

Headnotes

to the Order of the First Senate of 13 June 2007

1 BvR 1783/05

1. In respect of court decisions banning a novel, which constitute particularly serious interferences with freedom of the arts, the Federal Constitutional Court reviews the compatibility of the challenged decisions with the constitutional guarantee of freedom of the arts based on the specific circumstances of the case.
2. Freedom of the arts requires that literary works presented as novels be considered from a specifically artistic perspective. In particular, it gives rise to the presumption that a literary text is fictional.
3. Freedom of the arts includes the right to draw inspiration from real life.
4. The degree to which an author creates an aesthetic reality detached from actual fact and the intensity of a violation of the right of personality are interrelated. The greater the similarity between the artistic portrayal and the original, the more serious the impairment of the right of personality. The more the artistic creation affects dimensions of the right of personality that are afforded special protection, the greater the fictional elements must be in order to rule out violations of the right of personality.

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 1783/05 -

IN THE NAME OF THE PEOPLE

**In the proceedings
on the constitutional complaint of**

V... GmbH, represented by its directors ...,

– authorised representatives: ...

- against
- a) the Judgment of the Federal Court of Justice of 21 June 2005
- VI ZR 122/04 -,
 - b) the Final Judgment of the Munich Higher Regional Court of 6 April
2004
- 18 U 4890/03 -,
 - c) the Final Judgment of the Munich I Regional Court of 15 October
2003
- 9 O 11360/03 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Papier,
Steiner,
Hohmann-Dennhardt,
Hoffmann-Riem,
Bryde,
Gaier,
Eichberger,
Schluckebier

held on 13 June 2007:

1. The Judgment of the Federal Court of Justice of 21 June 2005 - VI ZR 122/04 -, the Final Judgment of the Munich Higher Regional Court of 6 April 2004 - 18 U 4890/03 - and the Final Judgment of the Munich I Regional Court of 15 October 2003 - 9 O 11360/03 - violate the complainant's fundamental right under Article 5(3) first sentence of the Basic Law, to the extent that the judgments granted plaintiff no. 2 the right to bar the complainant from publishing or having someone else publish, distributing or having someone else distribute, selling or having someone else sell and advertising or having someone else advertise the novel *Esra* in the version set out in the declaration of undertaking of 18 August 2003, making non-compliance punishable by a fine.

For the rest, the constitutional complaint is rejected.

2. The Judgment of the Federal Court of Justice of 21 June 2005 - VI ZR 122/04 - is reversed to the extent of the violation of fundamental rights set out in no. 1 of this order. The matter is remanded to the Federal Court of Justice in this respect.
3. [...]

REASONS:

A.

I.

The constitutional complaint is directed against judgments of the Munich I Regional Court, the Munich Higher Regional Court and the Federal Court of Justice, which banned the publication, distribution and dissemination of the novel *Esra*, written by B. and published by the complainant, on the grounds that the novel violated the general right of personality of the plaintiffs in the initial proceedings. 1

1. The novel *Esra* was published by the complainant's publishing house in the spring of 2003. It tells the love story of Adam and Esra, an author and an actress. The intimate relationship between the two main characters is set in Munich-Schwabing and is described from the perspective of the first-person narrator Adam over a period of four years. The couple's relationship faces all sorts of obstacles: Esra's family, with her domineering mother in particular, Esra's daughter from her first, failed marriage, the daughter's father, and above all, Esra's own passive, fatalistic personality. 2

Although the author and the complainant argue that the characters of the novel are fictional, both conceded in the initial proceedings that the author was inspired by his intimate relationship with plaintiff no. 1. [...]. 3

[...]

4-6

Plaintiff no. 1 was awarded the 1989 German Film Award. She got married at the age of 17 and has a daughter from this marriage. After the failure of her marriage, plaintiff no. 1 had an intimate relationship with the author for one and a half years. During this time, her daughter fell seriously ill. After her separation from the author, plaintiff no. 1 had a brief relationship with a former schoolmate. She has another child from this relationship, which later also failed. Plaintiff no. 2 is the mother of plaintiff no. 1. She received the 2000 Right Livelihood Award and owns a hotel in Turkey.

2. The Esra character is portrayed as a woman lacking independence who obeys her mother's will. In the latest version of the novel, she was awarded the [fictional] 'Fritz Lang Prize' for her acting performance in a film. Her relationship with the first-person narrator is marked by the constant switching between affection and rejection and by the disappointed love of the first-person narrator. It is doomed to fail since Esra is not able to free herself from the clutches of her mother, of her seriously ill daughter Ayla and of her daughter's father. The relationship of the first-person narrator to Esra is depicted in detail and on different levels, breaking up the chronology with several flashbacks. This includes Esra contemplating having an abortion when she is pregnant with her second child; ultimately, she does not have the abortion, because – as readers can infer from the first-person narrator's thoughts – she wants to have this child to replace her terminally ill daughter. The novel contains several passages portraying sexual acts between Esra and the first-person narrator.

Esra's mother, the Lale character, owns a hotel on the Turkish Aegean coast. In the original version of the novel, she was awarded the Right Livelihood Award for her environmental activism; in the version that was revised following the parties' endeavours to settle and which is challenged here, she was awarded the [fictional] 'Karl Gustav Prize'. There are clear and prominent similarities between Lale's biography and that of plaintiff no. 2 (number of marriages and children, places of residence and action). In the novel, the failure of Adam and Esra's relationship is largely blamed on Lale; the novel paints a distinctly negative picture of her. According to the judgment of the Federal Court of Justice, she is portrayed as a depressed and mentally ill alcoholic who bullies her daughter and family.

II.

1. [...] 10

2. [...] 11-12

3. The Regional Court ordered the complainant to refrain from publishing or having someone else publish, distributing or having someone else distribute, selling or having someone else sell and advertising or having someone else advertise the novel *Esra*, with non-compliance punishable by a fine.

[...] 14

The Regional Court found that the plaintiffs were recognisable in the characters in 15

the novel. [...]	
[...]	16-19
4. The Higher Regional Court dismissed the complainant’s appeal on points of fact and law (<i>Berufung</i>) against the judgment of the Regional Court. It found that the publication of the novel violated the plaintiffs’ general right of personality.	20
[...]	21-26
5. The Federal Court of Justice dismissed the appeal on points of law (<i>Revision</i>) against the judgment of the Higher Regional Court.	27
[...]	28-35
B.	
I.	
In its constitutional complaint, the complainant claims <i>inter alia</i> that the challenged decisions violate its right under Article 5(3) first sentence of the Basic Law.	36
[...]	37-47
II.	
Statements on the constitutional complaint were submitted by the Association of German Publishers and Booksellers (<i>Börsenverein des Deutschen Buchhandels</i>), the Association of German Writers in the United Services Union (<i>Verband deutscher Schriftsteller in der Vereinten Dienstleistungsgewerkschaft</i>), the German PEN Centre (<i>PEN-Zentrum Deutschland</i>) and the plaintiffs in the initial proceedings.	48
[...]	49-56
C.	
The constitutional complaint is well-founded in part. The challenged decisions violate the complainant’s fundamental right under Art. 5(3) first sentence of the Basic Law to the extent that they grant the injunctive relief sought by plaintiff no. 2.	57
I.	
The decisions challenged with the constitutional complaint interfere with the complainant’s fundamental right to freedom of the arts under Art. 5(3) first sentence of the Basic Law.	58
1. Notwithstanding the difficulties in conclusively defining the term ‘art’, which the Federal Constitutional Court has repeatedly emphasised (cf. BVerfGE 30, 173 <188 and 189>; 67, 213 <224 <i>et seq.</i> >), the challenged decisions correctly consider the novel <i>Esra</i> to be a work of art, namely a free creative composition that artists use to	59

express what they have felt, learned or experienced, by means of a chosen medium – in this case a novel (cf. BVerfGE 30, 173 <188 and 189>; 67, 213 <226>; 75, 369 <377>). Even though the legal dispute that led to the constitutional complaint mainly concerns the degree to which the author describes real-life persons in his work, it is clear that his aim is to present this reality through art.

[...]

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2. Like all fundamental freedoms, freedom of the arts is primarily directed against the state. [...]

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At the same time, this fundamental right is an objective decision in favour of freedom of the arts, which must also be taken into account in the relationship between private actors, particularly where individual rights are invoked in order to obtain bans on artistic works through the courts (cf. BVerfGE 30, 173 <187 *et seq.*>; 36, 321 <331>).

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3. The guarantee of freedom of the arts equally covers both elements of artistic creation: the 'creative process' (*Werkbereich*) and the 'effect produced' (*Wirkbereich*). Not just artistic activity (the creative process), but also the presentation and dissemination of the work of art are necessary for the work to be perceived, which is also specific to the artistic process. This 'effect produced' is the basis upon which the guarantee under Art. 5(3) first sentence of the Basic Law has mainly taken effect so far (cf. BVerfGE 30, 173 <189>; 36, 321 <331>; 67, 213 <224>; 81, 278 <292>).

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4. As a publisher, the complainant is also entitled to invoke this fundamental right.

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Art. 5(3) first sentence of the Basic Law comprehensively guarantees freedom of artistic activity. To the extent that publishing media are needed in order to establish a relationship between artists and the public, persons acting as intermediaries between artists and the public are also protected by the guarantee of freedom of the arts (cf. BVerfGE 30, 173 <191>; 36, 321 <331>; 77, 240 <251, 254>; 81, 278 <292>; 82, 1 <6>).

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5. Even where parties in a private law dispute involving a conflict between freedom of the arts and the right of personality have different positions that are protected by fundamental rights, this still constitutes a dispute between private actors, and it primarily falls to the civil courts to decide such disputes. In particular, civil courts are tasked with establishing the facts that are significant for finding a violation of the right of personality. However, banning a novel constitutes a particularly serious interference with freedom of the arts. Therefore, the Federal Constitutional Court cannot limit its review to whether the challenged decisions are based on a fundamentally incorrect understanding of the significance of Art. 5(3) first sentence of the Basic Law, and on an incorrect understanding of its scope of protection in particular. Rather, the Federal Constitutional Court must review the compatibility of the challenged decisions with the constitutional guarantee of freedom of the arts on the basis of the specific circumstances of the case (cf. dissenting opinion of Justice Stein, BVerfGE 30, 173

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<201 and 202>).

II.

The ban of the novel interferes with the complainant's fundamental right to freedom of the arts, which is only partially justified. 67

1. Freedom of the arts is not subject to an express limitation clause. However, this does not mean that freedom of the arts is guaranteed without limitation; rather, it is directly limited by other provisions of the Constitution that protect other significant legal interests in the constitutional order of the Basic Law (cf. BVerfGE 30, 173 <193>; 67, 213 <228>). 68

Especially where, for the sake of protecting artistic self-determination, the term 'art' is broadly defined, and where no attempt is made to use a narrow definition of art to exclude, from the outset, artistic forms of expression that conflict with the rights of others from such constitutional protection (as is the tendency in the decision BVerfG, Order of the Preliminary Examination Committee (*Vorprüfungsausschuss*) of 19 March 1984 - 2 BvR 1/84 -, NJW 1984, p. 1293 <1294>), and where protection not only covers the creative process but also extends to the effect produced, it must be possible for persons whose rights are impaired by artists to defend their rights and obtain effective legal protection, all while freedom of the arts is taken into consideration. In such a situation, the courts are obliged to equally give effect to the fundamental rights of both sides. If private legal action results in an interference with freedom of the arts, this is not an instance of state 'censorship of art', but must be reviewed as to whether such interference equally balances the fundamental rights of the artist on the one hand and those of the person affected by a work of art on the other. 69

In particular, this applies to the right of personality protected by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law (cf. BVerfGE 67, 213 <228>). This right enjoys a particularly high standing in the Federal Constitutional Court's case-law, especially with regard to its human dignity core (cf. BVerfGE 75, 369 <380>; 80, 367 <373 and 374>). The right of personality supplements the freedoms laid down in the Basic Law, and it serves to guarantee the personal sphere that is closer to the core of private life (*engere persönliche Lebenssphäre*) as well as its basic conditions (cf. BVerfGE 54, 148 <153>; 114, 339 <346>). Thus, it may also limit artistic creations. 70

The substance of this right has not yet been defined comprehensively and exhaustively. Its recognised protected elements include the right to determine the portrayal of one's person, to social recognition and to personal honour (cf. BVerfGE 54, 148 <153 and 154>; 99, 185 <193>; 114, 339 <346>). Notably, it guarantees protection against statements which could tarnish a person's reputation, especially their public image. In particular, the general right of personality protects individuals from skewed or distorted portrayals whose significance for the free development of their personality is not entirely negligible (cf. BVerfGE 97, 125 <148 and 149>; 99, 185 <193 and 194>; 114, 339 <346>). 71

[...]	72
2. The right of personality of the plaintiffs in the initial proceedings is affected.	73
a) This requires that the plaintiffs be recognisable as the real-life inspiration for the characters in the novel, although this in itself does not yet constitute a violation of their right of personality.	74
The challenged decisions are based on the finding that the plaintiffs were recognisable as the real-life inspiration for characters Esra and Lale in the novel. This assessment and its underlying findings are not objectionable under constitutional law. In particular, the Federal Court of Justice correctly applied a standard requiring that they be recognisable by a more or less large circle of acquaintances. In its <i>Mephisto</i> decision, the Federal Constitutional Court reviewed the standard to be applied by the civil courts, according to which a non-negligible readership would easily recognise that the character Hendrik Höfgen in the novel was inspired by the dead actor Gustaf Gründgens, since Gründgens was a figure of contemporary society and the public's recollection of him was still quite vivid. The Federal Constitutional Court found that this standard was not objectionable under constitutional law (cf. BVerfGE 30, 173 <196>). This was based on the specific circumstances of that case, but does not define a necessary condition for determining the recognisability of characters in a novel that is relevant under constitutional law. Otherwise, the protection of the right of personality vis-à-vis works of art would be limited to celebrities, although it is precisely the recognition of persons by their immediate circle of acquaintances that can be particularly harmful for these persons (cf. on a press law case BVerfGK 3, 319, NJW 2004, p. 3619 <3620>).	75
However, such recognisability cannot be sufficiently established when the real-life inspiration for a character in a novel can only be proven by way of further clues. Since artists are often inspired by reality, a critic or literary scholar who researches carefully will in many cases be able to identify sources of inspiration for characters in a novel, or be able to name actual events that form the basis of a novel. Freedom of the arts would be far too limited if such a possible identification were sufficient to establish the recognisability of the person serving as real-life inspiration. Rather, the identification must suggest itself at least to readers familiar with the circumstances. This usually requires a large number of identifying features.	76
In the present case, the courts correctly found that the plaintiffs were recognisable according to this standard. With regard to the original version of the novel, there is no doubt in this respect, given the clear identification of the plaintiffs by way of the prizes awarded to them [...]. The courts also reasonably assumed that the plaintiffs are still identifiable in the latest version of the novel, which is the subject matter of the present proceedings, despite a renaming of the prizes, because the facts are still similar to reality [...] and there are many other recognisable details [...]. Given the combination and accumulation of numerous circumstances, the identification of the plaintiffs suggests itself. In this respect, it is primarily for the ordinary courts to establish the facts	77

from which the recognisability of the affected persons can be deduced

b) The plaintiffs are also not affected to such a negligible degree that their right of personality must stand back, from the outset, behind freedom of the arts. Acts and characteristics that are recognisably inspired by the plaintiffs are attributed to the characters in the novel; if readers can link these acts and characteristics to the plaintiffs, this can seriously impair the plaintiffs' right of personality. 78

3. Yet freedom of the arts can, in turn, set limits to the right of personality. This is also the case because the enforcement of the right of personality vis-à-vis freedom of the arts is more likely to set substantive limits to the scope of freedom of the arts than to that of other individual rights asserted in respect of a work of art (cf. regarding property BVerfG, Order of the Preliminary Examination Committee of 19 March 1984 - 2 BvR 1/84 -, NJW 1984, p. 1293). In particular, there is a risk that invoking the right of personality may prevent public criticism and the discussion of topics important for the public and for society (cf. dissenting opinion of Justice Stein, BVerfGE 30, 200 <206 and 207>). 79

Therefore, in order to determine these limits in a specific case, it is not sufficient to establish, in court proceedings, that the right of personality has been impaired, without taking into consideration freedom of the arts. If it is established in a dispute that the exercise of freedom of the arts by a writer impairs the right of personality of third parties, freedom of the arts must be adequately taken into account in decisions on private-law claims to protection based on the general right of personality. Thus, it must be assessed whether the impairment is so serious that freedom of the arts must stand back. In view of the particular weight of freedom of the arts, minor impairment or the mere possibility of serious impairment are not sufficient. Yet where serious impairment of the right of personality is established with certainty, even freedom of the arts cannot justify it (cf. BVerfGE 67, 213 <228>). 80

In this respect, the severity of the impairment of the right of personality depends both on the degree to which the artist allows the reader to link the content of the work to real persons, and on the intensity of the impairment of the right of personality when the reader establishes this link. 81

a) A specific feature of narrative art forms such as novels is that they are often, or even regularly, based on reality, although the artist creates a new aesthetic reality. This requires applying a specifically artistic perspective for determining whether the novel allows readers to establish a link to reality in each of its elements, in order to assess, on this basis, the severity of the impairment of the general right of personality. 82

A work of art seeks to create its own 'more real' reality independent of 'actual' reality, in which reality is experienced more consciously on an aesthetic level in a new relationship with the individual. Therefore, artistic creations cannot be measured against real-world standards, but only against specifically artistic and aesthetic stan- 83

dards (cf. dissenting opinion of Justice Stein, BVerfGE 30, 200 <204>). This means that the tension between the right of personality and freedom of the arts cannot be examined only in light of the effects of a work of art in the non-artistic social domain, but that specifically artistic considerations must also be taken into account. Therefore, a decision whether the right of personality is violated can only be made by balancing all the circumstances of the individual case. In this balancing, it must be considered whether and to what extent the artistic presentation of the material and its incorporation into the work of art as an organic whole have made the artistic portrayal independent of the original, by rendering objective, symbolical and figurative what was individualised, personal, and intimate (cf. BVerfGE 30, 173 <195>).

The guarantee of freedom of the arts requires that the reader of a literary work be considered capable of distinguishing literary work from an expression of opinion, and of differentiating between a description of actual facts and a fictional story. Therefore, a literary work presented as a novel should initially be seen as a work of fiction that does not purport to be factual. Without the presumption of a literary text's fictionality, the specific qualities of a novel as a work of art, and thus the standards of freedom of the arts, would be overlooked. At the outset, this presumption also applies where real-life people are recognisable as the originals that inspired the characters in a novel. Since freedom of the arts extends to inspiration drawn from such real persons, there can also be no right to determine the portrayal of one's person, analogous to the right to one's own image, if such a right were interpreted as the right not to serve as inspiration for a character in a novel. However, for this to apply, the publication in question must actually be literature that the reader can recognise as not purporting to be factual. A report falsely labelled as a novel would not enjoy the protection afforded by a specifically artistic perspective.

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The more authors detach a character in a novel from its original, making it an independent fictional character ('altering' – *verfremden*; cf. BVerfGE 30, 173 <195>), the more their work will be measured against specifically artistic standards. In this context, fictionalisation does not necessarily mean that all traces of recognisability must be completely removed. Instead, it must be clear to readers that they should not assume the factuality of the text. It is true that a work of art not only has an effect on aesthetic reality but also on real-life facts. However, if due to this 'double effect' one were always obliged, in the context of balancing fundamental rights against one another, to only consider the possible effects on real life, freedom of the arts could never prevail in cases where a novel affects someone's personal sphere. It would be the opposite if one were to consider aesthetic reality alone. In that case, the right of personality could never prevail over freedom of the arts. Thus, this problem can only be solved by way of balancing both fundamental rights in a way that accommodates both.

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b) In balancing these rights, it is the intensity of the effect on the right of personality that is decisive.

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The substance of this right has yet to be comprehensively and exhaustively defined. Notwithstanding the great significance of this fundamental right, its individual dimensions carry differing weight as potential limits to freedom of the arts. 87

In its case-law, the Federal Constitutional Court has held that a core of private life is inviolable and subject to absolute protection, given its particular proximity to human dignity (cf. BVerfGE 6, 32 <41>; 6, 389 <433>; 27, 344 <350 and 351>; 32, 373 <378 and 379>; 34, 238 <245>; 35, 35 <39>; 38, 312 <320>; 54, 143 <146>; 65, 1 <46>; 80, 367 <373 and 374>; 89, 69 <82 and 83>; 109, 279 <313>). The private sphere is afforded a lesser degree of protection than this absolutely protected core (cf. BVerfGE 32, 373 <379 *et seq.*>; 35, 35 <39>; 35, 202 <220 and 221>; 80, 367 <374 and 375>), which also encompasses expressions of sexuality in particular (cf. BVerfGE 109, 279 <313>). 88

The different dimensions of the right of personality ought not to be understood as a schematic order of priority, but they do indicate the intensity of the impairment by the literary work. 89

c) The degree to which an author creates an aesthetic reality detached from actual fact and the intensity of the violation of the right of personality are interrelated. The greater the similarity between the artistic portrayal and the original, the more serious the impairment of the right of personality. The more the artistic presentation affects dimensions of the right of personality that are afforded special protection, the greater the fictional elements must be in order to rule out a violation of this right. 90

4. According to these standards, the courts did not fully satisfy the requirements of freedom of the arts in the present case. They fully granted the relief sought by both plaintiffs, even though there are clear differences between the two cases with regard to balancing freedom of the arts and the right of personality. 91

a) In respect of plaintiff no. 2, the challenged decisions do not consistently apply the required specifically artistic perspective; they thus violate the guarantee of freedom of the arts under Art. 5(3) first sentence of the Basic Law. 92

However, it is not objectionable under constitutional law that the challenged decisions found the novel's Lale character only slightly altered in comparison to plaintiff no. 2, the real-life person on which she was based. In this respect, the courts found that plaintiff no. 2 was recognisable as the source of inspiration for the character in the novel, on the basis of a variety of biographical data, in particular the award of a prize. This finding is not objectionable under constitutional law. 93

Contrary to their own starting point, according to which a ban on publication requires a serious violation of the right of personality in addition to recognisability, the courts, and in particular the Federal Court of Justice, only held that the novel's Lale character was portrayed in a very negative light and saw this to be a violation of her right of personality. At the same time, they assumed that not everything written about Lale in the novel corresponded to the facts, and criticised the novel precisely for that reason. 94

However, simply because plaintiff no. 2 is recognisable as the source of inspiration for Lale does not mean that the novel invites the reader to ascribe all of Lale's acts and characteristics to plaintiff no. 2.

In this respect, the court decisions do not sufficiently take into account that the novel must initially be regarded as a work of fiction. At the same time, it is not objectionable that the Federal Court of Justice considers that a disclaimer at the beginning or end of the novel stating that similarities with real people are purely coincidental and unintentional is insufficient to inform the assumption that a text is fictional. Instead, such an assumption must be evaluated on the basis of the text itself. If, according to this evaluation, a literary text turns out to be a mere retaliation against or calumny (*Schmähung*) of another person, the right of personality may well prevail.

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However, this is not the case with regard to the novel in question. It is true that *Esra* is realistic literature in the sense that the novel is set at real-life locations and has main characters with realistic features. The author most certainly plays with the overlap between fact and fiction. To this extent he intentionally seeks to blur boundaries. Nonetheless, a reasonable reader will be able to recognise that the text is not merely a report-like account of real-life persons and events, but that there is a second level beyond this realism. [...] More precisely, it is raising the question of blame and the emphasis on the difficult relationship between a man and his lover's mother that indicates a second level to the novel.

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This holds true with regard to the novel's Lale character, because unlike the author's portrayal of *Esra*, his portrayal of Lale predominantly does not stem from his own experience. Lale's biography is an extensive novel within the novel. In particular those elements of the novel challenged by plaintiff no. 2 are clearly narrative and are told, in part, with a certain detachment as retellings of other people's accounts, rumours and impressions.

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The findings of the Federal Court of Justice regarding the portrayal of plaintiff no. 2 insufficiently reflect the required specifically artistic perspective: it is stated that plaintiff no. 2 is portrayed "as a depressed and mentally ill alcoholic" who "(appears) to bully her daughter and family, who is domineering and cantankerous, who neglected her children, used her prize money to prop up her bankrupt hotel, stole money from her parents and sent the mafia after them, only fought against gold mining because there was no gold on her own fraudulently acquired property, took out a high fire insurance policy before her hotel burned down, urged her daughter to have an abortion, was cheated on by her first husband and beaten by her second husband, who was also an alcoholic". This summary by the Federal Court of Justice blends statements that might even be permissible as facts in an autobiography or a critical article on the recipient of the Right Livelihood Award with fictional elements and the court's own pointed interpretation. In response to the objection that some of the incriminating passages were true, the Federal Court of Justice states that the complainant did not provide proof for that; yet in doing so, the Court expects the artist to do something

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that, based on his own understanding of his work, he cannot do because he himself considers the narrative to be fictional. Thus, if this approach were used, a work of art that draws on reality would be afforded less protection than a factual account that has not been proven true.

It is indeed characteristic of works of literature drawing on reality that they mix real and fictional accounts. Under these circumstances, the fundamental rights protection of such literature would be flawed if it were sufficient to show that the source of inspiration for the character in the novel was recognisable and that the character had negative traits in order to establish a violation of the right of personality. Such an understanding of the right to determine the portrayal of one's person would not accommodate freedom of the arts. Instead, it would be necessary to at least prove that an author made it possible for the reader to regard certain parts of the account as actual events, and that it was precisely these parts that violated the right of personality because they contained false and defamatory statements or because they had no place in the public domain at all since they affected the core of personality. There is no evidence for this in the challenged decisions. Instead, the decisions fail to recognise that freedom of the arts requires an initial assumption that a text is fictional.

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b) By contrast, to the extent that the challenged decisions granted the injunctive relief sought by plaintiff no. 1, they are, ultimately, not constitutionally objectionable. Unlike in the case of plaintiff no. 2, the courts did not only find that plaintiff no. 1 was recognisable. They also established that certain accounts in the novel constituted specific serious violations of her right of personality, and based their decision in part on the violation of her intimate sphere and in part on the mother-daughter relationship in view of the daughter's life-threatening illness. Either aspect justifies the ban.

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aa) As the courts correctly found, plaintiff no. 1 is not only recognisable in the novel's Esra character. Her role in the novel also relates to central events which occurred directly between her and the first-person narrator, who is easily recognisable as the author, during their relationship. As the courts correctly found, her intimate relationship with the author, her marriage, her daughter's illness and her new relationship were more or less directly based on reality so that – unlike in the case of plaintiff no. 2 – the novel does not invite the readers to infer that these events should be regarded as fiction, given that the novel is written from the perspective of a first-person narrator presenting his own experiences.

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bb) The right of personality of plaintiff no. 1 is affected in a particularly serious manner precisely because of the realistic and detailed account of events stemming from the author's immediate experience. In particular, this concerns the exact account of some of the most intimate details of a woman who is clearly recognisable as an actual intimate partner of the author. This amounts to a violation of her intimate sphere and is thus a violation of a dimension of the right of personality belonging to its human dignity core (cf. BVerfGE 109, 279 <313>). In respect of this subject, neither she

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nor the author can provide evidence of the truth, nor would it be reasonable (*zumutbar*) to ask them to do so. Since the protection of the intimate sphere is of exceptional significance, plaintiff no. 1, who is clearly recognisable as Esra, does not have to bear readers asking themselves the obvious question whether the events reported in the novel really happened. Therefore, when the freedom of the arts of the publishing house that lodged the constitutional complaint is balanced against plaintiff no. 1's right of personality, the latter prevails (cf. also BVerfGE 75, 369 <380>).

cc) In addition, the account of the daughter's life-threatening illness also amounts to a serious violation of the right of personality of plaintiff no. 1. The daughter is also clearly identifiable to her social environment, for example to her classmates. In view of the special protection afforded children and the mother-child relationship (cf. BVerfGE 101, 361 <385 and 386>), the depiction of the illness and its effect on the mother-child relationship, with two clearly identifiable persons, does not belong in the public domain, as the Regional Court correctly found.

c) To the extent that the decisions granted the injunctive relief sought by plaintiff no. 1., they reasonably imposed a total ban on the novel. It is not objectionable under constitutional law that the courts, in the operative part of their judgments or in their reasons, did not limit the ban to those parts of the novel which specifically gave rise to the unjustified violation of the right of personality. In this respect, the Federal Court of Justice referred to an older decision (BGH, Judgment of 3 June 1975 - VI ZR 123/74 -, NJW 1975, p. 1882 <1884 and 1885>) and put forward its corresponding view that a total ban is not disproportionate if the challenged parts of the text are significant for the overall design of the work and for understanding its aim, which is also not objectionable under constitutional law. It is not for the courts to delete or modify certain parts of a novel so as to eliminate the violation of the right of personality, given that there are many possible ways to make such changes and the essence of the novel would be altered considerably through such interventions. However, freedom of the arts requires that the identification of the violation of the right of personality be so specific that the author and the publishing house are able to infer how they could remedy the shortcomings. This requirement was met with regard to plaintiff no. 1.

The above considerations show that the complainant and the author must be given the opportunity to find a solution that is in line with the Constitution by publishing a version of the novel which does not violate the right of personality of plaintiff no. 1. This could be achieved by making changes that reduce the identifiability of plaintiff no. 1 or by removing parts of the novel that violate her right of personality. Given that the degree to which an author creates an aesthetic reality and the intensity of the violation of the right of personality are interrelated, such changes do not mean that sexual matters become taboo, since the author can still depict intimate relations if they do not invite the reader to infer that such depictions refer to certain persons. Such changes also do not entail a prohibition on the use of biographical material such as in the work [by Goethe] *The Sorrows of Young Werther* (*Die Leiden des jungen Werther*), which is mentioned in one of the dissenting opinions. The author and pub-

lisher must accept that, as a consequence of a violation of plaintiff no. 1's right of personality which she was entitled to defend, the legal dispute surrounding the novel has made it harder, at least for the time being, to reduce the identifiability [of the real persons who inspired the characters].

III.

No other violations of constitutional law are ascertainable. Contrary to the complainant's view, the challenged decisions violate neither the prohibition of arbitrariness (Art. 3(1) of the Basic Law) nor the right to be heard (Art. 103(1) of the Basic Law). 106

IV.

With regard to plaintiff no. 2, the challenged decisions are based on the constitutional shortcomings outlined above. It cannot be ruled out that the courts would have decided differently if they had taken into account the constitutional requirements set out above, and in particular the required specifically artistic perspective. The matter is remanded to the Federal Court of Justice pursuant to § 95(2) of the Federal Constitutional Court Act. 107

V.

[...] 108

The decision was taken with 5:3 votes. 109

Papier	Steiner	Hohmann-Dennhardt
Hoffmann-Riem	Bryde	Gaier
Eichberger		Schluckebier

Dissenting Opinion of Justices Hohmann-Dennhardt and Gaier

We do not agree with the decision of the Senate majority. In the Federal Constitutional Court's *Mephisto* decision (BVerfGE 30, 173 *et seq.*), it was still the civil courts who, in balancing freedom of the arts against the protection of the personality of a person who serves as inspiration for a novel, failed to recognise the necessity of applying a specifically artistic perspective to the novel and instead applied the unsuitable criterion of recognisability to measure the severity of an impairment of the right of personality; this was rightly criticised by Justices Stein and Rupp-v. Brünneck in their dissenting opinions. Now, the majority of this Court has adopted this criterion as their own standard in the case of the novel *Esra*. In doing so, it has restricted freedom of the arts, guaranteed under Art. 5(3) of the Basic Law, in an untenable manner (see I below) Furthermore, this standard is applied differently to the two plaintiffs in the initial proceedings whose right of personality was affected, leading to unacceptable results (see II below). In our opinion, from a specifically artistic perspective, the novel *Esra* does not violate the right of personality of the plaintiffs in the initial proceedings and thus must not be banned (see III below).

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I.

1. We concur with the majority (which differs from the majority opinion in the *Mephisto* decision in this respect) that in reviewing civil court decisions that ban novels and thus constitute a particularly serious interference with freedom of the arts, the Federal Constitutional Court may not limit itself to the question of whether the challenged decisions are based on a general failure to recognise the significance and scope of protection of Art. 5(3) of the Basic Law. Rather, the Court must assess whether the decisions are compatible with the guarantee of freedom of the arts based on the specific circumstances of the case at hand. We also subscribe to the view that a conflict between the freedom of the arts afforded the author and his publisher on the one hand, and the protection of the right of personality on the other hand can only arise if it is not merely possible to guess the identity of a person serving as inspiration for a character, but if the person is actually recognisable as such; in this context, recognisability can be limited to a more or less large circle of acquaintances. The extent of recognisability is not a matter of whether a person is affected, but to what degree they are affected. Finally, we concur with the majority's considerations to the effect that a novel, even if it is based on reality, elevates this reality to a different aesthetic level, transforms it, further develops it, sets it in other contexts and thereby creates new realities; initially, a novel must thus generally be regarded as a work of fiction that does not purport to be factual. Given that the author used their imagination to create a new reality in the literary work, this work may not be measured against reality to establish whether the artistic portrayal could nevertheless amount to a serious violation of the right of personality. Rather, a specifically artistic standard is required in this respect; the Court also considered such a standard to be decisive for review in its *Mephisto* decision, although it was not applied in that decision after all (cf. BVerfGE

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30, 173 <195>).

2. The majority rightly refers to this specifically artistic standard, but then ties this standard back to reality again. According to the majority, this standard should not be based on the type of literature, the specific genre of the novel, its forms of presentation or its thematic levels. Instead, authors should only benefit from this standard to the extent that they detach their characters from reality, i.e., alter them. In order to establish that a work of art, which is categorised and accepted as a novel, impairs the right of personality, it is ultimately significant, in the view of the majority, to what degree a person is recognisable therein and which protected part of the personality of the person concerned is affected. According to this view, the greater the alteration, the higher the degree of art in a work; the greater the recognisability, the greater the impairment; and the more attention a person's intimate sphere receives, the more alteration is required. In our opinion, this leads to erroneous conclusions that do not adequately give effect to freedom of the arts. 112

It is contradictory to relativise the application of a standard which is itself based precisely on the fact that art transforms real-life facts into new realities by making this application contingent upon the degree to which the work of art is detached from real-life fact, thereby treating the artistically transformed reality as though it were real after all. Such an application of quantitative measures for comparing a novel with reality does not adequately take into account the qualitative dimension of the artistic processing of reality. [...] Art is not merely a subjective view of realities; rather, it takes these and forges own worlds from them, lending expression to the artist's concerns. 113

It is also not obvious how the degree of a person's recognisability in a novel can lead to the conclusion of a serious impairment of their right of personality. The only effect of recognisability is that the possibility of impairment cannot be ruled out. It cannot help distinguish between what is fact and what is fiction in a novel. [...] 114

Finally, in our view, it is not tenable to assume that merely because there are recognisable references to certain persons, their rights of personality have been impaired and to conclude from this that the more a novel affects the core of a person's private life, in particular their intimate and sexual sphere, the more a violation of the right of personality must be ruled out by fictionalising, i.e. altering, the source of inspiration. While it is true that a person's intimate sphere belongs to the core of personality affecting their dignity, and must therefore be protected, it is wrong to conclude solely based on the fact that a novel contains intimate scenes that these scenes tell of the true sex life of the person who inspired one of the characters in the novel involved in the scenes, and that they thus affect the personal sphere, which enjoys absolute protection. There is no basis for this at all, apart from the details that make the source of inspiration recognisable. In addition, the question arises how the author can alter the source so that they can rule out an impairment of fundamental rights. The intention certainly cannot be for the author to change the account so that it no longer reflects 115

potential real-life facts. After all, readers are unable to discern if and how intimate relations occurred in reality, and if and how the author might already have altered them. Nor is the alteration of the details of affected persons helpful as long as these persons are recognisable as inspiration. The only alternative would be to refrain from using characters that are based on reality or not to portray the intimate and sexual sphere in the novel. And yet, the things to be portrayed in the novel are literature. The majority's consideration that an author can still portray intimate relations if they do not invite the reader to think that these refer to a real person does not give rise to a different conclusion. This is because if a person remains recognisable in an intimate situation portrayed in a novel, they are necessarily connected with the situation – regardless of how many identifiable traits this recognition is based on. This also ultimately leaves an author with only two options: either they only portray intimate scenes with unrecognisable persons or they do not write about such scenes at all.

This approach limits freedom of the arts in an unacceptable manner given that artists are thus ultimately compelled to treat sexual matters as taboo because art thrives on its references to reality and there is thus always the risk that persons will recognise themselves or be recognisable to others. 116

It is doubtful whether a ban would not have to be imposed on Goethe's novel *The Sorrows of Young Werther* based on the majority's standards – even if the majority denies this. [...] In that novel, both criteria that the majority considers sufficient for establishing a serious violation of the right of personality – clear recognisability of the persons portrayed and scenes that are part of the intimate sphere – are met. 117

II.

In addition, the majority applies these standards, which do not adequately give effect to freedom of the arts, in different ways and uses additional criteria to assess whether the novel *Esra* violates the right of personality of the plaintiffs in the initial proceedings, who recognise themselves in the novel. It makes distinctions based on stylistic devices and uses these to assess the extent to which the author invites the reader to infer that parts of his novel correspond to reality. This approach, too, is unsuitable for distinguishing fact from fiction in a novel and for determining whether a description amounts to a violation of the right of personality so serious that it can no longer be justified by freedom of the arts. 118

1. In the case of plaintiff no. 2, who was the source of inspiration for the novel's Lale character, the majority concludes that the courts violated freedom of the arts by failing to consider the novel from a specifically artistic perspective. The majority holds that the negative portrayal of this character is not sufficient to establish a violation of the right of personality, given that fact and fiction overlap in reality-based literature, so that acts and character traits cannot readily be attributed to plaintiff no. 2. The majority states that the challenged court decisions did not sufficiently consider the fact that the novel is primarily a work of fiction. We fully support this view and the reasons 119

given. The only question that remains is why the majority then fails, in this case, to apply the standard of recognisability developed above, which we consider to be wrong, and which will supposedly reveal the violation of the right of personality and its extent. After all, plaintiff no. 2 is no less recognisable than plaintiff no. 1. [...]

2. In the case of plaintiff no. 1, however, the majority considers that the portrayal of the character Esra in the novel constitutes a serious violation of her right of personality. Unlike with plaintiff no. 2, there is no reference to a specifically artistic perspective here. Rather, the majority bases this finding, firstly, on the recognisability of plaintiff no. 1; secondly, on the fact that the account concerning Esra was based on the author's direct experience, was realistic and detailed, and precisely for these reasons constituted a particularly serious impairment of plaintiff no. 1's right of personality; and thirdly, on the fact that very intimate details are portrayed, which the plaintiff did not have to bear. Again, the majority makes assumptions regarding the degree of reality of the narration on the basis of the recognisability of the source of inspiration and the narrative style. In doing so, it fails to set out where it obtained the knowledge that the account depicts actual experiences and on what basis it makes this assessment. This may be the subjective impression of the Justices, but it could also be seen in a completely different light, in particular from a specifically artistic perspective, which is not applied here. According to the majority's opinion, the "truthfulness" of the account does not even matter with regard to the intimate scenes and those parts in which plaintiff no. 1's child appears to be recognisable as inspiration. In these instances, the majority invokes a categorical imperative – such depictions must not be tolerated and have no place in the public domain – to find that the right of personality has been violated and uphold the ban of the novel. Yet moral considerations alone, without any indication as to whether what is described occurred in the way described or even occurred at all, whether it is not simply a poetic way of expressing feelings and conflicts, or really is intended to portray plaintiff no. 1 after all, are not a yardstick that may be applied to art if art is to be free, as required by Art. 5(3) of the Basic Law.

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3. Furthermore, in overall consideration of the outcome of the majority's decision, it is difficult to understand why in the same novel, with similarly many links to the lives of the plaintiffs, the depiction and portrayal of the characters should be considered fictional in one case and factual in the other. A novel is a complete work that is difficult to dissect into individual parts. Either the work as a whole is a novel and tells a fictional story or it is not a novel at all. Yet the majority does not deny that *Esra* is indeed a novel. Therefore, its content cannot be subject to double standards. Only if there were indications showing that the form of a novel is used to make someone the subject of calumny would a differentiated assessment be necessary. However, this is not the case in regard of *Esra*, particularly when the two characters in the novel are compared. [...]

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III.

If one proceeds from the premise that literature should, for the sake of freedom of

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the arts, be reviewed based on a specifically artistic perspective – as the Senate majority actually rightly requires –, it is not sufficient to simply identify the genre of the narrative, even if the genre does give an indication of how the text should be understood. According to the majority’s view, too, *Esra* is to be classified as a novel; this implies that the story told in the novel is fiction, even though it relates to real-life people or events. Yet this does not resolve conclusively whether the content of the narrative is novelistic and whether fact and fiction have formed a symbiotic relationship from which an independent story has arisen. However, such an assessment cannot be left to the much cited reader alone, who possesses more or less well-developed literary knowledge and their own view of the novel. [...] Instead, it is necessary to consult literary scholars.

Literary scholars unanimously hold that the novel *Esra* is about the relationship of the first-person narrator (whose details correspond to the author’s) and the character Esra (who is in some respects based on plaintiff no. 1); yet this relationship is described from the author’s own perspective and is not just used as a means of expressing subjective feelings, but also as a framework to address topics in a multifaceted way that are in turn reflected in the characters’ utterances and behaviour and which characterise and guide them. For instance, literary scholars point out that even dialogues between Esra and the first-person narrator concern our way of perceiving reality, raising the question whether literature which deals with reality can be misunderstood as representing reality; the author thus provocatively questions himself and his work [...]. In view of the above, literary scholars unanimously conclude that the novel *Esra* neither re-creates experiences nor presents autobiographical material, but that it instead pursues a literary-aesthetic objective and that it is a narrative construction – a novel [...].

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This not only confirms our understanding of the book, but also leads to the conclusion that in the case of plaintiff no. 1, too, a violation of her right of personality is neither ascertainable nor can it be presumed. [...] If an overall assessment of a novel leads to the conclusion that this art form is being abused, and is merely a sham, a device for insulting, defaming or denigrating certain persons, then it is no longer protected by freedom of the arts (cf. BVerfGE 30, 218 <224>). Neither we nor the literary scholars see any such intention on the part of the author in the *Esra* novel. This would make *Esra* a novel in which real-life fact has dissolved into art. Thus, it is impossible to distinguish between what is fact and what is fiction. We subscribe to Adorno’s view: “For everything that artworks contain with regard to form and materials, spirit and subject matter, has emigrated from reality into the artworks and in them has divested itself of its reality” [...]. The ban of the novel *Esra*, based on a violation of the right of personality of plaintiffs nos. 1 and 2 and imposed by the courts in the challenged decisions, is therefore an unconstitutional interference with the author’s and the complainant’s freedom of the arts, protected under Art. 5(3) of the Basic Law.

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Dissenting Opinion of Justice Hoffmann-Riem

This decision of the Court gives greater consideration to freedom of the arts than its *Mephisto* decision (BVerfGE 30, 173). While the Court held in its *Mephisto* decision that specifically artistic aspects must be taken into account when a legal assessment of the effects of a work of art is made, it did not establish sufficiently far-reaching consequences; in particular, the decision did not apply the now accepted presumption that a literary text is fictional. Furthermore, the Court now makes it clear that it is not sufficient that a person be recognisable in a novel, even if negative character traits are attributed to that person, to establish a violation of their right of personality. According to the Court's view, it must be shown, taking into account the presumption of fictionality, that the author invites the reader to infer that the events described actually happened or that a person actually had the traits attributed to them. 125

While it must be acknowledged that this constitutes a further development of the protection afforded by Art. 5(3) of the Basic Law, I am not convinced by certain aspects of the legal reasoning set out here (see 1 below) and by the application of the principles to the specific case (see 2 below). Following my questions and criticism, I try to explain why there is a risk that the starting point used by the majority could fail to take account of the special features of works of art and of their protection (see 3 below). 126

The majority is right to consider the judicial ban of the publication of the novel an interference with freedom of the arts. However, I do not think that the explanations for why this interference is partially justified are convincing under constitutional law. To supplement the dissenting opinion of Justices Hohmann-Dennhardt and Gaier, I would like to add the following: 127

1. a) The Federal Court of Justice considers it sufficient that a specific person be recognisable as the source of inspiration for a character in a novel for finding that this person's right of personality has been impaired (it uses the term "interference"). By contrast, the majority correctly finds that such recognisability initially only indicates that a person is affected. Being affected – as the first step of review – is a necessary, but not a sufficient condition for a possible violation of the right of personality. 128

b) In cases where a person is recognisable, the majority calls for a second step in which it must be established that the degree to which a person is affected must not be so minor that freedom of the arts must prevail over the right of personality from the outset. This indicates a minimum threshold for the impairment of the right of personality: a restriction of freedom of the arts can only be based on impairments of the right of personality that attain a certain degree of severity. 129

c) Since the majority assumes that the minimum threshold has been crossed in the case at hand, they consider the interaction between freedom of the arts and the protection afforded by the right of personality in a third step. They again apply the formula used in the second step, holding that the impairment of the right of personality must 130

be so serious that freedom of the arts cannot prevail. Thus, a more serious impairment than in the second step is obviously meant: its severity must be determined in a balancing against freedom of the arts in the specific case – and is thus, in principle, variable.

In this third step, a specifically artistic perspective is required (see C II 3 a above). In particular, its purpose is to determine what is within the realm of fiction. Accordingly, the majority finds that fictionality should be presumed when a literary work is presented as a novel and – even if it uses real-life persons as inspiration – when it is clear that it does not purport to be factual, i.e. if it is not simply a report falsely labelled as a novel. [...] In this context, the presumption of fictionality does not just relate to the persons portrayed, but also to events described, character traits and similar features. 131

d) However, the significance of the work being classified as fictional is partially undone by the majority in a fourth review step (see C II 3 c above). Where the violation of the right of personality is serious – in the case at hand, the descriptions of the intimate and sexual spheres as well as the illness of the child fall into this category (see C II 4 b above) – the presumption of fictionality no longer applies. Instead, the majority adds another requirement: the more extensive the protection afforded the affected dimension of the right of personality, the greater the need for efforts to fictionalise the source of inspiration. [...] 132

2. I certainly do not have any doubt that the right of personality is violated if someone realistically presents the most intimate details of their partner's sexual behaviour to others, let alone to the general public – regardless of whether it is based on direct experience or not. However, in the present case it is doubtful, and the author denies, that he wanted to describe past sexual activities or that he wrote a report about them. In my opinion, the majority does not give sufficient consideration to this and instead simply upholds the factual findings of the ordinary courts, who for their part did not proceed from a presumption of fictionality. 133

a) To the extent that Art. 5(3) of the Basic Law requires a presumption of fictionality for the novel as an art form even where a specific source of inspiration is recognisable, and to the extent that it requires that this also apply to specifically described events, behaviour or character traits, it is not understandable why this should not also cover descriptions of the sexual sphere. However, if this presumption of fictionality is ultimately to be disregarded here, this signifies that the specifically artistic perspective is set aside in this respect. To put it differently, descriptions of sexuality will only be protected as art if their fictionality is more strongly substantiated than for other subject matters, and there will be no presumption of fictionality. [...] 134

Yet if the presumption of fictionality to which the required specifically artistic perspective gives rise were also applied here, this presumption would not already be rebutted by the detailed and realistic description of sexual intercourse given that such a description could also occur in a fictional account. The fact that an author [...] writes 135

about the behaviour or character traits of a person from their own experience is not in itself an indication that they claim or that it must be presumed that what is described is a factual report about that person's sexual practices; this applies even if that person is recognisable as the author's intimate partner. [...] It is unfathomable how the author could rule out the possibility of a violation of the right of personality by "fictionalising the source of inspiration", as suggested by the majority. [...]

Unlike their approach in respect of the Esra character, the majority applies the presumption of fictionality with regard to the description of Lale and rejects the objection of the Federal Court of Justice that the complainant failed to provide any proof of its truthfulness, holding that expecting the artist to provide proof would mean expecting something from him that, based on his own understanding of his work, he could not do because he himself considers the narrative to be fictional. 136

b) Why this should apply in one case but not in the other is not understandable. [...] 137

c) Apparently, what the Court considers to be decisive is which dimension of the right of personality has been adversely affected. It is not apparent that the assertions made about Lale, including that she was a depressed, mentally ill alcoholic who neglected her children, bullied her family, and had been beaten by her husband, constitute less serious impairments of the right of personality than the portrayal of sexual practices, at least not to such a degree that the distinction would justify giving effect to freedom of the arts through a presumption of fictionality in one case but not in the other. 138

3. The difficulties experienced by the majority in giving shape to the specifically artistic perspective and in applying it in such a way that it is integrated into a coherent line of legal reasoning seem to stem from the majority's understanding of what constitutes a description of reality (real-life facts) and what constitutes processing it into art. In this context, the majority appears to assume that there is a distinction or even a conflict between empirical facts and artistic fiction. At the same time, the attempt to overcome the dilemmas arising from difficulties experienced in the balancing of interests by resorting to a presumption of fictionality may help obtain acceptable results in many cases; however, it does not always work, in particular not where the artist does not describe a product of their imagination, but instead artistically processes events that can be observed intersubjectively, as shown by the present case. 139

a) [...] 140-141

The special protection afforded freedom of the arts by Art. 5(3) of the Basic Law is a protection of the freedom to construct reality in a "specifically artistic" way. In this respect, there are, however, no general rules or conventions regarding what is art or specifically artistic. Art keeps inventing new ways of constructing reality, challenges the aesthetic standard time and again and defines it variably. Many works of art aim to transcend established boundaries and artists are involved in unbounding and blending old or even newly developed categories. 142

b) Assuming, as even, in principle, the majority does, the necessity of applying a specifically artistic perspective to how artists construct reality in works of art, various phenomena of significance for jurists can be affected. For instance, occurrences which anyone, i.e. also everyday observers, can observe and discuss intersubjectively with other everyday observers may be observed and described in a completely different manner by artists in their field of reference. [...]

This must be gradually, not principally, distinguished from an artistic presentation that does not at all aim to describe events that can also be observed by other persons or to depict them in a specifically artistic manner according to aesthetic principles, but that instead – as a product of the artist’s imagination – is separate from things specifically observed, even if the artist, when processing and describing material, may make use of insights and experiences from previous observations and may create the impression that what is described could relate to an event that could also have been observed by others. This second type of art is meant when fictionality is discussed. [...]

However, it is undisputed that freedom of the arts extends not only to presentations that are the products of a person’s imagination, but also to artistic processing of real-life events that can be observed and communicated intersubjectively. Furthermore, it also extends to intermediate forms, i.e. combinations and blends of artistic treatments of circumstances that can be observed intersubjectively together with products of the imagination.

c) It is easy to lose sight of this diversity in artistic creativity and the necessity for developing dimensions of protection that take into consideration this diversity if the protection of art is ultimately limited to fictional works and a work of art is assessed on the basis of the presumption that it is either fictional or empirical (real-life facts). In this context, there is a risk that the artist’s independence regarding the use of their observations, i.e. the artistic construction of reality, will be lost. This risk cannot be avoided by making the scope of protection of freedom of the arts contingent on the degree of fictionality, as proposed by the majority. Making protection contingent on whether fictional elements prevail may be useful as a legal tool for distinguishing what can be observed intersubjectively from what are products of a person’s imagination, but it is not suitable for taking into account the special way of artistically processing an event which can be observed intersubjectively. The artistic processing of such events in a novel – in the language of the majority by developing a “second level” – does not turn them into fiction, but it does turn them into a work of art. Accordingly, a presumption in favour of the arts must also apply in this respect. [...] The majority’s understanding of fictionalisation is in any case not so clear as to allow authors to use it as a practical guideline. The majority is of the opinion that “the author could reduce the identifiability” of affected persons – yet the persons apparently still remain identifiable – and remove the parts of the novel that violate the right of personality; but under what circumstances can an “aesthetic reality” (understood as a specifically artistic construction of reality) even violate the right of personality at all?

d) If, despite these objections, the protection of freedom of the arts is made contingent on the degree of fictionality, this would require related evidentiary principles and principles for the rebuttal of presumptions. The majority recognises that the principles of legal proof are unsuitable to the extent that it holds, in the case of the portrayal of Lale, that the author has allowed distinctions to become blurred and played with the overlap between truth (apparently meant in the sense of an event that can be observed intersubjectively) and fiction (apparently meant as additions from the author's imagination); the majority also recognises that the principles of legal proof are unsuitable in its finding that the author could not reasonably be expected to prove something which he regarded as fictional if he did not set out to write a report. It may be added: a work that claims to be fictional cannot violate the right of personality of others. 147

A classification is more difficult where artists base their description on events that can also be observed by others, but where it is not recognisable to what extent they describe what can be observed and to what extent they make artistic additions imagined through their way of observing and describing or even through adding things they have come up with. 148

The majority did not make any attempt to make this type of distinction with regard to the portrayal of Esra. [...] Therefore, it is difficult to avoid the impression that it is the subject matter – in particular the description of sexual details – that rules out an assessment based on a specifically artistic perspective with regard to such descriptions in the novel in the context of a balancing of interests. The possibility that the author may also have “constructed” a specifically artistic, aesthetic reality in the case of this literary subject matter is quickly dismissed by the majority. 149

The author is not given the benefit of the presumption of fictionality. This presumption would, however, have to be understood in a broader sense to extend it to the constellation relevant here. If the presumption were to be applied, it would be necessary to raise the question (provided there were specific parallels between the events described in the novel and what can be observed intersubjectively) whether the artistic processing of these events had lifted them to the “second level” – which the majority has emphasised is decisive – to an extent that the artist could be said to have constructed a “new reality” following its own aesthetic rules. This question cannot be answered without the expertise of literary scholars. 150

An author can include a disclaimer in the novel making clear that readers should not assume that the story is factual (i.e. intersubjectively provable) (see C II 3 a above). A disclaimer will have its own significance if it corresponds to the content of the novel, i.e. if it does not appear to be false. However, if the disclaimer turns out to be false, i.e. if the author does not fulfil their claim to deal with a subject matter in artistic terms, they are not covered by the protection of freedom of the arts. In this context, it is unfortunate that the majority uses the term “calumny” to express the opposite of a work of art. The term ‘calumny’ is a technical term in connection with the principles govern- 151

ing Art. 5(1) of the Basic Law, which is related and limited to the legal categorisation of value judgments, and covers cases in which an evaluation has no basis in reality even from the point of view of the critic and is aimed at personal defamation. However, if, as in this case, the issue is whether the account can be categorised as an intersubjectively understandable description of events that have really occurred or as fiction or as a specifically artistic construction of reality, such categories are not suitable or may only serve as loose guidelines.

Hoffmann-Riem

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