

## **HEADNOTE**

to the Order of the First Senate of 13 January 1981  
1 BvR 116/77

It does not violate fundamental rights that the Bankruptcy Code imposes an unconditional obligation on debtors to provide information in bankruptcy proceedings, which can be enforced by coercive measures. If, in this context, debtors disclose their involvement in criminal acts, their testimony may not be used against them in criminal proceedings without their consent.

### **FEDERAL CONSTITUTIONAL COURT - 1 BvR 116/77 -**

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

In the proceedings  
on the constitutional complaint of

merchant B...,

– authorised representatives: ...

against a) the Order of the Oldenburg Regional Court of 6 February 1977  
- 6 T 62/77 -

b) the Order of the Vechta Local Court of 14 January 1977  
- N 23/75 -

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

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

held on 13 January 1981:

The constitutional complaint is rejected.

[...]

## REASONS:

### A.

The complainant, a debtor in bankruptcy proceedings, invokes the right to refuse to answer questions that might require him to disclose criminal conduct. 1

#### I.

The debtor's obligation to provide information in bankruptcy proceedings is based on [...] provisions of the Bankruptcy Code. 2

[...] 3-6

The Bankruptcy Code is silent on whether a debtor's obligation to provide information in bankruptcy proceedings also extends to information through which they would have to disclose that they had engaged in criminal conduct, and whether detention may be imposed to enforce their obligation in such a case. Nor does the Bankruptcy Code contain any express prohibition to use such information against the debtor in criminal proceedings. 7

#### II.

1. Bankruptcy proceedings were initiated in respect of the complainant's assets. At the request of the trustee in bankruptcy, the complainant was to be questioned on certain asset transfers. He appeared at the evidentiary hearing, but refused to answer questions because criminal investigations into suspected bankruptcy offences were pending in relation to the matters on which he was questioned at the hearing, and he feared that he might incriminate himself by answering the questions. 8

2. Following this, the Bankruptcy Court ordered his detention pursuant to §§ 75, 101(2) of the Bankruptcy Code on the grounds that the debtor's refusal to answer the questions was unjustified. 9

The Regional Court dismissed the complainant's immediate complaint (*sofortige Beschwerde*) [...]. 10

3. The complainant lodged a constitutional complaint against these decisions [...]. 11

4. [...] 12

#### III.

[...] 13

### B.

The constitutional complaint is admissible but unfounded. The fact that the Bankruptcy Code imposes an unconditional obligation to give testimony on the complainant, which can be enforced by coercive measures, does not in and of itself violate the complainant's fundamental rights. His interests meriting protection are sufficiently 14

accommodated given that any self-incriminating statements fall under a prohibition to use them as evidence in criminal proceedings.

## I.

1. Persons who are subject to statutory obligations to provide information may face a dilemma: they must either incriminate themselves, or possibly commit a new offence by making a false statement, or risk coercive measures by choosing to remain silent. Therefore, an obligation to provide information that can be enforced by coercive measures amounts to an interference with the general freedom of action as well as an impairment of the right of personality within the meaning of Art. 2(1) of the Basic Law. Moreover, involuntary self-incrimination affects the human dignity of the persons whose testimony is used against them. 15

2. As the law stands, it provides for various safeguards protecting against unreasonable (*unzumutbar*) interferences and impairments. [...] 16

a) The protection against self-incrimination is most comprehensive for witnesses, parties to court proceedings and, most notably, persons charged with an offence in criminal or comparable proceedings. [...] 17

[Involuntary] self-incrimination constitutes a serious interference given its consequences under criminal law. Therefore, relevant safeguards have primarily been developed in cases where a person is asked to provide information specifically for the purposes of criminal proceedings or similar purposes. [...] According to the applicable case-law, the right to remain silent [...] is regarded as an inherent element of an order based on the rule of law and guided by respect for human dignity (BVerfGE 38, 105 <113>; [...]). In legal scholarship, the privilege against self-incrimination in criminal proceedings is considered a decision on constitutional values mandated by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law that accords precedence to the right of personality on the part of the accused, which outweighs the interest of the public in law enforcement in this context. The protection of human dignity requires that persons charged with a criminal offence be able to decide freely whether they themselves may be used as a means (*Werkzeug*) for bringing about their own conviction [...] 18

[...] 19

If not even persons charged with a criminal offence and parties to court proceedings are expected to incriminate themselves, witnesses deserve such protection all the more. [...] In the applicable case-law, this rule is considered an inherent element of the right to a fair trial under the rule of law. It protects the witnesses' right of personality, ensuring that other parties to the proceedings cannot treat them as mere objects used for establishing the truth (cf. BVerfGE 38, 105 <111 *et seq.*>; BGHSt 17, 245 <246>). 20

b) As the law stands, it grants witnesses, parties to court proceedings and persons charged with a criminal offence an unconditional right to remain silent and to refuse to answer questions so as to avoid possible self-incrimination. However, this does not necessarily apply to persons who, based on specific legal grounds, are subject to contractual or statutory obligations to provide necessary information to another person or a public authority. In such cases, the interests of the person required to provide 21

information conflict with the need for information on the part of others; the law accommodates these interests in obtaining information in different ways.

[...]

22-24

## II.

1. The legal order grants a right to remain silent and a right to refuse to answer questions to persons charged with a criminal offence, witnesses and parties to court proceedings in order to protect them against self-incrimination. Yet these rights cannot to the same extent apply to debtors in bankruptcy proceedings. Unlike the testimony given by persons charged with a criminal offence, the testimony given by debtors is not intended to contribute to the debtor's own conviction. [...] In bankruptcy proceedings, debtors are one of the most important sources of information, and creditors and the bodies overseeing the proceedings rely on the information debtors provide to conclude the bankruptcy case properly. The law specifically determines the debtors' rights and obligations in line with the objective demands of bankruptcy proceedings. The prevailing opinion in legal scholarship infers from the applicable provisions that debtors in bankruptcy proceedings have an unconditional obligation to provide information and that the interests of creditors must be given priority over the debtor's interest in being protected against involuntary self-incrimination [...].

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This interpretation of the applicable provisions set out in bankruptcy law is not objectionable under constitutional law. The legal interests protected by Art. 2(1) of the Basic Law are subject to limits set by the rights of others. Thus, this fundamental right does not merit absolute protection against self-incriminating statements without taking into account whether this would impair interests of third parties that also merit protection. As repeatedly emphasised in the Court's case-law in respect of the fundamental right to general freedom of action (cf. BVerfGE 4, 7 <15>; 8, 274 <329>; 27, 344 <351>), the Basic Law resolves the tension between the individual and the community by endorsing the notion that the individual is connected to and bound by the community. The individual must therefore accept that their freedom of action is subject to limitations imposed by the legislator to maintain and foster social coexistence, within the limits of what is generally reasonable and provided that personal autonomy is upheld. It would be unreasonable and incompatible with human dignity to compel persons to provide information that could lead to their own criminal conviction or similar sanctions. In that respect, Art. 2(1) of the Basic Law, as a defensive right against state interference, affords protection in line with long-established and commonly recognised legal tradition. If, however, the information at issue is necessary to satisfy a legitimate interest, the legislator may undertake a balancing of the various parties' conflicting interests. The legislator may take into consideration that bankruptcy proceedings do not only concern an interest of the state or the public in obtaining information, but also the interests of injured third parties. In this respect, the obligations imposed in bankruptcy proceedings differ from the obligations to provide information imposed under administrative law, which the legislator, in more recent legislation, has supplemented by a right to refuse to answer questions in cases of self-incrimination. An unconditional obligation to provide information is the only way to prevent debtors in bankruptcy proceedings from removing parts of the bankruptcy estate from the legitimate reach of their creditors. In this context, a right to refuse to answer questions would unjustifiably privilege those debtors who have behaved especially reprehensibly to the detriment of their creditors.

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It does not amount to a violation of human dignity that the legislator holds debtors in bankruptcy proceedings liable to meet the debts owed to their creditors and to assist in settling those debts in the best possible manner by providing the necessary information.

Even if, in light of the above, debtors in bankruptcy proceedings have no right to refuse to provide information, compelling them to incriminate themselves would interfere with their right of personality protected under Art. 2(1) of the Basic Law. Thus, imposing coercive measures can [...] be disproportionate, and therefore impermissible, in the individual case. In addition, the debtor's obligation to provide information must be supplemented by a prohibition to use the information as evidence under criminal law [...]. For the reasons set out above, the obligation imposed on debtors is unconditional only in the context of bankruptcy proceedings where the interests of debtors must stand back behind the interests of creditors. However, the debtor's right of personality would be disproportionately impaired if self-incriminating statements obtained by coercive measures were used for other purposes against the debtor's will and were admissible as evidence in criminal proceedings. This impairment is not justified by objective reasons. For the reasons discussed above, constitutional law requires that debtors be granted a right to remain silent in criminal proceedings; the use as evidence of information obtained by coercive measures in this context is impermissible. Yet this right to remain silent would be meaningless if self-incriminating statements obtained by coercive measures outside the context of criminal proceedings could be used against the debtors for law enforcement purposes against their will. In bankruptcy proceedings, it may be reasonable to impose an unconditional obligation to provide information on debtors in the interest of creditors; this does not, however, mean that it were also justified to require debtors to assist in their own criminal conviction, or to provide law enforcement authorities with means that would not be available to them in other criminal cases.

2. While the Bankruptcy Code imposes an obligation to provide information on debtors in bankruptcy proceedings and allows for its enforcement by way of coercive measures, it does so without setting out a prohibition to use such information in criminal proceedings. It is in principle incumbent on the legislator to fill this gap given that only statutory law can define the prohibition to use the information as evidence in more detail and provide for additional safeguards in the form of prohibitions to disclose the information obtained. However, in cases where a provision that predates the Basic Law must be amended for reasons of constitutional law, it also falls to judges to fill legal gaps, following the applicable statutory law as closely as possible and drawing on directly applicable provisions of the Basic Law, until the legislator enacts new provisions (cf. BVerfGE 37, 67 <81>; 49, 286 <301 et seq.>; additionally BVerfGE 33, 23 <34>).

[...]

### III.

In light of the above, the bankruptcy law provisions imposing an unconditional obligation on debtors to provide information, which is supplemented by a prohibition to use the testimony in criminal proceedings, is constitutionally unobjectionable. The complainant could not invoke a right to refuse to provide information, as claimed by

