

Headnote

to the Order of the First Senate of 24 February 2015

1 BvR 472/14

1. The general right of personality following from Article 2(1) in conjunction with Article 1(1) of the Basic Law protects the private and intimate spheres, and thus also the right to decide oneself whether and how to disclose information relating to one's intimate sphere and one's sex life. This includes not having to disclose sexual relations with a specific partner.
2. A court decision obliging a mother to disclose information on the identity of her child's putative father in order to enable the former legal father to assert his claim to compensation (§ 1607(3) of the Civil Code) exceeds the constitutional limits of judicial development of the law since it does not have a sufficiently clear basis in statutory law.

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 472/14 -

IN THE NAME OF THE PEOPLE

In the proceedings

on the constitutional complaint of

Ms M...,

– authorised representative: ...

against a) the Order of the Schleswig-Holstein Higher Regional Court
of 28 January 2014 - 15 UF 165/13 -

b) the Order of the Bad Segeberg Local Court
of 27 September 2013 - 13a F 40/13 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on 24 February 2015:

- 1. The Orders of the Bad Segeberg Local Court of 27 September 2013 - 13a F 40/13 - and of the Schleswig-Holstein Higher Regional Court of 28 January 2014 - 15 UF 165/13 - violate the complainant's general right of personality (Article 2(1) in conjunction with Article 1(1) of the Basic Law) and her fundamental right under Article 2(1) of the Basic Law in conjunction with the principle of the rule of law (Article 20(3) of the Basic Law). The Order of the Schleswig-Holstein Higher Regional Court of 28 January 2014 - 15 UF 165/13 - is reversed and the matter is remanded to the Schleswig-Holstein Higher Regional Court.**

2. [...]

REASONS:

A.

The constitutional complaint concerns the question whether it is compatible with the Basic Law that the courts obliged the complainant, as the mother of a child, to disclose, on the basis of § 1353(1) in conjunction with § 242 of the Civil Code, information on the identity of the putative biological father to the non-biological, former legal father (so-called *Scheinvater*) upon the latter's successful challenge to his paternity in order to enable the latter to assert his compensation claim under § 1607(3) of the Civil Code.

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I.

If a paternity challenge is successful (§§ 1599 *et seq.* of the Civil Code), a retroactive declaration of non-paternity is issued. The child's maintenance claims against the legal father then also retroactively cease to exist. The child's maintenance claims vis-à-vis the biological father are vested in the former legal father (§ 1607(3) first and second sentence of the Civil Code) to the extent of the maintenance the latter actually previously paid. [...]

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The former legal father can, however, only assert a claim to compensation under § 1607(3) first and second sentence of the Civil Code if he knows the identity of the biological father. If he does not know who the biological father is, the question arises whether he can demand that the mother disclose information on the identity of the putative biological father. Such a right to information is not explicitly provided for by law.

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In a decision dated 9 November 2011 (BGHZ 191, 259 *et seq.*), the Federal Court of Justice recognised the former legal father's right to information, following from the requirement of good faith under § 242 of the Civil Code. It held that, in cases where the mother brought the former legal father to acknowledge paternity, the mother's general right of personality, which is affected by her obligation to disclose information, does not carry more weight than the former legal father's claim to effective legal protection. [...]

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II.

The complainant, then 20 years old, had a relationship with the plaintiff in the initial proceedings (hereinafter: the plaintiff) – in respect of whom a declaration of non-paternity was later issued. During the course of this relationship, she became pregnant. [...] The complainant and the plaintiff were married owing to her [...] pregnancy. Their daughter [...] was born in wedlock in October 1991, thereby making the plaintiff the legal father of the child pursuant to § 1592 no. 1 of the Civil Code. [...] In a letter to

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the plaintiff in 1994, the complainant disclosed that he might not be the biological father. They were divorced in 1995. [...]

[...] 6

III.

1. The challenged order of the Local Court obliged the complainant to disclose to the plaintiff the identity of the putative father of the child. [...] 7

2. The Higher Regional Court dismissed the complaint against this order. [...] 8

[...] 9-12

IV.

[...] 13-17

V.

Statements in respect of the constitutional complaint were submitted by the Federal Court of Justice, the German Conference of Family Courts (*Deutscher Familiengerichtstag*), the Academic Society for Family Law (*Wissenschaftliche Vereinigung für Familienrecht*) and the association 'Alimony and Family Law' (*Interessenverband Unterhalt und Familienrecht*). 18

[...] 19-21

B.

The constitutional complaint is admissible and well-founded. 22

[...] 23

The challenged decisions violate the complainant's general right of personality under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law since they fail to recognise the scope of the complainant's fundamental rights. In the initial proceedings, the civil courts did not correctly assess the impact of the fundamental rights, and based the challenged decisions on this flawed assessment (see I below). 24

Regardless of the circumstances of the case at hand, a court decision taken despite a lack of a clear statutory basis therefor and obliging the complainant to disclose information exceeds the constitutional limits of judicial development of the law, which also constitutes a violation of the complainant's rights (Art. 2(1) in conjunction with Art. 20(3) of the Basic Law) (see II below). 25

I.

Given the circumstances of the case at hand, the complainant's general right of personality protected by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law has been 26

violated. The courts did not correctly assess the significance to be attached to this fundamental right (see 1 below). It cannot be ruled out that the courts would have reached a different conclusion had they attributed to the complainant's fundamental right the weight required under constitutional law when balancing it against the conflicting interest of her former husband to assert his compensation claim under § 1607(3) first and second sentence of the Civil Code (see 2 below).

1. The courts did not correctly assess the significance to be attached to the complainant's general right of personality. 27

a) Obliging the complainant to disclose the required information is a serious impairment of her general right of personality. By obliging her to provide information on the identity of the putative biological father, the decisions compel the complainant to disclose a sexual relationship with one particular man or several particular men. In doing so, the complainant must reveal very intimate matters of her private life. For most people, there are certainly very few matters that are as intimate and that they would wish to keep as confidential for the sake of their personal integrity as their sexual relations. 28

The general right of personality following from Art. 2(1) in conjunction with Art. 1(1) of the Basic Law protects a person's private and intimate spheres and thus also aspects of their sex life and the right to keep these private. The protection of the private and intimate spheres covers matters that, due to the information they convey, are typically regarded as private in particular because their discussion or display in public is regarded as unseemly, because they are regarded as embarrassing if they become known, or because they provoke negative reactions from one's social environment, which is particularly true when it comes to sexuality. Without any protection against others obtaining knowledge thereof, one's sexual development would be severely impaired even though it is protected by fundamental rights (cf. BVerfGE 101, 361 <382> with further references). The right to respect of one's private and intimate spheres specifically protects the right not to have to disclose sexual relations with a partner, but to decide oneself whether, how and to whom to disclose information relating to one's intimate sphere and sex life (cf. BVerfGE 117, 202 <233> with further references). 29

b) The courts correctly set this right against the former legal father's interest in asserting his statutory claim to compensation under § 1607(3) first and second sentence of the Civil Code. Even though the interest in deciding oneself whether and to whom one wishes to disclose information on one's sex life carries great constitutional weight, the mother's interest in confidentiality may in certain cases – on grounds, for example, of earlier conduct – merit less protection than the former legal father's interest in financial compensation [...]. Particularly in circumstances where, given her conduct, the mother is liable to compensate the former legal father for his payments made towards his former legal child pursuant to § 826 of the Civil Code [i.e. for intentional unconscionable damage] [...], it might be reasonable (*zumutbar*) under consti- 30

tutional law to oblige her to disclose the information necessary for a claim to compensation under § 1607(3) of the Civil Code. Therefore, under constitutional law, it cannot be ruled out from the outset that the mother may be required to disclose to the former legal father the identity of the actual father, even against her will, in order to enable him to assert his claim to compensation.

c) In the present case, however, the courts failed to correctly assess the significance of the complainant's right to decide for herself whether, how and to whom she wishes to disclose information on her intimate sphere and her sex life.

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The Local Court did not attach any importance to the complainant's general right of personality solely on the grounds that she had not informed the plaintiff – who when they married assumed he was the child's biological father – that he was not the only possible biological father. Thereby, the court impermissibly curtailed the protection afforded to the complainant by the general right of personality and failed to balance her interest in not having to name the putative father against the plaintiff's financial interest in compensation on the basis of the specific circumstances of the case.

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The Higher Regional Court, by contrast, found that obliging the complainant to disclose the identity of the putative father of her child affected her right of personality. Nevertheless, based on flawed considerations, the Higher Regional Court subsequently failed to address the impairment of the complainant's general right of personality and therefore did not further balance her fundamental right against the plaintiff's financial interest. Indeed, the court at first correctly asserted that the general right of personality protects the authority conferred upon the individual to, in principle, decide themselves to what extent and to whom they disclose aspects of their personal life. However, the court then assumed that there was no "such interference", since the successful paternity challenge had shown that the complainant had had sexual intercourse with another man around the time of conception; according to the court, the "only" remaining question was the identity of the father. In pursuing this line of argument, the court failed to recognise that the mother's constitutionally protected intimate sphere encompasses in particular information about the partner or partners with whom she had sexual relations. With regard to protecting the private sphere of the person concerned, the disclosure and naming of sexual partners is often even more sensitive than the circumstance that the child was conceived out of wedlock. When she disclosed that she had had other sexual relations, the complainant did not forfeit her right not to have to disclose information on sexual relations with a specific partner, which is specifically protected by the general right of personality; the courts should have continued to take this right into account in their balancing of interests.

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2. The challenged decisions are founded on a failure to recognise the significance of the general right of personality, because the courts, precisely as a result of this failure, did not sufficiently consider the specific circumstances of the present case that speak for or against the worthiness of protection of the parties to the proceedings and failed to include these in their decision. [...]

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II.

A court decision obliging the mother to disclose information on the identity of the putative father of the child in order to enable the former legal father to assert his claim to compensation (§ 1607(3) of the Civil Code) exceeds the constitutional limits of judicial development of the law since it has no sufficiently clear basis in statutory law, regardless of the circumstances of the case at hand. Therefore, the complainant's fundamental rights have been violated (Art. 2(1) in conjunction with Art. 20(3) of the Basic Law). 35

[...] 36

1. [...] 37-38

2. [...] 39-42

3. [...] 43

a) The limits set by fundamental rights on judicial development of the law are narrower in this case because the obligation to disclose information considerably impairs constitutionally protected legal interests, while the reasons in favour of an obligation to disclose information are of minor weight under constitutional law. 44

The impairment of the complainant's fundamental rights resulting from the obligation to disclose the information sought is serious (see B I 1 a above). Furthermore, the complainant's obligation to disclose information indirectly impairs the general right of personality and the family life of a man to be named. 45

In the present case, this impairment is solely set against the former legal father's interest in asserting his claim to compensation under statutory law. The fact that the legislator designed the claim to compensation in a manner that makes it difficult to assert by not pairing it with a right to information does not require correction under constitutional law. The legislator was not constitutionally obliged to make it easier to assert the claim to compensation. [...] 46

In principle, by means of development of the law, civil courts can strengthen individual legal interests beyond the minimum level required under constitutional law. However, in the case of the claim to information under review here, the scope for judicial development of the law that reaches beyond what is necessary under constitutional law is narrower due to the mother's conflicting fundamental right. 47

b) Accordingly, the courts may not base an obligation on the mother's part to disclose information on the identity of former sexual partners for the purpose of asserting the claim to compensation under § 1607(3) second sentence of the Civil Code solely on the blanket provision of § 242 of the Civil Code. Rather, court decisions obliging a mother to disclose information on a sexual partner or partners require a more specific statutory basis, from which an obligation to disclose information of the type in question can be derived. 48

[...]

49-51

Thus, given that there is no specific statutory basis, and regardless of the specific circumstances of the case, the courts cannot generally derive from § 242 of the Civil Code a right to information afforded a former legal father against the mother that serves to assert the compensation claim. Strengthening the former legal father's claim to compensation would require action on the part of the legislator. The legislator is not prevented from introducing a provision to protect the former legal father, even though it is not required to do so in order to fulfil its duty of protection following from fundamental rights. The legislator could provide for stronger protection than what the courts can grant through their application of existing blanket provisions (cf. BVerfGE 134, 204 <223 and 224 para. 70>). However, the legislator would have to take the mother's conflicting general right of personality into account, which carries great weight under these circumstances.

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III.

[...]

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Kirchhof	Gaier	Eichberger
Schluckebier	Masing	Paulus
Baer		Britz

**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 24. Februar 2015 -
1 BvR 472/14**

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