HEADNOTES
to the Order of the First Senate of 8 February 1983
1 BvL 20/81

1. Where a decision in preliminary proceedings before the ordinary courts regarding a right of reply in relation to allegations published in the press or in the broadcasting media will settle the matter in dispute in a definitive manner, the ordinary court can make a judicial referral to the Federal Constitutional Court pursuant to Article 100(1) of the Basic Law.

2. Making a right of reply in broadcasting media subject to the requirement that the request for a reply be made within two weeks of publication of the challenged broadcast is incompatible with the general right of personality guaranteed by Article 2(1) in conjunction with Article 1(1) of the Basic Law.

FEDERAL CONSTITUTIONAL COURT
- 1 BvL 20/81 -

IN THE NAME OF THE PEOPLE

In the proceedings
for constitutional review of

the Hamburg Act on the State Treaty of the *Länder* on the North German Broadcasting Corporation of 1 December 1980, to the extent that it refers to § 12(2) first sentence of the State Treaty of the *Länder*

– Order of Suspension and Referral of the Hamburg Regional Court of 29 July 1981 - 74 O 235-81 -

the Federal Constitutional Court – First Senate –
with the participation of Justices
President Benda,
Böhmer,
Simon,
Faller,
Hesse,
Katzenstein,
Niemeyer,
Heußner

held on 8 February 1983:

The Hamburg Act on the State Treaty of the *Länder* on the North German Broadcasting Corporation of 1 December 1980 (GVBl HH p. 349), to the extent that it refers to § 12(2) first sentence of the State Treaty of the *Länder* on the North German Broadcasting Corporation (GVBl HH p. 350), is incompatible with Article 2(1) in conjunction with Article 1(1) of the Basic Law, and thus void, insofar as it provides that a right of reply must be requested within two weeks after the challenged programme was broadcast.

REASONS:

A.

The proceedings concern the question whether it is compatible with the Basic Law that a right of reply (*Gegendarstellung*) in relation to radio and TV programmes can only be requested within two weeks after the challenged programme was broadcast. 1

I.

Until 1980, § 11 of the Hamburg Press Act of 29 January 1965 provided the legal basis for a right of reply on the part of persons affected by a broadcast of the NDR broadcasting corporation […]. Pursuant to § 11(2) fifth sentence of the Hamburg Press Act, affected persons could demand the publication of a reply if the responsible editor or publisher received the request “without undue delay and within three months of publication”. 2

On 20 August 1980, the Free and Hanseatic City of Hamburg, the *Land* Lower Saxony, and the *Land* Schleswig-Holstein concluded a new State Treaty on the NDR (*Staatsvertrag über den Norddeutschen Rundfunk*) […]. The NDR State Treaty replaces the previous regime, providing as follows. 3

§12 Right of Reply 4

(1) (…) 5
(2) The right of reply must be requested in writing, without undue delay and at the latest within two weeks after the challenged programme was broadcast; the reply must be signed by the person concerned or their legal representative (…)
(3)-(6) (…)

II.

1. On 1 June 1981, the news programme *Tagesthemen*, produced by the NDR and broadcast on the ARD television network, included a segment titled “Turks in the City of Bingen”. In the segment, it was suggested, *inter alia*, that the Turkish-Islamic Cultural Association headquartered in the German city of Bingen was part of the Turkish Federation in Frankfurt and considered by the Turkish authorities as the foreign arm of the MHP, a criminal terrorist organisation. 6

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By letter […] of 12 June 1981, the plaintiff in the initial proceedings, the Registered Federation of the Turkish Democratic Associations of Idealists in Europe, requested a copy of the broadcast transcript from the defendant, the NDR. On 15 June 1981, the plaintiff received the transcript. By letter of 22 June 1981, the plaintiff demanded that the defendant broadcast a reply to the segment in dispute, which the defendant refused.

The plaintiff then sought a preliminary injunction from the referring court ordering the defendant to broadcast the reply. It withdrew the application after the court indicated concerns regarding its merits. On 9 July 1981, the plaintiff demanded that the defendant broadcast an amended version of the reply. When this demand was rejected yet again by the defendant, the plaintiff applied for a preliminary injunction the following day ordering the defendant to broadcast the [amended] reply […]. The defendant requested that the application be rejected, on the grounds that the limitation period pursuant to § 12(2) first sentence of the NDR State Treaty had expired and that the reply was manifestly false. 8

2. Even though the Regional Court considered the plaintiff's application to be admissible and well-founded, it found that it could not issue a preliminary injunction due to the statutory limitation period. It suspended the proceedings and referred to the Federal Constitutional Court the question 9

> whether § 12(2) first sentence of the State Treaty of the *Länder* on the North German Broadcasting Corporation of 20 August 1980, in conjunction with the Act on the State Treaty of the *Länder* on the North German Broadcasting Corporation of 1 December 1980, is incompatible with the Basic Law, and therefore void, to the extent that it provides that the publication of the reply must be requested within two weeks after the challenged programme was broadcast. 10

[…] 11-15

III.

1. In consultation with the Governments of the *Länder* Lower Saxony and Schleswig Holstein, the Ministry of Justice of the Free and Hanseatic City of Hamburg submitted a statement on behalf of the Hamburg Government, contending that § 12(2) first sentence of the NDR State Treaty was compatible with the Basic Law. […] 16

[…] 17

2. […] 18-21

3. The ARD concurred with this statement. 22

4. […] 23

B.

I.

The referral is admissible. 24

[…] 25-27

II.

The provision referred for review is not compatible with Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 28

1. In light of the realities of modern mass communication, the right of reply is specifically recognised in media law as a means of protecting individuals from the media intruding into their personal sphere (cf. BGHZ 66, 182 <195> with further references). Anyone whose personal matters are publicly discussed in the media is granted the right to present their own account in the same forum, with the same publicity and before the same audience; it allows them to defend themselves in a timely manner, significantly increasing the effectiveness of their reply. By contrast, other legal remedies for the protection of one's personality under private and criminal law would generally only provide relief once the principal proceedings have been concluded, i.e. at a time when the public has long forgotten about the incident. 29

a) While the right of reply is not directly set out in the Constitution itself, recognising such a right serves to protect the right of individuals to determine the portrayal of their person, which is covered by the constitutional guarantee of the general right of personality under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law (cf. BVerfGE 54, 148 <153>, with further references). Individuals must be able to decide for themselves how they wish to present themselves vis-à-vis third parties or the public, how they wish to define their social image (*sozialer Geltungsanspruch*), and whether and to what extent third parties may determine the portrayal of their person by making it the subject of public discussion (BVerfGE 35, 202 <220>; 54, 148 <155 *et seq*.>). Accordingly, individuals affected by a media portrayal of their person must have a legally guaranteed right of reply to counter this portrayal; otherwise, they would be degraded to mere objects of public discussion. 30

The procedure governing the right of reply must be designed in line with objective demands ensuring that this right can be exercised effectively. Just as the right of reply itself serves to safeguard the general right of personality, procedural law plays a significant role in ensuring effective protection of the general right of personality; procedural law, too, must conform to the demands of such protection (cf. BVerfGE 53, 30 <65> with further references, and the dissenting opinion ibid. p. 71 *et seq*.). If procedural law does not fulfil its purpose or if it obstructs the exercise of the right of reply to such an extent that there is a risk of undermining substantive fundamental rights, it is incompatible with the fundamental rights it is meant to protect in the first place. Thus, the procedural provisions governing the right of reply must themselves be measured against the right of personality guaranteed by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 31

b) When specifying the right of reply in relation to the broadcasting media, the legislator must take into consideration not just the general right of personality of affected persons, but also the fundamental freedom of broadcasting (Art. 5(1) 32

second sentence of the Basic Law). This freedom guarantees the right to determine the form and content of broadcasting programmes (BVerfGE 35, 202 <223>; 59, 231 <258>). Regardless of the content of the reply, this freedom is impaired – albeit only marginally – by the fact that the broadcasting media are legally obliged to broadcast a reply. In terms of content, the obligation to publish a reply may indeed run counter to freedom of broadcasting if the reply conflicts with the broadcasting media's duty to provide comprehensive and accurate information, or – as seems possible in the present case – if the reply is broadcast so late that it lacks topicality, i.e. that the link to the originally published information that it now aims to correct is no longer clear to the audience.

Both the general right of personality and freedom of broadcasting are essential elements of the constitutional order of the Basic Law (BVerfGE 35, 202 <225>), which is why neither can claim to take general precedence. Thus, in case of conflict, a balance must be struck, where possible, with the principle of proportionality serving as the applicable constitutional standard for weighing the conflicting interests (cf. BVerfGE 44, 353 <373>). According to this principle, measures restricting a fundamental right must be suitable and necessary to achieving the purpose pursued, without placing an excessive burden on affected persons, which means the measures must be reasonable (*zumutbar*). 33

2. The provision referred for review violates the principle of proportionality. The referring court assumes correctly that the provision excessively restricts the constitutionally guaranteed right of personality: even when taking into account the protected interests of the broadcasting media, the provision unduly impedes the exercise of the right of reply as a means of effectively protecting the personality rights of individuals affected by a broadcasting programme. 34

a) The legislator is not barred from subjecting a request to publish a reply to a time limit, in keeping with the purpose of the right of reply; this applies all the more since affected persons can still invoke other claims under private law to protect their right of personality. The legislator has considerable latitude in setting such a time limit. It may, for instance, opt for a shorter period than the three months specified in most other comparable provisions concerning a right of reply. However, the time limit set out in § 12(2) first sentence of the NDR State Treaty is so short that it renders the exercise of the right of reply considerably more difficult, if not impossible, in more than just exceptional cases. The time limit starts to run on the date of the broadcast, regardless of whether the affected person listened to or viewed the programme, and regardless of when they learned about it from a third party. If the person concerned neither followed the programme themselves nor learned about it [from other sources] within two weeks, they have virtually no possibility – through no fault of their own – of protecting their personality rights by publishing a reply. Given the number of radio and television programmes available, this is not an unlikely scenario. Even if the person concerned followed the programme themselves – that is, in the best case, which was apparently the assumption on which the *Länder* based the treaty provision in question – there is a risk, not just in individual cases, that the persons concerned will be unable to meet the two-week time limit. In the case of radio and television programmes, a reply that satisfies the strict statutory prerequisites necessarily requires the affected person to first obtain the transcript of the programme. The postal delivery times alone, first for requesting the transcript 35

and then for submitting one's reply, already take up some time. In addition, it will take time for the broadcasting corporation to process the request. The person concerned has no influence over when the broadcaster will send the transcript; the transcript might be sent with some delay, even if just for technical reasons, and it may thus arrive only shortly before the two-week limit expires. In the remaining time, the person concerned must decide on their approach, possibly seek legal advice and draft a reply that does not raise legal objections. Where the contested media publication is complex and broad in scope, more time may be needed to draft a reply that satisfies legal requirements. These aspects may prevent the person concerned from exercising their right of reply, even if they become aware of the programme within the two-week time limit but only so late that they cannot submit a reply to the broadcaster in due time.

In light of these consequences, § 12(2) first sentence of the NDR State Treaty does not satisfy the principle of proportionality, specifically the element of necessity. It is not discernible what protected interests of the broadcasting media were capable of establishing the need for such a short limitation period, giving rise to such serious consequences [for the other party]. Notably, the interest in ensuring that replies are published in a timely manner does not require that replies can generally only be requested within two weeks after the programme at issue was broadcast. The interests of the broadcasting media can generally be accommodated by way of the less restrictive requirement that replies be requested without undue delay. Such a requirement is also contained in § 12(2) third sentence of the NDR State Treaty, which provides that the right of reply be exercised without any delay attributable to the person concerned. This allows for the circumstances of the individual case to be taken into account, while ensuring that the reply, at the time it is disseminated, has not lost its relevance. […] 36

b) […] 37

3. The referring court correctly pointed out that the unequivocal wording of the State Treaty does not allow for an interpretation of the provision in conformity with the Basic Law, for instance to the effect that the limitation period could begin not at the actual time of the broadcast, but only at the time when the broadcast comes to the attention of the person concerned (cf. BVerfGE 54, 277 <299>). Since § 12(2) first sentence of the NDR State Treaty is thus incompatible with Art. 2(1) in conjunction with Art. 1(1) of the Basic Law to the extent that it requires that the right of reply be exercised within two weeks after the challenged programme was broadcast, the Hamburg Act on the NDR State Treaty is declared void pursuant to § 82(1) in conjunction with § 78 first sentence of the Federal Constitutional Court Act. 38

Benda Böhmer Simon
Faller Hesse Katzenstein
Niemeyer Heußner