Order of the First Chamber of the First Senate
of 29 November 2005
– 1 BvR 1444/01 –

in the proceedings on the constitutional complaint of Mr. B.

I. directly against 1. a) the order of Stuttgart Higher Regional Court (Oberlandesgericht) of 17 July 2001 – 8 W 201/2001 –,

b) the order of Ravensburg Regional Court (Landgericht) of 16 March 2001 – 2 T 45/01 –,

c) the order of Ravensburg Local Court (Amtsgericht) of 31 January 2001 – XVI 9/92 –,

2. the order of Ravensburg Local Court of 31 August 2001 – XVI 9/92 –,

II. indirectly against § 1748.4 of the Civil Code (Bürgerliches Gesetzbuch – BGB).

RULING:

1. The order of Stuttgart Higher Regional Court (Oberlandesgericht) of 17 July 2001 – 8 W 201/2001 –, the order of Ravensburg Regional Court (Landgericht) of 16 March 2001 – 2 T 45/01 – and the orders of Ravensburg Local Court (Amtsgericht) of 31 January 2001 and of 31 August 2001 – XVI 9/92 – violate the complainant's fundamental right under Article 3.1 of the Basic Law (Grundgesetz – GG); they are reversed.
2. The Land (state) Baden-Württemberg is ordered to reimburse the complainant the necessary expenses of the constitutional complaint proceedings.

GROUNDS:

I.

In the constitutional complaint, the natural father of a child born illegitimate challenges the adoption of that child by the husband of the child's mother. The constitutional complaint is directed indirectly against § 1748.4 of the Civil Code (*Bürgerliches Gesetzbuch – BGB*), to the extent that it provides that the consent of a father of an illegitimate child, where the father has at no time had custody, may be substituted subject to less rigorous requirements than is the case for other fathers. 1

1. The complainant is the father of a son who was born illegitimate in January 1987. He acknowledged his paternity immediately after the birth. At this time, he was living in a common household with the mother of the child. In 1989, the mother left him. In summer 1990, she married her present husband. In the year 1992, a child was born to the new spouses. The last contact of the complainant with his son consented to by the mother of the child took place in May 1990. Further visits were prevented by the 2

mother. Repeated applications by the complainant for arrangements for contact were unsuccessful.

On 10 April 1992, the mother of the child and her husband – under law applicable at that time – applied to adopt the complainant's son. The Local Court granted the adoption in an order of 20 May 1992. The complainant filed a constitutional complaint against this; the Federal Constitutional Court (*Bundesverfassungsgericht*) granted the relief sought by this constitutional complaint in the Senate decision of 7 March 1995 (Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 92, 158)). It held that the order of the Local Court of 20 May 1992 violated the complainant's fundamental right under Article 6.2 sentence 1 of the Basic Law and reversed its finality to the extent that this conflicted with a re-examination and a new decision. The matter was referred back to the Local Court (BVerfGE 92, 158 (159-160)). 3

2. In compliance with the requirements of the Federal Constitutional Court (loc. cit., p. 189), the Local Court, by an order of 9 August 1995, suspended the adoption proceedings until the law was amended. 4

After the enactment of the Act on the Reform of Parent and Child Law (*Gesetz zur Reform des Kindschaftsrechts – Kindschaftsrechtsreformgesetz*), which came into force on 1 July 1998, the Local Court resumed the suspended proceedings. As a result of the new legal position, which no longer provides for a child born illegitimate to be adopted by its mother, the mother of the child no longer upheld her application for adoption. Accordingly, in November 1998, the Local Court cancelled the adoption of the child by its mother granted in the year 1992, with effect ex nunc. Her husband continued to pursue his application to adopt the child. At the same time an application was made to substitute the consent of the complainant, as the natural father of the child, to the adoption, under § 1748.4 of the Civil Code. 5

By an order of 31 January 2001, challenged in the present constitutional complaint, the Local Court substituted the consent of the complainant to the adoption of his child by its stepfather. The court found that the requirements of § 1748.4 of the Civil Code were satisfied; this provides that the Guardianship Court (*Vormundschaftsgericht*) must substitute the consent of the father in the cases of § 1626.a.2 of the Civil Code if the fact that the adoption did not take place would be disproportionately disadvantageous to the child. 6

The complainant's complaint filed against this decision was dismissed by the Regional Court on 16 March 2001 with reference to the grounds of the Local Court order that was being challenged. In this dismissal, the court made it clear that the application for the substitution of the father's consent to the adoption had been made by the child, represented by its mother, and not, as had been stated in the grounds of the Local Court decision, the stepfather. 7

In an order of 17 July 2001, the Higher Regional Court rejected as unfounded the 8

immediate further appeal on points of law against the order of the Regional Court filed by the complainant. The Court held that procedural objections of the complainant that were set out in more detail had not been successful. To the extent that the complainant asserted that § 1748.4 of the Civil Code, which was newly introduced in 1998, and the decisions of the lower courts based on this, violated the Basic Law and the European Convention on Human Rights, the Higher Regional Court stated that it did not follow this argument. In the opinion of the Higher Regional Court, § 1748.4 in conjunction with § 1626.a.2 of the Civil Code, which had to be seen in connection with § 1747.3 of the Civil Code, satisfied the constitutional requirements of Article 6.2 of the Basic Law, even if other solutions had been conceivable. To the extent that the requirements of adoption in the case of an unmarried father who had never held (joint) custody and had never “had responsibility for the child” were less than in the case of other parents, this distinction appeared factually justified in the circumstances of life that are typically found in this case. The approach chosen by the legislature in the amended law, which made it possible for the child that was born to parents whose relationship was not stabilised by marriage, in the interests of the child itself, more easily to be completely integrated in a family founded later, was based on a proper weighing of interests. The Local Court and the Regional Court had examined the “disproportionate disadvantage” in the meaning of § 1748.4 of the Civil Code; this examination had not erred in law. The struggle of the natural father for his rights, which lasted many years, had forced the child and its new family into a position of opposition, and this made it necessary to decide in favour of adoption, in the interests of the child. It could not be disregarded, the court argued, that the complainant had had his last personal contact with the child consented to by the mother in 1990, when the child was three years old. Further occasions of contact with the complainant without the consent of the mother had resulted in insecurity and resistance on the part of the child.

3. On 7 August 2001, the complainant filed a constitutional complaint and challenged the violation of Article 3.1 and Article 6.2 sentence 1 of the Basic Law. 9

a) To the extent that § 1748.4 of the Civil Code did not treat the case of a rape leading to the birth of a child differently from cases in which fathers had lived together in a long-term relationship with the mother of the child of the two of them and had fulfilled all their paternal duties, it violated Article 6.2 sentence 1 of the Basic Law, according to the complainant. Article 6 of the Basic Law and the “principle of equality before the law” had been violated to the extent that § 1748.4 of the Civil Code treated fathers of illegitimate children who lived together with the mother before the child was born substantially differently in law than fathers who were divorced from the mother of the child. Fathers who lived together as cohabitants with the mother of the child before the Act on the Reform of Parent and Child Law came into force on 1 July 1998 and whose separation from the mother took place before that date had had no legal possibility, the complainant submitted, of holding (joint) custody. The complainant had lived together with the mother of the child for years before and after the birth of his son and 10

had fulfilled all his paternal duties. Furthermore, the complainant is of the opinion that the fact that the order of 20 May 1992 granted the adoption of the child and the complainant's paternal consent to this was substituted nine years later violates the prohibition of arbitrariness following from Article 3.1 of the Basic Law and the right to a fair trial.

b) In an additional application, the complainant also filed a constitutional complaint against an order of the Local Court of 31 August 2001, in which the Local Court once more granted the adoption of the child by the husband of the child's mother. 11

4. The Federal Constitutional Court gave parties and others the opportunity to express an opinion under § 94.3 and § 94.4 and § 77 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*). 12

II.

The constitutional complaint is to be accepted for decision, because accepting it is advisable in order to enforce the complainant's fundamental right to equal treatment under Article 3.1 of the Basic Law (see § 93.a.2 letter b of the Federal Constitutional Court Act). 13

1. The constitutional complaint has no fundamental constitutional significance (see § 93.a.2 letter a, § 93.c.1 sentence 1 of the Federal Constitutional Court Act). Nor is it reserved to the Senate under § 93.c.1 sentence 3 of the Federal Constitutional Court Act, and therefore the constitutional complaint may be accepted by a Chamber decision. 14

a) With regard to Article 6.2 sentence 1 of the Basic Law, the constitutional questions relating to the adoption of a child against the will of its natural father have already been answered by the Senate decision of 7 March 1995 (BVerfGE 92, 158). In particular, the Federal Constitutional Court has held that the parental right of a father affected – whether the child was born legitimate or illegitimate – makes it necessary to take his concerns into account. In addition, the court made it clear that an adoption of the child by the stepfather would (only) be unobjectionable with regard to the rights of the natural father affected under Article 6.2 of the Basic Law if weighing the stepfather's interest showed that the interest of the child in the adoption being granted outweighed it (see BVerfGE, loc. cit. (182)). 15

b) Nor does the constitutional complaint have fundamental constitutional significance with regard to the question of whether the distinction made in § 1748.1 and § 1748.4 of the Civil Code in the requirements for substitution of consent to the adoption between fathers who formerly had custody and fathers who do not have custody is compatible with the principle of equality before the law under Article 3.1 of the Basic Law. 16

A constitutional complaint has fundamental constitutional significance if it raises a constitutional question which cannot automatically be answered on the basis of the 17

Basic Law and has not yet been clarified by the case-law of the Federal Constitutional Court. There must therefore be serious doubts as to the answer to the constitutional question. An indication that a constitutional question has fundamental constitutional significance may in particular be the fact that there has been a dispute about the question in the specialised literature or there have been different answers to it in the case-law of the nonconstitutional courts (see BVerfGE 90, 22 (24-25)).

The question as to the constitutionality of the distinction made in § 1748.1 and § 1748.4 of the Civil Code between fathers who once had custody and fathers who do not have custody in the requirements for the substitution of consent to the adoption is not longer seriously disputed following the decision of the Federal Court of Justice (*Bundesgerichtshof*) of 23 March 2005 (*Neue Juristische Wochenschrift – NJW* 2005, pp. 1781 et seq.). The said decision of the Federal Court of Justice creates expectations that the case-law of the nonconstitutional courts will be unified in this question. 18

aa) In particular, the provision of § 1748.4 of the Civil Code is open to an interpretation that can prevent the above groups of fathers from being treated unequally. In the opinion of the Federal Court of Justice, after the constitutionally required weighing of the interests of father and child, the fact that the adoption does not take place is only a disproportionate disadvantage for the child if the adoption would offer the child such a material advantage that a parent taking reasonable care of his child would not insist on upholding the relationship (see Federal Court of Justice, *Neue Juristische Wochenschrift* 2005, p. 1781 (1783)). In this connection, the Federal Court of Justice expressly stated that on the father's side it would *inter alia* be necessary to weigh whether and how far there was or had been a direct father-child relationship or what reasons had prevented the father from developing or maintaining such a relationship (see Federal Court of Justice, *Neue Juristische Wochenschrift* 2005, p. 1781 (1783)). As is shown in its further statements, the Federal Court of Justice here relies essentially on the one hand on the motives and concerns of the father in refusing consent to the adoption, and on the other hand on the conduct of the child's mother. In particular, the statements show, it is decisive whether and how far the mother of the child and her husband are attempting to prevent the father from having a relationship to his child (see Federal Court of Justice, *Neue Juristische Wochenschrift* 2005, p. 1781 (1783-1784)). Even if there is no lived relationship between the father and the child, a substitution of the father's consent under subsection 4 will here normally only be possible if the father himself is responsible for the failure of such a relationship by reason of his conduct. On the facts, the Federal Court of Justice has clarified here for the nonconstitutional courts that § 1748.4 of the Civil Code also requires the prior conduct of the father to be taken into account. Consequently, it can also be expected that there will be uniform case-law of the nonconstitutional courts to the effect that the requirements for adoption in § 1748.4 of the Civil Code are essentially adapted to the requirements for adoption under § 1748.1 to § 1748.3 of the Civil Code. 19

bb) The case-law of the Federal Court of Justice cited above is in harmony with the constitutional requirements which the Federal Constitutional Court established in its 20

decision of 7 March 1995 for a constitutional organisation of adoption proceedings (BVerfGE 92, 158). By this decision, in view of the importance of the parental rights of the fathers of illegitimate children it would not be appropriate to differentiate depending on the closeness of the relationship of the father to the child or to the mother (see BVerfGE, loc. cit. (178)). However, the power of the legislature to design is all the greater, the less it is possible to proceed from an agreement between the parents and from a social relationship between the individual parent and the child. In further refining the rights of the fathers of illegitimate children in connection with what is known as step-parent adoption, the legislature may also take into account the fact that it is not in general possible to assume that a social relationship exists, and to take into account whether the father shows an interest in the development of his child (see BVerfGE, loc. cit. (179)). In the comprehensive weighing of interests that needs to be made here, account must be taken of the fact that the extinction of the relationship to the father brings with it the loss of all rights of the child arising from this, in particular its claims to maintenance and inheritance. As a rule, in addition, it does not serve the welfare of the child that the adoption completely excludes the father's possibilities of contact for the future (see BVerfGE, loc. cit. (181)). It is not justified by outweighing concerns of the child that the father is granted virtually no rights of any kind when the child is adopted by the mother's husband. In this case, the adoption has little effect on the actual situation of the child, and in particular it does not deprive the child of the opportunity to grow up in a family that offers it good conditions in which to develop. Instead, the adoption is intended to ensure that the factual situation that already exists is legally secured. Such a securing of the situation may be in the interest of the child, but in the cases of stepchild adoption it is often somewhat problematical. It cannot automatically be assumed that adoption by the stepfather in general serves the welfare of the child (see BVerfGE, loc. cit. (181-182)). To safeguard the best interests of the child, it would be sufficient if an adoption by the mother's husband without the consent of the father were made possible only in the cases in which weighing them against the father's concerns shows that the child's interests in the adoption being granted carry greater weight (see BVerfGE, loc. cit. (182)).

This position was expressly adopted by the Federal Court of Justice (see Federal Court of Justice, *Neue Juristische Wochenschrift* 2005, p. 1781 (1782-1783)). In particular in its finding, cited above, that an adoption is a possibility only if it offers such a material advantage for the child that a parent taking reasonable care of his child would not insist on upholding the relationship, the Federal Court of Justice took account of the constitutional requirement to weigh the interests of the child and those of the father against each other. The Federal Constitutional Court [as stated above] held that it may not in general be assumed that a social relationship exists and that it is important whether the father shows an interest in the development of his child (see BVerfGE 92, 158 (179)); when the Federal Court of Justice imposed a procedural requirement that the causes of the lack of a social relationship between father and child should be examined, it also took sufficient regard of this holding of the Federal Constitutional Court. 21

c) Since this avoids material unequal treatment of fathers who once had custody and fathers who do not have custody, the constitutional complaint no longer has fundamental constitutional significance. 22

2. The constitutional complaint is admissible and is also well-founded. 23

The decisions challenged do not satisfy the constitutionally required standards of interpretation of § 1748.4 of the Civil Code founded in the principle of equality under Article 3.1 of the Basic Law. 24

a) Admittedly, the Higher Regional Court recognised that in the interpretation of § 1748.4 of the Civil Code a weighing of the interests of the child and those of the complainant is constitutionally required. However, in the interpretation, the court did not take appropriate account of the interests of the complainant protected as fundamental rights. 25

Even the assumption of the Higher Regional Court that no objections could be made to the fact that the requirements for adoption in the case of an unmarried father who had never had (joint) custody and therefore had never “had responsibility for the child” were less than in the case of other parents fails to satisfy the standards established for the interpretation of § 1748.4 of the Civil Code. Here, the Higher Regional Court does not take account of the fact that, *inter alia*, precisely this fact makes it necessary to substitute the consent of the natural father to a stepchild adoption only subject to more rigorous requirements than in cases of third-party adoption (see Federal Court of Justice, *Neue Juristische Wochenschrift* 2005, p. 1781 (1783)). The Local Court too based its decision on the fact that the interests of the child in the adoption had priority over the interests asserted by the complainant. On the complainant’s side, the Local Court essentially restricted itself to establishing that in effect no father-child relationship had existed between the complainant and the child for eleven years. The courts – the Regional Court followed the grounds for the decision of the Local Court – did not take into account in a positive sense the fact that the complainant, according to his submissions, lived together with the child at least for some time and fulfilled his parental responsibility. The constitutionally required examination of what reasons prevented the father from maintaining a lived father-child relationship was clearly not undertaken by the courts. 26

b) Admittedly, the Higher Regional Court points out that the struggle of the complainant for many years for his right forced the child and its new family into a position of opposition, which made it necessary to give priority to the child’s interest in the adoption. In this respect, however, it similarly failed to appreciate the requirements of an application of the provision taking into account the complainant’s fundamental right. For it unilaterally attributes to the complainant the responsibility for the non-existence of a father-child relationship. Here the Higher Regional Court, in its finding that the complainant’s struggle for many years for his right forced the child and its new family into a position of opposition, did not examine the causes of the struggle for a right of contact in detail. As stated above, however, a careful investigation of these 27

causes was required. Even the files of the original proceedings contain indications that the mother of the child only unilaterally prevented the child's contact with its father after she had become acquainted with her present husband. The complainant's constant efforts to obtain contact were therefore not necessarily to be evaluated unilaterally to his disadvantage, even if the complainant, by reason of his course of action, may finally have been rightly excluded from contact.

c) For this reason alone, the decisions do not fulfil the constitutional requirements of a comprehensive weighing of interests, and therefore it is not relevant whether further challenges by the complainant are well-founded. 28

3. The decision on the reimbursement of expenses is based on § 34.a.2 of the Federal Constitutional Court Act. 29

This decision is non-appealable. 30

Judges: Papier, Hohmann-Dennhardt, Hoffmann-Riem

Bundesverfassungsgericht, Beschluss der 1. Kammer des Ersten Senats vom 29. November 2005 - 1 BvR 1444/01

Zitiervorschlag BVerfG, Beschluss der 1. Kammer des Ersten Senats vom 29. November 2005 - 1 BvR 1444/01 - Rn. (1 - 30), http://www.bverfg.de/e/rk20051129_1bvr144401en.html

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