

## **HEADNOTE**

to the Order of the First Senate of 9 March 1988  
1 BvL 49/86

The public announcement of legal incapacitation on the grounds of profligacy or alcoholism (§ 687 of the Code of Civil Procedure) is incompatible with the general right of personality (Article 2(1) in conjunction with Article 1(1) of the Basic Law).

## **FEDERAL CONSTITUTIONAL COURT** **- 1 BvL 49/86 -**

### **IN THE NAME OF THE PEOPLE**

In the proceedings  
for constitutional review of

§ 687 of the Code of Civil Procedure

– Order of Suspension and Referral of the Detmold Local Court of 28 July 1986  
(15 C 8/83) –

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Herzog,  
Niemeyer,  
Heußner,  
Henschel,  
Seidl,  
Grimm,  
Söllner,  
Dieterich

held on 9 March 1988:

§ 687 of the Code of Civil Procedure is incompatible with Art. 2(1) in conjunction with Art. 1(1) of the Basic Law and void.

This does not apply to the public announcement that a legal incapacitation is lifted if such announcement is made with the affected person's consent and the incapacitation itself had previously been publicly announced.

### **REASONS:**

**A.**

The referral concerns the question of whether § 687 of the Code of Civil Procedure, which orders the public announcement of a person's legal incapacitation on the grounds of profligacy or alcoholism, is compatible with the Basic Law.

## I.

According to § 6(1) of the Civil Code, persons may be declared legally incapacitated if they are unable to manage their affairs on the grounds of mental illness or mental deficiency (no. 1), if they expose themselves or their family to the risk of indigence as a result of profligacy (no. 2) or if, as a result of alcoholism or drug abuse, they cannot manage their affairs or expose themselves or their family to the risk of indigence, or endanger others (no. 3). The essential effects of legal incapacitation are set out in §§ 104 *et seq.* of the Civil Code. A person who has been declared legally incapacitated on the grounds of mental deficiency, profligacy, alcoholism or drug abuse has limited capacity to contract pursuant to § 114 of the Civil Code. Legal incapacitation on grounds of mental illness brings about the incapacity to contract, pursuant to § 104 no. 3 of the Civil Code. A legally incapacitated person who has reached the age of majority is assigned a legal guardian under § 1869 of the Civil Code.

The proceedings for incapacitation are governed by §§ 645 to 687 of the Code of Civil Procedure. The wording of the provision in question [...] reads:

### § 687

The legal incapacitation of a person on the grounds of profligacy or alcoholism as well as the lifting of the incapacitation is to be announced publicly by the Local Court.

The general view is that the public announcement of legal incapacitation is intended to protect third parties who may be engaged in legal transactions with the incapacitated person. It is intended to protect them from any losses they may incur because they were unaware of the limited contractual capacity of the person concerned. Furthermore, some consider § 687 of the Code of Civil Procedure to also have an instructional function. According to this view, the announcement is intended to influence legally incapacitated persons and motivate them to behave in a socially adequate manner.

Public announcement is only mandatory in cases of legal incapacitation on the grounds of profligacy, alcoholism and – according to prevailing opinion – drug addiction, as well as for the lifting of the incapacitation orders. However, § 687 of the Code of Civil Procedure does not require public announcements for legal incapacitation on the grounds of mental illness or mental deficiency. The original reasoning for this distinction was that no warning was necessary in the case of mentally ill persons because their condition was obvious to third parties anyway.

The public announcement has no legal effect on incapacitation. Its sole purpose is to serve as a warning.

## II.

The person concerned in the initial proceedings was declared legally incapacitated on the grounds of alcoholism. The Local Court suspended the legal incapacitation proceedings in respect of the still outstanding public announcement, and referred to the Federal Constitutional Court the question of

whether the mandatory public announcement of legal incapacitation on the grounds of alcoholism as required by § 687 of the Code of Civil Procedure is compatible with the requirement to protect the general right of personality enshrined in Art. 1(1) and Art. 2 of the Basic Law.

The Local Court considers the provision to be unconstitutional. [...]

[...]

### III.

Statements on the referral were submitted by the Federal Ministry of Justice on behalf of the Federal Government, the President of the Federal Court of Justice, data protection officers and the German Head Office for Addiction Matters (*Deutsche Hauptstelle gegen die Suchtgefahren e.V.*).

[...]

### B.

The referral is admissible. [...]

[...]

### C.

§ 687 of the Code of Civil Procedure is incompatible with Art. 2(1) in conjunction with Art. 1(1) of the Basic Law.

1. The general right of personality guaranteed by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law encompasses the authority of the individual to decide themselves on the disclosure and use of their personal data (right to informational self-determination – cf. BVerfGE 65, 1 <41 *et seq.*>). The act and the status of legal incapacitation as well as the personal circumstances that led to the incapacitation also constitute protected data.

[...] Because it is rooted in the general right of personality, the right to informational self-determination provides general protection against the collection and processing of personal data by the state [...]. A public announcement of the kind provided for by § 687 of the Code of Civil Procedure with regard to certain cases of legal incapacitation is merely a special form of data sharing by the state. The effect of the announcement is to share personal data with an unspecified and unspecifiable group of recipients, both within and beyond administrative authorities and other public bodies, in what is assumed to be the legitimate interest of the recipients. It does so without imposing any restrictions on the use of the data and without any additional procedural safeguards.

[...]

2. The right to informational self-determination is not guaranteed without limitation. The individual must accept that this right is subject to restrictions serving overriding public interests. However, in accordance with Art. 2(1) of the Basic Law, such restrictions require a statutory basis and must satisfy the requirements of proportionality. The principle of proportionality requires that a restriction of fundamental rights be sufficiently justified by the common good; that the chosen means be suitable and necessary for achieving the intended purpose; and that the limits of what is reasonable (*zumutbar*) must be respected in an overall balancing of the severity of the interference on the one hand, and the weight of the reasons invoked to justify it on the other hand (cf. BVerfGE 71, 183 <196 and 197> with further references). § 687 of the Code of Civil Procedure does not meet these requirements. 29

a) The main purpose of the provision is to protect legal relationships by informing participants in transactions of the limited contractual capacity of the legally incapacitated person, so that they may protect themselves against losses incurred in legal transactions concluded without the necessary approval or consent of the guardian. The legislator may pursue such a purpose in the interest of reliably functioning legal relationships. 30

[...] 31

b) It is true that the public announcement of legal incapacitation can only fulfil its warning function to the extent that participants in legal relationships actually become aware of it and know that the legally incapacitated person is identical with their potential contractual partner. However, given today's anonymous lifestyles, the mobility of the population, the reach of publishing institutions and the plethora of available information, this will only seldom be the case. On the other hand, automatic data processing provides new possibilities for storing and retrieving such information centrally, which can be used to this end if there is a legitimate interest (cf. § 32(2) of the Federal Data Protection Act), as is increasingly the case. That is sufficient to make the provision suitable for achieving its intended purpose. 32

[...] 33

c) To achieve the legislative purpose, it is indeed necessary that the information be publicly accessible. [...] 34

d) Balancing the severity of the interference and the reasons invoked to justify it leads to the conclusion that the limits of what is reasonable have been exceeded. On the one hand, it must be taken into account that the public announcement has no legal effect, and instead serves solely to issue a general warning with no specific objective. Furthermore, the legislator has itself refrained from requiring an announcement in the great majority of legal incapacitation cases (fewer than 10% concern cases of profligacy, alcoholism and drug abuse – cf. BTDrucks 10/5970, pp. 7 and 8). On the other hand, the public announcement of legal incapacitation on the grounds of alcoholism or profligacy constitutes a severe restriction of a person's fundamental right to decide themselves on the disclosure and use of their personal data. The severity of the interference follows from the contents of the announcement. It is not only a statement on contractual capacity, which is a status relevant to legal relationships, but also affects the person as a whole. As such, it can give rise to the risk of social 35

exclusion and hamper measures taken under the principle of the social state to help a person overcome their addiction and to reintegrate them into society. As has been shown, the public announcement addresses an unspecified and unspecifiable group of persons and thus reaches an indeterminable number of individuals in addition to those whose interests it is meant to serve. Under these circumstances, it is not possible to limit the use of the data to the verification of contractual capacity. [...]

[...] 36

However, in cases in which legal incapacitation has already been announced publicly, the person concerned must retain the possibility of making the lifting of their legal incapacitation publicly known as well. § 687 of the Code of Civil Procedure is incompatible with the Basic Law, subject to the above-mentioned exception regarding cases of prior announcement. 37

#### D.

[...] 38

Herzog	Niemeyer	Heußner
Henschel	Seidl	Grimm
Söllner	Dieterich	