378 and 379>; 33, 367 <376>). The constitutional requirement to respect this core that encompasses the intimate sphere of the individual is based on the right to the free development of one’s personality, as guaranteed by Art. 2(1) of the Basic Law. When determining the content and scope of this fundamental right under Art. 2(1) of the Basic Law, it must be taken into account that, according to the fundamental precept in Art. 1(1) of the Basic Law, human dignity is inviolable and must be respected and protected by all state authority. Moreover, under Art. 19(2) of the Basic Law, the essence (*Wesensgehalt*) of the fundamental right under Art. 2(1) of the Basic Law may also not be infringed upon (BVerfGE 27, 344 <350 and 351>; 32, 373 <379>). The core of private life enjoys absolute protection, and even overriding public interests cannot justify an interference; this protection is not subject to a balancing of interests under the principle of proportionality. 30

However, not the entire domain of private life enjoys the absolute protection afforded by the fundamental right under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law (BVerfGE 6, 389 <433>; 27, 1 <7>; 27, 344 <351>; 32, 373 <379>; 33, 367 <376 and 377>). Rather, as a citizen connected to and bound by the community, every person must tolerate state measures that serve overriding public interests and that strictly adhere to the requirement of proportionality, unless these infringe upon the inviolable part of private life. In this respect, the principles which the Federal Constitutional Court has developed in its case-law on the constitutional permissibility of interferences with physical integrity apply accordingly (BVerfGE 16, 194 <201 and 202>; 17, 108 <117 and 118>; 27, 211 <219>; 27, 344 <351>; 32, 373 <379>). 31

2. Art. 2(1) of the Basic Law guarantees every person the right to the free development of their personality, insofar as they do not infringe the rights of others or violate the constitutional order or moral law. This fundamental right also protects legal interests 32

that are essential to the development of one's personality. Subject to certain limitations, this fundamental right also includes the right to one's own speech, just as it includes the right to one's own image. Therefore, every person may, in principle, determine for themselves who may record their speech, and for whom, if at all, their voice recorded on a sound recording device may be played.

On a tape recording, a person's speech and voice are detached from this person and become objects at the disposal of others. The inviolability of someone's personality would be seriously curtailed if others could freely use words spoken in private, without the consent of the person concerned or even against the person's will. Human communication free from fear or worry would be largely impossible if everyone were aware that one's every utterance – a remark that might be unreflected or intemperate, a tentative opinion expressed in an unfolding conversation, or an expression comprehensible only in this context – could be brought up on another occasion and in a different context to bear witness against the person using the content, expression, or tone of the statement. Every person should be able to conduct a private conversation without the suspicion or fear that a secret recording of it could be used without their consent or even against their declared will. § 298 and § 353d of the Criminal Code for substantive criminal law, [...] and the case-law of the Federal Court of Justice on the general right of personality, for private law [...] have long reflected this concern. 33

3. The conversation between Mr and Mrs B. and the complainant was confidential. It was recorded secretly. The complainant opposed the use of the recording as evidence. Under these circumstances, such use in the criminal investigation constitutes an interference with the constitutionally guaranteed right to one's own speech. 34

There are indeed cases in which a tape recording made without the speaker's knowledge does not fall within the scope of protection of Art. 2(1) in conjunction with Art. 1(1) of the Basic Law from the outset because, in such situations, it is generally agreed that the right to one's own speech is inapplicable. [...] But this is not the case here. The conversation took place between three persons. They were discussing a contractual agreement. The complainant did not have to expect that his words were being recorded. He is therefore entitled to invoke the right to one's own speech guaranteed by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 35

4. Whether a secret tape recording affects the absolutely inviolable part of private life or merely the part of private life where state interference may be permissible under certain circumstances is difficult to determine in the abstract. This question can be answered satisfactorily only on a case-by-case basis, taking into account the particularities of each situation. 36

The present case concerns a business conversation. Partners to a transaction were discussing their differences in respect of the purchase of a building and the adequacy of the agreed price. They did not discuss any highly personal matters that could be attributed to their inviolable intimate sphere. 37

5. Since this is not a matter of an intrusion of public authority into the absolutely protected part of personality, the use of the tape recording would be permissible if it were justified by an overriding public interest. This is, however, not the case. 38

a) The Basic Law attributes high standing to the right to the free development of one's personality. State measures that impair it are, if at all, allowed only if the requirement of proportionality is strictly observed. However, the Basic Law also attaches particular importance to the effective administration of justice. [...]

There are many ways in which the constitutionally guaranteed right to the free development of one's personality and the effective administration of justice can come into conflict with one another. A fair balance to resolve these tensions can only be found if the protection requirement under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law is used as an ongoing corrective to the interferences that seem necessary for the effective administration of justice (cf. BVerfGE 19, 342 <347>; 20, 45 <49>, 144 <147>). This means that it must be determined in every case which of these two constitutionally significant principles carries greater weight. 40

b) In such a balancing, the interest – meriting protection – of the accused is taken into account by the Code of Criminal Procedure, by way of its protection *inter alia* against self-incrimination (§ 136(1) second sentence of the Code of Criminal Procedure). Beyond this specific safeguard, the accused also requires protection when a statement recorded on tape without their knowledge is used against them in criminal proceedings. 41

c) However, this does not rule out that in cases where overriding public interests imperatively require it, even the protected interest of the accused to have secret tape recordings excluded from use as evidence must stand back. 42

Thus, generally, constitutional objections will not arise in cases involving serious crime – be it against life and limb, against the existential foundations of the free democratic basic order, or against other legal interests of comparable magnitude – where the law enforcement authorities, as a last resort, have used tape recordings secretly made by a third party to establish the identity of offenders or to exculpate persons wrongly accused of a criminal offence. [...]

Yet here – as in all cases – it is crucial that such an interference be compatible with the principle of proportionality in a balancing that takes all the circumstances of the case into account. This means that on the one hand, it must be determined how seriously the intended use of a specific tape recording – in view of its content and form – would interfere with the right to the free development of the personality of the affected person. On the other hand, when balancing the thus determined severity of the interference with the right to the free development of one's personality against the legitimate requirements of the criminal justice system, the focus must be not only on the charged offence in its abstract constituent elements, but on the specific wrongdoing considered in the case at hand. Otherwise, a proper and fair balancing would be impossible, given the multitude of possible acts that may in fact be constituent elements of many offences. 44

In addition, it is relevant to consider, when all other legally permissible possibilities have been exhausted, whether the use of the tape recording is the only means of convicting the offender of a serious crime or of exculpating the accused. 45

Finally, it is important to take into account whether and to what extent there is a legal and factual guarantee that knowledge of the statements recorded on the tape, which may possibly not be relevant to the criminal proceedings, will be restricted to those 46

