HEADNOTE
to the Order of the First Senate of 14 February 1973
1 BvR 112/65

The case-law developed by the civil courts according to which financial compensation may also be claimed for non-material damage is compatible with the Basic Law.

FEDERAL CONSTITUTIONAL COURT
- 1 BvR 112/65 -

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaint of

1. *Die Welt* publishing company, represented by its Managing Director..., 2. Mr V...

– authorised representative: …

against a) the Order of the Federal Court of Justice of 8 December 1964 - VI ZR 201/63 -,

b) the Order of the Karlsruhe Higher Regional Court of 3 July 1963 - 1 U 7/63 -,

c) the Order of the Mannheim Regional Court of 24 August 1962 - 7 O 73/61 -

the Federal Constitutional Court – First Senate –
with the participation of Justices
President Benda,
Ritterspach,
Haager,
Rupp-v. Brünneck,
Böhmer,
Faller,
Brox,
Simon

held on 14 February 1973:

The constitutional complaint is rejected.

REASONS:

A.

1. Pursuant to § 249 of the Civil Code, a person liable for damages must restore the injured person's position to the position that would have existed had the circumstances giving rise to such liability not occurred. This principle of 'natural restitution' (restitution in kind) also applies to the compensation of non-pecuniary, 'non-material' damage. In the case of violation of a person's honour, for instance, the insulted person's loss of reputation may be redressed by retraction or by publication of a judgment requiring retraction of the insulting statement. 1

However, restitution in kind requires that restoration to the former position is possible, however. If, for factual reasons, such restoration leads to no or to insufficient compensation for damage, the injured party may request financial compensation pursuant to § 251(1) of the Civil Code. In respect of non-material damage, however, this principle is limited by § 253 of the Civil Code: According to this provision, financial compensation may only be requested in the cases specified by law, which are mainly damages for pain and suffering (*Schmerzensgeld*) […]. Beyond the scope of the Civil Code, specific grounds for non-material damage are set out in other legislation […]. 2

2. […] 3

3. […] 4-5

There was […] general approval in 1954 when the Federal Court of Justice first recognised the general right of personality (BGHZ 13, 334 <337 and 338>). The court held that the right to human dignity and to the free development of one's personality protected by Arts. 1 and 2 of the Basic Law is also a right under private law, which must be respected by everyone in private legal transactions. According to the court, the general right of personality is protected under § 823(1) of the Civil Code [which lists the rights and interests whose injury can lead to liability for damages]; however, the assessment of whether this right was violated requires a thorough and detailed balancing of the legal interests involved. In its later decisions, the Federal Court of Justice sought to specify the blanket-clause-like scope of the general right of personality (cf. BGHZ 15, 249; 20, 345; 26, 52; 27, 284; 31, 308). 6

4. While the general right of personality as such was quickly accepted by the courts and legal scholars, the question whether applicable law allowed affected persons to claim financial compensation for non-material damage in case of violation of the right of personality remained controversial. 7

[…] 8-11

5. The courts did not wait for the legislator to enact statutory provisions on the protection of one's personality. In 1958, the Federal Court of Justice first granted financial compensation to a person whose right of personality had been violated through non-pecuniary damage in the so-called *Dressage Rider* judgment (*Herrenreiter-Urteil*) […]. […] 12

In a number of further decisions, the Federal Court of Justice confirmed and developed the standards laid down in that judgment. […] 13

[…] 14

6. The civil courts and legal scholarship largely followed the view of the Federal Court of Justice […]. The Federal Labour Court and the Federal Finance Court also adopted it. 15

[…] 16

B.

1. The complainant in the present proceedings is the publishing company *Die Welt*, which is part of the Axel Springer Group. In the past, it also published the weekly magazine *Das Neue Blatt mit Gerichtswoche*, which was sold all over Germany. Until June 1961, complainant no. 2 was the managing editor of that magazine, which mainly entertained readers with its sensational reporting on societal matters. In 1961 and 1962, the magazine repeatedly ran illustrated articles on the Shah of Iran's divorced wife, Princess Soraya Esfandiary-Bakhtiary. On the first page of the 29 April 1961 issue, a so-called special report was published […], which included an 'exclusive interview' that Princess Soraya was supposed to have given to a journalist. The report contained statements by the princess about her private life. The interview had been sold to the magazine by a freelancer; it was purely fictional. In its 1 July 1961 issue, the magazine published a brief correction by Princess Soraya, indented within a new report […]. In this correction, she stated that the interview had in fact not taken place. 17

The Regional Court granted Princess Soraya's action for damages on the basis of the violation of her right of personality and declared the complainants jointly and severally liable for DM 15,000. The complainants' appeals were unsuccessful. The Federal Court of Justice held the dissemination of the fictional interview on Princess Soraya's private life to be an unlawful violation of her right of personality. […] 18

Based on its earlier decisions (BGHZ 35, 363 and 39, 124), the Federal Court of Justice set out that financial compensation could be demanded in respect of severe violations of personality rights if there were no other way to properly redress the non-material damage caused by the interference. According to the court, these requirements were met here. When assessing the interference with the right of personality, the fact that the fictional interview had been disseminated widely and the fact that it had been published in pursuit of purely commercial interests carried particular weight. The court held that publishing the correction did not redress the damage inflicted. 19

2. In their constitutional complaint, the complainants claim a violation of their fundamental rights under Art. 2(1) in conjunction with Art. 20(2) and (3), Art. 5(1) second sentence and (2) and Art. 103(2) of the Basic Law; as a "precautionary" challenge, they also claim a violation of their fundamental rights under Arts. 3, 12 and 14 of the Basic Law. […] 20

[…] 21-22

C.

The constitutional complaint is unfounded. 23

I.

1. The court case that led to the challenged decisions is a private law case. It is not for the Federal Constitutional Court to review the interpretation and application of private law as such. However, the objective system of values enshrined in the fundamental rights provisions of the Constitution also guide the interpretation of private law; as fundamental decisions enshrining constitutional values they are applicable to all areas of law. It is incumbent upon the Federal Constitutional Court to ensure that this permeating effect of fundamental rights on other areas of law (*Ausstrahlungswirkung*) is observed. Therefore, the Court reviews whether the civil courts' decisions are based on a fundamentally incorrect understanding of the scope and impact of a fundamental right or if the outcome of a decision violates the fundamental rights of one of the parties (in this regard, cf. in general BVerfGE 7, 198 <205 *et seq*.>; 18, 85 <92 and 93>; 30, 173 <187 and 188, 196 and 197>; 32, 311 <316>). 24

In the case at hand, the complainants not only object to the outcome of the civil court decisions; they primarily challenge the method the courts used to reach that outcome. The complainants dispute that judges, being bound by law, are allowed to grant financial compensation in such cases. […]. 25

2. In the private law case at hand, the statutory basis for the claim was § 823(1) of the Civil Code. The Federal Court of Justice also includes the "general right of personality" in the rights listed in that provision, citing its established case-law, in particular the detailed reasons given in its decision of 25 May 1954 (BGHZ 13, 334); it holds the complainants' behaviour to be a violation of this right. It is not for the Federal Constitutional Court to evaluate the 'correctness' of this case-law insofar as its reasons and development adhere to private law doctrines. It is sufficient to establish that the general right of personality – still rejected by the drafters of the Civil Code – has asserted itself over the course of decades of debate in legal scholarship, finally attaining recognition in the above-mentioned decision of the Federal Court of Justice, which has allowed it to become an integral part of private law […]. 26

There is no reason for the Federal Constitutional Court to object to this case-law of the Federal Court of Justice on constitutional grounds. The free development of human personality within the social community and its dignity lie at the core of the system of values of the fundamental rights (BVerfGE 6, 32 <41>; 7, 198 <205>). It must be respected and protected by all state authority (Arts. 1 and 2(1) of the Basic Law). In particular the individual's private sphere is afforded such protection. This is the domain in which individuals wish to be left alone, make their own decisions for themselves and not be disturbed by interferences of any kind (BVerfGE 27, 1 <6>). In private law, the general right of personality also serves to ensure this kind of protection; it fills gaps in the protection of one's personality, which have persisted despite the recognition of individual personality rights and have become ever more noticeable over time for different reasons. Therefore, the Federal Constitutional Court has never objected to the recognition of a general right of personality in the case-law of the civil courts (see especially BVerfGE 30, 173 <194 *et seq*.>; 34, 118 <135 and 136> and BVerfGE 34, 238 <246 and 247>). 27

3. § 823(1) of the Civil Code is a general law within the meaning of Art. 5(2) of the Basic Law (BVerfGE 7, 198 <211>; 25, 256 <263 *et seq*.>). Given that the general right 28

of personality, according to the interpretation that is not objectionable under constitutional law, is to be included in the rights listed in that provision, the Constitution affords it the ability to restrict the fundamental right to freedom of the press invoked by the complainants. The potential impact of the general law is constitutionally reinforced, as established above, by the mandate of protection under Arts. 1 and 2(1) of the Basic Law. However, the fundamental importance of freedom of the press for the free democratic order must not be ignored. It retains its weight in the balancing that is required in case of conflict between the parties' constitutionally protected interests in a private law relationship (BVerfGE 25, 256 <263>; 30, 173 <196 and 197>). When balancing these interests, the general right of personality cannot claim precedence *per se*; depending on the specific case, freedom of the press may have a restrictive effect on the right of personality (BVerfGE 7, 198 <208 and 209>).

4. The challenged decisions gave precedence to the protection of the personal sphere of the initial proceedings' plaintiff over freedom of the press This approach does not raise any constitutional concerns, given the established facts of the case. According to these, the complainants published a fictional interview with the initial proceedings' plaintiff in an entertainment magazine in which events from the plaintiff's private life were depicted as though she had described them herself. The courts considered this an unauthorised interference with the plaintiff's private life, given that it is for her to decide whether and how she wishes to disclose parts of her private life to the public. 29

Indeed, in this situation, the complainants cannot invoke freedom of the press to justify their actions. It would be going too far if the entertainment and sensational press were generally denied the protection of this fundamental right, as decided by the Regional Court based on individual views in legal scholarship. The term 'press' must be interpreted broadly and formally; irrespective of which standards are applied, it must not hinge upon an assessment of the individual press product. Freedom of the press is not limited to the 'serious' press ([…]; see also BVerfGE 25, 296 <397> and – for radio – BVerfGE 12, 205 <260>). However, this does not mean that the protection derived from the fundamental right must be granted to any press medium in any legal context and for any statement in the same way. When balancing freedom of the press against other constitutionally protected legal interests, it can be taken into account whether the press discusses a public interest matter in a serious and fact-based way in a specific case, thus satisfying the readership's need for information and contributing to the formation of public opinion, or whether it merely satisfies the need of a more or less broad readership for superficial entertainment. 30

In the case at hand, the need for protection of the private sphere of the plaintiff in the initial proceedings was not countered by an overriding public interest in public discussion on the matters covered in the interview. Readers do not have a right to be 'informed', by way of fictional reports, about the private life of a person who has been of public interest at some point. And even if such an interest were recognised as justified in this area, a fabricated interview cannot contribute to true opinion-forming. Ultimately, the protection of the private sphere must thus take precedence over press statements of this kind. 31

II.

If a general law potentially restricts freedom of the press, the manner in which such a restriction applies is solely determined by the content of that specific law. This primarily 32

means that only sanctions authorised by the law may be imposed on the press and effectively restrict its freedom. On that basis, the complainants claim there was no general law that provides for financial compensation for non-material damage when the right of personality is violated and that in fact, § 253 of the Civil Code even explicitly excluded such a claim. According to the complainants, when the courts granted such compensation claims, they thus crossed the boundary within which it was constitutionally permissible to restrict freedom of the press; furthermore, the courts imposed a sanction that violated freedom of the press in substantive terms, because it was directed one-sidedly against the press and imposed an unpredictable risk which would threaten its existence in the long run. This, they claim, fundamentally failed to recognise the essence and significance of freedom of the press in a free and democratic state.

As regards these submissions, too, it must be highlighted that the Federal Constitutional Court is not competent to decide whether the legal consequence that the Federal Court of Justice derived from the presumed violation of the general right of personality can be justified on grounds of private law doctrine, i.e. whether it was possible and advisable, from a private law perspective, to pursue the recognition of the general right of personality thus far, and to grant this right the protection provided by similar constituent elements set out in § 847 of the Civil Code by granting a claim for compensation. 33

In respect of this question, too, the Federal Constitutional Court must limit itself to reviewing the constitutional aspects of the case-law. In doing so, the following questions arise: First, does the substantive outcome of the decisions as such already violate the fundamental right to freedom of the press? Secondly, is it compatible with the Basic Law to bring about this outcome by way of judicial decision despite the lack of an unequivocal basis in written law? 34

An assessment of both questions does not raise any constitutional concerns in relation to the case-law of the Federal Court of Justice insofar as it forms the basis for the decisions challenged here. 35

III.

It is only natural that violations of the general right of personality are mainly committed by press organs as they possess the technical means for obtaining and disseminating information, which makes it relatively easy for them to intrude into the private sphere of individuals. However, examples from the case-law show that the civil courts also apply the rules they developed for the protection of the general right of personality to areas other than the press (cf., e.g., BGHZ 26, 349; 30, 7; 35, 363). For that reason alone, this is not a case of “special rights against the press”. 36

Imposing excessively strict sanctions, including unpredictably large claims for damages, would indeed restrict freedom of the press in an unconstitutional manner, in particular if the legal requirements for such claims were not clearly defined. However, this is not the case here. Financial compensation for non-material damage is not a sanction that is generally alien to our legal order, as demonstrated by § 253 of the Civil Code. It is laid down in § 847 of the Civil Code for a violation of other legal interests specified in § 823 of the Civil Code, as well as certain other statutes. Over the course of the development of the relevant case-law, the groups of cases in which 37

compensation must be paid for non-material damage have taken clear shape. The claim for compensation is subsidiary in nature; the courts only grant financial compensation if natural restitution, for instance in the form of injunctive relief or an order of retraction, is not possible or not sufficient in light of the facts of the case; it is out of the question to see a “commercialisation of honour” in this matter. Given the prerequisites of serious impairment to the personal sphere and serious misconduct, it is ensured that the duty of care imposed on a responsible press organ is not too strict and that liability is not incurred for any inaccuracy or objectively incorrect information. Finally, the relevant case-law shows that – just like in the case at hand – compensation payments granted remain within reasonable limits, particularly when taking into account that the press behaviour leading to the claims for compensation is usually guided by commercial interests. The risks faced by the press due to this case-law thus do not exceed the limits of what is reasonable (*zumutbar*). In the case at hand, this is particularly evident; the degree of care necessary to prevent a fabricated interview from being disseminated is never unreasonable.

IV.

1. Judges are traditionally bound by the law; this is an integral part of the principle of the separation of powers, and thus the rule of law. This principle is modified in the Basic Law, at least in respect of its wording, in that the judiciary is bound by “law and justice” (Art. 20(3) of the Basic Law). The general view is that this indicates a rejection of narrow legal positivism. The wording makes it clear that law and justice are generally but not necessarily always aligned. Justice is not identical to the entirety of written laws. Beyond the positive statutes adopted by state authority, there may exist further law that finds its source in the constitutional legal order as a meaningful whole and may act as a corrective to written law; it is the judiciary’s duty to find and implement it in its case-law. Under the Basic Law, judges are not obliged to apply legislative instructions within the limits of their literal meaning to individual cases. Such an obligation would require there to be no gaps in the positive legal order of the state, which may be defensible as a postulate of legal certainty in principle, but is unattainable in practice. Judicial activity does not merely consist in identifying and pronouncing legislative decisions. In particular, judicial activity may require that values inherent in the constitutional legal order but which are not, or only incompletely, expressed in written law be brought to light and manifested in decisions in an act of evaluative assessment, which does not lack elements of will. In doing so, judges must remain free from arbitrariness; their decisions must be based on rational argument. It must be reasonably laid out how the written law at issue does not serve its function of solving a legal problem justly. The judicial decision then closes this gap in accordance with the standards of practical reason and “the community’s established general notions of justice” (BVerfGE 9, 338 <349>). 38

A judge’s responsibility and authority for “constructive development of the law” has never been called into question in principle – in any case not under the Basic Law […]. The highest federal courts have claimed this authority from the beginning (cf., e.g., BGHZ 3, 308 <315>; 4, 153 <158>; BAG 1, 279 <280 and 281>). The Federal Constitutional Court has always recognised it (cf., e.g., BVerfGE 3, 225 <243 and 244>; 13, 153 <164>; 18, 224 <237 and 238>; 25, 167 <183>). The legislator itself has expressly assigned the task of “development of the law” to the Grand Senates of the highest federal courts (cf., e.g., § 137 of the Courts Constitution Act). In some areas of 39

the law, such as labour law, judicial development of the law has taken on particular significance as legislation has lagged behind social developments.

It is only the limits of such constructive development of the law that may be controversial, considering the principle that the judiciary be bound by law, which is indispensable for rule-of-law reasons. These limits cannot be standardised for all areas of law or all legal relationships arising from or governed by these. 40

2. For the purposes of this decision, the relevant issue can be limited to the area of private law. In this area, judges have at their disposal the grand codification of the Civil Code, which has been in force for more than 70 years. This is important in two respects: Firstly, the more “codifications age” […], that is to say the more time has elapsed between the adoption of a law and the judicial decision on an individual case, the more a judge’s freedom for constructive development of the law must necessarily grow. The interpretation of a legal provision cannot forever hold on to the meaning assigned to it when it was drafted. It must be considered what reasonable purpose it may serve at the time of its application. The provision is always situated in the context of the social conditions and the socio-political views upon which it is to have an effect; its content can, and possibly must, change as they do. This applies in particular when living conditions and legal views have changed as profoundly between the time of drafting and the application of a law as they have in this century. If a conflict arises between a provision and the substantive ideas of justice of a changed society, judges cannot withdraw from it by pointing to the unaltered wording of the law; they must handle legal provisions more freely in order not to fail at their task of administering justice. Secondly, experience has shown that legislative reforms encounter particular difficulties and obstacles when they attempt to change one of the grand legislative works that characterise the legal order as a whole, the way the codification of the Civil Code has impacted private law. 41

3. As stated above, the question that is the subject of the case-law challenged here was already controversial during the preparatory work on the Civil Code […]. The criticism that immediately followed the legislative solution – initially, without taking into consideration constitutional aspects – did not die down with time. Critics invoked the development of the law in other Western countries, which, to a far greater extent, recognise the option of financial compensation for non-material damage, too, […]. Thus, the critics could argue that nowhere in the West did an unlawful act remain without private law sanctions as frequently as in Germany on the grounds that it ‘only’ caused non-material damage. The limitation of financial compensation for non-material damage to a few explicitly specified particular cases – with a certain “lack of clear direction” – was characterised as “legislative failure” […]. This criticism became harsher once the civil courts proceeded to recognise the general right of personality under the influence of the “power of the Basic Law in shaping private law” […]. This recognition revealed a gap in view of the sanctions to be imposed when the right of personality was violated. The significance of this problem was not foreseeable at the time of development of the Civil Code, but it urgently required a solution when changed legal views and the moral concept of the new Constitution emerged; no such solution could be derived from statutory law given the enumeration clause in § 253 of the Civil Code [listing non-material damage in respect of which compensation can be claimed]. 42

The judiciary was faced with the question of whether to close this gap with available means or to wait for the legislator to intervene. When courts chose the former option, 43

their decisions were affirmed by important voices in the legal discourse […]. Relevant decisions by the Federal Court of Justice and other courts thus met with broad approval in legal scholarship from the outset […]. This reveals that the case-law was in line with general notions of justice and was not considered an unacceptable restriction of freedom of expression or freedom of the press. Deliberations at the 42nd and 45th (1957 and 1964) German Jurists' Convention (*Deutscher Juristentag*) as well as the explanatory memorandum to the draft act by the Federal Government (BTDrucks III/1237) show how strongly the need for effective protection of one's personality under private law, and specifically by way of awarding non-material damages, was perceived. Therefore, the criticism was not directed so much against the outcomes of the judicial decisions as against the methodological and doctrinal considerations used by the courts to justify the chosen approach. To the extent that methods of private law are concerned, it generally does not fall to the Federal Constitutional Court to review the validity of objections presented in that context. However, it cannot be overlooked that the majority of scholars in private law apparently also do not see a problem with the courts' considerations in doctrinal terms […]. In the context of the negotiations of the Expert Group for Comparative Private Law of the Society for Comparative Law (*Fachgruppe für Zivilrechtsvergleichung der Gesellschaft für Rechtsvergleichung*) in Mannheim in 1971 (*Arbeiten zur Rechtsvergleichung*, vol. 61 (1972)), the case-law of the Federal Court of Justice was seen as having brought about a legal situation largely in line with international legal developments […]. An outcome resulting from an approach that is at least acceptable in private law, and which in any case does not obviously run counter to the rules of private law hermeneutics, is not objectionable under constitutional law if it serves to enforce and effectively protect a legal interest which the Constitution itself regards as the centre of its system of values. This outcome reflects justice within the meaning of Art. 20(3) of the Basic Law – not in contradiction to written law, but as a supplement and further development of it.

As things stand, the alternative option – to wait until the legislator settles the matter – cannot be considered to be required by constitutional law. […] 44

Furthermore, the method of developing the law applied by the Federal Court of Justice is not objectionable under constitutional law given that it edges away from written law only to the degree that is indispensable for manifesting justice in the specific case. The Federal Court of Justice neither held that § 253 of the Civil Code is non-binding in its entirety, nor did it seek to designate it as unconstitutional (an option that would have been available to the court, given that the provision is pre-constitutional). The court left the principle of enumeration expressed in the provision untouched and merely added another case to those in respect of which the legislator had already mandated compensation for non-material damage; the development of social realities, but also *jus superveniens* of higher rank, namely Arts. 1 and 2(1) of the Basic Law, urgently required this addition. In recognising this addition, the Federal Court of Justice and the courts following it have not abandoned the legal order or imposed their own will regarding legal policy; rather, they have merely resorted to means inherent in the system to further develop fundamental notions of the legal order shaped by the Constitution […]. The legal principle thus discovered is therefore a legitimate component of the legal order and, as a general law within the meaning of Art. 5(2) of the Basic Law, it serves as a limitation to freedom of the press. Its goal is to guarantee, also in private law, effective protection of human personality and of human dignity, which are at the core of the system of values of the Basic Law, and thus strengthen 45

the applicability of fundamental rights in one area of law. For these reasons, the complainants' constitutional objections are without merit.

V.

[…] 46-47

Benda Ritterspach Haager
Rupp-v. Brünneck Böhmer Faller
Brox Simon