Headnote

to the Judgment of the First Senate of 7 June 2005

– 1 BvR 1508/96 –

Decision regarding the question of the constitutional limits on the interpretation of laws concerning support and social assistance when determining the ability to pay of children who are required by the social assistance funding agency to pay support for their parents as the result of an assigned right.

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 1508/96 –

Pronounced
on 7 June 2005
Ms Wagner
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Ms B(…),

– authorised representative: Rechtsanwalt […] –

against the judgment of the Duisburg Regional Court (*Landgericht*) of 3 May 1996 – 24 (4) S 285/95 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Papier,

Haas,

Hömig,

Steiner,

Hohmann-Dennhardt,

Hoffmann-Riem,

Bryde,

Gaier

held on the basis of the oral hearing of 15 March 2005:

Judgment:

1. The judgment of the Duisburg Regional Court of 3 May 1996 – 24 (4) S 285/95 – violates the fundamental right of the complainant under Article 2.1 of the Basic Law (*Grundgesetz* – GG).

2. The judgment is overturned and the matter is referred back to the Regional Court.

R e a s o n s :

A.

The constitutional complaint relates to the determination of the ability to pay of children who are required by the social assistance funding agency to pay support for a parent as the result of an assigned right. 1

I.

1. Under § 1601 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB), lineal relatives have an obligation to give each other support; consequently, children also have an obligation to support their parents. The requirement for this is, on the one hand, that the parent who claims support is not able to support himself or herself from his or her own means (§ 1602.1 of the Civil Code), and therefore that parent is indigent. On the other hand, the child who is required to pay support must be able, taking into account his or her other obligations, to pay support to the parent without endangering that child's own reasonable support (§ 1603.1 of the Civil Code), that is, the child must be able to pay. In this calculation, the indigence and the ability to pay must exist concurrently. Only if and as long as the person liable for support is able to pay during the time when there is a need for support does a support claim arise. […] 2

The child's own reasonable support therefore constitutes the limit in support law up to which the child liable for support may be required to commit his or her income and assets. The legislature has not defined in detail what the person liable for support would need to have left under these conditions, and therefore this would have to be interpreted by the courts. 3

[…] 4-5

2. The state too has a duty to help an indigent person in its obligation to establish and maintain a social state, which is laid down in constitutional law. It does this in the form of social assistance, which it also grants as assistance with nursing care – at the time relevant in the present case this was still governed by §§ 68 et seq. of the Federal Social Assistance Act (*Bundessozialhilfegesetz* – BSHG) – to those persons who are in need of care in their old age and cannot afford the full costs for nursing care either from their own means or from the funds of long-term care insurance. However, the support claim of an indigent person against a person liable for support who is able 6

to pay has priority over his or her claim to social assistance (see § 2 of the Federal Social Assistance Act). If the social assistance funding agency grants social assistance despite the fact that a support claim exists, until 26 June 1993, under §§ 90 and 91 of the Federal Social Assistance Act the agency was able to send a notice in writing to the person liable for support with the effect that the support claim passed to the social assistance funding agency up to the amount of social assistance granted. From the date of its amendment by the Act on the Implementation of the Federal Consolidation Programme (*Gesetz zur Umsetzung des Föderalen Konsolidierungsprogramms* – FKPG) of 23 June 1993 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I p. 944), § 91 of the Federal Social Assistance Act provided that for the period for which assistance is granted, the support claim of a social assistance recipient existing under private law passes by operation of law to the social assistance funding agency up to the amount of the expenditure incurred.

Social assistance law also contains provisions for taking account of income and assets. § 91.2 of the Federal Social Assistance Act, new version, and § 91.1 sentence 2 of the Federal Social Assistance Act, old version, provided that the support claim of a social assistance recipient passes to the social assistance funding agency, or was permitted to be assigned to the social assistance funding agency, only insofar as a recipient of assistance has to commit his or her own income and assets. This equal treatment of a person liable for support and a recipient of assistance, which restricts the passing of an existing support claim, related to assets pursuant to § 88 of the Federal Social Assistance Act, subsection 2 of which set out what must be left to the recipient of assistance as exempt assets, and subsection 3 of which provided that assets are not to be committed to the extent that this would constitute a hardship for the owner of the assets and his or her relatives entitled to support. This is the case in connection with assistance in particular situations above all if a reasonable standard of living or the maintenance of reasonable old-age provision would otherwise be considerably more difficult (see § 88.3 sentence 2 of the Federal Social Assistance Act). Finally, § 89 of the Federal Social Assistance Act created the possibility for persons who have to commit their assets for their own support under § 88 of the Federal Social Assistance Act and therefore cannot claim social assistance to nevertheless be granted social assistance as a loan if they cannot reasonably be expected to realise their assets immediately. 7

3. The Act to Integrate Social Assistance Law into the Code of Social Law (*Gesetz zur Einordnung des Sozialhilferechts in das Sozialgesetzbuch*) of 27 December 2003 (Federal Law Gazette I p. 3022) repealed the Federal Social Assistance Act with effect from 1 January 2005. It has been replaced by the Twelfth Book of the Code of Social Law (*Zwölftes Buch Sozialgesetzbuch* – SGB XII) – Social Assistance – which did not alter the contents of the social assistance provisions that are relevant in the present case (see §§ 61 et seq., 93-94 and 90-91 of the Twelfth Book of the Code of Social Law). 8

However, the fourth chapter of the Twelfth Book of the Code of Social Law integrated basic provision in old age and in the case of reduction of working capacity which those over sixty-five can claim to the extent that they cannot finance their subsistence from their income and assets (§§ 41 et seq. of the Twelfth Book of the Code of Social Law) into social assistance law (governed from 1 January 2003 to 31 December 2004 by § 2.1 of the Basic Provision Law (*Grundsicherungsgesetz*)). Under § 43.2 of the Twelfth Book of the Code of Social Law, this does not take into account support claims of the person eligible for support against children, insofar as their total annual income is less than the amount of EUR 100,000. 9

II.

1. The mother of the complainant lived in an old people's nursing home from July 1991 until her death in September 1995 because she was in need of long-term care. The costs of the nursing home were much higher than her income, which consisted of her own old-age pension and her widow's pension. The City of B., as the local social assistance funding agency, paid her assistance for long-term care, charged to the supra-local social assistance funding agency, under §§ 68 et seq. of the Federal Social Assistance Act. By the date of the mother's death, the sum of the assistance granted had reached the figure of approximately DM 123,000. By a notice of the same month in which the mother was accepted in the old people's nursing home, the complainant's social assistance funding agency gave notice in due form to the complainant under §§ 90 and 91 of the Federal Social Assistance Act, which was in force at the time, of the statutory assignment of the support claims of the complainant's mother against the complainant, and it later asserted the assigned rights against the complainant in court proceedings. 10

At this time, the complainant, who was born in the year 1939, was married with no children, and from 1970 on she worked half-time, eventually earning a net monthly income in the amount of approximately DM 1,100. In the year 1994, the married couple separated. The complainant's husband, who had not been gainfully employed since 1990, retired in 1995. The complainant's employment relationship was terminated for redundancy in autumn 1996. Together with her husband, the complainant was and is the co-owner in equal shares of a piece of real estate with a block of four flats erected on it which was intended to provide joint old-age provision. The market value of the real estate was stated as DM 660,000, although at the beginning of 1992 there were encumbrances in the amount of DM 168,000. The complainant and her husband lived in one of the four flats as the matrimonial home until they separated, and after this the complainant lived there alone. The three other flats were let out. The monthly mortgage repayments for the property were greater than the rental income. 11

2. In the proceedings before the Local Court (*Amtsgericht*), the social assistance funding agency applied for an order that the complainant pay it support for the period from July 1991 to January 1995 in the amount of DM 104,921.25, and from February 1995 DM 2,640.95 per month for her mother, who was being paid social assistance. It 12

submitted that the complainant had realisable assets in the form of the real estate and building that belonged to her and her husband. It stated that it was not necessary to sell the property, since the complainant could make an acknowledgment of debt with regard to her support debts, and on the basis of this the social assistance funding agency could have a mortgage registered against the real estate in the Land Register.

The action was dismissed by the Local Court on the grounds that the complainant was not obliged to make support payments for lack of ability to pay. Her income from gainful employment and letting out property was less than the amount she would have been allowed to retain, which at all events was more than DM 1,600, according to the court. It held that the complainant did not have to commit her co-owner's share of half of the real estate for the purpose of granting support. It was true that § 1603.1 of the Civil Code in principle created an obligation to commit the capital, but only insofar as the reasonable lifelong support of the person liable was not endangered or the realisation did not result in financially unjustifiable disadvantages. But in the case of the complainant, this would be the result of a realisation of the real estate. Because the block of flats was let out in full and it was therefore not possible for a purchaser to use it himself or herself, the only proceeds of sale that could be expected would be in severe disproportion to the market value. In addition, in the case of a part auction the complainant's husband would also be indirectly forced to sell his property. 13

The court stated that the complainant could also not reasonably be expected to realise the real estate because it had been purchased for old-age provision. It had to be taken into account that since 1990 her husband had been in early retirement, she herself was threatened with the loss of her job and in view of her age she scarcely had a chance of finding a new job, and therefore, as a result of her unemployment, her income would be appreciably smaller in future. According to the court, every realisation of her share of the real estate would result in considerable financial disadvantages, endangering her own support, for the rest of her life, additionally taking into account the fact that the spouses had separated. 14

3. The social assistance funding agency appealed against the judgment of the Local Court. By an order of 5 December 1995, the Regional Court presented a settlement proposal to the parties. Under this proposal, the social assistance funding agency was to agree to grant the support contributions it had asserted as an interest-free loan, applying § 89 of the Federal Social Assistance Act by analogy, in respect of the outstanding payment up to December 1995 in the total amount of DM 132,500 and from January 1996 in the amount of DM 2,500 per month, up to a total maximum loan amount of DM 245,000, the market value of the complainant's share of the real estate less the encumbrances. The loan was to be repayable at the end of three months after the complainant's death. At the same time, the complainant was to agree to secure the repayment of the loan in favour of the social assistance funding agency by consenting to and applying for a land charge to be registered against her co-owner's share. 15

In justification of this settlement proposal, the court stated that on the one hand it was undisputed that the complainant was not able to pay in the meaning of § 1603 of the Civil Code, since she was not in a position to pay support from regular earnings without endangering her own reasonable support. It was also extremely questionable whether she had a duty to realise her co-owner's share. On the other hand, there was every reason to believe that the complainant was obliged in good faith to accept the offer of a loan from the social assistance funding agency made on the basis of the legal principle of § 89 of the Federal Social Assistance Act, if this merely, without endangering her subsistence, prevented her permanently from realising her real estate. 16

The complainant did not accept this settlement proposal. Thereupon the social assistance funding agency altered its statement of claim and now applied for a declaration that the complainant owed the total amount of DM 125,527.92 for the long-term care expenses for her mother, who had now died, and an order that the complainant must accept the offer of an interest-free loan in this amount from the social assistance funding agency, repayable three months after the complainant's death – the social assistance funding agency confirmed that it would make this loan – and must consent to an *in rem* security. 17

By judgment of 3 May 1996, the Regional Court largely granted these applications. It held that the complainant was obliged to pay a support contribution owed to her mother and assigned to the social assistance funding agency in the amount of DM 123,306.88. The court ordered the complainant to accept the interest-free loan offered by the social assistance funding agency in the amount of the sum owed and, in order to secure it, to consent to the registration of a land charge in the amount of DM 123,000 against her co-owner's share. Without endangering her own support and her old-age provision, the complainant, it held, was in the position to commit her co-owner's share with the help of the interest-free loan offered to her by the social assistance funding agency, repayable only after her death, for the arrears of support owed to her mother. The court stated that the obligation of a debtor to pay did not cease if the creditor voluntarily or on the basis of a legal obligation only asserted the claim at a later date. Just as the social assistance funding agency could grant social assistance under § 89 of the Federal Social Assistance Act as a loan to an indigent person who had to commit his or her property, it could also provide the complainant as a person who owed support with the necessary funds in the form of a loan. In order to satisfy obligations to pay support, according to the court, a person liable for support also had to draw on his or her capital, and there was no general equitable limit to the realisation of this. For this reason, the complainant was all the more obliged to commit her assets if she was expected not to realise it immediately but merely to encumber it with a land charge. 18

It was not necessary to guarantee that the complainant received old-age provision from the property and the capital was ultimately retained for the heirs. On the contrary, the property had to be committed in such a way that it was exhausted by the probable end of the life of the person owing support. Similarly, the court held, it could 19

not be assumed on the basis of the complainant's income situation, her rent-free accommodation and the rental income, which had not been submitted in detail, and her burden of repayment of capital and interest that by reason of the burden of the land charge the complainant was not in a position to guarantee her own support.

4. The constitutional complaint challenges this decision; in it, the complainant submits that her rights under Article 2.1 and Article 14.1 of the Basic Law (*Grundgesetz* – GG) have been violated. […] 20

[…] 21-22

III.

[…] 23-33

B.

The constitutional complaint is admissible and is well-founded. 34

The challenged decision of the Regional Court violates the complainant's fundamental right under Article 2.1 of the Basic Law. There is no basis in law for the obligation imposed on the complainant to accept an interest-free loan and to consent to a land charge being registered against her co-owner's share. The determination made by the court that the complainant is obliged to pay a support contribution owed to her mother and assigned to the social assistance funding agency because she is able to pay by reason of the interest-free loan offered her by the social assistance funding agency cannot be justified from any legal point of view. The decision therefore unconstitutionally restricts the complainant's financial freedom to dispose, protected by Article 2.1 of the Basic Law. 35

I.

1. Article 2.1 of the Basic Law guarantees personal freedom to act in a comprehensive sense, but only within the limits stated in the provision containing this fundamental right. It is in particular subject to constitutional order and may be limited by this (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 6, 32 (37 et seq.); 74, 129 (151-152); 80, 137 (152-153)). This includes the legal provisions passed by the legislature or other lawmaker, including their interpretation by the courts, insofar as the provisions and their interpretation are in conformity with the Basic Law (see BVerfGE 57, 361 (378); 74, 129 (152)). In this respect, the law of support and the law of social assistance as interpreted by the courts also impose limits on personal freedom to act. However, the interpretation and application of constitutional provisions of support law and social assistance law may not lead to unconstitutional results (see BVerfGE 80, 286 (294)). 36

2. The interpretation of non-constitutional legal norms and their application to an individual case are matters for the courts with jurisdiction. It is only if in the process the 37

courts violate constitutional law that the Federal Constitutional Court may intervene in response to a constitutional complaint. The mere fact that a decision is objectively wrong when measured against non-constitutional legal norms is not sufficient for this (see BVerfGE 18, 85 (92-93)). However, if the interpretation is in sharp contradiction to all applicable legal norms, and if this creates claims that have no basis whatsoever in existing law, the courts are laying claim to powers which the constitution has clearly granted to the legislature. In doing this, the courts are assuming the role of lawmakers instead of accepting their true role as administrators of the law, that is, they are ignoring their commitment to law and justice within the meaning of Article 20.3 of the Basic Law (see BVerfGE 96, 375 (394-395)). This results in their imposing a limitation on the personal freedom to act protected in Article 2.1 of the Basic Law which is no longer legitimated by the constitutional order. This is the case here.

3. The Regional Court's interpretation of the law on which the challenged decision is based does not correspond to any of the recognised methods of interpretation (on this, see BVerfGE 93, 37 (81)). Both the interpretation of § 1603.1 of the Civil Code by the Regional Court and that of §§ 90, 91, 88 and 89 of the Federal Social Assistance Act contradict the wording of the provisions and their systematic integration into the context of the provision in question (a), their objective (b), and the legislative intention associated with them (c). 38

a) The Regional Court's opinion of the complainant's ability to pay was based solely on the view that the complainant was obliged to commit her assets by encumbering her co-owner's share with a land charge to secure the interest-free loan offered to her by the social assistance funding agency. The court stated that she must accept this offer in order to fulfil her obligation to support her mother without endangering her own support or her old-age provision. Since the complainant was offered the loan after the settlement proposal of the Regional Court, the complainant's ability to pay, which the court presumed to exist, only arose at this time, that is, after the death of the complainant's mother. The court therefore based a support claim for a past period of time on an ability to pay on the part of the complainant that occurred after the mother's indigence had already ended on her death. 39

Basing support claims for past periods in such a way on the retroactive creation of the ability to pay in earlier periods when there was a need for support contradicts the very wording and structure of the provisions of support law and social assistance law which are relevant here. 40

aa) § 1602.1 and § 1603.1 of the Civil Code contain no express reference to the temporal relationship of the indigence of the person entitled to support and the ability to pay of the person liable for support as the conditions of a support claim. But if the wording of § 1603.1 of the Civil Code is that a person who, taking into account his other obligations, is unable to provide support without endangering his own reasonable support, this shows that for the duration of the inability to pay no support claim can arise. This was even emphasised in the materials to the original Civil Code (*Motive*; 41

loc. cit. (see *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich*, vol. IV, 2nd ed. 1896, pp. 687-688)). But since under § 1602.1 of the Civil Code, on the other hand, a support claim only exists when the person entitled to support is indigent, a support claim under § 1601 of the Civil Code can exist only if both conditions are fulfilled at the same time.

bb) The wording and legislative context of § 90.1 of the Federal Social Assistance Act, old version, and § 91.1 of the Federal Social Assistance Act, new version, also presumed that the statutory assignment of support claims required temporal concurrence of indigence and ability to pay. They permitted the statutory assignment of support claims to which the recipient of assistance is entitled for the period for which assistance is given. This implies that the support claim must exist in the period during which assistance is given, which is subject to the ability to pay of the person liable for support in this period. 42

Notwithstanding these statutory conditions for the assignment of an existing support claim, the Regional Court assumed that such a claim existed against the complainant, although in the period when social assistance was granted to her mother even in the Regional Court's own opinion she was not yet able to pay, for lack of a loan offer. In this connection, the Regional Court's argument is not convincing when it states that the basic obligation to draw in addition on one's main capital fund to fulfil obligations to pay support, if appropriate by lending against property and taking a loan, also results in the person liable for support only later paying the support owed and thus fulfilling the obligation only after the end of the periods of indigence. Under §§ 1601 and 1603 of the Civil Code and under §§ 90 and 91 of the Federal Social Assistance Act, what matters is not the manner in which a person liable for support is drawn on to satisfy a support claim against him or her, but solely whether the person liable for support is/was able to pay during the period when the person entitled was indigent, that is, whether the person liable for support was able to satisfy the need for support during this period without endangering his or her own support, for example by taking a loan against his or her property. However, even in the opinion of the Regional Court such a possibility was not available to the complainant until the social assistance funding agency offered her an interest-free loan, and thus only after the end of the period of her mother's need. 43

cc) § 89 of the Federal Social Assistance Act was also invoked by the Regional Court as the basis of a support claim against the complainant in a manner that is in clear contradiction to the wording of this provision and its systematic integration into the structure of statutes on social assistance law. The provision referred to § 88 of the Federal Social Assistance Act, which determined what assets of a person's own are to be committed before a person may claim social assistance for indigence. If usable assets are available, that is, if there is no indigence, social assistance might nevertheless be granted as a loan under § 89 of the Federal Social Assistance Act, if the assets cannot be realised immediately or if this would constitute a hardship. The application of § 89 of the Federal Social Assistance Act therefore required that there 44

was no indigence. Its application by analogy to a person liable for support with assets may logically be possible at best if the person liable for support too were obliged to commit his or her assets and would therefore be able to pay, but in place of this he or she had, in order to avoid hardship, been offered a loan with the help of which he or she could satisfy the support obligations. Just as the granting of social assistance in the form of a loan cannot end the indigence of a person seeking assistance and thus that person's claim for social assistance, an application of § 89 of the Federal Social Assistance Act by analogy to the situation of a person liable for support by granting a loan cannot give that person the ability to pay.

The inapplicability of § 89 of the Federal Social Assistance Act also follows from § 90.1 sentence 1 of the Federal Social Assistance Act, old version, and § 91.1 sentence 1 of the Federal Social Assistance Act, new version, which provided that only a support claim which actually existed in the period when assistance was granted might be assigned to the social assistance funding agency. This assignment was further limited by § 91.1 sentence 2 of the Federal Social Assistance Act, old version, and § 91.2 sentence 1 of the Federal Social Assistance Act, new version, which referred to the fourth section of the Federal Social Assistance Act and thus also to §§ 88 and 89 of the Federal Social Assistance Act, to the proportion of the income and assets of a person seeking assistance is reasonably expected to commit. On the other hand, if there was no support claim, no statutory assignment under §§ 90 and 91 of the Federal Social Assistance Act was possible. 45

b) The interpretation of the Regional Court also contradicts the purpose of the provisions applied. The support obligation of lineal relatives is laid down in §§ 1601 et seq. of the Civil Code and serves to secure mutual support within the family. The principle that applies here is that in the first instance each person must ensure his or her own support. Thus only persons who are not able to do this are entitled to support (§ 1602.1 of the Civil Code), and only persons who are in the position to pay support over and above their own reasonable needs are liable for support (§ 1603.1 of the Civil Code). At the same time, §§ 1606 et seq. of the Civil Code lay down the order of priority of the persons liable for support in relation to those entitled to support. This establishment and limitation of support obligations between relatives is definitively laid down in the Civil Code. Social assistance law relates the claims it creates to these civil-law support obligations, but it does not alter them, as was expressly emphasised by § 2.2 sentence 1 of the Federal Social Assistance Act. Consequently, the support obligations have no statutory basis in social assistance law. On the contrary, the purpose of social assistance is to make it possible for persons who cannot support themselves and who do not receive the necessary assistance from others, for example from a relative with a support obligation (see § 1.1 of the Federal Social Assistance Act) to lead lives that are in keeping with human dignity (see § 1.2 of the Federal Social Assistance Act). 46

aa) This subordination of social assistance as against existing support claims is also expressed in §§ 90 and 91 of the Federal Social Assistance Act, which ensured, 47

when support claims of the recipient of assistance were assigned, that the social assistance funding agencies ultimately have to bear only the costs of social assistance for which persons liable to make support payments to the recipient of assistance cannot be called on. But the possibility created here of refinancing social assistance payments that have been granted by asserting assigned support claims does not exist where no support claim whatsoever exists in the absence of ability to pay on the part of the person liable for support. Then social assistance ceases to be subordinate, and the legal claim to social assistance takes effect.

bb) It runs counter to the principle of social assistance law of granting a legal claim to assistance, albeit a claim that is subordinate to a support claim, to justify under social assistance law, by means of a loan given by the social assistance funding agency, a support claim that does not exist in civil law. This legal construction would eventually cause social assistance claims to be extinguished completely. For if it could be ensured with the help of a loan that a person liable for support had the ability to pay, it would be up to the social assistance funding agency to decide that a social assistance claim was not to take effect. By granting a loan, the agency could have the social assistance payments granted refinanced to itself again and again by the person liable for support paying off the outstanding principal. As a result, the existence of a support claim and therefore also of a social assistance claim of the indigent person would depend on the actions of the social assistance funding agency, with the consequence that although an indigent person would be unsuccessful in asserting a support claim against a person liable for support who by reason of his or her income and assets was not able to pay, the social assistance funding agency could nevertheless substantiate the support claim by offering an appropriate loan and in this way could relieve itself of its obligation to grant social assistance. This would not only result in the removal of the social assistance claim laid down in §§ 1 and 2 of the Federal Social Assistance Act, but it would also contravene the purpose of social assistance law that the granting of assistance should not be left to the free decision of the state social assistance funding agency, but instead a legal claim to social assistance should be created subject to the conditions provided in the statute. In addition, it would run counter to the obligation to establish and maintain a social state of Article 20.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law, which requires persons to be given a claim to assistance from the state in order to ensure that they reach subsistence level. 48

It was precisely for this reason that the legislature specifically did not make it possible to give an indigent person a loan in order to remove the indigence in this way and thus to end the claim to social assistance and have the payments granted later reimbursed. On the contrary, in § 89 of the Federal Social Assistance Act the legislature permitted social assistance to be granted by way of a loan only where the person seeking assistance was not indigent by reason of property of his or her own which could be committed. The purpose of this legislation is turned on its head if this provision, which existed in favour of a non-indigent person seeking assistance, is used by 49

way of analogy to create a support claim and thus to the detriment of the person liable for support.

c) Finally, the interpretation of the Regional Court also runs counter to the intention of the legislature. Despite the legal policy discussion in the last years on the preservation of parental support […], the legislature did not make any alterations to the family-law provisions on support for relatives in §§ 1601 et seq. of the Civil Code. It still proceeds on the basis of the mutual family responsibility for one another which exists between parents and children, which is laid down in the mutual duty of assistance and respect and the duty to give support in § 1618a of the Civil Code (see BVerfGE 57, 170 (178)). 50

aa) However, Article 6.2 of the Basic Law expressly creates only the right and duty of the parents to give their children care and bring them up, and thus also to give them support (see BVerfGE 108, 52 (72); […]). In contrast, no duty of the children to give their parents support can be derived from the wording of the Basic Law. But Article 6.1 of the Basic Law places the family under the particular protection of the state order. In the structuring of family responsibility, the legislature is not constitutionally prevented from not only imposing on the parents obligations of support towards their children, but also imposing such duties on children towards their parents if the latter are not in a position to secure their own support. 51

bb) In laying down the order of priority of support claims within lineal family relationships, the legislature defined the relevant support obligations hierarchically. While under § 1609.1 of the Civil Code parents are primarily obliged to give support to their children, and over and above this under § 1603.2 of the Civil Code they also have an obligation to unmarried minor children and unmarried children who have reached the age of majority up to the age of twenty-one to commit all available means equally for their own support and the support of the children, children are liable for the support of their parents before the relatives in the ascending line (§ 1606.1 of the Civil Code). However, the claim of the parents is subordinate to all other claims of the children, the spouses and the other descendants of the person liable for support (§ 1609 of the Civil Code); in addition, the child liable for support may only be called on to pay support to the extent that a reasonable amount remains for the child's own support (§ 1603.1 of the Civil Code). 52

Here, the legislature indicated that within the structure of support law it attaches differing weight to the two obligations to pay support. It not only gave subordinate weight to parental support in contrast to child support, but also markedly limited the scope of the obligation in contrast to that of the duty to grant child support. The legislature did not merely take account of the differing dependence and role of the indigent persons in the family support system. The subordinate treatment of parental support also, as the Federal Court of Justice (*Bundesgerichtshof* – BGH) emphasised (see BGH, *Zeitschrift für das gesamte Familienrecht* – FamRZ 1992, p. 795), corresponds to the fundamentally different life situation in which the obligation to support takes effect in 53

each case. Parents have to care for their children and must as a general rule expect to give them support even after they reach the age of majority, until the children, after their education and training, are able to support themselves with their own income. In contrast, the obligation to give parental support usually takes effect when the children have long since started their own families, are exposed to support claims of their own children and spouses, and have to provide for themselves and their own old-age security. In addition, one or both parents now have a need for support in old age which cannot be met by their income, in particular their pension, above all if they need long-term care.

The legislature took account of these cumulative demands when it not only gave subordinate priority to parental support, but in § 1603 of the Civil Code also ensured that the child retains reasonable support of his or her own, that is, appropriate to the child's personal circumstances. The Federal Government also pointed out this intention of the legislature in the oral hearing, and stated that the subordinate and limited degree to which children can be called on for parental support was at the same time intended to take account of the circumstance that the children are already called on to cover their parents' old-age support by way of their contributions to pensions insurance. 54

cc) The latest legislative developments further emphasise the relatively weak legal position accorded by the legislature to parental support. 55

Through the step-by-step reduction of the benefits provided by the statutory old-age pension scheme and the introduction of private old-age provision promoted by statute (known as the Riester Pension) by the Act for the Reform of the Statutory Old-Age Pension Scheme and to Promote a Funded Old-Age Provision Scheme (Retirement Savings Act – *Gesetz zur Reform der gesetzlichen Rentenversicherung und zur Förderung eines kapitalgedeckten Altersvorsorgevermögens – Altersvermögensgesetz* – AVmG) of 26 June 2001 (Federal Law Gazette I p. 1310) and the Retirement Savings Amendment Act (*Altersvermögensergänzungsgesetz* – AVmEG) of 21 March 2001 (Federal Law Gazette I p. 403), the legislature has emphasised the responsibility each individual has to provide in time and adequately for his or her old age alongside the statutory old-age pension scheme. On the one hand, this emphasises the principle which is also laid down in § 1602.1 of the Civil Code that a person must primarily ensure his or her own support. On the other hand, it is associated with the expectation that provision for oneself also extends to periods in future in which no further earned income is to be expected, and therefore appropriate financial precautions must be taken prior to this in order to ensure one's own old-age support in an amount appropriate to one's previous standard of living, which is no longer guaranteed by the statutory old-age pension scheme alone. In this way, parental support for old-age provision is given still less value, and at the same time it is expected of an adult child liable for support that in addition to the other support burdens and the old-age provision of earlier generations, he or she will also bear the burden of his or her own old-age provision. This must be taken appropriately into account when his or her 56

remaining reasonable support is determined under § 1603.1 of the Civil Code (see BGH, FamRZ 2002, p. 1698; *FamRZ* 2004, p. 1184).

In particular, however, by introducing a basic provision in old age and in the case of a reduction of earning capacity from 1 January 2003 through the Basic Provision Act (*Grundsicherungsgesetz*) and from 1 January 2005 by §§ 41 et seq. of the Twelfth Book of the Code of Social Law, the legislature has made it clear that burdening adult children with the duty to pay parental support is to be subjected to limits, taking account of their own personal circumstances. § 43.2 of the Twelfth Book of the Code of Social Law has now introduced an income limit of EUR 100,000 per annum, up to which children may receive income without support claims of their parents against them being taken into account in the grant of basic provision in old age. In addition, there is a statutory presumption that the income of a child liable for support does not exceed this limit. 57

This too clearly shows the intention of the legislature, not to release children completely from the duty to give support to their parents, but in considering whether a support claim against the children exists to take into account the subordination of this claim and also the particular situation of the person liable for support with regard to burdens. 58

II.

In view of the foregoing, the Regional Court, with its acting as a law-maker in presuming that a support claim exists in contradiction to the wording of all legal provisions that are relevant to the decision, their legislative context and the recognised methods of interpretation, left the firm basis of established law. Its interpretation of the legal provisions applied is inconsistent with the relationship of support law and social assistance law laid down by the legislature and encroaches without a legal basis on a person's personal freedom to act under Article 2.1 of the Basic Law when it calls on that person, who is not able to pay by reason of her own income and assets, to make support payments. The decision of the Regional Court therefore has no basis in the constitutional order, which only sets limits to the personal freedom to act protected in Article 2.1 of the Basic Law, and it violates the complainant's right under Article 2.1 of the Basic Law. The decision is overturned and the matter is referred back to the Regional Court. 59

C.

[…] 60

Papier Haas Hömig

Steiner Hohmann-Dennhardt Hoffmann-Riem

Bryde Gaier

Bundesverfassungsgericht, Urteil des Ersten Senats vom 7. Juni 2005 - 1 BvR 1508/96

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