

HEADNOTES

to the Judgment of the First Senate of 5 June 1973
1 BvR 536/72

1. A radio or television broadcasting corporation may, in principle, invoke the protection of Article 5(1) of the Basic Law for every broadcast. Freedom of broadcasting covers both the selection of the material presented and the choice of the way in which it is presented, including the form chosen for the programme.

Only in cases where freedom of broadcasting conflicts with other legal interests do the interest pursued with the specific programme, the design of the programme and its achieved or foreseeable effect become relevant.

2. §§ 22 and 23 of the Art Copyright Act provide enough scope for a balancing of interests to sufficiently take into account the permeating effect of freedom of broadcasting under Article 5(1) first sentence of the Basic Law on all other areas of law on the one hand, and the protection of one's personality under Article 2(1) in conjunction with Article 1(1) of the Basic Law on the other hand.

In such a balancing, neither of the two constitutional values can generally claim to take precedence. Rather, the intensity of the interference with the personal domain must be balanced against the interest of the public in obtaining information in the individual case.

3. In respect of current events coverage of serious crimes, the interest of the public in obtaining information generally takes precedence over the protection of the offender's personality interests. Yet both life's inviolable innermost domain and the principle of proportionality must be respected; thus, it is not always permissible to name, portray or otherwise identify the offender.

However, the constitutional protection of one's personality does not allow television to report on the offender and their private sphere indefinitely, beyond news coverage, for example in the form of a docudrama.

Later coverage is in any case not permissible if it might have a significantly new or an added adverse effect on the offender, especially if it might jeopardise their social reintegration. Social reintegration will frequently be jeopardised where a TV programme about the crime identifying the offender is broadcast shortly before or after the offender's release from prison.

FEDERAL CONSTITUTIONAL COURT
- 1 BvR 536/72 -

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaint of

Mr W...,

authorised representative: ...

against a) the Judgment of the Koblenz Higher Regional Court of 5 October 1972
- 9 U 552/72 -

b) the Judgment of the Mainz Regional Court of 8 June 1972
- 1 O 128/72 -

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

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

held on the basis of the oral hearing of 2 and 3 May 1973:

JUDGMENT

1. The Judgments of the Mainz Regional Court of 8 June 1972 - 1 O 128/72 - and the Koblenz Higher Regional Court of 5 October 1972 - 9 U 552/72 - violate the complainant's fundamental rights under Article 2(1) in conjunction with Article 1(1) of the Basic Law. They are reversed.
2. By way of preliminary injunction and on pain of a fine of an unlimited amount to be determined in case of non-compliance, the ZDF broadcasting corporation is barred from broadcasting the docudrama *Der Soldatenmord von Lebach* ("The murder of soldiers in Lebach"), insofar as the applicant and complainant is named or portrayed therein, before a final judgment has been rendered with regard to the action brought in the principal proceedings.

[...]

3. [...]

REASONS:

A.

The constitutional complaint is directed against the civil courts' rejection of the complainant's application for a preliminary injunction to bar the ZDF broadcasting corporation from broadcasting its own docudrama production insofar as the complainant is named or portrayed therein.

I.

The complainant, born in 1945, was involved in a serious crime, known as the murder of soldiers in Lebach. This crime was dealt with in proceedings before the competent court. The two main offenders were friends with each other and with the complainant; the relationships were partly of a homosexual nature. The three young men sought to establish a community outside of society, which they rejected. They planned to raid an ammunition depot of the *Bundeswehr* (German Federal Armed Forces) in order to get hold of weapons, with the help of which they wanted to commit other crimes in order to realise their dream of life on an ocean-going yacht in the South Seas. In January 1969, the two main offenders carried out the attack: they killed four soldiers of the guard team who were asleep, seriously injured another soldier and stole weapons and ammunition. Later, they tried to extort money from a financial broker by threatening similar acts. During the planning stages, the complainant had repeatedly stated that he was incapable of carrying out the crime; therefore, he had not participated in the attack. 2

On 7 August 1970, the competent court sentenced the two main offenders to life imprisonment and the complainant to a total of six years' imprisonment on a charge of accessory [to murder]. [...] 3

By now, the complainant has served almost two-thirds of his sentence; execution of the remainder of the prison sentence will likely be suspended on probation in July of this year in accordance with § 26(1) of the Criminal Code. The complainant intends to return to his hometown. 4

II.

1. The violent crime of Lebach attracted an unusual amount of attention from the German public, in part because the search for the perpetrators lasted several months. The crime, the extensive investigations and the criminal proceedings were widely covered in the press, on the radio and on television. 5

Even before the judgment in the criminal proceedings became final, the head of the ZDF docudrama department, Jürgen Neven duMont, and the chief criminal investigator of the Federal Criminal Police Office (*Bundeskriminalamt*), Karl Schütz, in collaboration with Rainer Söhnlein, published a book about the case. 6

Furthermore, Neven duMont and Söhnlein wrote the script for a TV docudrama *Der Soldatenmord von Lebach*, directed by Söhnlein and completed in the spring of 1972. According to the – undisputed – facts ascertained by the Higher Regional Court, the docudrama is to be featured on ZDF presumably on a Friday night as a two-part programme, with a break for news headlines, running to a total of 2 hours and 40 minutes. The first part of the docudrama portrays the relationships within the group of friends and shows how the attack was planned and carried out. The second part primarily deals with the search for and identification of the perpetrators and with the attempted blackmail. Photographs of both the complainant and the main offenders are shown at the beginning of the docudrama; the complainant is played by an actor thereafter. His name is mentioned repeatedly throughout the docudrama. 7

2. The complainant argues that the planned broadcast of the docudrama constitutes an unlawful violation of his right of personality, his right to his own name and his right to his own image. In the challenged decisions, the Regional Court and the Higher Regional Court rejected his application for a preliminary injunction to bar the ZDF from broadcasting the docudrama insofar as he is named or portrayed therein. Both judgments are based on §§ 22 and 23 of the Art Copyright Act of 9 January 1907.

[...] 9-12

III.

1. With his constitutional complaint, the complainant claims that the challenged decisions violate his fundamental rights under Art. 1(1) and Art. 2(1) of the Basic Law.
[...]

[...] 14

2. [...] 15-17

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4. [...] 19-23

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IV.

1. The Federal Constitutional Court issued a preliminary injunction on 13 March 1973 barring the ZDF from broadcasting the docudrama insofar as the complainant is named or portrayed therein until a decision on the constitutional complaint is rendered. 30

2. The Federal Constitutional Court has examined the docudrama. [...] 31

[...] 32-40

B.

The constitutional complaint is well-founded. 41

I.

The constitutional complaint is directed against court decisions rendered in civil proceedings that are based on the application of private law provisions. In such cases, it neither falls to the Federal Constitutional Court to review the interpretation and application of the relevant legal provisions as such, nor is it for the Court to review the related determination and assessment of the facts. However, it is subject to review by the Federal Constitutional Court whether the permeating effect (*Ausstrahlungswirkung*) on private law of decisions on constitutional values is sufficiently reflected in the decisions of the ordinary courts. The Federal Constitutional Court must therefore review whether the challenged decisions are based on a fundamentally incorrect understanding of the scope and impact of one of the fundamental rights asserted here, 42

or whether the outcome of the decision in itself violates such a fundamental right (cf. BVerfGE 7, 198 <206 and 207>; 21, 209 <216>; 30, 173 <187 and 188>; 32, 311 <316>). [...]

II.

In the case at hand, the Higher Regional Court correctly recognised that several 43
fundamental rights affect the application of ordinary law, and that they in fact pull in
opposite directions: The protection of one's personality guaranteed by Art. 2(1) in
conjunction with Art. 1(1) of the Basic Law conflicts with freedom of reporting by the
broadcast media under Art. 5(1) second sentence of the Basic Law.

1. A TV programme of the type at issue here, i.e. a programme that deals with the 44
planning, carrying out and prosecution of a criminal act and depicts, portrays and
names the offender, necessarily affects the scope of the offender's fundamental rights
guaranteed by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. The right to the
free development of one's personality and human dignity guarantee everyone an
autonomous domain of private life in which they can develop and protect their
individuality. This includes the right "to be left alone", "to be oneself" within this domain
of one's private life [...], and to be free from intrusion or inspection by others (cf.
BVerfGE 27, 1 <6>; 33, 367 <376>; 34, 238 <245 et seq.>). It also encompasses the
right to one's own image and the right to one's own speech (cf. BVerfGE 34, 238), and
especially the right to determine the portrayal of one's person. In principle, every
person has the right to determine for themselves whether and to what extent others
may portray their biography or certain incidents from their life in public.

According to the Federal Constitutional Court's established case-law, however, not the 45
entire domain of private life enjoys the absolute protection afforded by the above-
mentioned fundamental rights (cf. BVerfGE 6, 389 <433>; 27, 1 <7>; 27, 344 <351>;
32, 373 <379>; 33, 367 <376 and 377>; 34, 238 <245>). Where an individual
communicates with others as a member of the community or influences them by way
of being or behaviour and thereby affects the personal sphere of others or interests of
the common good, the exclusive right to decide on one's private domain may be
subject to limitations as long as the inviolable innermost domain is not affected. Any
such bearing on social relations – provided it is sufficiently strong – may justify
measures taken by public authorities to protect interests of the general public, for
example, the publishing of images of suspects for the purpose of law enforcement
(§ 24 of the Art Copyright Act). However, neither the state's interest in investigating
crimes nor any other public interest *per se* justifies an intrusion into the personal
domain (cf. BVerfGE 32, 373 <381>; 34, 238 <248>). Rather, the high standing of the
right to the free development of and to respect for one's personality that follows from
its close connection to human dignity, the Constitution's highest value, mandates that
the protection requirement under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law
be used as an ongoing corrective to the interferences that seem necessary to give
effect to such interests. Accordingly, the affected rights and interests must be balanced
in each case to ascertain whether the public interest pursued should take precedence
in general and under the particular circumstances, whether the intended interference
with the private sphere is required in view of its nature and scope, and whether the
interference is appropriate in light of the significance of the matter (cf. BVerfGE 27, 344
<353 and 354>; 32, 373 <381>; 34, 238 <248>).

These principles, developed in the case-law on measures by public authority, must also be observed accordingly in judicial decisions on conflicting interests under private law. Yet this does not preclude taking into account the special status of radio and television given their organisation under public law and their public function. 46

2. In this respect, [...] it is a significant factor here that the disputed broadcast serves a function the free exercise of which is itself directly protected in the Constitution by a fundamental right. Just like freedom of the press, freedom of expression and freedom of information, freedom of reporting by the broadcast media enshrined in Art. 5(1) second sentence of the Basic Law (freedom of broadcasting) is a constitutive element of the free democratic basic order (cf. BVerfGE 7, 198 <208>; 10, 118 <121>; 12, 205 <259 *et seq.*>; 20, 56 <97 and 98>; 20, 162 <174 *et seq.*>; 27, 71 <81 and 82>). 47

Like the press, radio and television are indispensable means of mass communication. They have a decisive impact both on the link between the people and state organs and on the scrutiny of such state organs, as well as on the integration of the community in all areas of life. They provide individuals with the necessary comprehensive information on current affairs and political and social developments. [...] Despite the narrow wording [in the Basic Law] (“reporting”), in its essence, freedom of broadcasting does not differ from freedom of the press; it applies to both broadcasts with a focus on reporting and other broadcasts. Information and opinions can be conveyed through a TV docudrama or a music programme just as well as through news or political commentary; to some extent, each broadcasting service shapes opinions simply through its selection of broadcasts and the presentation of its programmes (cf. BVerfGE 12, 205 <260>; 31, 314 <326>). Furthermore, from the outset, freedom of broadcasting also does not permit differentiating between programmes on the basis of the interests pursued or the quality of the respective format; ultimately, a restriction to ‘serious’ productions that serve a commendable private or public interest would amount to rating and control by public authorities, which would contradict the very essence of this fundamental right (cf. BVerfGE 25, 296 <307>; 34, 269 <281 and 282>; with further references). Accordingly, a broadcasting or TV corporation may, in principle, invoke the protection of Art. 5(1) second sentence of the Basic Law for each broadcast, irrespective of whether political broadcasts, critical discussions of other questions of general interest, radio plays, cabaret programmes or other entertainment programmes are concerned. The applicability of the constitutional guarantee is thus not dependent on a demonstrated ‘justified’ or ‘legitimate’ interest in the broadcast concerned [...]. Correspondingly, freedom of broadcasting covers not only the selection of the material presented, but also the decision on the way in which it is presented, including the right to determine which of the various forms of programmes to use for this purpose. 48

Yet the interest pursued with the specific programme, the design of the programme and its achieved or foreseeable effect do become relevant where the exercise of freedom of broadcasting conflicts with other legal interests. The Constitution handles the potential conflict between freedom of broadcasting and the interests of individuals, groups or the community affected by this freedom by referring to the general legal order: pursuant to Art. 5(2) of the Basic Law, broadcasts are subject to the limitations that result from general laws. However, according to the established case-law of the Federal Constitutional Court, the respect for other legal interests as required by law may not relativise freedom of broadcasting; rather, laws restricting freedom of broadcasting must be interpreted in light of the constitutional guarantee and, where 49

necessary, must be restricted themselves in order to ensure adequate realisation of freedom of broadcasting (cf. BVerfGE 20, 162 <176 *et seq.*>; 7, 198 <208 *et seq.*>). This requires a general and specific balancing of the conflicting legal interests in the individual case.

III.

1. General laws within the meaning of Art. 5(2) of the Basic Law also include the provisions on which the challenged decisions are based, namely §§ 22 and 23 of the Art Copyright Act [...]. These statutory provisions, which, according to their wording and their original meaning, only relate to the right to one's own image, have long been interpreted in the case-law and in legal scholarship as applying to the image of a person, regardless of whether their name is mentioned, and to the representation of a person by an actor on stage, in film or on television [...]. 50

These provisions are not objectionable under constitutional law; their relatively flexible design provides sufficient scope for application in conformity with the Constitution. [...] 51

2. In cases of conflict of the kind at hand, the general principle applies that the application of §§ 22 and 23 of the Art Copyright Act to television broadcasts must not excessively constrain freedom of broadcasting. Yet in contrast to other general laws within the meaning of Art. 5(2) of the Basic Law, this constellation is special in that the restriction of freedom of broadcasting itself serves to protect a constitutional value of high standing: the interest of the affected person opposing portrayal or representation, which must be taken into account pursuant to § 23 of the Art Copyright Act, is directly strengthened by the constitutional guarantee of the protection of one's personality. 52

The resolution of this conflict must reflect that, according to the Constitution's intent, both constitutional values constitute essential elements of the free democratic order of the Basic Law, which is why neither can claim to take general precedence. [...] Thus, in case of conflict, a balance must be struck between both constitutional values where possible; if this cannot be achieved, the specific circumstances and nature of the case must be taken into account in order to decide which interest must stand back behind the other. In this respect, both constitutional values must be viewed in light of their connection to human dignity as the centre of the Constitution's system of values. Accordingly, freedom of broadcasting may result in restrictive effects on rights derived from the right of personality; however, any loss in personality resulting from a portrayal in public must not be disproportionate to the significance of the public portrayal for free communication [...]. Furthermore, this benchmark requires, on the one hand, that the necessary balancing of interests take into account the intensity of the interference with the personal domain resulting from the programme at issue. On the other hand, the specific interest which the programme serves to satisfy and is suited to satisfy must be assessed, and it must be reviewed whether and to what extent this interest can also be satisfied without impairing the protection of one's personality, or at least without impairing it to the same extent. 53

IV.

1. The following constitutionally relevant criteria can be derived from these general principles for the purpose of assessing TV programmes like the one at issue here. 54

a) Public reporting of a crime that depicts, portrays and names the offender will always constitute a severe impairment of their personal domain, given that it publicly discloses that person's wrongdoings and, from the outset, conveys a negative image of the person to the audience. [...]

b) Notwithstanding the possibility that the respective presentation (polemics, falsification) may amount to an additional impairment, even television coverage that aims for objectivity and fact-based reporting usually entails a far greater interference with the private sphere than spoken or written coverage on the radio or in the press. This follows from the greater intensity of the visual impression and the combination of image and sound, but especially from its far greater reach, which is a particular feature of television also when compared with film and theatre. Therefore, it is especially important "to ensure that the limitations set by law are adhered to and to prevent abuse of the right of personality, which has become more vulnerable. In this respect, the law must not defer to technical development" (BGH, NJW, 1966, p. 2353 <2354>).

It is of course important to differentiate according to the types of programme. The present case concerns a production that belongs to the genre of TV docudramas developed by the ZDF. According to the former head of the ZDF Department of TV Docudramas, Dr. Wolfgang Bruhn, this type of programme, in which an authentic incident is enacted in an equally authentic manner, has quickly become one of the most popular types of programme and is more popular with the audience than feature films and entertainment shows (cf. Bruhn, *Fernsehen in Deutschland*, 1967, p. 157 *et seq.* <157, 160>). [...].

c) For these reasons alone, there is already a particular need for protection against violations of the right of personality resulting from television programmes with such a reach. In addition, the docudrama broadcasting format entails specific risks with regard to aspects that are relevant here. It combines catchy information with intriguing entertainment; it re-enacts an actual event, including its development and its course, without distorting or disguising it, and it shows or represents the persons involved therein as realistically as possible. For example, almost all names of places and persons remained unchanged in the programme at issue; some of the actual protagonists of the events presented, such as some minor characters, play themselves in the docudrama [...]. If the casting of the main characters is convincing, such a docudrama has a "fascinating effect on the audience. It evokes significantly greater intellectual, emotional and thus active awareness than even the best documentary or so-called feature would be able to achieve. [...]" (cf. Bruhn, *loc. cit.*, p. 160).

Such a vivid portrayal of a serious crime, emphasising emotional components in particular, will usually incite stronger and more lasting reactions in the audience against the portrayed offenders compared to simple spoken or written coverage. In addition, a docudrama, even if it restricts itself to portraying the events as realistically as possible, cannot do without narrative features [...]. Another striking characteristic of such docudramas is that the concentration that is necessary for dramaturgic reasons, including temporal synopsis and an accelerated depiction of the course of events, leads to a portrayal of the offenders' person that is linked exclusively to the offence and its interpretation by the screenwriter and director. Since the programme creates the 'illusion of authenticity', the audience thinks that they are provided a comprehensive view of the offender's real personality. In fact, such docudramas reduce the portrayal to the negative dimension of the offender's personality, without

showing fine nuances or highlighting the person's positive or neutral traits and behaviour.

d) [...] 60

Finally, the problem of selective perception, which also occurs with regard to other means of communication, is especially prevalent in television. Selective perception means that the audience tends to be unaware of the fact that it selects and perceives the statements provided in line with its own opinions or bias. [...] In the present context, this means that the portrayal of criminal or homosexual persons in a docudrama can reinforce a prevailing general disapproval of such social outsiders and, as a result, may also lead to an unfavourable overall assessment of the portrayed individuals. 61

In summary, it follows that television coverage of a crime – and in particular a docudrama – in which the offender is depicted, portrayed and named will usually result in serious interference with his personal sphere. 62

2. Nevertheless, there are important reasons for comprehensively informing the public about crimes and the events leading up to them, including information on the offender. Crimes are also an element of contemporary society, the presentation of which is one of the basic tasks of the media. Furthermore, the violation of the general legal order, the impairment of the legal interests of affected persons or the community, sympathy for the victims and their families, fear of similar crimes being committed and the endeavour to prevent them give rise to a legitimate interest in obtaining further information about the crime and the perpetrators. The importance of this interest increases the more the offence at issue stands out when compared to ordinary crime, because of the special nature of its target, the way in which the crime was committed or the severity of its consequences. Thus, in respect of serious violent crime like the criminal act at issue in the present case, there are serious reasons – i.e. reasons beyond general curiosity and sensationalism – for the interest in obtaining information about who the perpetrators were, what motives they had, what was done to identify and punish them and how to prevent similar offences. [...] Furthermore, the legitimate democratic need for the scrutiny of state organs and of authorities responsible for public security, of law enforcement authorities and of criminal courts is significant. Finally, there is no need to further explain that television broadcasts are specifically suited to meeting such information needs, precisely because of their reach. 63

3. When balancing this interest in obtaining information through suitable television reporting with the necessary intrusion into the offender's personal domain, the interest in obtaining current information about crimes must generally take precedence. If someone violates the peaceful legal order (*Rechtsfrieden*) and attacks or injures fellow citizens or legal interests of the community through a criminal act or its consequences, that person must not only accept the criminal punishment imposed by the legal order, but they must also, in principle, accept that the crime itself attracts the interest of the public in obtaining information, which the public will satisfy by resorting to the normal channels in a community living in accordance with the principle of free communication. In fact, the scrutiny of law enforcement authorities and criminal proceedings that such reporting entails also benefits the offenders. 64

The precedence of the interest in obtaining information is not absolute. One limitation to this right is the general right of personality; the central constitutional importance of 65

this right requires, in addition to respect for life's inviolable innermost domain (cf. BVerfGE 32, 373 <379>), strict adherence to the principle of proportionality. The intrusion into the personal sphere may not extend further than necessary to adequately satisfy the interest of the public in obtaining information; furthermore, the disadvantages inflicted upon the offender must be appropriate to the severity of the crime or to its relevance to the public based on other reasons. Accordingly, it is by no means always permissible to name, portray or otherwise identify the offender. In practice, the media mostly adhere to these general principles in cases of so-called petty crime or if juveniles are involved. [...].

The presumption of innocence that applies in favour of the accused until their final conviction (cf. Art. 6(2) ECHR, BGBl 1952 II, p. 686) also requires restraint, and at least an appropriate consideration of the facts and arguments put forward in their defence. It is self-evident that the right of personality only stands back in case of factual reporting and serious interpretation of the facts, but not in case of sensational, deliberately one-sided or distorting coverage; in that respect, reference can be made to the principles developed in legal scholarship and case-law on § 23 of the Art Copyright Act in respect of how information is presented. [...].

On the other hand, news coverage of a serious crime is justification not only for naming, portraying or otherwise identifying the offender; in principle, it also extends to coverage of their personal life insofar as it is directly linked to the crime committed, provides information on the motives or other preconditions of the crime and appears essential for assessing the culpability of the offender from a contemporary criminal law perspective. Where to draw the line with regard to the generally prevailing interest in information from news reporting can only be decided in consideration of the particular circumstances of each case. [...].

4. However, the permeating effect on private law of the constitutional protection of one's personality does not permit the media to indefinitely cover the personal life and private sphere of the offender beyond news reporting. Instead, as soon as the interest of the public in obtaining current information on the crime has been satisfied, the offender's "right to be left alone" gains significance and sets limits to the mass media's desire for, and the public's interest in, discussing the offender's individual domain; this applies all the more to turning their individual domain into an object of entertainment. Even an offender who has attracted the interest and disapproval of the public by committing a serious crime still remains a member of this community and has a constitutional right to the protection of their individuality. If the crime that attracted the interest of the public was prosecuted in criminal proceedings, and thus punished as required by the common good, and if the public was adequately informed, any further or repeated interference with the offender's personal domain will generally not be justified; it would impose a renewed social sanction on the offender, especially in the case of television broadcasts.

5. a) It is impossible to determine a general rule applicable in every case stating after how many months or years one would have to draw the line between news coverage, which is in principle permissible, and a later portrayal or discussion, which is in principle impermissible. The decisive criterion is whether the respective broadcast, as weighed against the current level of information available to the public, might have a significantly new or an added adverse effect on the offender. [...].

b) The offender's interest in rehabilitation into society, i.e. their interest in social reintegration, can be a significant benchmark for a more precise determination of such a time limit. In recent decades, the significance of this objective has been increasingly acknowledged in criminal law; according to the prevailing opinion, the offender's social reintegration or socialisation is the primary objective of prison sentences (cf. also BVerfGE 33, 1 <7 et seq.>). Prisoners should be imparted with the ability and the will to lead responsible lives. They are to learn how to assert themselves in a free society without breaking the law, to make use of its opportunities and conquer its risks. [...]

[...]

Under constitutional law, this principle reflects the self-perception of a community with human dignity at the centre of its system of values that is committed to the principle of the social state. As holders of fundamental rights that follow from human dignity and ensure its protection, convicted offenders must be given the opportunity to reintegrate into the community after having served their sentence. From their point of view, the interest in social reintegration derives from their fundamental right guaranteed by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. From the community's point of view, the principle of the social state requires that the state provide care and support to those social groups whose personal or social development is impeded due to personal weaknesses or fault, inability or social disadvantage, including prisoners or persons released from prison. Not least, social reintegration serves to protect the community itself; it has a direct interest in preventing the offender from reoffending and from harming fellow citizens or the community.

c) [...] Practical experience has shown that social reintegration often fails because of the community's contempt for and rejection of the person released from prison, even if preconditions were relatively favourable and forensic therapy had been successful. This kind of isolation can destroy the courage especially of unstable persons to start afresh, and throw them back on the same path that had already previously led them to crime.

d) In line with the considerations outlined above (see B IV 1 above), there is no need to further discuss that the attitude of the community towards released former prisoners can be negatively influenced by television coverage of the crime, especially by coverage in the form of a docudrama. In addition, large parts of the population still do not sufficiently recognise and accept the need for the community to help those released from prison reintegrate into society. Therefore, the adverse effects of the television programme in question are in fact reinforced by the existing generally defensive attitude towards former prisoners. At the same time, such a television programme can also destroy or call into question the internal stabilisation offenders have achieved – perhaps painstakingly – in prison: The renewed graphic confrontation with the crime effectively throws them back to their state at the time of the crime and discourages them, making them believe that the community still sees them as the offender from that time, despite all their efforts. Based on this insight, the German Press Council (*Deutscher Presserat*), upon the suggestion of the Federal President, made the following recommendations on 28 September 1971:

“not to publish names of prisoners or details that allow drawing conclusions about released prisoners, their families or the place of their release from prison” (Activity Report 1971, p. 102).

e) In sum, repeated television broadcasts about a serious crime that are no longer justified by the interest of the public in obtaining information on current events will in any case not be permissible if they jeopardise the offender's social reintegration. [...]

Social reintegration will regularly be jeopardised where a television programme identifying the offender and covering their crimes is broadcast shortly before or after their release from prison. In that respect, it must be taken into account that a fixed-term prison sentence may be suspended on probation pursuant to § 26(2) of the Criminal Code as soon as prisoners have served half the sentence, and that their sentence must be suspended on probation in accordance with the conditions set out in § 26(1) of the Criminal Code after they have served two-thirds of the sentence.

V.

When reviewed in light of the constitutional criteria developed above, the challenged decisions cannot be upheld.

1. [...]

2. An assessment sufficiently giving effect to the impact of the relevant fundamental rights on ordinary law requires the granting of the complainant's application.

As noted in the challenged decisions, it can be assumed that the specifics of the case – namely the attack on a *Bundeswehr* facility, the heinous way the crime was carried out, the number of victims, and the unusual, largely incomprehensible motivation – attracted great interest among the population in further information and investigation. This must be taken into consideration when balancing the right of the ZDF to portray events significant for contemporary society within the meaning of § 23(1) no. 1 of the Art Copyright Act – a right that is strengthened by freedom of broadcasting – against the complainant's interest in preventing the portrayal of the events – a right that is strengthened by the fundamental right to the free development of one's personality and human dignity. It must also be taken into account that the docudrama at issue seeks to be as realistic as possible and that the portrayal of the relationship between the perpetrators is not offensive.

However, for the above-mentioned reasons (see B IV 1 above), the broadcasting of the docudrama would result in a serious interference with the complainant's right of personality given the programme's reach, the chosen docudrama form and its anticipated impact. To the extent that the ZDF argued that the drama should, among other purposes, also serve to promote understanding for the complainant, the courts in the initial proceedings already held that this submission is irrelevant because the docudrama's content and design do not reveal any such tendency. In fact, the chosen interpretation of the crime that emphasises homosexual grouping has [...] the opposite effect insofar as it conveys the impression that the criminal act is not really much less attributable to the complainant than to the main offenders and in that it suggests that he only remained in the background due to his cowardliness while aggressively encouraging the others in their endeavours. This does not match the assessment of the court of first instance, which came to the conclusion that the complainant's contributing role was much smaller than that of the main offenders.

This serious interference with the complainant's personal domain cannot be justified by the interest in the coverage of the crime as a current event, which generally takes precedence. This interest has been satisfied by the extensive information provided to the public in all media immediately after the crime was discovered, during the search for the perpetrators and especially over the course of the criminal proceedings. In comparison, the portrayal in a docudrama that no longer has a direct temporal link to the criminal proceedings amounts to a new impairment of the protection of the complainant's personality [...].

This new interference [...] might seriously jeopardise the social reintegration of the complainant; the broadcast would adversely affect, first and foremost, the community's attitude towards the complainant, but also his internal stabilisation. To have such an impact, temporal proximity of the new broadcast to the forthcoming release from prison is required; this would be the case here, irrespective of the potential date of release the assessment is based on. Given that the ZDF suggested to hear other expert opinions with regard to the personality assessment of the complainant, and thus apparently questioned the success of social reintegration in general but also the complainant's social reintegration in particular, it must be highlighted that it is not for the civil or constitutional court proceedings to replace with their own prognosis the assessment of the primarily competent criminal court and of the authorities responsible for the carrying out of the sentence. In addition, the success of social reintegration always depends on the interaction of various factors, which can never be foreseen with complete certainty. As far as the assessment under constitutional law is concerned, what matters is merely that the complainant retain his chance of reintegrating into society – a chance that the competent authorities found to exist.

[...]

It is not ascertainable that the public has an exceptionally significant interest in forming opinions, which could justify such a serious infringement of personality in exceptional cases (cf. also BVerfGE 7, 198 <211 and 212>; 12, 113 <126 *et seq.*>; 25, 256 <264>; BGHZ 45, 296 <308>; BGH, NJW 1965, p. 1476 <1477>). [...]

As a result, when interpreting § 23 of the Art Copyright Act in accordance with the values enshrined in the Constitution, the complainant's interest in preventing the broadcasting of the docudrama must take precedence. This interest would not be satisfied if, as suggested by the Federal Government, the broadcast were prohibited only insofar as it depicts and names the complainant. Even if the complainant were not depicted or named in the broadcast, the remainder of the portrayal would be sufficient to identify the complainant and thus could adversely affect his social reintegration; in fact, the audience might be tempted to decipher the secret, which could specifically direct the interest of the audience to the complainant – especially in the relevant local area.

[...]

3. There is no need to decide whether the disputed docudrama that aims to realistically reproduce an actual event should also be recognised as a work of art within the meaning of Art. 5(3) of the Basic Law. Even if this constitutional provision were applied, it should be noted that freedom of the arts, although it is not subject to the limitations set out in Art. 5(2) of the Basic Law, does not have a higher standing than the

protection of one's personality guaranteed by Art. 1 and Art. 2(1) of the Basic Law (cf. BVerfGE 30, 173 <193 *et seq.*>).

VI.

Therefore, the challenged decisions violate the complainant's fundamental rights under Art. 2(1) in conjunction with Art. 1 of the Basic Law and must be reversed pursuant to § 95(2) of the Federal Constitutional Court Act. Remanding the case to another court with jurisdiction in civil proceedings would not do justice to the particularities of the case. These constitutional standards and the evidence compiled by the Federal Constitutional Court leave no latitude for a new decision by the courts in the present case; rather, the complainant's application must be fully successful. [...]

[...] 92

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