

Headnote

to the Order of the First Senate of 24 March 1998

1 BvR 131/96

The protection of freedom of expression and the general right of personality also apply to saying one's own name when making a statement protected by Article 5(1) first sentence of the Basic Law.

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 131/96 -

IN THE NAME OF THE PEOPLE

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

Ms K...,

– authorised representatives: ...

against the Judgment of the Celle Higher Regional Court of 22 November 1995 -
13 U 84/94 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Papier,

Grimm,

Kühling,

Seibert,

Jaeger,

Haas,

Hömig,

Steiner

held on 24 March 1998:

The Judgment of the Celle Higher Regional Court of 22 November 1995 - 13 U 84/94 - violates the complainant's fundamental rights under Article 5(1) first sentence and Article 2(1) in conjunction with Article 1(1) of the Basic Law insofar as it requires her to refrain from naming herself when stating that the plaintiff in the initial proceedings sexually abused her. To this extent, [...] the judgment is reversed. The matter is remanded to the Higher Regional Court.

[...]

REASONS:

A.

The constitutional complaint challenges a civil court decision ordering the complainant to refrain from making any statement in which she names her father or herself. 1

I.

1. The complainant is the daughter of the plaintiff in the initial proceedings. According to the findings of the Regional Court and the Higher Regional Court, the plaintiff sexually abused her from a young age over a period of many years. 2

The complainant, who is now 41 years old and [...] still uses her maiden name, first revealed the abuse to her friends in 1973. In 1977, she told one of her superiors about it. In 1986, she confided in several doctors [...]. [...] In addition, she notified the youth welfare office of the abuse in order to protect her sister's daughter, for whom [her father] occasionally baby-sat [...]. 3

[...] In January 1991, she stated on a TV show that she had been abused by her father as a child. [...] In 1992, she once again approached the youth welfare office. Soon afterwards, she spoke of the abuse on the TV show *Schreinemakers Live* and offered, to the magazine *Emma*, to write an article on claims for damages against the person responsible for long-term psychological effects of sexual abuse. 4

Citing the renewed notification of the youth welfare office, the plaintiff in the initial proceedings requested that the complainant refrain from accusing him of sexual abuse in the presence of others. The complainant refused to comply with this request. Thereupon, the plaintiff sought injunctive relief. [...] 5

2. The Regional Court dismissed the action for injunctive relief. [...] 6

a) [...] 7

b) Upon the plaintiff's appeal on points of fact and law (*Berufung*), the Higher Regional Court ordered the complainant to refrain from accusing the plaintiff of having sexually abused her, if in doing so she states either the plaintiff's or her own name. 8

[...] 9-11

II.

The complainant challenges that judgment with her constitutional complaint, claiming a violation of Art. 5(1) first and second sentence and Art. 2(1) of the Basic Law insofar as she is required to refrain from stating her own name when discussing the sexual abuse. [...] 12

[...] 13-17

III.

[...]

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B.

The constitutional complaint is well-founded. The judgment of the Higher Regional Court violates Art. 5(1) first sentence and Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 23

I.

These fundamental rights are affected by the challenged decision. 24

1. Naming one's own name in a statement is protected by freedom of expression. 25

The fundamental right to freedom of expression protects any expression of opinion and factual assertion as well as other types of statements if these are required for forming an opinion (cf. BVerfGE 61, 1 <8>; 85, 23 <31>). Mentioning one's own name in a statement does not amount to a separate type of statement, nor is it, strictly speaking, an inherent part of the statement. [...] However, this does not mean that mentioning one's name does not fall within the scope of protection of this fundamental right. On the contrary, the name is of great significance not only in respect of the statement itself, but also as part of an individual's or the general public's opinion-forming process, as it contributes thereto. 26

The free expression of opinion is "the most direct form of expression of an individual's personality in society" (BVerfGE 7, 198 <208>). When the person making the statement is named, the connection between the person and the statement becomes manifest. When a person making a statement adds their name to the statement, they express that the statement is their personal opinion or view, and that they are prepared to back it up and, if their statement is a factual assertion, to personally vouch for its veracity. Naming one's own name is thus one of the prerequisites for conveying the intended meaning of the statement, particularly in respect of statements with which the speaker strongly identifies or which describe their own story. 27

Moreover, the name of the person making the statement can also convey a message that goes beyond the mere content of the statement. It is possible, for instance, that a personal account of painful experiences encourages other affected persons to break their silence. Such a message could not be conveyed in the same way without stating one's own name given that, in doing so, the person making the statement reveals that they are personally affected. This applies particularly when communication on certain occurrences is treated as a taboo. [...] 28

[...] Art. 5(1) first sentence of the Basic Law [...] protects statements not only with regard to dissemination, but also with regard to their impact (cf. BVerfGE 7, 198 <210>). Freedom of expression also encompasses the speaker's right to choose to deliver their statement in precisely the form and under the circumstances that will en- 29

sure the greatest possible impact (cf. BVerfGE 93, 266 <289>). However, the impact of a statement on others largely depends on whether or not the person making the statement can be identified. Anonymous statements often lack the degree of authenticity and credibility that brings about the desired effect or produces the desired response.

[...]

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2. Furthermore, stating one's own name falls within the scope of protection of the general right of personality under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law.

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A person's name not only serves to organise [society] and distinguish [persons from one another], it is also an expression of one's identity and individuality. Individuals have the right to demand that the legal order respect and protect their name. In certain contexts, this protection [...] also encompasses the desire to withhold one's undisputed name, or to replace it with a pseudonym. A name, as an expression of one's identity and individuality, cannot be exchanged at will. [...] Thus, refraining from stating one's name is not without adverse effects on one's personality.

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The same applies in respect of naming one's own name in a statement. Statements do not consist solely of the transmission of specific communication contents. They are also an expression of the personality of the person making a statement. Through their statements, those concerned present themselves to others as a person. These statements allow others to perceive their identity. When persons making a statement name their own name, others can not only associate the statement with the person, they can also integrate this statement into their image of the person's personality. At the same time, they are able to assess not only the contents of the statement, but also the person making the statement. Thus, if persons are obliged to refrain from naming their own name when making statements which they expressly regard as personal, and where it is important to them that such statements are associated with them, such an obligation must also be measured against the standards of Art. 2(1) in conjunction with Art. 1(1) of the Basic Law.

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3. By contrast, the fundamental right to freedom of the press is not relevant here. [...]

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4. Obliging the complainant to refrain from saying her name when publicly discussing that she was sexually abused by her father restricts her fundamental right to freedom of expression and her right of personality. The fact that the statement may be further disseminated in public does not change this, because the use of one's name falls within the scope of protection of both fundamental rights.

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II.

The challenged decision is incompatible with the fundamental right to freedom of expression and the general right of personality.

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1. Both fundamental rights are, of course, subject to statutory limitations. Pursuant to Art. 5(2) of the Basic Law, freedom of expression is only guaranteed within the limits of the provisions of general laws, of provisions for the protection of young persons, and of the right to personal honour. Under Art. 2(1) of the Basic Law, the development of one's personality is bound by the limits set by the constitutional order. This includes all legal provisions that are compatible with the Basic Law in terms of both their form and substance (cf. BVerfGE 6, 32 <41>). Among these are the provisions of §§ 823, 1004 of the Civil Code, on which the Higher Regional Court based the challenged judgment. 37

2. However, the application of these provisions in the present case does not meet the fundamental rights requirements. 38

a) The interpretation and application of private law falls to the civil courts, just as it is also their task to establish the facts of the case and to evaluate the evidence. However, when, in the course of applying constitutionally unobjectionable provisions of private law, legal interests that are protected by fundamental rights are affected, the civil courts must be guided by the significance and scope of the affected fundamental rights to ensure that the values enshrined therein are upheld when applying the relevant statutory provisions (cf. BVerfGE 7, 198 <205 *et seq.*>; established case-law). This generally requires a balancing, during the usual course of the civil proceedings, between the significance of the restricted fundamental right for its holders in the specific case and the extent of their impairment, on the one hand, and the importance of the legal interest protected by the applied law and the severity of its impairment through the exercise of fundamental rights, on the other hand. In doing this, the courts must have sufficient regard to both interests and must balance them in such a way that both are adequately taken into account. In particular, where a civil court fails to consider the impact of the fundamental rights altogether or incorrectly appraises it, and where the decision is grounded in this disregard for the impact of fundamental rights, this amounts to a violation of fundamental rights, which the Federal Constitutional Court must then remedy (cf. BVerfGE 95, 28 <37>). 39

b) On the complainant's side of the balancing, it is particularly significant that, in respect of freedom of expression and the right of personality, the disputed statement is closely related to the complainant's personality and she would be largely deprived of the desired impact of her communication process if she were prohibited from stating her name. 40

The complainant is only permitted to publicly make the statement in question if she refrains from disclosing her name; yet this statement relates not to some distant subject but to one that concerns her highly personal story. On the basis of the facts established by the civil courts, which the Federal Constitutional Court must accept, this is an experience with far-reaching consequences that is significant to her physical and psychological development. Every person is free to decide whether to share experiences of this type with others at all, and whether to do so publicly. Yet if the per- 41

son concerned decides to do so, a prohibition on personally describing this highly personal story generally amounts to a severe impairment to one's means of communication and the development of one's personality.

This finding is not altered by the fact that the challenged judgment does not prevent the complainant from discussing her abuse experience using her own name in the context of private conversations or therapy sessions. That is because she is prevented from discussing it beyond her personal circle of acquaintances or the persons professionally concerned with her personality development. The complainant cannot make a public appearance as an identifiable person, vouch for her story with her name and receive direct reactions to her story from others.

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This also reduces the impact of her story on persons in a similar position, or on members of the general public who are concerned by the issue of sexual abuse of children, as there is a danger that the credibility and authenticity of the description generally associated with the use of one's name may be lacking. [...]

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The life-changing experience about which the complainant wishes to speak publicly is, however, inextricably linked to her father. While this relationship demands a certain degree of restraint, it must be taken into account that the complainant speaks about the plaintiff in the initial proceedings from her perspective as a victim of his actions. [...] The fact that the complainant is a victim, as established by the courts, would be re-emphasised if the victim were denied the chance to present her story in a personalised form. [...]

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c) In the balancing, on the side of the plaintiff in the initial proceedings, significance must be accorded to his right of personality, which is protected as a fundamental right and reflected in private law in §§ 823 and 1004 of the Civil Code. [...] However, personality interests must generally stand back behind freedom of expression when the disputed statement concerns facts that must be considered true.

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There are, however, some exceptions to this principle. True reports may constitute a violation of the right of personality of the person concerned, particularly when the portrayal would have serious consequences for the development of their personality, and if the need for protection outweighs the interest in making the statement. Thus, in its *Lebach* decision (BVerfGE 35, 202) the Federal Constitutional Court accorded personality interests precedence over freedom of broadcasting [...].

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The present case is indeed different, given that not media reports but a report by the victim are at issue. [...]

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Notwithstanding this, the consequences for the plaintiff in the initial proceedings are serious given that he is accused of having sexually abused his own child, which is considered a particularly heinous crime. Reports of such conduct usually lead to the stigmatisation of the perpetrator. Due to societal judgment and behaviour mechanisms, i.e. patterns that are not within the control of the affected person, stigmatisation can result in a loss of social acceptance and lead to social isolation and to fun-

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damental insecurity and loss of self-worth on the part of the affected person in numerous areas of life. The free development of one's personality is thereby rendered considerably more difficult [...].

The protection afforded by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law does not require the statements about a person to be false. In fact, the protection also applies in cases in which the statements are true and may therefore result in social exclusion and isolation. [...] 49

[...] The right to the protection of one's personality applies [...] also with regard to the consequences of this allegation becoming information for others. That is why the information and the means of identification that the addressees of the statement are provided with are relevant. The possibility that an allegation may be taken to refer to a certain person who will have to bear the consequences – consequences against which the constitutional right of personality grants protection – thus arises not only when the person's name is mentioned, but also when other details make their identification possible. 50

Nevertheless, the weight of the impairment of the fundamental right depends on how far-reaching the discriminatory effects are. This can vary depending on how well-known the person concerned is. Furthermore, it must be taken into account whether the effects of the statement are limited due to the name's frequency. If the name is very common, the statement will only have an effect in respect of those persons who know the speaker and their family and who can therefore draw conclusions as to the identity of the perpetrator from a public appearance of the speaker using her own name. In the case of a television appearance, the statement of the speaker's name gives rise to an even less serious impairment of the right of personality, as much of the speaker's identity is revealed even if the name is not disclosed. 51

d) In its balancing of interests, the Higher Regional Court did not sufficiently take into account these aspects, although mandated to do so by fundamental rights. 52

The Higher Regional Court, in accordance with the civil courts' case-law, did affirm a pillorying effect by the complainant's statement on the plaintiff in the initial proceedings, with serious consequences for the development of his personality, and held that this could therefore only be tolerated if it were matched by important reasons for publishing the allegation in such a form that would allow for his identification. There are no constitutional objections to this reasoning. 53

However, the Higher Regional Court failed to attribute sufficient weight to the arguments in favour of making a statement using one's own name. Its judgment raises doubts as to whether the court was aware of the fact that the complainant, in using her name when making her statement, is protected by freedom of expression and by the general right of personality. In any event, the complainant's interests protected by these fundamental rights were not sufficiently taken into account in the court's balancing. [...] 54

[...] 55-56

As the Higher Regional Court failed to sufficiently address the specific interests that are relevant with regard to freedom of expression and the right of personality, it also failed to properly attribute weight to the necessary elements in the balancing of interests. [...] 57

[...] 58

e) [...] 59

Papier	Grimm	Kühling
Seibert	Jaeger	Haas
Hömig		Steiner

**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 24. März 1998 -
1 BvR 131/96**

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