Headnote

to the Order of the First Senate of 25 October 2005

1 BvR 1696/98

Where an ambiguous statement of opinion violates another person's right of personality, an action for injunctive relief against any future repetition of the statement is not ruled out just because the statement could also be interpreted in a different manner that would not impair another's personality. The standard in injunctive relief proceedings differs from the standard applicable when courts hold a person liable for past statements, for instance by imposing punishment, damages or an obligation to retract.

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 1696/98 -

IN THE NAME OF THE PEOPLE

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

Dr. S…,

– authorised representatives: …

against the Judgment of the Federal Court of Justice of 16 June 1998
- VI ZR 205/97 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Papier,

Haas,

Hömig,

Steiner,

Hohmann-Dennhardt,

Hoffmann-Riem,

Bryde,

Gaier

held on 25 October 2005:

The Judgment of the Federal Court of Justice of 16 June 1998 - VI ZR 205/97 - violates the complainant's fundamental right under Article 2(1) in conjunction with Article 1(1) of the Basic Law. It is reversed and the matter is remanded to the Federal Court of Justice.

REASONS:

A.

The constitutional complaint concerns claims for injunctive relief against the dissemination of disparaging factual assertions. 1

I.

The complainant had served as chairperson of the executive committee (*Konsistorialpräsident*) of the Berlin-Brandenburg Protestant Church in the GDR. After German reunification, he became Minister-President of the *Land* Brandenburg. From 1969 to 1989, in his capacity as a church representative, he had maintained contacts with officials at the Ministry of State Security (*Ministerium für Staatssicherheit*). He was listed in the Ministry's internal files as an unofficial collaborator (*inoffizieller Mitarbeiter* – IM) under the code name *IM-Sekretär*. 2

The defendant in the initial proceedings (hereinafter: the defendant) is a lawyer, notary and former deputy chairperson of the CDU parliamentary group in the Berlin state parliament. On 2 April 1996, during a ZDF television broadcast discussing public opinion in the build-up to the referendum on merging the *Länder* Berlin and Brandenburg into one federal state, he made the following comments about the complainant: 3

> I have a massive problem with the fact that Mr S. – who as we all know served the GDR Ministry of State Security for over 20 years under the code name *IM Sekretär* as an unofficial collaborator – that this man has now been given the chance, in 1999 here in Berlin, to become Berlin's Minister-President, meaning that he could become *my* Minister-President, that he could be Minister-President over the people of Berlin. 4

The complainant is seeking injunctive relief against the defendant. The assertion that he served the GDR Ministry of State Security for over twenty years is defamatory, he claims. He contends that he never worked as an unofficial collaborator in the service of the Ministry of State Security and that the defendant's assertion – emphasised by the words "fact" and "as we all know" – is capable of disparaging and demeaning him in public opinion. 5

The Regional Court rejected the complainant's action for injunctive relief primarily on the grounds that the statement was covered by the fundamental right to freedom of expression. 6

The Higher Regional Court reversed the Regional Court's judgment and ordered the defendant, on pain of an administrative fine, to refrain from disseminating or repeating the assertion that the complainant had "served the GDR Ministry of State Security for more than 20 years under the code name *IM-Sekretär*". In its reasoning, the court in essence stated that the defendant had made and disseminated a factual assertion disparaging and demeaning the complainant. The court found that, based on normal language usage, the meaning of the challenged statement was that someone, based on an explicit or implicit 'undertaking' (*Verpflichtungserklärung*), had collected or obtained information about third parties at the request of the Ministry of State Security and had passed this information to their 'employers' for them to exploit. 7

The Higher Regional Court further held that pursuant to § 823(2) of the Civil Code and § 186 of the Criminal Code, it would have been incumbent upon the defendant to 8

prove the truthfulness of his assertion, but that he had failed to do so. According to the court, the fact that the complainant had been kept on file by the GDR Ministry of State Security as *IM-Sekretär* was not sufficient proof that he had actually been in the service of the Ministry. It was not known whether there had been any written undertaking, the court found. The file kept on the complainant by the Ministry of State Security had been destroyed. […]

Following the defendant's appeal on points of law (*Revision*), the Federal Court of Justice reversed the Higher Regional Court's judgment (BGHZ 139, 95) and rejected the complainant's initial appeal on points of fact and law (*Berufung*) against the Regional Court's judgment. This decision is now being challenged in the constitutional complaint proceedings. The Federal Court of Justice held that the Higher Regional Court had wrongly granted the injunctive relief sought by the complainant. 9

It further held that the challenged statement contained factual assertions whose truthfulness could be ascertained by means of evidence. Yet the Higher Regional Court had wrongly interpreted the meaning of the statement in one very specific sense only, without even discussing other possible interpretations. The reference to activities 'serving' the GDR Ministry of State Security did not necessarily mean that the complainant had carried out such activities on the basis of an undertaking that recognised the Ministry as his employer. Rather, that part of the statement in question could also be understood as meaning that the complainant, who was listed as *IM-Sekretär* in the relevant files, had provided services to the Ministry of State Security – without having been obliged to do so on the basis of any undertaking – by intentionally and deliberately providing the Ministry of State Security (for whatever reasons) with information about third parties or specific events in the context of his (undoubtedly close) relations with the Ministry, thereby meeting the latter's expectations. In doing so, one could say that he had indeed acted as an agent in the sense that he knew the information he provided served (i.e. was useful to) the Ministry of State Security. The Federal Court of Justice found that such an interpretation could in any case not be ruled out. It held that where it was possible to attribute different meanings to a statement, and where these different interpretations were not mutually exclusive, the legal assessment had to be based on the interpretation that was more favourable for the party against which injunctive relief is sought and less intrusive for the affected person. In this case that would be the second interpretation. 10

[…] 11-13

II.

The complainant claims a violation of his general right of personality (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law), and of procedural fundamental rights guarantees (Art. 2(1) in conjunction with Art. 20(3) and Art. 103(1) of the Basic Law). 14

He claims that the Federal Court of Justice's decision violates his general right of personality by assigning to the defendant's assertion a new meaning that has no ten- 15

able basis. […]

[…] 16-17

III.

[…]

B.

The constitutional complaint is admissible and well-founded. 22

I.

The Federal Court of Justice's decision violates the complainant's general right of personality under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 23

1. The decision affects the scope of protection of the complainant's general right of personality. 24

a) The general right of personality enshrined in Art 2(1) in conjunction with Art. 1(1) of the Basic Law supplements the freedoms laid down in the Basic Law and protects 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>). The substance of this right has yet to be comprehensively and exhaustively defined. 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>). 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>). 25

b) The constitutional protection of the right of personality under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law mandates that the state protect individuals against risks to this right originating from third parties. When applying provisions of private law that give effect to such protection, the courts must take into account the relevant constitutional standards. Failure to meet these standards not only violates objective constitutional law, but also the individual fundamental rights of affected persons. Therefore, where individuals challenge statements affecting their personality on the grounds that these statements are false, yet the courts find the statements to be permissible, these court decisions affect the general right of personality (cf. BVerfGE 99, 185 <194 and 195>). 26

This is the case here. The Federal Court of Justice rejected the complainant's application for injunctive relief regarding the statement that he had served the Ministry of State Security as *IM-Sekretär* for more than twenty years. Given that the statement was capable of damaging the complainant's social and political reputation, the Fed- 27

eral Court of Justice's decision affects his general right of personality.

2. The Federal Court of Justice's decision violates the complainant's general right of personality. The defendant's statement, which adversely affects the complainant, is not covered by the fundamental right to freedom of expression under Art. 5(1) first sentence of the Basic Law. 28

a) Private law gives effect to the general right of personality by allowing claims for injunctive relief against adverse statements on the basis of § 1004(1) and § 823(2) of the Civil Code in conjunction with § 186 of the Criminal Code. By contrast, § 193 of the Criminal Code primarily gives effect to interests relating to freedom of expression. This provision contains an exemption from liability for defamation where the respective statement seeks to safeguard legitimate interests. This also applies in private law relations, either by directly invoking § 823(2) of the Civil Code or by invoking the general precept underlying it (cf. BVerfGE 99, 185 <195 and 196>). These provisions recognise that the general right of personality is not guaranteed without reservation. Under Art. 2(1) of the Basic Law, it is limited by the constitutional order, including the rights of others. These rights include freedom of expression under Art. 5(1) first sentence of the Basic Law, which is also not guaranteed without reservation. Pursuant to Art. 5(2) of the Basic Law, it may be limited *inter alia* by the provisions of general laws and by the right to personal honour. 29

The interpretation and application of private law provisions by the competent [ordinary] courts must be guided by the affected fundamental rights to ensure that the values enshrined therein are upheld when applying the relevant statutory provisions in practice (cf. BVerfGE 7, 198 <205 and 206>; 85, 1 <13>; established case-law). The civil courts apply the general right of personality as a guarantee that is open to interpretation and that thus requires an appropriate balancing of interests in order to determine whether an unlawful violation has occurred (cf. BGHZ 45, 296 <307 and 308>; 50, 133 <143 and 144>; 73, 120 <124 and 125>). This is not objectionable under constitutional law. In cases of the present type, the severity of a statement's adverse impact on an individual's personality must be balanced against the curtailing of freedom of expression that prohibiting the statement would entail. This balancing must give consideration to fundamental rights requirements. When reviewing and deciding cases concerning statements of opinion, certain considerations and rules developed in the case-law for determining which legal interests take precedence must be observed to ensure that the conflicting fundamental rights are safeguarded to the greatest possible extent (cf. BVerfGE 61, 1 <8 *et seq*.>; 85, 1 <14 *et seq*.>; 93, 266 <293 *et seq*.>; 99, 185 <196 *et seq*.>). The outcome of the balancing can generally not be determined in the abstract, given that the balancing is contingent upon the circumstances of the individual case. 30

b) When assessing whether a statement violates fundamental rights, it is imperative that the statement's meaning be properly determined. In particular, it is necessary to clarify how and to what extent the statement's objective meaning impairs the com- 31

plainant's right of personality. In interpreting the statement, the courts may not rely on the subjective intention of the person making the statement, nor may they rely on the understanding of the person affected by the statement. Rather, it is necessary to determine how the statement would be understood by a neutral and reasonable audience (cf. BVerfGE 93, 266 <295>; BGHZ 95, 212 <215>; 132, 13 <19>). Far-fetched interpretations must be discarded (cf. BVerfGE 93, 266 <296>). If, based on this standard, the statement's meaning is unambiguous, the court must rely on this meaning in its assessment. However, if a neutral and reasonable audience perceives the statement to be ambiguous, or if a considerable number of persons representing such an audience understand the meaning in different ways, the court must presume the statement to be ambiguous for the purpose of its review.

In the case at hand, the Federal Court of Justice found the statement to be ambiguous. In this regard, it based its decision on the standards developed by the Federal Constitutional Court for reviewing criminal and private law sanctions for ambiguous statements of opinion made in the past. In doing so, however, the Federal Court of Justice did not take into account that these standards do not apply accordingly to actions seeking injunctive relief in respect of future statements. The basis of the legal assessment [in the challenged decision] was thus flawed from the outset (see aa below). The balancing carried out on this basis by the Federal Court of Justice also runs counter to constitutional requirements (see bb below). 32

aa) (1) When reviewing sanctions imposed under criminal or private law with regard to ambiguous statements made in the past, the Federal Constitutional Court presumes that, in principle, freedom of expression is violated if the lower court based its decision to find against the person making the statement on an interpretation that leads to a conviction, without having plausibly ruled out other possible interpretations that would not justify the sanction (cf. BVerfGE 82, 43 <52>; 93, 266 <295 *et seq*.>; 94, 1 <9>). According to this case-law, a criminal conviction, or a civil court order for damages or for retraction or correction of the statement, violates Art. 5(1) first sentence of the Basic Law if the wording of the contested statement or its context would also allow a different interpretation, one that does not violate the right of personality (cf. BVerfGE 43, 130 <136>; 93, 266 <296> – regarding criminal sanctions; BVerfGE 85, 1 <18>; 86, 1 <11 and 12> – regarding private law sanctions). […] The potential chilling effect of state-imposed sanctions in such cases could have major adverse effects on freedom of speech, freedom of information and the free formation of opinion, striking at the heart of freedom of expression (cf. BVerfGE 43, 130 <136>; 54, 129 <136> 94, 1 <9>). 33

(2) By contrast, when courts decide on injunctive relief regarding future statements, the individual exercise of fundamental rights or the functioning of the opinion-forming process is not in equal need of protection. When balancing freedom of expression against the protection of one's personality in such cases, it must be taken into account that the person making the statement has the possibility to express themselves more clearly in the future. They can therefore clarify the meaning of the statement on 34

which the courts must base their legal assessment of whether the statement violates the right of personality. […] If the statement is a factual assertion, it is decisive whether the person making the statement can prove its truthfulness. If the statement is a value judgment, it is material whether it amounts to calumny (*Schmähung*), profanity (*Formalbeleidigung*) or an attack on human dignity, as this would already be sufficient for a claim to injunctive relief. Where this is not the case, it must be assessed whether the protection of the statement takes precedence over the protection of personality in the context of the necessary balancing (cf. BVerfGE 90, 241 <248 and 249>; 93, 266 <293 and 294>).

If the person making the statement is unwilling to clarify the intended meaning in an unambiguous manner, there is no constitutionally sound reason to exempt them from liability in injunctive relief proceedings merely because the statement lends itself to several possible interpretations, including interpretations which would not (or only to a lesser degree) violate the right of personality. Rather, the balancing [of the interests on the part of the person making the statement] against the right of personality must take into account all possible interpretations that could impair this right, with the exception of far-fetched ones. Nothing prevents the person making the statement from expressing themselves in the future in a manner that is not ambiguous and – if an interpretation that would violate the right of personality does not actually correspond to the intended meaning – from clarifying how they want the statement to be understood. According to the case-law, the person making the statement can avoid an injunctive relief order issued by a civil court if they declare in a serious and sufficiently precise manner that they will not repeat the ambiguous statement that lends itself to an interpretation that would violate the right of personality, or that they will only do so on condition that the statement is adequately clarified […]. 35

Unlike criminal or private law sanctions imposed retroactively with regard to statements that have already been made, these requirements imposed on the person making the statement do not create a chilling effect on the process of free expression and formation of opinion. The right on the part of the person making the statement to determine the meaning of their statement is upheld. At the same time, the right of personality afforded individuals adversely affected by the statement is protected. The person making the statement can continue to pursue the interests advanced by the statement in free self-determination, albeit in a manner that does not violate another individual's right of personality. Where this is not possible, their freedom of expression stands back behind the limits deriving from the protection of personality. 36

(3) The Federal Court of Justice put forward an interpretation that differs from the one undertaken by the complainant and by the Higher Regional Court. It then carried out its legal assessment of whether the statement violated the complainant's personality solely on the basis of this interpretation. Its decision was not therefore guided by the standards applicable in injunctive relief cases. 37

The complainant and the Higher Regional Court interpret the defendant's statement 38

as an assertion that the complainant had worked for the GDR Ministry of State Security based on an explicit or implicit undertaking and that he had passed information about third parties to his ‘employers’ for them to exploit. While the Federal Court of Justice considers this interpretation to be tenable, it put forward a different interpretation: namely that the statement suggested that the complainant, within the framework of his existing contacts with the Ministry of State Security, had provided a service to the latter by supplying information about third parties or specific events in line with the Ministry’s expectations. In doing so, he had acted as an agent in the sense that he knew that this information would serve (i.e. be useful to) the Ministry. The Federal Court of Justice held that such an interpretation of the statement could in any case not be ruled out.

Applying the case-law developed by the Federal Constitutional Court for criminal and private law sanctions, the Federal Court of Justice based its decision regarding the claim for injunctive relief on this interpretation. In doing so, it failed to give consideration to the difference between claims for injunctive relief under private law, which pertain to future conduct, and sanctions under criminal or private law for statements made in the past. The court should instead have based its assessment on the interpretation that resulted in the more severe violation of the complainant’s right of personality. The constitutional requirements have not been satisfied, since the basis of the legal assessment was flawed from the outset. 39

bb) The flawed basis of the court’s assessment negatively impacted the balancing of the affected legal interests to the detriment of the complainant. The balancing itself also fails to fully satisfy the constitutional requirements. 40

(1) The assertion that the complainant had been in the service of the Minister of State Security as *IM-Sekretär* is – as the Federal Court of Justice correctly found – a severe violation of the complainant’s personality. Since this is an assertion of fact, it is possible to prove the truthfulness of the statement. 41

According to the ordinary courts’ case-law, the burden of proof regarding truthfulness is on the person making a factual assertion that could violate another’s personality (cf. BGHZ 132, 13 <23>). This is also in line with the legal precept reflected in § 186 of the Criminal Code, which is applied accordingly in private law cases concerning free speech in a manner that is not objectionable under constitutional law. There is generally no justification for disseminating untrue factual assertions (cf. BVerfGE 61, 1 <8>; 94, 1 <8>; 99, 185 <197>). In principle, where factual assertions are deliberately untrue or proven to be false, freedom of expression stands back behind the right of personality (cf. BVerfGE 85, 1 <17>). 42

According to the findings of the Higher Regional Court, it is impossible to establish the truthfulness of the statement on the basis of the interpretation that is less favourable for the defendant, which is the interpretation the court’s decision was based on. In the view of the Federal Court of Justice, the truthfulness of the statement when interpreted in the version that is more favourable for the defendant has also not 43

been proven. Therefore, the courts had to presume a *non liquet* (inconclusive evidence) for both interpretations.

When reviewing the dissemination of factual assertions in cases where the truthfulness of the statement cannot be conclusively established, the civil courts determine the balance between the requirements of freedom of expression on the one hand and the interests in protecting one's personality on the other by examining whether the person making the statement has satisfied the requirements for justifying a dissemination of unverified factual assertions on the grounds of pursuing legitimate interests (§ 193 of the Criminal Code) (cf. BGH, NJW 1987, pp. 2225-2226 with further references). According to this case-law, at least in cases regarding matters that have a considerable bearing on public concerns, it is not permissible to bar someone from making or disseminating an allegation that might be untrue as long as that person conducted sufficiently diligent research regarding the truthfulness of the statement (cf. BGHZ 132, 13 <23 and 24>). 44

There are no constitutional objections to establishing such duties of care provided that the ordinary courts determine the scope of these duties in accordance with the constitutional requirements (cf. BVerfGE 99, 185 <198>). On the one hand, to safeguard freedom of expression, the ordinary courts must ensure that the requirements they set regarding the duty to be truthful do not reduce the willingness to exercise this fundamental right and hence curtail freedom of expression in general (cf. BVerfGE 54, 208 <219 and 220>; 85, 1 <17>). On the other hand, however, they also have to take into account that the duty to be truthful is a manifestation of the duty of protection deriving from the general right of personality (cf. BVerfGE 12, 113 <130>; 99, 185 <198>). If there is a serious interference with the right of personality, this gives rise to strict requirements regarding compliance with the duty of care (cf. BGHZ 95, 212 <220>; 132, 13 <24>). These requirements are not satisfied if the person making the statement solely bases the assertion on points which are negative for the affected person, doing so in a selective manner and without making this clear to the public, while failing to disclose aspects that could possibly refute the assertion (cf. BVerfGE 12, 113 <130 and 131>; BGHZ 31, 308 <318>). 45

(2) When determining the scope of the defendant's duty to be truthful and his duty of care, the Federal Court of Justice did not satisfy these requirements arising from the general right of personality – not even based on its own less intrusive interpretation of the statement. These requirements are most certainly not met if one takes the interpretation that should have been applied in the present case. 46

[…] 47

The Federal Constitutional Court has recognised that the extended burden of substantiation incumbent upon the person making defamatory statements, which applies in addition to their duty to be truthful and their duty of care, can be satisfied by using uncontested press reports as references (cf. BVerfGE 85, 1 <21 *et seq*.>). However, this presupposes that the referenced press reports are actually capable of supporting 48

the statement in question (cf. BVerfGE 99, 185 <199>). If the person making the statement is aware that the truthfulness of the assertion disseminated by the press is in doubt, they may not base their own statement on such reports […]. The duty to be truthful thus goes beyond the obligation to exhaust all possibilities of research available to the person making the statement. If the person making the statement disseminates assertions which their own research was not able to confirm, they must disclose this fact. They may not portray as true what they know to be disputed or doubtful (cf. BVerfGE 12, 113 <130 and 131>; […]).

In the case at hand, the nature of the complainant's activities in connection with the GDR Ministry of State Security [that the statement refers to] was disputed. This holds true even on the basis of the interpretation put forward by the Federal Court of Justice, which would have amounted to a less intrusive interference. Both the official statements published by the authorities and the media reporting on this matter were controversial. The case at hand did not concern the dissemination of a specific factual assertion on the basis of undisputed media reports, but rather a selective account that endorsed one specific view of the reported facts as the only correct representation when in fact it was contested. 49

When making a statement that endorses a specific view of known facts, which results in a violation of the right of personality of the person affected by the statement, the person making the statement must make it clear that their view is controversial, and that the underlying facts are not sufficiently clarified, in order to ensure protection of the right of personality. […] Should the defendant wish to make similar statements in the future, requiring him to disclose that his assertion is not supported by uncontested facts does not excessively stretch the duty to be truthful and is thus not incompatible with the presumption in favour of free speech. 50

II.

[…] 51-52

III.

It cannot be ruled out that the Federal Court of Justice would have reached a different conclusion if it had based its assessment on the interpretation of the statement that more seriously implicated the complainant's person, and had applied the requirements necessary for protecting the complainant's right of personality with regard to the defendant's duty to be truthful. The challenged decision must therefore be reversed and the matter remanded to the Federal Court of Justice (§ 95(2) of the Federal Constitutional Court Act). 53

[…] 54

Papier Haas Hömig

Steiner Hohmann-Dennhardt Hoffmann-Riem

Bryde Gaier

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 25. Oktober 2005 - 1 BvR 1696/98

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