

HEADNOTES

to the Judgment of the First Senate of 3 June 1980
1 BvR 185/77

1. The general right of personality, as constitutionally guaranteed by Article 2(1) in conjunction with Article 1(1) of the Basic Law, also protects individuals from having statements falsely attributed to them that impair their right to maintain a self-defined social image.
2. As long as the defendant has a procedural obligation to cooperate, there is no constitutional requirement to deviate, in cases of this nature, from the general rule of civil procedure that the plaintiff must provide proof of the factual circumstances giving rise to their claim [for injunctive relief].

FEDERAL CONSTITUTIONAL COURT - 1 BvR 185/77 -

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint of

Dr. E...

– authorised representatives: ...

against the Judgment of the Stuttgart Higher Regional Court of 9 February 1977
- 4 U 117/76 -

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

President Benda,
Böhmer,
Simon,
Faller,
Hesse,
Katzenstein,
Niemeyer,
Heußner

held on 3 June 1980:

The constitutional complaint is rejected.

REASONS:

A.

I.

1. The complainant is the chairperson of the Baden-Württemberg regional branch of the *Sozialdemokratische Partei Deutschlands* (SPD political party); the defendant in the initial proceedings was the Baden-Württemberg regional branch of the *Christlich-Demokratische Union* (CDU political party). As a campaign service for the 1976 state parliament elections [...], the defendant provided a model speech to its district speakers titled “The Socialist Agenda”, excerpts of which read as follows: 1

“It is particularly disastrous that the social and economic policy ideas of the SPD 2
are clearly informed by Socialist ideology, framing *economic policy and social policy as polar opposites*. Given such a political narrative, demands for the *nationalisation* of banks and key industries flourish, as do calls for state control over *economic investments*, and for *co-determination*, which in reality is nothing other than *external control*. The intention here is ultimately – as E. and S. have put it – to test the economy’s resilience, as though industry were an engine which could be pushed until it chokes, and then re-started at will”. 2

2. The complainant contended that this violated his right of personality and lodged an application for injunctive relief; he claimed that he had never said, either verbatim or in spirit, that the economy’s resilience should be tested. The Regional Court rejected the application; the appeal on points of fact and law (*Berufung*) to the Higher Regional Court was unsuccessful. The Higher Regional Court gave the following reasons for its decision: 3

It was not possible for the court to determine whether the complainant had in fact said that one should test the economy’s resilience. The court also affirmed that it would generally be for the defendant to bear the consequences of this procedural *non liquet* (inconclusive evidence) [...]. However, the court held that this rule of evidence [placing the burden of proof on the defendant] was not applicable in the case at hand on the grounds that the defendant could invoke the defence of having pursued legitimate interests. It thus concluded that the burden of proof fell on the complainant, who was not able to demonstrate that he had not made the disputed statements. [...] 4

The court also concluded that the assertion challenged by the complainant did not amount to defamation in any case [...]. [...] 5

II.

1. With his constitutional complaint, the complainant challenges a violation of his fundamental rights under Art. 1(1), Art. 2(1), Art. 3(1) and Art. 3(3), Art. 4 and Art. 5 of the Basic Law. [...] 6

2. The Ministry of Justice of the *Land* Baden-Württemberg considers the constitutional complaint to be unfounded. [...] 7

B.

The constitutional complaint is unfounded. 8

I.

The constitutional complaint is directed against a court decision in civil proceedings regarding a claim for injunctive relief under private law. It is incumbent upon the ordinary courts to interpret the applicable legal provisions, taking into account the influence of fundamental rights on private law in their decisions. The Federal Constitutional Court is only called upon to ensure that the ordinary courts observe fundamental right guarantees and standards; in this respect, the Court must review whether a challenged decision shows any errors of interpretation that are based on a fundamentally incorrect understanding of the significance of a fundamental right, in particular of its scope of protection, and whether these deficits are of considerable weight in the case at issue (BVerfGE 42, 143 <147 *et seq.*> with further references). [...]

II.

Having regard to these limits of constitutional review, the challenged judgment cannot be held to violate fundamental rights. 10

1. The complainant claims a violation of his right of personality, which he asserts is guaranteed by Art. 1(1) and Art. 2(1) of the Basic Law; in addition, he invokes the specific fundamental rights set out in the constitutional complaint. It is correct to assume that within their respective scope, the specific fundamental rights also serve the protection of one's personality. However, neither the complainant's submissions nor other evidence provides any indication of a violation of the specific fundamental rights under Art. 3(1) and (3), Art. 4 or Art. 5 of the Basic Law. [...]

2. a) Given that a violation of specific fundamental rights can thus be ruled out, the applicable basis for review is the general right of personality, which is constitutionally guaranteed by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 12

While the specific ('listed') freedoms of the Basic Law, such as freedom of conscience or freedom of expression, also protect fundamental aspects of one's personality, the general right of personality supplements these guarantees as a 'non-listed' freedom. Affirming "human dignity" (Art. 1(1) of the Basic Law) as the supreme constitutive principle, the general right of personality serves to guarantee the personal sphere that is closer to the core of private life (*engere persönliche Lebenssphäre*) as well as its basic conditions, which cannot be entirely protected by the traditional specific freedoms guaranteed in the Constitution; most notably, this need for more comprehensive protection arises with regard to modern developments that pose new risks to the protection of one's personality. As the link to Art. 1(1) of the Basic Law reveals, the general right of personality under Art. 2(1) of the Basic Law comprises an element of "free development of one's personality", which manifests as a right to respect for a certain protected domain, and that differs from the 'active' element of this development guaranteed in the form of general freedom of action (cf. BVerfGE 6, 32). Accordingly, the constituent elements of the general right of personality must be defined more narrowly than those relating to the general freedom of action: the former may only 13

come to bear on interferences that are capable of impairing one's closer personal sphere (cf. BVerfGE 34, 238 <247>; BGHZ 24, 72 <81>; 27, 284 <287>).

Given the particularities of the general right of personality set out above, neither the case-law of the Federal Constitutional Court nor the case-law of the Federal Court of Justice has exhaustively defined the substance of this protected right; rather, the various manifestations of this right have been developed on a case-by-case basis. Legal interests that have thus been recognised as protected by the general right of personality include the private sphere, the secret sphere and the intimate sphere (cf., e.g., BVerfGE 27, 1 <6>; 27, 344 <350 and 351>; 32, 373 <379>; 34, 238 <245 and 246>; 47, 46 <73>; 49, 286 <298>), personal honour, the right to determine the portrayal of one's person (BVerfGE 35, 202 <220>), the right to one's own image and to one's own speech (BVerfGE 34, 238 <246>) and, under certain circumstances, the right to be protected against fabricated comments attributed to one's person (cf. BVerfGE 34, 269 <282 and 283>). These manifestations of the constitutionally protected right of personality must be observed by the courts when they assess conflicting interests under provisions of private law in their decisions (cf. BVerfGE 35, 202 <221>).

14

b) The factual circumstances underlying the constitutional complaint do not fall within any of the manifestations of the right of personality protected by Art. 2(1) of the Basic Law that have been recognised in case-law so far. Neither the complainant's private sphere nor his secret or personal sphere are affected. The assertion challenged by the complainant also does not constitute an attack on his honour; [...]. Calling for the economy's resilience to be tested does, by itself, not amount to dishonourable conduct; nor does it constitute incitement to unconstitutional action [...]. [...] Finally, the complainant cannot directly invoke the right to one's own speech (cf. in this regard BGHZ 13, 334 <338 and 339>). The case at hand specifically concerns a statement that has been attributed to, yet – according to his own submission – was never made by the complainant [and thus does not qualify as his own speech]; the statement in dispute also does not result in an incorrect portrayal of the complainant's personality by way of misquoting comments he made in the past.

15

The general right of personality guaranteed by Art. 2(1) of Basic Law may, however, also be invoked where statements are falsely attributed to one's person. This requires the challenged conduct to amount to a violation of a legal interest that has been recognised as protected by the right of personality, such as the private sphere; this is the case, for instance, where a fabricated interview is spread that concerns the private life of the affected rights holder (BGH, NJW 1965, p. 685; cf. also BVerfGE 34, 269 <282 and 283>). Even if the impairment of a protected interest is not ascertainable, an interference with the general right of personality may be found where statements attributed to a person who did not actually make these statements impair that person's right to maintain a self-defined social image (*selbst definierter sozialer Geltungsanspruch*). This follows from the notion of self-determination, which underlies the protection of the general right of personality: individuals should generally – not just in relation to their private life – be afforded the right to decide how they wish to present themselves vis-à-vis third parties or the public, and whether and to what extent third parties may determine or control aspects of their personality; this particularly includes the decision on whether and how the individual wishes to share their own statements with others. [...] In this context, it is only for the individual person to determine what should constitute their self-defined social image; to this end, the substance of the

16

general right of personality is primarily informed by the self-perception of the rights holder (cf. for freedom of worship BVerfGE 24, 236 <247 and 248>).

Thus, it would be incompatible with Art. 2(1) of Basic Law if the assessment of whether a statement falsely attributed to a person impaired their general right of personality were based on how the person is – justifiably or not – perceived by others, instead of giving consideration to the self-perception of the rights holder. [...]

3. a) Seen this way, the constitutional guarantee of the general right of personality could only be significant for the assessment of the merits in the initial proceedings if the complainant did not make the statement about testing the economy's resilience. If the Higher Regional Court had considered this to be true but nonetheless found no interference with the complainant's right of personality, it would not only have failed to give sufficient consideration to the substance of this right as set out above, but the court itself would have violated Art. 2(1) of the Basic Law by setting its own perception of the complainant's personality as the relevant standard for assessing whether the statement that was attributed to the complainant distorted the portrayal of his personality. In that scenario, the social image of the complainant would have been defined not by the complainant himself, but by the court. Despite the fact that the court did refer to comments made by the complainant in different contexts, such an approach is incompatible with Art. 2(1) of the Basic Law.

b) These considerations, however, would only have been relevant for the challenged judgment if it had been established as fact that the complainant did not make the statement in dispute. In this regard, the Higher Regional Court concluded that the evidence was inconclusive with regard to establishing the truth of the defendant's assertions. The evaluation of the evidence presented that led to this conclusion is not subject to review by the Federal Constitutional Court. [...]

[...] The Higher Regional Court correctly assumed that the statement in dispute was not capable of disparaging the complainant or negatively affecting public opinion of him. The only open question is whether the Higher Regional Court's view that it was incumbent upon the complainant to demonstrate and prove the alleged unlawful violation of his right of personality resulted in a violation of constitutional law. Ultimately, this view is not objectionable under constitutional law.

A facet of constitutional law that would require a deviation from the general evidentiary rules of civil procedure applicable in cases of this kind is not discernible. The rules of evidence provide that the burden of proof regarding the elements of the claim rests with the injured party; in this regard, evidence might indeed be difficult to obtain if the injured party must prove that it did not make a disputed statement. However, this does not impose an undue burden on the injured party, given that the defendant is under an obligation to cooperate: the defendant must substantiate the contention that the plaintiff made a certain statement; thus, the defendant must specify, in particular, when and how the statement was made and to whom it was addressed. These assertions may be refuted by the plaintiff. In the case at hand, the defendant had indeed specified the relevant circumstances, and the information provided in this regard was thoroughly examined and assessed. [...] In a case like this, constitutional law does not require [...] a departure from the general rules of civil procedure in respect of the burden of proof.

c) Based on the factual findings of the Higher Regional Court, which were established without any violation of constitutional law, it is not ascertainable that a statement was falsely attributed to the complainant in violation of his right to a – self-defined – social image. In order to assert an interference with the complainant’s right of personality, it would have been necessary for the complainant to first establish that a statement had been falsely attributed to him. [...]

Benda
Faller

Böhmer
Hesse
Niemeyer

Simon
Katzenstein
Heußner