

## **HEADNOTE**

to the Order of the First Senate of 15 January 1970  
1 BvR 13/68

Forwarding the files of divorce proceedings to the investigating officer in disciplinary proceedings [initiated against one of the spouses] constitutes an interference with the fundamental right deriving from Article 2(1) in conjunction with Article 1(1) of the Basic Law. Without the affected spouses' consent, such an interference is only permissible if it is justified by overriding public interests and strictly observes the requirement of proportionality.

### **FEDERAL CONSTITUTIONAL COURT - 1 BvR 13/68 -**

#### **IN THE NAME OF THE PEOPLE**

In the proceedings  
on the constitutional complaint of

Mr ...,

– authorised representatives: ...

against the Order of the Hamm Higher Regional Court of 20 November 1967  
- 15 VA 1/67 -

the Federal Constitutional Court – First Senate –  
with the participation of Justices

President Müller,  
Stein,  
Ritterspach,  
Haager,  
Rupp-v. Brünneck,  
Böhmer,  
Brox,  
Zeidler

held on 15 January 1970:

The Order of the Hamm Higher Regional Court of 20 November 1967 - 15 VA 1/67 - 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 Hamm Higher Regional Court.

## REASONS:

### A.

1. In 1965, the District Chief Administrative Officer (*Regierungspräsident*) [...] initiated formal disciplinary proceedings against the complainant, who had served as Chief Municipal Director (*Oberstadtdirektor*) since 1961; he was accused, *inter alia*, of having had “a very public adulterous relationship” with his former secretary, “presumably from 1956/57 to the present day”. A daughter was born out of this relationship in 1962. As of 31 March 1965, the complainant was sent into early retirement due to incapacity for office. 1

The complainant, who has been married since 1949, had filed for divorce in November 1963. The action was rejected, whereupon the complainant submitted an appeal on points of fact and law (*Berufung*). He later withdrew the action with the agreement of his wife. 2

2. The investigating officer in the disciplinary proceedings requested access to the files of these divorce proceedings. In an order addressed to the presiding judge of the competent civil chamber, the President of the Regional Court approved the release of the files, which were then forwarded to the investigating officer. 3

When the complainant later learned about the release of the files to the investigating officer, he filed objections and eventually requested that the Hamm Higher Regional Court issue a judicial decision, *inter alia*, to reverse the Regional Court President’s order. 4

With the challenged order of 20 November 1967, the Higher Regional Court declared the order of the President of the Regional Court to be lawful. In the reasons attached to this order, the court stated that the application had been admissible pursuant to § 23(1) of the Introductory Act to the Courts Constitution Act. 5

[...] 6-7

3. With the constitutional complaint directed against the order of the Higher Regional Court, the complainant claims a violation of his fundamental rights under Arts. 1(1), 2(1), 3(1), 6(1) and 103(1) of the Basic Law. [...] 8

[...] 9-10

4. [...] 11-15

### B.

The constitutional complaint is well-founded. 16

1. a) In its established case-law, the Federal Constitutional Court has affirmed that the Basic Law recognises, for each citizen, an inviolable part of private life which is, in principle, beyond the reach of public authority (BVerfGE 6, 32 <41>; 27, 1 <6>). The constitutional requirement to respect the intimate sphere of the individual is based on the right to the free development of one’s personality, as guaranteed by Art. 2(1) of the 17

Basic Law. When determining the content and scope of this fundamental right, it must be taken into account that, according to the fundamental precept in Art. 1(1) of the Basic Law, human dignity is inviolable and must be respected and protected by all state authority. Moreover, under Art. 19(2) of the Basic Law, the essence (*Wesensgehalt*) of the fundamental right under Art. 2(1) of the Basic Law may also not be infringed upon.

b) However, not the entire domain of private life enjoys the absolute protection afforded by the fundamental right under Art. 2(1) in conjunction with Art. 1(1) and Art. 19(2) of the Basic Law (cf. also BVerfGE 6, 389 <433>; 27, 1 <6 and 7>). Rather, as a citizen connected to and bound by the community (BVerfGE 4, 7 <15 and 16>; 27, 1 <7>), every person must tolerate state measures that serve overriding public interests and that strictly adhere to the requirement of proportionality, unless these infringe upon the inviolable part of private life. In this respect, the principles which the Federal Constitutional Court has developed in its case-law on the constitutional permissibility of interferences with physical integrity apply accordingly (BVerfGE 16, 194 <201 and 202>; 17, 108 <117 and 118>; 27, 211 *et seq.*). Moreover, the mental and psychological integrity of the person must be protected as a particularly high-ranking value [...].

c) It is true that files of divorce proceedings relate to the spouses' private lives. Nevertheless, they do not *per se* belong to the part of private life that is inviolable under all circumstances, which would render any inspection by outsiders impermissible from the outset.

As the law stands, spouses may be required to disclose certain information on the innermost part of their lives. Where divorce proceedings lead to the disclosure of events from private life to the court and the parties to the proceedings, this is done because the court must decide on a conflict of rights and interests within a marriage. However, even in this situation, the disclosure [of private information] is limited in respect of both the group of persons obtaining knowledge – namely the court and the parties to the proceedings – and the purpose pursued – namely to allow the court to reach a decision.

With regard to their contents, the divorce files are subject to confidentiality protection under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. Both spouses are jointly entitled to this protection. As a rule, the contents of the files can thus only be made available to third parties on the basis of a declaration of consent to disclosure by both spouses.

d) It follows from the foregoing that the permission to forward the files of the divorce proceedings to the investigating officer, which is formally based on the inter-agency obligation to provide administrative and legal assistance, constitutes an interference with the spouses' right of personality. Without their consent, forwarding the files is only permissible if it is justified under the principle of proportionality. If this is not the case, the measure violates Art. 2(1) in conjunction with Art. 1(1) and Art. 19(2) of the Basic Law.

2. In addition to the aforementioned general balancing of the protection of the private sphere against public interests, the principle of proportionality requires that the measure be suitable and necessary for the purpose pursued by it, and that the intensity

of the interference which it entails not be disproportionate to the importance of the matter and the strength of suspicion (BVerfGE 16, 194 <202>; 17, 108 <117>). The authorities and courts must carry out the necessary balancing of the envisaged measures, the grounds prompting them, and the impact of the interference, taking into account all personal and factual circumstances of the individual case. The Federal Constitutional Court cannot review this in detail, it only reviews whether the balancing took place and whether the underlying standards of review are in line with constitutional law (BVerfGE 27, 211 *et seq.*). Measured against these principles, the challenged court order does not stand up to constitutional review.

a) It is already objectionable that the release of the files was ordered and declared lawful by the courts although the investigating officer, when requesting the files, failed to demonstrate, in a substantiated manner and based on detailed facts, the significance of the matter and the necessity to inspect the files; as a result, there was no basis for the spouses to submit a statement responding to the request. [...]

b) The Higher Regional Court did, in principle, recognise the need to balance the conflicting interests, and set forth theoretical considerations on this issue. It did not, however, sufficiently specify these abstract standards, taking into account all personal and factual circumstances. [...]

c) In any case, the challenged decision cannot be upheld because it fails to assess the necessity of the investigation measure at issue. It is not ascertainable from the order whether the Higher Regional Court actually examined to what extent the divorce files contained information that could be considered significant for the disciplinary proceedings. [...]

Lastly, the Higher Regional Court also failed to consider the necessity of the measure as it did not determine whether other means of evidence would also have been available to investigate the facts of the case [in the disciplinary proceedings]. [...]

The Higher Regional Court thus violated the complainant's fundamental right under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law, in part by failing to conduct the balancing of interests required under the Constitution, and in part by conducting the balancing without adequately taking into account the standards applicable under constitutional law.

The challenged order is therefore reversed, and the matter remanded to the Higher Regional Court – there was no need to review the complainant's claims concerning the violation of other fundamental rights.

Müller	Stein	Ritterspach
Haager	Rupp-v. Brünneck	Böhmer
	Brox	Zeidler