KONRAD ADENAUER STIFTUNG

CLJ Publication

70 YEARS GERMAN BASIC LAW
THE GERMAN CONSTITUTION AND ITS COURT

LANDMARK DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY IN THE AREA OF FUNDAMENTAL RIGHTS

Jürgen Bröhmer, Editor-in-Chief
Gisela Elsner, Clauspeter Hill (1st & 2nd Ed) and Marc Spitzkatz (2nd Ed), Editors

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The Book

The German Basic Law – the Constitution of the Federal Republic of Germany – has been in force for 70 years now and it is the foundation of democratic statehood in Germany. The Basic Law's central core is the principle of the rule of law as expressed by the broader German concept of the *"Rechtsstaatsprinzip"*. The protection of fundamental individual rights is one important cornerstone of this *"Rechtsstaatsprinzip"*.

As guardian of the Basic Law, the Federal Constitutional Court has shaped these rights through interpretation by a large body of case law. Taking note of the growing interest among scholars not only in continental Europe but more so in the Common Law world, an extensive English translation of that jurisprudence is therefore very timely.

This volume features 68 cases in regard to the basic rights. A general introduction to the Basic Law and the doctrine of fundamental rights strives to provide some contextual background to enable readers to better understand the comprehensive jurisprudence. In addition, there are specific annotations to each decision or a set of decisions with background information on the individual case. The last chapter suggests additional material in English for further research.

The Konrad-Adenauer-Stiftung (KAS)

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70 Years German Basic Law
The German Constitution and its Court

Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights

Jürgen Bröhmer, Editor-in-Chief
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Marc Spitzkatz (2nd Ed), Editors

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EDITORS' PREFACE TO THE THIRD EDITION

The German Basic Law celebrates its 70th anniversary this year and we are extremely delighted to be able to present a new, updated edition of the "70 Years German Basic Law: The German Constitution and its Court".

The world is going through a phase of rapid change. Technological progress, climate change, globalization, the global refugee crises, the rise of China as well as the rise of social media and connected phenomena (from "fake news" to "echo chambers") are contributing to a situation where traditional, western-style liberal democracy and the rule of law are being profoundly challenged. Nationalism is on the rise, as are autocratic governments. The "illiberal democracy" has been touted even by western leaders.

The Basic Law itself came into effect 70 years ago in 1949 as a consequence and reaction to the complete breakdown of civilization and destruction that followed the coming to power of forces predicated on pursuing similar objectives and using similar language to spread hate and incite the population in a hate-trenched vision of "us against them". Similar language can be heard (again) today in many parts of the globe, spoken by religious zealots of all persuasions, white supremacists, and other racists, by nationalists and by those who attempt to create a poisonous brew from a mixture of all those traits.

The Basic Law has been and continues to be the legal document that defines the limits of what is acceptable in Germany and its civil society. That applies to the government in all its forms and the exercise of its powers, and it applies to those who are active politically in the widest sense of the word. The Federal Constitutional Court was established two years later in 1051. Its power of judicial review and a broad jurisdictional framework allow it to decide proceedings brought by individuals directly (constitutional complaints) as well as proceedings initiated by other constitutional institutions, federal states or groups of parliamentarians seeking to challenge the exercise of power by the state. Over the years it became the champion of the Basic Law, and through steady work the Court managed to accrue a level of authority matched by few judicial institutions around the globe. In the light of the challenges that lie before us - and the Basic Law - this authority will be necessary to defend the basic consensus that is reflected in the Basic Law and without which no piece of paper, however solemnly proclaimed, can do what it promises to do.

In its 2017 decision in response to the application to prohibit the far-right, extremist so-called National Democratic Party (see Chapter X in this collection), the Court reiterated its role as the institution which will ultimately have to find the right balance between defending freedom and allowing freedom to defend itself.

70 Years German Basic Law
The German Constitution and its Court

One challenge for constitutions, and as such for the Basic Law, lies in the conflict that they are supposed to reflect the foundational and enduring consensus of the political system they erect but that at the same time they must be able to react and adjust to new developments in society and demographic changes. Some of these developments can be very controversial and come about very quickly. The Federal Constitutional Court had its share of such change scenarios before it ranging from same-sex unions, to the rights of transgender people, to addressing in essence cultural conflicts arising from an increasing Muslim population in Germany bringing to the fore new conflicts between the wearing of the headscarf in schools and the religious neutrality necessary in compulsory public schools. Free speech is an issue that never goes away and rise of hate speech is one aspect in this regard.

In the future, the legitimacy of the judiciary as the guardian of constitutional principles will come under even greater pressure owing to the rapid growth of technology and new media. These innovations add a novel dimension to the never-ending paradox of change in constitutionalism. The technological advancements have the potential to test the nature and scope of our liberal, democratic political order and fundamental rights in multiple ways. The digital world that we rely on - the internet, social networks, artificial intelligence - creates opportunities for information collection, tracking movement, and instances to invade privacy. The Federal Constitutional Court has delivered about 20 decisions, which call into question practically all legislations that use surveillance technologies in policing, indicating the key role of the judiciary in maintaining the balance between security and individual freedom to privacy.

It is against this background that we are presenting this updated third edition of the "German Basic Law: The German Constitution and its Court". We hope that this edition can inform readers about the workings of the German Basic Law and its interpretation by the Federal Constitutional Court. We hope to be able to illustrate how important a functioning judiciary is in times of rapid social change. No legal document and no constitutional court can alone create a functioning state and a thriving civil society. But functioning institutions and a constitutional court able to persuade with the authority of its arguments are very important and for Germany have been and will continue to be crucial for its ability to master the challenges described above. All constitutions are rooted in their respective historical, social, economic, and political realities. It is rarely a good idea to merely copy from another constitution. However, knowledge about constitutional systems and approaches, i.e. comparative constitutional law, is a field of study that can help to find ways to deal with these challenges in a way that keeps our societies united and respects the autonomy of all members of society. We hope that this book can contribute in a small way to achieving this goal.

Singapore, October 2019 — Jürgen Bröhmer, Gisela Elsner

EDITORS' PREFACE TO THE FIRST AND SECOND EDITION

The German Basic Law has been in force for more than 60 years now and it is the foundation of democratic statehood in Germany. The Basic Law's central core is the principle of the rule of law as expressed by the broader German concept of the "*Rechtsstaatsprinzip*". The protection of fundamental individual rights is one important cornerstone of this "*Rechtsstaatsprinzip*".

The success story of the Basic Law can be traced to a number of factors. The institutional structure of Germany prescribed in the Basic Law and maintained after reunification has obviously proved its reliability. However, the fundamental rights guaranteed to individuals, some to all human beings, some to citizens of Germany only, and their interpretation and enforcement by the Federal Constitutional Court have been of utmost significance in turning the Basic Law from a technical instrument into an identity shaping national document.

The people in Germany have understood that the Basic Law is their constitution and that the fundamental rights protected there are their personal rights. They have also understood that this is not theoretical at all but that they can turn to the courts in general and to the Federal Constitutional Court in Karlsruhe in particular and have their rights effectively enforced against unjustified infringements by the legislative, executive or judicial branches of government.

The Constitutional Court has assumed its role as a true "guardian of the constitution" not only but especially in regard to fundamental rights protection and has earned the great respect of the German people. The Court was very successful at striking a fair balance between individual rights and the interests of society as a whole. Achieving this balance has never been an easy task and it has become more difficult after the attacks of 11 September 2001 in the USA and the renewed debate on the relationship between individual rights and liberties on the one hand and security on the other.

The procedural framework for the Federal Constitutional Court, most notably the constitutional complaints procedure, have allowed the Court to develop a specific, consistent and, after 60 years, a reliable dogmatic approach to fundamental rights interpretation and application. This has contributed to a remarkable interest in German constitutional theory and jurisprudence worldwide.

Countries in Latin America, Eastern Europe and Asia were keen to understand this approach in greater depth when they converted to real democracies based on the rule of law. In some cases Germany shares similar legal traditions and, above all, a common value system and legal ideals with those regions, for example the fact that the German legal system adheres to the civil law tradition of codified law.

But the German approach to constitutional law and fundamental rights protection is also interesting for common law countries. A written constitution constitutes codified law and requires statutory interpretation. But more importantly nowhere are the common and civil law legal traditions closer together than in the area of constitutional law where the decisions of the constitutional courts serve as precedents if not *de jure* than at least *de facto*. In the case of the German Constitutional Court the holding of a judgment can have the force of law and the Court can therefore assume a law making function quite similar to that of the highest courts in common law countries.

It is therefore not surprising that German constitutional law has become a field of growing interest to legal scholars, practitioners and officials involved in state reforms around the world. The work of American scholars, Donald P. Kommers and Russell Miller, "The Constitutional Jurisprudence of the Federal Republic of Germany" (3rd ed. to be published: Durham, NC: Duke University Press, 2011) is one prime example and we would like to recommend it to anyone interested in these matters. Most of the cases of our collection are discussed in their volume.

Taking note of this increasing demand the Rule of Law Programme of the Konrad-Adenauer-Stiftung in Singapore took the initiative for this project of aiming to make some core decisions of the German Constitutional Court accessible to judges, lawyers and scholars who do not speak German and to put these judgments into an explanatory context. One of the important objectives promoted by the Asia branch of the Rule of Law programme is the concept of constitutionalism and the support for mechanisms to review the constitutionality of actions of other state organs. Safeguarding citizens' rights is a core element of such systems and therefore also of great significance for our programme.

This volume focuses on the case law of the German Constitutional Court in regard to the basic rights that are of utmost importance in German constitutional law. The general introduction to Basic Law and the doctrine of fundamental rights strives to provide some contextual background to enable readers to better understand the comprehensive jurisprudence. In addition, there are specific annotations to each decision or a set of decisions with background information on the individual case. We have also tried to suggest additional material in English where we could find useful and helpful sources.

Editors' Preface to the First and Second Edition

In selecting the decisions for this volume we tried to provide the most relevant cases. At times this means that some concepts are dealt with repeatedly. Usually, the Federal Constitutional Court has elaborated on the one or another aspect in greater detail and shaped the law more precisely case by case. The selection has also been guided, and limited to a certain extent, by the necessity to keep the book at a manageable size. We wanted to provide more than just head notes or short extracts from each decision. We are convinced that a comprehensive translation is more useful for readers who might not have broader knowledge of German constitutional law. Therefore, the facts of each case were summarized and only preliminary issues - such as the admissibility of a case - have been left out. If deemed important those aspects have been mentioned in the short explanations to each case or set of cases.

All cases are cited in the original German way "BVerfGE" as the court itself uses to refer to its decisions. This acronym literally means 'Federal Constitutional Court Decisions' followed by volume and page number where they were published in the official collection of cases of the Federal Constitutional Court (e.g. BVerfGE 45 [volume of official collection], 187 [page where case begins]).

Most of the decisions have been translated by Dr. Donna Elliott, LL.M. who is an Australian lawyer who has worked in Germany for many years and who has frequently been engaged as translator for the Federal Constitutional Court as well as the Federal Government. A number of translations were provided by courtesy of the Constitutional Court itself and can also be found on the Court's website (*www.bverfg.de*).

We are also very grateful to Donald P. Kommers, Sir Basil Markesinis, Robert E. Jonas and John D. Gorby for their generous permission to reprint decisions that were translated and published under their copyright in earlier publications. Last but not least we thank the Nomos Verlag for its generosity to use translations previously published in ['Decisions of the Bundesverfassungsgericht - Federal Constitutional Court - Federal Republic of Germany] (Vol. 1, 2 and 4, Baden-Baden 1993 - 2007)'. Whenever translations of other authors or publishers were used it has been indicated in detail.

A special word of thanks goes to Ms. Miriam Söhne who is the research associate at the Konrad-Adenauer-Stiftung office in Singapore. She translated two decisions on her own and amended translations of others where head notes or other important sections had not been translated before. Miriam and Ms. Jenny Chan, the executive assistant, were also extremely helpful in proof reading and compiling the whole manuscript. Mr. Martin Matasi, lawyer from Kenya and PhD-student at the University of New England, School of Law, has also helped in proofreading the introduction and the decision annotations and has also helped in pointing out improvements when the original draft became "too German" and therefore harder to understand for non-German lawyers.

70 Years German Basic Law
The German Constitution and its Court

'Democracy is more than a parliamentary form of government. It is a philosophy of life (*Weltanschauung*) based on the appreciation of the dignity, the value and the inalienable rights of each individual human being. A true democracy must respect these rights and the value of each and every human being in all respects of political, economic and cultural life.' Those words by Konrad Adenauer[1] who was the President of the Parliamentary Council in 1948 - 1949 inspired all the members of that Council when drafting the Basic Law and have become the guiding principle of constitutional jurisprudence in Germany.

The editors hope that this book will contribute to a deeper understanding of German legal thinking in this respect. As always, any errors and causes for misunderstanding are to be blamed on us.

We dedicate this book to the many who have contributed to the success of the German Basic Law in many ways small and large and who have helped to shape a Germany that stands for the ideas of democracy, freedom and human rights.

Armidale / Singapore, October 2010 J. Bröhmer / C. Hill

1 Original German citation: "Demokratie ist mehr als eine parlamentarische Regierungsform, sie ist eine Weltanschauung, die wurzelt in der Auffassung von der Würde, dem Wert und den unveräußerlichen Rechten eines jeden einzelnen Menschen. Eine echte Demokratie muß diese unveräußerlichen Rechte und den Wert eines jeden einzelnen Menschen achten im staatlichen, im wirtschaftlichen und kulturellen Leben."

FOREWORD BY THE PRESIDENT OF THE GERMAN CONSTITUTIONAL COURT

Over the past decades, the interest in the jurisprudence of the German Federal Constitutional Court has increased considerably among academics and political actors from all over the world. This holds true not only for countries characterized by Continental-European law, but also for countries with an Anglo-American legal tradition. Independently hereof, in the course of reforms towards the rule of law in many developing countries and countries in transition - at least in those where English is a working language - a demand for translations of decisions of the German Federal Constitutional Court has arisen. Hence, I strongly appreciated the initiative of the Konrad-Adenauer-Stiftung to publish an English edition of landmark decisions of the Federal Constitutional Court, when it was first brought to my attention. The success of the first two editions is reflected by the high demand for a new edition. Currently, this English edition stands alongside twelve other translated volumes in Spanish, Portuguese as well as various languages of South-Eastern Europe to name a few. The translation focuses on decisions pertaining to fundamental rights, which constitute an essential field of the Federal Constitutional Court's jurisprudence, and delineate the boundaries between the individual sphere and society and state. Simultaneously, fundamental rights play an important role for the participation of the citizen - as an individual or in a collective - in the democratic decision-making process. The Basic Law, whose 70th anniversary we celebrate this year, is a "living instrument" and this is mirrored in the selected decisions.

Constitutional law is influenced by the jurisprudence of the Federal Constitutional Court more than any other field of German law. The text of the German Basic Law organizes the structure of the state as well as life in community and for this reason is phrased so as to cover an endless variety of cases. Its abstract norms are frequently substantiated by jurisprudence in case-related interpretation.

Another distinctive feature of the Federal Constitutional Court's jurisprudence is the range of subject matters of proceedings. Not only measures taken by the executive and decisions made by trial and appellate courts, but also statutes which are enacted in Parliament and disputes between government bodies, are subject to constitutional review. This circumstance inevitably establishes a certain proximity to the political arena and raises the question of the jurisdiction of the Federal Constitutional Court under the principle of the separation of powers. It should not be disregarded that the Federal Constitutional Court lays out the basic conditions within which the political leaders of the executive and the legislative operate. Seen in the context of its capacity to constitutionally affirm or reject acts of Parliament, one can argue that "the Federal Constitutional Court participates in government". This very strong connection between the jurisdiction of the Federal Constitutional Court and the other branches of government within the system of the separation of powers has been subject to frequent criticism. Nevertheless, the

Federal Constitutional Court is a "real" court. It cannot act on its own initiative but only when called upon to do so. The basic legal principle summed up in the German adage "no plaintiff, no judge" also applies here. Furthermore, the Federal Constitutional Court decides only within the framework of statutorily predetermined procedures. Above all, the criteria the Federal Constitutional Court applies are always and exclusively found in current constitutional law, not in political, social or economic considerations of expediency. Constitutional norms in particular can often be relatively open and allow certain room for interpretation. The basic principle that constitutional jurisprudence is not political composition but legal actualization following juridical methods applies, despite a certain ambiguity and the difficulty of drawing a crystal-clear line in particular cases.

The function of the Federal Constitutional Court extends beyond the judicial review of statutes and the settlements of conflicts between the highest constitutional organs. In practice, the review of executive acts and court decisions in individual cases is particularly essential. This has substantive as well as procedural reasons. On the one hand, the fundamental rights of the Basic Law are not only guidelines for the legislative body, but apply directly to every administrative act and to every court decision. They basically constitute defensive rights against state interference. On the other hand, they also embody an objective system of values that must be considered in judicial interpretation and application of the law. Even in the context of the settlement of disputes between citizens, the constitutional values must be observed by the civil courts. For example, in custody disputes under family law, parental rights and the rights of protection for children (Art. 6 of the Basic Law) must be taken into account. This very important aspect of the effects of fundamental rights is founded in the landmark "Lüth-decision" (BVerfGE 7, 198 - in this collection). The practical task of the Federal Constitutional Court is set out by this fundamental idea in a significant way. It provides citizens the opportunity to defend against court decisions violating their fundamental rights by way of constitutional complaint (*Verfassungsbeschwerde*, see Art. 93(1) no. 4a of the Basic Law). Thus, the Federal Constitutional Court is not purely a "court for state matters" (*Staatsgerichtshof*).

Accordingly, constitutional complaints challenging trial and appellate court decisions form a large part of the Federal Constitutional Court's caseload. In addition to constitutional complaints, the Federal Constitutional Court has a variety of further competences (see § 13 of the Federal Constitutional Court Act in conjunction with Art. 93(1) of the Basic Law). In abstract judicial review proceedings (*abstrakte Normenkontrolle*, Art. 93(1) no. 2 of the Basic Law), the Court examines - upon application by either the federal or a *Land* (state) government or one third of the members of the *Bundestag* - federal and *Land* statutes with regard to their compatibility with the Basic Law. Furthermore, the Federal Constitutional Court decides disputes between constitutional organs (*Organstreitverfahren*, Art. 93(1) no. 1 of the Basic Law). Finally, specific judicial review (*konkrete Normenkontrolle*) can be requested of the Federal Constitutional Court by any trial or appellate court that questions the constitutionality of any applicable legislation (see Art. 100(1) of the Basic Law).

Foreword by the President
of the German Constitutional Court

The Federal Constitutional Court is composed of two Senates (*Senate*), each consisting of eight Constitutional Court Justices. The distribution of cases between the two Senates depends on the type and subject matter of the proceedings. In case of diverging legal interpretations between the Senates, decisions are made by the Justices of both Senates together in the Plenary. Not all decisions require the involvement of all eight Justices of a Senate. Each Senate forms three Chambers (*Kammern*), which can decide a large number of constitutional complaints themselves as long as the central legal questions at issue have already been decided by a Senate.

Seventy years after its foundation, the Federal Republic of Germany is now embedded in an even larger number of agreements under international law, notably the European Convention on Human Rights (ECHR), the enforcement of which is incumbent upon the European Court of Human Rights in Strasbourg, and the membership in the European Union, the law of which is watched over by the Court of Justice of the European Union. In the area of protection of fundamental rights, the Federal Constitutional Court and the Court of Justice of the European Union operate in separate systems. Thus, secondary legal acts of European law are scrutinized exclusively by European courts on the scale of European fundamental rights as long as the fundamental rights standard of European law is in essence equal to the standard of the Basic Law (see BVerfGE 73, 339 - included in this collection). In contrast, an integrating approach applies with regard to the protection of the European Convention of Human Rights: the values expressed in the ECHR are to be incorporated into the interpretation of German law - including constitutional law (see BVerfGE 111, 307 - included in this collection). Both in applying European law and incorporating the human rights enshrined in the European Convention, the Federal Constitutional Court seeks a close dialogue with its relevant counterparts in Strasbourg and Luxembourg. That this dialogue also leaves room for critical tones is illustrated by more recent decisions of the Federal Constitutional Court (see BVerfGE 140, 317 and BVerfGE 148, 296 - both included in this collection).

An enormous amount of constitutional findings concerning a great variety of questions has been developed in the described organizational framework between the state and the courts. These are the fruit of intensive arguments and not least the result of the courageous pursuit of justice by the parties to the proceedings. This selection provides a good opportunity to get to know the spectrum covered by case-law, to form an opinion based on the original argumentation of the Federal Constitutional Court and to explore potential transferability to constitutional constellations and issues in other countries.

To that end, I wish this new edition a great success!

Karlsruhe, October 2019 Andreas Voßkuhle

Basic Law for the Federal Republic of Germany

23 May 1949

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CURRENT TEXT OF THE GERMAN BASIC LAW

Basic Law of the Federal Republic of Germany

Last amended on 28 March 2019

Preamble

Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law. Germans in the *Länder* of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people.

I. Basic Rights

Article 1 [Human dignity – Human rights – Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Article 2 [Personal freedoms]

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Article 3 [Equality before the law]

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability.

Article 4 [Freedom of faith and conscience]

(1) Freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviolable. I. Basic Rights

(2) The undisturbed practice of religion shall be guaranteed.

(3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

Article 5 [Freedom of expression, arts and sciences]

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour.

(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

Article 6 [Marriage – Family – Children]

(1) Marriage and the family shall enjoy the special protection of the state.

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

(3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.

(4) Every mother shall be entitled to the protection and care of the community.

(5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

Article 7 [School system]

(1) The entire school system shall be under the supervision of the state.

(2) Parents and guardians shall have the right to decide whether children shall receive religious instruction.

(3) Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.

(4) The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the state and shall be subject to the laws of the *Länder*. Such approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities or the professional training of their teaching staff and when segregation of pupils according to the means of their parents will not be encouraged thereby. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured.

(5) A private elementary school shall be approved only if the education authority finds that it serves a special educational interest or if, on the application of parents or guardians, it is to be established as a denominational or interdenominational school or as a school based on a particular philosophy and no state elementary school of that type exists in the municipality.

(6) Preparatory schools shall remain abolished.

Article 8 [Freedom of assembly]

(1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission.

(2) In the case of outdoor assemblies, this right may be restricted by or pursuant to a law.

Article 9 [Freedom of association]

(1) All Germans shall have the right to form societies and other associations.

(2) Associations whose aims or activities contravene the criminal laws or that are directed against the constitutional order or the concept of international understanding shall be prohibited.

(3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.

Article 10 [Privacy of correspondence, posts and telecommunications]

(1) The privacy of correspondence, posts and telecommunications shall be inviolable.

(2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a *Land*, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.

Article 11 [Freedom of movement]

(1) All Germans shall have the right to move freely throughout the federal territory.

(2) This right may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a *Land*, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect or to prevent crime.

Article 12 [Occupational freedom]

(1) All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.

(2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.

(3) Forced labour may be imposed only on persons deprived of their liberty by the judgment of a court.

Article 12a [Compulsory military and alternative civilian service]

(1) Men who have attained the age of eighteen may be required to serve in the Armed Forces, in the Federal Border Police, or in a civil defence organisation.

(2) Any person who, on grounds of conscience, refuses to render military service involving the use of arms may be required to perform alternative service. The duration of alternative service shall not exceed that of military service. Details shall be regulated by a law, which shall not interfere with the freedom to make a decision in accordance with the dictates of conscience and which shall also provide for the possibility of alternative service not connected with units of the Armed Forces or of the Federal Border Police.

(3) Persons liable to compulsory military service who are not called upon to render service pursuant to paragraph (1) or (2) of this Article may, when a state of defence is in effect, be assigned by or pursuant to a law to employment involving civilian services for defence purposes, including the protection of the civilian population; they may be

assigned to public employment only for the purpose of discharging police functions or such other sovereign functions of public administration as can be discharged only by persons employed in the public service. The employment contemplated by the first sentence of this paragraph may include services within the Armed Forces, in the provision of military supplies or with public administrative authorities; assignments to employment connected with supplying and servicing the civilian population shall be permissible only to meet their basic requirements or to guarantee their safety.

(4) If, during a state of defence, the need for civilian services in the civilian health system or in stationary military hospitals cannot be met on a voluntary basis, women between the age of eighteen and fifty-five may be called upon to render such services by or pursuant to a law. Under no circumstances may they be required to render service involving the use of arms.

(5) Prior to the existence of a state of defence, assignments under paragraph (3) of this Article may be made only if the requirements of paragraph (1) of Article 80a are met. In preparation for the provision of services under paragraph (3) of this Article that demand special knowledge or skills, participation in training courses may be required by or pursuant to a law. In this case the first sentence of this paragraph shall not apply.

(6) If, during a state of defence, the need for workers in the areas specified in the second sentence of paragraph (3) of this Article cannot be met on a voluntary basis, the right of German citizens to abandon their occupation or place of employment may be restricted by or pursuant to a law in order to meet this need. Prior to the existence of a state of defence, the first sentence of paragraph (5) of this Article shall apply, *mutatis mutandis*.

Article 13 [Inviolability of the home]

(1) The home is inviolable.

(2) Searches may be authorised only by a judge or, when time is of the essence, by other authorities designated by the laws and may be carried out only in the manner therein prescribed.

(3) If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorisation shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge.

(4) To avert acute dangers to public safety, especially dangers to life or to the public, technical means of surveillance of the home may be employed only pursuant to judicial order. When time is of the essence, such measures may also be ordered by other authorities designated by a law; a judicial decision shall subsequently be obtained without delay.

(5) If technical means are contemplated solely for the protection of persons officially deployed in a home, the measure may be ordered by an authority designated by a law. The information thereby obtained may be otherwise used only for purposes of criminal prosecution or to avert danger and only if the legality of the measure has been previously determined by a judge; when time is of the essence, a judicial decision shall subsequently be obtained without delay.

(6) The Federal Government shall report to the Bundestag annually as to the employment of technical means pursuant to paragraph (3) and, within the jurisdiction of the Federation, pursuant to paragraph (4) and, insofar as judicial approval is required, pursuant to paragraph (5) of this Article. A panel elected by the Bundestag shall exercise parliamentary oversight on the basis of this report. A comparable parliamentary oversight shall be afforded by the *Länder*.

(7) Interferences and restrictions shall otherwise only be permissible to avert a danger to the public or to the life of an individual or, pursuant to a law, to confront an acute danger to public safety and order, in particular to relieve an accommodation shortage, to combat the danger of an epidemic or to protect young persons at risk.

Article 14 [Property – Inheritance – Expropriation]

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

(2) Property entails obligations. Its use shall also serve the public good.

(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

Article 15 [Nationalisation]

Land, natural resources and means of production may, for the purpose of nationalisation, be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation. With respect to such compensation the third and fourth sentences of paragraph (3) of Article 14 shall apply, *mutatis mutandis*.

Article 16 [Citizenship – Extradition]

(1) No German may be deprived of his citizenship. Loss of citizenship may occur only pursuant to a law and, if it occurs against the will of the person affected, only if he does not become stateless as a result.

(2) No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed.

Article 16a [Right of asylum]

(1) Persons persecuted on political grounds shall have the right of asylum.

(2) Paragraph (1) of this Article may not be invoked by a person who enters the federal territory from a member state of the European Communities or from another third state in which application of the Convention Relating to the Status of Refugees and of the Convention for the Protection of Human Rights and Fundamental Freedoms is assured. The states outside the European Communities to which the conditions referred to in the first sentence of this paragraph apply shall be specified by a law requiring the consent of the Bundesrat. In the cases specified in the first sentence of this paragraph, measures to terminate an applicant's stay may be implemented without regard to any legal challenge that may have been instituted against them.

(3) By a law requiring the consent of the Bundesrat, states may be specified in which, on the basis of their laws, enforcement practices and general political conditions, it can be safely concluded that neither political persecution nor inhuman or degrading punishment or treatment exists. It shall be presumed that a foreigner from such a state is not persecuted, unless he presents evidence justifying the conclusion that, contrary to this presumption, he is persecuted on political grounds.

(4) In the cases specified by paragraph (3) of this Article and in other cases that are plainly unfounded or considered to be plainly unfounded, the implementation of measures to terminate an applicant's stay may be suspended by a court only if serious doubts exist as to their legality; the scope of review may be limited, and tardy objections may be disregarded. Details shall be determined by a law.

(5) Paragraphs (1) to (4) of this Article shall not preclude the conclusion of international agreements of member states of the European Communities with each other or with those third states which, with due regard for the obligations arising from the Convention Relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms, whose enforcement must be assured in the contracting states, adopt rules conferring jurisdiction to decide on applications for asylum, including the reciprocal recognition of asylum decisions.

Article 17 [Right of petition]

Every person shall have the right individually or jointly with others to address written requests or complaints to competent authorities and to the legislature.

Article 17a [Restriction of basic rights in specific instances]

(1) Laws regarding military and alternative service may provide that the basic right of members of the Armed Forces and of alternative service freely to express and disseminate their opinions in speech, writing and pictures (first clause of the first sentence of paragraph (1) of Article 5), the basic right of assembly (Article 8) and the right of petition (Article 17), insofar as it permits the submission of requests or complaints jointly with others, be restricted during their period of military or alternative service.

(2) Laws regarding defence, including protection of the civilian population, may provide for restriction of the basic rights of freedom of movement (Article 11) and inviolability of the home (Article 13).

Article 18 [Forfeiture of basic rights]

Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14) or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.

Article 19 [Restriction of basic rights – Legal remedies]

(1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.

(2) In no case may the essence of a basic right be affected.

(3) The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits.

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.

II. The Federation and the *Länder*

Article 20 [Constitutional principles – Right of resistance]

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available.

Article 20a [Protection of the natural foundations of life and animals]

Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

Article 21 [Political parties]

(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.

(2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

(3) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free II. The Federation and the *Länder* 28 democratic basic order or to endanger the existence of the Federal Republic of Germany shall be excluded from state financing. If such exclusion is determined, any favourable fiscal treatment of these parties and of payments made to those parties shall cease.

(4) The Federal Constitutional Court shall rule on the question of unconstitutionality within the meaning of paragraph (2) of this Article and on exclusion from state financing within the meaning of paragraph (3).

(5) Details shall be regulated by federal laws.

Article 22 [Federal capital – Federal flag]

(1) Berlin is the capital of the Federal Republic of Germany. The Federation shall be responsible for representing the nation as a whole in the capital. Details shall be regulated by federal law.

(2) The federal flag shall be black, red and gold.

Article 23 [European Union – Protection of basic rights – Principle of subsidiarity]

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

(1a) The Bundestag and the Bundesrat shall have the right to bring an action before the Court of Justice of the European II. The Federation and the *Länder* 29 Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity. The Bundestag is obliged to initiate such an action at the request of one

fourth of its Members. By a statute requiring the consent of the Bundesrat, exceptions to the first sentence of paragraph (2) of Article 42 and the first sentence of paragraph (3) of Article 52 may be authorised for the exercise of the rights granted to the Bundestag and the Bundesrat under the contractual foundations of the European Union.

(2) The Bundestag and, through the Bundesrat, the *Länder* shall participate in matters concerning the European Union. The Federal Government shall notify the Bundestag of such matters comprehensively and as early as possible.

(3) Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.

(4) The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter or insofar as the subject falls within the domestic competence of the *Länder*.

(5) Insofar as, in an area within the exclusive competence of the Federation, interests of the *Länder* are affected and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the *Länder*, the structure of *Land* authorities, or *Land* administrative procedures are primarily affected, the position of the Bundesrat shall receive prime consideration in the formation of the political will of the Federation; this process shall be consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.

(6) When legislative powers exclusive to the *Länder* concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the *Länder* designated by the Bundesrat. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.

(7) Details regarding paragraphs (4) to (6) of this Article shall be regulated by a law requiring the consent of the Bundesrat.

Article 24 [Transfer of sovereign powers – System of collective security]

(1) The Federation may, by a law, transfer sovereign powers to international organisations.

(1a) Insofar as the *Länder* are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions.

(2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.

(3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration.

Article 25 [Primacy of international law]

The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

Article 26 [Securing international peace]

(1) Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be criminalised.

(2) Weapons designed for warfare may be manufactured, transported or marketed only with the permission of the Federal Government. Details shall be regulated by a federal law.

Article 27 [Merchant fleet]

All German merchant vessels shall constitute a unitary merchant fleet.

Article 28 [Land constitutions – Autonomy of municipalities]

(1) The constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law within the meaning of this Basic Law. In each *Land*, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections. In county and municipal elections, persons who possess the citizenship of any member state of the European Community are also eligible to vote and to be elected in accordance with European Community law. In municipalities a local assembly may take the place of an elected body.

(2) Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government in accordance with the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.

(3) The Federation shall guarantee that the constitutional order of the *Länder* conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

Article 29 [New delimitation of the federal territory]

(1) The division of the federal territory into *Länder* may be revised to ensure that each *Land* be of a size and capacity to perform its functions effectively. Due regard shall be given in this connection to regional, historical and cultural ties, economic efficiency and the requirements of local and regional planning.

(2) Revisions of the existing division into *Länder* shall be effected by a federal law, which must be confirmed by referendum. The affected *Länder* shall be afforded an opportunity to be heard.

(3) The referendum shall be held in the *Länder* from whose territories or parts of territories a new *Land* or a *Land* with redefined boundaries is to be established (affected *Länder*). The question to be voted on is whether the affected *Länder* are to remain as they are or whether the new *Land* or the *Land* with redefined boundaries should be established. The proposal to establish a new *Land* or a *Land* with redefined boundaries shall take effect if the change is approved by a majority in the future territory of such *Land* and by a majority in the territories or parts of territories of an affected *Land* taken together whose affiliation with a *Land* is to be changed in the same way. The proposal shall not take effect if, within the territory of any of the affected *Länder*, a majority reject the change; however, such rejection shall be of no consequence if in any part of the territory whose affiliation with the affected *Land* is to be changed a two-thirds majority approves the change, unless it is rejected by a two-thirds majority in the territory of the affected *Land* as a whole.

(4) If, in any clearly defined and contiguous residential and economic area located in two or more *Länder* and having at least one million inhabitants, one tenth of those entitled to vote in Bundestag elections petition for the inclusion of that area in a single *Land*, a federal law shall specify within two years whether the change shall be made in accordance with paragraph (2) of this Article or that an advisory referendum shall be held in the affected *Länder*.

(5) The advisory referendum shall establish whether the changes the law proposes meet with the voters' approval. The law may put forward not more than two distinct proposals for consideration by the voters. If a majority approves a proposed change of the existing division into *Länder*, a federal law shall specify within two years whether the change shall be made in accordance with paragraph (2) of this Article. If a proposal is approved in accordance with the third and fourth sentences of paragraph (3) of this Article, a federal law providing for establishment of the proposed *Land* shall be enacted within two years after the advisory ballot, and confirmation by referendum shall no longer be required.

(6) A majority in a referendum or in an advisory referendum shall consist of a majority of the votes cast, provided that it amounts to at least one quarter of those entitled to vote in Bundestag elections. Other details concerning referendums, petitions and advisory referendums shall be regulated by a federal law, which may also provide that the same petition may not be filed more than once within a period of five years.

(7) Other changes concerning the territory of the *Länder* may be effected by agreements between the *Länder* concerned or by a federal law with the consent of the Bundesrat, if the territory that is to be the subject of the change has no more than 50,000 inhabitants. Details shall be regulated by a federal law requiring the consent of the Bundesrat and of a majority of the Members of the Bundestag. The law must provide affected municipalities and counties with an opportunity to be heard.

(8) *Länder* may revise the division of their existing territory or parts of their territory by agreement without regard to the provisions of paragraphs (2) to (7) of this Article. Affected municipalities and counties shall be afforded an opportunity to be heard. The agreement shall require confirmation by referendum in each of the *Länder* concerned. If the revision affects only part of a *Land*'s territory, the referendum may be confined to the areas affected; the second clause of the fifth sentence shall not apply. In a referendum under this paragraph a majority of the votes cast shall be decisive, provided it amounts to at least one quarter of those entitled to vote in Bundestag elections; details shall be regulated by a federal law. The agreement shall require the consent of the Bundestag.

Article 30 [Sovereign powers of the Länder]

Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the *Länder*.

Article 31 [Supremacy of federal law]

Federal law shall take precedence over *Land* law.

Article 32 [Foreign relations]

(1) Relations with foreign states shall be conducted by the Federation.

(2) Before the conclusion of a treaty affecting the special circumstances of a *Land*, that *Land* shall be consulted in timely fashion.

(3) Insofar as the *Länder* have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.

Article 33 [Equal citizenship – Public service]

(1) Every German shall have in every *Land* the same political rights and duties.

(2) Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.

(3) Neither the enjoyment of civil and political rights nor eligibility for public office nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.

(4) The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law.

(5) The law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service.

Article 34 [Liability for violation of official duty]

If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity.

Article 35 [Legal and administrative assistance and assistance during disasters]

(1) All federal and *Land* authorities shall render legal and administrative assistance to one another.

(2) In order to maintain or restore public security or order, a *Land* in particularly serious cases may call upon personnel and facilities of the Federal Border Police to assist its police when without such assistance the police could not fulfil their responsibilities, or could do so only with great difficulty. In order to respond to a grave accident or a natural disaster, a *Land* may call for the assistance of police forces of other *Länder* or of personnel and facilities of other administrative authorities, of the Armed Forces or of the Federal Border Police.

(3) If the natural disaster or accident endangers the territory of more than one *Land*, the Federal Government, insofar as is necessary to combat the danger, may instruct the *Land* governments to place police forces at the disposal of other *Länder* and may deploy units of the Federal Border Police or the Armed Forces to support the police. Measures taken by the Federal Government pursuant to the first sentence of this paragraph shall be rescinded at any time at the demand of the Bundesrat and in any event as soon as the danger is removed.

Article 36 [Personnel of federal authorities]

(1) Civil servants employed by the highest federal authorities shall be drawn from all *Länder* in appropriate proportion. Persons employed by other federal authorities shall, as a rule, be drawn from the *Land* in which they serve.

(2) Laws regarding military service shall also take into account both the division of the Federation into *Länder* and the regional loyalties of their people.

Article 37 [Federal execution]

(1) If a *Land* fails to comply with its obligations under this Basic Law or other federal laws, the Federal Government, with the consent of the Bundesrat, may take the necessary steps to compel the *Land* to comply with its duties.

(2) For the purpose of implementing such coercive measures, the Federal Government or its representative shall have the right to issue instructions to all *Länder* and their authorities.

III. The *Bundestag*

Article 38 [Elections]

(1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience.

(2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.

(3) Details shall be regulated by a federal law.

Article 39 [Electoral term – Convening]

(1) Save the following provisions, the Bundestag shall be elected for four years. Its term shall end when a new Bundestag convenes. New elections shall be held no sooner than forty-six months and no later than forty-eight months after the electoral term begins. If the Bundestag is dissolved, new elections shall be held within sixty days.

(2) The Bundestag shall convene no later than the thirtieth day after the elections.

(3) The Bundestag shall determine when its sessions shall be adjourned and resumed. The President of the Bundestag may convene it at an earlier date. He shall be obliged to do so if one third of the Members, the Federal President or the Federal Chancellor so demand.

Article 40 [Presidency – Rules of procedure]

(1) The Bundestag shall elect its President, Vice-Presidents and secretaries. It shall adopt rules of procedure.

(2) The President shall exercise proprietary and police powers in the Bundestag building. No search or seizure may take place on the premises of the Bundestag without his permission.

Article 41 [Scrutiny of elections]

(1) Scrutiny of elections shall be the responsibility of the Bundestag. It shall also decide whether a Member has lost his seat.

(2) Complaints against such decisions of the Bundestag may be lodged with the Federal Constitutional Court.

(3) Details shall be regulated by a federal law.

Article 42 [Public sittings – Majority decisions]

(1) Sittings of the Bundestag shall be public. On the motion of one tenth of its Members, or on the motion of the Federal Government, a decision to exclude the public may be taken by a two-thirds majority. The motion shall be voted upon at a sitting not open to the public.

(2) Decisions of the Bundestag shall require a majority of the votes cast unless this Basic Law otherwise provides. The rules of procedure may permit exceptions with respect to elections to be conducted by the Bundestag.

(3) Truthful reports of public sittings of the Bundestag and of its committees shall not give rise to any liability.

Article 43 [Right to require presence, right of access and right to be heard]

(1) The Bundestag and its committees may require the presence of any member of the Federal Government.

(2) The members of the Bundesrat and of the Federal Government as well as their representatives may attend all sittings of the Bundestag and meetings of its committees. They shall have the right to be heard at any time.

Article 44 [Committees of inquiry]

(1) The Bundestag shall have the right, and on the motion of one quarter of its Members the duty, to establish a committee of inquiry, which shall take the requisite evidence at public hearings. The public may be excluded.

(2) The rules of criminal procedure shall apply, *mutatis mutandis*, to the taking of evidence. The privacy of correspondence, posts and telecommunications shall not be affected.

(3) Courts and administrative authorities shall be required to provide legal and administrative assistance.

(4) The decisions of committees of inquiry shall not be subject to judicial review. The courts shall be free to evaluate and rule upon the facts that were the subject of the investigation.

Article 45 [Committee on the European Union]

The Bundestag shall appoint a Committee on European Union Affairs. It may authorise the committee to exercise the rights of the Bundestag under Article 23 vis-à-vis the Federal Government. It may also empower it to exercise the rights granted to the Bundestag under the contractual foundations of the European Union.

Article 45a [Committees on Foreign Affairs and Defence]

(1) The Bundestag shall appoint a Committee on Foreign Affairs and a Defence Committee.

(2) The Defence Committee shall also have the powers of a committee of inquiry. On the motion of one quarter of its members it shall have the duty to make a specific matter the subject of inquiry.

(3) Paragraph (1) of Article 44 shall not apply to defence matters.

Article 45b [Parliamentary Commissioner for the Armed Forces]

A Parliamentary Commissioner for the Armed Forces shall be appointed to safeguard basic rights and to assist the Bundestag in exercising parliamentary oversight. Details shall be regulated by a federal law.

Article 45c [Petitions Committee]

(1) The Bundestag shall appoint a Petitions Committee to deal with requests and complaints addressed to the Bundestag pursuant to Article 17.

(2) The powers of the Committee to consider complaints shall be regulated by a federal law.

Article 45d Parliamentary Oversight Panel

(1) The Bundestag shall appoint a panel to oversee the intelligence activities of the Federation.

(2) Details shall be regulated by a federal law.

Article 46 [Immunities of Members]

(1) At no time may a Member be subjected to court proceedings or disciplinary action or otherwise called to account outside the Bundestag for a vote cast or a remark made by him in the Bundestag or in any of its committees. This provision shall not apply to defamatory insults.

(2) A Member may not be called to account or arrested for a punishable offence without permission of the Bundestag unless he is apprehended while committing the offence or in the course of the following day.

(3) The permission of the Bundestag shall also be required for any other restriction of a Member's freedom of the person or for the initiation of proceedings against a Member under

(4) Any criminal proceedings or any proceedings under Article 18 against a Member and any detention or other restriction of the freedom of his person shall be suspended at the demand of the Bundestag.

Article 47 [Right of refusal to give evidence]

Members may refuse to give evidence concerning persons who have confided information to them in their capacity as Members of the Bundestag or to whom they have confided information in this capacity and to give evidence concerning this information itself. To the extent that this right of refusal to give evidence applies, no seizure of documents shall be permissible.

Article 48 [Candidature – Protection of membership – Remuneration]

(1) Every candidate for election to the Bundestag shall be entitled to the leave necessary for his election campaign.

(2) No one may be prevented from accepting or exercising the office of Member of the Bundestag. No one may be given notice of dismissal or discharged from employment on this ground.

(3) Members shall be entitled to remuneration adequate to ensure their independence. They shall be entitled to the free use of all publicly owned means of transport. Details shall be regulated by a federal law.

Article 49 [Repealed]

IV. The *Bundesrat*

Article 50 [Functions]

The *Länder* shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union.

Article 51 [Composition – Weighted voting]

(1) The Bundesrat shall consist of members of the *Land* governments, which appoint and recall them. Other members of those governments may serve as alternates.

(2) Each *Land* shall have at least three votes; *Länder* with more than two million inhabitants shall have four, *Länder* with more than six million inhabitants five and *Länder* with more than seven million inhabitants six votes.

(3) Each *Land* may appoint as many members as it has votes. The votes of each *Land* may be cast only as a unit and only by Members present or their alternates.

Article 52 [President – Decisions – Rules of procedure]

(1) The Bundesrat shall elect its President for one year.

(2) The President shall convene the Bundesrat. He shall be obliged to do so if the delegates of at least two *Länder* or the Federal Government so demand.

(3) Decisions of the Bundesrat shall require at least a majority of its votes. It shall adopt rules of procedure. Its meetings shall be open to the public. The public may be excluded.

(3a) For matters concerning the European Union the Bundesrat may establish a Chamber for European Affairs, whose decisions shall be considered decisions of the Bundesrat; the number of votes to be uniformly cast by the *Länder* shall be determined by paragraph (2) of Article 51.

(4) Other members or representatives of *Land* governments may serve on committees of the Bundesrat.

Article 53 [Attendance of members of the Federal Government]

The members of the Federal Government shall have the right, and on demand the duty, to participate in meetings of the Bundesrat and of its committees. They shall have the right to be heard at any time. The Bundesrat shall be kept informed by the Federal Government with regard to the conduct of its affairs.

IVa. The Joint Committee

Article 53a [Composition – Rules of procedure]

(1) The Joint Committee shall consist of Members of the Bundestag and members of the Bundesrat; the Bundestag shall provide two thirds and the Bundesrat one third of the committee members. The Bundestag shall designate Members in proportion to the relative strength of the various parliamentary groups; they may not be members of the Federal Government. Each *Land* shall be represented by a Bundesrat member of its choice; these members shall not be bound by instructions. The establishment of the Joint Committee and its proceedings shall be regulated by rules of procedure to be adopted by the Bundestag and requiring the consent of the Bundesrat.

(2) The Federal Government shall inform the Joint Committee about its plans for a state of defence. The rights of the Bundestag and its committees under paragraph (1) of Article 43 shall not be affected by the provisions of this paragraph.

V. The Federal President

Article 54 [Election – Term of office]

(1) The Federal President shall be elected by the Federal Convention without debate. Any German who is entitled to vote in Bundestag elections and has attained the age of forty may be elected.

(2) The term of office of the Federal President shall be five years. Re-election for a consecutive term shall be permitted only once.

(3) The Federal Convention shall consist of the Members of the Bundestag and an equal number of members elected by the parliamentary assemblies of the *Länder* on the basis of proportional representation.

(4) The Federal Convention shall meet not later than thirty days before the term of office of the Federal President expires or, in the case of premature termination, not later than thirty days after that date. It shall be convened by the President of the Bundestag.

(5) After the expiry of an electoral term, the period specified in the first sentence of paragraph (4) of this Article shall begin when the Bundestag first convenes.

(6) The person receiving the votes of a majority of the members of the Federal Convention shall be elected. If, after two ballots, no candidate has obtained such a majority, the person who receives the largest number of votes on the next ballot shall be elected.

(7) Details shall be regulated by a federal law.

Article 55 [Incompatibilities]

(1) The Federal President may not be a member of the government or of a legislative body of the Federation or of a *Land*.

(2) The Federal President may not hold any other salaried office or engage in any trade or profession or belong to the management or supervisory board of any enterprise conducted for profit.

Article 56 [Oath of office]

On assuming his office, the Federal President shall take the following oath before the assembled Members of the Bundestag and the Bundesrat:

> "I swear that I will dedicate my efforts to the well-being of the German people, promote their welfare, protect them from harm, uphold and defend the Basic Law and the laws of the Federation, perform my duties conscientiously and do justice to all. So help me God."

The oath may also be taken without religious affirmation.

Article 57 [Substitution]

If the Federal President is unable to perform his duties, or if his office falls prematurely vacant, the President of the Bundesrat shall exercise his powers.

Article 58 [Countersignature]

Orders and directions of the Federal President shall require for their validity the countersignature of the Federal Chancellor or of the competent Federal Minister. This provision shall not apply to the appointment or dismissal of the Federal Chancellor, the dissolution of the Bundestag under Article 63, or a request made under paragraph (3) of Article 69.

Article 59 [International representation of the Federation]

(1) The Federal President shall represent the Federation in international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys.

(2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply, *mutatis mutandis*.

Article 59a [Repealed]

Article 60 [Appointment of civil servants – Pardon – Immunity]

(1) The Federal President shall appoint and dismiss federal judges, federal civil servants and commissioned and non-commissioned officers of the Armed Forces, except as may otherwise be provided by a law.

(2) He shall exercise the power to pardon offenders on behalf of the Federation in individual cases.

(3) He may delegate these powers to other authorities.

(4) Paragraphs (2) to (4) of Article 46 shall apply to the Federal President, *mutatis mutandis*.

Article 61 [Impeachment before the Federal Constitutional Court]

(1) The Bundestag or the Bundesrat may impeach the Federal President before the Federal Constitutional Court for wilful violation of this Basic Law or of any other federal law. The motion of impeachment must be supported by at least one quarter of the Members of the Bundestag or one quarter of the votes of the Bundesrat. The decision to impeach shall require a majority of two thirds of the Members of the Bundestag or of two thirds of the votes of the Bundesrat. The case for impeachment shall be presented before the Federal Constitutional Court by a person commissioned by the impeaching body.

(2) If the Federal Constitutional Court finds the Federal President guilty of a wilful violation of this Basic Law or of any other federal law, it may declare that he has forfeited his office. After the Federal President has been impeached, the Court may issue an interim order preventing him from exercising his functions.

VI. The Federal Government

Article 62 [Composition]

The Federal Government shall consist of the Federal Chancellor and the Federal Ministers.

Article 63 [Election of the Federal Chancellor]

(1) The Federal Chancellor shall be elected by the Bundestag without debate on the proposal of the Federal President.

(2) The person who receives the votes of a majority of the Members of the Bundestag shall be elected. The person elected shall be appointed by the Federal President.

(3) If the person proposed by the Federal President is not elected, the Bundestag may elect a Federal Chancellor within fourteen days after the ballot by the votes of more than one half of its Members.

(4) If no Federal Chancellor is elected within this period, a new election shall take place without delay, in which the person who receives the largest number of votes shall be elected. If the person elected receives the votes of a majority of the Members of the Bundestag, the Federal President must appoint him within seven days after the election. If the person elected does not receive such a majority, then within seven days the Federal President shall either appoint him or dissolve the Bundestag.

Article 64 [Appointment and dismissal of Federal Ministers – Oath of office]

(1) Federal Ministers shall be appointed and dismissed by the Federal President upon the proposal of the Federal Chancellor.

(2) On taking office the Federal Chancellor and the Federal Ministers shall take the oath provided for in Article 56 before the Bundestag.

Article 65 [Power to determine policy guidelines – Department and collegiate responsibility]

The Federal Chancellor shall determine and be responsible for the general guidelines of policy. Within these limits each Federal Minister shall conduct the affairs of his department independently and on his own responsibility. The Federal Government shall resolve differences of opinion between Federal Ministers. The Federal Chancellor shall conduct the proceedings of the Federal Government in accordance with rules of procedure adopted by the Government and approved by the Federal President.

Article 65a [Command of the Armed Forces]

(1) Command of the Armed Forces shall be vested in the Federal Minister of Defence.

(2) (Repealed)

Article 66 [Incompatibilities]

Neither the Federal Chancellor nor a Federal Minister may hold any other salaried office or engage in any trade or profession or belong to the management or, without the consent of the Bundestag, to the supervisory board of an enterprise conducted for profit.

Article 67 [Vote of no confidence]

(1) The Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected.

(2) Forty-eight hours shall elapse between the motion and the election.

Article 68 [Vote of confidence]

(1) If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the Bundestag within twenty-one days. The right of dissolution shall lapse as soon as the Bundestag elects another Federal Chancellor by the vote of a majority of its Members.

(2) Forty-eight hours shall elapse between the motion and the vote.

Article 69 [Deputy Federal Chancellor – Term of office]

(1) The Federal Chancellor shall appoint a Federal Minister as his deputy.

(2) The tenure of office of the Federal Chancellor or of a Federal Minister shall end in any event when a new Bundestag convenes; the tenure of office of a Federal Minister shall also end on any other occasion on which the Federal Chancellor ceases to hold office.

(3) At the request of the Federal President the Federal Chancellor, or at the request of the Federal Chancellor or of the Federal President a Federal Minister, shall be obliged to continue to manage the affairs of his office until a successor is appointed.

VII. Legislative Powers of the Federation

Article 70 [Division of powers between the Federation and the Länder]

(1) The *Länder* shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.

(2) The division of authority between the Federation and the *Länder* shall be governed by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.

Article 71 [Exclusive legislative power of the Federation]

On matters within the exclusive legislative power of the Federation, the *Länder* shall have power to legislate only when and to the extent that they are expressly authorised to do so by a federal law.

Article 72 [Concurrent legislative powers]

(1) On matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.

(2) The Federation shall have the right to legislate on matters falling within items 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of paragraph (1) of Article 74, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.

(3) If the Federation has made use of its power to legislate, the *Länder* may enact laws at variance with this legislation with respect to: 1. hunting (except for the law on hunting licences); 2. protection of nature and landscape management (except for the general principles governing the protection VII. Federal Legislation and Legislative Procedures 58 of nature, the law on protection of plant and animal species or the law on protection of marine life); 3. land distribution; 4. regional planning; 5. management of water resources (except for regulations related to materials or facilities); 6. admission to institutions of higher education and requirements for graduation in such institutions. Federal laws on these matters shall enter into force no earlier than six months following their promulgation unless otherwise provided with the consent of the Bundesrat. As for the relationship between federal law and law of the *Länder*, the latest law enacted shall take precedence with respect to matters within the scope of the first sentence.

(4) A federal law may provide that federal legislation which is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by *Land* law.

Article 73 [Matters under exclusive legislative power of the Federation]

(1) The Federation shall have exclusive legislative power with respect to:

1. foreign affairs and defence, including protection of the civilian population;
2. citizenship in the Federation;
3. freedom of movement, passports, residency registration and identity cards, immigration, emigration and extradition;
4. currency, money and coinage, weights and measures, and the determination of standards of time;
5. the unity of the customs and trading area, treaties regarding commerce and navigation, the free movement of goods, and the exchange of goods and payments with foreign countries, including customs and border protection;

5a. safeguarding German cultural assets against removal from the country;

6. air transport;

6a. the operation of railways wholly or predominantly owned by the Federation (federal railways), the construction, maintenance and operation of railway lines belonging to federal railways and the levying of charges for the use of these lines;

7. postal and telecommunications services;
8. the legal relations of persons employed by the Federation and by federal corporations under public law;
9. industrial property rights, copyrights and publishing;

9a. protection by the Federal Criminal Police Office against the dangers of international terrorism when a threat transcends the boundary of one *Land*, when respons ibility is not clearly assignable to the police authorities of any particular *Land* or when the highest authority of an individual *Land* requests the assumption of federal responsibility;

10. cooperation between the Federation and the *Länder* concerning

    a) criminal police work,

    b) protection of the free democratic basic order, existence and security of the Federation or of a *Land* (protection of the constitution), and

    c) protection against activities within the federal territory which, by the use of force or preparations for the use of force, endanger the external interests of the Federal Republic of Germany, as well as the establishment of a Federal Criminal Police Office and international action to combat crime;

11. statistics for federal purposes;

12. the law on weapons and explosives;

13. benefits for persons disabled by war and for dependents of deceased war victims as well as assistance to former prisoners of war;

14. the production and utilisation of nuclear energy for peaceful purposes, the construction and operation of facilities serving such purposes, protection against hazards arising from the release of nuclear energy or from ionising radiation, and the disposal of radioactive substances.

(2) Laws enacted pursuant to item 9a of paragraph (1) require the consent of the Bundesrat.

Article 74 [Matters under concurrent legislative powers]

(1) Concurrent legislative power shall extend to the following matters:

1. civil law, criminal law, court organisation and procedure (except for the law governing pre-trial detention), the legal profession, notaries and the provision of legal advice;

2. registration of births, deaths and marriages;

3. the law of association;

4. the law relating to residence and establishment of foreign nationals;

4a. (repealed)

5. (repealed)

6. matters concerning refugees and expellees;

7. public welfare (except for the law on social care homes);

8. (repealed)

9. war damage and reparations;

10. war graves and graves of other victims of war or despotism;

11. the law relating to economic matters (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges and private insurance), except for the law on shop closing hours, restaurants, amusement arcades, display of persons, trade fairs, exhibitions and markets;

12. labour law, including the organisation of enterprises, occupational health and safety and employment agencies, as well as social security, including unemployment insurance;

13. the regulation of educational and training grants and the promotion of research;

14. the law regarding expropriation, to the extent relevant to matters enumerated in Articles 73 and 74;

15. the transfer of land, natural resources and means of production to public ownership or other forms of public enterprise;

16. prevention of the abuse of economic power;

17. the promotion of agricultural production and forestry (except for the law on land consolidation), ensuring the adequacy of food supply, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing and coastal preservation;

18. urban real estate transactions, land law (except for laws regarding development fees), and the law on rental subsidies, subsidies for old debts, homebuilding loan premiums, miners' homebuilding and pit villages;

19. measures to combat human and animal diseases which pose a danger to the public or are communicable, admission to the medical profession and to ancillary professions or occupations, as well as the law on pharmacies, medicines, medical products, drugs, narcotics and poisons;

19a. the economic viability of hospitals and the regulation of hospital charges;

20. the law on food products including animals used in their production, the law on alcohol and tobacco, essential commodities and feedstuffs as well as protective measures in connection with the marketing of agricultural and forest seeds and seedlings, the protection of plants against diseases and pests, as well as the protection of animals;

21. maritime and coastal shipping, as well as navigational aids, inland navigation, meteorological services, sea routes and inland waterways used for general traffic;

22. road traffic, motor transport, construction and maintenance of long-distance highways, as well as the collection of tolls for the use of public highways by vehicles and the allocation of the revenue;

23. non-federal railways, except mountain railways;

24. waste disposal, air pollution control, and noise abatement (except for the protection from noise associated with human activity);

25. state liability;

26. medically assisted generation of human life, analysis and modification of genetic information as well as the regulation of organ, tissue and cell transplantation;

27. the statutory rights and duties of civil servants of the *Länder*, the municipalities and other corporations established under public law as well as of the judges in the *Länder*, except for their career regulations, remuneration and pensions;

28. hunting;

29. protection of nature and landscape management;

30. land distribution;

31. regional planning;

32. management of water resources;

33. admission to institutions of higher education and requirements for graduation in such institutions.

(2) Laws enacted pursuant to items 25 and 27 of paragraph (1) shall require the consent of the Bundesrat.

Article 74a [Repealed]

Article 75 [Repealed]

Article 76 [Bills]

(1) Bills may be introduced in the Bundestag by the Federal Government, by the Bundesrat or from the floor of the Bundestag.

(2) Federal Government bills shall first be submitted to the Bundesrat. The Bundesrat shall be entitled to comment on such bills within six weeks. If for important reasons, especially with respect to the scope of the bill, the Bundesrat demands an extension, the period shall be increased to nine weeks. If in exceptional circumstances the Federal Government, on submitting a bill to the Bundesrat, declares it to be particularly urgent, it may submit the bill to the Bundestag after three weeks or, if the Bundesrat has demanded an extension pursuant to the third sentence of this paragraph, after six weeks, even if it has not yet received the Bundesrat's comments; upon receiving such comments, it shall

transmit them to the Bundestag without delay. In the case of bills to amend this Basic Law or to transfer sovereign powers pursuant to Article 23 or 24, the comment period shall be nine weeks; the fourth sentence of this paragraph shall not apply.

(3) Bundesrat bills shall be submitted to the Bundestag by the Federal Government within six weeks. In submitting them the Federal Government shall state its own views. If for important reasons, especially with respect to the scope of the bill, the Federal Government demands an extension, the period shall be increased to nine weeks. If in exceptional circumstances the Bundesrat declares a bill to be particularly urgent, the period shall be three weeks or, if the Federal Government has demanded an extension pursuant to the third sentence of this paragraph, six weeks. In the case of bills to amend this Basic Law or to transfer sovereign powers pursuant to Article 23 or 24, the comment period shall be nine weeks; the fourth sentence of this paragraph shall not apply. The Bundestag shall consider and vote on bills within a reasonable time.

Article 77 [Legislative procedure – Mediation Committee]

(1) Federal laws shall be adopted by the Bundestag. After their adoption the President of the Bundestag shall forward them to the Bundesrat without delay.

(2) Within three weeks after receiving an adopted bill, the Bundesrat may demand that a committee for joint consideration of bills, composed of Members of the Bundestag and of the Bundesrat, be convened. The composition and proceedings of this committee shall be regulated by rules of procedure adopted by the Bundestag and requiring the consent of the Bundesrat. The members of the Bundesrat on this committee shall not be bound by instructions. When the consent of the Bundesrat is required for a bill to become law, the Bundestag and the Federal Government may likewise demand that such a committee be convened. Should the committee propose any amendment to the adopted bill, the Bundestag shall vote on it a second time.

(2a) Insofar as its consent is required for a bill to become law, the Bundesrat, if no request has been made pursuant to the first sentence of paragraph (2) of this Article or if the mediation proceeding has been completed without a proposal to amend the bill, shall vote on the bill within a reasonable time.

(3) Insofar as its consent is not required for a bill to become law, the Bundesrat, once proceedings under paragraph (2) of this Article are completed, may within two weeks object to a bill adopted by the Bundestag. The time for objection shall begin, in the case described in the last sentence of paragraph (2) of this Article, upon receipt of the bill as re-adopted by the Bundestag, and in all other cases upon receipt of a communication from the chairman of the committee provided for in paragraph (2) of this Article to the effect that the committee's proceedings have been concluded.

(4) If the objection is adopted by the majority of the votes of the Bundesrat, it may be rejected by a decision of the majority of the Members of the Bundestag. If the Bundesrat adopted the objection by a majority of at least two thirds of its votes, its rejection by the Bundestag shall require a two-thirds majority, including at least a majority of the Members of the Bundestag.

Article 78 [Passage of federal laws]

A bill adopted by the Bundestag shall become law if the Bundesrat consents to it or fails to make a demand pursuant to paragraph (2) of Article 77 or fails to enter an objection within the period stipulated in paragraph (3) of Article 77 or withdraws such an objection or if the objection is overridden by the Bundestag.

Article 79 [Amendment of the Basic Law]

(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty regarding a peace settlement, the preparation of a peace settlement or the phasing out of an occupation regime or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.

(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Article 80 [Issuance of statutory instruments]

(1) The Federal Government, a Federal Minister or the *Land* governments may be authorised by a law to issue statutory instruments. The content, purpose and scope of the authority conferred shall be specified in the law. Each statutory instrument shall contain a statement of its legal basis. If the law provides that such authority may be further delegated, such subdelegation shall be effected by statutory instrument.

(2) Unless a federal law otherwise provides, the consent of the Bundesrat shall be required for statutory instruments issued by the Federal Government or a Federal Minister regarding fees or basic principles for the use of postal and telecommunication facilities, basic principles for levying of charges for the use of facilities of federal railways or the construction and operation of railways, as well as for statutory instruments issued pursuant to federal laws that require the consent of the Bundesrat or that are executed by the *Länder* on federal commission or in their own right.

(3) The Bundesrat may submit to the Federal Government drafts of statutory instruments that require its consent.

(4) Insofar as *Land* governments are authorised by or pursuant to federal laws to issue statutory instruments, the *Länder* shall also be entitled to regulate the matter by a law.

Article 80a [State of tension]

(1) If this Basic Law or a federal law regarding defence, including protection of the civilian population, provides that legal provisions may be applied only in accordance with this Article, their application, except when a state of defence has been declared, shall be permissible only after the Bundestag has determined that a state of tension exists or has specifically approved such application. The determination of a state of tension and specific approval in the cases mentioned in the first sentence of paragraph (5) and the second sentence of paragraph (6) of Article 12a shall require a two-thirds majority of the votes cast.

(2) Any measures taken pursuant to legal provisions by virtue of paragraph (1) of this Article shall be rescinded whenever the Bundestag so demands.

(3) Notwithstanding paragraph (1) of this Article, the application of such legal provisions shall also be permissible on the basis of and in accordance with a decision made by an international body within the framework of a treaty of alliance with the approval of the Federal Government. Any measures taken pursuant to this paragraph shall be rescinded whenever the Bundestag, by the vote of a majority of its Members, so demands.

Article 81 [Legislative emergency]

(1) If, in the circumstances described in Article 68, the Bundestag is not dissolved, the Federal President, at the request of the Federal Government and with the consent of the Bundesrat, may declare a state of legislative emergency with respect to a bill, if the Bundestag rejects the bill although the Federal Government has declared it to be urgent. The same shall apply if a bill has been rejected although the Federal Chancellor had combined it with a motion under Article 68.

(2) If, after a state of legislative emergency has been declared, the Bundestag again rejects the bill or adopts it in a version the Federal Government declares unacceptable, the bill shall be deemed to have become law to the extent that it receives the consent of the Bundesrat. The same shall apply if the Bundestag does not pass the bill within four weeks after it is reintroduced.

(3) During the term of office of a Federal Chancellor, any other bill rejected by the Bundestag may become law in accordance with paragraphs (1) and (2) of this Article within a period of six months after the first declaration of a state of legislative emergency. After the expiry of this period, no further declaration of a state of legislative emergency may be made during the term of office of the same Federal Chancellor.

(4) This Basic Law may neither be amended nor abrogated nor suspended in whole or in part by a law enacted pursuant to paragraph (2) of this Article.

Article 82 [Certification – Promulgation – Entry into force]

(1) Laws enacted in accordance with the provisions of this Basic Law shall, after countersignature, be certified by the Federal President and promulgated in the Federal Law Gazette. Statutory instruments shall be certified by the authority that issues them and, unless a law otherwise provides, shall be promulgated in the Federal Law Gazette.

(2) Every law or statutory instrument shall specify the date on which it shall take effect. In the absence of such a provision, it shall take effect on the fourteenth day after the day on which the Federal Law Gazette containing it was published.

VIII. The Execution of Federal Laws and the Federal Administration

Article 83 [Execution by the Länder]

The *Länder* shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit.

Article 84 [Länder administration – Federal oversight]

(1) Where the *Länder* execute federal laws in their own right, they shall provide for the establishment of the requisite authorities and regulate their administrative procedures. If federal laws provide otherwise, the *Länder* may enact derogating regulations. If a *Land* has enacted a derogating regulation pursuant to the second sentence, subsequent federal statutory provisions regulating the organisation of authorities and their administrative procedure shall not be enacted until at least six months after their promulgation, provided that no other determination has been made with the consent of the Bundesrat. The third sentence of paragraph (2) of Article 72 shall apply, *mutatis mutandis*. In exceptional cases, owing to a special need for uniform federal legislation, the Federation may regulate the administrative procedure with no possibility of separate *Land* legislation. Such laws shall require the consent of the Bundesrat. Federal laws may not entrust municipalities and associations of municipalities with any tasks.

(2) The Federal Government, with the consent of the Bundesrat, may issue general administrative provisions.

(3) The Federal Government shall exercise oversight to ensure that the *Länder* execute federal laws in accordance with the law. For this purpose the Federal Government may send commissioners to the highest *Land* authorities and, with their consent or, where such consent is refused, with the consent of the Bundesrat, also to subordinate authorities.

(4) Should any deficiencies that the Federal Government has identified in the execution of federal laws in the *Länder* not be corrected, the Bundesrat, on application of the Federal Government or of the *Land* concerned, shall decide whether that *Land* has violated the law. The decision of the Bundesrat may be challenged in the Federal Constitutional Court.

(5) With a view to the execution of federal laws, the Federal Government may be authorised by a federal law requiring the consent of the Bundesrat to issue instructions in particular cases. They shall be addressed to the highest *Land* authorities unless the Federal Government considers the matter urgent.

Article 85 [Execution by the Länder on federal commission]

(1) Where the *Länder* execute federal laws on federal commission, establishment of the authorities shall remain the concern of the *Länder*, except insofar as federal laws enacted

with the consent of the Bundesrat otherwise provide. Federal laws may not entrust municipalities and associations of municipalities with any tasks.

(2) The Federal Government, with the consent of the Bundesrat, may issue general administrative provisions. It may provide for the uniform training of civil servants and other salaried public employees. The heads of intermediate authorities shall be appointed with its approval.

(3) The *Land* authorities shall be subject to instructions from the competent highest federal authorities. Such instructions shall be addressed to the highest *Land* authorities unless the Federal Government considers the matter urgent. Implementation of the instructions shall be ensured by the highest *Land* authorities.

(4) Federal oversight shall extend to the legality and appropriateness of execution. For this purpose the Federal Government may require the submission of reports and documents and send commissioners to all authorities.

Article 86 [Federal administration]

Where the Federation executes laws through its own administrative authorities or through federal corporations or institutions established under public law, the Federal Government shall, insofar as the law in question makes no special stipulation, issue general administrative provisions. The Federal Government shall provide for the establishment of the authorities insofar as the law in question does not otherwise provide.

Article 87 [Matters]

(1) The foreign service, the federal financial administration and, in accordance with the provisions of Article 89, the administration of federal waterways and shipping shall be conducted by federal administrative authorities with their own administrative substructures. A federal law may establish Federal Border Police authorities and central offices for police information and communications, for the criminal police and for the compilation of data for purposes of protection of the constitution and of protection against activities within the federal territory which, through the use of force or acts preparatory to the use of force, endanger the external interests of the Federal Republic of Germany.

(2) Social insurance institutions whose jurisdiction extends beyond the territory of a single *Land* shall be administered as federal corporations under public law. Social insurance institutions whose jurisdiction extends beyond the territory of a single *Land* but not beyond that of three *Länder* shall, notwithstanding the first sentence of this paragraph, be administered as *Land* corporations under public law, if the *Länder* concerned have specified which *Land* shall exercise supervisory authority.

(3) In addition, autonomous federal higher authorities as well as new federal corporations and institutions under public law may be established by a federal law for matters on which the Federation has legislative power. When the Federation is confronted with new responsibilities with respect to matters on which it has legislative power, federal

authorities at intermediate and lower levels may be established, with the consent of the Bundesrat and of a majority of the Members of the Bundestag, in cases of urgent need.

Article 87a [Armed Forces]

(1) The Federation shall establish Armed Forces for purposes of defence. Their numerical strength and general organisational structure must be shown in the budget.

(2) Apart from defence, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law.

(3) During a state of defence or a state of tension the Armed Forces shall have the power to protect civilian property and to perform traffic control functions to the extent necessary to accomplish their defence mission. Moreover, during a state of defence or a state of tension, the Armed Forces may also be authorised to support police measures for the protection of civilian property; in this event the Armed Forces shall cooperate with the competent authorities.

(4) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a *Land*, the Federal Government, if the conditions referred to in paragraph (2) of Article 91 obtain and forces of the police and the Federal Border Police are insufficient, may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and in combating organised armed insurgents. Any such employment of the Armed Forces shall be discontinued if the Bundestag or the Bundesrat so demands.

Article 87b [Federal Defence Administration]

(1) The Federal Defence Administration shall be conducted as a federal administrative authority with its own administrative substructure. It shall have jurisdiction for personnel matters and direct responsibility for satisfaction of the procurement needs of the Armed Forces. Responsibilities connected with pensions for injured persons or with construction work may be assigned to the Federal Defence Administration only by a federal law requiring the consent of the Bundesrat. Such consent shall also be required for any laws to the extent that they empower the Federal Defence Administration to interfere with rights of third parties; this requirement, however, shall not apply in the case of laws regarding personnel matters.

(2) In addition, federal laws concerning defence, including recruitment for military service and protection of the civilian population, may, with the consent of the Bundesrat, provide that they shall be executed, wholly or in part, either by federal administrative authorities with their own administrative substructures or by the *Länder* on federal commission. If such laws are executed by the *Länder* on federal commission, they may, with the consent of the Bundesrat, provide that the powers vested in the Federal Government or in the competent highest federal authorities pursuant to Article 85 be transferred wholly or in part to federal higher authorities; in this event the law may provide that such authorities shall not require the consent of the Bundesrat in issuing general administrative provisions pursuant to the first sentence of paragraph (2) of Article 85.

Article 87c [Production and utilisation of nuclear energy]

Laws enacted under item 14 of paragraph (1) of Article 73 may, with the consent of the Bundesrat, provide that they shall be executed by the *Länder* on federal commission.

Article 87d [Air transport administration]

(1) Air transport administration shall be conducted under federal administration. Air traffic control services may also be provided by foreign air traffic control organisations which are authorised in accordance with European Community law.

(2) By a federal law requiring the consent of the Bundesrat, responsibilities for air transport administration may be delegated to the *Länder* acting on federal commission.

Article 87e [Rail transport administration]

(1) Rail transport with respect to federal railways shall be administered by federal authorities. Responsibilities for rail transport administration may be delegated by a federal law to the *Länder* acting in their own right.

(2) The Federation shall discharge rail transport administration responsibilities assigned to it by a federal law, above and beyond those regarding federal railways.

(3) Federal railways shall be operated as enterprises under private law. They shall remain the property of the Federation to the extent that their activities embrace the construction, maintenance and operation of the lines. The transfer of federal shares in these enterprises under the second sentence of this paragraph shall be effected pursuant to a law; the Federation shall retain a majority of the shares. Details shall be regulated by a federal law.

(4) The Federation shall ensure that, in developing and maintaining the federal railway system as well as in offering services over this system, other than local passenger services, due account is taken of the interests and especially the transportation needs of the public. Details shall be regulated by a federal law.

(5) Laws enacted pursuant to paragraphs (1) to (4) of this Article shall require the consent of the Bundesrat. The consent of the Bundesrat shall also be required for laws regarding the dissolution, merger or division of federal railway enterprises, the transfer of federal railway lines to third parties or the abandonment of such lines or affecting local passenger services.

Article 87f [Posts and telecommunications]

(1) In accordance with a federal law requiring the consent of the Bundesrat, the Federation shall ensure the availability of adequate and appropriate postal and telecommunications services throughout the federal territory.

(2) Services within the meaning of paragraph (1) of this Article shall be provided as a matter of private enterprise by the firms succeeding to the special trust Deutsche Bundespost and by other private providers. Sovereign functions in the area of posts and telecommunications shall be discharged by federal administrative authorities.

(3) Notwithstanding the second sentence of paragraph (2) of this Article, the Federation, by means of a federal institution under public law, shall discharge particular responsibilities relating to the firms succeeding to the special trust Deutsche Bundespost as prescribed by a federal law.

Article 88 [The Federal Bank – The European Central Bank]

The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability.

Article 89 [Federal waterways – Administration of waterways]

(1) The Federation shall be the owner of the former Reich waterways.

(2) The Federation shall administer the federal waterways through its own authorities. It shall exercise those state functions relating to inland shipping which extend beyond the territory of a single *Land*, and those functions relating to maritime shipping, which are conferred on it by a law. Insofar as federal waterways lie within the territory of a single *Land*, the Federation on its application may delegate their administration to that *Land* on federal commission. If a waterway touches the territory of two or more *Länder*, the Federation may commission that *Land* which is designated by the affected *Länder*.

(3) In the administration, development and new construction of waterways, the requirements of land improvement and of water management shall be assured in agreement with the *Länder*.

Article 90 [Federal roads and motorways]

(1) The Federation shall remain the owner of the federal motorways and other federal trunk roads. This ownership shall be inalienable.

(2) The administration of the federal motorways shall be a matter for the federal administrative authorities. The Federation may make use of a company under private law to discharge its responsibilities. This company shall be in the inalienable ownership of the Federation. Third parties shall have no direct or indirect holding in the company and its subsidiaries. Third parties shall have no holdings in the framework of public-private partnerships in road networks comprising the entire federal motorway network or the entire network of other federal trunk roads in a *Land* or significant parts of these networks. Details shall be regulated by a federal law.

(3) The *Länder*, or such self-governing corporate bodies as are competent under *Land* law, shall administer on federal commission the other federal trunk roads.

(4) At the request of a *Land*, the Federation may assume administrative responsibility for the other federal trunk roads insofar as they lie within the territory of that *Land*.

Article 91 [Internal emergency]

(1) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a *Land*, a *Land* may call upon police forces of other *Länder*, or upon personnel and facilities of other administrative authorities and of the Federal Border Police.

(2) If the *Land* where such danger is imminent is not itself willing or able to combat the danger, the Federal Government may place the police in that *Land* and the police forces of other *Länder* under its own orders and deploy units of the Federal Border Police. Any such order shall be rescinded once the danger is removed or at any time on the demand of the Bundesrat. If the danger extends beyond the territory of a single *Land*, the Federal Government, insofar as is necessary to combat such danger, may issue instructions to the *Land* governments; the first and second sentences of this paragraph shall not be affected by this provision.

VIIIa. Joint Tasks

Article 91a [Joint tasks – Responsibility for expenditure]

(1) In the following areas the Federation shall participate in the discharge of responsibilities of the *Länder*, provided that such responsibilities are important to society as a whole and that federal participation is necessary for the improvement of living conditions (joint tasks):

1. improvement of regional economic structures;
2. improvement of the agrarian structure and of coastal preservation.

(2) Federal laws enacted with the consent of the Bundesrat shall specify the joint tasks as well as the details of coordination.

(3) In cases to which item 1 of paragraph (1) of this Article applies, the Federation shall finance one half of the expenditure in each *Land*. In cases to which item 2 of paragraph (1) of this Article applies, the Federation shall finance at least one half of the expenditure, and the proportion shall be the same for all *Länder*. Details shall be regulated by law. The provision of funds shall be subject to appropriation in the budgets of the Federation and the *Länder*.

Article 91b [Education programmes and promotion of research]

(1) The Federation and the *Länder* may cooperate on the basis of agreements in cases of supraregional importance in the promotion of sciences, research and teaching. Agreements primarily affecting institutions of higher education shall require the consent of all the *Länder*. This provision shall not apply to agreements regarding the construction of research facilities, including large scientific installations.

(2) The Federation and the *Länder* may mutually agree to cooperate for the assessment of the performance of education systems in international comparison and in drafting relevant reports and recommendations.

(3) The apportionment of costs shall be regulated in the pertinent agreement.

Article 91c [Information technology systems]

(1) The Federation and the *Länder* may cooperate in planning, constructing and operating information technology systems needed to discharge their responsibilities.

(2) The Federation and the *Länder* may agree to specify the standards and security requirements necessary for exchanges between their information technology systems. Agreements regarding the bases of cooperation under the first sentence may provide, for individual responsibilities determined by their content and scope, that detailed regulations be enacted with the consent of a qualified majority of the Federation and the *Länder* as laid down in the agreements. They require the consent of the Bundestag and the legislatures of the participating *Länder*; the right to withdraw from these agreements cannot be precluded. The agreements shall also regulate the sharing of costs.

(3) The *Länder* may also agree on the joint operation of information technology systems along with the establishment of installations for that purpose.

(4) To link the information networks of the Federation and the *Länder*, the Federation shall establish a connection network. Details regarding the establishment and the operation of the connection network shall be regulated by a federal law with the consent of the Bundesrat.

(5) Comprehensive access by means of information technology to the administrative services of the Federation and the *Länder* shall be regulated by a federal law with the consent of the Bundesrat.

Article 91d [Comparison of performance]

With a view to ascertaining and improving the performance of their administrations, the Federation and the *Länder* may conduct comparative studies and publish the results thereof.

Article 91e [Cooperation in respect of basic support for persons seeking employment]

(1) In the execution of federal laws in the field of basic support for persons seeking employment, the Federation and the *Länder* or the municipalities and associations of municipalities responsible pursuant to *Land* law shall cooperate as a rule in joint institutions.

(2) The Federation may authorise a limited number of municipalities and associations of municipalities, at their request and with the consent of the highest *Land* authority, to discharge the tasks pursuant to paragraph (1) alone. In this case, the Federation shall bear the necessary expenditures including the administrative expenses for the tasks which are to be discharged by the Federation in the execution of laws pursuant to paragraph (1).

(3) Details shall be regulated by a federal law requiring the consent of the Bundesrat.

IX. The Judiciary

Article 92 [Court organisation]

The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law and by the courts of the *Länder*.

Article 93 [Jurisdiction of the Federal Constitutional Court]

(1) The Federal Constitutional Court shall rule:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body;

2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or *Land* law with this Basic Law or the compatibility of *Land* law with other federal law on application of the Federal Government, of a *Land* government or of one fourth of the Members of the Bundestag;

2a. in the event of disagreements as to whether a law meets the conditions set out in paragraph (2) of Article 72, on application of the Bundesrat or of the government or legislature of a *Land*;

3. in the event of disagreements concerning the rights and duties of the Federation and the *Länder*, especially in the execution of federal law by the *Länder* and in the exercise of federal oversight;

4. on other disputes involving public law between the Federation and the *Länder*, between different *Länder* or within a *Land*, unless there is recourse to another court;

4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority;

4b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a *Land* law, however, only if the law cannot be challenged in the constitutional court of the *Land*;

4c. on constitutional complaints filed by associations concerning their non-recognition as political parties for an election to the Bundestag;

5. in the other instances provided for in this Basic Law. (2) At the request of the Bundesrat, a *Land* government or the parliamentary assembly of a *Land*, the Federal Constitutional Court shall also rule whether, in cases falling under paragraph (4) of Article 72, the need for a regulation by federal law does not exist any longer or whether, in the cases referred to in item 1 of paragraph (2) of Article 125a, federal law could not be enacted any longer. The Court's determination that the need has

ceased to exist or that federal law could no longer be enacted substitutes a federal law according to paragraph (4) of Article 72 or item 2 of paragraph (2) of Article 125a. A request under the first sentence is admissible only if a bill falling under paragraph (4) of Article 72 or the second sentence of paragraph (2) of Article 125a has been rejected by the German Bundestag or if it has not been considered and determined upon within one year or if a similar bill has been rejected by the Bundesrat.

(3) The Federal Constitutional Court shall also rule on such other matters as shall be assigned to it by a federal law.

Article 94 [Composition of the Federal Constitutional Court]

(1) The Federal Constitutional Court shall consist of federal judges and other members. Half the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat. They may not be members of the Bundestag, of the Bundesrat, of the Federal Government or of any of the corresponding bodies of a *Land*.

(2) The organisation and procedure of the Federal Constitutional Court shall be regulated by a federal law, which shall specify in which instances its decisions shall have the force of law. The law may require that all other legal remedies be exhausted before a constitutional complaint may be filed and may provide for a separate proceeding to determine whether the complaint will be accepted for adjudication.

Article 95 [Supreme federal courts]

(1) The Federation shall establish the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court and the Federal Social Court as supreme courts of ordinary, administrative, financial, labour and social jurisdiction.

(2) The judges of each of these courts shall be chosen jointly by the competent Federal Minister and a committee for the selection of judges consisting of the competent *Land* ministers and an equal number of members elected by the Bundestag.

(3) A Joint Chamber of the courts specified in paragraph (1) of this Article shall be established to preserve the uniformity of decisions. Details shall be regulated by a federal law.

Article 96 [Other federal courts]

(1) The Federation may establish a federal court for matters concerning industrial property rights.

(2) The Federation may establish federal military criminal courts for the Armed Forces. These courts may exercise criminal jurisdiction only during a state of defence or over members of the Armed Forces serving abroad or on board warships. Details shall be regulated by a federal law. These courts shall be under the aegis of the Federal Minister of Justice. The judges officiating there as their primary occupation shall be persons qualified to hold judicial office.

(3) The supreme court of review from the courts designated in paragraphs (1) and (2) of this Article shall be the Federal Court of Justice.

(4) The Federation may establish federal courts for disciplinary proceedings against, and for proceedings on complaints by, persons in the federal public service.

(5) With the consent of the Bundesrat, a federal law may provide that courts of the *Länder* shall exercise federal jurisdiction over criminal proceedings in the following matters:

1. genocide;
2. crimes against humanity under international criminal law;
3. war crimes;
4. other acts tending to and undertaken with the intent to disturb the peaceful relations between nations (paragraph (1) of Article 26);
5. state security.

Article 97 [Judicial independence]

(1) Judges shall be independent and subject only to the law.

(2) Judges appointed permanently to positions as their primary occupation may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiry of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

Article 98 [Legal status of judges – Impeachment]

(1) The legal status of federal judges shall be regulated by a special federal law.

(2) If a federal judge infringes the principles of this Basic Law or the constitutional order of a *Land* in his official capacity or unofficially, the Federal Constitutional Court, upon application of the Bundestag, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement it may order his dismissal.

(3) The legal status of the judges in the *Länder* shall be regulated by special *Land* laws if item 27 of paragraph (1) of Article 74 does not otherwise provide.

(4) The *Länder* may provide that *Land* judges shall be chosen jointly by the *Land* Minister of Justice and a committee for the selection of judges.

(5) The *Länder* may enact provisions regarding *Land* judges that correspond with those of paragraph (2) of this Article. Existing *Land* constitutional law shall not be affected. The decision in cases of judicial impeachment shall rest with the Federal Constitutional Court.

Article 99 [Constitutional disputes within a Land]

A *Land* law may assign the adjudication of constitutional disputes within a *Land* to the Federal Constitutional Court and the final decision in matters involving the application of *Land* law to the supreme courts specified in paragraph (1) of Article 95.

Article 100 [Concrete judicial review]

(1) If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the *Land* court with jurisdiction over constitutional disputes where the constitution of a *Land* is held to be violated or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by *Land* law and where a *Land* law is held to be incompatible with a federal law.

(2) If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.

(3) If the constitutional court of a *Land*, in interpreting this Basic Law, proposes to derogate from a decision of the Federal Constitutional Court or of the constitutional court of another *Land*, it shall obtain a decision from the Federal Constitutional Court.

Article 101 [Ban on extraordinary courts]

(1) Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.

(2) Courts for particular fields of law may be established only by a law.

Article 102 [Abolition of capital punishment]

Capital punishment is abolished.

Article 103 [Fair trial]

(1) In the courts every person shall be entitled to a hearing in accordance with law.

(2) An act may be punished only if it was defined by a law as a criminal offence before the act was committed.

(3) No person may be punished for the same act more than once under the general criminal laws.

Article 104 [Deprivation of liberty]

(1) Liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment.

(2) Only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following that of the arrest. Details shall be regulated by a law.

(3) Any person provisionally detained on suspicion of having committed a criminal offence shall be brought before a judge no later than the day following that of his arrest; the judge shall inform him of the reasons for the arrest, examine him and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefor or order his release.

(4) A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of liberty.

X. Finance

Article 104a [Apportionment of expenditures – Financial system – Liability]

(1) The Federation and the *Länder* shall separately finance the expenditures resulting from the discharge of their respective responsibilities insofar as this Basic Law does not otherwise provide.

(2) Where the *Länder* act on federal commission, the Federation shall finance the resulting expenditures.

(3) Federal laws providing for money grants to be administered by the *Länder* may provide that the Federation shall pay for such grants wholly or in part. If any such law provides that the Federation shall finance one half or more of the expenditure, it shall be executed by the *Länder* on federal commission.

(4) Federal laws that oblige the *Länder* to provide money grants, benefits in kind or comparable services to third parties and which are executed by the *Länder* in their own right or according to the second sentence of paragraph (3) on commission of the Federation shall require the consent of the Bundesrat if the expenditure resulting therefrom is to be borne by the *Länder*.

(5) The Federation and the *Länder* shall finance the administrative expenditures incurred by their respective authorities and shall be responsible to one another for ensuring proper administration. Details shall be regulated by a federal law requiring the consent of the Bundesrat.

(6) In accordance with the internal allocation of competencies and responsibilities, the Federation and the *Länder* shall bear the costs entailed by a violation of obligations incumbent on Germany under supranational or international law. In cases of financial corrections by the European Union with effect transcending one specific *Land*, the Federation and the *Länder* shall bear such costs at a ratio of 15 to 85. In such cases,

the *Länder* as a whole shall be responsible in solidarity for 35 per cent of the total burden according to a general formula; 50 per cent of the total burden shall be borne by those *Länder* which have caused the encumbrance, adjusted to the size of the amount of the financial means received. Details shall be regulated by a federal law requiring the consent of the Bundesrat.

Article 104b [Financial assistance for investments]

(1) To the extent that this Basic Law confers on it the power to legislate, the Federation may grant the *Länder* financial assistance for particularly important investments by the *Länder* and municipalities (associations of municipalities) which are necessary to:

1. avert a disturbance of the overall economic equilibrium,
2. equalise differing economic capacities within the federal territory, or
3. promote economic growth.

By way of derogation from the first sentence, the Federation may grant financial assistance even outside its field of legislative powers in cases of natural disasters or exceptional emergency situations beyond governmental control and substantially harmful to the state's financial capacity.

(2) Details, especially with respect to the kinds of investments to be promoted, shall be regulated by a federal law requiring the consent of the Bundesrat or by an executive agreement based on the Federal Budget Act. The federal law or executive agreement may contain provisions on the shaping of the respective *Land* programmes for the use of the financial assistance. The criteria for the shaping of the *Land* programmes shall be specified in agreement with the affected *Länder*. To ensure that the funds are used for their intended purpose, the Federal Government may require the submission of reports and documents and conduct surveys of any authorities. The funds from the Federation shall be provided in addition to funds belonging to the *Länder*. The duration of the grants shall be limited, and the grants must be reviewed at regular intervals with respect to the manner in which they are used. The financial assistance must be designed with descending annual contributions.

(3) Upon request, the Bundestag, the Federal Government and the Bundesrat shall be informed about the implementation of such measures and the improvements reached.

Article 104c [Financial assistance for investments in municipal education infrastructure]

The Federation may grant the *Länder* financial assistance for investments of significance to the nation as a whole, and for special limited-term expenditures on the part of the *Länder* and municipalities (associations of municipalities) directly connected with such investments to improve the efficiency of municipal education infrastructure. The first three sentences and the fifth and sixth sentences of paragraph (2), as well as paragraph (3) of Article 104b, shall apply, *mutatis mutandis*. To ensure that the funds are used for their intended purpose, the Federal Government may require the submission of reports and, where circumstances so warrant, documents.

Article 104d [Financial assistance for investments in social housing]

The Federation may grant the *Länder* financial assistance for investments of significance to the nation as a whole on the part of the *Länder* and municipalities (associations of municipalities) in social housing. The first five sentences of paragraph (2), as well as paragraph (3) of Article 104b, shall apply, *mutatis mutandis*.

Article 105 [Distribution of powers regarding tax laws]

(1) The Federation shall have exclusive power to legislate with respect to customs duties and fiscal monopolies.

(2) The Federation shall have concurrent power to legislate with respect to all other taxes the revenue from which accrues to it wholly or in part or as to which the conditions provided for in paragraph (2) of Article 72 apply.

(2a) The *Länder* shall have power to legislate with regard to local taxes on consumption and expenditures so long and insofar as such taxes are not substantially similar to taxes regulated by federal law. They are empowered to determine the rate of the tax on acquisition of real estate.

(3) Federal laws relating to taxes the revenue from which accrues wholly or in part to the *Länder* or to municipalities (associations of municipalities) shall require the consent of the Bundesrat.

Article 106 [Apportionment of tax revenue and yield of fiscal monopolies]

(1) The yield of fiscal monopolies and the revenue from the following taxes shall accrue to the Federation:

1. customs duties;
2. taxes on consumption insofar as they do not accrue to the *Länder* pursuant to paragraph (2), or jointly to the Federation and the *Länder* in accordance with paragraph (3) or to municipalities in accordance with paragraph (6) of this Article;
3. the road freight tax, motor vehicle tax, and other taxes on transactions related to motorised vehicles;
4. the taxes on capital transactions, insurance and bills of exchange;
5. non-recurring levies on property and equalisation of burdens levies;
6. income and corporation surtaxes;
7. levies imposed within the framework of the European Communities.

(2) Revenue from the following taxes shall accrue to the *Länder*:

1. the property tax;
2. the inheritance tax;

3. the motor vehicle tax;

4. such taxes on transactions as do not accrue to the Federation pursuant to paragraph (1) or jointly to the Federation and the *Länder* pursuant to paragraph (3) of this Article;

5. the beer tax;

6. the tax on gambling establishments.

(3) Revenue from income taxes, corporation taxes and turnover taxes shall accrue jointly to the Federation and the *Länder* (joint taxes) to the extent that the revenue from the income tax and the turnover tax is not allocated to municipalities pursuant to paragraphs (5) and (5a) of this Article. The Federation and the *Länder* shall share equally the revenues from income taxes and corporation taxes. The respective shares of the Federation and the *Länder* in the revenue from the turnover tax shall be determined by a federal law requiring the consent of the Bundesrat. Such determination shall be based on the following principles:

1. The Federation and the *Länder* shall have an equal claim against current revenues to cover their necessary expenditures. The extent of such expenditures shall be determined with due regard to multi-year financial planning.

2. The financial requirements of the Federation and of the *Länder* shall be coordinated in such a way as to establish a fair balance, avoid excessive burdens on taxpayers and ensure uniformity of living standards throughout the federal territory. In determining the respective shares of the Federation and the *Länder* in the revenue from the turnover tax, reductions in revenue incurred by the *Länder* from 1 January 1996 because of the provisions made with respect to children in the income tax law shall also be taken into account. Details shall be regulated by the federal law enacted pursuant to the third sentence of this paragraph.

(4) The respective shares of the Federation and the *Länder* in the revenue from the turnover tax shall be apportioned anew whenever the ratio of revenues to expenditures of the Federation becomes substantially different from that of the *Länder*; reductions in revenue that are taken into account in determining the respective shares of revenue from the turnover tax under the fifth sentence of paragraph (3) of this Article shall not be considered in this regard. If a federal law imposes additional expenditures on or withdraws revenue from the *Länder*, the additional burden may be compensated for by federal grants pursuant to a federal law requiring the consent of the Bundesrat, provided the additional burden is limited to a short period of time. This law shall establish the principles for calculating such grants and distributing them among the *Länder*.

(5) A share of the revenue from the income tax shall accrue to the municipalities, to be passed on by the *Länder* to their municipalities on the basis of the income taxes paid by their inhabitants. Details shall be regulated by a federal law requiring the consent of the Bundesrat. This law may provide that municipalities may establish supplementary or reduced rates with respect to their share of the tax.

(5a) From and after 1 January 1998, a share of the revenue from the turnover tax shall accrue to the municipalities. It shall be passed on by the *Länder* to their municipalities on the basis of a formula reflecting geographical and economic factors. Details shall be regulated by a federal law requiring the consent of the Bundesrat.

(6) Revenue from taxes on real property and trades shall accrue to the municipalities; revenue from local taxes on consumption and expenditures shall accrue to the municipalities or, as may be provided for by *Land* legislation, to associations of municipalities. Municipalities shall be authorised to establish the rates at which taxes on real property and trades are levied, within the framework of the laws. If there are no municipalities in a *Land*, revenue from taxes on real property and trades as well as from local taxes on consumption and expenditures shall accrue to the *Land*. The Federation and the *Länder* may participate, by virtue of an apportionment, in the revenue from the tax on trades. Details regarding such apportionment shall be regulated X. Finance 98 by a federal law requiring the consent of the Bundesrat. In accordance with *Land* legislation, taxes on real property and trades as well as the municipalities' share of revenue from the income tax and the turnover tax may be taken as a basis for calculating the amount of apportionment.

(7) An overall percentage of the *Land* share of total revenue from joint taxes, to be determined by *Land* legislation, shall accrue to the municipalities or associations of municipalities. In all other respects *Land* legislation shall determine whether and to what extent revenue from *Land* taxes shall accrue to municipalities (associations of municipalities).

(8) If in individual *Länder* or municipalities (associations of municipalities) the Federation requires special facilities to be established that directly result in an increase of expenditure or in reductions in revenue (special burden) to these *Länder* or municipalities (associations of municipalities), the Federation shall grant the necessary compensation if and insofar as the *Länder* or municipalities (associations of municipalities) cannot reasonably be expected to bear the burden. In granting such compensation, due account shall be taken of indemnities paid by third parties and financial benefits accruing to these *Länder* or municipalities (associations of municipalities) as a result of the establishment of such facilities.

(9) For the purpose of this Article, revenues and expenditures of municipalities (associations of municipalities) shall also be deemed to be revenues and expenditures of the *Länder*.

Article 106a [Federal grants for local public transport]

Beginning on 1 January 1996 the *Länder* shall be entitled to an allocation of federal tax revenues for purposes of local public transport. Details shall be regulated by a federal law requiring the consent of the Bundesrat. Allocations made pursuant to the first sentence of this Article shall not be taken into account in determining the financial capacity of a *Land* under paragraph (2) of Article 107.

Article 106b [Länder share of motor vehicle tax]

As of 1 July 2009, following the transfer of the motor vehicle tax to the Federation, the *Länder* shall be entitled to a sum from the tax revenue of the Federation. Details shall be regulated by a federal law requiring the consent of the Bundesrat.

Article 107 [Distribution of tax revenue – Financial equalisation among the Länder – Supplementary grants]

(1) Revenue from *Land* taxes and the *Land* share of revenue from income and corporation taxes shall accrue to the individual *Länder* to the extent that such taxes are collected by finance authorities within their respective territories (local revenue). Details regarding the delimitation as well as the manner and scope of allotment of local revenue from corporation and wage taxes shall be regulated by a federal law requiring the consent of the Bundesrat. This law may also provide for the delimitation and allotment of local revenue from other taxes. The *Land* share of revenue from the turnover tax shall accrue to the individual *Länder* on a per capita basis, unless otherwise provided in paragraph (2) of this Article.

(2) A federal law requiring the consent of the Bundesrat shall ensure a reasonable equalisation of the disparate financial capacities of the *Länder*, with due regard for the financial capacities and needs of municipalities (associations of municipalities). To this end, additions to and deductions from the financial capacity of the respective *Länder* shall be regulated in the allotment of their shares of revenue from the turnover tax. The conditions for granting additions and imposing reductions as well as the criteria governing the amount of these additions and deductions shall be specified in the law. For the purpose of measuring financial capacity, it shall be permissible to consider only part of the revenue from mining royalties. The law may also provide for grants to be made by the Federation to financially weak *Länder* from its own funds to assist them in meeting their general financial needs (supplementary grants). Irrespective of the criteria specified in the first to the third sentence of this paragraph, grants may also be made to such financially weak *Länder* whose municipalities (associations of municipalities) have a particularly low capacity to generate tax revenue (municipal tax-base grants) and, in addition, to such financially weak *Länder* whose shares of the support funds under Article 91b are lower than their per capita shares.

Article 108 [Financial administration of the Federation and the Länder – Financial courts]

(1) Customs duties, fiscal monopolies, taxes on consumption regulated by a federal law, including the turnover tax on imports, the motor vehicle tax and other transaction taxes related to motorised vehicles as from 1 July 2009 and charges imposed within the framework of the European Communities shall be administered by federal finance authorities. The organisation of these authorities shall be regulated by a federal law. Inasmuch as intermediate authorities have been established, their heads shall be appointed in consultation with the *Land* governments.

(2) All other taxes shall be administered by the financial authorities of the *Länder*. The organisation of these authorities and the uniform training of their civil servants may be

regulated by a federal law requiring the consent of the Bundesrat. Inasmuch as intermediate authorities have been established, their heads shall be appointed in agreement with the Federal Government.

(3) Where taxes accruing wholly or in part to the Federation are administered by revenue authorities of the *Länder*, those authorities shall act on federal commission. Paragraphs (3) and (4) of Article 85 shall apply, the Federal Minister of Finance acting in place of the Federal Government.

(4) Where and to the extent that execution of the tax laws will be substantially facilitated or improved thereby, a federal law requiring the consent of the Bundesrat may provide for collaboration between federal and *Land* revenue authorities in matters of tax administration, for the administration of taxes enumerated in paragraph (1) of this Article by revenue authorities of the *Länder* or for the administration of other taxes by federal revenue authorities. The functions of *Land* revenue authorities in the administration of taxes whose revenue accrues exclusively to municipalities (associations of municipalities) may be delegated by the *Länder* to municipalities (associations of municipalities) wholly or in part. The federal law referred to in the first sentence of this paragraph may, with regard to collaboration between the Federation and *Länder*, provide that, with the consent of a majority specified in the law, rules for the execution of tax laws will become binding for all *Länder*.

(4a) A federal law requiring the consent of the Bundesrat may provide, in the case of the administration of taxes enumerated in paragraph (2), for collaboration between *Land* revenue authorities and for an inter-*Land* transfer of competence to *Land* revenue authorities of one or more *Länder* by agreement with the *Länder* concerned where and to the extent that execution of the tax laws will be substantially facilitated or improved thereby. The apportionment of costs may be regulated by a federal law.

(5) The procedures to be followed by federal revenue authorities shall be prescribed by a federal law. The procedures to be followed by *Land* revenue authorities or, as provided by the second sentence of paragraph (4) of this Article, by municipalities (associations of municipalities) may be prescribed by a federal law requiring the consent of the Bundesrat.

(6) Financial jurisdiction shall be uniformly regulated by a federal law.

(7) The Federal Government may issue general administrative rules which, to the extent that administration is entrusted to *Land* revenue authorities or to municipalities (associations of municipalities), shall require the consent of the Bundesrat.

Article 109 [Budget management in the Federation and the Länder]

(1) The Federation and the *Länder* shall be autonomous and independent of one another in the management of their respective budgets.

(2) The Federation and the *Länder* shall jointly discharge the obligations of the Federal Republic of Germany resulting from legal acts of the European Community for the

maintenance of budgetary discipline pursuant to Article 104 of the Treaty Establishing the European Community and shall, within this framework, give due regard to the requirements of overall economic equilibrium.

(3) The budgets of the Federation and the *Länder* shall, in principle, be balanced without revenue from credits. The Federation and *Länder* may introduce rules intended to take into account, symmetrically in times of upswing and downswing, the effects of market developments that deviate from normal conditions, as well as exceptions for natural disasters or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity. For such exceptional regimes, a corresponding amortisation plan must be adopted. Details for the budget of the Federation shall be governed by Article 115 with the proviso that the first sentence shall be deemed to be satisfied if revenue from credits does not exceed 0.35 per cent in relation to the nominal gross domestic product. The *Länder* themselves shall regulate details for the budgets within the framework of their constitutional powers, the proviso being that the first sentence shall only be deemed to be satisfied if no revenue from credits is admitted.

(4) A federal law requiring the consent of the Bundesrat may establish principles applicable to both the Federation and the *Länder* governing budgetary law, cyclically appropriate budgetary management and long-term financial planning.

(5) Sanctions imposed by the European Community on the basis of the provisions of Article 104 of the Treaty Establishing the European Community in the interest of maintaining budgetary discipline shall be borne by the Federation and the *Länder* at a ratio of 65 to 35 per cent. In solidarity, the *Länder* as a whole shall bear 35 per cent of the charges incumbent on the *Länder* according to the number of their inhabitants; 65 per cent of the charges incumbent on the *Länder* shall be borne by the *Länder* according to their degree of causation. Details shall be regulated by a federal law which shall require the consent of the Bundesrat.

Article 109a [Budgetary emergencies]

(1) To avoid a budgetary emergency, a federal law requiring the consent of the Bundesrat shall provide for:

1. the continuing supervision of budgetary management of the Federation and the *Länder* by a joint body (Stability Council),

2. the conditions and procedures for ascertaining the threat of a budgetary emergency,

3. the principles for the establishment and administration of programs for taking care of budgetary emergencies.

(2) From the year 2020, oversight of compliance with the provisions of paragraph (3) of Article 109 by the Federation and the *Länder* shall be entrusted to the Stability Council. This oversight shall be focused on the provisions and procedures regarding adherence to budgetary discipline from legal acts based on the Treaty on the Functioning of the European Union.

(3) The decisions of the Stability Council and the accompanying documents shall be published.

Article 110 [Federal budget]

(1) All revenues and expenditures of the Federation shall be included in the budget; in the case of federal enterprises and special trusts, only payments to or remittances from them need be included. The budget shall be balanced with respect to revenues and expenditures.

(2) The budget for one or more fiscal years shall be set forth in a law enacted before the beginning of the first year and making separate provision for each year. The law may provide that various parts of the budget apply to different periods of time, divided by fiscal years.

(3) Bills to comply with the first sentence of paragraph (2) of this Article as well as bills to amend the Budget Act or the budget itself shall be submitted simultaneously to the Bundesrat and to the Bundestag; the Bundesrat shall be entitled to comment on such bills within six weeks or, in the case of amending bills, within three weeks.

(4) The Budget Act may contain only such provisions as relate to federal revenues and expenditures and to the period for which it is enacted. The Budget Act may specify that its provisions shall expire only upon promulgation of the next Budget Act or, in the event of an authorisation pursuant to Article 115, at a later date.

Article 111 [Interim budget management]

(1) If, by the end of a fiscal year, the budget for the following year has not been adopted by a law, the Federal Government, until such law comes into force, may make all expenditures that are necessary:

(a) to maintain institutions established by a law and to carry out measures authorised by a law;

(b) to meet the legal obligations of the Federation;

(c) to continue construction projects, procurements and the provision of other benefits or services or to continue to make grants for these purposes, to the extent that amounts have already been appropriated in the budget of a previous year.

(2) To the extent that revenues based upon specific laws and derived from taxes or duties or other sources or the working capital reserves do not cover the expenditures referred to in paragraph (1) of this Article, the Federal Government may borrow the funds necessary to sustain current operations up to a maximum of one quarter of the total amount of the previous budget.

Article 112 [Extrabudgetary expenditures]

Expenditures in excess of budgetary appropriations or for purposes not contemplated by the budget shall require the consent of the Federal Minister of Finance. Such consent may be given only in the event of an unforeseen and unavoidable necessity. Details may be regulated by a federal law.

Article 113 [Increase of expenditures]

(1) Laws that increase the budget expenditures proposed by the Federal Government or entail or will bring about new expenditures shall require the consent of the Federal Government. This requirement shall also apply to laws that entail or will bring about decreases in revenue. The Federal Government may demand that the Bundestag postpone its vote on bills to this effect. In this event the Federal Government shall submit its comments to the Bundestag within six weeks.

(2) Within four weeks after the Bundestag has adopted such a law, the Federal Government may demand that it vote on the law a second time.

(3) If the bill has become law pursuant to Article 78, the Federal Government may withhold its consent only within six weeks and only after having initiated the procedure provided for in the third and fourth sentences of paragraph (1) or in paragraph (2) of this Article. Upon the expiry of this period such consent shall be deemed to have been given.

Article 114 [Submission and auditing of accounts]

(1) For the purpose of discharging the Federal Government, the Federal Minister of Finance shall submit annually to the Bundestag and to the Bundesrat an account for the preceding fiscal year of all revenues and expenditures as well as of assets and debts.

(2) The Federal Court of Audit, whose members shall enjoy judicial independence, shall audit the account and determine whether public finances have been properly and efficiently administered by the Federation. For the purpose of the audit pursuant to the first sentence of this paragraph, the Federal Court of Audit may also conduct surveys of authorities outside the federal administration; this shall also apply in cases in which the Federation allocates to the *Länder* ring-fenced financing for the performance of tasks incumbent on the *Länder*. It shall submit an annual report directly to the Bundestag and the Bundesrat as well as to the Federal Government. In other respects the powers of the Federal Court of Audit shall be regulated by a federal law.

Article 115 [Limits of borrowing]

(1) The borrowing of funds and the assumption of surety obligations, guarantees or other commitments that may lead to expenditures in future fiscal years shall require authorisation by a federal law specifying or permitting computation of the amounts involved.

(2) Revenues and expenditures shall in principle be balanced without revenue from credits. This principle shall be satisfied when revenue obtained by the borrowing of funds does not exceed 0.35 per cent in relation to the nominal gross domestic product. In addition, when economic developments deviate from normal conditions, effects on the budget in periods of upswing and downswing must be taken into account symmetrically. Deviations of actual borrowing from the credit limits specified under the first to third sentences are to be recorded on a control account; debits exceeding the threshold of 1.5 per cent in relation to the nominal gross domestic product are to be reduced in accordance with the economic cycle. The regulation of details, especially the adjustment of revenue and expenditures with regard to financial transactions and the procedure for the calculation of the yearly limit on net borrowing, taking into account the economic cycle on the basis of a procedure for adjusting the cycle together with the control and balancing of deviations of actual borrowing from the credit limit, requires a federal law. In cases of natural catastrophes or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity, these credit limits may be exceeded on the basis of a decision taken by a majority of the Members of the Bundestag. The decision must be combined with an amortisation plan. Repayment of the credits borrowed under the sixth sentence must be accomplished within an appropriate period of time.

Xa. State of Defence

Article 115a [Declaration of a state of defence]

(1) Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defence) shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the Bundestag.

(2) If the situation imperatively calls for immediate action and if insurmountable obstacles prevent the timely convening of the Bundestag or the Bundestag cannot muster a quorum, the Joint Committee shall make this determination by a two-thirds majority of the votes cast, which shall include at least a majority of its members.

(3) The determination shall be promulgated by the Federal President in the Federal Law Gazette pursuant to Article 82. If this cannot be done in time, promulgation shall be effected in another manner; the determination shall be printed in the Federal Law Gazette as soon as circumstances permit.

(4) If the federal territory is under attack by armed force, and if the competent federal authorities are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, the determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce that time as soon as circumstances permit.

(5) If the determination of a state of defence has been promulgated, and if the federal territory is under attack by armed force, the Federal President, with the consent of the Bundestag, may issue declarations under international law regarding the existence of the state of defence. Under the conditions specified in paragraph (2) of this Article, the Joint Committee shall act in place of the Bundestag.

Article 115b [Power of command of the Federal Chancellor]

Upon the promulgation of a state of defence the power of command over the Armed Forces shall pass to the Federal Chancellor.

Article 115c [Extension of the legislative powers of the Federation]

(1) The Federation shall have the right to legislate concurrently for a state of defence even with respect to matters within the legislative powers of the *Länder*. Such laws shall require the consent of the Bundesrat.

(2) To the extent required by circumstances during a state of defence, a federal law for a state of defence may:

1. make temporary provisions concerning compensation in the event of expropriation that deviate from the requirements of the second sentence of paragraph (3) of Article 14;

2. establish a time limit for deprivations of freedom different from that specified in the third sentence of paragraph (2) and the first sentence of paragraph (3) of Article 104, but not exceeding four days, for cases in which no judge has been able to act within the time limit that normally applies.

(3) To the extent necessary to repel an existing or imminently threatened attack, a federal law for a state of defence may, with the consent of the Bundesrat, regulate the administration and finances of the Federation and the *Länder* without regard to Titles VIII, VIIIa and X of this Basic Law, provided that the viability of the *Länder*, municipalities, and associations of municipalities, especially with respect to financial matters, is assured.

(4) Federal laws enacted pursuant to paragraph (1) or item 1 of paragraph (2) of this Article may, for the purpose of preparing for their enforcement, be applied even before a state of defence arises.

Article 115d [Urgent bills]

(1) During a state of defence the federal legislative process shall be governed by the provisions of paragraphs (2) and (3) of this Article without regard to the provisions of paragraph (2) of Article 76, the second sentence of paragraph (1) and paragraphs (2) to (4) of Article 77, Article 78 and paragraph (1) of Article 82.

(2) Federal Government bills that the Government designates as urgent shall be forwarded to the Bundesrat at the same time as they are submitted to the Bundestag. The Bundestag and the Bundesrat shall debate such bills in joint session without delay. Insofar

as the consent of the Bundesrat is necessary for any such bill to become law, a majority of its votes shall be required. Details shall be regulated by rules of procedure adopted by the Bundestag and requiring the consent of the Bundesrat.

(3) The second sentence of paragraph (3) of Article 115a shall apply to the promulgation of such laws, *mutatis mutandis*.

Article 115e [Joint Committee]

(1) If, during a state of defence, the Joint Committee by a two-thirds majority of the votes cast, which shall include at least a majority of its members, determines that insurmountable obstacles prevent the timely convening of the Bundestag or that the Bundestag cannot muster a quorum, the Joint Committee shall occupy the position of both the Bundestag and the Bundesrat and shall exercise their powers as a single body.

(2) This Basic Law may neither be amended nor abrogated nor suspended in whole or in part by a law enacted by the Joint Committee. The Joint Committee shall have no power to enact laws pursuant to the second sentence of paragraph (1) of Article 23, paragraph (1) of Article 24 or Article 29.

Article 115f [Use of Federal Border Police – Extended powers of instruction]

(1) During a state of defence the Federal Government, to the extent that circumstances require, may:

1. employ the Federal Border Police throughout the federal territory;

2. issue instructions not only to federal administrative authorities but also to *Land* governments and, if it deems the matter urgent, to *Land* authorities and may delegate this power to members of *Land* governments designated by it.

(2) The Bundestag, the Bundesrat and the Joint Committee shall be informed without delay of the measures taken in accordance with paragraph (1) of this Article.

Article 115g [Federal Constitutional Court]

Neither the constitutional status nor the performance of the constitutional functions of the Federal Constitutional Court or its judges may be impaired. The law governing the Federal Constitutional Court may be amended by a law enacted by the Joint Committee only insofar as the Federal Constitutional Court agrees is necessary to ensure that it can continue to perform its functions. Pending the enactment of such a law, the Federal Constitutional Court may take such measures as are necessary to this end. Determinations by the Federal Constitutional Court pursuant to the second and third sentences of this Article shall be made by a majority of the judges present.

Article 115h [Expiry of electoral terms and terms of office]

(1) Any electoral terms of the Bundestag or of parliamentary assemblies of the *Länder* that are due to expire during a state of defence shall end six months after the termination of the state of defence. A term of office of the Federal President that is due to expire

during a state of defence and the exercise of his functions by the President of the Bundesrat in case of the premature vacancy of his office shall end nine months after the termination of the state of defence. The term of office of a member of the Federal Constitutional Court that is due to expire during a state of defence shall end six months after the termination of the state of defence.

(2) Should it be necessary for the Joint Committee to elect a new Federal Chancellor, it shall do so by the votes of a majority of its members; the Federal President shall propose a candidate to the Joint Committee. The Joint Committee may express its lack of confidence in the Federal Chancellor only by electing a successor by a twothirds majority of its members.

(3) The Bundestag shall not be dissolved while a state of defence exists.

Article 115i [Powers of the Land governments]

(1) If the competent federal bodies are not in a position to take the measures necessary to avert the danger, and if the situation imperatively calls for immediate independent action in particular areas of the federal territory, the *Land* governments or the authorities or representatives they designate shall be authorised, within their respective spheres of competence, to take the measures provided for in paragraph (1) of Article 115f.

(2) Any measures taken in accordance with paragraph (1) of this Article may be rescinded at any time by the Federal Government, or, with respect to *Land* authorities and subordinate federal authorities, by Minister-Presidents of the *Länder*.

Article 115k [Rank and duration of emergency provisions]

(1) Laws enacted in accordance with Articles 115c, 115e and 115g, as well as statutory instruments issued on the basis of such laws, shall suspend the operation of incompatible law so long as they are in effect. This provision shall not apply to earlier law enacted pursuant to Articles 115c, 115e or 115g.

(2) Laws adopted by the Joint Committee, as well as statutory instruments issued on the basis of such laws, shall cease to have effect no later than six months after the termination of a state of defence.

(3) Laws containing provisions that diverge from Articles 91a, 91b, 104a, 106 and 107 shall apply no longer than the end of the second fiscal year following the termination of a state of defence. After such termination they may, with the consent of the Bundesrat, be amended by a federal law so as to revert to the provisions of Titles VIIIa and X.

Article 115l [Repeal of emergency measures – Conclusion of peace]

(1) The Bundestag, with the consent of the Bundesrat, may at any time repeal laws enacted by the Joint Committee. The Bundesrat may demand that the Bundestag reach a decision on this question. Any measures taken by the Joint Committee or by the Federal Government to avert a danger shall be rescinded if the Bundestag and the Bundesrat so decide.

(2) The Bundestag, with the consent of the Bundesrat, may at any time, by a decision to be promulgated by the Federal President, declare a state of defence terminated. The Bundesrat may demand that the Bundestag reach a decision on this question. A state of defence shall be declared terminated without delay if the conditions for determining it no longer exist.

(3) The conclusion of peace shall be determined by a federal law.

XI. Transitional and Concluding Provisions

Article 116 [Definition of "German" – Restoration of citizenship]

(1) Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person.

(2) Former German citizens who, between 30 January 1933 and 8 May 1945, were deprived of their citizenship on political, racial or religious grounds and their descendants shall, on application, have their citizenship restored. They shall be deemed never to have been deprived of their citizenship if they have established their domicile in Germany after 8 May 1945 and have not expressed a contrary intention.

Article 117 [Suspended entry into force of two basic rights]

(1) Law which is inconsistent with paragraph (2) of Article 3 of this Basic Law shall remain in force until adapted to that provision, but not beyond 31 March 1953.

(2) Laws that restrict freedom of movement in view of the present accommodation shortage shall remain in force until repealed by a federal law.

Article 118 [New delimitation of Baden and Württemberg]

The division of the territory comprising Baden, Württemberg-Baden and Württemberg-Hohenzollern into *Länder* may be revised, without regard to the provisions of Article 29, by agreement between the *Länder* concerned. If no agreement is reached, the revision shall be effected by a federal law, which shall provide for an advisory referendum.

Article 118a [New delimitation of Berlin and Brandenburg]

The division of the territory comprising Berlin and Brandenburg into *Länder* may be revised, without regard to the provisions of Article 29, by agreement between the two *Länder* with the participation of their inhabitants who are entitled to vote.

Article 119 [Refugees and expellees]

In matters relating to refugees and expellees, especially as regards their distribution among the *Länder*, the Federal Government, with the consent of the Bundesrat, may issue statutory instruments having the force of law, pending settlement of the matter by a federal law. In this

connection the Federal Government may be authorised to issue individual instructions in particular cases. Unless time is of the essence, such instructions shall be addressed to the highest *Land* authorities.

Article 120 [Occupation costs – Burdens resulting from the war]

(1) The Federation shall finance the expenditures for occupation costs and other internal and external burdens resulting from the war, as regulated in detail by federal laws. To the extent that these war burdens were regulated by federal laws on or before 1 October 1969, the Federation and the *Länder* shall finance such expenditures in the proportion established by such federal laws. Insofar as expenditures for such of these war burdens as neither have been nor will be regulated by federal laws were met on or before 1 October 1965 by *Länder*, municipalities (associations of municipalities) or other entities performing functions of the *Länder* or municipalities, the Federation shall not be obliged to finance them even after that date. The Federation shall be responsible for subsidies towards meeting the costs of social security, including unemployment insurance and public assistance to the unemployed. The distribution of war burdens between the Federation and the *Länder* prescribed by this paragraph shall not be construed to affect any law regarding claims for compensation for consequences of the war.

(2) Revenue shall pass to the Federation at the time it assumes responsibility for the expenditures referred to in this Article.

Article 120a [Equalisation of burdens]

(1) Laws implementing the equalisation of burdens may, with the consent of the Bundesrat, provide that, with respect to equalisation payments, they shall be executed partly by the Federation and partly by the *Länder* acting on federal commission and that the relevant powers vested in the Federal Government and the competent highest federal authorities by virtue of Article 85 shall be wholly or partly delegated to the Federal Equalisation of Burdens Office. In exercising these powers, the Federal Equalisation of Burdens Office shall not require the consent of the Bundesrat; except in urgent cases, its instructions shall be given to the highest *Land* authorities (*Land* Equalisation of Burdens Offices).

(2) The second sentence of paragraph (3) of Article 87 shall not be affected by this provision.

Article 121 [Definition of "majority of the members"]

Within the meaning of this Basic Law, a majority of the Members of the Bundestag and a majority of the members of the Federal Convention shall be a majority of the number of their members specified by a law.

Article 122 [Date of transmission of legislative powers]

(1) From the date on which the Bundestag first convenes, laws shall be enacted only by the legislative bodies recognised by this Basic Law.

(2) Legislative bodies and institutions participating in the legislative process in an advisory capacity whose competence expires by virtue of paragraph (1) of this Article shall be dissolved as of that date.

Article 123 [Continued applicability of pre-existing law]

(1) Law in force before the Bundestag first convenes shall remain in force insofar as it does not conflict with this Basic Law.

(2) Subject to all rights and objections of interested parties, treaties concluded by the German Reich concerning matters within the legislative competence of the *Länder* under this Basic Law shall remain in force, provided they are and continue to be valid under general principles of law, until new treaties are concluded by the authorities competent under this Basic Law or until they are in some other way terminated pursuant to their provisions.

Article 124 [Continued applicability of law within the scope of exclusive legislative power]

Law regarding matters subject to the exclusive legislative power of the Federation shall become federal law in the area in which it applies.

Article 125 [Continued applicability of law within the scope of concurrent legislative power]

Law regarding matters subject to the concurrent legislative power of the Federation shall become federal law in the area in which it applies:

1. insofar as it applies uniformly within one or more occupation zones;
2. insofar as it is law by which former Reich law has been amended since 8 May 1945.

Article 125a [Continued applicability of federal law – Replacement by Land law]

(1) Law that was enacted as federal law but that, by virtue of the amendment of paragraph (1) of Article 74, the insertion of the seventh sentence of paragraph (1) of Article 84, of the second sentence of paragraph (1) of Article 85 or of the second sentence of paragraph (2a) of Article 105 or because of the repeal of Articles 74a, 75 or the second sentence of paragraph (3) of Article 98, could no longer be enacted as federal law shall remain in force as federal law. It may be superseded by *Land* law.

(2) Law that was enacted pursuant to paragraph (2) of Article 72 as it stood up to 15 November 1994 but which, because of the amendment of paragraph (2) of Article 72, could no longer be enacted as federal law shall remain in force as federal law. A federal law may provide that it may be superseded by *Land* law.

(3) Law that has been enacted as *Land* law but which, because of the amendment of Article 73, could not be enacted any longer as *Land* law shall continue in force as *Land* law. It may be superseded by federal law.

Article 125b [Continued applicability of framework laws – Deviation power of the Länder]

(1) Law that was enacted pursuant to Article 75 as it stood up to 1 September 2006 and which could be enacted as federal law even after this date shall remain in force as federal law. The powers and duties of the *Länder* to legislate shall, in this regard, remain unaffected. In the areas referred to in the first sentence of paragraph (3) of Article 72 the *Länder* may enact regulations that deviate from this law; however, in those areas covered by items 2, 5 and 6 of the first sentence of Article 72 the *Länder* may do so only if and insofar as the Federation has made use of its power to legislate after 1 September 2006, in those areas covered by items 2 and 5 beginning at the latest on 1 January 2010, in cases under item 6 beginning at the latest on 1 August 2008.

(2) The *Länder* may enact regulations derogating from federal regulations enacted pursuant to paragraph (1) of Article 84 as it stood up to 1 September 2006; up to 31 December 2008, however, they may derogate from regulations on administrative procedure only if, after 1 September 2006, regulations on administrative procedure in the relevant federal law have been amended.

Article 125c [Continued applicability of law within the scope of joint tasks]

(1) Law that was enacted by virtue of paragraph (2) of Article 91a in conjunction with item 1 of paragraph (1) as it stood up to 1 September 2006 shall continue in force until 31 December 2006.

(2) The rules enacted in the areas of municipal transport financing and promotion of social housing by virtue of paragraph (4) of Article 104a as it stood up to 1 September 2006 shall remain in force until 31 December 2006. The rules enacted on municipal transport financing for special programmes pursuant to paragraph (1) of section 6 of the Municipal Transport Infrastructure Financing Act, as well as the other rules enacted by the Act of 20 December 2001 governing the Federal Financing of Seaports in Bremen, Hamburg, Mecklenburg-Western Pomerania, Lower Saxony and Schleswig-Holstein under paragraph (4) of Article 104a of the Basic Law as it stood up to 1 September 2006 shall continue in force until their repeal. Amendment of the Municipal Transport Infrastructure Financing Act shall be permissible. The fourth sentence of paragraph (2) of Article 104b shall apply, *mutatis mutandis*. The other rules enacted in accordance with paragraph (4) of Article 104a of the Basic Law as it stood up to 1 September 2006 shall continue in force until 31 December 2019, provided no earlier repeal has been or is determined.

(3) The fifth sentence of paragraph (2) of Article 104b shall apply for the first time to regulations that enter into force after 31 December 2019.

Article 126 [Determination about continued applicability of law as federal law]

Disagreements concerning the continued applicability of law as federal law shall be resolved by the Federal Constitutional Court.

Article 127 [Extension of law to the French zone and to Berlin]

Within one year after promulgation of this Basic Law the Federal Government, with the consent of the governments of the *Länder* concerned, may extend to the *Länder* of Baden, Greater Berlin, Rhineland-Palatinate and Württemberg-Hohenzollern any law of the Administration of the Combined Economic Area, insofar as it remains in force as federal law under Article 124 or 125.

Article 128 [Continued authority to issue instructions]

Insofar as law that remains in force grants authority to issue instructions within the meaning of paragraph (5) of Article 84, this authority shall remain in existence until a law otherwise provides.

Article 129 [Continued authority to issue legal acts]

(1) Insofar as legal provisions that remain in force as federal law grant authority to issue statutory instruments or general administrative rules or to make administrative decisions in individual cases, such powers shall pass to the authorities that henceforth have competence over the subject matter. In cases of doubt the Federal Government shall decide in agreement with the Bundesrat; such decisions shall be published.

(2) Insofar as legal provisions that remain in force as *Land* law grant such authority, it shall be exercised by the authorities competent under *Land* law.

(3) Insofar as legal provisions within the meaning of paragraphs (1) and (2) of this Article grant authority to amend or supplement the provisions themselves or to issue legal provisions that have the force of laws, such authority shall be deemed to have expired.

(4) The provisions of paragraphs (1) and (2) of this Article shall apply, *mutatis mutandis*, to legal provisions that refer to provisions no longer in force or to institutions no longer in existence.

Article 130 [Transfer of existing administrative institutions]

(1) Administrative agencies and other institutions that serve the public administration or the administration of justice and are not based on *Land* law or on agreements between *Länder*, as well as the Administrative Union of South West German Railways and the Administrative Council for Postal and Telecommunications Services for the French Occupation Zone, shall be placed under the control of the Federal Government. The Federal Government, with the consent of the Bundesrat, shall provide for their transfer, dissolution or liquidation.

(2) The supreme disciplinary authority for the personnel of these administrative bodies and institutions shall be the competent Federal Minister.

(3) Corporations and institutions under public law not directly subordinate to a *Land* nor based on agreements between *Länder* shall be under the supervision of the competent highest federal authority.

Article 131 [Persons formerly in the public service]

The legal relations of persons, including refugees and expellees, who on 8 May 1945 were employed in the public service, have left the service for reasons other than those recognised by civil service regulations or collective bargaining agreements and have not yet been reinstated or are employed in positions that do not correspond to those they previously held shall be regulated by a federal law. The same shall apply, *mutatis mutandis*, to persons, including refugees and expellees, who on 8 May 1945 were entitled to pensions and related benefits and who for reasons other than those recognised by civil service regulations or collective bargaining agreements no longer receive any such pension or related benefits. Until the pertinent federal law takes effect, no legal claims may be made, unless *Land* law otherwise provides.

Article 132 [Retirement of civil servants]

(1) Civil servants and judges who enjoy life tenure when this Basic Law takes effect may, within six months after the Bundestag first convenes, be retired, suspended or transferred to lower-salaried positions if they lack the personal or professional aptitude for their present positions. This provision shall apply, *mutatis mutandis*, to salaried public employees other than civil servants or judges whose employment cannot be terminated at will. In the case of salaried employees whose employment may be terminated at will, notice periods longer than those set by collective bargaining agreements may be rescinded within the same period.

(2) The preceding provision shall not apply to members of the public service who are unaffected by the provisions regarding "Liberation from National Socialism and Militarism" or who are recognised victims of National Socialism, save on important personal grounds.

(3) Persons affected may have recourse to the courts in accordance with paragraph (4) of Article 19.

(4) Details shall be specified by a statutory instrument issued by the Federal Government with the consent of the Bundesrat.

Article 133 [Succession to the Administration of the Combined Economic Area]

The Federation shall succeed to the rights and duties of the Administration of the Combined Economic Area.

Article 134 [Succession to Reich assets]

(1) Reich assets shall, in principle, become federal assets.

(2) Insofar as such assets were originally intended to be used principally for administrative tasks not entrusted to the Federation under this Basic Law, they shall be transferred without compensation to the authorities now entrusted with such tasks, and to the extent that such assets are now being used, not merely temporarily, for administrative tasks that under this Basic Law are now performed by the *Länder*, they shall be transferred to the *Länder*. The Federation may also transfer other assets to the *Länder*.

(3) Assets that were placed at the disposal of the Reich without compensation by *Länder* or municipalities (associations of municipalities) shall revert to those *Länder* or municipalities (associations of municipalities) insofar as the Federation does not require them for its own administrative purposes.

(4) Details shall be regulated by a federal law requiring the consent of the Bundesrat.

Article 135 [Assets in case of territorial changes between the Länder]

(1) If, after 8 May 1945 and before the effective date of this Basic Law, an area has passed from one *Land* to another, the *Land* to which the area now belongs shall be entitled to the assets of the *Land* to which it previously belonged that are located in that area.

(2) The assets of *Länder* or of other corporations or institutions established under public law that no longer exist, insofar as they were originally intended to be used principally for administrative tasks or are now being so used, not merely temporarily, shall pass to the *Land*, corporation or institution that now performs those tasks.

(3) Real property of *Länder* that no longer exist, including appurtenances, shall pass to the *Land* within which it is located, insofar as it is not among the assets already referred to in paragraph (1) of this Article.

(4) Insofar as an overriding interest of the Federation or the particular interest of a region requires, a federal law may depart from the rules prescribed by paragraphs (1) to (3) of this Article.

(5) In all other respects, the succession to and disposition of assets, insofar as it has not been effected before 1 January 1952 by agreement between the affected *Länder* or corporations or institutions established under public law, shall be regulated by a federal law requiring the consent of the Bundesrat.

(6) Holdings of the former *Land* of Prussia in enterprises established under private law shall pass to the Federation. Details shall be regulated by a federal law, which may also depart from this provision.

(7) Insofar as assets that, on the effective date of this Basic Law, would devolve upon a *Land* or a corporation or institution established under public law pursuant to paragraphs (1) to (3) of this Article have been disposed of by or pursuant to a *Land* law or in any other manner by the party thus entitled, the transfer of assets shall be deemed to have taken place before such disposition.

Article 135a [Old debts]

(1) Federal legislation enacted pursuant to paragraph (4) of Article 134 or paragraph (5) of Article 135 may also provide that the following debts shall not be discharged, or that they shall be discharged only in part:

1. debts of the Reich, of the former *Land* of Prussia, or of such other corporations and institutions established under public law as no longer exist;

2. such debts of the Federation or of corporations and institutions established under public law as are connected with the transfer of assets pursuant to Article 89, 90, 134 or 135 and such debts of these bodies as arise from measures taken by the bodies designated in item 1;

3. such debts of the *Länder* or municipalities (associations of municipalities) as have arisen from measures taken by them before 1 August 1945 within the framework of administrative functions incumbent upon or delegated by the Reich to comply with orders of the occupying powers or to terminate a state of emergency resulting from the war.

(2) Paragraph (1) of this Article shall apply, *mutatis mutandis*, to debts of the German Democratic Republic or its institutions as well as to debts of the Federation or other corporations and institutions established under public law that are connected with the transfer of assets of the German Democratic Republic to the Federation, *Länder* or municipalities, and to debts arising from measures taken by the German Democratic Republic or its institutions.

Article 136 [First convening of the Bundesrat]

(1) The Bundesrat shall convene for the first time on the day on which the Bundestag first convenes.

(2) Until the election of the first Federal President, his powers shall be exercised by the President of the Bundesrat. He shall not have authority to dissolve the Bundestag.

Article 137 [Right of state employees to stand for election]

(1) The right of civil servants, other salaried public employees, professional or volunteer members of the Armed Forces and judges to stand for election in the Federation, in the *Länder* or in the municipalities may be restricted by a law.

(2) The election of the first Bundestag, of the first Federal Convention and of the first Federal President shall be governed by an electoral law to be enacted by the Parliamentary Council.

(3) Until the Federal Constitutional Court is established, its authority under paragraph (2) of Article 41 shall be exercised by the German High Court for the Combined Economic Area, which shall make determinations in accordance with its procedural rules.

Article 138 [South German notaries]

Changes in the rules governing the notarial profession as it now exists in the *Länder* of Baden, Bavaria, Württemberg-Baden and Württemberg-Hohenzollern shall require the consent of the governments of these *Länder*.

Article 139 [Continued applicability of denazification provisions]

The legal provisions enacted for the "Liberation of the German People from National Socialism and Militarism" shall not be affected by the provisions of this Basic Law.

Article 140 [Law of religious denominations]

The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be an integral part of this Basic Law.

Article 141 ["Bremen Clause"]

The first sentence of paragraph (3) of Article 7 shall not apply in any *Land* in which *Land* law otherwise provided on 1 January 1949.

Article 142 [Reservation in favour of basic rights in Land constitutions]

Notwithstanding Article 31, provisions of *Land* constitutions shall also remain in force insofar as they guarantee basic rights in conformity with Articles 1 to 18 of this Basic Law.

Article 142a [Repealed]

Article 143 [Duration of derogations from the Basic Law]

(1) The law in the territory specified in Article 3 of the Unification Treaty may derogate from provisions of this Basic Law for a period extending no later than 31 December 1992 insofar and so long as disparate circumstances make full compliance impossible. Derogations may not violate paragraph (2) of Article 19 and must be compatible with the principles specified in paragraph (3) of Article 79.

(2) Derogations from Titles II, VIII, VIIIa, IX, X and XI shall be permissible for a period extending to no later than 31 December 1995.

(3) Independently of paragraphs (1) and (2) of this Article, Article 41 of the Unification Treaty and the rules for its implementation shall also remain in effect insofar as they provide for the irreversibility of acts interfering with property rights in the territory specified in Article 3 of this Treaty.

Article 143a [Exclusive legislative power concerning federal railways]

(1) The Federation shall have exclusive power to legislate with respect to all matters arising from the transformation of federal railways administered by the Federation into business enterprises. Paragraph (5) of Article 87e shall apply, *mutatis mutandis*. Civil servants employed by federal railways may be assigned by a law to render services to federal railways established under private law without prejudice to their legal status or the responsibility of their employer.

(2) Laws enacted pursuant to paragraph (1) of this Article shall be executed by the Federation.

(3) The Federation shall continue to be responsible for local passenger services of the former federal railways until 31 December 1995. The same shall apply to the corresponding functions of rail transport administration. Details shall be regulated by a federal law requiring the consent of the Bundesrat.

Article 143b [Transformation of the Deutsche Bundespost]

(1) The special trust Deutsche Bundespost shall be transformed into enterprises under private law in accordance with a federal law. The Federation shall have exclusive power to legislate with respect to all matters arising from this transformation.

(2) The exclusive rights of the Federation existing before the transformation may be transferred by a federal law for a transitional period to the enterprises that succeed to the Deutsche Bundespost Postdienst and to the Deutsche Bundespost Telekom. The Federation may not surrender its majority interest in the enterprise that succeeds to the Deutsche Bundespost Postdienst until at least five years after the law takes effect. To do so shall require a federal law with the consent of the Bundesrat.

(3) Federal civil servants employed by the Deutsche Bundespost shall be given positions in the private enterprises that succeed to it, without prejudice to their legal status or the responsibility of their employer. The enterprises shall exercise the employer's authority. Details shall be regulated by a federal law.

Article 143c [Compensation for the cessation of joint tasks]

(1) From 1 January 2007 until 31 December 2019, the *Länder* shall be entitled to receive annual payments from the federal budget as compensation for losing the Federation's financial contributions resulting from the abolition of the joint tasks of extension and construction of institutions of higher education, including university hospitals and educational planning, as well as for losing financial assistance for the improvement of municipal traffic infrastructure and for the promotion of social housing. Until 31 December 2013, these amounts are to be determined by averaging the financial share of the Federation for the years 2000 to 2008.

(2) Until 31 December 2013, the payments pursuant to paragraph (1) shall be distributed among the *Länder* in the form of:

1. fixed annual payments the amounts of which shall be determined according to the average share of each *Land* during the period 2000 to 2003;

2. payments earmarked for the functional area of the former joint financing.

(3) Until the end of 2013, the Federation and the *Länder* shall review the extent to which the financing allotted to individual *Länder* pursuant to paragraph (1) is still appropriate and necessary for the discharge of their tasks. Beginning on 1 January 2014, the earmarking pursuant to item 2 of paragraph (2) of the financial means allotted under paragraph (1) shall cease; the earmarking for the volume of the means for investment purposes shall remain unchanged. Agreements resulting from Solidarity Pact II shall remain unaffected.

(4) Details shall be regulated by a federal law which shall require the consent of the Bundesrat.

Article 143d [Transitional provisions relating to consolidation assistance]

(1) Articles 109 and 115 in the version in force until 31 July 2009 shall apply for the last time to the 2010 budget. Articles 109 and 115 in the version in force as from 1 August 2009 shall apply for the first time to the 2011 budget; debit authorisations existing on 31 December 2010 for special trusts already established shall remain unaffected. In the period from 1 January 2011 to 31 December 2019, the *Länder* may, in accordance with their applicable legal regulations, derogate from the provisions of paragraph (3) of Article 109. The budgets of the *Länder* are to be planned in such a way that the 2020 budget fulfils the requirements of the fifth sentence of paragraph (3) of Article 109. In the period from 1 January 2011 to 31 December 2015, the Federation may derogate from the provisions of the second sentence of paragraph (2) of Article 115. The reduction of the existing deficits should begin with the 2011 budget. The annual budgets are to be planned in such a way that the 2016 budget satisfies the requirement of the second sentence of paragraph (2) of Article 115; details shall be regulated by federal law.

(2) As assistance for compliance with the provisions of paragraph (3) of Article 109 after 1 January 2020, the *Länder* of Berlin, Bremen, Saarland, Saxony-Anhalt and Schleswig-Holstein may receive, for the period 2011 to 2019, consolidation assistance from the federal budget in the global amount of 800 million euros annually. The respective amounts are 300 million euros for Bremen, 260 million euros for Saarland and 80 million euros each for Berlin, Saxony-Anhalt, and Schleswig-Holstein. The assistance payments shall be allocated on the basis of an administrative agreement under the terms of a federal law requiring the consent of the Bundesrat. These grants require a complete reduction of financial deficits by the end of 2020. The details, especially the annual steps to be taken to reduce financial deficits and the supervision of the reduction of financial deficits by the Stability Council, along with theconsequences entailed in case of failure to carry out the step-by-step reduction, shall be regulated by a federal law requiring the consent of the Bundesrat and by an administrative agreement. Consolidation assistance shall not be granted concurrently with redevelopment assistance awarded on the grounds of an extreme budgetary emergency.

(3) The financial burden resulting from the granting of the consolidation assistance shall be borne equally by the Federation and the *Länder*, to be financed from their share of revenue from the turnover tax. Details shall be regulated by a federal law requiring the consent of the Bundesrat.

(4) As assistance for future autonomous compliance with the provisions of paragraph (3) of Article 109, the *Länder* of Bremen and Saarland may receive redevelopment assistance from the federal budget in the global amount of 800 million euros annually from 1 January 2020. To this end, the *Länder* shall adopt measures to reduce excessive debts and to strengthen their economic and financial capacity. Details shall be regulated by a

federal law requiring the consent of the Bundesrat. This redevelopment assistance shall not be granted concurrently with redevelopment assistance awarded on the grounds of an extreme budgetary emergency.

Article 143e [Federal motorways, transformation of commissioned administration]

(1) Notwithstanding the provisions of paragraph (2) of Article 90, the federal motorways shall be administered on federal commission by the *Länder* or such self-governing bodies as are competent under *Land* law until no later than 31 December 2020. The Federation shall regulate the transformation from commissioned administration to federal administration under paragraphs (2) and (4) of Article 90 by means of a federal law requiring the consent of the Bundesrat.

(2) At the request of a *Land*, to be made by 31 December 2018, the Federation, notwithstanding the provisions of paragraph (2) of Article 90, shall assume administrative responsibility for the other federal trunk roads, insofar as they lie within the territory of that *Land*, with effect from 1 January 2021.

(3) By a federal law with the consent of the Bundesrat, it may be regulated that a *Land*, upon application, takes over, on commission of the Federation, the function of administering plan approval and planning permission for the construction and alteration of federal motorways and other federal trunk roads for which the Federation has assumed administrative responsibility under paragraph (4) of Article 90 or paragraph (2) of Article 143e and on what conditions this function may be transferred back.

Article 143f [Financial relations within the federal system of government]

Article 143d, the Act regulating Revenue Sharing between the Federation and the *Länder* (Financial Equalisation Act) and other laws enacted on the basis of paragraph (2) of Article 107 as it stands from 1 January 2020 shall expire if, after 31 December 2030, the Federal Government, the Bundestag or at least three *Länder* acting jointly have requested negotiations on a restructuring of financial relations within the federal system of government and, when five years have elapsed since the Federal President was notified of the negotiation request made by the Federal Government, the Bundestag or the *Länder*, no statutory restructuring of financial relations within the federal system of government has entered into force. The expiry date shall be published in the Federal Law Gazette.

Article 143g [Continued applicability of Article 107]

For the regulation of the distribution of tax revenue, of financial equalisation between *Länder* and of federal supplementary grants, Article 107 as it stood until the entry into force of the Basic Law Amendment Act of 13 July 2017 shall continue to be applied until 31 December 2019.

Article 144 [Ratification of the Basic Law – Berlin]

(1) This Basic Law shall require ratification by the parliaments of two thirds of the German *Länder* in which it is initially to apply.

(2) Insofar as the application of this Basic Law is subject to restrictions in any *Land* listed in Article 23 or in any part thereof, such *Land* or part thereof shall have the right to send representatives to the Bundestag in accordance with Article 38 and to the Bundesrat in accordance with Article 50.

Article 145 [Entry into force of the Basic Law]

(1) The Parliamentary Council, with the participation of the members for Greater Berlin, shall confirm the ratification of this Basic Law in public session and shall certify and promulgate it.

(2) This Basic Law shall take effect at the end of the day on which it is promulgated.

(3) It shall be published in the Federal Law Gazette.

Article 146 [Duration of the Basic Law]

This Basic Law, which, since the achievement of the unity and freedom of Germany, applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.

Appendix to the Basic Law

Extracts from the German Constitution of August 11, 1919 [Weimar Constitution]

Religion and Religious Societies

Article 136

(1) Civil and political rights and duties shall be neither dependent upon nor restricted by the exercise of religious freedom.

(2) Enjoyment of civil and political rights and eligibility for public office shall be independent of religious affiliation.

(3) No person shall be required to disclose his religious convictions. The authorities shall have the right to inquire into a person's membership of a religious society only to the extent that rights or duties depend upon it or that a statistical survey mandated by a law so requires.

(4) No person may be compelled to perform any religious act or ceremony, to participate in religious exercises or to take a religious form of oath.

Article 137

(1) There shall be no state church.

(2) The freedom to form religious societies shall be guaranteed. The union of religious societies within the territory of the Reich shall be subject to no restrictions.

(3) Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community.

(4) Religious societies shall acquire legal capacity according to the general provisions of civil law.

(5) Religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same rights upon application, if their constitution and the number of their members give assurance of their permanency. If two or more religious societies established under public law unite into a single organisation, it too shall be a corporation under public law.

(6) Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with *Land* law.

(7) Associations whose purpose is to foster a philosophical creed shall have the same status as religious societies.

(8) Such further regulation as may be required for the implementation of these provisions shall be a matter for *Land* legislation.

Article 138

(1) Rights of religious societies to public subsidies on the basis of a law, contract or special grant shall be redeemed by legislation of the *Länder*. The principles governing such redemption shall be established by the Reich.

(2) Property rights and other rights of religious societies or associations in their institutions, foundations and other assets intended for purposes of worship, education or charity shall be guaranteed.

Article 139

Sunday and holidays recognised by the state shall remain protected by law as days of rest from work and of spiritual improvement.

Article 141

To the extent that a need exists for religious services and pastoral work in the army, in hospitals, in prisons or in other public institutions, religious societies shall be permitted to provide them, but without compulsion of any kind.

INTRODUCTION TO GERMAN CONSTITUTIONAL LAW AND THE DOCTRINE OF BASIC RIGHTS

By Jürgen Bröhmer

I. Introduction

1. Brief Historical Context

When on 23 May 1949, the Basic Law of the new Federal Republic of Germany came into effect the new country still lay largely in ruins. The ruins were not only of bricks and mortar. Perhaps more importantly, there was the complete moral devastation the country had experienced between 1933 and 1945. How was it possible that a proud nation, the home of countless thinkers, scientists and artists, a country with one of the most educated general populations at the time became one of the most barbaric nations the world ever had to endure? To create a governmental order that safeguards future generations from unrestrained rampages of evil was the primary goal of the 61 fathers and four mothers of the Basic Law. Much if not all that happens and has happened in Germany, from subsequent constitutional reforms to the terror years of the Red Army Faction, from Germany's reunification in 1990 to Germany's participation in the development of the European Union, from the federal structure of Germany to the special role of its Constitutional Court can only be understood against the historical background of the annihilation brought onto others and self between 1933 and 1945. The Basic Law is the child of this catastrophe.

The Basic Law is also a child of the Allied Powers and the occupational power exercised by them in Germany after the end of World War II in 1945. Soon it became clear that the emerging cold war between the western powers, i.e., the USA, United Kingdom, and France on the one side and the Soviet Union on the other would make any solution for Germany as a whole, impossible for the time being. As a result, the western powers, together with Germany's neighboring countries, Belgium, The Netherlands and Luxembourg held a conference in London in 1948.[1] This conference brought about the Frankfurt Documents which contained some ground rules for a new post-war constitution for what was to become West Germany in 1949, the institutional framework for its adoption including the prescription of a constitutional assembly as well as principles for the relationship of the new state to be formed and the western allied powers.

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1 See documents provided by Department of State, Office of the Historian, Foreign Relations of the united States, 1948, Germany and Austria, Volume II, I. The London Conference on Germany, https://history.state.gov/historicaldocuments/frus1948v02/comp1 and II. Implementation of the Recommendations of the London Conference on Germany, https://history.state.gov/historicaldocuments/frus1948v02/comp2 (last accessed 15.9.2019).

70 Years German Basic Law
The German Constitution and its Court

The Parliamentary Council was the constitutional assembly created based on the allied blueprint communicated in the Frankfurt Documents. It met for the first time in the old University City of Bonn on the banks of the Rhine River on 1 September 1948.[2] Under the Chairmanship of *Konrad Adenauer*[3], soon to become Chancellor of the Federal Republic and to remain in office for just over 14 years, 65 members altogether, 61 men and four women[4], elected to the Council by the parliaments of the 11 *Länder* (states) which were to become part of the new West-German federation and had already previously been established, and representing the political spectrum from the communist left to the national right with a solid majority for the large center-left and center-right parties[5] came together to draft the new Basic Law in less than nine months. The Basic Law was not the result of a grassroots' democratic movement in Germany. It was drafted under the close supervision of the western Allies by a group of dignitaries and experts; the broader public couldn't have cared much less at the time.[6]

The drafters did not at all intend this document to be lasting. To the contrary, they went to great length to emphasize the fact that it was merely to guide a transitional, and in that sense unwanted regime to overcome the emerging new geopolitical reality of a Germany divided by the cold war. The absence of any direct democratic legitimization of the new constitutional order and its very name - Basic Law rather than 'constitution' - together with the express stipulation of its transitional character in the original Preamble[7] and in Article 146[8] were deliberate steps taken to communicate this provisional character.

However, provisional as the document was intended to be it was from the beginning a constitution heavily drawn on the lessons to be learned from the failure of the first republican and democratic constitution of Germany, the Weimar Constitution of 1919, and from the unprecedented disregard for human dignity, life and freedom shown in the twelve years

2 Photographic impressions by Erna Wagner-Hehmke and more available at https://www.parlamentarischerrat.de/ (last accessed 15.9.2019).

3 Born 5 January 1876, died 19 April 1967; (Foundation) Federal Chancellor from 15 September 1949 to 16 October 1963.

4 Photo gallery and names available at https://www.parlamentarischerrat.de/mitglieder_891.html (last accessed 14.9.19). The four women were Frederike Nadig, Elisabeth Selbert from the Social-Democratic Party, Helene Weber from the Christian-Democrats and Helene Wessel from the Catholic Zentrum party.

5 The Christian-Democratic Union and the Social-Democratic Party held 27 seats each for a combined total 54 of the 65 seats. These two parties remained as dominant political forces. However, for several years now and growing there appeasr to be a trend that the electoral support for these two parties is slipping considerably; for the Social Democrats this is happening in dramatic fashion and not only in Germany. At the time of writing even the combined weight of these two parties could not create a majority in Parliament anymore.

6 The new Republic started with 40% of the population being indifferent to the Basic Law and only 21% interested in the new Constitution and in 1955 more than half of the population did not know about the Basic Law, see Voränder, Hans, Die Deutschen und ihre Verfassung, Aus Politik und Zeitgeschichte (APuZ) 18-19/ 2009, p. 8 at 9, http://www.bpb.de/apuz/32021/die-deutschen-und-ihre-verfassung (last accessed 15.9.2019).

7 The Preamble originally read: "Conscious of its responsibility before God and mankind, filled with the resolve to preserve its national and political unity […] the German people in the *Länder* […] enacted this Basic Law of the Federal Republic of Germany to provide a new governmental order for a transitional period." [translation by author]

8 The original language of Article 146 was: "This Basic Law shall become invalid on the day when a constitution freely adopted by the German people enters into force." [translation by author]

between 1933 and 1945. At the beginning, like a beacon of light and hope, stood and stand Articles 1 to 19 containing a catalogue of fundamental rights of freedoms and defining parameters and limits for governmental intervention in those rights and freedoms, guarded by Article 20.3 and the fundamental difference between law and justice expressed therein, by Article 79.3, which disallows any and all changes to the fundamental core principals of the Basic Law and by Article 20.4 which grants all Germans the *ultima ratio* right to resistance against those who might wish to overthrow this order.

2. Principal Structure of the Basic Law

The principal content and structure of the Basic Law largely follows what might be expected from a constitutional document. A preamble preludes followed by the first chapter "Basic Rights" extending from Article 1 through to Article 19 and complemented by procedural guarantees in Articles 101 to 104.

Article 1 is the foundation norm insofar as all basic rights and freedoms have a core that can and must be traced to human dignity and hence to an understanding of the human being that precedes the law and regards individual rights not as something bestowed upon men and women in an act of benevolent largesse by other human beings but as an inherent quality of all human beings. However, it does so without suggesting any explanation for this assumption of human dignity, leaving it to those governed by the Basic Law to come to their own conclusions, be they .law oriented or more technocratic reduced to ideas of social contracts or the like.[9]

The second chapter (Articles 20 - 37) contains a bouquet of norms under the somewhat misleading title "The Federation and the *Länder*" to do with the foundation, objectives, and purposes of the state, its relationship to international law, its participation in the development of the European Union and its internal federal structure. Article 20 is one of the core foundational norms of the Basic Law. Article 21 describes the role of political parties in the democratic process. Article 22 stipulates the colors of the German flag and, after a recent amendment, that Berlin is the capital city. Article 23 was introduced in the wake of the Maastricht Treaty on the European Union and addressed Germany's participation in the development of the European Union and some internal federal problems arising from membership in this highly integrated supranational organization. Article 24 regulates the transfer of sovereign power to international organizations outside the European Union and, for example, governs Germany's membership and collaboration in organizations of collective security such as NATO[10] and the United Nations.[11] Article 25 stipulates the precedence of norms of customary international law over domestic statutory - but not constitutional - law. Article 26 forbids any engaging in or preparation for military aggression or other action intended at disturbing international peace. Article 27 deals with the merchant fleet. Article 28 requires the constituent states to be organized in accordance with

9 For a more profound look at the legal concept of human dignity see Sourlas, Paul, Human Dignity and the Constitution, 7/1 Jurisprudence 2016, 30, https://doi.org/10.1080/20403313.2015.1066556 (last accessed 15.9.2019).

10 The North Atlantic Treaty Organization, https://www.nato.int/ (last accessed 15.9.2019).

11 See https://www.un.org/en/ (last accessed 15.9.2019).

fundamental principles of democracy and the rule of law and guarantees a meaningful standard of municipal self-government. Article 29 is one of the longest provisions of the Basic Law and prescribes detailed procedures for internal territorial restructures such as amalgamations of *Länder* or redrawing of internal borders. Article 30 stipulates the principle of enumerated powers. The federal authorities may only exercise those powers specifically assigned to them by the Basic Law and all residual powers rest with the *Länder*. This principle is repeated for the exercise of legislative power in Article 70. The refreshingly short and precise Article 31 stipulates the precedence of federal law over the law of the *Länder*. Article 32 deals with foreign affairs assigning the principal functions in this respect to the central level but leaving some powers for the *Länder* as well. Article 33 stipulates the equal citizenship rights for all German citizens regardless of what constituent *Land* they live in, demands that all citizens have equal access to public office in the civil service (to be read in conjunction with Article 36) and guarantees the independent and impartial function of the civil service. Article 34 deals with state liability for wrongful acts and Article 35 regulates legal and administrative assistance in the case of natural disasters or threats to public security. The provision currently restricts any assistance of the military forces to natural disasters which has led to calls for amending it to allow for a greater internal role of the military, for example in the case of a major terrorist attack. Article 37 gives the Federation the power to enforce the Basic Law in the *Länder* should a *Land* fail to comply with it. The provision has never been used.

The next five chapters deal with the organs of the state, their composition, principal powers, and task and other specific issues pertaining to them.

Articles 38 to 48 are concerned with the Federal Parliament, the *Bundestag*.[12] The electoral principles - general, direct, free, equal and secret elections - and the status of the deputies as independent representatives of the whole people (and not their party) and their remuneration are addressed in Articles 38 and 48[13]; the electoral term is governed by Article 39 and election oversight by Article 41. Several articles address the Committee structure of the *Bundestag* and other powers such as the power to summon members of the government. The *Bundestag* legislates its own rules of procedure, which address in detail its procedures and the rights of the individual deputies, the parliamentary groups and factions, the Committees, the conduct of hearings, debates and question times and other related issues.

Articles 50 to 53 deal with the Federal Chamber, the *Bundesrat*[14], an institution that allows the *Länder* a high degree of co-decision powers in the federal legislative process (Article 50). The *Länder* are represented in the *Bundesrat* by members of their executive branches (governments) and voting is weighted according to the size of the respective *Land* (Article 52).

12 For more information see https://www.bundestag.de/en/ (last accessed 15.9.2019).

13 The details are governed by the Federal Election Act (*Bundeswahlgesetz*), https://www.gesetze-im-internet.de/bwahlg/BJNR003830956.html (in German only; an older and not current but in some apsects perhaps still useful version in English is available at https://germanlawarchive.iuscomp.org/?p=228) and by the Act on the Legal Status of the Members of the German Bundestag (*Abgeordnetengesetz*), https://www.bundestag.de/resource/blob/189732/6e3095be7d1968201ca34bbca5c285d9/memlaw-data.pdf (last accessed 15.9.2019).

14 See https://www.bundesrat.de/EN/homepage/homepage-node.html (last accessed 15.9.2019).

Article 53a regulates the Joint Committee, a conference committee of *Bundestag* and *Bundesrat* to deal with cases of legislative deadlock, i.e., bills that were successfully passed in one house but could not muster a majority in the other and therefore require compromise negotiations.

Articles 54 to 61 spell out the status and relatively minor powers of the Federal President, the formal Head of State. Articles 62 to 69 do the same for the Federal Government, which consists of the Federal Chancellor, currently Angela Merkel of the Christian-Democratic Union, and the various government ministers (Article 62).[15] Germany is a parliamentary democracy; hence, the Chancellor is elected by the Parliament (*Bundestag*, Article 63). The Basic Law affords a constitutional leadership role to the Chancellor in deciding the principles of the political agenda of the Federal Government (Article 65) but in practice much depends on the political strength of the various players in the political arena. The *Bundestag* may elect a new chancellor by a constructive vote of no-confidence (Article 67) at any time.[16] The pathways for dissolution of the *Bundestag* and new elections outside the regular electoral term are much more restricted (Articles 67 and 68).

Chapter VII of the Basic Law deals with the legislative process and legislative powers of the federal parliament. The principal norm reflecting the underlying principle of enumerated powers is repeated in Article 70. The distribution of legislative powers between the Federation and its constituent *Länder* has been the subject of significant constitutional reform and reallocation recently.[17] The Basic Law distinguishes between exclusive legislative powers of the Federation and concurring powers, where the power to legislate resides with the constituent *Länder* until and insofar as these powers are or have been taken up by the Federation. Both sets of powers are governed by extensive sets of subject matter catalogs attributing specific powers to the federal level (Article 73 for exclusive powers, Article 74 for concurring powers). Articles 76 to 82 stipulate the details of the legislative procedure beginning with the introduction of a bill (Article 76.1) to the final signature of the Federal President (Article 82).

Articles 83 to 91 of Chapter VIII address the issues of administration and implementation of federal law. Legislative and administrative powers are treated differently in the Basic Law. From the perspective of the Federation, possessing the legislative power is not tantamount to possessing the power to administer, implement, and execute the legislation. The principal of

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15 See https://www.bundesregierung.de/breg-en/federal-government/structure-and-tasks-470508 (last accessed 15.9.2019).

16 As opposed to a destructive vote of no confidence. In a constructive no confidence vote, a majority must be found that is willing to elect a new chancellor whereas in a destructive no confidence vote the majority must only agree to oust the present government or head of government without electing a new one.

17 Amendments to the Basic Law as a result of stage 1 of the federalism reform effort came into force in 2006. For more background see Stecker, Christian, The effects of federalism reform on the legislative process in Germany, 26/5 Regional & Federal Studies 2016, 603, https://doi.org/10.1080/13597566.2016.1236334; see also http://webarchiv.bundestag.de/archive/2008/0506/htdocs_e/parliament/bodies/federalism1/index.html (Stage I of the reforms). Stage II of the constitutional reforms was concerned with the financial relationship between the Federation and the *Länder*, see Heinz, Dominic, Federal Reform II in Germany, 2/2 Perspectives on Federalism 2010 (Centro Studi Sul Federalismo), http://on-federalism.eu/attachments/071_download.pdf (last accessed 15.9.2019).

enumerated powers governs this field as well and the *Länder* hold all administrative powers unless otherwise stipulated in the Basic Law in general and in the provisions of Chapter VIII in particular (Article 83 and, for example, Articles 87 to 87f).

Chapter IX (Articles 92 to 104) is concerned with the judicial power of the Federal Republic. The judicial power is vested in independent (Article 97) judges and federal and state courts (Article 92). Article 95 names the five supreme federal courts for general civil and criminal, labor, administrative, welfare, and tax matters. Articles 93 and 94 deal with the jurisdiction and composition of the Federal Constitutional Court. The Court has shaped the constitutional reality of the Federal Republic to a degree that can hardly be overestimated. Its role as the guardian of the Basic Law in general and for the fundamental rights and freedoms in particular can only be described as a blessing for the country, notwithstanding the occasional aberration or even fundamental mistake inherent in any human activity.

Chapter X (Articles 104a to 115) contains the financial constitution of the Federal Republic, i.e., provisions concerning income (taxes and distribution of tax income) and expenditure (budget and debt). The complexity of these issues and their political significance is illustrated by the fact that these provisions are very long, very complicated, not overly well-drafted, and often unbefitting of a constitution. This notwithstanding, it is these provisions that have largely defined the special strand of German federalism and have ensured that the constituent *Länder* and their independent role has not been overtaken to the same degree by the power of the federal purse as can be observed in other large federal systems such for example the USA and Australia. One important question in this regard is the control and limitation of public debt. Despite the relative lack of success in trying to control and limit public debt by legal means the German constitutional legislator has just recently amended the relevant Article 115 of the Basic Law intending to limit the amount of deficit spending in the budget process.[18]

Chapter Xa (Articles 115a to 115l) was included into the Basic Law in 1968 - after great controversy and student revolts - and addresses the state of war and the effects these will have on the running of the government.

The final Chapter XI contains an assortment of transitional and concluding provisions reaching from the definition of German citizenship (Article 116) to the integration of some norms of the Weimar Constitution of 1919 about the relationship between state and churches. Finally, Article 146 provides that the Basic Law can be replaced at any time by a new constitution adopted freely by the German people.

18 57th Amendment to the Basic Law of 29.7.2009, Official Journal of the Federal Republic of Germany (BGBl.), Part I, p. 2248 (2009).

II. The Basic Law's Fundamental Norms and State Objectives

1. The Preamble of the Basic Law

The Preamble is part of the Basic Law, therefore subject to amendment and has been amended, namely in 1990 to replace all references to reunification and the transitional character of the Basic Law after completion of German unity in 1990.[19] It has normative character[20] mainly concerning the nomination of state objectives of which the successfully achieved reunification of Germany was one. The other two pivotal state objectives of the Federal Republic are "the promotion of world peace" in which the Federal Republic is to engage as "an equal partner in a united Europe", thus requiring the Federal Republic to play a positive role in the - undefined development of this united Europe. Both of these goals had and have direct impacts on the interpretation of subsequent norms of the Basic Law.[21]

2. Article 1 of the Basic Law - More than Human Dignity

Article 1 of the Basic Law is a cornerstone of the Basic Law in general and the anchor provision for its system of fundamental rights protection. Commencing with the stipulation of the inviolability of human dignity and commanding state authority to actively protect it is a deliberate contrast and consequence from the terror years of the Nazi regime and from a perceived shortcoming of the Weimar Constitution that preceded that regime, which mentioned human dignity in a rather peripheral manner. The core message is the primacy of the individual over the state. The state as the embodiment of human community is there to serve the individual members of the community and thus the community as a whole and not the other way around. The supreme concept of human dignity, as inherently vague as it is, together with the reference to "justice" in Article 20.3 of the Basic Law, could, from a common law perspective, be regarded as a kind of incorporation of natural law in the codification that constitutes the Basic Law.

Notwithstanding the great significance of the protection of human dignity both as the anchor provision and pivot of fundamental rights protection, its practical relevance has been reduced by the fact that no violation of human dignity is conceivable that would not also violate one of the more specific fundamental rights spelled out in the Basic Law. The protection of human dignity in Article 1 Basic Law is in that sense not legally necessary to achieve comprehensive fundamental rights protection and the lack of a similar clause in the European Convention of Human Rights illustrates this impressively. However, the example of the European Convention[22] as well as many other - domestic and international treaties also illustrate impressively that the

19 Official Journal of the Federal Republic of Germany (BGBl.), Part II, p. 885 (1990).

20 Recognized by the Constitutional Court, see BVerfG 36, 1 (17).

21 BVerfG, 2 BvE 2/08, http://www.bverfg.de/e/es20090630_2bve000208en.html, paras. 222 et seq.

22 In the words of the European Court of Human Rights: "[...] the very essence of the Convention being respect for human dignity and human freedom", ECtHR, Appl. No. 35968/97, 12.6.2003, van Kück/Germany, para. 69; see also Appl. No. 2346/02, 29.4.2002, Pretty/UK, para. 65; Appl. Nos. 32541/08 and 43441/08, 17.7.2014, Svinarenko and Slyadnev/Russia, para. 118 [GC]; Appl. No. 46043/14, 5.6.2015, Lambert et al./France, para. 142 [GC] (ECtHR judgments and decisions are available at https://hudoc.echr.coe.int).

protection of fundamental rights is only comprehensible against the backdrop of a specific understanding of the role and status of the individual human being and the abstract concept of human dignity is the embodiment of that understanding.

Article 1.2 adds to the dignity protection by linking it to the programmatic declaration and recognition of human rights protection as the foundation of any human community and as a foundation for peace and justice. Human rights protect the individual and secure a sphere of individual autonomy against the state. That said, the Basic Law does not pair community and state on the one hand and human rights, on the other hand, antagonistically against each other. By contrast, human rights protection is regarded as an inherent and indispensable precondition for communal peace and justice.

Article 1.3 is a key norm in its own right because it clarifies that all fundamental rights contained in the Basic Law are directly applicable and justiciable "hard-law" obligations for all state authority. The fundamental rights of the Basic Law directly limit the exercise of executive, legislative, and judicial power. The possibility of judicial review for acts of parliament is an indirect consequence that has found its direct expression in the role afforded to the Constitutional Court in Article 93 of the Basic Law.

The stipulation of the legislative, executive and judicial authority as addressees of the obligations flowing from fundamental rights of freedoms also clarifies that these rights do not directly obligate private individuals. The primary function of fundamental rights is the defense of individual autonomy *vis-à-vis* the state and not the limitation of individual autonomy *vis-à-vis* other individuals. However, the fundamental rights of the basic law do have considerable effect between private parties - so-called indirect third party effect - because of their objective function as a determining guide for the interpretation of private (civil) law norms. Such norms, especially the generic legal terms used, for example, in the German Civil Code, must be interpreted in the light of the fundamental rights of the Basic Law. That has consequences for example in damage cases for defamation because the incriminated speech might be protected under the free speech guarantee.

3. Article 20 of the Basic Law - Core Principles

Article 20 is the central foundational norm defining the status of the German Federation. Article 20.1 describes and prescribes what kind of state Germany is and must be - a democratic, social, and federal republic. Article 20.3 adds to these attributes the rule of law as a fourth one by making it clear that any legislative action must be constitutional and any actions of the executive branch and the judiciary are bound by the constitution and the statutory and other law in effect at the time.

However, Article 20.3, again in direct consequence of the experiences of the Nazi dictatorship, also stipulates that state action is not only bound and determined by positive law but also by the meta-positivist notion of justice. Not everything that is legal is just as legal norms can be drafted to allow for or even demand to commit the most heinous crimes perceivable. Legality and legitimacy are different concepts. In the case of the order established by the Basic Law that conflict could only eventuate if forces had succeeded in usurping this order and at least practically rendering it ineffective. That would have to include, for example, eliminating

effective access to the courts and the Constitutional Court in particular. Should such a constitutional crisis occur Article 20.4 expressly provides for a right to resistance for all Germans, including armed resistance should that prove to be necessary.

Article 20.2 elaborates on the democratic principle adopted for the Federal Republic of Germany. The people are the sovereign but they exercise their sovereignty in the form of indirect parliamentary democracy by way of elections and delegate the exercise of authority to the various organs and institutions of the state, the Federal Parliament (*Bundestag*) being the most significant. All state action must be traceable to the people as the sovereign, acting through Parliament to which everybody else is directly or indirectly accountable and which in turn answers to the people. Section 2 also makes it clear that the Basic Law's notion of democracy is not one of direct democracy where the people can directly legislate and circumvent parliament. The absence of practically all elements of direct democracy, though more the rule than the exception around the world at least concerning central rather than local or regional affairs[23], has been criticized by some as a weakness of the Basic Law. However, the proponents of more direct democracy elements in the Basic Law have so far not found sufficient support.[24]

The rule of law,[25] as described in Article 20.3, is an abstract principle with many practical emanations. The supremacy of law (and justice) and of the Basic Law over all other domestic law is only one albeit a very important one. Of immense practical significance is the notion that for law to rule any state action must be determined by the law and hence any state action must have an identifiable base in the law. All individuals must have access to the courts to be able to have their legal rights assessed by an independent judicial body. One consequence of this is that any action by public authorities limiting the rights of individuals is only legally possible if provided for in the law. From the perspective of the citizen everything is legal unless prohibited by law. From the perspective of state authority any action by state authority is illegal unless specifically authorized by law.

Another emanation of the rule of law is that legal norms must be formulated with sufficient clarity so that those at whom they are addressed can understand what is required of them. This is, of course, a difficult proposition in times of complex and highly abstract tax and social systems. It should be kept in mind that from the perspective of the separation of powers, any

23 Switzerland is one notable exception, see https://www.eda.admin.ch/content/dam/PRS-Web/en/dokumente/Moderne_Direkte_Democratie_EN.pdf (last accessed 15.9.2019).

24 Some member states of the European Union either have at least the constitutional possibility or are outright required to hold public referenda on some issues, the development of European integration by way of new treaties being one example. The fact that such referenda took place in a number of member states, for example on the Draft Constitutional Treaty of the European Union, has also prompted demands for such an option in Germany where the Basic Law as it stands today does not allow for referenda and would have to be amended accordingly. The more recent developments after the Brexit referendum in the UK show that referendums can have a very divisive effect. Among EU member states referenda are not infrequent with 46 EU-related referenda between 1972 and 2017, see Beach, Derek, Referendums in the European Union, Oxford Research Encyclopedia of Politics, 26.2.2018, https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-503 (last accessed 15.9.2019).

25 The English term "rule of law" can only rudimentarily convey the full scope of the meaning of the German term "Rechtsstaat".

imprecision in law-making always expands the role of the judiciary as the branch of government responsible for the interpretation of norms. Sufficient clarity is especially important in the area of criminal law where sanctions for violations are inherently harsh (e.g., fines or even deprivation of liberty). A further aspect of the rule of law is the prohibition of retroactive laws. Norms, whether criminal law norms or, for example, tax laws, can only be adhered to when people can know about them. Norms that have not even been passed at the time of the conduct in question can therefore not be applied to this conduct.[26]

Of pivotal importance in the context of the rule of law is the principle of proportionality, which for all practical purposes dominates the fundamental rights protection regime under the Basic Law. The principle of proportionality involves the application of a three-pronged test to all state action. Firstly, state action must be able to reach the objective for which it is undertaken. Secondly, any state action must not go beyond what is necessary to achieve this goal effectively. And finally, on the third level, state authority must not pursue even otherwise legitimate objectives if the price for achieving them in terms of rights restrictions is disproportionate to the objective pursued. Bluntly spoken, the police must never shoot the thief even if it means that the thief gets away.

The social state principle in Article 20.1 demands that the government strives to achieve a just social order[27], without defining or even giving any guidance as to what a just social order might be. It follows that governmental authority has a wide margin of appreciation in the pursuit of this goal. However, the state must provide the bare fundamental necessities for every human being.[28] That would certainly include a place to sleep, something to eat, and access to fundamental health care. The increasing, albeit on a very low scale, the number of homeless or otherwise destitute people in Germany shows that law and reality can and do collide. Legally there is no room for involuntary homelessness.

The attribute 'Republic' only requires that Germany must not be a monarchy, not even a constitutionally organized democratic monarchy. The republican attribute is owed to the historical developments at the end of and after World War I and has no practical relevance today, as there are no noticeable or even remotely significant monarchical tendencies visible in Germany.

One open question is whether Article 20 protects only the attributes of statehood mentioned above or whether the sovereign statehood of the Federal Republic of Germany itself is also protected. That question is relevant because of Germany's participation in the European Union. Whereas the European Union has not yet developed into a federal state commanding sovereignty externally and internally, such a development is not inconceivable. If Article 20 as such also protected sovereign statehood such a European federal state with Germany as a constitutive element could not be achieved for Germany by way of amending the Basic Law. It follows that

26 The Constitutional Court has interpreted Article 103.2 of the Basic Law restrictively to prohibit the application of criminal norms to behavior not directly covered by them but applicable in the form of an analogy, see BVerfGE 92, 1 (14 et seq.).

27 BVerfGE 59, 231 (263); 100, 271 (284).

28 Cf. BVerfGE 82,60 (80); 110, 412 (445).

for Germany this step of European integration would require the activation of the *"pouvoir constituant"*, i.e., the constitution-making power of the German people rather than the amending power of the two chambers of Parliament.[29]

4. *Article 23 of the Basic Law - European Union*

The so-called "Europe-Article" 23 was introduced into the Basic Law in 1992 in the context of the founding of the European Union by the Treaty of Maastricht and after the previous and unrelated Article 23 had become obsolete in the wake of German reunification and had been struck out of the Basic Law. Until the introduction of the new Article 23, German participation in international cooperation and integration, including the transfer of sovereign powers to inter and supranational bodies (for example, European Communities, United Nations, NATO) had to be conducted based on the very generally formulated Article 24 Basic Law. With Article 23 the very special and indeed unique case of the European Union and Germany's integration into this *supranational* organization was given a special foundation in the Basic Law, providing a constitutional framework for the ongoing dynamic process of European integration by formulating objectives and limitations and by balancing the federal interests involved, i.e. those of the federation *vis-à-vis* the constituent *Länder*, in a legally binding way.

Article 23.1 links the participation of Germany in the process of European unity to the core principles of the German state (Article 20.1 of the Basic Law): democracy, rule of law, federalism and social welfare and adds to it the principle of subsidiarity, which speaks to the division of powers between the European Union and its member states and limits the exercise of the powers attributed to the European Union unless certain conditions are met.[30] This creates a delicate relationship between the international law aspects of European integration, the fact that this integration process has created a deeply integrated union of law and classical notions of state sovereignty. Potential conflict over the power of the last word on the scope and extent of sovereign powers transferred to the Union - does the power of the last word still lie within the member states and their constitutional courts or with the European Union and the European Court of Justice - are still lingering but have so far not led to outright conflict between the European Union and its member states.

Under the new Treaty of Lisbon[31] and protocols pertaining to the rights of national Parliaments and the application of the principle of subsidiarity, the national Parliaments will enjoy direct participation rights in the decision-making process of the European Union. The Treaty of Lisbon will also trigger the coming into effect of a new Article 23.1a empowering both houses

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29 BVerfG, 2 BvE 2/08 of 30.6.2009, https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html, paras. 226-228 (last accessed 15.9.2019).

30 The European Union can only exercise a power attributed to it in the relevant treaties under the principle of enumerated powers if, in addition to this attribution, it can establish that the objectives pursued by the legislative measure cannot be better achieved at the members state level therefore warranting action on the European Union level, Article 5.1 TEU (available at https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html).

31 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 (17.12.2007). The Treaty entered into force on 1 December 2009. Text(s) available at https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-overview.html.

of Parliament, *Bundestag*, and *Bundesrat*, to institute proceedings before the European Court of Justice in Luxembourg claiming a violation of the principle of subsidiarity. The new Article 23.1a even obligates the *Bundestag* to do so if a minority of 25 percent wish to proceed in this manner. The new addition to Article 23 reflects the concerns of (some) member states over a significant loss of jurisdiction to the European Union. The loss is inherently more relevant for the legislative branch because it is by and large legislative power that is ceded to the European Union and because the executive branches retain at least some power by being represented in the Council of Ministers on the European level.

Articles 23.2 to 23.8 of the Basic Law deal with the participation of both Houses of Parliament in the formation of the German positions to be taken on the European level. These participation rights reach from information and consultation by the government to various degrees of how the views, especially of the federal chamber of Parliament, the *Bundesrat* with its *Länder*-representatives, have to be taken into account. The scope extends from merely taking note of the views of *Bundestag* and/or *Bundesrat* all the way to shifting the representation of Germany in the Council of Ministers of the European Union away from the Federal Government to a representative appointed by the federal chamber, the *Bundesrat*, if the legislative matter at issue at the European Union falls under a subject-matter which internally constitutes an exclusive power of the *Länder*.

5. Eternity Clause, End and New Beginning, Articles 79.3 and 146 of the Basic Law

The "eternity clause" in Article 79.3 and the "termination-clause" in Article 146 are rather peculiar features of the Basic Law. Constitutions usually do not contain clauses defining their own end and one might even argue that such a clause is superfluous anyway because who and what is to stop the pouvoir constituant, the constitution-making power of the people, to replace the existing constitution with a new one?[32]

In the case of the Basic Law, the fact that such a provision came into the constitution and remained there has historical reasons. Originally, Article 146 was an expression of the transitional character of the Basic Law as a provisional constitutional order to bridge the gap until German reunification. When the time for reunification came in 1989/1990 Article 146 and its concept of building a new unified Germany on the basis of a new constitution had to compete with a second option provided for by the Basic Law in the original Article 23,[33] which allowed for the accession of "other parts" of Germany to the Federal Republic thus extending the territorial scope of the existing Basic Law. It was the (old) Article 23 option under which German reunification took place in 1990. The former German Democratic Republic acceded to the Federal Republic and

32 There are examples of constitutions that, though not defining their end, address the question of fundamental revisions as opposed to partial revisions or amendments, see for example, Article 44.3 of the Austrian Federal Constitutional Statute, http://www.verfassungen.at/indexheute.htm, Article 193 of the Federal Constitution of the Swiss Confederation, http://www.verfassungen.ch/verf99-i.htm (last accessed 15.9.2019).

33 The original Article 23 read: "For the time being this Basic Law will be effective in the territories of the *Länder* Baden, Bayern, Bremen, Greater Berlin, Hamburg Hessen, Lower Saxony, North-Rhine Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden und Württemberg-Hohenzollern. It shall enter into force in other parts of Germany upon their accession." [translation by author].

was at the same time restructured into five new *Länder*, which became *Länder* of the Federal Republic.[34] However, the debate continued whether the option of relegitimizing the constitution and providing space to incorporate into the constitution more of the East-German history - whatever that might have been in constitutional terms - should be dropped altogether and Article 146 removed or whether that option should remain. The compromise reached was that the Basic Law should remain in place largely unchanged but that Article 146 would also be retained to leave open the option of broader constitutional reform debate at a later stage.[35]

Article 79 of the Basic Law deals with the amendment of the constitution, defining the requirements for affording constitutional change. Article 79.2 requires qualified two-third majorities in both Houses of Parliament, the *Bundestag* (lower house) and the *Bundesrat* (Federal Council of constituent *Länder*).

Article 79.1 demands that the Basic Law can only be amended by changing its wordings, by changing the language in one or more of its provisions, adding new provisions or striking out existing ones. By contrast, amending regular statutory law by way of a qualified majority cannot change the constitutional order. This ensures that constitutional law is concentrated in one constitutional document, rather than being spread out over the whole body of law and that such amendments are and remain transparent.[36]

Article 79.3 is often referred to as the 'eternity clause' because it stipulates that the federal character of the nation, including the participation of the *Länder* in the federal legislative process and the fundamental principles laid down in Articles 1 and 20 are not subject to amendments. The principles referred to are the protection of human dignity in Article 1 and, following from that, the dignity-related core of the fundamental rights protected in Articles 2 to 19 of the Basic Law. The principles laid down in Article 20 are the fundamental core characteristics of the German state established under the Basic Law:

- A republican form of state (as opposed to a constitutional monarchy),
- A democratic form of government where all exercise of state authority is linked to and legitimized by representatives freely elected at regular intervals,

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34 See Article 1 of the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the establishment of German Unity (Unification Treaty): "(1) Upon the accession of the German Democratic Republic to the Federal Republic of Germany in accordance with Article 23 of the Basic Law taking effect on 3 October 1990 the *Länder* of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia shall become *Länder* of the Federal Republic of Germany." Text available at: http://ghdi.ghi-dc.org/sub_document.cfm?document_id=78 (last accessed 15.9.2019).

35 See Article 5 "Future Amendments to the Constitution" of the Unification Treaty, id.: "The Governments of the two Contracting Parties recommend to the legislative bodies of the united Germany that within two years they should deal with the questions regarding amendments or additions to the Basic Law as raised in connection with German unification, in particular […] - with the question of applying Article 146 of the Basic Law and of holding a referendum in this context."

36 As is the case for example in Austria, where the Constitution is not codified in a single document and constitutional amendments can be found in numerous other statutes and as was the case in the preceding Weimar Constitution of 1919 in Germany as well.

- The principal character of Germany as a social (welfare) state securing access to a bare minimum of resources to satisfy fundamental needs for housing, clothing, and food relative to the general standard of living,[37] and
- Rule of law, a broad concept consisting of various sub-concepts such as the absolute supremacy of the Constitution which guides and restricts the exercise of power by the legislative, executive and judicial branch of government, the supremacy of acts of parliament, which are binding on the executive and judicial branches, the requirement of a statutory law foundation for the exercise of any and all governmental authority thus ensuring the involvement of the directly elected parliament and democratically legitimizing all exercise of governmental power, the principal separation of powers in a legislative, executive and judicial branch, the guarantee of access to independent courts for legal protection against the exercise of any and all governmental power and the notion of limited government which can exercise its powers only subject to judicially enforceable fundamental rights and guarantees (as spelled out in Articles 1-19 of the Basic Law) which protect individuals and secure a core level of personal autonomy against infraction by the democratic majority.

In its recent decision concerning the constitutionality of the Lisbon Treaty reforming the European Union, of which Germany is a member state, the German Constitutional Court addressed the possible relationship between Article 146 and Article 79.3 of the Basic Law. In Article 79.3 the question is whether German sovereign statehood as such is also part of the eternity clause and hence not subject to the amending power of Parliament. If that were the case, Parliament could not ratify future treaties that would develop the European Union into a federal state. Concerning Article 146 the question has been raised whether even the constitution-making power (*pouvoir constituant*) is subject to the eternity clause of Article 79.3, which, if answered in the affirmative, would make Germany's participation in a European federal state legally impossible and in effect require a revolutionary act. The decision by the German Constitutional Court contains *obiter dicta* indicating that such a development would indeed be barred by Article 79.3 but that this provision might not extend to Article 146 and hence the creation of a European federal state remains legally possible from a German constitutional law perspective, albeit only by way of creating a new constitution and not by amending the existing Basic Law.[38]

37 The social state principle has found its statutory expression in § 1 of Book XII of the General Social Code (Sozialgesetzbuch): "It is the objective of social aid [Sozialhilfe] to enable those entitled to it to lead their lives in a manner which is consistent with human dignity. […]" [translation by the author; German version available at http://bundesrecht.juris.de/sgb_12/, last accessed 15.9.2019].

38 BVerfG, 2 BvE 2/08, 30.6.2009, https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html. See also Bröhmer, Jürgen, "Containment eines Leviathans" - Anmerkungen zur Entscheidung des Bundesverfassungsgerichts zum Vertrag von Lissabon, ZEuS 2009, p. 543, 552 et seq.

III. The Fundamental Rights and Freedoms Guaranteed by the Basic Law

1. Introduction and Overview

The fundamental rights guaranteed and protected by the Basic Law are the central pillar of Germany's constitutional order. Their significance for the development of Germany after the war is a direct result of the despotic regime that preceded the free and democratic Germany of 1949 and that significance was reinforced when the communist dictatorship broke down in the former East-Germany in 1989 and the country was unified under the Basic Law in 1990.

The framers placed the catalog of fundamental rights intentionally at the beginning of the Basic Law in Articles 1 to 19. The rights protected there include the general nomenclature of fundamental civil and political rights, similar to the ones found in international human rights treaties, ranging from the protection of life, limb, and liberty in Article 2 sec. 2, religious freedom in Article 4, free speech and freedom of assembly and demonstration in Articles 5 and 8, freedom of association in Article 9 and the protection of property against expropriation and other forms of taking in Article 14 to more context-oriented rights such as commercial and professional freedom in Article 12, school and education in Article 7, family and children in Article 6, equality in Article 3, asylum in Article 16 or the peculiar and subsidiary general freedom for everyone to do whatever one wants to do without infringing upon the rights of others in Article 2.1.

However, fundamental rights are not only found in Articles 1 to 19 of the Basic Law. Other more special fundamental guarantees are contained in the chapter on the judiciary and deal with the right to a lawful judge in Article 101.1[39], specific procedural guarantees in case of arrest and detention in Article 104 and the guarantee of a fair trial in Article 103.

The Basic Law did not take up the notion of social, economic, or cultural rights as they can be found in the International Covenant on Economic, Social and Cultural Rights[40] or the European Social Charter.[41] The Basic Law does not guarantee, for example, the right to work, the right to fair remuneration or the right to an adequate standard of living. The reason for this lies in the fact that such rights are very difficult to enforce. By and large political and civil rights spell out limitations for the exercise of governmental authority, i.e., they order the government not to act in a certain way. Where they go beyond this and require positive action, the actions required will be fairly easy to determine. The protection of social rights, on the other hand, is much more difficult and complicated because one often does not know what action is required to achieve the goal. What a government must do to guarantee a right to work is generally contested and part of the democratic discourse. Some think it might require more

39 The right to a lawful judge ensures that the allocation of cases to courts, tribunals and judges must be such that the relevant dispositions are in place before the act that gives rise to the case are committed so that no subsequent interference, such as allocating certain criminal cases to "favourable" judges, is possible.

40 Certified copy available at https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf (last accessed 15.9.2019).

41 Copy available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163 (last accessed 15.9.2019).

government intervention in the form of higher taxation or regulation, and others believe the opposite to be the case. Rights to an adequate standard of living require a certain distribution of resources, but the right does not tell governments how to achieve that. Social rights are therefore always in danger of becoming or at least being regarded as programmatic expressions rather than enforceable hard law. Social justice is no less important than civil and political freedoms and the danger does not lie in the goals pursued by social rights. However, there is a risk that the relativity and complexity of social rights might be transferred into the field of political rights as well and that these rights will then be watered down as a result.

The Basic Law's fundamental rights chapter does, however, contain Article 15, which stipulates that "*land*, natural resources, and means of production may for the purpose of socialization be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation." This norm is a reflection of the economic neutrality of the Basic Law. In 1949 it was by no means clear whether a social market economy would prove to be a successful formula or whether more socialistic or even communist ideas would prevail. As far as economic organization was concerned and in sharp contrast to the individual rights protection afforded, the Basic Law did not want to decide this issue one way or another.

Finally, there is the fundamental right of citizens to participate in general and free elections as guaranteed by Article 38 of the Basic Law for any citizen[42] who has attained the age of 18 years. This right has gained perhaps surprising significance because the Federal Constitutional Court has construed this right as not only guaranteeing an election process as such but also as guaranteeing that the entity to be elected, in this case the Federal Parliament (*Bundestag*), actually has retained sufficient powers to ensure that the elections are democratically meaningful. The Court has used this interpretation of Article 38 to set limits to the extent of legislative powers Germany can transfer to the European Union.[43]

2. Fundamental Rights: How do they work?

Fundamental rights of the Basic Law are not absolute. Restrictions and limitations of rights are therefore possible and must be possible. In fact, in the field of human rights, there is only one guarantee to which no legal exception exists, and that is the prohibition of torture.[44]

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42 Only citizens are entitled to participate in federal and state elections, not foreigners regardless of how long they have lived in Germany and regardless of their specific legal status as residents. The Federal Constitutional Court has held that democratic legitimacy can only flow from elections if the right to vote is limited to citizens, BVerfGE 83, 60 (81). This does not apply to local, municipal elections where at least citizens of the European Union must be allowed to participate actively and passively and to elections for the European Parliament. See Article 20.2(b) TEU, (available at https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html).

43 BVerfG, 2 BvE 2/08 of 30.6.2009, http://www.bverfg.de/e/es20090630_2bve000208en.html (last accessed 15.9.2019).

44 See, for example, Article 3 ECHR, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005; Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 2.2 CAT specifically states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture", CAT text available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx (last accessed 15.9.2019).

However, the prohibition of torture does not exist as such in the Basic Law. It is part of Article 2.2, which protects the health and physical integrity of persons. Obviously conduct amounting to torture would fall under this provision and could never be justified but it is also evident that the health and physical integrity of a person extends beyond torturous conduct and would, for example, also come into play when a policeman uses the baton against an individual, or when firearms are used, etc. and it is equally obvious that such actions must be legally possible under certain circumstances. How then can it be determined, by those responsible for such actions, by the courts exercising their adjudicatory function and, finally, by the Federal Constitutional Court[45] whether fundamental rights and guarantees of the Basic Law were breached? The principal dogmatic approach to this problem is the 'scope-limitation, counter-limitation' test.

a. The determination of the Scope of a Fundamental Right

The first step in this test is to determine under which right(s) or guarantee(s) the impugned activity might fall. Thus, the use of the baton by the police, will *prima facie* fall within the ambit of Article 2.2 because this norm addresses, among other things, the health and physical integrity of persons. If the baton was used in the context of a demonstration or assembly, Article 8 might also be relevant as this provision protects the right to assemble and demonstrate. An issue might even arise under the free speech clause in Article 5 of the Basic Law. Having thus *prima facie* identified the relevant topics for the legal analysis of the conduct in question, the next step is to identify and define the exact scope of the rights and guarantees so identified. In other words what follows now is an act of statutory interpretation, i.e., of identifying the concrete meaning of the abstract language in which the various rights identified are formulated in the Basic Law. The result will be a definition of the "personal and subject-matter" scope of the right in question as it pertains to the case constellation at issue.

b. The Determination of an Infringement of a Fundamental Right

After this exercise, a determination will have to be made as to whether the factual conduct at issue, for example, the use of the baton against the person, infringed on one or more of the rights identified as potentially relevant. That will be the case if the action in question reduces the scope of the right in question as properly construed using the tools of statutory interpretation. Being hit by a police baton will necessarily result in pain and therefore affect the health of an individual and his or her physical integrity. It follows that in this example the beating constitutes an infringement of Article 2.2. Whether one could also determine an infringement of the freedom to demonstrate (Article 8 of the Basic Law) will depend on the circumstances. If the victim had been a demonstrator the answer would be "yes"; if the victim had been somebody who happened to be at the venue only coincidentally the answer would have to be "no".

45 And, as will be shown below, subsequently perhaps even by the European Court on Human Rights (ECtHR) in Strasbourg.

c. Defining the Scope of Possible Limitations and Justifications for Infringements of Fundamental Rights

The next step after having determined scope and infringement is to look at the possible limitations of the infringed right. The question here is whether the limitation can be justified. Most rights and guarantees in the Basic Law contain specific language about possible limitations. The scope of those possible limitations to the rights in question must again be determined by applying the tool of statutory interpretation. Article 2.2, for example, stipulates that the right to physical integrity is not absolute and can be regulated and restricted by law. It follows from this language that, to pick up the above example again, the use of the baton against an individual must be authorized by statutory law. The Federal Constitutional Court has consistently held that only Parliament itself, and not the executive by way of delegated legislation, can and must legislate the necessary statutory law based on which infringement of rights may be justified.

Other fundamental rights provisions contain more detailed or more restricted limitation clauses. The language on possible restrictions of free speech in Article 5.2 of the Basic Law provides an illustrating example. Some rights provisions contain no limitation language at all. The freedom of religion in Article 4.1 of the Basic Law is one such example. The absence of limiting language, however, does not mean that these rights are absolute and grant unrestricted liberty. This would be nonsensical. Nobody has the right to pray in the middle of a four-lane highway during rush hour and if somebody claimed this under the freedom of religion clause the freedom could be restricted on account of "inherent constitutional limitations", i.e., limitations that flow from other rights or legal positions protected by the Basic Law.

d. Applying Counter-Limitations to the Scope of Justified Limitations of Fundamental Rights - The Principle of Proportionality

The next and last step in the exercise of determining the constitutionality of potential rights restrictions is concerned with limiting the scope of the potential rights restrictions (counter-limitations). The core, but not the only tool in this exercise, is the application of the principle of proportionality. The proportionality test itself consists of three subtests.

The first one is the principle of utility or effectiveness whereby it must be established that the exercise of governmental authority which led to the limitation of a fundamental right can achieve the goal the government set out to achieve. Whereas the government will have a margin of appreciation in the determination of what measures might work to achieve a certain objective, the exercise of this discretion is subject to judicial scrutiny.

The second sub-test is the *principle of least impact*. It requires the government to select from the catalog of potentially possible and effective measures the one that, while being equally effective, will have the least impact on the individual rights of those affected by the measure. If, for example, a demonstration threatens to cause violent clashes with counter-demonstrators, a prohibition of the demonstration could solve the problem. However, the authorities would have to consider, for example, prescribing a different venue to separate the parties before they could prohibit the demonstration, as this would have a lesser impact on the freedom of demonstration but still avoid the violence.

The third and final sub-test is the principle of reasonableness or proportionality in the narrow sense. It stipulates that some otherwise lawful means just cannot be pursued if the only means of achieving the otherwise lawful goal is obtainable only at too high a price. The police cannot stop the shoplifter by shooting him even if this is the only means to stop the theft.

The courts in general and the Federal Constitutional Court in particular will apply these tests in all cases in which an individual contests a limitation placed on his or her fundamental right.

3. Functions of Fundamental Rights

The fundamental rights of the Basic Law have several functions, an understanding of which will also shed some light on how the fundamental rights work.

a. The Traditional "Defence-Function" - Protecting Individual Autonomy

The traditional, and arguably still the most significant function of fundamental rights is the "defense-function". Fundamental rights defend against the intrusion of governmental authority into the sphere of individual autonomy protected by them. In other words, fundamental rights create a protective wall around the individual to secure a space of individual liberty. That space is amorphous and its extent is determined on a case-by-case basis as shown above. The defense-function of fundamental rights reigns in governmental authority: state authority can go this far but no further.

This has two major implications. First, if fundamental rights restrict the exercise of governmental authority, then they cannot be instrumentalized against other individuals. And indeed, the fundamental rights of the Basic Law are, in principle directed against public authority only and not against private individuals. An individual may invoke his or her right to free speech against the government but not against the neighbor. The government will have to tolerate a demonstration on public streets but the house-owner does not have to tolerate a demonstration on his or her front lawn.

The second implication following from the defense-function is that fundamental rights are minority rights. However, this is not about ethnic or religious or other such minorities. It is about any minority in a political sense. It is about those who have lost the political argument and protects them against majority rule. In the so-called 'war against terror', the political majority of the day might favor security over individual rights. However, the proponents of individual rights will have to succumb to the majority only insofar as limitations of individual rights are legally possible. The majority cannot legally go beyond whatever the defined scope of personal autonomy is under the fundamental rights regime.

Fundamental rights are a limitation of democratic majority rule. It is for this very reason that societies heavily based on concepts such as parliamentary sovereignty or where the concept of democracy is primarily understood as democratically legitimized majority rule, such as the United Kingdom, Australia, or even the USA[46], often have difficulties with the concept of

46 The United Kingdom has no written constitution and hence no constitutional catalogue of fundamental rights. However, the European Convention on Human Rights has taken on a similar function in the UK after its incorporation into domestic law by the Human Rights Act 1998, http://www.legislation.gov.uk/ukpga/1998/42/contents (last accessed 15.9.2019). Australia has a constitution and a Court with the power of judicial review but no catalogue of rights. The US has both and a Supreme Court which has asserted the rights of judicial review.

fundamental rights protection and the role of a powerful court in this context. However, to limit the concept of democracy to majority rule falls short. The protection of the minorities of the day (of all types, political, ethnic, religious or otherwise) is part and parcel of democratic rule because the inherent limitation of governmental power as achieved by fundamental rights regimes is one important pillar of democratic legitimization, the electoral process and majority rule being the other. Both pillars are necessary to support the democratic system of government of the Basic Law.[47]

b. The Objective Function

The objective function of fundamental rights addresses a consequence of the fact that fundamental rights of the Basic Law are primarily defensive rights against government intrusion. Does this mean that fundamental rights play no role whatsoever in private relationships? The answer to that narrower question is "no" and the objective function is the vehicle to transport effects of fundamental rights protection into the sphere of private relationships. The main instrument to achieve this is statutory interpretation. Private relationships are governed by the Civil Code, which contains provisions for contractual obligations and liabilities flowing, for example, from the law of torts or unjust enrichment. The relevant provisions in the Civil Code are framed in abstract legal terms and require legal interpretation as do all legal norms. The objective function of fundamental rights requires that fundamental rights implications are a constitutive part of that interpretative effort, i.e., that these private law norms, which provide the framework for the relationship of private individuals, must be interpreted in the light of fundamental rights and in conformity with them. The objective function of fundamental rights is, in other words, a vehicle for achieving indirect third party effect to fundamental rights.

The leading Lüth decision of the Constitutional Court[48] amply illustrates the workings of this objective function. Mr. Lüth had, in his capacity as a private citizen, publicly called for a boycott of a movie shown in German cinemas on account of the movie director's past racist propaganda work for the Nazi regime. The production firm of the movie feared economic loss from this call to boycott the movie and sought and was granted an injunction based on a norm in the Civil Code that prohibits the intentional and malicious infliction of economic loss on another individual. The term malicious, of course, requires interpretation and the Constitutional Court held that this interpretation would have to take into account the enormous significance of the free speech guarantee in Article 5.1 of the Basic Law. At issue was a controversy and so long as this controversy was conducted by voicing opinions and using the power of persuasion, as opposed to, for example, the use of a dominant market position or other means of extortion, it was protected by the free speech guarantee and the respective private law provisions invoked in this case had to be interpreted restrictively to comply with the Basic Law.

47 It is a different question whether that protection of the minority of the day necessarily requires a constitutional catalogue as in a bill of rights. That protection can also be afforded in other ways in a relatively sufficient manner. Australia is an example for that.

48 BVerfGE 7, 198 - translation of the decision in this book.

c. The Duty to Protect

The third function of fundamental rights is the duty to protect. It means that fundamental rights do not only tell the government what not to do; they can also constitute an obligation for the government to take action. The right to life is an illustrative example. The defensive function of that right limits governmental action that poses a risk to an individual's life. The duty to protect, on the other hand, requires governmental action to protect individuals against life-threatening behavior. Providing an appropriate legal order with criminal sanctions for the taking of life is one example. Whereas that might sound trivial as all legal orders will punish homicide and similar crimes, it may well play a role when it comes to the negligent taking of life or even to the protection of unborn life. The decisions of the German Constitutional Court in the abortion cases are prime examples.[49] The Court stipulated that the duty to protect flowing from Article 2.2 of the Basic Law would bar the government from legalizing abortion and demand that some protective system be put into place, for example counseling and support services that could persuade the mother to opt pro-life.

The duty to protect comes into play in trilateral constellations involving two colliding rights and the government as a potential mediator. In abortion scenarios, it is usually the right of the mother to self-determination and the right of the unborn. The duty to protect defines the legal minimum of protection for the unborn that the government must undertake. The defensive function of the self-determination rights of the mother describes the legal maximum the government can engage in to protect the unborn. The space between the minimum and the maximum defines the margin of appreciation the government has in this balancing act.

The duty to protect is potentially problematic because fundamental freedoms become the legal basis for the restriction of freedoms. The protection of personality rights could, for example, lead to significant restrictions to free speech, the problem of delineating free speech from defamation has been controversial not only in Germany but in many jurisdictions. The German Constitutional Court has so far been successful in keeping a check on governmental duties to protect. The defensive function is and must be the prime function of fundamental rights.

d. Participatory Function and Entitlements

The main difference between traditional, liberal defense rights and social rights is the direct connection to resources that is inherent to social rights. The traditional defensive function of political rights is cost neutral. Insofar as they prohibit the government from taking certain actions, they might even save money. The prosecution of certain opinions demands resources, tolerating opinions costs nothing.

However, that distinction between social rights and traditional liberal rights does not always apply. There are some traditional rights, which require the allocation of resources. The right of access to court and fair trial require the availability of a functioning judicial system with a sufficient number of judges and judicial administrative staff. The prohibition of torture and inhuman treatment requires certain minimum standards for prisons and other institutions where people are confined in the care of the government.

49 BVerfGE 39, 1 and 88, 205, translations of the decisions in this book.

Other rights have an indirect connection to resources. Property rights are relevant only for those who own property. The freedom of the press is, ignoring the possibility of leaflets, only relevant for those who have the capital to operate a newspaper and the freedom to broadcast electronically usually requires significant resources as well. Do the respective rights of the Basic Law create an obligation for the government to provide the respective resources?

As a matter of principle, the rights protected by the Basic Law do not grant entitlements in the narrow sense. Nobody can demand from the government the money to run a newspaper. However, the Constitutional Court has construed the freedom to broadcast as including and guaranteeing the existence of a public broadcasting system which must be financed in such a way that it can fulfill its role as a guarantor of plurality in the electronic media sector.[50] It follows from the protection of human dignity, Article 1.1, in conjunction with the duty to protect the health of those living in Germany and in conjunction with the fundamental requirement of the Basic Law that Germany is a social welfare state that the existential minimum of food, clothing and housing must be provided.[51]

The Court has also held that the *de facto* state monopoly on university education necessitates a corresponding equal participation right derived from Article 12 of the Basic Law for access to universities if the educational requirements are met and subject only to the available capacity.[52]

However, direct or indirect entitlements remain an exception. The allocation of resources cannot be subjected to a rights' regime unless one is willing to risk the effectiveness of this regime. Experience shows that the protection of rights becomes very difficult if resources are required. Not only because the resources might not be available or the allocation of the resources to the specific cause might not find acceptance but also because any investment will take time to become effective making the violation of that right systemic. The danger is that rights become very relative concepts. It is for that reason that the Basic Law has remained very reluctant in construing the fundamental rights of the Basic Law as entitlement rights and has left the decisions over the allocation of financial resources to the democratic process.

4. *The Relationship between the German Basic Law and the European Systems for the Protection of Fundamental Rights*

a. Overview

Fundamental human rights protection in Germany is not merely a national affair but has increasingly become an international or even supranational issue. Germany is a signatory to the international treaties that make up the international 'bill of rights', most prominently the International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol to the ICCPR providing for an individual complaints procedure to the Human Rights Committee

50 BVerfGE 90, 107.

51 Cf. BVerfGE 91, 93 (115); 99, 216 (256 ff.).

52 BVerfGE 33, 303.

and thus turning the objective guarantees of the ICCPR into subjective rights pursuable by any individual.[53] However, the international embedding of fundamental rights protection in Europe in general and in Germany, in particular, goes much further.

b. The European Convention on Human Rights (ECHR)

This is particularly due to the fact of Germany's membership, together with 46 other European nations, in the European Convention of Human Rights (ECHR).[54] The ECHR was signed in 1950, came into force in 1953 and underwent a major reform in 1998 with the coming into force of the 11th Protocol.[55] The major effect of this Protocol was to abolish the previous two-tier system of a Human Rights Commission with only *quasi*-judicial functions and a non-permanent Court with optional jurisdiction and to replace it with a permanent European Court of Human Rights (ECtHR) with compulsory jurisdiction. The ECtHR's sole task is to adjudicate and interpret the ECHR. Article 46 ECHR stipulates that decisions of the ECtHR are binding on the member states and the Committee of Ministers supervises their execution.[56] The ECtHR may only deal with the matter after all domestic remedies have been exhausted and in the case of Germany that means that the German Federal Constitutional Court must have rendered a decision before the ECtHR can attend to the matter. Between 1959 and 2018 the ECtHR issued 340 judgments in cases involving Germany of which 195 judgments found at least one violation of a provision in the ECHR[57] - despite the fact that all of these cases had already undergone the scrutiny of the domestic court system including the Federal Constitutional Court. This demonstrates the significance of this extra layer of international human rights protection in Germany and beyond.

c. The European Union

(1) General Principles of European Union Law

The coming into force of the new Lisbon Treaty on 1 December 2009 also had an effect on human rights protection in Europe. The original foundation treaties of the European Communities and the European Union did not contain a catalogue of fundamental rights. This gap was subsequently overcome by the jurisprudence of the European Court of Justice (ECJ) in Luxembourg who developed fundamental rights under the concept of unwritten general principles of European Union law based on

53 Germany ratified the ICCPR on 17 December 1973 and the Optional Protocol on 25 August 1993, see https://treaties.un.org/Pages/ParticipationStatus.aspx under Chapter IV Human Rights (last accessed on 14.9.2019).

54 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680063765 (last accessed 14.9.2019).

55 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11.5.1994, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cda9 (last accessed on 14.9.2019).

56 See Articles 13 et seq. of the Statute of the Council of Europe, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680935bd0 (last accessed on 14.9.2019).

57 European Court of Human Rights, Statistics by State, https://www.echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf (last accessed on 14.9.2019).

the fact that such rights are shared by all member states of the European Union in their domestic constitutional law and legal systems and that all member states of the European Union are also member states of the European Convention of Human Rights.[58] This concept of unwritten general principles of law is now enshrined in Article 6.3 of the TEU.

(2) Treaty of Lisbon and Charter of Fundamental Rights of the European Union

However, in addition to the general principles of law the Treaty of Lisbon also created Article 6.1 TEU providing that the Charter of Fundamental Rights of the European Union of 7 December 2000[59], which back then had been adopted as "soft law" only, will now have the "same value as the treaties" and will hence become part of the primary law of the European Union. This has given new impetus to the question of whom the European Union fundamental rights are addressed to and how their scope is to be delineated from domestic fundamental rights protection. Article 51 of the Charter stipulates that:

> "[T]he provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law."

This clarifies that the European Union fundamental rights are not an overarching catalogue of rights guiding and superior to the domestic rights regimes but that the European Union rights are meant to limit the exercise of European Union authority and are meant to limit the Member States only insofar as they are exercising European Union powers by implementing European Union law.

In addition, Article 6.2 TEU the Treaty of Lisbon finally created the authority for the European Union to "accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms". This opens up the possibility for the European Union to become a member of the European Convention on Human Rights. The Council of Europe on its side has created the same possibility in the 14th Protocol to the European Convention on Human Rights[60], which specifically provides for the European Union to become a member of the ECHR.[61] However,

58 For more information see European Parliament Factsheet on "The Protection of Fundamental Rights in the EU", http://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu (last accessed 15.9.2019).

59 Text available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016P/TXT (last accessed 15.9.2019).

60 See supra n. 62.

61 Article 17 of the Protocol amends Article 59 ECHR by adding a new paragraph 2 stipulating that "The European Union may accede to this Convention."

accession has not yet been achieved. The draft Accession Agreement of the EU to the ECHR between the 47 Member States of the Council of Europe and the EU was finalized on 5 April 2013. However, the European Court of Justice (ECJ) in an opinion of 18.12.2014 identified shortcomings in the draft accession agreement, not least the relationship between its powers of judicial review and that of the European Court of Human Right (ECtHR).[62] The accession process is continuing but will probably take some time to complete.[63]

(3) Fundamental Rights Protection and Supremacy of European Union Law in Germany

The relationship between the European Union and Germany is somewhat more complicated. European Union law is supreme to the law of the member states. The supremacy of European Union law extends to domestic constitutional law as well. The European Court of Justice (ECJ) has consistently held that the member states of the European Union cannot invoke their domestic law, constitutional or otherwise, against legal norms of the European Union, i.e., against statutory provisions legislated at the European level in so-called regulations or directives or norms contained in decisions by relevant European authorities. Member states are therefore barred, from the perspective of the European Union, to render ineffective European Union law on account of a violation of their domestic fundamental rights. European Union law must measure up only to European Union fundamental rights and the ECHR but not to domestic fundamental rights. However, the German Constitutional Court has never fully accepted this approach. It has consistently held that the final responsibility for the protection of fundamental rights lies with itself. This potential jurisdictional conflict has never manifested itself because the German Constitutional Court has also consistently held that it will exercise this function in cooperation with the European Court of Justice and that, in practice, for the German Court to assume this role would require for a potential plaintiff to show that the European Court of Justice no longer adequately protects fundamental rights and that this would have to be demonstrated not just for the case in question but as a "general and evident" trend of continuous delinquency.[64]

62 ECJ, Opinion 2/13, 18.12.2014, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CV0002 (last accessed 15.9.2019).

63 For more information see https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights (last accessed 15.9.2019).

64 See BVerfG, 2 BvR 2253/06 vom 27.1.2010, http://www.bverfg.de/e/rk20100127_2bvr225306.html, paras. 19 and 20 (with further references) (available in German only, last accessed 15.9.2019).

IV. The Interpretation of the Basic Law and the Role of the Federal Constitutional Court

The provisions of the Basic Law in general and the fundamental rights provision do not explain themselves. Like all norms, and perhaps even more so, they require interpretation, i.e., their meaning is to be construed to make it applicable to the specific case constellation or constitutional law question at issue. In the case of fundamental rights that applies, as explained above, to the construction of the scope of freedom, the construction of the possible limitations and the construction of the possible counter-limitations.

1. Grammatical Interpretation

The interpretation of the Basic Law, by and large, follows the general rules of interpretation, which can be found in many jurisdictions. The starting point for interpretation is the objective meaning of the words used, also referred to as *grammatical interpretation*. However, that usually does not yield the decisive result, which is why the legal profession is not made up of linguists.

2. Systematic Interpretation

The second and third steps beyond grammatical interpretation are often the decisive steps for elucidating the precise meaning of the abstract constitutional norm. The second step is referred to as *systematic* interpretation and requires that in order to determine the specific meaning of a (constitutional) norm, it must be read with a view to its systematic context. This means looking for identical or similar terms in other provisions of the Basic Law in neighboring sections, within the chapter and within the text as a whole.

3. Teleological Interpretation

The third step is referred to as *teleological interpretation*, which means interpreting a norm according to the object or purpose that the norm objectively appears to have. The attribute 'objective' denotes one of the major differences between the interpretation of the Basic Law and the interpretation of constitutional norms in other jurisdictions, for example, in the USA or Australia. The subjective will of the drafters of the constitution and, in the case of subsequent amendments, of the two Houses of Parliament plays a very small role in this exercise. The subjective will of the drafters will only be of relevance to confirm the result achieved by the other means of interpretation or to resolve any interpretative difficulties that remain after the application of the other means of interpretation.[65]

65 See, for example, BVerfG, 2 BvR 1520/01 of 30.3.2004, http://www.bverfg.de/e/rs20040330_2bvr152001.html, para.94 et seq. (last accessed 15.9.2019).

4. "Living Constitution"

Another major difference in the approach to interpretation lies in the fact that the Federal Constitutional Court, and this is as such not disputed in the legal or political community, interprets the Basic Law as a "living Constitution" rather than as a static document.[66] Hence, not only does the will of the drafters of the Constitution play little role in the determination of the actual meaning of the normative language, the meaning of the same language can change substantially over time.

The meaning of equality in Article 3 of the Basic Law illustrates this vividly. The principal obligation under the non-discrimination rule is to treat all things that are equal equally and to differentiate between all things that are not equal. The application of Article 3 therefore requires that comparison groups are formed and objective reasons are identified for treating the comparison groups differently. Children, for example, are different from adults and it is therefore not only possible to discriminate against children but actually mandated because children must be protected. Hence their access to employment is severely limited, and, depending on age, even prohibited. The type of work they can do is limited and their freedoms can be limited with regard to such things as going to the pub, drinking alcohol or watching certain movies. Women are also different from men in some respects. However, in both examples the perception of the scope of discrimination that can be constitutionally justified has dramatically changed over the last decades. Especially women are treated much "more equal" today as was the case 20, 30 or 40 years ago even though the principal nondiscrimination provision in Article 3.1 of the Basic Law has not fundamentally changed. What has changed, however and fortunately, is the perception of the comparison groups; male and female, and the social evaluation of objective criteria that differentiate the sexes.[67]

5. Conflict of Norms

Fundamental rights protection often involves conflict between two or more fundamental rights. One of the functions of fundamental rights as shown above is the duty of the state to protect the legal sphere of people within their jurisdiction. It follows that the exercise of a freedom, e.g., to demonstrate, can and will frequently collide with the rights of others, e.g., to move freely on the road or to have open access to their store. Sometimes this conflict can culminate in a life and death matter in one person. That is the case when the right to life, if extended to the unborn fetus as under Article 2.2 of the Basic Law, collides with the right of the mother to self-determination, privacy, health or even her own life. Such constellations are

66 The European Court of Human Rights (ECtHR) consistently interpretes the ECHR in this evolutive dynamic fashion, see, for example, Appl. No. 18030/11, 8.11.2016, Magyar Helsinki Bizottság v. Hungary, paras. 120-122, 138-148 and, very instructively, the Concurring Opinion of Judges Sicilianos and Raimondi, http://hudoc.echr.coe.int/eng?i=001-167828 (last accessed 15.9.2019). This approach to constitutional interpretation is very controversial especially in the US where the late Justice Antonin Scalia was a forceful proponent of a restrictive originalist view.

67 Perhaps the two most prominent areas where attitutional changes in society resulted in changes of what is commonly perceived as discrimination. One was in the area of military service of women (in combat units) and the other in marriage equality between same-sex and heterosexual partners.

common and marked by the fact that they involve trilateral constellations rather than just the bilateral relationship between state and subject. The arrest of a person by the police is a purely bilateral issue between the government and the arrested person and subject to the defensive function of the respective fundamental right. When fundamental rights conflict there are always at least three parties involved: the government exercising state authority through the executive, legislative or judicial branch, the person asserting a right and the person asserting that the exercise of that right would unduly infringe on his or her rights.

The balancing exercise required to solve such rights' conflicts falls to the courts and especially to the Federal Constitutional Court. One parameter used in this balancing act is the notion of "practical concordance". It means that in such situations, the courts will strive for solutions that grant the greatest possible effect for all rights involved in the conflict.[68]

The Constitutional Court takes a very flexible approach to constellations where more than one fundamental right might be involved. To identify the right against which state action is to be measured is important because rights differ in the scope of possible limitations. However, the Court's doctrine developed in the context of free speech (Article 5 Basic Law) of interpreting the scope of possible limitations of rights in the light of the significance of the right in question has led to a dogmatically lamentable but practically acceptable flexibility in this regard. One could not maintain the position, for example, that possible limitations of rights containing no limitation clause (e.g., Article 4 Basic Law) under the doctrine of constitutionally immanent limitations, are *per se* more difficult or more restricted in scope than limitations of rights which do contain limitation clauses.

The most important constellation in which the identification of the correct right has played a role has been in the context of free speech (Article 5.1) and freedom of the arts in Article 5.3 of the Basic Law. Whereas free speech can be restricted within the parameters of Article 5.2, albeit only with great care under the Constitutional Court's consistent doctrine of the fundamental significance of free speech, the freedom of the arts is one of those rights that contain no limitation clause and can therefore only be restricted to safeguard other constitutionally protected legal interest should there be a conflict. An example for such a conflict is the *Mephisto* case where the Court had to balance post-mortem personality rights of an actor who had ruthlessly pursued his career during the Nazi regime, which, after his death, became the blueprint for a highly critical novel by the author Klaus Mann. The surviving son of the depicted actor sought to stop the sale of the book and was successful on account of a violation of the personality rights of his deceased father.[69]

68 The concept of "practical concordance" was developed by the constitutional scholar Konrad Hesse, see Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20. Aufl., Heidelberg 1999, para. 317 et seq.

69 BVerfGE 30 (173) - Mephisto (German text at http://www.servat.unibe.ch/dfr/bv030173.html, last accessed 15.9.2019).

V. The Procedural Context for Fundamental Rights Protection under the Basic Law

1. Overview

The protection of fundamental rights in Germany under the Basic Law is not only a task of the Federal Constitutional Court or the judiciary for that matter. Article 1.3 makes it abundantly clear that the fundamental rights of the Basic Law "bind the legislature, the executive and the judiciary as directly applicable law". Hence all state authority is under an obligation to observe the freedoms and guarantees afforded by the Basic Law.

The role of the judiciary, however, is somewhat more pronounced as it falls mainly to the judiciary to exercise oversight and control the behavior of the other two branches and most notably of the executive branch.[70] This task falls to all courts but by nature the general and special administrative courts will be at the forefront of this and the Federal Constitutional Court is the main player in this area.

2. Procedural Framework - The Jurisdiction of the Bundesverfassungsgericht

The jurisdiction of the *BVerfG* is enumerated in the *Grundgesetz* (Article 93 GG) and, with more detail, in the Federal Constitutional Court Act.[71] There are several different procedures with varying admissibility requirements, especially concerning standing, that can be brought to the *BVerfG*.[72]

3. Judicial Review

The *BVerfG* has the full power of judicial review. This means that the court has the power to quash any parliamentary statute on account of its unconstitutionality. Judicial review proceedings can be brought to the *BVerfG* as principal or as incidental judicial review. Principal judicial review comes as *abstract or concrete judicial review*.[73]

The abstractness is a result of the fact that there is not a concrete case or dispute at issue in which the constitutionality of a norm arises as an incidental question. Rather, the constitutionality of a statute, respectively of one or more norms within a statute is the sole judicial matter brought to the court.[74] Such abstract judicial review proceedings can only be brought by

70 Mainly but again not exclusively; Parliament, for example, can and must exercise that oversight by acting to amend legislation if it finds that the executive has gone overboard.

71 Act on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz - BVerfGG, https://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html (last accessed 15.9.2019).

72 Altogether there are 19 different procedures, which can be brought to the Court. All are enumerated in Section13 BVerfGG, id.

73 Article 93 Abs. 1 No. 2 of the Basic Law, ss. 13 No. 6, 76-79 BVerfGG.

74 The BVerfG's power to judicial review is not limited to these two procedures of "*principal* norm control", i.e. where the constitutionality of a norm is the subject-matter of the case. The constitutional complaints procedure or any other procedure may also lead to incidental judicial review of parliamentary laws, i.e. where the constitutionality of a norm appears as an incidental question.

the federal government, a state government or by joint application of one-fourth of the deputies of the first chamber of parliament (*Bundestag*).[75] If the constitutionality of a norm is challenged on the grounds of the federation having the power to legislate, the proceeding can also be brought by the second chamber of parliament, the *Bundesrat* and by a state parliament.[76]

The second possibility for judicial review is referred to as a concrete judicial review of the constitutionality of a norm.[77] The concreteness arises from the fact that in these proceedings the constitutionality of a norm arises as the decisive question in regular court proceedings. However, regular courts do not possess the power to declare an act of Parliament unconstitutional.[78] If a regular court comes to the conclusion that such an unconstitutionality exists and the decision of the concrete case is contingent on this unconstitutionality, the court must interrupt proceedings, prepare an opinion outlining in detail why it is convinced of the unconstitutionality of the norm and submit this opinion to the Constitutional Court who will then review the constitutionality of the norm in question. After that has happened, the regular court will then decide its case based on the decision rendered by the Constitutional Court.

4. Constitutional Complaints Procedure

Arguably, the most important procedure the *BVerfG* has to deal with is the constitutional complaints procedure (*Verfassungsbeschwerde*).[79] The constitutional complaints procedure is by far the most numerous type of procedure brought before the court. In the year 2018 alone, 5678 constitutional complaints were brought to the court. Since 1951 almost 230,000 constitutional complaints have been lodged with the Court. The success rate for constitutional complaints is very low. In 2018, the *BVerfG* rendered a decision in 5853 constitutional complaints. Only 98 were successful (1.67%). In the past decade, the success rate for constitutional complaints has always been below 3%.[80]

Constitutional complaints can be brought to the *BVerfG* only after regular judicial remedies have been exhausted.[81] That means that the *BVerfG* will only deal with constitutional complaints after the 'regular' courts, through all available appeals, have rendered a decision in the matter. The filter effect of this so-called subsidiarity of the Constitutional Complaint procedure partly explains the low success rate. There is also no cost attached to bringing such a case to the *BVerfG* and hence parties have little to lose and risk only a relatively modest frivolous procedure fee in a worst-case scenario. Representation by a lawyer is only required if a hearing is necessary, which can be waived by the parties.

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75 S. 76 of the Federal Constitutional Court Act, https://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html (last accessed 15.9.2019).

76 See s. 76.2 BVerfGG, id.

77 Article 100.1 GG, ss. 13 No. 11, 80-82 BVerfGG.

78 The judicial review power of regular courts is therefore limited to "pre-constitutional" norms, i.e. norms passed before the *Grundgesetz* became effective and the Bundestag began to operate and to non-parliamentary executive legislation such as regulations.

79 Article 93.1, No. 4a Basic Law, ss. 13 No. 8a, 90-95 BVerfGG.

80 All statistical information is available from the Federal Constitutional Court, Jahresstatistik 2018, https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2018/statistik_2018_node.html (last accessed 15.9.2019).

81 § 90.2 BVerfGG, https://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html (last accessed 15.9.2019).

VI. Challenges and Outlook

The Basic Law of the Federal Republic of Germany has undoubtedly been a major success story. It has guided the Republic on its difficult path from tyranny into a modern democratic state. It has weathered any and all storms along the way, from the NATO and rearmament debates in the early 1950's, to the student unrest around the Vietnam war and the inclusion of state of emergency provisions into the Basic Law in the 1960's, to the attempts of the terrorists of the Red Army Fraction to specifically strike at the heart of the Basic Law in the 1970's, to the stationing of nuclear missiles in the 1980's. And when German reunification became a reality and the reason for the provisional name "Basic Law" became history, the vast majority of Germans did not want to engage in the adoption of a new constitution as Article 146 had envisaged for just this case preferring rather to stick with the Basic Law that had served the Federal Republic so well.

However, no linguistic text, however carefully drafted, can by itself determine the shape of society. It requires functioning institutions and the people in these institutions have to administer and implement the constitutional text in the light of the spirit of the text, based on a general and profound conviction of individual liberty and freedom. It is an interdependent trilateral coalition of the constitutional text, functioning institutions and responsible people, which together shaped and shape the German state and society. The institutions and the people need the scaffolding of the Basic Law as much as the Basic Law needs the people to be dedicated to its principal ideas of freedom, tolerance, and responsibility. Today, these pillars of a liberal society are under attack - not only in Germany but in Germany as well. The scourge of nationalism, intolerance, and (religious and other) fascism is becoming ever more apparent. The enemies of freedom are pushing to become mainstream again.

Liberty, freedom, tolerance are never achieved. They have to be actively defended in an ongoing dynamic process. The threat posed by global terror, whatever its causes might be, creates constant pressure on any society based on ideas of liberty and tolerance. Social and demographic change, perceived threats to identity, economic and social pressures, loss of perspective, and opportunity will remain as constant challenges. The future success of the Basic Law will depend on how the trilateral coalition of constitutional text and scaffolding, institutional efficacy and a strong consensus based on liberty and tolerance can stand together to deal with these challenges.

SELECTED FUNDAMENTAL DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT

I. General Considerations

Direct or Indirect Third-Party Effect of Fundamental Rights?
BVerfG, 11.4.2018, 1 BvR 3080/09,
http://www.bverfg.de/e/rs20180411_1bvr308009en.html
"(Football) Stadium Ban"

Explanatory Annotation

Football violence is a problem in much of the football world, sometimes more, sometimes less. In Germany, and almost everywhere else, (professional) football is organized in football leagues and clubs which are all private associations or corporations. The spectators buy tickets and in doing so, enter into contractual relations with the event organizer. As a matter of principle, such standard contractual relationships are not directly affected by the fundamental rights of the Basic Law. In other words, private individuals are not the direct addressees of fundamental rights. That, however, is not to say that the private or contractual sphere in which individuals and corporations operate is entirely a space devoid of any fundamental rights' influence. Contractual relationships are governed by the private (civil) law framework constituted in Germany largely but not exclusively by the German Civil Code (GCC).[1] The GCC contains clauses of a general nature using very abstract language to, for example, include such concepts as "good faith" (§ 242 GCC) or "public policy" as a determinant liability for intentional actions causing harm to others (§ 826 GCC). The German Constitutional Court has consistently held that the fundamental rights of the Basic Law enter the world of private law relationships through the interpretation of these clauses.[2]

In the decision here at issue, a young supporter of the Bayern Munich Football Club became embroiled in an altercation after the end of the match with supporters of the opposing football club of MSV Duisburg leading to personal injury and property damage. The Duisburg football club acting with and for the peak German Football Association and the German Football league issued a countrywide stadium ban for the young Munich supporter. The criminal charges independently pursued by German authorities against the supporter were discontinued under

1 The German Civil Code (GCC) is available in English at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html (last accessed on 15.8.2019).

2 BVerfG, 11.4.2018, 1 BvR 3080/09, http://www.bverfg.de/e/rs20180411_1bvr308009en.html. For an interesting perspective on this same issue under the Hong Kong Basic Law see Hin Ting Liu/Joshua Chan, 'Horizontal Effect' Effect of the Hong Kong Basic Law, 45 (2/3) Common Law World Review 2016, 101, DOI: 10.1177/1473779516660486.

§ 153.1 of the German Criminal Procedure Code[3] as minor misdemeanors. The countrywide stadium ban imposed by the private law associations, however, remained in place. The banned Munich supporter challenged the stadium ban but lost in all instances, thus opening the gate for a constitutional review by the Constitutional Court.

It should be noted that the Constitutional Court is not a court of appeal. It does not review the interpretation of statutory or other non-constitutional law. It has jurisdiction only to ensure that the provisions of the Basic Law are adequately considered by the other courts, for example, when interpreting general clauses of the GCC.

The applicant had argued that in the light of the fact that the criminal proceedings did not produce any determination of wrong-doing on his part, the ban imposed could not be justified and would, therefore, have to be considered arbitrary. Given the significance of football for social life, the applicant claimed that the ban violates his general freedom of action (i.e., to do as one pleases as long as it does not infringe on the rights of others or is otherwise prohibited by law) guaranteed in Article 2.1 of the Basic Law.

The Constitutional Court took the opportunity to make some interesting remarks on the scope of the horizontal effect of the fundamental rights protected by the Basic Law in the context of private law relationships. The stadium ban dispensed by the football club, football association, and football league has its basis in private law and as such, is based on general provisions in the GCC speaking towards the property owner's right to enforce house rules (§§ 862, 1004 GCC). These property rights are, in essence, private law expressions of concrete legal positions and interests protected by the fundamental right of the protection of private property contained in Article 14 of the Basic Law.[4] In other words, the horizontal or third party effect attributed to fundamental rights in the Basic Law can be construed as a conflict of competing emanations of fundamental rights protected by the Basic Law and shining into a private law relationship, which is primarily governed by contract or property law. Looking at the relationship between the football fan and the event organizer through that prism, the latter's property rights conflict with a potential right of the supporter "to do as he pleases." However, and that is an important point of clarification, the Constitutional Court rejected the notion that the broad and subsidiary freedom "to do as one pleases" ("general freedom of action") could be molded into a legal interest precise and strong enough to stand against the property rights of the clubs and peak bodies mediating them. The principal asymmetry between the free individual and the state, where the latter always requires a justification to limit freedom, does not exist in private law, where the subjects oppose each other as legal equals. The general freedom of action which in essence is the legal basis and a reflection of that asymmetry can only be used to interfere in a private law relationship in exceptional circumstances, which the Constitutional Court failed to see in this case[5] (but which could, of course, always be construed by the Court, thus leaving a "backdoor" for the Court to step in if necessary).

3 The German Criminal Procedure Code is available in English at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html (last accessed on 16.8.2019).

4 See BVerfG, 11.4.2018, 1 BvR 3080/09, http://www.bverfg.de/e/rs20180411_1bvr308009en.html, para. 35.

5 Id. at para. 38.

The second point the Constitutional Court made is about the equality guarantee in Article 3.1 of the Basic Law. Constitutional equality protections, as constitutional prohibitions against discrimination, have always been very controversial as the traditional private law freedom to contract was always regarded as the free choice of contractual partners without being forced to disclose why one chooses to contract with one but not the other. That makes perfect sense when choosing a VW car over a Toyota or when buying a ticket to see Arsenal FC play at home against the Tottenham Hotspurs even if the sole reason for the choice is that one dislikes anything Japanese (or German in the reverse case) or one would never spend a penny that could flow into the pockets of the Spurs because one simply "hates" the Spurs. This is even true if the dislike centers around criteria otherwise fully and even legally unacceptable grounds, e.g., not buying a car from a specific car maker because their CEO is of a certain race, ethnicity or gender. That said, if the utility or a bank were not to contract with a person merely because that person is black or a woman, matters change profoundly. But where does the legal difference lie between the two scenarios? Why is it legally ok to be hateful in the one instance but unacceptable to be hateful in the other scenario? One important element might be the power matrix at play between the parties. If on the one side there is a quasimonopoly and on the other side an existential need to contract, one can make a case that there needs to be interference in the freedom to contract to protect the institutionally weaker side. But what about such basic situations as a landlord and tenant relationship? What if the landlord as a matter of principle does not rent to black families or perhaps just not to families with kids regardless of race, religion, or ethnicity? The legal order could not just stand by and perhaps hide behind potential evidentiary difficulties.[6]

This case does not concern the particularly sensitive issues of race, ethnicity, religion, or gender. But the Constitutional Court nonetheless spoke to the equality clause of Article 3.1 of the Basic Law. It did so in a quite peculiar way. First, it stipulated that Article 3.1 of the Basic Law is in principle not conducive to espouse horizontal effects in private law relationships. The Court stated rather forcefully that "in principle, all persons have the freedom to choose – according to their personal preferences – when, with whom and under what circumstances they want to enter into contracts, and how they want to make use of their property in this context."[7] Then it went on to say that this could be different under specific circumstances and that such circumstances are present in this case. The Court pointed to the fact that such soccer games are open to the public at large and that a unilateral ban on one person has a considerable effect on that person's ability to participate in social life. The Court concludes that, therefore the event organizers cannot refuse entrance to a person without reason. The impact on the ability of social life as part of the considerations that have to be made to balance the rights and interests of the

6 See Schulze, Reiner, non-Discrimination in European Private Law, 2011, for a profound discussion of some of these issues by various authors. The underlying difficulties are amply illustrated in the scenario underlying the wedding cake decision of the US-Supreme Court. This case was about a bakery refusing to contract with a gay couple on the provision of a wedding cake for their (same-sex) wedding on religious grounds, see Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission et al., 138 S. Ct. 1719, https://www.supremecourt.gov/opinions/17pdf/16-111_new2_22p3.pdf. See also the instructive case-note by Kendrick, Leslie/Schwartzman, Micah, The Etiquette of Animus, 132 Harvard Law Review (2018), 133, https://harvardlawreview.org/wp-content/uploads/2018/11/133-170_Online.pdf (last accessed 17.8.2019).

7 BVerfG, 11.4.2018, 1 BvR 3080/09, http://www.bverfg.de/e/rs20180411_1bvr308009en.html, para. 40.

parties has its footing in the "public good"- clause which qualifies property protection in Article 14.2 of the Basic Law. The Constitutional Courts even points to the right to take part in cultural life under Article 15.1(a) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[8] The Constitutional Court also explains the foremost procedural consequences of this construction. Stadium Operators must make reasonable efforts to investigate the facts, and they must hear persons before subjecting them to bans.[9] Finally, the Court finished up by saying that the challenged court decisions, in particular the final appeal judgment rendered by the German Supreme Court (*Bundesgerichtshof, BGH*) upholding the ban did indeed give proper recognition to the constitutional framework and this despite the fact that they did not mention the equality clause of Article 3.1 of the Basic Law at all as long as the relevant considerations can be deduced from the judgment.[10] The Constitutional Court considered it sufficient to rely on the fact that the prosecution authorities had commenced criminal investigations and such a commencement requires a solid factual basis. And the Court stressed that given the mass appeal of such sporting events, obligations on the clubs and associations must not be overly burdensome.[11]

Indeed, one could ask why the Constitutional Court applied so much effort to write about horizontal effect in ways not even raised by the parties and in a manner that does not lead to "overly strict standards" for addressees to adhere to. The answer could lie in the broader context of the underlying scenarios. The distinction between the public and the private is growing increasingly tenuous. In a 2011 decision concerning **Frankfurt Airport**, the applicants had challenged an "airport ban" imposed on them after they had been stopped by airport security and Federal Police from approaching staff and visitors of the Airport in protest of deportation of aliens.[12] Frankfurt Airport is operated by the Fraport Corporation, a publicly traded multinational business. The actions taken against the small group of protesters were based on private law provisions concerning the rights of property owners. These are, as explained above, a reflection of the property rights protected by Article 14 of the Basic Law. The protesters themselves from their perspective were using free speech and freedom of assembly and demonstration guarantees protected in Articles 5.1 and 8 of the Basic Law. However, the Constitutional Court did not accept this juxtaposition in the Fraport decision. The reason was that just over 50% of the Fraport shares are held by the state of Hesse and a private law entity that operates as the utility for the City of Frankfurt.[13] In other words, two public entities have a controlling majority stake in Fraport. The Constitutional Court reemphasized that the state cannot get out of obligations arising from fundamental rights of the Basic Law by discharging functions under cover of a private law entity. That had already been accepted for undertakings wholly owned by the state and the Court now explicitly extended the reach of fundamental rights of the Basic Law to private corporations partially owned by the state if the ownership extends

8 International Covenant on Economic, Social and Cultural Rights of 16.12.1966, entry into force 3.1.1976, https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (last accessed 17.8.2019).

9 BVerfG, 11.4.2018, 1 BvR 3080/09, http://www.bverfg.de/e/rs20180411_1bvr308009en.html, para. 46.

10 Id. at para. 44.

11 Id. at para. 52.

12 BVerfG, 22.2.2011, 1 BvR 699/06, http://www.bverfg.de/e/rs20110222_1bvr069906en.html (Fraport).

13 Id. at para. 53 and 60.

beyond 50%. It must be emphasized that in such cases the fundamental rights of the Basic Law do not only obligate the state entities as shareholders but the corporation itself.[14] Having thus established that in this case the shareholder structure required that, with regard to fundamental rights, the Fraport corporation must be treated as a state and not as a private entity, the issue of horizontal effect of rights was no longer relevant. It is noteworthy that the Court made it a point to state nonetheless, that this difference in how fundamental rights impact legal relationship – directly if brought against a state actor, indirectly, i.e., horizontally, if brought up in private party relationships – does not mean that the scope and reach of the fundamental rights in question is different, i.e. of lesser impact when invoked in the context of private law relationships. In other words, the impact of fundamental rights can be just as strong on a private actor as it is on state actors.[15]This *obiter dictum* can only be understood as an attempt to communicate the position of the Constitutional Court that public and private remain two different things but that in regard to the exercise of fundamental rights the focus is on the balance between the exercise of the right in question and any opposing legal interests and that this balancing act is not at all or at least not in any special way determined by the organizational framework under which the actors operate.[16]

Translation of "Football Stadium Ban" decision, BVerfG, 11.4.2018, 1 BvR 3080/09, http://www.bverfg.de/e/rs20180411_1bvr308009en.html

Headnotes:

1. Even in conjunction with the doctrine of the indirect horizontal effects of fundamental rights (*mittelbare Drittwirkung*), Article 3(1) of the Basic Law does not give rise to an objective constitutional principle according to which legal relationships between private actors would be generally subject to equality guarantees. In principle, all persons have the freedom to choose - according to their own preferences - when, with whom and under what circumstances they want to enter into contracts.

2. Under specific circumstances, however, equality requirements relating to relationships between private actors may derive from Article 3(1) of the Basic Law. Article 3(1) of the Basic Law does have horizontal effects, *inter alia*, where private actors exercise their right to enforce house rules (*Hausrecht*) under private law to exclude individual persons from events organised, of the private actors' own volition, for large audiences to the effect that admission is granted without distinguishing between individual persons, and where such exclusion has a considerable impact on the ability of the persons concerned to participate in social life. Event organisers may not use their discretionary powers to exclude specific persons from such events without factual reasons.

14 Id. at 52.

15 Id. at para. 59.

16 The problem of private property and free speech or assembly was at issue in the decision of the European Court of Human Rights (ECtHR) in the case of Appleby and others v. the United Kingdom, Appl. No. 44306/98, 6.5.2003, http://hudoc.echr.coe.int/eng?i=001-61080, where the ECtHR denied the claim that exercising the communication rights guaranteed in Article 10 (free speech) and 11 (freedom of assembly and association) of the ECHR could only be effectively exercised in the privately-owned shopping mall in the town center. The ECtHR made extensive reference to US and Canadian case-law in this regard, see paras. 25-32.

3. Imposing a stadium ban is not contingent upon proving that the person in question has committed a criminal offence; rather, it is sufficient to demonstrate that factual indications give rise to concerns that the affected persons will cause future disturbances. Before a ban is imposed, the persons concerned must, in principle, be heard; they may request that reasons be given for the stadium ban, to allow for legal recourse.

Facts:

The constitutional complaint concerns a nationwide stadium ban imposed on the complainant by a football club [the defendant in the initial proceedings]. **[1]**

I.

[Excerpt from press release no.29/2018 of 27 April 2018]

In 2006, the complainant, a then sixteen-year-old fan of the football club FC Bayern Munich, attended a football match against MSV Duisburg in the opposing team's stadium. After the end of the match, verbal and physical altercations involving a group of FC Bayern Munich fans, among them the complainant, and fans of MSV Duisburg resulted in personal injury and damage to property. Subsequently, approximately 50 persons, including the complainant, were placed in police custody for the purposes of establishing their identities. The public prosecution office opened investigation proceedings on suspicion of rioting charges against the complainant. Following this, MSV Duisburg imposed a ban on the complainant at the suggestion of the local chief of police, prohibiting him from entering any stadium in Germany until June 2008. In this respect, MSV Duisburg acted as agent on behalf of the German Football Association (*Deutscher Fußball-Bund e.V.* - DFB), the League Association (*Ligaverband*) as well as all Bundesliga football clubs, as the clubs have mandated each other as agents with the authority to impose such stadium bans, to exercise the owner's right to enforce house rules and to enforce bans on entering the grounds of their respective football venues. In imposing the stadium ban, MSV Duisburg invoked its right to enforce house rules and the DFB's "Guidelines on Stadium Bans" in the version valid at the time. The criminal investigation proceedings were discontinued on the grounds that the charges were classified as misdemeanours involving only minor personal guilt pursuant to § 153(1) of the Code of Criminal Procedure (*Strafprozessordnung* - StPO). Nonetheless, MSV Duisburg decided, without having heard the complainant, that the stadium ban be kept in place. FC Bayern Munich subsequently expelled the complainant from the club and cancelled his annual membership pass.

The complainant brought an action requesting that the nationwide stadium ban be lifted. After the initial application filed by the complainant had been rendered moot, the complainant modified his application in the appeal proceedings to an application seeking a declaration that the stadium ban had been unlawful. The initial action and the appeal on points of fact and law, as well as the appeal on points of law before the Federal Court of Justice (*Bundesgerichtshof*), were unsuccessful.

[End of excerpt]

6. With his constitutional complaint, the complainant claims a violation of his fundamental rights, contending that he was banned from entering stadiums on the basis of a mere suspicion without viable justification or reasons. The complainant argues that in light of the paramount significance of football for social life and the importance attached to it by the general public and society, the stadium ban was not merely in breach of ordinary law but also violated his fundamental rights. In this respect, the complainant invokes Art. 2(1) in conjunction with Art. 20(3) of the Basic Law (*Grundgesetz* - GG) and his general right of personality deriving from Art. 2(1) in conjunction with Art. 1(1) GG. **[19]**

B.

II.

The constitutional complaint is unfounded. The challenged decisions do sufficiently take into account the principle that fundamental rights permeate private law (*Ausstrahlungswirkung*). **[30]**

1. The standard of review applicable to the challenged decisions under constitutional law is informed by the doctrine of the indirect horizontal effects of fundamental rights (*mittelbare Drittwirkung der Grundrechte*). **[31]**

a) The challenged decisions concern a legal dispute between private actors relating to the scope of rights of ownership and possession *vis-à-vis* third parties under private law. According to the established case-law of the Court, fundamental rights may have a bearing on such disputes by way of indirect horizontal effects (cf. BVerfGE 7, 198 <205 and 206>; 42, 143 <148>; 89, 214 <229>; 103, 89 <100>; 137, 273 <313 para. 109>; established case-law). Fundamental rights do not generally create direct obligations between private actors. They do, however, permeate legal relationships under private law; it is thus incumbent upon the regular courts to give effect to fundamental rights in the interpretation of ordinary law, in particular by means of general clauses contained in private law provisions and legal concepts that are not precisely defined in statutory law. These effects are rooted in the decisions on constitutional values (*verfassungsrechtliche Wertentscheidungen*) enshrined in fundamental rights, which permeate private law in terms of "guiding principles" (cf. BVerfGE 73, 261 <269>; 81, 242 <254>; 89, 214 <229>; 112, 332 <352>); accordingly, the case-law of the Federal Constitutional Court has referred to the fundamental rights as an "objective order of constitutional values" (cf. BVerfGE 7, 198 <205 and 206>; 25, 256 <263>; 33, 1 <12>). In this context, the fundamental rights do not serve the purpose of consistently keeping freedom-restricting interferences to a minimum; rather, they are to be developed as fundamental values informing the balancing of the freedoms of equally entitled rights holders. The freedom afforded one right holder must be reconciled with the freedom afforded another. For this purpose, it is necessary to assess conflicting fundamental rights positions in terms of how they interact, and to strike a balance in accordance with the principle of practical concordance (*praktische Konkordanz*), which requires that the fundamental rights of all persons concerned be given effect to the broadest possible extent (cf. BVerfGE 129, 78 <101 and 102>; 134, 204 <223 para. 68>; 142, 74 <101 para. 82>; established case-law). **[32]**

In this regard, the extent to which fundamental rights indirectly permeate private law depends on the circumstances of the individual case. In order to sufficiently lend effect to the constitutional values enshrined in fundamental rights, it is imperative that a balance be sought between the spheres of freedom of the various rights holders. Decisive factors may include the inevitable consequences resulting from certain situations, the disparity between opposing parties, the importance attached to certain services in society, or the social position of power held by one of the parties (cf. BVerfGE 89, 214 <232 et seq.>; 128, 226 <249 and 250>). **[33]**

b) […] **[34]**

2. The challenged decisions are based on §§ 862, 1004 of the Civil Code (*Bürgerliches Gesetzbuch* - BGB) with regard to determining the scope of the right to enforce house rules under private law on the part of stadium operators *vis-à-vis* football fans seeking access. In this context, constitutional law requires that the guarantee of private property under Art. 14(1) GG and the protection against arbitrary unequal treatment under Art. 3(1) GG be taken into consideration. **[35]**

a) The defendant in the initial proceedings invokes the right to enforce house rules in its capacity as a stadium operator. This right is protected under the guarantee of private property in Art. 14(1) GG. §§ 862, 1004 BGB [...] and the right to enforce house rules deriving from ownership and possession under private law lend shape to the constitutional guarantee of private property in the area of private law. In this respect, the rights of stadium operators must be interpreted in civil proceedings in a manner that takes into account the content of the freedom of property pursuant to Art. 14(1) GG. **[36]**

b) In the case at hand, the complainant cannot invoke the general freedom of action (*allgemeine Handlungsfreiheit*) guaranteed in Art. 2(1) GG against the right of ownership of the defendant in the initial proceedings. The general freedom of action provides a defensive right *vis-à-vis* the state that can be invoked against any unjustified prohibitions, especially on the grounds of disproportionality; as such, it is also applicable to bans [imposed by the state] restricting stadium access during football matches. This is a manifestation of the asymmetry of the rule of law, under which citizens are free, in principle, whereas the state is subject to limitations and held accountable when interfering with this freedom (cf. BVerfGE 128, 226 <244 and 245>). However, the constitutional guarantee of the general freedom of action does not encompass a similarly general constitutionally enshrined value which would ensure that in every private law dispute, the unspecified freedom to engage in any kind of self-determined conduct would guide the interpretation of private law, by way of indirect horizontal effects. To this end, the freedom to engage in any conduct one subjectively pleases - in this case to attend a football match -, based on the general freedom of action, cannot generally be invoked to restrict the ownership rights of private actors organising certain events. **[37]**

In specific situations, however, the protection provided under Art. 2(1) GG may extend into private law relations. This applies, for instance, in certain typical case categories

where a particularly heavy burden is imposed, or where one contracting party is placed at a structural disadvantage (cf. BVerfGE 89, 214 <232>). Moreover, in individual cases, Art. 2(1) GG may serve as a catch-all fundamental right (*Auffanggrundrecht*) (cf. BVerfGE 85, 214 <217 et seq.>). The constitutional complaint at hand does not fall within any of these specific categories in which the general freedom of action would have to be indirectly taken into consideration as a decision on values enshrined in the Constitution. […] The central issue in the current proceedings is that the complainant was treated unequally compared to persons that were granted access to the stadium. […] **[38]**

c) In the current proceedings, the general requirement of equal treatment under Art. 3(1) GG must be considered opposite the stadium operator's right of ownership under Art. 14(1) GG. **[39]**

Yet Art. 3(1) GG does not give rise to an objective constitutional principle according to which legal relationships between private actors would be generally subject to equality guarantees. Requirements to that effect cannot be derived from the doctrine of indirect horizontal effects, either. In principle, all persons have the freedom to choose - according to their own preferences - when, with whom and under what circumstances they want to enter into contracts, and how they want to make use of their property in this context. This freedom is further shaped and variously restricted through statutory law and in particular through private law; in this regard, it can also be subject to specific requirements arising under constitutional law. In contrast, no general principle according to which legal relationships between private actors would generally be subject to equality guarantees follows from Article 3(1) of the Basic Law even when read in conjunction with the doctrine of indirect horizontal effects. It is not within the scope of the current proceedings to decide whether stricter standards could be derived from specific equality rights such as Art. 3(2) and (3) GG. **[40]**

However, under specific circumstances, equality requirements relating to relationships between private actors may arise from Art. 3(1) GG. The nationwide stadium ban in dispute constitutes such a circumstance. The indirect horizontal effect of the requirement of equal treatment comes into play here because the stadium ban imposes - based on the right to enforce house rules - a one-sided exclusion from events, which the organisers, of their own volition, had opened up to a large audience without distinguishing between individual persons, and this ban has a considerable impact on the ability of the persons concerned to participate in social life. By undertaking to organise such events, private actors also take on a special legal responsibility under constitutional law. They may not use their discretionary powers, which here result from the right to enforce house rules - in other cases they might potentially arise from a monopoly or a position of structural advantage -, to exclude specific persons from such events without factual reasons. In this case, the constitutional recognition of ownership as an absolute right *in rem* and the resulting one-sided discretionary powers of the owner to enforce house rules must be balanced - in light of the principle that property entails a social responsibility for the public good (*Sozialbindung des Eigentums*) (Art. 14(2) GG) - against the principle, which is binding upon the regular courts, that the guarantee of equal treatment permeates private law. **[41]**

Factually, this also lends effect to the right to take part in cultural life pursuant to Art. 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (entry into force on 3 January 1976, UNTS vol. 993, p. 3, Federal Law Gazette [*Bundesgesetzblatt* - BGBl] II p. 428; regarding sporting events open to everyone cf. Committee on Economic, Social and Cultural Rights, General Comment No. 21 [2009], 43rd session, UN Doc E/C.12/GC/21, paras. 13 and 16). **[42]**

d) […] **[43]**

3. When reviewing a stadium ban issued on the basis of the right to enforce house rules under private law, it is primarily incumbent upon the civil courts to resolve the conflict between ownership rights and the principle of equal treatment. The courts are afforded a wide margin of assessment in this respect. The Federal Constitutional Court intervenes only in the event of manifest errors of interpretation that are based on a fundamentally incorrect understanding of the significance of the relevant fundamental right (cf. BVerfGE 34, 269 <279 and 280>; 85, 248 <257 and 258>; 110, 226 <270>; established case-law). In this respect, it is irrelevant whether the civil courts directly invoke fundamental rights in their decision or, alternatively, give effect to these values by way of considerations rooted in ordinary law in conjunction with the established principles of interpretation under private law, thereby leaving the legal order more open for further development. What matters is that, ultimately, the values enshrined in fundamental rights are sufficiently taken into account. **[44]**

a) Consequently, the civil courts must ensure, in light of the principle of equal treatment, that stadium bans are not arbitrarily imposed, but are based on factual reasons. In particular, the courts are called upon to further specify how to achieve the necessary balancing with ownership rights in light of the factual circumstances under which stadium bans are imposed, the intended effects of the bans as well as the responsibility of the persons concerned. It is not objectionable under constitutional law if courts already consider it to be a sufficient factual reason justifying a stadium ban if there are well-founded concerns that a person poses a risk of future disturbances. In this context, evidence of previous criminal conduct or unlawful behaviour is not a necessary prerequisite, given that stadium operators have a legitimate interest in ensuring undisturbed football matches and are responsible for the safety of athletes and the public. It is sufficient to demonstrate that the concerns regarding future disturbances caused by the persons affected by the measures are supported by specific and proven facts of sufficient weight. This in line with other areas of private law that allow sanctions to be imposed when there are reasonable grounds for suspicion. […] **[45]**

b) The requirement that stadium bans be based on factual reasons gives rise to procedural requirements. In particular, stadium operators must make reasonable efforts to investigate the facts of the case. This includes, at least in principle, that the persons concerned be given a hearing prior to the imposition of a stadium ban. Furthermore, reasons for the decision must be provided upon request in order to enable the persons concerned to seek legal recourse. **[46]**

Recognising such procedural guarantees does not conflict with the nature of private law disputes. It is true that there is no basis for recognising such guarantees in private law relations where the parties freely determine their mutual contractual obligations. Where it is clear from the outset that decisions in the domain of private law do not come into conflict with the protected rights of third parties, and where these decisions can be made without regard to the concerns of the other party, it is not necessary, at least not generally, to put in place such procedural guarantees. The situation is different, however, insofar as the legal relationship between the parties is permeated by the principle of equal treatment deriving from fundamental rights, and it requires that the denial of a service be based on justifying reasons. When decisions made on the basis of house rules have a factually punitive effect, thus requiring that the persons concerned be given viable reasons, certain basic standards must be met: the persons concerned must be given the opportunity to address the allegations against them and, in submitting their view, to exercise their rights in a timely manner. This does not rule out that the decision may initially be taken without a hearing in certain justifiable cases; the person concerned may then be heard at a later date. […] **[47]**

In this respect, it is again primarily incumbent upon the regular courts to further specify the relevant requirements. […] In this context, the courts must take into consideration the largescale nature of major sporting events, the specific threats posed by violent fan groups and the interests of those banned from entering stadiums. **[48]**

4. Based on these considerations, the challenged decisions by the regular courts are not objectionable. The relevant subject of review is the decision of the Federal Court of Justice [in the proceedings of appeal on points of law], which affirms, by way of final decision, the previous decisions rendered by the courts of first instance and appeal. **[49]**

a) The Federal Court of Justice finds the stadium ban imposed on the complainant to be lawful on the grounds that it was based on a factual reason. The relevant considerations satisfy the constitutional requirements pertaining to the horizontal effects of Art. 3(1) GG. **[50]**

aa) In its reasoning, the Federal Court of Justice does not endorse the view that event organisers could take the decision on whether to impose a stadium ban at their free discretion; instead, the Federal Court of Justice requires that such bans be based on factual reasons. According to Federal Court of Justice's reasoning, the risk of possible future disturbances at sporting events constitutes such a factual reason. It further states that the assertion of such a risk must not be based on subjective concerns, but on objective facts. **[51]**

These considerations satisfy the constitutional requirements set out above. The Federal Court of Justice affirms the complainant's right not to be subject to arbitrary decisions, which derives from the values enshrined in Art. 3(1) GG and which must also be given effect in the private law relationship underlying the case at hand; subsequently, it weighs this right against the stadium operator's right to organise football matches in its stadium in accordance with its own ideas and, in particular, in accordance with the safety measures for which the stadium operator

is responsible. In this respect, the Federal Court of Justice submits that "no overly strict standards" should be applied when assessing whether concerns regarding a risk of disturbances are justified; in light of the unique nature of major sporting events, elaborated upon by the court, this approach is within the margin of appreciation afforded regular courts. **[52]**

bb) The challenged decisions are consistent with the arguments put forward by the stadium operators in finding that the factual reason justifying the original stadium ban was the initiation of investigation proceedings by the public prosecution office which had not yet been concluded at the time. By law, investigation proceedings may only be initiated where there is a fact-based initial suspicion (*Anfangsverdacht*). Given that event organisers generally do not dispose of any better evidentiary means, they may rely on the assessment of the security authorities where investigations are still ongoing. In this context, the Federal Court of Justice also confirms that Art. 4(3) of the DFB Guidelines on Stadium Bans (*Stadionverbots-Richtlinie* - SVRL) is compatible with the law and, as an internal league regulation, provides a reasonable guiding standard. **[53]**

This assessment is not objectionable under constitutional law. As it explicitly states, the Federal Court of Justice does not relieve event organisers of the duty to examine the plausibility of the allegations against the person concerned, so that criminal proceedings initiated in a manifestly arbitrary manner or based on incorrect factual assumptions can be ruled out. However, it is not unreasonable to let stadium operators rely on the assessment of the public prosecution office or of the police while investigation proceedings are still pending. As the stadium operators have a legitimate interest in taking measures as early as possible in order to ensure safety, it cannot be asked of them to await the conclusion of the investigations before taking action. **[54]**

cc) Furthermore, the Federal Court of Justice holds that the subsequent discontinuation of the investigation proceedings did not suppress the factual reason for the stadium ban. While it could not be presumed, once the proceedings were discontinued pursuant to § 153 StPO, that the complainant himself had committed any criminal offence, the circumstances that had not only given rise to the initial suspicion of criminal conduct resulting in the investigation proceedings, but also to concerns that the complainant may cause further disturbances in the future, still persisted despite the fact that the criminal investigations were discontinued. The complainant knowingly frequented groups prone to violence that had indeed committed considerable acts of violence. […] **[55]**

The Federal Court of Justice did not err in considering this to be a factual reason for justifying the stadium ban. In this respect, the court did not accept at face value that the investigation proceedings could continue to provide a justification for the stadium ban even after they had been discontinued. Rather, the court upheld the stadium ban based on findings that, taken on their own, would suffice to establish a justified concern that the complainant would cause future

disturbances, irrespective of the discontinuation of the criminal investigation proceedings. In contrast to the internal league regulation in the former version of § 6(1) SVRL, the decision to impose a stadium ban was, in particular, neither contingent on a reversal of the burden of proof nor solely based on the assertion that the complainant had failed to prove his innocence. Rather, the stadium ban was based on an independent assessment of the circumstances giving rise to the concern [that the complainant was likely to cause further disturbances] - which also appears to be the standard set out in the currently applicable DFB Guidelines on Stadium Bans (cf. § 7(2) SVRL, version dated July 2014). For the rest, the fact that stadium operators base their decisions on unified guidelines further ensures that stadium bans observe uniform standards, promoting objectivity. **[56]**

b) As regards the procedural requirements, the constitutional complaint is also unsuccessful. **[57]**

[...] At least for the future, the now updated Guidelines on Stadium Bans provide that the person concerned has a right to be heard and that, as a rule, this must take place before a stadium ban is imposed (cf. § 6(1) SVRL). Likewise, based on a reasonable interpretation of the Guidelines, decisions issuing a stadium ban must provide reasons, at least in cases where the decision is under review (cf. § 7(2) SVRL). With regard to the specific stadium ban at issue, which has by now expired, the complainant did for that matter have the opportunity in the proceedings before the civil courts to at least retroactively address the reasons put forward for the stadium ban and to be heard in this regard. **[58]**

II. Human Dignity - Article 1 of the Basic Law

a) Life Imprisonment, BVerfGE 45, 187

Explanatory Annotation

Article 102 of the Basic Law prohibits the death penalty absolutely and with no exception in times of peace or war. The German Criminal Code's[17] most severe sanction is imprisonment for life. This sanction is prescribed for the most heinous of crimes reaching from qualified forms of homicide (e.g. "murder" as defined in ss. 211, 212, and other crimes causing the death of victims, see ss. 176b, 178, 239a, 251, 306c, 307, 308, 309, 316a, 316c Criminal Code), to preparation of a war of aggression (s. 80), and qualified forms of treason (ss. 81, 94, 100). It is also prescribed as a sanction for certain international crimes such as genocide, crimes against humanity, and certain war crimes under the Code of Crimes Against International Law introduced in 2002.[18]

Life imprisonment, as the term suggests, could mean imprisonment until death. That raises two issues in the context of human dignity. The first one is connected to the understanding of human dignity itself. The understanding of human dignity as the core of a number of specialized and specified rights deriving from it in essence means that all of the rights guaranteed by the Basic Law have a dignity core. One of these rights is the freedom of movement in Article 2.2. That right is obviously severely limited if one is sentenced to a prison term. However, if one is sentenced to imprisonment for life, and if that were indeed to mean imprisonment until death, the right of freedom of movement would in fact be reduced to naught. This is incompatible with the notion of Article 1.1 of the Basic Law that every human being, including heinous criminals, partake in the protection of human dignity, that this dignity must be protected and that human dignity cannot be reduced to naught.

The Constitutional Court therefore stipulated in this decision that imprisonment for life cannot be construed as meaning imprisonment until death. Every human being must retain the possibility of regaining his or her freedom and this "freedom perspective" must be more than just the vague hope for clemency or an executive pardon at some time in the future. In practice this means that after 15 years of imprisonment, prisoners must either be released on probation (ss. 57a and 57b Criminal Code) or review processes must be in place that guarantee a periodic review of the prisoner's status and his potential for being released on probation.

The second issue raised by the imprisonment for life case if construed as imprisonment until death, has to do with Article 19.2 of the Basic Law which states that "[i]n no case may the essence of a basic right be affected". Article 19.2 requires that whereas certain limitations of

17 German version at http://www.gesetze-im-internet.de/stgb/BJNR001270871.html; English translation available at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

18 German version at http://www.gesetze-im-internet.de/vstgb/BJNR225410002.html; English translation available from http://www.iuscomp.org/gla/statutes/statutes.htm (http://www.iuscomp.org/gla/statutes/VoeStGB.pdf).

rights can be justified, some rest of the right must always remain and a right cannot be "limited away" in totality. Construing life imprisonment as imprisonment until death would totally eliminate the right to freedom. The connection of Article 19.2 to the dignity core of all rights is evident.

There is one case where this "dignity core" approach is more difficult to establish. There are undoubtedly instances in which the police can use deadly force, e.g. in hostage-taking constellations if killing the hostage-taker appears to be the only way to save the hostages. One could argue that this necessarily takes away the hostage-takers right of life and nothing remains of this right. From a dignity perspective, however, it is important to note that the actor in these situations will always have some control over the situation. A hostage-taker, for example, can give up and release the hostages. It is up to him or her to stop and withdraw from the criminal act. The hostage taker is a main actor, a subject of the unfolding events and not just a mere object of government action and hence his dignity is not affected. However, from the perspective of the right to life and Article 19.2 things are more complicated and one will either have to construe this as an exception to the "untouchable core" principle or one will have to construe the right beyond just its individual component and argue that the killing affects only one person whereas the right of life of all the others remains unaffected.

Translation of the Life Imprisonment Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 45, 187*

Headnotes:

1. Life imprisonment for murder (s. 211 of the Criminal Code) is, in compliance with the following headnotes, compatible with the Basic Law.

2. As according to the status quo of scientific findings, it cannot be proven that the execution of the lifelong imprisonment is indispensably resulting in irreparable damages of a person's psychical or physical health and therefore establishing an infringement of human dignity (Article 1.1 of the Basic Law). This is if life imprisonment is executed in compliance with the penal law and considering the present practice of granting pardons.

3. A humane execution of the life imprisonment can only be assured if the sentenced criminal has a principally attainable option to regain freedom at a later point in time. The possibility of being granted a pardon is not sufficient; rather, the principle of the rule of law demands a statutory provision, determining the requirements for the suspension of an execution of life imprisonment and the applicable procedure.

4. It is not contrary to the Basic Law if the 'wantonly cruel' killing of a human being and the killing of a human being, to conceal another crime' are qualified as murder according to s. 211.2 of the Criminal Code. But this assumption requires the provision to be subject to a restrictive interpretation, in compliance with the principle of proportionality.

Order of the First Senate of 21 June 1977 - 1 BvL 14/76 -

* Translation by Miriam Söhne; © Konrad-Adenauer-Stiftung.

Facts:

This case has its origin as a District Court case in the town of Verden. The defendant Detlev R. was a policeman and drug dealer. One of his customers, the substance-abuser Guenter L., blackmailed the defendant and demanded free drugs. Detlev R. pretended to go along and scheduled a visit at Guenter L.'s house. The defendant actually provided Guenter L. with the demanded drugs, but while the latter was busy preparing an injection, Detlev R. fatally shot him in the head three times at close range.

The case is before the Federal Constitutional Court due to a referral from the Verden District Court. The reason for the deferral was that the Verden court deemed the murder and the manslaughter statutes, ss. 211 and 212, respectively, of the Criminal Code in the revised version of 1969, incompatible with the human dignity clause of Article 1.1 of the Basic Law. The murder and the manslaughter statute both provide for life imprisonment in extreme cases-such as homicide to satisfy sexual urges, homicide as a result of greed, homicide to conceal another crime, extreme homicides in general, et cetera. The Verden court argued in detail that life imprisonment can be shown to destroy human beings within about twenty years. The District Court outlined how such long prison terms turn people into spiritual and physical wrecks. It concluded that the permanent exclusion of the criminal from society will destroy him psychologically and therefore the legislator violated its duty to respect human dignity as commanded by Article 1.1 of the Basic Law when it passed ss. 211 and 212 of the Criminal Code. The question was whether statutes which allow for life imprisonment in certain extreme cases of homicide are compatible with Article 1.1 of the Basic Law which commands that the state has the duty to respect and protect human dignity.

Extract from the Grounds:

C. I.

A sentence of life imprisonment represents an extraordinary severe infringement of a person's basic rights. In the catalogue of penalties, this punishment is the most invasive of the inviolable right to personal freedom under Article 2.2 of the Basic Law.

…

In implementing this penalty, the state not only limits the basic right guaranteed by article 2.2 of the Basic Law but it also implicates numerous other rights guaranteed by the Basic Law, depending on the individual case. The constitutional matter in question is therefore of considerable gravity and importance.

Indeed, the right of personal freedom under Article 2.2 of the Basic Law may be limited by a statutory act of Parliament. Parliament's freedom to enact legislation, however, is limited by the constitution in numerous respects.

In exercising its powers the legislature must take account of both the inviolability of human dignity (Article 1.1 of the Basic Law) which is the highest value in the constitutional order, as well as other constitutional principles, especially the principle of equality (Article 3.1 of the Basic Law), the rule of law, and the social state (Article 20.1 of the Basic Law).

Since the freedom of the individual is already such a highly important object of legal protection that it may only be limited on truly compelling grounds (BVerfGE 22, 180 [219]), any lifelong deprivation requires special scrutiny by the criterion of proportionality.

…

II.

1. Respect and protection of human dignity are among the constitutional principles of the Basic law. The free human personality and human dignity represent the highest legal values within the constitutional order (see BVerfGE 6, 32 [41]; 27, 1 [6]; 30, 173 [193]; 32, 98 [108]). The state in all its forms has the duty to respect and to protect the dignity of human beings.

This is based on the conception of man as a spiritual-moral being endowed to determine and develop hisself. This freedom, within the meaning of the Basic Law, is not one of an isolated and self-regarding individual, but rather it is the freedom of an individual that is related to the community and bound by it (see BVerfGE 33, 303 [334]). Due to the fact that the individual is bound by the community, the freedom cannot be in principle unlimited. The individual must allow those limitations of his freedom to act that the legislator deems bearable and necessary, in particular factual circumstances for the nourishment and support of the communal living with each other; however, the autonomy of the individual must be protected (see BVerfGE 30, 1 [20] - "Eavesdropping"). This means, also, that within the community each individual must be recognized, as a matter of principle, as a member with equal rights and a value of his own. The sentence "the human being must always remain the end of itself" has unlimited validity in all areas of the law; for the dignity of man as a person, which can never be taken away consists particularly therein, that he remains recognized as a person who bears responsibility for himself.

In the area of criminal law in which the highest demands to the maintenance of justice are posed, Article 1.1 of the Basic Law determines the understanding of the nature of penal sanctions and the relation between guilt and atonement. The fundamental principle *nulla poena sine culpa* has the rank of a constitutional norm (BVerfGE 20, 323 [331]). Every penal sanction must bear a just relation to the severity of the offence and the guilt of the offender (BVerfGE 6, 389 [439]; 9, 167 [169]; 20, 323 [331]; 25, 269 [285 seq.]). The command to respect human dignity means in particular that cruel, inhuman and degrading punishments are not permitted (BVerfGE 1, 332 [348]; 6, 389 [439]). The offender may not be turned into a mere object of the state's fight against crime under violation of his constitutionally protected right to social worth and respect (BVerfGE 28, 389 [391]). The fundamental prerequisites of individual and social existence of men must be preserved. From Article 1.1 of the Basic Law, in conjunction with the social state principle, one can, and this is particularly true in the execution of criminal punishments, derive the duty of the state to allow everyone at least that minimum level of existence at which human dignity is conceived. It would be inconsistent with human dignity perceived in this way if the state were to claim the right to forcefully strip a human of his freedom without the person having at least the possibility to ever regain freedom.

In the course of the discussion one must never loose sight of this principle: The dignity of the human being is something indispensable. The recognition of what is necessary to comply with the command to respect human dignity is, however, inseparable from the historical development.

The history of criminal law clearly shows that most cruel punishments were always replaced by milder punishments. The progress, away from more raw towards more humane, away from more simple towards more differentiated forms of punishment, has continued, and the path future progress will take, becomes visible. The judgment on what is necessary for the maintenance of human dignity can therefore only rest on present understanding and claim no right to timeless validity.

2. If these standards are used in assessing nature and effect of life imprisonment, one reaches the conclusion that no violation of Article 1.1 of the Basic Law is before the court.

…

c) With such a factual background, the constitutional review must exercise restraint (BVerfGE 37, 104 [118]; 43, 291 [347]). It is true that the Federal Constitutional Court has the duty to protect the basic rights against infringements from the legislator. Therefore, the court is in its review not bound by the legal understanding of the legislator. However, if assessments and actual judgments by the legislator are of importance for the constitutional review, then the court may, as a matter of principle, only overrule those which are possible to disproof. It seems apprehendable, however, that, even in cases where serious interferences with basic rights are under review, uncertainties in the evaluation of facts are to be resolved to the burden of the holder of the basic right. When the Federal Constitutional Court nevertheless denied finding a violation of the inviolability of the dignity of man as guaranteed by Article 1.1 of the Basic Law, that decision was mainly due to the following reasons:

aa) Life imprisonment finds its constitutionally necessary complement in a sensible execution of treatment. Penal institutions are obliged, even in the cases of life imprisonment, to promote the rehabilitation of the inmates, to maintain their ability and willingness to function as human beings and to offset damaging consequences caused by the loss of freedom and thereby especially preventing them from all deforming alterations of personality. These obligations for the execution of the penal sanctions are based on the Constitution. They can be derived from the inviolability of the dignity of man as guaranteed by Article 1.1 of the Basic Law. If these obligations are adequately complied with by the penal institutions, then those institutions substantially contribute to counter, for instance, the threat of changing personalities of inmates.

As of today, the execution of criminal penalties in the Federal Republic of Germany has already been more than a mere execution to incapacitate. Rather, the authorities have attempted to achieve an execution with treatment aimed at the reintegration of the offenders into society. This is consistent with former decisions by the Federal Constitutional Court on issues of the execution of criminal penalties. The court on several occasions has maintained that rehabilitation is constitutionally required in any community that puts human dignity at its centre and that it is committed to the principle of social justice. The prisoner's interest in reintegration into society flows from Article 1.1 of the Basic Law in conjunction with Article 2.1 of the Basic Law. The condemned criminal must be given the chance to

re-enter society after having atoned for his crime (BVerfGE 35, 202 [235 seq.] - Lebach; 36, 174 [188]). The state is obliged within the realm of the possible to take all legal measures that are useful and necessary to achieve this goal.

If one assumes that even the criminal sentenced to life imprisonment must principally be granted a possibility to regain his freedom, then he must also have a right to be prepared to re-enter the society, even if he will only after a long period of atonement for his crime have the possibility to be obliged to handle a life in freedom (BVerfGE 40, 276 [284]). Even in such cases, the execution of the penalty can establish the prerequisites for a later release and ease the convict's reintegration into society.

…

bb) Empirical data shows that the full serving of a life imprisonment sentence is a rare exception. The criminals sentenced to life imprisonment, except in a few cases in which the predictions of social reintegration are negative and for reasons of public safety a continued execution of the sentence is necessary, are most often being released on parole. The probability of an occurrence of serious alterations of inmates' personalities is significantly limited by this practice. A summary study of the parole administration in the states shows, that over a period of thirty years, of the 702 inmates with lifetime sentences, who were released, very few (48) were released before 10 years and also very few were released after the extreme length of up to thirty years (27). The vast majority of parole releases happens between the 15th and the 25th year of the sentence.

…

III.

…

4. a) The assessment of the constitutionality of life imprisonment especially with references to Article 1.1 of the Basic Law and the principle of the rule of law (Rechtsstaatsprinzip) shows that a humane execution of life imprisonment is possible only when the prisoner is given a concrete and realistically attainable chance to regain freedom at a later point in time; the state strikes at the very core of human dignity if it treats the prisoner without regard to the development of his personality and strips him of any hope of regaining his freedom. In order to assure the perspective to regain freedom at some point in the future, which is the prerequisite for rendering life imprisonment bearable according to the court's understanding of human dignity, in a manner which meets constitutional requirements, the current legal provisions relating to the granting of pardons are not sufficient.

…

b) A basically new trend became evident in the Ministry of Justice's 1974 draft of the fifteenth amendment to the Criminal Code. This draft provides that the execution of the penal sanction of life imprisonment can be suspended under parole with the

consent of the inmate after an adequate part of the sentence has passed - the draft proposes 12 to 15 years - and one can justify to test whether the convict will cease to commit crimes. A review board shall then decide on the prisoner's release. This decision shall apparently be subject to the approval of a superior appellate court. The preface to the draft states that under certain conditions it should still be possible to enforce life imprisonment. Life imprisonment is the most invasive punishment in the current catalogue of penalties and should still be imposed, if necessary to protect the common good. As long as it is necessary to protect the common good, the state should not only impose such sentences but also carry them out. However, experience shows that the execution of life imprisonment to its full term is not always necessary to protect the common good. With regard to murder, the crime for which a sentence of life imprisonment is most often imposed, there are a significant number of offenders who in all probability will not repeat that crime. In these cases, where a positive social prognosis can be set up, life imprisonment can hardly be justified. Moreover, the finding that the long, continuous lack of freedom is an extraordinary physical and psychological burden that could result in a substantial detriment to the prisoner's personality provides a good reason for introducing a possibility of release. Additionally, a sentence of life imprisonment cannot be enforced humanely if from the outset the prisoner is denied any and every possibility of returning to freedom. Indeed, it has hardly been the rule up to now to require the prisoner to serve out his life sentence. Yet, an individual and case-by-case decision on whether a prisoner can be granted parole is not a satisfactory solution. Leading state officials rightly noted in their resolution of March 16, 1972 that it cannot be a satisfactory solution to correct the law in force by implementing a uniform practice of granting pardons.

…

IV.

The legislature does not infringe the constitutional requirement of sensible and appropriate punishment if it decides to impose life imprisonment for most offensive acts of killing (BVerfGE 28, 386 [391]).

…

c) The imposition of a life sentence does not contradict the constitutionally-based concept of rehabilitation, given the practice of granting pardons and current legislation concerning the suspension of punishments. The murderer sentenced to life usually does have a chance to be released after serving a certain period of time.

…

But for the criminal who remains a threat to society, the goal of rehabilitation may never be fulfilled. It is the particular personal circumstances of the criminal which may rule out successful rehabilitation rather then the sentence of life imprisonment itself.

…

V.

Article 1.1 and Article 2.1 together with the principle of the rule of law require that the elements of crime and its consequences must be harmonised in a reasonable way, in compliance with the idea of justice (see BVerfGE 20, 323 [331]; 25, 269 [286]; 27, 18 [29]). Therefore, the threatened punishment must be tailored in due consideration of the severity of the crime and the culpability of the offender.

…

In this context especially, the question arises whether the principle of proportionality may require a penalty other than life imprisonment for "murders of wanton cruelty" or for cases of murder "to conceal another crime". The issue is particularly relevant here because, with the exception of murder (s. 211 of the Criminal Code) and genocide (s. 220a.1 no. 1 of the Criminal Code), the legislature usually granted a range of punishment to the applicable court. Within this range it may ascertain the extent of punishment in a concrete case, according to the criteria concerning the award of punishment, named in s. 46 of the Criminal Code.

…

Under specific circumstances, the application of s. 211 of the Criminal Code might indeed result in an undue burden to the offender. But the senate is of the opinion that this is not the case as far as the killing under consideration is concerned. However, the criterion of an undue burden might still apply to cases where the offence was not specifically condemnable.

…

b) Aviation Security Act, BVerfGE 115, 118

Explanatory Annotation

The decision concerning the Aviation Security Act is one of several dealing with legislative efforts concentrating on security in the aftermath of the 9/11-attacks in New York and Washington, D.C. in 2001. Under the Basic Law any and all executive action requires a statutory legal basis if and insofar as such action has the potential to infringe upon a person's rights as guaranteed by the Basic Law. However, there was no such statutory authority to shoot down an aircraft if that was the only way to stop this aircraft from being used as a weapon against structures on the ground thus potentially threatening the lives of many. The new Aviation Security Act[19] intended to fill this perceived gap but was immediately challenged in constitutional complaint proceedings before the Constitutional Court. The Court struck down the statute on two main grounds.

First, the Court saw no constitutional authority for the use of the armed forces within the territory of the Republic. The use of the armed forces, i.e. the military, is tightly regulated by the Basic Law and restricted to the defence of the Republic from armed attacks and to

19 Luftsicherheitsgesetz, BGBl I, p. 78 (2003).

extraterritorial military activities as part of collective self-defence organizations such as NATO or the United Nations. Domestic deployments and missions are only possible under Article 35.2 and 35.3 of the Basic Law to assist state police forces in their response to "grave accidents" and "natural disasters". The Court limited this assistance to measures the police forces could take themselves and the shooting down of an aircraft is not one of those measures.

Second, and despite the fact that the Act was already unconstitutional for lack of constitutional authority, the Court also addressed the fundamental rights aspect. The shooting down of a passenger aircraft with "innocent" passengers on board is obviously relevant under the right to life and human dignity guarantees of Articles 1.1 and 2.2 of the Basic Law. The shooting down of a passenger aircraft would inherently reduce the innocent passengers on board to mere objects of this decision, devoid of any and all rights, procedural or otherwise. The orders to shoot down would be tantamount to the order to sacrifice their lives for the protection of other lives. It would inherently mean that state authority values some lives, those on the ground, higher than those in the plane. The Court was not persuaded by and regarded as a purely fictional construct the argument that those who board a passenger aircraft (after 9/11) are familiar with this risk and have implicitly consented to be shot down. The Court also dismissed the argument that the airplane passengers are dead anyway because if not shot down they will almost certainly die when crashed into the target. In a human dignity context the fallacy of this argument is evident as it would require state authority to make a judgment on the value of life based on an estimate of the remaining life span and these decisions would have to be reached within a very small time span and under inherent insecurity of the precise facts.

It is only consequent that these considerations could not apply to an airplane solely occupied by terrorists. In this case the individuals on board are not merely helpless pawns but subjects controlling the unfolding events.

Translation of the Aviation Security Act Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 115, 118*

Headnotes:

1. Article 35.2 sentence 2 and 35.3 sentence 1 of the Basic Law (Grundgesetz - GG) directly grants the Federation the right to issue regulations that provide the details concerning the deployment of the armed forces for the control of natural disasters and in the case of especially grave accidents in accordance with these provisions and concerning the cooperation with the *Länder* (states) affected. The concept of an "especially grave accident" within the meaning of Article 35.2, sentence 2 of the Basic Law also comprises events in which a disaster can be expected to happen with near certainty.

2. Article 35.2, sentence 2 and 35.3, sentence 1 of the Basic Law does not permit the Federation to order missions of the armed forces with specifically military weapons for the control of natural disasters and in the case of especially grave accidents.

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*

3. The armed forces' authorisation pursuant to s. 14.3 of the Aviation Security Act (Luftsicherheitsgesetz - LuftSiG) to shoot down by the direct use of armed force an aircraft that is intended to be used against human lives is incompatible with the right to life under Article 2.2 sentence 1 of the Basic Law in conjunction with the guarantee of human dignity under Article 1.1 of the Basic Law to the extent that it affects persons on board the aircraft who are not participants in the crime.

Judgment of the First Senate of 15 February 2006 on the basis of the oral hearing of 9 November 2005 - 1 BvR 357/05 -

Facts:

The constitutional complaint challenges the armed forces' authorisation by the Aviation Security Act to shoot down, by the direct use of armed force, aircraft that are intended to be used as weapons in crimes against human lives.

The incidents on 11 September 2001 and 5 January 2003 caused a large number of measures aimed at preventing unlawful interference with civil aviation, at improving the security of civil aviation as a whole and at protecting it, in doing so, also from dangers that are imminent where aircraft are taken command of by people who want to abuse them for objectives that are unrelated to air traffic.

On 16 December 2002, the European Parliament and the Council of the European Union adopted Regulation (EC) No. 2320/2002 - amended by Regulation (EC) No. 849/2004 of 29 April 2004 (Official Journal of the European Communities (OJ) L 158 of 30 April 2004, p. 1) - Regulation (EC) No. 2320/2002 establishing common rules in the field of civil aviation security (OJ L 355 of 30 December 2002, p. 1). In the Federal Republic of Germany, factual as well as legal measures have been taken whose intended objectives are to increase the security of air traffic and to protect it from attacks.

Since 1 October 2003, a "National Air Security Centre" (Nationales Lage- und Führungszentrum "Sicherheit im Luftraum"), which has been established in Kalkar on the Lower Rhine, has been operational. It is intended to ensure coordinated, swift cooperation of all authorities of the Federation and the *Länder* in charge of questions of aviation security as a central information hub in order to guarantee security in the German air space. In the National Air Security Centre, members of the Federal Armed Forces, the Federal Police and the Deutsche Flugsicherung (German Air Navigation Services) survey the air space. The main function of the centre is to avert dangers that emanate from so-called renegade planes, which are civil aircraft that have been taken command of by people who want to abuse them as weapons for a targeted crash. Once an aircraft has been classified as a renegade, - be it by NATO or be it by the National Air Security Centre itself, - the responsibility for the measures required for averting such danger in the German air space rests with the competent authorities of the Federal Republic of Germany.

With their constitutional complaint, the complainants directly challenge the Aviation Security Act because, as they argue, it permits the state to intentionally kill persons who have not become perpetrators but victims of a crime. The complainants put forward that s. 14.3 of the Aviation

Security Act, which under the conditions specified in the law authorises to shoot down aircraft, violates their rights under Article 1.1, Article 2.2 sentence 1 in conjunction with Article 19.2 of the Basic Law.

Extracts from the Grounds:

B.

The constitutional complaint is admissible.

…

C.

The constitutional complaint is also well-founded. s. 14.3 of the Aviation Security Act is incompatible with Article 2.2 sentence 1 in conjunction with Article 87a.2 and Article 35.2 and 35.3 and in conjunction with Article 1.1 of the Basic Law, and is void.

I.

Article 2.2 sentence 1 of the Basic Law guarantees the right to life as a liberty right (see BVerfGE 89, 120 [130]). With this right, the biological and physical existence of every human being is protected against encroachments by the state from the point in time of its coming into being until the human being's death, independently of the individual's circumstances of life and of his or her physical state and state of mind. Every human life as such has the same value (see BVerfGE 39, 1 [59]). Although it constitutes an ultimate value within the order of the Basic Law (see BVerfGE 39, 1 [42]; 46, 160 [164]; 49, 24 [53]), also this right is nevertheless subject to the constitutional requirement of the specific enactment of a statute pursuant to Article 2.2 sentence 3 of the Basic Law. Also the fundamental right to life can therefore be encroached upon on the basis of a formal Act of Parliament (see BVerfGE 22, 180 [219]). The precondition for this is, however, that the Act in question meets the requirements of the Basic Law in every respect. It must be adopted in accordance with the legislative competences, it must leave the essence of the fundamental right unaffected pursuant to Article 19.2 of the Basic Law, and it may also not contradict the fundamental decisions of the constitution in any other respect.

II.

The challenged provision of s. 14.3 of the Aviation Security Act does not live up to these standards.

1. It encroaches upon the scope of protection of the fundamental right to life, which is guaranteed by Article 2.2 sentence 1 of the Basic Law, of the crew and of the passengers of an aircraft affected by an operation pursuant to s. 14.3 of the Aviation Security Act and also of those who want to use the plane against the lives of people in the sense of this provision. Recourse to the authorisation to use direct armed force against an aircraft pursuant to s. 14.3 of the Aviation Security Act will virtually always result in its crash. The consequence of the crash, in turn, will with near certainty be the death, and consequently the destruction of the lives, of all people on board the aircraft.

2. No constitutional justification can be adduced for such an encroachment. Under formal aspects already, s. 14.3 of the Aviation Security Act cannot be based on a legislative competence of the Federation (a). Apart from this, the provision also infringes Article 2.2 sentence 1 of the Basic Law as regards substance to the extent that it not only affects those who want to abuse the aircraft as a weapon but also persons who are not responsible for causing the major aerial incident presumed under s. 14.3 of the Aviation Security Act (b).

a) The Federation lacks the legislative competence to enact the challenged regulation.

aa) S. 14.3 of the Aviation Security Act is part of the provisions in Part 3 of the Aviation Security Act. This part has the title "Support and Administrative Assistance by the Armed Forces" and thereby makes it evident that their deployment as it is regulated in ss. 13 to 15 of the Aviation Security Act does not primarily constitute the performance of an autonomous function of the Federation but assistance, "in the context of the exercise of police power" and of the "support of the police forces of the *Länder*" (s. 13.1 of the Aviation Security Act), with a function that is incumbent on the *Länder*. This assistance is rendered, as s. 13 of the Aviation Security Act specifies in its subsections 1 to 3, along the lines of Article 35.2 sentence 2 of the Basic Law on the one hand and of Article 35.3 of the Basic Law on the other hand. Because these Articles incontestably form part of those regulations of the Basic Law which within the meaning of Article 87a.2 of the Basic Law explicitly permit the use of the armed forces outside defence (see Bundestag document V/2873, p. 2 under B in conjunction with pp. 9-10; on Article 35.3 of the Basic Law, see also BVerfGE 90, 286 [386, 387]), s. 14.3 of the Aviation Security Act, just like the other regulations of Part 3 of the Act, is not about defence, also within the meaning of the provision under Article 73 no. 1 of the Basic Law, which establishes the corresponding competences (a different opinion is advanced in the reasoning of the draft bill on the new regulation of aviation security functions, Bundestag document 15/2361, p. 14, and also for instance in Federal Administrative Court, Die Öffentliche Verwaltung - DÖV 1973, p. 490 [492]). Also the sector of the protection of the civil population, which is included in the competence title "Defence", is therefore not pertinent.

S. 14.3 of the Aviation Security Act can also not be based on the legislative competence of the Federation for air traffic pursuant to Article 73 no. 6 of the Basic Law. It need not be decided here whether the Federation could, in the framework of Article 73 no. 6 of the Basic Law, take over functions in the context of police power to a greater extent than it does so far. According to the design of the law, ss. 13 to 15 of the Aviation Security Act are about support of the *Länder* in the context of their police power. It is the objective of the regulation to determine the procedures in the area of the Federation and as regards the co-operation with the *Länder* and to determine the operational equipment of the armed forces for the case of the armed forces being placed at the disposal of the police forces of the *Länder* to support them in the averting of dangers that are caused by a major aerial incident. Consequently, they are implementing regulations for the deployment of the armed forces under the circumstances of Article 35.2

sentences 2 and 3 of the Basic Law. The legislative competence of the Federation for this does not result from Article 73 no. 6 of the Basic Law (stated also in the Federal Government's reasoning for the bill; see Bundestag document 15/2361, p. 14). Instead, the competence for regulations of the Federation which determine details concerning the deployment of its armed forces, in cooperation with the *Länder* involved, to deal with a regional or interregional emergency situation, directly follows from Article 35.2 sentences 2 and 3 of the Basic Law itself.

bb) However, s. 14.3 of the Aviation Security Act is not covered by this area of competence of the Federation because the provision cannot be reconciled with the framework provided by the Basic Law of constitutional law relating to the armed forces.

aaa) The armed forces, whose deployment is regulated by ss. 13 to 15 of the Aviation Security Act, are established by the Federation for defence purposes pursuant to Article 87a.1 sentence 1 of the Basic Law. Pursuant to Article 87a.2 of the Basic Law, they may only be employed for other purposes ("Apart from defence") to the extent explicitly permitted by the Basic Law. This regulation, which has been created in the course of the incorporation of the emergency constitution into the Basic Law by the Seventeenth Act to Amend the Basic Law of 24 June 1968 (Gesetz zur Änderung des Grundgesetzes, Federal Law Gazette I p. 709) is intended to prevent that for the deployment of the armed forces as a means of the executive power, "unwritten … competences" are derived "from the nature of things" (statement by the Bundestag Committee on Legal Affairs in its Written report on the draft of an emergency constitution, Bundestag document V/2873, p. 13). What is decisive for the interpretation and application of Article 87a.2 of the Basic Law is therefore the objective to limit the possibilities for an deployment of the Federal Armed Forces within the domestic territory by the precept of strict faithfulness to the wording of the statute (see BVerfGE 90, 286 [356, 357]).

bbb) This objective also determines the interpretation and application of the regulations by which, within the meaning of Article 87a.2 of the Basic Law, the deployment of the armed forces for purposes other than defence is explicitly provided in the Basic Law. They comprise, as has already been mentioned, the authorisations in Article 35.2 sentences 2 and 3 of the Basic Law, on the basis of which ss. 13 to 15 of the Aviation Security Act are intended to serve the control of major aerial incidents and of the dangers connected with them. In the case of a regional emergency situation pursuant to Article 35.2 sentence 2 of the Basic Law, the Land affected can, *inter alia*, request the assistance of forces and facilities of the armed forces to deal with the natural disaster or the especially grave accident. In the case of an interregional emergency situation, which endangers an area larger than a Land, no such request is necessary pursuant to Article 35.3 sentence 1 of the Basic Law. Instead, the Federal Government can in this case employ units of the armed forces of its own accord to support the police forces of the *Länder*,

apart from units of the Federal Border Guard, which by an Act of 21 June 2005 (Federal Law Gazette I p. 1818) has been renamed Federal Police, to the extent that this is necessary for effectively dealing with the emergency situation.

ccc) The authorisation of the armed forces under s. 14.3 of the Aviation Security Act to use direct armed force against an aircraft is not in harmony with these regulations.

(1) Article 35.2 sentence 2 of the Basic Law rules out the use of direct armed force in the case of a regional emergency situation.

(a) It is not constitutionally objectionable, however, that s. 14.3 of the Aviation Security Act, as results from the connection of the provision with s. 13.1 and s. 14.1 of the Aviation Security Act, pursues the objective to prevent, by the use of police force, the occurrence of an especially grave accident pursuant to Article 35.2 sentence 2 of the Basic Law which is imminent as a present danger as a consequence of a major aerial incident.

(aa) What is understood as an especially grave accident within the meaning of Article 35.2 sentence 2 of the Basic Law - and with this, also within the meaning of ss. 13 to 15 of the Aviation Security Act - is, in general, the occurrence of a damage of major extent which - such as a grave air or railway accident, a power failure with effects on essential sectors of the services of general interest, or an accident in a nuclear power plant - especially affects the public due to its significance and which is caused by human wrongdoing or technical deficiencies (along this line, see already Part A no. 3 of the Guideline of the Federal Minister of Defence for Assistance by the German Armed Forces in the Case of Natural Disasters or Especially Grave Accidents and in the Context of Emergency Assistance (Richtlinie des Bundesministers der Verteidigung über Hilfeleistungen der Bundeswehr bei Naturkatastrophen oder besonders schweren Unglücksfällen und im Rahmen der dringenden Nothilfe) of 8 November 1988, Ministerialblatt des Bundesministers für Verteidigung - VMBl p. 279). This understanding of the concept of an especially grave accident, which is constitutionally unobjectionable, also comprises events such as the ones that are at issue here.

(bb) The fact that the crash of the aircraft against which the measure pursuant to s. 14.3 of the Aviation Security Act is directed is meant to be caused intentionally does not run counter to the application of Article 35.2 sentence 2 of the Basic Law.

According to general usage, also an event whose occurrence is due to human intention can easily be understood as being an accident. Grounds to suppose that Article 35.2 sentence 2 of the Basic Law, in derogation of this, is intended to be restricted to accidents that have been caused unintentionally or negligently, so that it is not meant to include incidents that are based on intention, can be inferred neither from the wording of the provision nor from the materials relating to the Act (see Bundestag document V/1879, pp. 22 et seq.; V/2873, pp. 9-10). The

meaning and purpose of Article 35.2 sentence 2 of the Basic Law, which is to make effective disaster control possible also through the deployment of the armed forces (see Bundestag document V/1879, pp. 23-24) also speak in favour of interpreting the concept of "accident" broadly. For a long time state practice therefore has been rightly assuming that also occurrences of damages that are caused intentionally by third parties are to be regarded as especially grave accidents (see, respectively, nos. 3 of the Order of the Federal Minister of Defence on Assistance by the German Armed Forces in the Case of Natural Disasters or Especially Grave Accidents and in the Context of Emergency Assistance (Erlass des Bundesministers der Verteidigung über Hilfeleistungen der Bundeswehr bei Naturkatastrophen bzw. besonders schweren Unglücksfällen und dringende Nothilfe) of 22 May 1973, Ministerialblatt des Bundesministers für Verteidigung p. 313, and of the corresponding guideline of 17 December 1977, Ministerialblatt des Bundesministers für Verteidigung 1978 p. 86).

(cc) It is also constitutionally unobjectionable that the operation pursuant to s. 14.3 of the Aviation Security Act is intended to be ordered and carried out at a point in time in which a major aerial incident within the meaning of s. 13.1 of the Aviation Security Act has already happened, its consequence, however, the especially grave accident itself which is supposed to be prevented by the direct use of armed force (see s. 14.1 of the Aviation Security Act), has not yet occurred. Article 35.2, sentence 2 of the Basic Law does not require the especially grave accident, for the control of which the armed forces are intended to be employed, to have already happened. By contrast, the concept of an emergency situation also comprises events in which a disaster can be expected to happen with near certainty.

It cannot be inferred from Article 35.2 sentence 2 of the Basic Law that the armed forces' deployment for assistance is intended to be different in the case of natural disasters and especially grave accidents as regards the beginning of the deployment. As regards natural disasters, however, it is generally assumed in conformity with the Federal Minister of Defence's guideline for assistance (see Part A no. 2 of the Guideline of 8 November 1988) that this concept also comprises situations of imminent danger (see for example Bauer, in: Dreier, Grundgesetz, vol. II, 1998, Article 35, marginal no. 24; Gubelt, in: von Münch/Kunig, GrundgesetzKommentar, vol. 2, 4th/5th ed. 2001, Article 35, marginal no. 25; von Danwitz, in: v. Mangoldt/Klein/Starck, Kommentar zum Grundgesetz, 5th ed., vol. 2, 2005, Article 35, marginal no. 70), which means that it also covers situations of danger in which the damaging event that is imminent in the respective case can be expected to occur with near certainty if the situations of danger are not counteracted in time. For especially grave accidents, nothing different can apply for the sole reason that there cannot always be a clear-cut dividing line between them and natural disasters and because also here, the transition between a danger that is still imminent and the occurrence of the damage which has already happened can be fluid in the individual case. The meaning and purpose of Article 35.2 sentence 2 of the Basic Law, which is to enable the Federation to render effective assistance in the sphere of activity of the *Länder*, speaks in favour of treating both

causes of disasters in the same manner as regards the aspect of time, i.e. not to wait, in both cases, until the development of the danger that results in the occurrence of the damage has come to a close.

The fact that pursuant to Article 35.2 sentence 2 of the Basic Law the request for armed forces and their deployment is made "to render assistance" "in the case of" a natural disaster and "in the case of" an especially grave accident, does not forcibly suggest the assumption that the occurrence of the respective damage must have already occurred. The sense of the wording of the regulation equally admits of an interpretation to the effect that assistance can already be requested and rendered when it becomes apparent that in all probability, a case of damage will occur soon, i.e. if a present danger within the meaning of police law exists. This is perceptibly the assumption made under Article 35.3 sentence 1 of the Basic Law, which, going back to Article 35.2 sentence 2 of the Basic Law, extends the Federal Government's competences for the case that the natural disaster or the accident "endangers" the area of more than one Land. As is the case here with an interregional emergency situation, the existence of a present danger is to be regarded as sufficient for the deployment of the armed forces also in a regional emergency situation pursuant to Article 35.2 sentence 2 of the Basic Law.

The Guidelines of the Federal Minister of Defence for Assistance by the German Armed Forces in the Case of Natural Disasters or Especially Grave Accidents and in the Context of Emergency Assistance have therefore rightly been assuming for a long time already that the armed forces may be employed not only "in cases of interregional endangerment" pursuant to Article 35.3 of the Basic Law, but also "in cases of regional endangerment" pursuant to Article 35.2 sentence 2 of the Basic Law (thus most recently Part A no. 4 of the Guideline of 8 November 1988). This necessarily rules out the assumption that the especially grave accident must have already happened.

(b) The reason why an operation involving the direct use of armed force against an aircraft does not respect the boundaries of Article 35.2 sentence 2 of the Basic Law is, however, that this provision does not permit an operational mission of the armed forces with specifically military weapons for the control of natural disasters or in the case of especially grave accidents.

(aa) The "assistance" referred to in Article 35.2 sentence 2 of the Basic Law is rendered to the *Länder* to enable them to effectively fulfil the function, which is incumbent on them, to deal with natural disasters or especially grave accidents. This is correctly assumed also by s. 13.1 of the Aviation Security Act, pursuant to which the deployment of the armed forces is intended to support the *Länder*, in the context of the exercise of police power, in preventing the occurrence of an especially grave accident to the extent that this is necessary for effectively dealing with such danger. Because the assistance is oriented towards this function which falls under the area of competence of the police authorities of the *Länder*, which according to the reasoning of the Act is not supposed to be encroached upon by ss. 13 to 15 of the Aviation Security Act (see Bundestag document 15/2361,

p. 20 on s. 13), this also necessarily determines the kind of resources that can be used where the armed forces are employed for rendering assistance. They cannot be of a kind which is completely different, with regard to its quality, from those which are originally at the disposal of the *Länder* police forces for performing their duties. This means that when the armed forces are employed "to render assistance" upon the request of a Land pursuant to Article 35.2 sentence 2 of the Basic Law, they can use the weapons that the law of the respective Land provides for its police forces. In contrast to this, military implements of combat, for instance the on-board weapons of a fighter aircraft which are required for measures pursuant to s. 14.3 of the Aviation Security Act, may not be used.

(bb) This understanding of the provision, which is imposed by the wording and by the meaning and purpose of Article 35.2 sentence 2 of the Basic Law, is confirmed by the place of this provision in the legal system and by its legislative history. Pursuant to the draft of an emergency constitution presented by the Federal Government, the regional emergency situation within the meaning of Article 35.2 sentence 2 of the Basic Law was originally intended to be regulated in Article 91 of the Basic Law together with the so-called domestic state of emergency (see Bundestag document V/1879, p. 3). It was the objective of the proposal to constitutionally legitimise the deployment of the armed forces within the domestic territory *vis-à-vis* the citizens and in view of the Basic Law's allocation of competences also for the case of regional disaster response (see Bundestag document V/1879, p. 23 on Article 91.1). What was intended pursuant to the explicit wording of the intended regulation was, however, that the armed forces can only be made available "as police forces". Thus, the Federal Government intended to ensure that the armed forces can be employed for police functions alone, and only with the competences provided under police law *vis-à-vis* the citizens (see Bundestag document V/1879, p. 23 on Article 91.2). This includes the statement that the use of specific military weapons should be ruled out where the armed forces are employed in the sphere of activity of the *Länder*.

Admittedly, the restrictive wording of an deployment of the armed forces "as police forces" has not been incorporated into the subsequent text of the constitution; it has been left out on the suggestion of the Bundestag's Committee on Legal Affairs to regulate assistance for the benefit of the *Länder* in the case of an emergency situation due to a disaster in Article 35.2 and 35.3 of the Basic Law and the assistance of the *Länder* in dealing with domestic states of emergency in Article 87a.4 and Article 91 of the Basic Law, i.e. in different factual contexts (on this, see Bundestag document V/2873, p. 2 under B, p. 9 on s. 1 no. 2c). This, however, did not pursue the objective to extend the objects regarded as admissible equipment of the armed forces to include weapons that are typical of the military (see also Cl. Arndt, Deutsches Verwaltungsblatt - DVBl 1968, p. 729 [730]).

On the contrary: With the provision proposed by it, which the constitution-amending legislature has later on made its own to this extent, the Committee intended to raise the threshold of the deployment of the military as an armed

force in comparison with the draft presented by the government and to permit the armed deployment of the Federal Armed Forces only for combating militarily armed insurgents pursuant to Article 87a.4 of the Basic Law (see Bundestag document V/2873, p. 2 under B). This finds its visible expression in the fact that the provision on the deployment of the armed forces in a regional emergency situation has been incorporated into Part II of the Basic Law, which concerns the Federation and the *Länder*, and not into Part VIII, which also regulates the deployment of the armed forces in a war. According to the ideas of the constitution-creating legislature, their deployment for "assistance" pursuant to Article 35.2 sentence 2 of the Basic Law was explicitly intended to be restricted to enabling the Federal Armed Forces to perform the police functions, and to exercise their authorisation to take coercive police measures, which arise in the context of a regional emergency situation, for instance to block off endangered property and to perform traffic control (see Bundestag document V/2873, p. 10 on Article 35.2; on the constitutional-policy background of the North German flood disaster in 1962. See also the statements made by Senator Ruhnau (Hamburg, SPD) in the 3rd public information meeting of the Committees on Legal Affairs and on Internal Affairs of the 5th German Bundestag on 30 November 1967, Minutes, p. 8, and by Deputy Schmidt (Hamburg, SPD) in the 175th Session of the 5th German Bundestag on 16 May 1968, Stenographic Record, p. 9444).

(2) S. 14.3 of the Aviation Security Act is also incompatible with the regulation about interregional emergency situations under Article 35.3 sentence 1 of the Basic Law.

(a) In this context, however, the fact that the direct use of armed force against an aircraft pursuant to s. 14.3 in conjunction with s. 13.1 of the Aviation Security Act occurs as a consequence of an action which has been started intentionally by those who want to use the aircraft against human lives is also constitutionally unobjectionable. For the reasons given with regard to Article 35.2 sentence 2 of the Basic Law (see above under C II 2 a bb ccc (1) (a)), such an incident, which has been caused intentionally, can be regarded as an especially grave accident within the meaning of Article 35.3 sentence 1 of the Basic Law. As results from the element "endangered", the fact that not all of its consequences have occurred yet, but that instead, events are still moving towards disaster, does also not rule out the application of Article 35.3 sentence 1 of the Basic Law. Where it is that the endangerment occurs, and whether consequently the requirement of an interregional endangerment has been met, is the question in each individual case. That such endangerment concerns more than one Land if the requirements of s. 14.3 of the Aviation Security Act are met is at any rate possible; according to the legislature's assessment of the situation (see Bundestag document 15/2361, pp. 20, 21, on s. 13 respectively) and according to the opinions submitted by the Bundestag and the Federal Government this is rather the rule.

(b) However, s. 14.3 of the Aviation Security Act meets with constitutional objections already because the deployment of the armed forces which is admissible pursuant to this provision does, in accordance with s. 13.3 of the Aviation Security Act, not always require a decision about the mission which is taken by the Federal Government before the mission.

Pursuant to Article 35.3 sentence 1 of the Basic Law, only the Federal Government is explicitly authorised to order the deployment of the armed forces in the case of an interregional emergency situation. Pursuant to Article 62 of the Basic Law, the Federal Government consists of the Federal Chancellor and the Federal Ministers. It is a collegial body. If the competence for deciding about the deployment of the armed forces for the purpose of interregional disaster response is reserved to the Federal Government, Article 35.3 sentence 1 of the Basic Law consequently requires a decision of the collegial body (see Article 80.1 sentence 1 of the Basic Law - BVerfGE 91, 148 [165, 166]). The competence for taking decisions that rests with the Federal Government as a whole is also a more powerful safeguard of the interests of the *Länder*, which are deeply affected by the deployment of the armed forces in their sphere of competence without this having been previously requested by the endangered *Länder* (see BVerfGE 26, 338 [397]).

S. 13.3 of the Aviation Security Act lives up to this only in its sentence 1, pursuant to which the decision about a mission pursuant to Article 35.3 of the Basic Law shall be taken by the Federal Government in consultation with the *Länder* affected. Sentences 2 and 3, however, provide that the Federal Minister of Defence, or in the event of the Minister of Defence having to be represented, the member of the Federal Government who is authorised to represent the Minister, shall decide if a decision of the Federal Government is not possible in time; in such case, which, in the opinion of the legislature, will be the rule (see Bundestag document 15/2361, p. 21 on s. 13), the decision of the Federal Government is to be brought about subsequently without delay. Pursuant to this provision, the Federal Government will not only in exceptional cases but regularly be substituted by individual government ministers when it comes to deciding on the deployment of the armed forces in interregional emergency situations. In view of Article 35.3 sentence 1 of the Basic Law, this can also not be justified by the special urgency of the decision. Instead, the fact that generally, the time available in the area of application of s. 13.3 of the Aviation Security Act will only be very short shows particularly clearly that as a general rule, it will not be possible to deal with measures of the kind regulated in s. 14.3 of the Aviation Security Act in the manner that is provided under Article 35.3 sentence 1 of the Basic Law.

(c) Moreover, the boundaries of constitutional law relating to the armed forces under Article 35.3 sentence 1 of the Basic Law have been overstepped above all because also in the case of an interregional emergency situation, a mission of the armed forces with typically military weapons is constitutionally impermissible.

Article 35.3 sentence 1 of the Basic Law differs from Article 35.2 sentence 2 of the Basic Law only in two aspects. Firstly, Article 35.3 sentence 1 of the Basic Law requires the existence of a danger which threatens the territory of more than one Land. Secondly, regarding the interregional nature of the emergency situation, the initiative for effectively dealing with this situation is shifted to the Federal Government, and its competences to support the police forces of the *Länder* are extended; the Federal Government can, *inter alia*, employ units of the armed forces of its own accord. What is not provided, however, is that in such a mission, the armed forces can use specifically military weapons which are needed for an operation pursuant to s. 14.3 of

the Aviation Security Act. Instead, the wording of Article 35.3 sentence 1 of the Basic Law, which permits the deployment of the armed forces only "to support" the police forces of the *Länder*, i.e. again only to perform a Land function, and the purpose of the regulation of mere support of the *Länder* by the Federation, which becomes apparent from this, rule out a mission with weapons that are typical of the military in the light of Article 87a.2 of the Basic Law also when it comes to dealing with interregional emergency situations.

This is confirmed by the legislative history of Article 35.3 sentence 1 of the Basic Law to the extent that as regards this provision, the constitution-amending legislature did not see any reason for regulating the deployment of the armed forces and their equipment in a different manner than in Article 35.2 sentence 2 of the Basic Law. After it had been expressed with regard to this provision that in the context of an deployment for assistance in favour of the *Länder* also the performance of police functions that arise in such a mission is intended to be permitted, the corresponding statement concerning Article 35.3 sentence 1 of the Basic Law obviously was so much a matter of course that the materials relating to the Act could do without any remarks on this (see Bundestag document V/2873, p. 10 on Article 35.2 and 35.3). This is understandable regarding the purposes of deployment "to render assistance" in Article 35.2 sentence 2 of the Basic Law and "to support" in Article 35.3 sentence 1 of the Basic Law, which in general usage are essentially equal in meaning (on this, see also Cl. Arndt, loc. cit.). Also the Federal Minister of Defence's assistance guidelines of 8 November 1988 assume quite naturally in Part A no. 5 in conjunction with no. 4 and in Part C no. 16 that the powers as well as the nature and the extent of the Federal Armed Forces' assistance in the cases regulated by Article 35.2 sentence 2 and those regulated by Article 35.3 sentence 1 of the Basic Law do not differ from each other. The Guidelines also do not provide missions of the armed forces with specifically military weapons of the kind assumed in s. 14.3 of the Aviation Security Act for the support of the police forces of the *Länder* pursuant to Article 35.3 sentence 1 of the Basic Law.

b) Regarding the guarantee of human dignity enshrined in Article 1.1. of the Basic Law (aa), over and above this, s. 14.3 of the Aviation Security Act is not in harmony with Article 2.2 sentence 1 of the Basic Law also as regards substance to the extent that it permits the armed forces to shoot down aircraft with human beings on board who have become victims of an attack on the security of air traffic pursuant to s. 1 of the Aviation Security Act (bb). The provision is constitutionally unobjectionable as concerns substance (cc) only to the extent that the operation provided by s. 14.3 of the Aviation Security Act is aimed at a pilotless aircraft or exclusively against the person or persons to whom such an attack can be attributed.

aa) The fundamental right to life guaranteed by Article 2.2 sentence 1 of the Basic Law is subject to the requirement of the specific enactment of a statute pursuant to Article 2.2 sentence 3 of the Basic Law (see also above under C I). The Act, however, that restricts the fundamental right must in its turn be regarded in the light of the fundamental right and of the guarantee of human dignity under Article 1.1 of the Basic Law, which is closely linked with it. Human life is the

vital basis of human dignity as the essential constitutive principle, and as the supreme value, of the constitution (see BVerfGE 39, 1 [42]; 72, 105 [115]; 109, 279 [311]). All human beings possess this dignity as persons, irrespective of their qualities, their physical or mental state, their achievements and their social status (see BVerfGE 87, 209 [228]; 96, 375 [399]). It cannot be taken away from any human being. What can be violated, however, is the claim to respect which results from it (see BVerfGE 87, 209 [228]). This applies irrespective, *inter alia*, of the probable duration of the individual human life (see BVerfGE 30, 173 [194] on the human being's claim to respect of his or her dignity even after death).

In view of this relation between the right to life and human dignity, the state is prohibited, on the one hand, from encroaching upon the fundamental right to life by measures of its own, thereby violating the ban on the disregard of human dignity. On the other hand, the state is also obliged to protect every human life. This duty of protection demands of the state and its bodies to shield and to promote the life of every individual, which means above all to also protect it from unlawful attacks, and interference, by third parties (see BVerfGE 39, 1 [42]; 46, 160 [164]; 56, 54 [73]). Also this duty of protection has its foundations in Article 1.1 sentence 2 of the Basic Law, which explicitly obliges the state to respect and protect human dignity (see BVerfGE 46, 160 [164]; 49, 89 [142]; 88, 203 [251]).

What this obligation means in concrete terms for state action cannot be definitely determined once and for all (see BVerfGE 45, 187 [229]; 96, 375 [399, 400]). Article 1.1 of the Basic Law protects the individual human being not only against humiliation, branding, persecution, outlawing and similar actions by third parties or by the state itself (see BVerfGE 1, 97 [104]; 107, 275 [284]; 109, 279 [312]). Taking as a starting point the idea of the constitution-creating legislature that it is part of the nature of human beings to exercise self-determination in freedom and to freely develop themselves, and that the individual can claim, in principle, to be recognised in society as a member with equal rights and with a value of his or her own (see BVerfGE 45, 187 [227, 228]), the obligation to respect and protect human dignity generally precludes making a human being a mere object of the state (see BVerfGE 27, 1 [6]); 45, 187 [228]; 96, 375 [399]). What is thus absolutely prohibited is any treatment of a human being by public authority which fundamentally calls into question his or her quality of a subject, his or her status as a legal entity (see BVerfGE 30, 1 [26]; 87, 209 [228]; 96, 375 [399]) by its lack of respect of the value which is due to every human being for his or her own sake, by virtue of his or her being a person (see BVerfGE 30, 1 [26]; 109, 279 [312, 313]). When it is that such a treatment occurs must be stated in concrete terms in the individual case in view of the specific situation in which a conflict can arise (see BVerfGE 30, 1 [25]; 109, 279 [311]).

bb) According to these standards, s. 14.3 of the Aviation Security Act is also incompatible with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that the shooting down of an aircraft affects people who, as its crew and passengers, have not exerted any influence on the occurrence of the non-warlike aerial incident assumed under s. 14.3 of the Aviation Security Act.

aaa) In the situation in which these persons are at the moment in which the order to use direct armed force against the aircraft involved in the aerial incident pursuant to s. 14.4 sentence 1 of the Aviation Security Act is made, it must be possible, pursuant to s. 14.3 of the Aviation Security Act, to assume with certainty that the aircraft is intended to be used against human lives. As has been stated in the reasoning for the Act, the aircraft must have been converted into an assault weapon by those who have brought it under their command (see Bundestag document 15/2361, p. 20 on s. 13.1); the aircraft itself must be used by the perpetrators in a targeted manner as a weapon for the crime, not merely as an auxiliary means for committing the crime, against the lives of people who stay in the area in which the aircraft is intended to crash (see Bundestag document 15/2361, p. 21 on s. 14.3), In such an extreme situation, which is, moreover, characterised by the cramped conditions of an aircraft in flight, the passengers and the crew are typically in a desperate situation. They can no longer influence the circumstances of their lives independently from others in a self-determined manner.

This makes them objects not only of the perpetrators of the crime. Also the state which in such a situation resorts to the measure provided by s. 14.3 of the Aviation Security Act treats them as mere objects of its rescue operation for the protection of others. The desperateness and inescapability which characterise the situation of the people on board the aircraft who are affected as victims also exist *vis-à-vis* those who order and execute the shooting down of the aircraft. Due to the circumstances, which cannot be controlled by them in any way, the crew and the passengers of the plane cannot escape this state action but are helpless and defenceless in the face of it with the consequence that they are shot down in a targeted manner together with the aircraft and as result of this will be killed with near certainty. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.

bbb) In addition, this happens under circumstances in which it cannot be expected that at the moment in which pursuant to s. 14.4 sentence 1 of the Aviation Security Act a decision concerning an operation under s. 14.3 of the Aviation Security Act is taken, there is always a complete picture of the factual situation and that the factual situation can always be assessed correctly. One also cannot rule out the possibility that the course of events will be such that it is no longer required to carry out the operation. According to the findings that the Senate has gained from the written opinions submitted in the proceedings and from the statements made in the oral hearing, it cannot be assumed that the factual prerequisites for ordering and carrying out such an operation can always be established with the certainty required for this.

(1) In particular the Cockpit Association has pointed out that depending on the circumstances, establishing that a major aerial incident within the meaning of s. 13.1 of the Aviation Security Act has occurred and that such incident constitutes the danger of an especially grave accident is already fraught with great uncertainties. According to the Cockpit Association, such establishment can only rarely be made with certainty. The critical point in the assessment of the situation was said to be to what extent the possibly affected crew of the plane is still able to communicate the attempt at, or the success of, hijacking an aircraft to the decision-makers on the ground. If this was not possible, the factual basis was said to be tainted with the stigma of a misinterpretation from the very beginning.

Also the findings that are supposed to be gained from reconnaissance measures and checks pursuant to s. 15.1 of the Aviation Security Act are, in the opinion of the Cockpit Association, vague at best, even with ideal weather conditions. In the opinion of the Cockpit Association, there are limits to the approach of interceptors to an aircraft that has become conspicuous in view of the dangers involved. For this reason, the possibility of making out the situation and the events on board of such an aircraft is, according to the Cockpit Association, limited even if there is visual contact, which, moreover, is often difficult to establish. Under these circumstances, the assessment of the motivation and the objectives of the hijackers of an aircraft that is made on the basis of the facts ascertained were said to probably remain, as a general rule, speculative to the very end. Consequently, the danger concerning the application of s. 14.3 of the Aviation Security Act was said to be that the order to shoot down the aircraft was made too early on an uncertain factual basis if, within the time slot available, which as a general rule is extremely narrow, armed force was at all supposed to be used in a timely manner with prospects of success and without disproportionately endangering people who are not participants in the crime. For such a mission to be effective, it was said to have to be accepted from the very beginning that the operation was possibly not required at all. In other words, reactions would probably often have to be excessive.

(2) In the proceedings, no indications have arisen for assuming that this assessment could be based on unrealistic, and thus unfounded, assumptions. On the contrary, also the Independent Flight Attendant Organisation UFO has plausibly stated that the decision to be taken by the Federal Minister of Defence or by the Minister's deputy pursuant to s. 14.4 sentence 1 in conjunction with s. 14.3 of the Aviation Security Act must be made on the basis of information most of which is uncertain. Due to the complicated and error-prone channels of communication between the cabin crew and the cockpit on board an aircraft that is involved in an aerial incident on the one hand and between the cockpit and the decision-makers on the ground on the other hand, and with a view to the fact that the situation on board the aircraft can change within minutes or even seconds, it was said to be virtually impossible for those on the ground who must decide under extreme time pressure to reliably assess whether the requirements of s. 14.3 of the Aviation Security Act are met. It was put forward that as a general rule, the decision would have to be taken on the basis of a suspicion only and not on the basis of established facts.

This appraisal appears convincing to the Senate not least because the complicated decision-making system, which depends on a large number of decision-makers and persons concerned, that must have been gone through pursuant to ss. 13 to 15 of the Aviation

Security Act until an operation pursuant to s. 14.3 of the Aviation Security can be carried out, will require considerable time in the case of an emergency. In view of the fact that the overflight area of the Federal Republic of Germany is relatively small, this means that there is not only enormous time pressure on decision-making but also the danger of premature decisions.

ccc) Even if in the area of police power, insecurities concerning forecasts often cannot be completely avoided, it is absolutely inconceivable under the applicability of Article 1.1 of the Basic Law to intentionally kill persons such as the crew and the passengers of a hijacked plane, who are in a situation that is hopeless for them, on the basis of a statutory authorisation which even accepts such imponderabilities if necessary. It need not be decided here how a shooting down that is performed all the same, and an order relating to it, would have to be assessed under criminal law (on this, and on cases with comparable combinations of circumstances see, for instance, Decisions of the Supreme Court of Justice for the British Zone in Criminal Matters (Entscheidungen des Obersten Gerichtshofs für die Britische Zone in Strafsachen - OGHSt) 1, 321 [331 et seq., 335 et seq.]; 2, 117 [120 et seq.]; Roxin, Strafrecht, Allgemeiner Teil, vol. I, 3rd ed. 1997, pp. 888-889; Erb, in: Münchener Kommentar zum Strafgesetzbuch, vol. 1, 2003, s. 34, marginal nos. 117 et seq.; Rudolphi, in: Systematischer Kommentar zum Strafgesetzbuch, vol. I, Allgemeiner Teil, Vor s. 19, marginal no. 8 [as at April 2003]; Kühl, Strafgesetzbuch, 25th ed. 2004, Vor s. 32, marginal no. 31; Tröndle/Fischer, Strafgesetzbuch, 52nd ed. 2004, Vor s. 32, marginal no. 15, s. 34, marginal no. 23; Hilgendorf, in: Blaschke/Förster/Lumpp/Schmidt, Sicherheit statt Freiheit?, 2005, p. 107 [130]). What is solely decisive for the constitutional appraisal is that the legislature may not, by establishing a statutory authorisation for intervention, give authority to perform operations of the nature regulated in s. 14.3 of the Aviation Security Act *vis-à-vis* people who are not participants in the crime and may not in this manner qualify such operations as legal and thus permit them. As missions of the armed forces of a non-warlike nature, they are incompatible with the right to life and the obligation of the state to respect and protect human dignity.

(1) Therefore it cannot be assumed - differently from arguments that are advanced sometimes - that someone boarding an aircraft as a crew member or as a passenger will presumably consent to it being shot down, and thus consenting to his or her own killing, in the case of the aircraft becoming involved in an aerial incident within the meaning of s. 13.1 of the Aviation Security Act which results in a measure averting the danger pursuant to s. 14.3 of the Aviation Security Act. Such an assumption lacks any realistic grounds and is no more than an unrealistic fiction.

(2) Also the assessment that the persons who are on board a plane that is intended to be used against other people's lives, within the meaning of s. 14.3 of the Aviation Security Act, are doomed anyway, cannot remove its nature of an infringement of their right to dignity from the killing of innocent people in a situation that is desperate for them which an operation performed pursuant to this provisions as a general rule involves. Human life

and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being (see above under C I, II 2 b aa). Whoever denies this or calls this into question denies those who, such as the victims of a hijacking, are in a desperate situation that offers no alternative to them, precisely the respect which is due to them for the sake of their human dignity (see above under C II 2 b aa, bb aaa).

In addition, uncertainties as regards the factual situation exist here as well. These uncertainties, which characterise the assessment of the situation in the area of application of ss. 13 to 15 of the Aviation Security Act in general (see above under C II 2 b bb bbb), necessarily also influence the prediction of how long people who are on board a plane which has been converted into an assault weapon will live, and whether there is still a chance of rescuing them. As a general rule, it will therefore not be possible to make a reliable statement about these people's lives being "lost anyway already".

(3) The assumption that anyone who is held on board an aircraft under the command of persons who intend to use the aircraft as a weapon of a crime against other people's lives within the meaning of s. 14.3 of the Aviation Security Act has become part of a weapon and must bear being treated as such also does not justify a different assessment. This opinion expresses in a virtually undisguised manner that the victims of such an incident are no longer perceived as human beings but as part of an object, a view by which they themselves become objects. This cannot be reconciled with the Basic Law's concept of the human being and with the idea of the human being as a creature whose nature it is to exercise self-determination in freedom (see BVerfGE 45, 187 [227]), and who therefore may not be made a mere object of state action.

(4) The idea that the individual is obliged to sacrifice his or her life in the interest of the state as a whole in case of need if this is the only possible way of protecting the legally constituted body politic from attacks which are aimed at its breakdown and destruction (for instance Enders, in: Berliner Kommentar zum Grundgesetz, vol. 1, Article 1, marginal no. 93 (as of July 2005)) also does not lead to a different result. In this context, the Senate need not decide whether, and should the occasion arise, under which circumstances such a duty of taking responsibility, in solidarity, over and above the mechanisms of protection provided in the emergency constitution can be derived from the Basic Law. For in the area of application of s. 14.3 of the Aviation Security Act the issue is not averting attacks aimed at abolishing the body politic and at eliminating the state's legal and constitutional system.

SS. 13 to 15 of the Aviation Security Act serve to prevent, in the context of police power, the occurrence of especially grave accidents within the meaning of Article 35.2 sentences 2 and 3 of the Basic Law. As appears from the reasoning of the Act, such accidents can be politically motivated but can also be caused by criminals or by mentally confused persons acting on their own (see Bundestag document 15/2361, p. 14). As the incorporation of ss. 13 et seq. of the Aviation Security Act into the system of disaster control pursuant to Article 35.2 sentences 2 and 3 of the Basic Law shows, incidents are assumed which are not aimed at calling into question the state and its continued existence

even where they are caused by political motives in the individual case. Under these circumstances, there is no room to assume a duty to intervene within the meaning that has been explained.

(5) Finally, s. 14.3 of the Aviation Security Act also cannot be justified by invoking the state's duty to protect those against whose lives the aircraft that is abused as a weapon for a crime within the meaning of s. 14.3 of the Aviation Security Act, is intended to be used.

In complying with such duties of protection, the state and its bodies have a broad margin of assessment, valuation and organisation (see BVerfGE 77, 170 [214]; 79, 174 [202]; 92, 26 [46]). Unlike the fundamental rights in their function as subjective rights of defence against the state, the state's duties to protect which result from the objective contents of the fundamental rights are, in principle, not defined (see BVerfGE 96, 56 [64]). How the state bodies comply with such duties of protection is to be decided, as a matter of principle, by themselves on their own responsibility (see BVerfGE 46, 160 [164]; 96, 56 [64]). This also applies to their duty to protect human life. It is true that especially as regards this protected interest, in cases with a particular combination of circumstances, if effective protection of life cannot be achieved otherwise, the possibilities of choosing the means of complying with the duty of protection can be restricted to the choice of one particular means (see BVerfGE 46, 160 [164, 165]). The choice, however, can only be between means, the use of which is in harmony with the constitution.

This is not the case with s. 14.3 of the Aviation Security Act. What the ordering and the carrying out of the direct use of force against an aircraft pursuant to this provision leaves out of account is that, also the victims of an attack who are held in the aircraft are entitled to their lives being protected by the state. Not only are they denied this protection by the state, the state itself even encroaches on the lives of these defenceless people. Thus any procedure pursuant to s. 14.3 of the Aviation Security Act disregards, as has been explained, these people's positions as subjects in a manner that is incompatible with Article 1.1 of the Basic Law and disregards the ban on killing that results from it for the state. The fact that this procedure is intended to serve, to protect and to preserve other people's lives does not alter this.

cc) S. 14.3 of the Aviation Security Act is, however, compatible with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that the direct use of armed force is aimed at a pilotless aircraft or exclusively at persons who want to use the aircraft as a weapon of crime against the lives of people on the ground.

aaa) To this extent the guarantee of human dignity under Article 1.1 of the Basic Law is not contrary to the ordering and carrying out of an operation pursuant to s. 14.3 of the Aviation Security Act. This goes without saying in operations against pilotless aircraft but also applies in other case. Whoever, such as those who want to abuse an aircraft as a weapon to destroy human lives, unlawfully attacks the legal interests of others is not fundamentally called into question as regards his or her quality as a subject by being made the mere object of

state action (see above under C II 2 b aa) where the state, complying with its duty of protection, defends itself against the unlawful attack and tries to avert it, complying with its duty of protection *vis-à-vis* those whose lives are intended to be annihilated. On the contrary, it exactly corresponds to the attacker's position as a subject if the consequences of his or her self-determined conduct are attributed to him or her personally, and if the attacker is held responsible for the events that he or she started. The attacker's right to respect of the dignity that is inherent also to him or her is therefore not impaired.

This is also not altered by the uncertainties which can arise in the examination of whether the prerequisites for ordering and carrying out of an operation pursuant to s. 14.3 of the Aviation Security Act are actually met (see above under C II 2 b bb bbb). In nature of the cases discussed here, these insecurities are not comparable to those that will have to be assumed, as a general rule, where there are, apart from the offenders also crew members and passengers on board the aircraft. If those who have the aircraft under their command do not intend to use it as a weapon, if therefore the corresponding suspicion is unfounded, they can, on the occasion of the early measures carried out pursuant to s. 15.1 and s. 14.1 of the Aviation Security Act, for instance on account of the threat to use armed force or on account of a warning shot, easily show by cooperating, for instance by changing course or by landing the aircraft, that no danger emanates from them. The specific difficulties that can arise as regards communication between the cabin crew, which is possibly threatened by offenders, and the cockpit, and between the cockpit and the decision-makers on the ground, do not exist here. In such cases, it is therefore easier to ascertain with sufficient reliability and also in a timely manner that an aircraft is intended to be abused as a weapon for a targeted crash.

If no indications exist that there are people on board an aircraft that has become conspicuous who are not participants in the crime, remaining uncertainties - for example as regards the underlying motives of the aerial incident - refer to a course of events that has been started, and can be averted, by those against whom the measure averting danger pursuant to s. 14.3 of the Aviation Security Act is exclusively directed. Imponderabilities in this context are therefore attributable to the offenders' sphere of responsibility.

bbb) To the extent that it is only applied *vis-à-vis* persons on board an aircraft who want to use it as a weapon against human lives, the regulation under s. 14.3 of the Aviation Security Act also lives up to the requirements of the principle of proportionality.

(1) The provision serves the objective of saving human lives. With regard to the ultimate value that human life has in the Basic Law's constitutional order (see above under C I), this is a regulatory purpose of such weight that it can justify the serious encroachment upon the right to life of the offenders on board the aircraft.

(2) S. 14.3 of the Aviation Security Act is not absolutely unsuitable for achieving this purpose of protection because it cannot be ruled out that this purpose is promoted in an individual case by a measure pursuant to s. 14.3 of the Aviation Security Act (see BVerfGE 30, 292 [316]; 90, 145 [172]; 110, 141 [164]). Regardless of the uncertainties concerning the assessment and prediction of the situation that have been described (see above under C II 2 b bb bbb), situations are conceivable in which it can be reliably ascertained that the only people on board an aircraft which is involved in an aerial incident are offenders participating in such incident, and in which it can also be assumed with sufficient certainty that a mission pursuant to s. 14.3 of the Aviation Security Act will not have consequences that are detrimental to the lives of people on the ground. Whether such a factual situation exists depends on the assessment of the situation in the individual case. If such assessment results in the safe judgment that there are only offenders on board the aircraft and in the prediction that the shooting down of the aircraft can avert the danger from the people on the ground who are threatened by the plane, the success that is intended to be achieved by s. 14.3 of the Aviation Security Act is furthered. Therefore the suitability of this provision for the purpose that is intended with it cannot be generally denied.

(3) In such a case also, the requirement of the necessity of the provision for achieving the objective is met because no equally effective means is apparent that does not impair the offenders' right to life at all, or impairs it less (see BVerfGE 30, 292 [316]; 90, 145 [172]; 110, 141 [164]).

Especially in ss. 5 to 12 of the Aviation Security Act, the legislature has taken a whole package of measures, all of which are intended to serve protection from attacks on the security of air traffic, in particular from hijackings, acts of sabotage and terrorist attacks within the meaning of s. 1 of the Aviation Security Act (for further details, see above under A I 2 b bb aaa (1)). In spite of this, the legislature has regarded it as necessary to enact, with ss. 13 to 15 of the Aviation Security Act, regulations with special authorisations for intervention and protective measures for the case that on account of a major aerial incident, the occurrence of an especially grave accident within the meaning of Article 35.2 sentence 2 or 35.3 of the Basic Law must be feared, regulations that even include the authorisation to use, as the *ultima ratio*, direct armed force against an aircraft under the conditions specified in s. 14.3 of the Aviation Security Act. This is based on the irrefutable assessment that experience has shown that also the extensive precautions pursuant to ss. 5 to 11 of the Aviation Security Act, as well as the extension of the pilots' functions and competences by s. 12 of the Aviation Security Act cannot provide absolutely reliable protection against the misuse of aircraft for criminal purposes. Nothing different can apply to other conceivable protective measures.

(4) Finally, the authorisation to use direct armed force against an aircraft on board of which there are only people who want to abuse it within the meaning of s. 14.3 of the Aviation Security Act, is also proportional in the narrower sense. According to the result of the overall weighing up between the seriousness of the encroachment upon fundamental rights that it involves and the weight of the legal interests that are to be protected (see on this BVerfGE 90, 145 [173]; 104, 337 [349]; 110, 141 [165]), the shooting down of such an aircraft is an appropriate measure of averting danger which is reasonable for the persons affected if there is certainty about the elements of the offence.

(a) However, the encroachment upon fundamental rights carries much weight because the execution of the operation pursuant to s. 14.3 of the Aviation Security Act will with near certainty result in the death of the people on board the plane. But under the combination of circumstances that is assumed here, it is these people themselves who, as offenders, have brought about the necessity of state intervention, and that they can avert such intervention at any time by refraining from realising their criminal plan. It is the people who have the aircraft under their command who determine not only the course of events on board, but also on the ground in a decisive manner. Their killing can only take place if it can be established with certainty that they will use the aircraft that is under their control to kill people, and if they keep to their plan even though they are aware of the danger to their lives that this involves for them. This reduces the gravity of the encroachment upon their fundamental rights.

On the other hand, those in the target area of the intended plane crash whose lives are intended to be protected by the measure of intervention under s. 14.3 of the Aviation Security Act by which the state complies with its duty of protection, as a general rule do not have the possibility of averting the attack that is planned against them and in particular, of escaping it.

(b) What must also be kept in mind, however, is that the application of s. 14.3 of the Aviation Security Act will possibly affect not only extremely dangerous installations on the ground but will possibly also kill people who are staying in areas in which, in all probability, the wreckage of the aircraft that is shot down by the use of armed force will come down. The state is constitutionally obliged to protect also the lives - and the health - of these people. In a decision pursuant to s. 14.4 sentence 1 of the Aviation Security Act, this cannot be left out of account.

This aspect, however, does not concern the continued existence in law of the regulation under s. 14.3 of the Aviation Security Act, but its application in the individual case. Pursuant to the opinions submitted in the proceedings, the application is intended to be refrained from anyway if it must be assumed with certainty that people on the ground would suffer damage or even lose their lives by plane wreckage falling down on densely populated areas. Concerning the question whether the provision also meets the proportionality requirements of constitutional law, it is sufficient to establish that combinations of circumstances are conceivable in which the direct use of armed force against an aircraft which only has attackers on air traffic on board can avert the danger to the lives of those against whom the aircraft is intended to be used as the weapon for the crime without the shooting down of the aircraft encroaching at the same time upon the lives of others. As has been set out (see above under C II 2 b cc bbb (2)), this is the case. This makes s. 14.3 of the Aviation Security Act also proportional in the narrower sense to the extent that it permits the direct use of armed force against a pilotless aircraft or against an aircraft which only has attackers on board.

ccc) The ban under Article 19.2 of the Basic Law on affecting the essence of a fundamental right does also not rule out such a measure against this group of persons. In view of the extremely exceptional situation that is assumed by

s. 14.3 of the Aviation Security Act, the essence of the fundamental right to life remains unaffected in the case assumed here by the encroachment upon the fundamental right that this provision involves as long as important interests of protection of third parties legitimise the encroachment and as long as the principle of proportionality is respected (see BVerfGE 22, 180 [219, 220]; 109, 133 [156]). According to the statements made above, both conditions are met (see under C II 2 b cc bbb).

III.

Because the Federation lacks legislative competence for s. 14.3 of the Aviation Security Act in the first place, the regulation does not continue in force also to the extent that the direct use of armed force against an aircraft can be justified under substantive constitutional law. The regulation is completely unconstitutional and consequently, it is void pursuant to s. 95.3 sentence 1 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG). Under the circumstances, there is no room for merely stating the incompatibility of the challenged regulation with the Basic Law.

D.

The decision about the costs is based on s. 34a.2 of the Federal Constitutional Court Act.

III. Free Development of Personality and the Protection of Physical Integrity and Personal Liberty - Article 2 of the Basic Law

1. Article 2.1 - Free Development of Personality

a) Elfes, BVerfGE 6, 32

Explanatory Annotation

This decision is one of the fundamental decisions of the Constitutional Court that has shaped the liberal character of the Basic Law. At issue was the refusal of a passport for an outspoken critic of the policies of the government at the time pertaining to the reorganization of military forces and the question of reunification of Germany.

The Court held that the freedom to leave the country to travel abroad is not part of the freedom of movement guarantee of Article 11 of the Basic Law, which it saw as limited to free movement within the territory of the Federal Republic. This raised the question of whether the freedom to travel abroad was unprotected under the Basic Law or whether it fell within the scope of Article 2.1 and its somewhat cryptic guarantee that "every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." A literal interpretation of "free development of personality" could lead to a narrow understanding of personality as a basket-term for those essential elements, which define the human as a spiritual-moral being. This narrow understanding of the norm would essentially have protected the dignity core of a human being. However, and herein lies the significance of the decision, the Court did not follow this narrow interpretation. Instead it chose a broad interpretation based on the original formulation for this provision in the drafting stage of the Basic Law, according to which "every person is free to do or not to do what he wishes" (as long as the rights of others or the constitutional order are not infringed upon), a formulation that was not abandoned because of its meaning but only because it was perceived as too ordinary an expression for this document.

Article 2.1, in other words, became an all encompassing "fall-back" right to protect against any state action infringing on the personal sphere. As broad as its protective scope is, as broad are its possible limitations. The fall-back right of Article 2.1 can be limited by any state action for which proportionate statutory authority exists.

The broad construction of the provision provoked the question why the Court construed a right, the scope of which is largely defined by the legislature. The Court's answer to this question is another central aspect of this decision. The Court held that Article 2.1 in its broad meaning could only be restricted on the basis of a statute which conforms to any aspect of the Basic Law, including formal aspects such as legislative procedure and sufficient power base for the federal or state legislature and substantive aspects, i.e. mainly the principle of proportionality.

The consequences of this interpretation of Article 2.1 are immense: Not only did the Court create a broad fall-back right against any and all state activity impacting on a person. The Court's interpretation of the limitation clause made it possible for individuals to raise any and all legality

issues against statutory provisions infringing on personal freedom in the constitutional complaint procedure. It strengthened the Court's power to exercise constitutional oversight over any and all state action if only one individual was willing to bring a constitutional complaint. And finally, the Court's decision underscored the pivotal importance of the principle of proportionality in the fundamental rights' protection system of the Basic Law, a principle which the Court interprets and applies and which gives the Court broad license for the exercise of its role as the final constitutional arbitrator.

Translation of the Elfes Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 6, 32*

1. Article 11 of the Basic Law does not cover the right to travel.
2. The right to travel, as deriving from the general freedom of action, is guaranteed, within the limits of the Constitutional order, by Article 2.1 of the Basic Law.
3. Constitutional order in terms of Article 2.1 of the Basic Law is the constitutional state law, i.e. every legal norm that conforms procedurally and substantively to the constitution.
4. Everyone can bring a Constitutional complaint to the Federal Constitutional court, claiming a norm restricting his or her general freedom of action not to be part of the Constitutional order.

Order of the Second Senate of 16 January 1957 - 1 BvR 253/56 -

Facts:

The complainant, an active member of the Christian Democratic Union (CDU), was elected to the North Rhine-Westphalia parliament in 1947. He was also a leading spokesman of a radical right wing organization vehemently opposed to the Federal Republic's policies toward military defence and German reunification. He had participated in a number of conferences and demonstrations at home and abroad in which he sharply criticized these policies and for which he was refused a passport to travel abroad. Claiming that the state had violated his freedom of movement under Article 11 of the basic Law, he filed a constitutional complaint against judicial decisions sustaining the denial of his passport.

* Translation by Donald P. Kommers in: The Constitutional Jurisprudence of the Federal Republic of Germany, 2nd ed, (1997) Durham NC., p 315 et seq. © Donald P. Kommers.

Extract from the Grounds:

The constitutional complaint is rejected

I.

1. The complainant contends that s. 7.1 of the Passport Act of March 4, 1952, is null and void because the right to travel abroad, allegedly based on Article 11 of the Basic Law, is impermissibly limited. That is not so. The Passport Act provision reads: "A passport must be refused if facts justify the supposition that (a) the applicant threatens the internal or external security or other vital interests of the Federal Republic of Germany or one of the German states. ..."

Article 11.1 of the Basic Law guarantees freedom of movement "throughout the federal territory." This text clearly does not protect a fundamental right to travel outside the federal territory. What is more, the original history of the provision does not provide any support for such an interpretation. …

The fundamental right to freedom of movement may be limited only by the express provisions of Article 11.2. Article 11.2 states: "This right may be restricted only by or pursuant to a law ... or in which such restriction is necessary to avert an imminent danger to the existence of the free democratic basic order of the federation or a state, to combat the danger of epidemics, to deal with natural disasters or particularly grave accidents, to protect young people from neglect, or to prevent crime." In providing for these limitations, the framers obviously had in mind freedom of movement within the country; Article 11.2 of the Basic Law makes no mention of traditional and relevant limitations on travel outside the country. Many countries (including free democracies) have long denied passports for reasons of state security. Similar restrictions, enforced in Germany since World War I, were carried over essentially unaltered into the Passport Act of 1952. If the framers had desired to incorporate a fundamental right to foreign travel into Article 11, they would not have forgotten to consider the long historical practice of withholding passports on the ground of state security. They clearly did not intend to guarantee freedom to travel abroad in Article 11.

…

Yet, freedom to travel abroad is not without some degree of constitutional protection as derivative of the basic right to general freedom of action.

2. In its ruling of July 20, 1954 (BVerfGE 4, 7 [15 seq.]), the Federal Constitutional Court did not decide whether the free development of one's personality includes freedom of action in the widest sense possible, or whether Article 2.1 of the Basic Law is limited to the protection of a minimum amount of this right to freedom of action without which an individual would be unable to develop himself as a spiritual-moral person.

a) The term "free development of personality" cannot simply mean development within that central area of personality that essentially defines a human person as a spiritual-moral being, i.e., the Kernbereichstheorie, for it is inconceivable how development within this core area could offend the moral code, the rights of others, or even the

constitutional order of a free democracy. Rather, the limitations imposed on the individual as a member of the political community show that the freedom of action in Article 2.1 of the Basic Law is to be broadly construed.

To be sure, the solemn formulation of Article 2.1 of the Basic Law was an inducement to see it in the light of Article 1 and to infer therefrom that its purpose was to embody the Basic Law's image of man. Yet nothing else is suggested other than that Article 1 is a fundamental constitutional principle which, like all the provisions of the Basic Law, informs the meaning of Article 2.1. Legally speaking, it represents a separate, individual basic right that guarantees a person's general right to freedom of action. Linguistic rather than legal considerations prompted the framers to substitute the current language for the original proposal, which read, "Every person is free to do or not to do what he wishes" (see v. Mangoldt, Parlamentarischer Rat, 42. session, p. 533) Apparently, the fact that the constitutional order is also mentioned in the second half of the sentence among the permissible limitations on the citizen's development of personality contributed to the theory that Article 2.1 intended to protect only a limited core area of personality. In the effort to uniformly interpret this term, i.e., "constitutional order", which appears in other provisions of the Constitution, the constitutional order was viewed as a more restrictive concept than the concept of a legal order that conforms to the Constitution. Thus one felt compelled to conclude that the Constitution should protect only a core sphere of personality, and not one's right to freedom of action.

In addition to the general right to freedom of action secured by Article 2.1, the Basic Law employs specific fundamental tights to protect man's self-determination in certain areas of life that were historically subject to encroachment by public authority. These constitutional provisions contain graduated reservation clauses that limit the extent to which the legislature may encroach upon a given basic right. The individual may invoke Article 2.1 in the face of an encroachment upon his freedom by public authority to the extent that fundamental rights do not specifically protect such special areas of life. There was no need for a general reservation clause here because the extent to which encroachments are possible by the state is easily ascertained from the restriction the constitutional order imposes upon the development of personality.

In other contexts (e.g., Article 9 of the Basic Law), the concept of the constitutional order can be limited to certain elementary principles of the Constitution (see BGHSt 7, 222 [227]; 9, 285 [286]).

…

Within the context of Article 2.1 of the Basic Law, "constitutional order" refers to the "general legal order, i.e. all norms conforming to the substantive and procedural provisions of the Constitution."

c) Legal scholars often held that the basic right of Article 2.1 will prove hollow if it is put under such a broad limitation because it could be restricted by any act of Parliament. They overlook the fact that legislative power is subject to more stringent constitutional restrictions than under the Weimar Constitution of 1919.... The legislature at that time could modify or alter constitutional rights at will.

The Basic Law, on the other hand, erected a value oriented order that limits public authority. This order guarantees the independence, self-determination, and dignity of man within the political community (BVerfGE 2, 1 [12 seq.]; 5, 85 [204 seq.]). The highest principles of this order of values are protected against constitutional change (Articles 1, 20, 79.3 of the Basic Law).

…

Laws are not constitutional merely because they have been passed in conformity with procedural provisions. This refers to the Weimar Constitution's adherence to the positivistic theory of constitutional law. See the section in Chapter I on structures and principles of the Basic Law for a discussion of *Begriffsjurisprudenz*. They must be substantively compatible with the highest values of a free and democratic order - i.e., the constitutional order of values - and must also conform to unwritten fundamental constitutional principles as well as the fundamental decisions of the Basic Law, in particular the principles of the rule of law and the social welfare state. Above all, laws must not violate a person's dignity which represents the highest value of the Basic Law; nor may they restrict a person's spiritual, political, or economic freedom in a way that would erode the essence of personhood. This follows from the constitutional protection afforded to each citizen's sphere of private development; that is, that ultimately inviolable area of human freedom insulated against any intrusion by public authority.

…

3. Even if the right to leave the country does not specifically belong to the concept of freedom of movement as protected by Article 11, it nevertheless is guaranteed by Article 2.1, within the limits of the constitutional order (i.e., the legal order that conforms to the Constitution) as a manifestation of the general right to freedom of action. Whether or not the passport law is part of the constitutional order as defined here remains to be decided. The answer is yes.

a) The Passport Act requires all Germans crossing a foreign border to have a passport-in itself a substantial formal limitation on foreign travel. Because the law, however, by unanimous interpretation confers a legal right to a passport, it preserves the principle of free foreign travel. It does so by permitting the denial of a passport only under specified conditions. Thus the act is cognizant of the fundamental requirements of Article 2.1.

b) S. 7 of the Passport Act clearly sets forth the grounds for denying a passport. The provision at issue here is unobjectionable to the extent that it permits denial of a passport on the basis of an internal or external threat to the security of the Federal Republic of Germany. Objections might be raised to the extent that the provision allows

the apprehension of a threat to "other vital interests" to suffice for the denial of a passport. The application of such a substantively indeterminate standard could, of course, lead to an abuse of discretion on the part of passport authorities.

…

But that has not occurred here.

b) Riding in Forests, BVerfGE 80, 137

Explanatory Annotation

In this 1989 decision the Court confirmed its broad interpretation of the right to free development of one's personality as the right to do as one pleases, as long rights of others are not negatively affected. At issue were provisions restricting horseback riding in forests to trails and roads marked accordingly. Justice Grimm, in a forceful dissenting opinion, argued that Article 2.1 should not be afforded the broad meaning developed in the *Elfes* case. Unlike *Elfes*, where the important freedom to travel abroad was at issue and the question whether that freedom was to be constitutionally protected at all, the dissent saw no comparable legal position requiring constitutional oversight in this case. Fundamental rights should not be trivialized and they should not provide an avenue for opening up judicial review of legislation across the board when such norm review was generally procedurally limited and in principle not open for individuals. The majority, however, upheld its decision in *Elfes* and, for the time being, the question on the scope of Article 2.1 can be regarded as constitutionally settled.[20]

Translation of the Riding in Forests Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 80, 137*

Headnotes:

1. When constitutional complaint proceedings indirectly relate to the establishment of whether a provision of Land law is compatible with (ordinary) federal law, the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) must interpret the Land law itself and is in that respect not restricted to a constitutional review of the interpretation of the (ordinary) court.

2. A provision of Land law that in principle allows riding in forests only on private roads and paths that are identified as bridleways is compatible with s. 14 of the Federal Forest Act (Bundeswaldgesetz - BWaldG) of 2 May 1975 (Federal Law Gazette (*Bundesgesetzblatt* - BGBl.) I p. 1037) and is not in violation of Article 2.1 of the Basic Law.

20 See also BVerfGE 90, 145 on the right to use drugs (cannabis), available in German at http://www.servat.unibe.ch/dfr/bv090145.html and BVerfGE 54, 143 on the municipal prohibition to feed doves, http://www.servat.unibe.ch/dfr/bv054143.html.

* Translation by Donna Elliott; © Konrad-Adenauer.Stiftung.

Order of the First Senate of 6 June 1989 - 1 BvR 921/85:

Facts:

S. 14 of the Federal Forest Act allows everyone access to forests for recreational purposes. Under s. 14.1 sentence 2 of the Federal Forest Act, riding in forests is allowed only on roads and paths. The regulation of details is left to the *Länder* (s. 14.2 sentence 1 of the Federal Forest Act), which may under certain circumstances restrict access to or any other use of forests. S. 27 of the Federal Nature Conservation Act (Bundesnaturschutzgesetz - BnatSchG) contains a similar provision that pertains to roads and paths on farmland. With s. 50.2 sentence 1 of the Landscape Act (Landschaftsgesetz - LG) of 26 June 1980 (Bavarian Law Gazette [*Bayerisches Gesetz und Verordnungsblatt* - GVBl.]. p. 734), the Land of North RhineWestphalia adopted a provision that, *inter alia*, restricts riding in forests to private roads and paths identified as bridleways in accordance with the provisions of the Highway Code (Straßenverkehrsordnung - StVO). The complainant petitioned the administration courts without success to find, *inter alia*, that he could use the paths under dispute in a specific forested area as a rider without being bound by the Landscape Act.

The constitutional complaint challenging the court decisions and indirectly also s. 50.2 sentence 2 of the Landscape Act was dismissed.

Extract from the Grounds:

C. I.

The fundamental right of the complainant under Article 2.1 of the Basic Law (Grundgesetz - GG) is not infringed by the challenged decisions and the underlying provision of s. 50.2 sentence 1 of the Landscape Act of 1980.

1. a) On the basis of the principles established in the case law of the Federal Constitutional Court, Article 2.1 of the Basic Law guarantees general freedom of action in a comprehensive sense (established case law since BVerfGE 6, 32 [36]; more recently, for example: BVerfGE 74, 129 [151]; 75, 108 [154, 155]).

   Accordingly, protection is afforded not only to a limited area of the development of a person's personality, but rather to every form of human activity without regard to the importance of the activity for the development of a person's personality (see, for example, the decision of a pre-review committee in BVerfGE 54, 143 [146] - Feeding Pigeons [*Taubenfütten*]).

   However, except for a core area of private conduct of life that enjoys absolute protection and is removed from the sphere of influence of public authority (BVerfGE 6, 32 [41]), general freedom of action is guaranteed only within the constraints of the second half of the sentence constituting Article 2.1 of the Basic Law and is therefore in particular subject to the constitutional (legal) order (BVerfGE 6, 32 [37, 38]; 74, 129 [152]).

When an act of a public authority that affects freedom of action is based on a provision of law, a constitutional complaint invoking Article 2.1 of the Basic Law may be filed to seek review for the purposes of establishing whether such provision inheres to the constitutional order, that is, whether it is in form and substance compatible with the articles of the Basic Law (established case law since BVerfGE 6, 32).

This involves not only a substantive assessment of the provision of law in respect of Article 2.1 of the Basic Law, but also an examination of its compatibility with the Basic Law otherwise. As a result, it is also necessary in particular to establish whether the law is in compliance with provisions governing constitutional jurisdiction (BVerfGE 11, 105 [110]; 29, 402 [408]; 75, 108 [146, 149]).

In the case of Land legislation, it is also necessary to examine in addition to the jurisdictional issues involved in view of Article 31 of the Basic Law whether the substance of the Land law is in compliance with federal law (enacted in turn in compliance with jurisdictional requirements) and also with federal framework legislation (BVerfGE 51, 77 [89, 90, 95, 96]; see also BVerfGE 7, 111 [118, 119]).

In terms of substance, the principle of proportionality provides the standard for establishing the extent to which general freedom of action may be restricted (BVerfGE 17, 306 [314]; 55, 159 [165]; 75, 108 [154, 155]). In the event an existing right is subsequently set aside, the protection of legitimate expectations required by the principle of the rule of law must be preserved (BVerfGE 74, 129 [152]).

In addition, it is necessary to satisfy the requirements that derive (see also on this BVerfGE 6, 32 [42]; 20, 150 [157, 158]) from the constitutional necessity for the enactment of a specific statute (BVerfGE 49, 89 [126, 127]).

b) Reservations in respect of the above case law of the Federal Constitutional Court have been and are still being raised in the literature (see, for example, Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 16th ed., marginal nos. 426 et seq.; extensive references from the past in Scholz, AöR 100 [1975], pp. 80 et seq.). They are directed in particular against the unrestricted inclusion of all forms of human activity in the area protected by the fundamental rights, which as compared with other areas protected by fundamental rights results in protection "in excess of the system of values" (see Scholz, op. cit., pp. 8283, with further references), but on the other hand deprives the fundamental right of substance due to the broad possibility of restriction inherent in the expansion of the scope of protection (Hesse, op. cit., marginal no. 426).

The restriction of the scope of protection afforded by Article 2.1 of the Basic Law that is advocated could in the present case become important since it is doubtful that riding on private forest paths can be subsumed under development of personality as understood in the narrower sense.

There is, however, no justification for restriction of the scope of protection afforded by Article 2.1 of the Basic Law in deviation from previous case law. Not only the history of the development of the fundamental right would stand in the way of such

restriction (see BVerfGE 6, 32 [3940]). In addition to the above rights of freedom, comprehensive protection of the freedom of human activity also fulfils a valuable function in terms of preserving freedom since the fundamental right guarantees protection of substantial weight despite the broad possibilities for restriction under the above standards. Any attempt at a normative restriction of the scope of protection would therefore result in a loss of freedom for citizens that may not be imposed, if for no other reason than because other fundamental rights have a scope of protection that is narrower and of distinct quality and because no compelling reasons for such a loss are otherwise apparent. Limitation, for example, to a guarantee for a narrower, personal sphere of life, even if not restricted to purely intellectual and moral development, or on the basis of similar criteria would, moreover, be accompanied by difficult problems of differentiation that would in practice defy satisfactory resolution.

2. As a form of human activity, riding does fall within the scope of protection of Article 2.1 of the Basic Law, but does not belong to the core area of private conduct of life. It is therefore in principle not exempt from statutory restriction. The provision contained in s. 50.2 sentence 1 of the Landscape Act of 1980 that is indirectly challenged, restricts in a manner that is compatible with the Basic Law; the right to ride in forests.

The provision, which is a statute under Land law, does not conflict with the provisions of federal law contained in s. 14 of the Federal Forest Act and s. 27 of the Federal Nature Conservation Act.

a) In deciding this matter, the Federal Constitutional Court is not limited to a review of the interpretation of the provisions of federal law by the ordinary courts in the initial proceedings on the basis of the principles that have been established for the purposes of review by the constitutional court of the application of ordinary law in decisions of the courts (see BVerfGE 18, 85 [92, 93]).

The effect of these principles would be that the review of the validity of the provision under Land law, which must be included in the decision indirectly, could be carried out only to a limited extent. If in a subsequent case an ordinary court were to interpret the federal rule differently, which - as long as the Federal Constitutional Court has not itself rendered a decision as regards the interpretation - it cannot be prohibited from doing, the provision under Land law would then have to be measured again - possibly with different results - against this interpretation. This would defeat the purpose of a judicial review, even if only an indirect one. A decision as to whether a provision under Land law is valid or not must be conclusive; as a result, the standard of review - in this case the substance of the federal provision - must be established. The Federal Constitutional Court has accordingly itself consistently interpreted federal laws as provided for under Article 100.1 sentence 2 (2nd alternative) of the Basic Law in connection with the review of Land law to determine compliance with federal law (BVerfGE 25, 142 [149 et seq.]; 66, 270 [282 et seq.]; 66, 291 [307 et seq.]). No objective reason is evident that would warrant proceeding otherwise in the case of an interlocutory judicial review.

Accordingly, in the case of constitutional complaint proceedings the Federal Constitutional Court must therefore also interpret the federal provision in order to establish the standard of review when the compatibility of a provision under Land law with a federal provision is to be reviewed indirectly (see also BVerfGE 51, 77 [90 et seq., in particular p. 92]).

b) The wording of s. 14 of the Federal Forest Act could be understood to mean that access to forests is already allowed in principle by subsection 1 sentence 1 of this provision and that - according to subsection 2 - the *Länder* may restrict this principle by law only for good reason. The same would have to apply as regards riding, if riding were to be subsumed under access. However, even if riding were to be considered to fall under "other type of use" within the meaning of s. 14.2 sentence 2 of the Federal Forest Act, this would in principle not change anything in the end. "Equivalence" with other types of use within the meaning of s. 14.2 sentence 2 of the Federal Forest Act would then apply not only to allowance on principle, but also as regards the right of the *Länder* to make provision for exceptions. It could, to be sure, not logically be construed to mean that regulation of all types of use would have to be completely identical, if other types of use are even included in the first place. As far as their methodology is concerned, provisions governing use on foot and those governing other types of use would, however, have to correspond to one another.

However, such an interpretation of s. 14 of the Federal Forest Act - which is not compelled by the wording of the provision - can be excluded in view of the nature of the provision as framework legislation and its historical development.

aa) S. 14 of the Federal Forest Act contains no legal provisions that are directly binding upon the public; moreover, the provisions address exclusively the *Länder*, which must themselves enact the appropriate public laws.

…

This is not inconsistent with the fact that the term "framework provisions" contained in Article 75 of the Basic Law is not to be construed in this narrower technical sense since the federal legislature may also enact individual, directly applicable provisions in the exercise of the powers it is granted, therein in addition to guidelines for the legislatures of the *Länder* (see BVerfGE 4, 115 [130]).

The fact that the provision contained in s. 14.1 of the Federal Forest Act is itself also intended only as a guideline for the legislatures of the *Länder* is also again underscored by the wording of s. 14.2 sentence 1 of the Federal Forest Act, which stipulates that the *Länder* are to regulate the details. If the substantive content of s. 14.1 of the Federal Forest Act had been intended as directly applicable law, it would have to have been formulated to stipulate that the *Länder* may enact complementary provisions.

…

cc) The nature of a framework provision is such as to indicate in the case of doubt that it is intended to be filled out and that the legislative power of the *Länder* is not to be restricted any more than is compellingly required by the wording of the framework provision (see BVerfGE 25, 142 [152]; 67, 1 [12]). According to this rule of interpretation, s. 14.1 sentence 2 of the Federal Forest Act in conjunction with s. 2 sentence 1 of the provision is to be understood to mean that the legislatures of the *Länder* may allow riding in forests only on roads and paths, but may themselves provide the details within this framework. In the case of a provision that restricts riding within the prescribed framework, legislatures must be sure to respect the aspects enumerated for this purpose in s. 14.2 sentence 2 of the Federal Forest Act since the provision also constitutes a guideline for the legislatures in this regard. It is on the other hand not possible to infer the existence of a specific mandatory methodology in the framework, in particular in the sense of a system of rules and exceptions. It therefore also does not preclude a provision that serves to separate recreational riders and others seeking recreation and assigns riders to special bridleways to protect persons visiting the forest, as was provided for by s. 50.2 sentence 1 of the Landscape Act of 1980.

…

3. The provision contained in s. 50.2 sentence 1 of the Landscape Act of 1980 also meets the standards that derive directly from the Basic Law in respect of restriction of the general freedom of action under Article 2.1 of the Basic Law.

a) The provision under challenge is compatible with the principle of proportionality.

It is intended to achieve consistent separation of "recreational traffic" in forests by assigning riders on the one hand and others seeking recreation (in particular those on foot and bicyclists) on the other hand to separate paths. As the Land government submitted, what the legislature primarily wanted to achieve with this provision was to avoid the dangers and other inconveniences that result for those seeking recreation on foot, from encounters with horses and the de-compaction of the floor of the forest associated with riding. This was intended to achieve a purpose that is not only in the public interest and legitimate under constitutional law, but can also be justified directly under Article 2.1 of the Basic Law. By attempting to achieve orderly coexistence of various forms of activity that fall under the category of general freedom of action through the separation of riders and others seeking recreation, the legislature undertook a responsibility that is grounded in the fundamental right itself and prescribed in Article 2.1 of the Basic Law by the reference to the rights of others.

It cannot be established that the legislature has succumbed to any obvious error of judgment in pursuing this objective. It was able to rely upon experience gained while the predecessor provision was in force. In this context, the Land government has plausibly set forth, that encounters with horses cause many persons seeking recreation to feel threatened and that persons on foot could be exposed to situations involving serious dangers due to riders, especially on narrower forest paths. Ultimately, the complainant himself concedes this by assuming the existence of conflicts of interest

between riders and others seeking recreation in the vicinity of major metropolitan centres. His claim to the effect that most people seeking recreation enjoy seeing horses being ridden in the country cannot in any case apply to situations involving encounters at close quarters.

The provision is obviously suitable for achieving the desired purpose of protection. The fact that riders are assigned to separate paths precludes from the very start the use of the same forest paths by both persons on foot and riders and as a result the concomitant dangers and inconveniences for persons on foot as well.

The separation of riders and other "recreational traffic" in forests also satisfies the dictate of exigency. The Federal Constitutional Court may consequently limit itself to a review of the alternatives that are enumerated by the complainant and other alternatives discussed among experts for the purposes of establishing whether they could make it possible to achieve the desired goal in a manner that is not only simpler and equally effective, but also involves less tangible restriction of fundamental rights (BVerfGE 77, 84 [109]).

More moderate means of achieving in a comparably effective manner the twofold goal pursued (protection of persons on foot against the danger posed by animals and maintenance of paths in a condition suitable for hiking) are neither set forth by the complainant nor otherwise apparent.

Finally, the provision is in the narrower sense, proportionate. It is of special importance in this context that the two classes whose competing interests in the use of forests that the law is intended to reconcile, namely, persons on foot and riders, be able to rely equally upon Article 2.1 of the Basic Law. In separating recreational traffic, the legislature had to regulate the competing claims to the use of the existing network of paths in a manner that does justice to the interests of all parties involved. The fact that the legislature effected this separation by setting bridleways apart from the total number of available private forest paths and not, the other way around, by setting apart special paths for persons on foot cannot be objected to. In view of the smaller number of riders as compared with that of persons on foot and the greater effect on the ground of the latter, this cannot be considered a failure on the part of the legislature to achieve the equitable reconciliation of interests with which it is charged. This applies all the more so since the landscape authorities are explicitly charged under s. 50.7 of the Landscape Act of 1980 to make provision for an adequate and suitable network of bridleways.

b) The provision under challenge satisfies the requirements that arise from the constitutional necessity for the enactment of a specific statute.

Under the doctrine that binds the administration to the law, a provision that restricts freedom of action may not be so unspecific as to leave prohibition of an activity to the discretion of the administration with, for practical purposes, no possibility for review (see BVerfGE 6, 32 [42 et seq.]).

The Federal Constitutional Court elaborated on this doctrine in its judgment on the Collection Act (Sammlungsgesetz - SammlG) (BVerfGE 20, 150), stating that the legislature may, to be sure, regulate the exercise of allowed activities by adopting a negative statute that makes provision for authorization of otherwise prohibited activities (BVerfGE, op. cit., 154 et seq.).

It must, however, according to the Court, then specify conditions for the issuance of such authorization and upon compliance with such conditions extend a legal right to such approval to the holder of the fundamental right, for it must itself define the legal sphere within the scope of the exercise of the fundamental right that is exposed to governmental intervention and may not leave this to the discretion of administrative authorities (BVerfGE, op. cit., 155, [157, 158]).

In that regard, the doctrine that binds the administration to the law is affected from the point of view of the constitutional necessity for the enactment of a specific statute (see BVerfGE 49, 89 [126, 127]).

The provision under challenge does not, in any case within the meaning established by the Federal Constitutional Court, fall under the term "negative statute that makes provision for authorization," which the Federal Administrative Court (Bundesverwaltungsgericht) also used in the initial proceedings concerning the provision contained in s. 50.2 sentence 1 of the Landscape Act of 1980. It would not, however, be possible to achieve the goal of separation of recreational traffic, which would be legitimate under constitutional law, through a negative statute that makes provision for authorization. Classification of the individual paths presupposes in each case the existence of a decision based on regulatory policy that is not already concretely predetermined by law and entails no obligation to grant a legal right to assignment of specific paths to riders. The decision as to which forest paths in particular are to be made available as bridleways in the context of regulation of all recreational traffic is pursuant to s. 50.2 sentence 1 in conjunction with s. 50.7 sentence 1 of the Landscape Act of 1980 ultimately an act of governmental (road) planning. The legislature of the Land has therefore adopted an approach to the regulation of riding in forests that has already become common practice in the case of legislation governing other specific activities involving freedom of movement - such as, for example, vehicular traffic. Such acts of planning cannot be predetermined by law by means of catalogue of conditions. However, the duty to balance competing interests in the area of planning does provide an objective standard that permits the achievement of an equitable reconciliation of the interests of the general public and the private concerns of the respective property owners as a function of concrete circumstances. As a result, that which applies to the planning of other travelling ways such as public roads applies equally in respect of the duty of the landscape authorities to plan and implement a network of bridleways as explicitly prescribed by s. 50.1 sentence 1 of the Landscape Act of 1980 (see on this BVerfGE 79, 174 [198, 199]).

In deciding which private forest ways are to be identified as bridleways and consequently, in compliance with the idea behind the law, closed to persons on foot, the responsible authorities involved must deal with a multitude of legitimate interests.

At the very least, not only the interest of riders in as large a network of bridleways as possible and the countervailing interest of persons on foot, but also the interest of property owners in the maintenance and undisturbed use of their own ways will regularly be affected and presently require reconciliation. The objective importance of each of these individual interests may vary from case to case.

The resolution of such conflicts lies beyond the reach of detailed regulation by law. This can also not be required from the point of view of the constitutional necessity for the enactment of a specific statute. For this doctrine may not be allowed to oblige the legislature to renounce a provision that it considers (and may so consider) appropriate for the purposes of achieving a goal that is legitimate under the Basic Law (see also BVerfGE 58, 300 [346]).

c) The provision under challenge is also not the subject of any reservations of a constitutional nature as regards the protection of legitimate expectations. The legislature also has in principle the power to further narrow existing limitations of general freedom of action within the bounds of proportionality. The predecessor provision of the Landscape Act, which in principle allowed riding on forest roads and ways, was in force for only five years. It was preceded by a regulation that in principle prohibited riding in forests (s. 4.e of the Land Forest Act of 1969). Before that time, no right to ride in forests had been granted by statute, nor is there evidence of any customary right to ride in forests that either the federal or Land legislature could have revoked under their respective authority (see also Bavarian Constitutional Court [*Bayerischer Verfassungsgerichtshof* - BayVfGH] 28, 107 [120] with further references).

In view of the inconveniences that result from mixed recreational traffic that includes riders, it was necessary to anticipate that the legislature might be moved by the experience gained under the law of 1975 to modify the provision again at the expense of riders. If for no other reason, riders could not rely on the continued existence of this provision because of the brief period during which riders were legally allowed to use all forest ways. Furthermore, the reasons that lend the provision under challenge legitimacy under constitutional law would also suffice to override any protection of legitimate expectations that might have been required.

c) Census Act, BVerfGE 65, 1

Explanatory Annotation

The intention to conduct a census in 1983 in order to collect framework data for planning purposes concerning personal, work and business related information and about living conditions was at issue in this decision. In absence of a specific right protecting against the collection and use of such data the Court resorted to the fall-back right of Article 2.1 as construed in the *Elfes*-decision.

Using the broad construction of the right of free development of one's personality whereby any state action affecting individuals in a negative way by reducing the sphere of individual freedom must be measured against Article 2.1 the Court went on to develop the right to

informational self-determination. Under this new right, which the Court also explicitly linked to the human dignity clause in Article 1.1 of the Basic Law, personal data is linked to the individual from whom it is taken and the release and use of such data must in principle be consented to by that individual. The Court argued that data collection and usage in the age of computer technology has a very different and potentially threatening dimension because such data collections could be used to comprehensively map individual behaviour without any influence of individuals to even know what data is collected about them and how it is, will or might be used in the future.

Infringements of this right are, of course, possible and as the Court had developed in the *Elfes*-decision, there is actually a broad scope for such infringements, however, only on the basis of statutory authority that is in compliance with the Basic Law in all respects, conforms to the principle of proportionality and contains organizational and procedural safeguards against the misuse of the data. The census statute of 1983, albeit unanimously passed by Parliament, did not fulfil these requirements.

This new right has played a crucial role in many other decisions of the Court, for example with regard to the "genetic fingerprint", i.e. the analysis and storage of DNA for identification purposes in criminal proceedings[21], or GPS surveillance in the context of organized crime and terrorism.[22]

Translation of the Census Act Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 65, 1*

Headnotes:

1. Given the context of modern data processing, the protection of individuals against unlimited collection, storage, use and transfer of their personal data is subsumed under the general right of personality governed by Article 2.1 in conjunction with Article 1.1 of the Basic Law (Grundgesetz - GG). In that regard, this fundamental right guarantees in principle the power of individuals to make their own decisions as regards the disclosure and use of their personal data.

2. Restrictions of this right to "informational self-determination" are permissible only in the case of an overriding general public interest. Such restrictions must have a constitutional basis that satisfies the requirement of legal certainty in keeping with the rule of law. The legislature must ensure that its statutory regulations respect the principle of proportionality. The legislature must also make provision for organizational and procedural precautions that preclude the threat of violation of the right of personality.

21 BVerfGE 103, 21, in German available at http://www.servat.unibe.ch/dfr/bv103021.html.

22 BVerfGE 112, 304, in German available at http://www.servat.unibe.ch/dfr/bv112304.html.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

3. As regards the constitutional requirements to be satisfied by such restrictions, it is necessary to distinguish between personal data that are collected and processed in personalized, non-anonymous form and data intended for statistical purposes.

   In the case of data collected for statistical purposes, it is not possible to require the existence of a narrowly defined, concrete purpose for the collection of such data. However, the collection and processing of information must be accompanied by appropriate restrictions within the information system to compensate for the absence of such a concrete purpose.

4. The survey program of the 1983 Census Act (Volkszählungsgesetz - VZG) (s. 2 nos. 1 to 7 and ss. 3 to 5) does not entail registration and classification of personal data that would be incompatible with human dignity; it therefore also satisfies the requirements of legal certainty and proportionality. Nonetheless, procedural precautions are required in connection with the execution and organization of the collection of such data in order to preserve the right to informational self-determination.

5. The provisions governing the transfer of data (including for the purposes of crosschecks with population registers) contained in s. 9.1 to 3 of the 1983 Census Act violate the general right of personality. The transfer of data for scientific purposes (s. 9.4 of the 1983 Census Act) is compatible with the Basic Law.

Judgment of the First Senate of 15 December 1983, on the basis of the oral hearing of 18 and 19 October 1983 - 1 BvL 209, 269, 362, 420, 440 and 484/83:

Facts:

The 1983 Census Act of 25 March 1982 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 369) made provision for a general census of the population, employment, housing and places of employment for statistical purposes in the spring of 1983. The declared purpose of the Act was to obtain information on the most recent state of the population, its geographic distribution and its composition in terms of demographic and social characteristics as well as on the economic activity of the population through the surveys to be carried out, which information provides the indispensable basis for decisions made by the Federation, the *Länder* and municipalities in the areas of social and economic policy. The previous census had been taken in the year 1970. The 1983 Census Act defined in detail the data to be collected and the respondents, and s. 9 made provision, among other things, for the possibility of crosschecking the data collected with municipalities and federal and Land authorities for specific purposes having to do with administrative enforcement.

In response to numerous constitutional complaints lodged directly against the 1983 Census Act, the Federal Constitutional Court found the Act to be essentially in compliance with the Basic Law; the Court declared in particular those provisions void that govern crosschecks with population registers and the power to transfer data for the purposes of administrative enforcement.

Extract from the Grounds:

B. II.

To the extent that the complainants were themselves personally affected by the 1983 Census Act, theirs is an immediate and current concern.

However, according to the case law of the Federal Constitutional Court, an immediate concern is lacking if the implementation of the provision under challenge requires a separate act of enforcement on the part of the administration. The reason for this is that such an act of enforcement will as a rule encroach on the legal sphere of the citizen first; legal recourse that may be taken against such encroachment also permits review of the constitutionality of the law applied (BVerfGE 58, 81 [104]; see BVerfGE 59, 1 [17]; 60, 360 [369 and 370].

Implementation of the 1983 Census Act necessarily involved requests to furnish information; only through such requests could the legal sphere of the complainants be affected (See s. 5.2 of the 1983 Census Act). The way to legal recourse against this enforcement measure before the administrative courts would have been opened. This does not, however, constitute an obstacle to the admissibility of the constitutional complaints.

The Federal Constitutional Court has, in cases involving special circumstances affirmed by way of exception, the admissibility of constitutional complaints lodged directly against a law before an act of enforcement was ordered when that law would force the parties affected to make decisions that cannot be rectified later or would cause them to take measures that they can then no longer reverse after enforcement of the law (see BVerfGE 60, 360 [372]). The constitutional complaints lodged directly against the 1983 Census Act are also admissible by way of exception before the act of enforcement is ordered.

Enforcement of this Act was intended to affect the entire population within a very short period of time. The questionnaires were to be distributed starting on 18 April 1983 and then collected by early May 1983. A period of only about two weeks would therefore have been available to obtain injunctive relief before the administrative courts. The courts would not have been able to address the issue in this limited period of time in such a manner as to make it possible for the Federal Constitutional Court to expect substantive preliminary review from them. Nevertheless, a constitutional complaint against negative decisions in proceedings pursuant to s. 80.5, s. 123 and s. 146.1 of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung - VwGO) would have been admissible (see BVerfGE 51, 130 [138 et seq.]; 53, 30 [49, 52]; 54, 173 [190]). In any case, after the request to furnish information was contested through recourse to the administrative courts, a decision from the Federal Constitutional Court would have been conceivable prior to exhaustion of such legal remedies pursuant to s. 90.2 sentence 2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG) (See BVerfGE 59, 1 [19 and 20]). The Federal Constitutional Court would then, however, have had to deal with numerous, possibly contradictory, decisions of the administrative courts. The fact that some courts had granted the parties affected injunctive relief, but others not, could also have resulted in the possibility of legal uncertainty. Under these circumstances, the subsidiarity principle, according to which the public is in principle initially referred to the

specialized courts, would have achieved the exact opposite of what is intended: it would no longer have served to relieve the Federal Constitutional Court and leave to it the review of cases of the specialized courts, but would have put it under especially great time pressure to make decisions on this subject matter. Given this situation, the complainants had the right, by way of exception, to challenge the law directly with their constitutional complaint.

C.

The constitutional complaints are - to the extent admissible - in part founded.

…

II.

The primary standard of review is the general right of personality, which is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law.

1. a) The worth and dignity of individuals, who through free self-determination function as members of a free society, lie at the core of the constitutional order. In addition to specific guarantees of freedom, the general right of personality guaranteed in Article 2.1 in conjunction with Article 1.1 of the Basic Law, which can also become important precisely in view of modern developments and the concomitant new threats to the personality, serves to protect that worth and dignity (see BVerfGE 54, 148 [153]). Previous concrete treatment in the case law does not conclusively describe the content of the right of personality. This right also subsumes - as has already been suggested in the BVerfGE 54, 148 [155] decision in extension of previous decisions (see BVerfGE 27, 1 [6]; 27, 344 [350 and 351]; 32, 373 [379]; 35, 202 [229]; 44, 353 [372 and 373]). - the right of individuals that follows from this idea of self-determination to decide in principle themselves when and within what limits personal matters are disclosed (see also BVerfGE 56, 37 [41 et seq.]; 63, 131 [142 and 143]).

   Given the current and future state of automated data processing, this right merits a special measure of protection. It is especially threatened since it is no longer necessary to consult manually assembled files and dossiers for the purposes of decision making processes, as was the case previously; to the contrary, it is today technically possible, with the help of automated data processing, to store indefinitely and retrieve at any time, in a matter of seconds and without regard to distance, specific information on the personal or material circumstances of individuals whose identity is known or can be ascertained (personal data (see s. 2.1 of the Federal Data Protection Act (Bundesdatenschutzgesetz - BDSG)). This information can also be combined - especially if integrated information systems are set up - with other collections of data to assemble a partial or essentially complete personality profile without giving the party affected an adequate opportunity to control the accuracy or the use of that profile. As a result, the possibilities for consultation and manipulation have expanded to a previously unknown extent, which can affect the conduct of the individual because of the mere psychological pressure of public access.

However, personal self-determination also presupposes - even in the context of modern information processing technologies - that individuals are to be afforded the freedom to decide whether to engage in or desist from certain activities, including the possibility of actually conducting themselves in accordance with their decisions. The freedom of individuals to make plans or decisions in reliance on their personal powers of self-determination may be significantly inhibited if they cannot with sufficient certainty determine what information on them is known in certain areas of their social sphere and in some measure appraise the extent of knowledge in the possession of possible interlocutors. A social order in which individuals can no longer ascertain who knows what about them and when and a legal order that makes this possible would not be compatible with the right to informational self-determination. A person who is uncertain as to whether unusual behaviour is being taken note of at all times and the information permanently stored, used or transferred to others will attempt to avoid standing out through such behaviour. Persons who assume, for example, that attendance of an assembly or participation in a citizens' interest group will be officially recorded and that this could expose them to risks will possibly waive exercise of their corresponding fundamental rights (Articles 8 and 9 of the Basic Law). This would not only restrict the possibilities for personal development of those individuals but also be detrimental to the public good since self-determination is an elementary prerequisite for the functioning of a free democratic society predicated on the freedom of action and participation of its members.

From this follows that free development of personality presupposes, in the context of modern data processing, protection of individuals against the unrestricted collection, storage, use and transfer of their personal data. This protection is therefore subsumed under the fundamental right contained in Article 2.1 in conjunction with Article 1.1 of the Basic Law. In that regard, the fundamental right guarantees in principle the power of individuals to make their own decisions as regards the disclosure and use of their personal data.

b) The guarantee of this right to "informational self-determination" is not entirely unrestricted. Individuals have no right in the sense of absolute, unrestricted control over their data; they are after all human persons who develop within the social community and are dependent upon communication. Information, even if related to individual persons, represents a reflection of societal reality that cannot be exclusively assigned solely to the parties affected. The Basic Law, as has been emphasized several times in the case law of the Federal Constitutional Court, embodies in negotiating the tension between the individual and the community a decision in favour of civic participation and civic responsibility (see BVerfGE 4, 7 [15]; 8, 274 [329]; 27, 1 [7]; 27, 344 [351 and 352]; 33, 303 [334]; 50, 290 [353]; 56, 37 [49]).

Individuals must therefore in principle accept restrictions on their right to informational self-determination in the overriding general public interest.

According to Article 2.1 of the Basic Law - as is also correctly recognized in s. 6.1 of the Federal Statistics Act (Bundesstatistikgesetz - BStatG) - these restrictions require a (constitutionally) legal basis from which the prerequisites for and the scope of the restrictions clearly follow and can be recognized by the public and which therefore satisfies the requirement of legal certainty in keeping with the rule of law (BVerfGE 45, 400 [420] with further references). The legislature must in its statutory regulations respect the principle of proportionality. This principle, which enjoys constitutional status, follows from the nature of the fundamental rights themselves, which, as an expression of the general right of the public to freedom from interference by the state, may be restricted by the public powers in any given case only insofar as indispensable for the protection of public interests (BVerfGE 19, 342 [348]; established case law). In view of the threats described above that arise from the use of automated data processing, the legislature must more than was the case previously, adopt organizational and procedural precautions that work counter to the threat of violation of the right of personality (see BVerfGE 53, 30 [65]; 63, 131 [143]).

2. The constitutional complaints provide no occasion for an exhaustive discussion of the right to informational self-determination. The only issue to be decided relates to the reach of this right in the case of governmental actions that require that individuals furnish personal data. It is not possible in such cases to limit consideration exclusively to the nature of the information. The usefulness and possible uses of the information are what are of decisive importance. This depends on the one hand upon the purpose served by the survey and on the other hand upon the possibilities for processing and collating information inherent in information technology. This is what makes it possible for data that are in and of themselves of no significance to take on new importance; in that respect, "unimportant" data no longer exist in the context of automated data processing.

Accordingly, the extent to which information is sensitive cannot depend exclusively upon whether it concerns intimate matters. Indeed, knowledge of the context in which data are used is necessary to establish the importance of data for the purposes of legislation governing the right to personality. Only after it has been clearly established, what the purpose is for requiring that data be furnished and what possibilities exist for collation and use of such data, is it possible to address the question as to the admissibility of restriction of the right to informational self-determination. In this context, it is necessary to distinguish between personal data that are collected and processed in personalized, non-anonymized form (see under (a)) and data intended for statistical purposes (see under (b)).

a) It has been acknowledged up to now that compulsory collection of personal data without restriction is not permissible, in particular if such data are to be used for the purposes of administrative enforcement (for example, in connection with taxation or allocation of social benefits). In that respect, the legislature has made provision for various measures to protect the parties affected that go in the direction required by the Basic Law (see, for example, provisions of the data protection laws of the Federation and the *Länder*; ss. 30, 31 of the Fiscal Code (*Abgabenordnung* - AO); s. 35 of the First Book of the Social Code (*Sozialgesetzbuch I* - SGB I) in conjunction with ss. 67 to 86 of the Social Code X). The extent to which the right to informational

self-determination and in that connection the principle of proportionality and the duty to take procedural precautions compel the legislature to make such provision on constitutional grounds depends on the nature, scope and conceivable uses of the collected data and the danger of abuse (see BVerfGE 49, 89 [142]; 53, 30 [61]).

An overriding general public interest will regularly exist exclusively in data of concern to society, to the exclusion of unreasonable, intimate information and self-incrimination. On the basis of the state of knowledge and experience from the past, the following measures in particular would seem important:

Compulsory disclosure of personal data presupposes that the legislature has specifically and precisely defined the intended area of use and that the information is suitable and required for that purpose. The collection of non-anonymized data to be stored for purposes that are not or have not yet been specified would not be compatible with this. All governmental entities that collect personal data to fulfil their duties will have to restrict themselves to the minimum required to achieve the specified purpose.

The use of the data is limited to the purpose specified by law. If for no other reason than because of the dangers associated with automated data processing, protection is required against unauthorized use - including protection against such use by other governmental entities - through a prohibition on the transfer and use of such data. Mandatory information, disclosure and deletion constitute further procedural precautions.

Due to the lack of transparency of the storage and use of data for the public in the context of automated data processing as well as in the interest of anticipatory legal protection in the form of timely precautions, the involvement of independent data protection officers is of significant importance for effective protection of the right to informational self-determination.

b) The collection and processing of data for statistical purposes involve unique aspects that may not be ignored in the context of constitutional scrutiny.

aa) Statistics are of significant importance for governmental policy that is subject to the principles and guidelines of the Basic Law. If economic and social progress is not to be taken as the result of inevitable fate but as a permanent goal, comprehensive, continuous and constantly updated information on economic, ecological and social developments is necessary. It is possible to create the basis for action that is indispensable for governmental policy that is aligned with the principle of the social state only with a knowledge of the relevant data and the possibility of using such information for statistical purposes with the help of the opportunities presented by automated data processing (see BVerfGE 27, 1 [9]).

In the case of surveys for statistical purposes, it is not possible to require that the purpose for which the data are collected be narrowly and concretely defined. It lies in the nature of statistics that data are intended to be used for a wide variety of different purposes after collection and that these purposes cannot be defined from the outset; accordingly, there is a need to store such data.

…

bb) If the variety of possibilities for the use and collation of data cannot therefore be determined in advance in the case of statistics because of the very nature of the situation, the collection and processing of information within the information system must be accompanied by appropriate restrictions to compensate for this. Clearly defined conditions must be created for processing to ensure that individuals do not become mere data subjects in the context of the automated collection and processing of the information pertaining to their person. Both the absence of a connection with a specific purpose that can be recognized and verified at all times and the multifunctional use of data, reinforce the tendencies that are to be checked and restricted by data-protection legislation, which represents the concrete manifestation of the constitutionally guaranteed right to informational self-determination. Precisely because there is from the outset an absence of purposive limits that restrict the data set, population censuses are likely to entail the danger of invasive registration and classification of individuals that has already been emphasized in the micro census decision (Mikrozensus-Beschluß) (see BVerfGE 27, 1 [6]). For that reason, the collection and processing of data for statistical purposes must be subjected to special requirements intended to protect the right of personality of respondents.

Notwithstanding the multinational nature of the collection and processing of data for statistical purposes, it is a prerequisite that this be done exclusively to support the fulfilment of public duties. Here too, not just any information may be required. Even in the case of the collection of individual data that are required for statistical purposes, the legislature must, when it imposes a duty to furnish information, determine in particular whether the collection of such information could entail the danger of social categorization (for example, in respect of substance addiction, criminal record, mental illness or social marginality) of the party affected and whether the purpose of the survey could not also be achieved by means of an anonymized investigation. This is, for example, likely to be the case of those aspects of the collection of data governed by s. 2 no. 8 of the 1983 Census Act, according to which the population and employment census in the institutional area includes information on the status of respondents as inmates or employees or relatives of employees. The collection of such data is intended to provide information on the population of institutions (*Bundestag* document (*Bundestagsdrucksache* - BTDrucks.), 9/451, p. 9). Such a goal can - apart from the danger of social stigmatization - also be achieved without reference to specific individuals. It would suffice to have the head of the institution provide figures on the population as of the date of the census, broken down according to the criteria listed in s. 2 no. 8 of the 1983 Census Act without any reference to individual persons. Collection of the personal data mentioned under s. 2 no. 8 of the 1983 Census Act would for that reason constitute from the outset a violation of the right of personality protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law.

Special precautions are required as regards the execution and organization of the collection and processing of data in order to preserve the right to informational self-determination since information can be more easily assigned to individuals during the collection phase - and to some extent also during storage; at the same time, rules are required for deletion of information that is required for secondary purposes (identifying characteristics) and would facilitate de-anonymization such as names, addresses, identification numbers and lists of census takers (see also s. 11.7 sentence 1 of the Federal Statistics Act).

Regulations that ensure effective protection against access from outside are of especial importance in the case of surveys carried out for statistical purposes. Strict confidentiality of the individual data collected for statistical purposes is indispensable for the purposes of protection of the right to informational self-determination - and to be sure also during the collection process - as long as a link to a person exists or can be created (confidentiality of statistics); the same applies as regards the necessity of (effective) anonymization at the earliest possible time together with precautions to prevent de-anonymization.

Governmental entities are allowed access to information required for planning purposes only in the case of hermetic isolation of statistics through anonymization of data and confidential treatment of data as long as they still relate to a person; same is required by the right to informational self-determination and must be guaranteed by law. Only under this condition can and may the public be expected to provide the mandatory information. If the transfer of personal data that are collected for statistical purposes were to be allowed against the will or without the knowledge of the parties affected, this would not only impermissibly restrict the constitutionally guaranteed right to informational self-determination but also jeopardize official statistics, which are provided for under the Basic Law itself in Article 73 no. 11 and therefore merit protection. The highest possible degree of accuracy and truthfulness in the data collected is necessary to ensure the functional viability of official statistics. This can be achieved only if respondents have the necessary confidence in the protection of data collected for statistical purposes against access from outside, without which it is not possible to create a willingness on the part of the public to provide truthful information (as already correctly justified in the Federal Government's draft of the 1950 Census Act; see *Bundestag* document I/982, p. 20 on s. 10).

Governmental practice that does not involve an effort to foster such confidence through disclosure of the data processing procedure and strict protection against access to information from outside would in the longer term lead to diminishing willingness to cooperate since a lack of trust would otherwise result. Since governmental compulsion can be of only limited effectiveness, governmental action that ignores the interests of the public will at best prove effective over the short term; in the long run, it will result in a decrease in the scope and accuracy of the information (*Bundestag* document I/982, loc. cit.). Since the constant increase in the complexity of the environment that is typical of highly industrialized societies can

be deciphered and rendered amenable to targeted governmental measures only with the help of reliable statistics, any threat to official statistics will in the end jeopardize an important prerequisite for governmental policy in the social area. If responsibility for "planning" can therefore be guaranteed only through hermetic isolation of statistics against access from outside, the principle of confidentiality and anonymization of data at the earliest possible time is not only required by the Basic Law for the protection of the right to informational self-determination of the individual but is also of constitutive importance for the statistics themselves.

cc) If the requirements discussed above are taken into account in an effective manner, there can be no misgivings on the basis of current knowledge and experience as regards the collection of data exclusively for statistical purposes on constitutional grounds. It is not possible to ascertain that the right of personality of individuals could be compromised if the collected data are made available to other governmental bodies or other agencies after anonymization or processing for statistical purposes (see s. 11.5 and s. 11.6 of the Census Act).

Any transfer (disclosure) of data that have been neither anonymized nor processed for statistical use and are therefore still personalized data raises special problems. Surveys conducted for statistical purposes also include personalized information on individual citizens that are not required for statistical purposes and - which the surveyed public must be able to assume - serve only to facilitate the survey process. All of this information may, to be sure be made available to other parties by virtue of explicit legal authority to the extent and insofar as this occurs for the purposes of statistical processing by other public authorities and the right of personality has been reliably protected by taking the required precautions, in particular as regards the confidentiality of statistics and the requirement of early anonymization, as well as through organizational and procedural means as in the case of the Statistical Offices of the Federation and the *Länder*. The act of making data collected for statistical purposes that have not been anonymized or statistically processed, available for the purposes of administrative enforcement may on the other hand improperly infringe the right to informational self-determination (see also C IV 1 below).

III.

The survey program of the 1983 Census Act essentially satisfies the constitutional requirements presented above. In that regard, the subject matter under review covers, with the exception of the question as to qualification as an inmate of an institution or member of the personnel of an institution (s. 2 no. 8 in conjunction with s. 5.1 no. 1 second half of the sentence), ss. 2 to 4 in conjunction with s. 5.1 of the Census Act. These provisions are compatible with the general right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law on condition that the legislature complement the legislation to compensate for heretofore lacking organizational and procedural rules to preserve the fundamental right, thereby ensuring compliance with the constitutional requirements to be satisfied by a total survey of the nature of the 1983 census.

…

c) The survey program of the 1983 Census Act also satisfies, to the extent relevant to the matter under review, the principle of proportionality. A measure to achieve the intended purpose must therefore be suitable and necessary; the intensity of the attendant action may not be disproportionate to the importance of the matter and the compromises imposed upon the public (see BVerfGE 27, 344 [352 and 353]; established case law).

The 1983 Census Act is intended to provide the state with information required for future planning and actions. As a prerequisite for making it possible to plan governmental activities (see BVerfGE 27, 1 [7]), the 1983 census serves a purpose that is obviously intended to fulfil legitimate duties of the state.

Through the use of a census in the form of a total census (exhaustive census) and the catalogue of questions of s. 2 no 1 to 7 and ss. 3 and 4 of the 1983 Census Act, the Federal Republic of Germany has fulfilled its obligation arising from the Directive of the Council of the European Communities of 22 November 1973 on the synchronization of general population censuses - 73/403/EWG (OJ no. L 347 of 17 December 1973, p. 50). The survey method and program are suitable and necessary for achieving the intended purpose and represent a reasonable imposition on respondents.

…

IV.

1. Data collected for statistical purposes that have not yet been anonymized and are therefore still personalized may - as has already been set forth (C II b cc above) - be made available to other parties by virtue of explicit legal authority to the extent and insofar as this occurs for the purposes of statistical processing by other public authorities and if the right of personality has been reliably protected by taking the required precautions, in particular as regards the confidentiality of statistics and the requirement of anonymization as in the case of the Statistical Offices of the Federation and the *Länder*. If on the other hand personalized, non-anonymized data collected for statistical purposes and intended for such purposes by the statutory regulation are transferred to other parties for the purposes of administrative enforcement (improper use) in compliance with the law, this would constitute improper infringement of the right to informational self-determination. The question may remain open as to whether there would be any objection to direct transmission of such data in general and even if the legislature were to explicitly make provision for such transmission on the grounds of incompatibility with the principle of separation of statistics and enforcement. There is also no need for a conclusive discussion as to whether simultaneous collection of personal data for statistical purposes, which is in and of itself allowed, and collection of personal data for the purposes of administrative enforcement, which is in and of itself allowed, would be permissible if different forms were used (combined survey). Both the direct transfer of data collected for statistical purposes as well as the use of combined surveys would constitute a source of misgivings since the combination of two different purposes with

different requirements would cause considerable uncertainty on the part of the public in view of the lack of transparency of the possibilities permitted by automated data processing, thereby threatening the reliability of the information and its suitability for statistical purposes. It is also necessary to take into account the different requirements that have to be satisfied: For example, the confidential nature of statistics, the requirement of anonymization and the prohibition of discrimination, apply to the collection and exploitation of data for statistical purposes; this does not apply, or not in the same manner, as regards the collection of data for the purposes of administrative enforcement; whereas identification data (for example, name and address) serve only to facilitate processing in the case of statistics, they do as a rule constitute essential elements of data collected for the purposes of administrative enforcement. In this case, the investigative organization that is designed for the collection of data for statistical purposes is also used to collect data for other purposes that would hardly justify such an organization on their own. It would also be necessary to take into account that judicial process can differ depending on which of the two types of data collection is used.

A regulatory measure intended to achieve both goals nonetheless is in any case unsuitable for achieving the intended purposes and therefore in violation of the Basic Law if it combines aspects that are basically incompatible. In such a case, the combination of statistical purposes with purposes of administrative enforcement in a census may result not only in a lack of clarity and obscurity in the statute, but also makes the statute disproportionate. Unlike the situation in the case of the collection of data for exclusively statistical purposes, it is essential that the data be transmitted for a narrowly defined, concrete purpose in this case (C II 2 (a) above). In addition, the requirement of legal certainty is of especial importance. The public must be able to clearly recognize from the statutory regulation that data are not being used exclusively for statistical purposes, the concrete purposes of administrative enforcement for which the personal data are intended and required and that the use of the data will remain limited to such purposes and the respondent shielded against self-incrimination.

2. The combination of the census conducted for statistical purposes and cross-checks with the population register pursuant to s. 9.1 of the 1983 Census Act does not satisfy the constitutional requirements.

…

d) Data Collection - BVerfGE 120, 274

Explanatory Annotation

In 2008 the Court extended the right to informational self-determination contained in Article 2.1 to include the confidentiality and integrity of information technology systems.[23] At issue was the question whether and under what conditions "constitution protection agencies", in essence domestic secret police with narrow jurisdiction, have the power to secretly hack into computer systems of suspects in order to search and retrieve relevant information. The Court erected several procedural and substantial safeguards. One of the problems in this context lies in the fact that such measures are by definition secretive and the person affected by such measures, if they are to make sense, will not know about them and will therefore be unable to obtain judicial protection. Any such measures can only be undertaken if authorized by a judge in order to secure judicial oversight before the measures are invoked. In addition, the necessary statutory authority for such measures must contain provisions for the immediate deletion of and the prohibition to use in any way irrelevant personal and private data.

Translation of the Data Collection Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 120, 274

Headnotes:

1. The general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law (Grundgesetz - GG)) encompasses the fundamental right to the guarantee of the confidentiality and integrity of information technology systems.

2. The secret infiltration of an information technology system by means of which the use of the system can be monitored and its storage media can be read, is constitutionally only permissible if factual indications exist of a concrete danger to a predominantly important legal interest. Predominantly important are the life, limb and freedom of the individual or such interests of the public a threat to which affects the basis or continued existence of the state or the basis of human existence. The measure can already be justified even if it cannot yet be ascertained with sufficient probability that the danger will arise in the near future insofar as certain facts indicate a danger posed to the predominantly important legal interest by specific individuals in the individual case.

3. The secret infiltration of an information technology system is in principle to be placed under the reservation of a judicial order. The statute granting powers to perform such an encroachment must contain precautions in order to protect the core area of private life.

4. Insofar as empowerment is restricted to a state measure by means of which the contents and circumstances of ongoing telecommunication are collected in the computer network, or the data related thereto is evaluated, the encroachment is to be measured against Article 10.1 of the Basic Law alone.

23 BVerfGE 120, 274; Available in English at: http://www.bverfg.de/entscheidungen/rs20080227_1bvr037007en.html.

5. If the state obtains knowledge of the contents of Internet communication by the channel technically provided therefore, this shall only constitute an encroachment on Article 10.1 of the Basic Law, if the state agency is not authorised to obtain such knowledge by those involved in the communication.

6. If the state obtains knowledge of communication contents which are publicly accessible on the Internet, or if it participates in publicly accessible communication processes, in principle it does not encroach on fundamental rights.

Judgment of the First Senate of 27 February 2008 on the basis of the oral hearing of 10 October 2007 - 1 BvR 370, 595/07:

Facts:

The subject matter of the constitutional complaints are the provisions of the North Rhine-Westphalia Constitution Protection Act regulating, firstly, the powers of the constitution protection authority regarding various instances of data collection, in particular from information technology systems, and secondly, the handling of the data collected.

The impugned provisions were largely inserted or amended by the Act Amending the Act on the Protection of the Constitution in North Rhine-Westphalia of 20 December 2006 (Law and Ordinance Gazette of North Rhine-Westphalia, p. 620).

Both constitutional complaints complain of the unconstitutionality of s. 5.2 no. 11 of the North Rhine-Westphalia Constitution Protection Act. This provision empowers the Constitution protection authority to carry out two types of investigative measures: Firstly, secret monitoring and other reconnaissance of the Internet (alternative 1), and secondly secret access to information technology systems (alternative 2).

Extract from the Grounds:

B.

Insofar as they are admissible, the constitutional complaints are largely well-founded. s. 5.2 no. 11 of the North Rhine-Westphalia Constitution Protection Act is unconstitutional and null and void in the second alternative listed there (I.). The same applies to the first alternative of this provision (II.). As a result of the nullity, the complaints addressed against s. 5.3 and s. 17 of the North Rhine-Westphalia Constitution Protection Act are disposed of (III.). By contrast, there are no constitutional objections (IV.) against s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act.

I.

S. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act, which regulates secret access to information technology systems, violates the general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) in its particular manifestation as a fundamental right to the guarantee of the confidentiality and integrity of information technology systems.

This manifestation of the general right of personality protects against encroachment on information technology systems, insofar as the protection is not guaranteed by other fundamental rights, such as in particular Article 10 or Article 13 of the Basic Law, as well as by the right to informational self-determination (1). In the instant case, the encroachments are not constitutionally justified: s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act does not comply with the principle of the clarity of provisions (2 a), the requirements of the principle of proportionality are not met (2 b) and the provision does not contain any sufficient precautions to protect the core area of private life (2 c). The impugned provision is null and void (2 d). There is no need for an additional review against other fundamental rights (2 e).

1. S. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act grants powers to encroach on the general right of personality in its special manifestation as a fundamental right to the guarantee of the confidentiality and integrity of information technology systems; it enters the field besides the other concrete forms of this fundamental right, such as the right to informational self-determination, as well as the guarantee of freedom contained in Article 10 and Article 13 of the Basic Law, insofar as these do not guarantee any or sufficient protection.

a) The general right of personality guarantee elements of the personality which are not the subject matter of the special guarantee of freedom contained in the Basic Law, but which are not inferior to these in their constituting significance for the personality (see BVerfGE 99, 185 [193]; 114, 339 [346]). Such a loophole closing guarantee is needed in particular in order to counter new types of endangerment which may occur in the course of scientific and technical progress or changed circumstances (see BVerfGE 54, 148 [153]; 65, 1 [41]; Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, Neue Juristische Wochenschrift 2007, p. 2464 [2465]). The assignment of a concrete legal protection claim regarding the various aspects of the right of personality conforms above all to the type of danger to the personality (see BVerfGE 101, 361 [380]; 106, 28 [39]).

b) The use of information technology has taken on a significance for the personality and the development of the individual which could not have been predicted. Modern information technology provides the individual with new possibilities, whilst at the same time entailing new types of endangerment of personality. …

cc) The increasing spread of networked information technology systems entails for the individual new endangerments of personality, in addition to new possibilities for the development of the personality.

(1) Such endangerments emerge from the fact that complex information technology systems such as personal computers open up a broad spectrum of use possibilities, all of which are associated with the creation, processing and storage of data. This is not only data which computer users create or store deliberately. In the context of the data processing process, information technology systems also create by themselves large quantities of further data which can be evaluated as to the user's conduct and characteristics in the same way as data stored by the user. As a consequence, a large amount of data can be accessed in the

working memory and on the storage media of such systems relating to the personal circumstances, social contacts and activities of the user. If this data is collected and evaluated by third parties, this can be highly illuminating as to the personality of the user, and may even make it possible to form a profile (see on the personality endangerments resulting from such conclusions BVerfGE 65, 1 [42]).

(2) These risks are exacerbated in a variety of ways in a networked system, in particular one which is connected to the Internet. Firstly, the expansion of the facilities offered by networking leads to a situation in which an even greater number and diversity of data is created, processed and stored in comparison to a stand alone system. This includes communication contents, as well as data relating to network communication. Wide ranging knowledge of the personality of the user can be obtained by storing and evaluating such data on the conduct of the users in the network.

Above all, however, the networking of the system opens to third parties a technical access facility which can be used in order to spy on or manipulate data kept on the system. The individual cannot detect such access at all in some cases, or at least can only prevent it to a restricted degree. Information technology systems have now reached such a degree of complexity that effective social or technical self-protection leads to considerable difficulties and may be beyond the ability of at least the average user. Technical self-protection may also entail considerable effort or result in the loss of the functionality of the protected system. Many possibilities of self-protection - such as encryption or the concealment of sensitive data - are also largely ineffective if third parties have been able to infiltrate the system on which the data has been stored. Finally, it is not possible, in view of the speed of the development of information technology, to reliably forecast the technical means which users may have to protect themselves in future.

c) A need for protection that is relevant from the fundamental rights perspective emerges from the significance of the use of information technology systems for the development of the personality and from endangerments of the personality linked with this use. The individual relies on the state respecting the expectations of the integrity and confidentiality of such systems which are justified with regard to the unhindered development of the personality. The fundamental rights guarantees contained in Article 10 and Article 13 of the Basic Law, like those manifestations of the general right of personality previously developed in the case law of the Federal Constitutional Court, do not adequately take account of the need for protection arising as a consequence of the development of information technology.

aa) The guarantee of the secrecy of telecommunication according to Article 10.1 of the Basic Law protects the non-physical transmission of information to individual recipients with the aid of telecommunication traffic (see BVerfGE 67, 157 [172]; 106, 28 [35, 36]), but not the confidentiality and integrity of information technology systems.

(1) The protection of Article 10.1 of the Basic Law covers telecommunication, regardless of the method of transmission (cable or broadcast, analogue or digital transmission) and the form of expression (speech, pictures, sound, symbols or other data) which are used

(see BVerfGE 106, 28 [36]; 115, 166 [182]). The scope of protection of the secrecy of telecommunication accordingly also covers the communication services of the Internet (see re e-mails BVerfGE 113, 348 [383]). What is more, not only the contents of the telecommunication are protected against knowledge being obtained of them, but also their circumstances. This includes in particular whether, when and how frequently telecommunication traffic has taken place or has been attempted between which persons or telecommunication facilities (see BVerfGE 67, 157 [172]; 85, 386 [396]; 100, 313 [358]; 107, 299 [312, 313]). In this context, the confidentiality of telecommunication encounters both old and new endangerments of personality emerging from the increased significance of information technology for the development of the individual.

Insofar as an empowerment is restricted to a state measure by means of which the contents and circumstances of the ongoing telecommunication are collected in the computer network, or the data related thereto is evaluated, the encroachment is to be measured against Article 10.1 of the Basic Law alone. The scope of protection of this fundamental right is affected here regardless of whether in technical terms the measure targets the transmission channel or the terminal used for telecommunication (see BVerfGE 106, 28 [37, 38]; 115, 166 [186, 187]). This also applies in principle if the terminal is a networked complex information technology system the use of which for telecommunication is only one among several types of use.

(2) The fundamental rights protection provided by Article 10.1 of the Basic Law however does not cover the contents and circumstances of the telecommunication stored subsequent to completion of the communication in the sphere of a subscriber, insofar as he or she can take their own protective precautions against secret data access. The specific dangers of spatially distanced communication which are to be averted by secrecy of telecommunication do not then continue to apply to such data (see BVerfGE 115, 166 [183 et seq.]).

(3) The protection effected by secrecy of telecommunication likewise does not apply if a state agency monitors the use of an information technology system as such or searches the storage media of the system. As to the collection of contents or circumstances outside the ongoing telecommunication, an encroachment on Article 10.1 of the Basic Law does not apply even if a telecommunication connection is used for transmission of the data collected to the evaluating authority, as is the case for instance with online access to stored data (see Germann, Gefahrenabwehr und Strafverfolgung im Internet, 2000, p. 497; Rux, Juristenzei-tung 2007, p. 285 [292]).

(4) Insofar as the secret access to an information technology system serves to collect data also where Article 10.1 of the Basic Law does not provide protection against access, a loop-hole in protection exists which is to be closed by the general right of personality in its manifestation as a protection of the confidentiality and integrity of information technology systems.

If a complex information technology system is technically infiltrated in order to perform telecommunication surveillance ("source telecommunication surveillance"), the infiltration overcomes the critical hurdle to spying on the system as a whole. The endangerment thereby brought about goes far beyond what is entailed by the mere surveillance of ongoing

telecommunication. In particular, the data stored on personal computers which does not relate to the use of the system for telecommunication can also be obtained. For instance, the conduct in using a personal computer for personal purposes, the frequency of accessing certain services, in particular also the contents of files created or - insofar as the infiltrated information technology system also controls appliances in households - the conduct in the personal dwelling can be discovered.

According to information from the experts heard in the oral hearing, moreover, it may happen that, data is collected following infiltration which is unrelated to the ongoing telecommunication, even if this is not intended. As a result - and in contradistinction to what is usually the case with traditional network based telecommunication surveillance - there is always a risk for the person concerned that further personal information is collected over and above the contents and circumstances of telecommunication. The specific endangerments of personality which this brings about cannot be countered or cannot be sufficiently countered by Article 10.1 of the Basic Law.

Article 10.1 of the Basic Law is by contrast the sole fundamental right related standard for the evaluation of an empowerment to engage in "source telecommunication surveillance" if the surveillance is restricted exclusively to data emanating from an ongoing telecommunication process. This must be ensured by technical precautions and legal instructions.

bb) Also the guarantee of the inviolability of the home granted by Article 13.1 of the Basic Law guarantees an elementary space to the individual with regard to his or her human dignity, as well as in the interest of the development of his or her personality, which may be encroached upon only under the special preconditions of Article 13.2 to 13.7 of the Basic Law, but leaves loopholes as regards access to information technology systems.

The interests protected by this fundamental right are constituted by the spatial sphere in which private life takes place (see BVerfGE 89, 1 [12]; 103, 142 [150, 151]). In addition to private dwellings, company and business premises are also within the scope of protection of Article 13 of the Basic Law (see BVerfGE 32, 54 [69 et seq.]; 44, 353 [371]; 76, 83 [88]; 96, 44 [51]). The fundamental rights protection is not restricted here to the prevention of physical penetration of the dwelling. Measures by means of which state agencies use special aids to obtain an impression of events within the dwelling which are removed from the natural perception from outside the protected area are also to be regarded as an encroachment on Article 13 of the Basic Law. This includes not only acoustic or optical monitoring of dwellings (see BVerfGE 109, 279 [309, 327]), but also for instance the measurement of electromagnetic radiation with which the use of an information technology system in the dwelling can be monitored. This can also concern a system which operates offline.

Over and above this, a state measure which is connected to secret technical access to an information technology system may be measured against Article 13.1 of the Basic Law, for instance if and insofar as staff of the investigation authority seek

access to premises that are protected as a dwelling in order to physically manipulate an information technology system there. A further case of the application of Article 13.1 of the Basic Law is the infiltration of an information technology system in a dwelling in order to monitor certain events within the dwelling by using it, for instance by using peripherals connected to the system, such as a microphone or a camera.

Article 13.1 of the Basic Law does not however confer on the individual any across-the-board protection regardless of the access modalities against the infiltration of his or her information technology system, even if this system is located in a dwelling (see for instance Beulke/Meininghaus, Der Strafverteidiger - StV 2007, p. 63 [64]; Gercke, Computer und Recht 2007, p. 245 [250]; Schlegel, Goltdammer's Archiv für Strafrecht 2007, p. 648 [654 et seq.]; other views for instance Buermeyer, Höchstrichterliche Rechtsprechung im Strafrecht 2007, p. 392 [395 et seq.]; Rux, Juristenzeitung 2007, p. 285 [292 et seq.]; Schaar/Landwehr, Kommunikation & Recht 2007, p. 202 [204]). The encroachment may take place regardless of location, so that space oriented protection is unable to avert the specific endangerment of the information technology system. Insofar as the infiltration uses the connection of the computer concerned to form a computer network, it leaves spatial privacy provided by delimitation of the dwelling unaffected. The location of the system is in many cases of no interest for the investigation measure, and frequently will not be recognisable even for the authority. This applies in particular to mobile information technology systems such as laptops, Personal Digital Assistants (PDAs) or mobile telephones.

Article 13.1 of the Basic Law also does not provide protection against the collection, facilitated by infiltration of the system, of data found in the working memory or on the storage media of an information technology system located in a dwelling (see on the parallel relationship of home searches and seizure BVerfGE 113, 29 [45]).

cc) The manifestations of the general right of personality, in particular the guarantees of the protection of privacy, and of the right to informational self-determination, previously recognised in the case law of the Federal Constitutional Court, also do not comply sufficiently with the special need for protection of the user of information technology systems.

(1) In its manifestation as protection of privacy, the general right of personality of the individual guarantees a spatially and thematically specified area which is to remain, in principle, free of undesired inspection (see BVerfGE 27, 344 [350 et seq.]; 44, 353 [372, 373]; 90, 255 [260]; 101, 361 [382, 383]). The need for protection of the user of an information technology system is however not solely restricted to data to be allotted to his or her privacy. Such an attribution also frequently depends on the context in which the data came about and into which it is brought by linking with other data. In many cases, the data itself does not reveal what significance it has for the person concerned and which

it may gain by inclusion in other contexts. The consequence of this is that, inevitably, not only private data is collected by the infiltration of the system, but access to all data is facilitated, so that a comprehensive picture of the user of the system may emerge.

(2) The right to informational self-determination goes beyond the protection of privacy. It confers on the individual, in principle, the power to determine for himself or herself the disclosure and use of his or her personal data (see BVerfGE 65, 1 [43]; 84, 192 [194]). It supports and expands the protection of freedom of conduct and privacy in terms of fundamental rights by already making it start at the level of endangerment of the personality. Such an endangerment situation can already arise in the run-up to concrete threats to specific legal interests, in particular if personal information can be used and linked in a manner which the person concerned can neither detect nor prevent. The extent of protection of the right to informational self-determination is not restricted here to information which is already sensitive by its nature and hence already protected by fundamental rights. Depending on the purpose of access and the existing processing and linking facilities, the use of personal data which *per se* has only little information content can also have an impact on the privacy and freedom of conduct of the person concerned in terms of fundamental rights (see Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, Neue Juristische Wochenschrift 2007, p. 2464 [2466]).

…

However, the right to informational self-determination does not fully consider elements of personality endangerments which emerge from the fact that the individual relies on the use of information technology systems for his or her personality development, and in such instances entrusts personal data to the system or inevitably provides such data already by using the system. A third party accessing such a system can obtain data stocks which are potentially extremely large and revealing without having to rely on further data collection and data processing measures. In its severity for the personality of the person concerned, such access goes beyond individual data collections against which the right to informational self-determination provides protection.

d) Insofar as no adequate protection exists against endangerments of the personality emerging from the individual relying on the use of information technology systems for his or her personality development, the general right of personality accounts for the need for protection in its loophole filling function over and above its manifestations recognised thus far by virtue of the fact that it guarantees the integrity and confidentiality of information technology systems. In the same way as the right to informational self-determination, this right is based on Article 2.1 in conjunction with Article 1.1 of the Basic Law; it protects the personal and private life of the subjects of the fundamental rights against access by the state in the area of information technology also insofar as the state has access to the information technology system as a whole, and not only to individual communication events or stored data.

aa) However, not all information technology systems which are able to create, process or store personal data require the special protection of a separate guarantee of personality rights. Insofar as such a system by its technical construction only

contains data with a partial connection to a certain area of life of the person concerned - for instance non-networked electronic control systems in household appliances -, state access to the existing data is no different in qualitative terms than other data collections. In such a case, the protection of the right to informational self-determination is sufficient to guarantee the justified interests of the person concerned in confidentiality.

The fundamental right to the guarantee of the integrity and confidentiality of information technology systems is to be applied, by contrast, if the empowerment to encroach covers systems which alone or in their technical networking can contain personal data of the person concerned to such a degree and in such a diversity that access to the system facilitates insight into significant parts of the life of a person or indeed provides a revealing picture of the personality. Such a possibility applies for instance to access to personal computers, regardless of whether they are installed in a fixed location or are operated while on the move. It is possible as a rule to conclude not only as regards use for private purposes, but also with business use, possible characteristics or preferences from the usage pattern. Specific fundamental right related protection also covers for instance mobile telephones or electronic assistants which have a large number of functions and can collect and store many kinds of personal data.

bb) What is first of all protected by the fundamental right to the guarantee of the confidentiality and integrity of information technology systems is the interest of the user in ensuring that the data which are created, processed and stored by the information technology system that is covered by its scope of protection remain confidential. An encroachment on this fundamental right is also to be presumed to have taken place if the integrity of the protected information technology system is affected by the system being accessed such that its performance, functions and storage contents can be used by third parties; the crucial technical hurdle for spying, surveillance or manipulation of the system has then been overcome.

(1) The general right of personality in the manifestation dealt with here in particular provides protection against secret access, by means of which the data available on the system can be spied on in its entirety or in major parts. The fundamental right related protection covers both the data stored in the working memory and also that which is temporarily or permanently kept on the storage media of the system. The fundamental right also protects against data collection using means which are technically independent of the data processing events of the information technology system in question, but the subject matter of which is these data processing events. This is for instance the case with use of so-called hardware keyloggers or in measuring the electromagnetic radiation from monitors or keyboards.

(2) The fundamental right related protection of the expectation of confidentiality and integrity exists regardless of whether access to the information technology system can be achieved easily or only with considerable effort. An expectation of confidentiality and integrity to be recognised from the fundamental rights perspective however only exists insofar as the person concerned uses the information technology system as his or her own, and hence may presume according to the circumstances that he or she alone or together with others

entitled to use it disposes of the information technology system in a self-determined manner. Insofar as the use of the personal information technology system takes place via information technology systems which are at the disposal of others, the protection of the user also covers this.

2. The fundamental right to the guarantee of the confidentiality and integrity of information technology systems is not unrestricted. Encroachments may be justified both for preventive purposes, and for criminal prosecution. The individual must only accept such restrictions of his or her right which are based on a statutory foundation that is constitutional. This is missing in the empowerment of the constitution protection authority to carry out preventive measures to be reviewed in the instant case.

a) The impugned provision does not meet the principle of the clarity of provisions and determinedness of provisions.

aa) The principle of determinedness finds its basis in the principle of the rule of law (Article 20 and Article 28.1 of the Basic Law) also with regard to the general right of personality in its various manifestations (see BVerfGE 110, 33 [53, 57, 70]; 112, 284 [301]; 113, 348 [375]; 115, 320 [365]). It is to ensure that the democratically legitimised parliamentary legislature itself takes the essential decisions on encroachments on fundamental rights and the extent of the encroachments, that the Government and the administration find steering and restricting action standards in the statute, and that the courts can carry out judicial review. Furthermore, the clarity and determinedness of the provision ensure that the person concerned can realise the legal situation and can adjust to possible burdensome measures (see BVerfGE 110, 33 [52 et seq.]; 113, 348 [375 et seq.]). The parliamentary legislature must determine the occasion, purpose and limits of the encroachment in a manner that is sufficiently area specific, precise and clear in terms of its wording (see BVerfGE 100, 313 [359, 360, 372]; 110, 33 [53]; 113, 348 [375]; Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, Neue Juristische Wochenschrift 2007, p. 2464 [2466]).

…

bb) According to these standards, s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act does not satisfy the principle of the clarity of provisions and determinedness of provisions insofar as the factual preconditions of the regulated measures cannot be sufficiently derived from the statute.

(1) The preconditions for measures according to s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act can be determined via two legislative referrals. Firstly, s. 5.2 of the North Rhine-Westphalia Constitution Protection Act refers in general terms to s. 7.1 of the North Rhine-Westphalia Constitution Protection Act, which in turn refers to s. 3.1 of the North Rhine-Westphalia Constitution Protection Act. Accordingly, the deployment of intelligence service means are permissible if information relevant to the protection of the constitution can be obtained by these means. Secondly,

s. 5.2 no. 11, sentence 2 of the North Rhine-Westphalia Constitution Protection Act refers to the more stringent preconditions of the Act re Article 10 of the Basic Law for a case in which a measure according to s. 5.2 no. 11 of the North Rhine-Westphalia Constitution Protection Act encroaches on the secrecy of correspondence, post and telecommunications or is equivalent to such encroachment in terms of its nature and grievousness.

(2) It is not compatible with the principle of the clarity of provisions and determinedness of provisions that s. 5.2 no. 11, sentence 2 of the North Rhine-Westphalia Constitution Protection Act makes the reference to the Act re Article 10 of the Basic Law contingent on whether a measure encroaches on Article 10 of the Basic Law. The answer to the question of which fundamental rights are encroached on by investigation measures taken by the constitution protection authority can require complex assessments and evaluations. They are first and foremost incumbent on the legislature. It cannot avoid its task of giving concrete form to the relevant fundamental rights by means of corresponding statutory precautions by passing on the decision on how this fundamental right is to be concretised and implemented to a statute executing administration through a mere factual reference to a possibly relevant fundamental right. Such "escape clause" legislative technique does not comply with the principle of determinedness in a provision such as s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act, which provides for new types of investigation measures which are intended to react to recent technological developments.

The breach of the principle of the clarity of provisions is made even more profound by the addition contained in s. 5.2 no.11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act that the reference to the Act re Article 10 of the Basic Law also applies if an investigation measure is equivalent by its "nature and grievousness" to an encroachment on Article 10 of the Basic Law. Hence, the factual preconditions of regulated access are made contingent upon an evaluating comparison being carried out between this access and a measure which would have to be regarded as an encroachment on a specific fundamental right. s. 5.2 no.11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act does not contain any standards for this comparison. If the factual preconditions cannot be adequately specified by merely referring to a specific fundamental right, this certainly applies to a provision which provides for such a comparison of the regulated measure on which there is no further statutory instruction with an encroachment on a specific fundamental right.

(3) The reference to the Act re Article 10 of the Basic Law in s. 5.2 no.11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act also does not comply with the principle of the clarity of provisions and of the determinedness of provisions insofar as the range of the reference is not regulated with an adequate level of determinedness.

S. 5.2 no. 11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act refers to the "preconditions" of the Act re Article 10 of the Basic Law. The provision hence largely leaves unclear the parts of the Act re Article 10 of the Basic Law to which the reference is intended to be made. It does not reveal whether only the substantive encroachment threshold regulated in s. 3 of the Act re Article 10 of the Basic Law is to be understood by the preconditions of this Act, or whether further provisions are also

intended to be referred to. For instance, the procedural rules contained in ss. 9 et seq. of the Act re Article 10 of the Basic Law could also be included among the preconditions for an encroachment according to this statute. It would at least be conceivable to further refer to both the substantive encroachment thresholds and also to all procedural precautions of the Act re Article 10 of the Basic Law, as has been proposed by the Government of the Land North Rhine-Westphalia. Accordingly, the provisions on dealing with collected data contained in s. 4 of the Act re Article 10 of the Basic Law and the provisions of ss. 14 et seq. of the Act re Article 10 of the Basic Law on parliamentary control would also be covered, although these provisions contain regulations which are not to be complied with until after an encroachment has taken place, and hence linguistically can hardly be counted among the preconditions for encroachment.

It is not evident that the undetermined version of the Act is due to particular legislative difficulties. The legislature could easily have listed in the referring provision those provisions of the Act re Article 10 of the Basic Law to which the reference was intended to be made.

b) S. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act also does not comply with the principle of proportionality. The latter demands that an encroachment on fundamental rights should serve a legitimate purpose and be suitable, necessary and appropriate as a means to this end (see BVerfGE 109, 279 [335 et seq.]; 115, 320 [345]; Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, Neue Juristische Wochenschrift 2007, p. 2464 [2468]; established case law).

aa) The data collections provided for in the impugned provision serve the constitution protection authority in the performance of its tasks according to s. 3.1 of the North Rhine-Westphalia Constitution Protection Act, and hence serve to secure, in the run-up to concrete dangers, the free democratic fundamental order, the continued existence of the Federation and of the *Länder*, as well as certain interests of the Federal Republic directed at international relations. Here, according to the reasoning of the Act, one of the goals pursued in particular with the revision of the Constitutional Protection Act was to ensure an effective fight against terrorism by the constitution protection authority in view of new risks, in particular connected with Internet communication (see Landtag document 14/2211, p. 1). However, the area of application of the revision is not restricted to the fight against terrorism, either explicitly or as a consequence of the systematic context. The provision requires a justification for its entire area of application.

The security of the state as a power securing peace and order which has a constitutional structure, and the security which it is to provide for the population against dangers to life, limb and freedom are constitutional values ranking equally with other high value interests (see BVerfGE 49, 24 [5657]; 115, 320 [346]). The duty to protect has its foundation both in Article 2.2 sentence 1 and in Article 1.1 sentence 2 of the Basic Law (see BVerfGE 115, 118 [152]). The state complies with its constitutional mandate by countering dangers from terrorist or other activities. The increased use of electronic or digital means of communication

and their penetration into almost all areas of life makes it more difficult for the constitution protection authority to perform its tasks effectively. Also, modern information technology offers extremist and terrorist groups many possibilities to establish and maintain contacts, as well as to plan and prepare, as well as to commit criminal offences. Legislative measures opening up information technology for state investigations in particular are to be seen against the background of the shift from traditional forms of communication to electronic message traffic and the possibilities to encrypt or conceal files (see on criminal prosecution BVerfGE 115, 166 [193]).

bb) Secret access to information technology systems is suitable to serve these purposes. It expands the possibilities available to the constitution protection authority for reconnaissance of threat situations. The legislature is granted considerable latitude in the evaluation of suitability (see BVerfGE 77, 84 [106]; 90, 145 [173]; 109, 279 [336]). It is not evident that this latitude has been exceeded here.

…

cc) Secret access to information technology systems also does not violate the principle of necessity. In the context of its prerogative of assessment, the legislature may presume that no path which is equally effective, but less burdensome for the person concerned, exists to collect the data that is available on such systems.

…

dd) S. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act however does not comply with the principle of appropriateness in the narrower sense.

This principle requires that the gravity of the encroachment, in an overall evaluation, may not be disproportionate to the gravity of the reasons justifying it (see BVerfGE 90, 145 [173]; 109, 279 [349 et seq.]; 113, 348 [382]; established case law). The legislature must appropriately attribute the individual interest encroached on by an encroachment on fundamental rights to the general interests served by the encroachment. A review carried out according to these standards can lead to a situation in which means may not be used to implement general interests because the impairments of fundamental rights emanating from it are more weighty than the interests to be implemented (see BVerfGE 115, 320 [345, 346]; Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, Neue Juristische Wochenschrift 2007, p. 2464 [2469]).

S. 5.2 no.11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act does not comply with this. The measures provided for in this norm entail encroachments on fundamental rights which are so intensive that they are disproportionate to the public investigation interest emerging from the regulated occasion for the encroachment. What is more, there is a need for supplementary procedural requirements in order to account for the interests of the person concerned protected by fundamental rights; these are also missing.

…

(ee) Insofar as data is collected which provides information on the communication of the person concerned with third parties, the intensity of the encroachment on fundamental rights is further increased by virtue of the fact that the possibility for the citizen to participate in telecommunication without being monitored - also within the public good - is restricted (see on the collection of connection data BVerfGE 115, 166 [187 et seq.]). Collection of such data indirectly impairs the freedom of the citizen because he or she may be prevented from engaging in uninhibited individual communication by fear of surveillance, even if surveillance does not take place until after the fact. What is more, such data collection shows in this respect a considerable spread, which increases the gravity of the encroachment, given that data collection of necessity covers communication partners of the target person, i.e. third parties, without it being necessary for the preconditions for such access to apply to these persons (see on telecommunication surveillance BVerfGE 113, 348 [382, 383]; furthermore BVerfGE 34, 238 [247]; 107, 299 [321]).

(b) The gravity of the encroachment on fundamental rights is particularly severe if - as provided for by the impugned provision - secret technical infiltration facilitates the longer-term surveillance of the use of the system and the ongoing collection of the data in question.

…

(4) In view of its intensity, the encroachment on fundamental rights lying in secret access to an information technology system in the context of a preventive goal only satisfies the principle of appropriateness if certain facts indicate a danger posed to a predominantly important legal interest in the individual case, even if it cannot yet be ascertained with sufficient probability that the danger will arise in the near future. What is more, the statute granting powers to perform such an encroachment must ensure the protection of the fundamental rights of the person concerned also by means of suitable procedural precautions.

(a) In the tension between the obligation incumbent on the state to protect legal interests and the interest of the individual in respect for his or her rights as guaranteed by the constitution, the task of the legislature includes in an abstract form achieving compensation between the conflicting interests (see BVerfGE 109, 279 [350]). This may lead to a situation in which certain intensive encroachments on fundamental rights may be provided only to protect certain legal interests, and only from certain suspicion or danger levels onwards. The obligations incumbent on the state to protect other legal interests also come up against their limits in the prohibition of inappropriate encroachments on fundamental rights (see BVerfGE 115, 320 [358]). Corresponding encroachment thresholds are to be guaranteed by a statutory provision (see BVerfGE 100, 313 [383, 384]; 109, 279 [350 et seq.]; 115, 320 [346]).

(b) A highly intensive encroachment on fundamental rights can already be disproportionate as such if the statutorily regulated occasion for the encroachment does not show sufficient gravity. Insofar as the relevant statute serves to avert certain dangers, as is the case for the Constitution Protection Act under s. 1 of the North Rhine-Westphalia Constitution Protection Act, it is the rank and the nature of the endangerment of protected interests referred to in the respective provision which is relevant to the gravity of the occasion for encroachment (see BVerfGE 115, 320 [360, 361]).

If the protected interests as such standing behind an empowerment to encroach are sufficiently prevalent to justify encroachments on fundamental rights of the regulated type, the principle of proportionality gives rise to constitutional requirements being placed on the factual preconditions of the encroachment. In this respect, the legislature has to maintain a balance between the nature and intensity of the impairment of fundamental rights on the one hand and the factual elements constituting an entitlement to encroachment on the other hand (see BVerfGE 100, 313 [392 et seq.]). The requirements as to the degree of probability and the factual basis of the prognosis must be proportionate to the nature and gravity of the impairment of fundamental rights. Even with the greatest weight of the threatening legal interest in encroachment, it is not possible to forgo the requirement of sufficient probability of occurrence. It must also be guaranteed as a precondition for a grave encroachment on fundamental rights that presumptions and conclusions have a starting point in fact which has a concrete outline (see BVerfGE 113, 348 [386]; 115, 320 [360, 361]).

(c) The principle of proportionality restricts a statutory provision granting powers to effect secret access to information technology systems initially insofar as special requirements exist as to the occasion for the encroachment. The latter consists here of risk aversion in the context of the tasks of the constitution protection authority according to s. 1 of the North Rhine-Westphalia Constitution Protection Act.

…

(d) Furthermore, empowerment to effect secret access to information technology systems must be linked with suitable statutory precautions in order to secure the interests of the person concerned under procedural law. If a norm provides for secret investigation activities on the part of the state which - as here - affect particularly protected zones of privacy or demonstrate a particularly high intensity of encroachment, the weight of the encroachment on fundamental rights is to be accounted for by suitable procedural precautions (see Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, Neue Juristische Wochenschrift 2007, p. 2464 [2471], with further references). In particular, access is in principle to be placed under the reservation of a judicial order.

…

(5) According to these standards, the impugned provision does not meet the constitutional requirements.

(a) According to s. 5.2 in conjunction with s. 7.1 no. 1 and s. 3.1 of the North Rhine-Westphalia Constitution Protection Act, preconditions for the deployment of intelligence service means by the constitution protection authority are only factual indications of the presumption that information on anti-constitutional activities can be obtained by these means. This is not a sufficient substantive encroachment threshold, either as to the factual preconditions for the encroachment, or to the weight of legal interests to be protected. Also, there is no provision for a prior examination by an independent body, so that the constitutionally-required procedural security is lacking.

(b) These shortcomings do not cease to apply if the reference contained in s. 5.2 no. 11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act to the detailed preconditions according to the Act re Article 10 of the Basic Law, is included in the examination despite its undeterminedness, and, in the broad interpretation of the Government of the Land North Rhine-Westphalia, is understood to refer to all formal and substantive precautions of this Act. s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act does not restrict secret access to an information technology system to telecommunication surveillance, the preconditions for which are regulated by s. 3.1 of the Act re Article 10 of the Basic Law, but facilitates such access in principle to obtain all available data. Neither the regulation of the encroachment threshold, nor the procedural requirements of the encroachment elements provided for in s. 3.1 of the Act re Article 10 of the Basic Law, meet the constitutional requirements.

…

c) Finally, there are no adequate statutory precautions to avoid encroachments on the absolutely protected core area of private life by measures according to s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act.

aa) Secret surveillance measures carried out by state agencies must respect an inviolable core area of private life, the protection of which emerges from Article 1.1 of the Basic Law (see BVerfGE 6, 32 [41]; 27, 1 [6]; 32, 373 [378, 379]; 34, 238 [245]; 80, 367 [373]; 109, 279 [313]; 113, 348 [390]). Even overriding interests of the public cannot justify encroachment on it (see BVerfGE 34, 238 [245]; 109, 279 [313]). The development of the personality in the core area of private life includes the possibility to express inner events such as perceptions and feelings, as well as considerations, views and experiences of a highly personal nature, without fear that state agencies may have access to them (see BVerfGE 109, 279 [314]).

In the context of secret access to an information technology system, the danger exists that the state agency might collect personal data which is to be attributed to the core area. For instance, the person concerned may use the system to establish and store files with highly personal contents, such as diary like records or private film or sound documents. Such files can enjoy absolute protection, as can for instance written embodiments of highly personal experiences (on this see BVerfGE 80, 367 [373 et seq.]; 109, 279 [319]). Secondly, insofar as it is used for telecommunication purposes, the system can be used to transmit contents which

can equally fall within the core area. This applies not only to speech telephony, but for instance also to telecommunication using e-mail or other Internet communication services (see BVerfGE 113, 348 [390]). The absolutely protected data can be collected with different types of access, such as with the inspection of storage media, just as with the surveillance of ongoing Internet communication or indeed with full surveillance of the use of the target system.

bb) In the event of secret access to the information technology system of the person concerned, there is a need for special statutory precautions protecting the core area of private life.

To manage their personal matters, and for use in telecommunication also with close persons, citizens increasingly use complex information technology systems which offer them development possibilities in the highly personal sphere. In view of this, an investigation measure such as access to an information technology system, using which the data available on the target system can be comprehensively collected, entails in comparison to other surveillance measures - such as the use of the Global Positioning System as a tool of technical monitoring (see on this BVerfGE 112, 304 [318]) - an increased danger of data being collected which have highly personal contents.

Because of the secrecy of access, the person concerned has no opportunity himself or herself to endeavour to ensure prior to or during the investigative measure that the investigating state agency respects the core area of his or her private life. This complete loss of control is to be countered by special provisions which provide protection against the danger of a violation of the core area through suitable procedural precautions.

cc) The constitutional requirements as to the concrete structure of the protection of the core area can differ depending on the nature of the collection of the information and the information collected by it.

A statutory empowerment to carry out a surveillance measure which may affect the core area of private life must ensure as far as possible that no data is collected which relates to the core area. If - as with secret access to an information technology system - it is practically unavoidable to obtain information before its reference to the core area can be evaluated, sufficient protection must be ensured in the evaluation phase. In particular, data that is found and collected which refers to the core area must be deleted without delay and its exploitation must be ruled out (see BVerfGE 109, 279 [318]; 113, 348 [391, 392]).

…

dd) The Constitution Protection Act does not contain the required provisions protecting the core area. Nothing else emerges if the reference in s. 5.2 no. 11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act to the Act re Article 10 of the Basic Law is included despite its undeterminedness. This statute also does not contain precautions to protect the core area of private life.

In contradistinction to the view taken by the Government of the Land North Rhine-Westphalia, s. 4.1 of the Act re Article 10 of the Basic Law may not even be referred to if the reference of s. 5.2 no. 11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act is understood broadly such that it covers this provision. s. 4.1 of the Act re Article 10 of the Basic Law only regulates that collected data is to be deleted which are not or are no longer needed, and hence regulates the general principle of necessity. The provision by contrast does not contain any special standards for the collection, viewing and deletion of data which can show a connection to the core area. The principle of necessity cannot be equated with constitutionally-required respect for the core area of private life. The core area is rather in particular not amenable to being qualified by contrary investigation interests, as was explicitly introduced by the application of the principle of necessity (see BVerfGE 109, 279 [314]).

d) The violation of the general right of personality in its manifestation as providing protection of the confidentiality and integrity of information technology systems (Article 2.1 in conjunction with Article 1.1 of the Basic Law) leads to the nullity of s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act.

e) In view of this, there is no longer any need to review the degree to which measures permitted by the provision also violate other fundamental rights or the principle of specifying the fundamental right which is restricted as contained in Article 19.1 sentence 2 of the Basic Law.

II.

The empowerment to secret reconnaissance of the Internet contained in s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act violates the secrecy of telecommunication guaranteed by Article 10.1 of the Basic Law. Measures according to this provision can in certain cases constitute an encroachment on this fundamental right which is constitutionally not justified (1); Article 19.1 sentence 2 of the Basic Law is also violated (2). Its unconstitutionality makes the provision null and void (3). The constitution protection authority may however continue to carry out measures of Internet reconnaissance insofar as these are not to be regarded as encroachments on fundamental rights (4).

1. The secret reconnaissance of the Internet regulated in s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act covers measures by means of which the constitution protection authority obtains knowledge of the contents of Internet communication via the channel technically provided therefor, in other words for instance by calling up a Web site on the World Wide Web using a Web browser (see above A I 1 a). In certain cases, this can encroach on the secrecy of telecommunication. Such an encroachment is constitutionally not justified by the impugned provision.

a) The area protected by Article 10.1 of the Basic Law covers the ongoing telecommunication carried out using an information technology system that is connected to the Internet (see above I 1 c, aa (1)). However, this fundamental right only protects the confidence of the individual that knowledge of the telecommunication in which he

or she is involved is not being obtained by third parties. By contrast, the confidence of the communication partners in one another is not the subject matter of the fundamental rights protection. If a state investigation measure does not focus on unauthorised access to telecommunication, but on the disappointment of the personal trust in the communication partner, this does not constitute an encroachment on Article 10.1 of the Basic Law (see BVerfGE 106, 28 [37, 38]). The state's obtaining knowledge of the contents of telecommunication is hence only to be measured against the secrecy of telecommunication if a state agency monitors a telecommunication relationship from outside without itself being an addressee of the communication. By contrast, the fundamental right does not provide protection against a state agency itself establishing a telecommunication relationship with a subject of fundamental rights.

If a state agency obtains knowledge of the contents of telecommunication conducted via the communication services of the Internet via the channel technically provided therefor, this shall only constitute an encroachment on Article 10.1 of the Basic Law if the state agency is not authorised to do so by those involved in the communication. Since the secrecy of telecommunication does not protect the mutual personal trust of those involved in communication, the state agency is already authorised to collect the communication contents if only one of several participants has permitted it such access voluntarily.

The secret reconnaissance of the Internet accordingly encroaches on Article 10.1 of the Basic Law if the constitution protection authority monitors secured communication contents by using access keys which it collected without authorisation or against the will of those involved in the communications. This is the case for instance if a password collected using key-logging is used in order to gain access to an e-mail inbox or to a closed chatroom.

By contrast, an encroachment on Article 10.1 of the Basic Law is to be denied if for instance a participant of a closed chatroom has voluntarily provided the person acting for the constitution protection authority with his or her access, and as a consequence the authority uses this access. Encroachment on the secrecy of telecommunication certainly does not apply if the authority collects generally accessible contents, for instance by viewing open discussion fora or Web sites which are not password protected.

b) The encroachments on Article 10.1 of the Basic Law facilitated by s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act are constitutionally not justified. The impugned provision does not meet the constitutional requirements as to empowerments to effect such encroachments.

aa) S. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act does not comply with the principle of the clarity of provisions and determinedness of provisions since the preconditions for encroachment are not sufficiently precisely regulated because of the undeterminedness of subsection 2 of this provision (see above C I 2 a, bb).

bb) The impugned provision is furthermore not in compliance with the principle of appropriateness in the narrower sense insofar as it is to be measured against Article 10.1 of the Basic Law.

The encroachment on the secrecy of telecommunication is grievous. On the basis of the impugned provision, the constitution protection authority may access communication contents which may be sensitive in nature, and which may provide insight into the personal matters and habits of the person concerned. It is not only the one who gave rise to the surveillance measure who is concerned. The encroachment can rather show a certain spread if information is obtained not only on the communication conduct of the party against whom the measure is addressed, but also on his or her communication partners. The secrecy of access increases the intensity of the encroachment. Additionally, because of the broad wording of the preconditions for encroachment contained in s. 7.1 no. 1 in conjunction with s. 3.1 of the North Rhine-Westphalia Constitution Protection Act, persons may also be monitored who have not given rise to the occasion for the encroachment.

Such a grievous encroachment on fundamental rights, even if the weight of the goals of protection of the constitution is taken into account, is in principle at least, also conditional on the provision of a qualified substantive encroachment threshold (see re criminal law investigations BVerfGE 107, 299 [321]). This is not the case here. Rather, s. 7.1 no. 1 in conjunction with s. 3.1 of the North Rhine-Westphalia Constitution Protection Act permits intelligence service measures to a considerable degree in the run-up to concrete endangerment without regard to the grievousness of the potential violation of legal interests, and also towards third parties. Such a broad empowerment to effect an encroachment is not compatible with the principle of proportionality.

cc) The Constitution Protection Act does not contain any precaution to protect the core area of private life in connection with encroachments according to s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act. Such provisions are however required insofar as a state agency is empowered to collect the contents of telecommunication by encroaching on Article 10.1 of the Basic Law (see BVerfGE 113, 348 [390 et seq.]).

2. Finally, s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act, insofar as the provision grants powers to effect encroachments on Article 10.1 of the Basic Law, does not comply with the principle of specifying the fundamental right restricted contained in Article 19.1 sentence 2 of the Basic Law.

According to Article 19.1 sentence 2 of the Basic Law, a statute must specify the fundamental right which is restricted by this statute or this Act, stating the relevant Article. The function of the principle of specifying the fundamental right restricted is to provide a warning and an occasion for reflection (see BVerfGE 64, 72 [79, 80]). Specifying the encroachment contained in the wording of the Act is intended to ensure that the legislature only provides for encroachments of which it is aware as such, and with regard to which it accounts to itself as to

their impact on the fundamental rights concerned (see BVerfGE 5, 13 [16]; 85, 386 [404]). The fact of explicit specifying also makes it easier to clarify the necessity and the extent of the intended encroachment on fundamental rights in the public debate. By contrast, it is not sufficient for the legislature to have been aware of the encroachment on fundamental rights if this has not been reflected in the text of the Act (see BVerfGE 113, 348 [366, 367]).

The impugned provision does not comply with the principle of specifying the fundamental right restricted with regard to Article 10.1 of the Basic Law. In contradistinction to the view taken by the Government of the Land North Rhine-Westphalia, the impugned provision does not meet the requirements simply because s. 5.2 no. 11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act may indicate by referring to the Act re Article 10 of the Basic Law that the legislature has considered an encroachment on the secrecy of telecommunication to be possible. The principle of specifying the fundamental right restricted is only accounted for if the fundamental right is explicitly named in the text of the Act as being restricted. Moreover, in view of the fact that s. 5.2 no. 11 of the North Rhine-Westphalia Constitution Protection Act contains two different empowerments to encroach, it by no means emerges from the statute with sufficient clarity for which of them the legislature at least anticipated the possibility of an encroachment on Article 10 of the Basic Law.

3. The violation of s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act against Article 10.1 and Article 19.1 sentence 2 of the Basic Law leads to the nullity of the provision.

4. The nullity of the empowerment however does not lead to a situation in which measures of Internet reconnaissance are in principle denied to the authority, insofar as these do not encroach on fundamental rights.

Insofar as it does not fall under Article 10.1 of the Basic Law, the secret reconnaissance of the Internet in particular does not always encroach on the general right of personality guaranteed by Article 2.1 in conjunction with Article 1.1 of the Basic Law.

a) The confidentiality and integrity of information technology systems guaranteed by the general right of personality is not affected by measures of Internet reconnaissance since measures according to s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act are restricted to data which the owner of the system has provided for Internet communication - for instance the operator of a Web server - using the channel technically provided therefor. The person concerned himself or herself has opened his or her system by technical terms for such data collections. He or she cannot rely on these not being carried out.

b) At least as a rule, an encroachment on Article 2.1 in conjunction with Article 1.1 of the Basic Law is also to be denied in its manifestation as a right to informational self-determination.

III.

Since s. 5.2 no. 11 of the North Rhine-Westphalia Constitution Protection Act is null and void as a whole, the complaints submitted against s. 5.3 and s. 17 of the North Rhine-Westphalia Constitution Protection Act are disposed of. Insofar as the complainants' complaints are admissible, the unconstitutionality of the impugned provisions is claimed only with regard to measures according to the provision that is null and void.

IV.

S. 5a.1 of the North Rhine-Westphalia Constitution Protection Act is compatible with the Basic Law insofar as its area of application was expanded to cover activities within the meaning of s. 3.1 no. 1 of the North Rhine-Westphalia Constitution Protection Act. In particular, this provision does not violate Article 2.1 in conjunction with Article 1.1 of the Basic Law.

1. The collection of account contents and account movements provided in s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act encroaches on the general right of personality in its manifestation as a right to informational self-determination.

Such account information can be significant for the protection of the personality of the person concerned, and is protected by the fundamental right. According to the current habits, most payment transactions which go beyond the cash transactions of daily life are carried out via accounts. If information is deliberately compiled on the contents of the accounts of a specific person, this makes it possible to view the assets and the social contacts of the person concerned, insofar as these show a financial dimension - for instance via subscriptions or maintenance payments. Some account content data, such as the amount of payments connected with consumption dependent recurring obligations, can also permit further conclusions to be drawn as to the conduct of the person concerned (see Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, Neue Juristische Wochen-schrift 2007, p. 2464 [2466]).

The measures provided in s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act encroach on the right to informational self-determination. It is not a matter here of whether the content of the impugned provision is limited to a power of the constitution protection authority to address a request for information to a financial institution, or whether it implicitly imposes an obligation on the respective financial institution to provide information. In either case, the provision empowers the authority to undertake data collection exercises which as such already bring about an encroachment on fundamental rights.

2. The encroachments on fundamental rights provided in s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act are however constitutionally justified for investigations in view of activities within the meaning of s. 3.1 no. 1 of the North Rhine-Westphalia Constitution Protection Act. In particular, the impugned provision complies with the principle of proportionality in this respect.

a) Because of the expansion of the area of application of the provision, the measures regulated in s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act also serve the purpose of reconnaissance of the financing channels and of the financial circumstances and intertwinings in connection with activities within the meaning of s. 3.1 no. 1 of the North Rhine-Westphalia Constitution Protection Act. This is a legitimate goal of protection of the constitution.

The provision in its expanded version is suited to reach this goal. It is also necessary for it. No equally effective means is evident to achieve reconnaissance of bank transactions with a view to activities within the meaning of s. 3.1 no. 1 of the North Rhine-Westphalia Constitution Protection Act that is less burdening for the person concerned.

b) S. 5a.1 of the North Rhine-Westphalia Constitution Protection Act also satisfies the principle of appropriateness in the narrower sense.

aa) The provision empowers the constitution protection authority to effect encroachments on fundamental rights.

Information on account contents and account movements can be sensitive data. Accessing of such data of such persons concerned, who are protected by fundamental rights, can considerably impairs their interests. The collection of such information has hence as a rule an increased weight from the fundamental rights perspective (see Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, Neue Juristische Wochenschrift 2007, p. 2464 [2470]). The intensity of the encroachment is also increased by virtue of its secrecy. According to s. 5a.3 sentence 11 of the North Rhine-Westphalia Constitution Protection Act, the financial institution which provides the information may not notify the person concerned of the request for information and of the data transmitted. Finally, the person concerned may incur disadvantages since the financial institution holding the account of necessity hears of the data collection and may draw unfavourable conclusions on an individual concerned on the basis of such knowledge (see Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, Neue Juristische Wochenschrift 2007, p. 2464 [2469]).

bb) The public interests pursued with s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act are however so weighty that they are not disproportionate to the encroachments on fundamental rights that are regulated in the provision.

(1) The statute links the obtaining of knowledge on the account contents and account movements to factual preconditions which adequately accommodate the significance of the encroachment on fundamental rights for the person concerned.

S. 5a.1 of the North Rhine-Westphalia Constitution Protection Act makes the collection contingent on an element of endangerment that is qualified both as to the legal interests concerned, and as to the factual basis of the encroachment. There must be factual

indications of grievous dangers to the interests protected contained in s. 3.1 of the North Rhine-Westphalia Constitution Protection Act. The term "grievous danger" refers - as in s. 8a.2 of the Federal Constitution Protection Act (Bundesverfassungsschutzgesetz - BVerfSchG) (see on this Bundestag document (Bundestagsdrucksache - BTDrucks) 16/2921, p. 14), which has identical wording in this respect - to an increased intensity of the threat to legal interests. The factual basis of the encroachments is additionally qualified by the requirement of factual indications of a grievous danger. It is not sufficient for the regulated data collection to be useful in general terms for the performance of the task of the constitution protection authority. Rather, indications must exist of a situation in which the protected interests are under threat in concrete terms.

With its two-fold qualification, the encroachment threshold meets the requirements of the general right of personality. No further restrictions of the factual preconditions of the encroachment are constitutionally required.

(2) The impugned provision also takes account of the grievousness of the regulated encroachment on fundamental rights by means of suitable procedural precautions.

For instance, data collection according to s. 5a.3 sentence 3 of the North Rhine-Westphalia Constitution Protection Act requires an order from the Minister of the Interior, which is to be requested by the head of the Constitution Protection Department or his or her deputy. The encroachment on fundamental rights lying in the collection of account contents and account movements is not so grievous that ex ante control by a neutral body is constitutionally required *per se*. The intra-authority control provided however serves to secure the interests of the person concerned in the preparatory phase of data collection, and hence contributes to the proportionality of the encroachment. What is more, additional ex-post control by the G 10 Commission is provided for according to s. 5a.3 sentences 4 to 8 of the North Rhine-Westphalia Constitution Protection Act, which equally serves the protection of the interests of the persons concerned that are protected by fundamental rights.

S. 5a.3 sentence 9 of the North Rhine-Westphalia Constitution Protection Act in conjunction with s. 4 of the Act on the Implementation of the Act re Article 10 of the Basic Law contains standards for the processing and transmission of the collected data, in particular meeting the requirements of necessity and of the limitation principle.

S. 5a.3 sentence 11 of the North Rhine-Westphalia Constitution Protection Act in conjunction with s. 5 of the Act on the Implementation of the Act re Article 10 of the Basic Law, finally, provides for notification of the person concerned as soon as a risk to the purpose of the restriction can be ruled out. By these means, the person concerned is largely enabled to pursue his or her interests at least ex-post.

2. Article 2.2 - Life, Limb and Liberty

The Right to Life: The Abortion Decisions, BVerfGE 39, 1, BVerfGE 88, 203

Explanatory Annotation

The German Constitutional Court addressed the issue of termination of pregnancy twice in two fundamental judgments. The main issue in the first judgment of 1974 was the question of whether the general legalization of abortion in the first 12 weeks of the pregnancy as provided for in the relevant criminal law reform act was constitutional. This question had arisen in the broader context of liberal reforms, which, in Germany, were the result of complex socio-political changes in the society. The student revolts of the late 1960s, the change from a conservative government to a social-democratic/liberal coalition government are examples for this trend and similar developments internationally also provided support. The epochal decision of the United States Supreme Court in the case of *Roe v Wade* of 1973 is one prime example.

The second decision of 1992 is, on the one hand, the continuation of the old struggle between those strictly opposed to abortion and those with more balancing views in the light of the empirical developments since the first decision in 1974. The second decision of the Constitutional Court of 1992, on the other hand, also reflects the German reunification of 1990 and the fact that the two Germanys had significantly different laws pertaining to the question of abortion. Former communist East-Germany had in effect liberalized abortion in the first 12 weeks of pregnancy whereas former West-Germany operated under the more complex and less liberal legal regime established as a consequence of the Court's first decision in 1974. The Unification Treaty[24] demanded in Article 31.4 that the abortion problem be addressed by the legislature until the end of 1992. The outcome of this reform process was the object of constitutional scrutiny in the second decision of 1992.

In substance, both decisions of the Court follow the same red line. The unborn life, the foetus, partakes in the right of life guarantee of Article 2.2 of the Basic Law and possesses human dignity as guaranteed in Article 1.1. Having thus decided that under the Basic Law, life in the sense of Article 2.2 begins at conception (or, to be more precise, with nidation, i.e. the implantation of the fertilized ovum in the endometrium of the uterus[25]) it is obvious that any legislative solution that would make this life dependent on the free will of another person, even if that other person is the mother, is not possible. The result was that the general liberalization of abortion in the first 12 weeks, as was intended under the West-German reform law of 1974 and as was the case under the East-German law (and in many other jurisdictions) was unconstitutional.

24 Einigungsvertrag (EV) of 31 August 1990 in conjunction with the Statute on the Unification Treaty of 23 September 1990, BGBl. Part II p. 885. Available in German at http://www.gesetze-im-internet.de/einigvtr/BJNR208890990.html. English version available at https://www.cvce.eu/obj/the_unification_treaty_between_the_frg_and_the_gdr_berlin_31_august_1990-en-2c391661-db4e-42e5-84f7-bd86108c0b9c.html.

25 http://medical-dictionary.thefreedictionary.com/nidation.

The consequence in West-Germany after 1974 was new legislation that maintained the illegality of abortion as a matter of principle but allowed for certain exceptions, the so-called 'indications', such as a significant danger to the life and health of the mother, rape, but also the eugenic indication, i.e. substantial genetic or other defects of the child and the most controversial 'social indication', which allowed for termination of the pregnancy if the mother was caught up in an 'emergency situation' and hence could not cope with the pregnancy and the child. These indications had by and large led to a situation at least akin to a general liberalization of abortion in the first part of the pregnancy and hence had given rise to much controversy, which influenced the post-reunification reform legislation and led to the second decision.

The second pillar of both decisions is the strong emphasis on the duty of the state to protect life. The Court held that it does not suffice that the state refrain from taking or interfering with life. Governmental authority must go beyond this and is obligated to actively protect life in its legal order. In the first decision the court had already held that this protection does not necessarily require criminalizing abortion and that criminal law as a protective means can be a last resort but that any means of protection must be effective.

In the second decision the Court had to deal with the reform law of 1992, which had replaced the 'indication' scheme with a counselling scheme under which abortion had to be preceded by defined counselling efforts designed to reinforce in the mother the will to carry out the pregnancy. The Court made it clear that the counselling framework must be such that the pregnant woman in her conflict situation can be offered concrete help to cope with the pregnancy and the child. This includes assistance when looking for accommodation, child-care and in continuing the education of the mother-to-be. The detail in which the Court described the elements of this counselling effort are striking and from the perspective of other jurisdictions one could well ask whether it is for a court of law to go into such detail. The Court also re-emphazed that abortion must retain the mark of an illegal activity even if the choice is not to sanction it criminally. Consequently abortion it could not be covered by the public health insurance system. It could, however, be covered by the subsidiary general welfare scheme for those qualifying.

Both decisions amply illustrate the pain the Court went through in order to find a balance between the right to life of the unborn and the right of the mother to self-determination. At times the decisions are not always practical and full of symbolism but they are always markedly different to the solution found, for example, by the United States Supreme Court in *Roe v Wade*. The US Constitution does not contain a right to life - but an implied right to privacy - and the function of fundamental rights, as creating a state duty to protect is also rather foreign to the US legal system. Different legal frameworks do not necessarily, but did in this instance, yield very different results.

a) Translation of the Abortion I Judgment: Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 39, 1*

Headnotes:

1. The life which is developing itself in the womb of the mother is an independent legal value which enjoys the protection of the constitution (Article 2.2 sentence 1, Article 1.1 of the Basic Law). The State's duty to protect forbids not only direct state attacks against life developing itself, but also requires the state to protect and foster this life.

2. The obligation of the state to protect the life developing itself exists, even against the mother.

3. The protection of life of the child *en ventre sa mere* takes precedence as a matter of principle for the entire duration of the pregnancy over the right of the pregnant woman to self-determination and may not be placed in question for any particular time.

4. The legislature may express the legal condemnation of the interruption of pregnancy required by the Basic Law through measures other than the threat of punishment. The decisive factor is whether the totality of the measures serving the protection of the unborn life guarantees an actual protection which in fact corresponds to the importance of the legal value to be guaranteed. In the extreme case, if the protection required by the constitution cannot be realized in any other manner, the legislature is obligated to employ the criminal law to secure the life developing itself.

5. A continuation of the pregnancy is not to be exacted (legally) if the termination is necessary to avert from the pregnant woman a danger to her life or the danger of a serious impairment of her health. Beyond that the legislature is at liberty to designate as non-exactable other extraordinary burdens for the pregnant woman which are of similar gravity and, in these cases, to leave the interruption of pregnancy free of punishment.

6. The Fifth Statute to Reform the Criminal Law of the 18th of June, 1974, (Federal Law Reporter I, p. 1297) has not in the required extent done justice to the constitutional obligation to protect prenatal life.

Order of the First Senate of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 -

Facts:

The subject matter of the proceeding is the question whether the so-called regulation of terms of the Fifth Statute to Reform the Criminal Law according to which termination of pregnancy remains free of punishment during the first twelve weeks after conception under certain conditions is consistent with the Basic Law.

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* Translation by Robert E. Jonas and John D. Gorby in The John Marshall Journal of Practice and Procedure (Vol. 9:605); © Robert E. Jonas and John D. Gorby.

The Fifth Statute to Reform the Criminal Law (5 CLRS) of June 18, 1974 (Federal Law Reporter I, p. 1297) has regulated punishability of the interruption of pregnancy in a new manner. SS. 218 to 220 have been replaced by provisions which *vis-a-vis* the previous state of the law contain primarily the following alterations

As a matter of principle, anyone who interrupts a pregnancy more than 13 days after conception shall be punished (s. 218.1). An abortion performed by a physician, however, with the consent of the pregnant woman is not punishable under s. 218 if not more than twelve weeks have elapsed since conception (s. 218a - Regulation of Terms.). Furthermore, an interruption of pregnancy performed by a physician with the consent of the pregnant woman after the expiration of the twelve week period is not punishable under s. 218 if the abortion is indicated, according to the judgment of medical science, to avert from the pregnant woman either a danger to her life or the danger of a serious impairment of the condition of her health to the extent that these dangers cannot be averted in a fashion which is otherwise exactable (s. 218b, No. 1- Medical Indication). Furthermore, abortion is not punishable if compelling reasons demand the assumption that the child, because of an hereditary disposition or harmful influences before birth, will suffer impairment to its health which cannot be alleviated and which are so weighty that the continuation of the pregnancy cannot be demanded of the pregnant woman, and not more than 22 weeks have elapsed since conception (s. 218b no. 2 - Eugenical Indication). Anyone who interrupts a pregnancy without the pregnant woman first having received social and medical counselling at a counselling centre or from a physician shall be punished (s. 218c). Even so an individual makes himself liable to punishment if he interrupts a pregnancy after the expiration of twelve weeks from conception without a competent counselling centre having previously certified that the prerequisites of s. 218b (Medical or Eugenic Indications) have been met (s. 219). The pregnant woman herself shall not be punished either under s. 218 or under s. 219.

Extract from the Grounds:

…

B.

The Fifth Statute to Reform the Criminal Law did not need the concurrence of the Federal Council.

1. The statute, in Articles 6 and 7, alters, it is true, the Order of Criminal Procedure and the Introductory Statute to the Criminal Code which, for their part, were passed with the concurrence of the Federal Council. This reason by itself, however, does not necessitate concurrence (BVerfGE 37, 363). Further, the statute alters no statutory provisions, which, for their part, were in need of concurrence.

2. The Fifth Statute to Reform the Criminal Law itself contains no provisions which under Article 84.1, or any other provision of the Basic Law require concurrence. Neither s. 218 nor s. 219 of the Criminal Code regulates the establishment of authorities or administrative procedure. Rather, they merely establish the substantive legal prerequisites of non-punishable interruption of pregnancy. This is also true, insofar as s. 218c.1 no. 1 of the

Criminal Code, requires that the pregnant woman, before the abortion, present herself to an authorized counselling centre and describe the object of the counselling. The setting up and establishment of counselling centres as well as the decreeing of administrative provisions for procedures to be followed by these centres are completely relegated to the federal states. For the same reasons s. 219 of the Criminal Code does not create a need for concurrence of the Federal Council by requiring the verification of the substantive prerequisites by "an authorized centre" before performing an abortion indicated under s. 218b.

3. The petitioning-state governments cannot be followed in concluding that concurrence is necessary insofar as they refer to the legal principle established in the decision of June 25, 1974, according to which an amendatory statute required the concurrence of the Federal Council "if, through the alteration of substantive legal norms, provisions regarding the administrative procedures which are not expressly altered experience an essentially different meaning and scope in a construction which is oriented to the purpose of the statute" (BVerfGE 37, 363, Fourth Guiding Principle and 383). The actual prerequisites for a direct application of this guiding principle are unquestionably not present here. Whether a continued extension of this legal principle in the sense proposed by the government of the federal state of Rhineland-Pfalz could come into consideration at all is uncertain. Even according to this view of the law, no requirement for concurrence for the Fifth Statute to Reform the Criminal Law arises since an even greater latitude to structure remains with the federal states under the substantive provisions for the administrative regulations incumbent upon them.

4. Finally, no requirement for concurrence can be inferred from the close connection of the Fifth Statute to Reform the Criminal Law with the Statute to Supplement the Criminal Law Reform which, with the content given it by the Federal Parliament, is viewed as needing concurrence. Regardless of that, the Statute to Supplement the Criminal Law Reform has not yet taken effect. The legislature is not prevented as a matter of principle in the exercise of its legislative freedom from dividing a statutory plan into several individual statutes. The Federal Constitutional Court has, up to this time, proceeded upon the principle that such divisions were permissible (cf. BVerfGE 34, 9 [28]; 37, 363 [382]). In the decision (BVerfGE 24, 184, [199 seq.]) -*Apostille*--the Court left unanswered the question whether there are constitutional limits to the authority and where these limits are to be found. In any event, such limits are not transgressed in this case. The Fifth Statute to Reform the Criminal Law and the planned Statute to Supplement the Criminal Law Reform were indeed voted upon consecutively. However, they must not necessarily be considered a statutory and technical unity. The first named statute contains in essence only criminal law and criminal procedure. In contrast, the Statute to Supplement the Criminal Law Reform contains social and labour law measures. The independence in content of the Statute to Supplement the Criminal Law Reform from the Fifth Statute to Reform the Criminal Law obviously results from the fact that the Statute to Supplement the Criminal Law Reform, according to its very wording, would be applicable to all of the proposed solutions for the new regulation of pregnancy termination, namely the "term solution" as well as the three indication solutions.

C.

…

I.

1. Article 2.2 sentence 1 of the Basic Law also protects the life developing itself in the womb of the mother as an intrinsic legal value.

a) The express incorporation into the Basic Law of the self-evident right to life - in contrast to the Weimar Constitution - may be explained principally as a reaction to the "destruction of life unworthy of life," to the "final solution" and "liquidations," which were carried out by the National Socialistic Regime as measures of state. Article 2.2 sentence 1 of the Basic Law, just as it contains the abolition of the death penalty in Article 102, includes "a declaration of the fundamental worth of human life and of a concept of the state which stands, in emphatic contrast to the philosophies of a political regime to which the individual life meant little and which therefore practiced limitless abuse with its presumed right over life and death of the citizen" (BVerfGE 18, 112 [117]).

b) In construing Article 2.2 sentence 1 of the Basic Law, one should begin with its language: "Everyone has a right to life. . ." Life, in the sense of historical existence of a human individual, exists according to definite biological-physiological knowledge, in any case, from the 14th day after conception (nidation, individuation) (cf. on this point the statements of Hinrichsen before the Special Committee for the Reform of the Criminal Law, Sixth Election Period, 74th Session, Stenographic Reports, p. 2142 seq.). The process of development which has begun at that point is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end even with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time a rather long time after birth. Therefore, the protection of Article 2.2 sentence 1 of the Basic Law cannot be limited either to the "completed" human being after birth or to the child about to be born which is independently capable of living. The right to life is guaranteed to everyone who "lives"; no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life. "Everyone" in the sense of Article 2.2 sentence 1 of the Basic Law is "everyone living"; expressed in another way: every life possessing human individuality; "everyone" also includes the yet unborn human being.

c) In opposition to the objection that "everyone" commonly denotes, both in everyday language as well as in legal language, a "completed" person and that a strict interpretation of the language speaks therefore against the inclusion of the unborn life within the effective area of Article 2.2 sentence 1 of the Basic Law, it should be emphasized that, in any case, the sense and purpose of this provision of the Basic Law requires that the protection of life should also be extended to the life developing itself. The security of human existence against encroachments by the state would be incomplete if it did not also embrace the prior step of "completed life," unborn life.

This extensive interpretation corresponds to the principle established in the opinions of the Federal Constitutional Court, "according to which, in doubtful cases, that interpretation is to be selected which develops to the highest degree the judicial effectiveness of the fundamental legal norm" (BVerfGE 32, 54 [71]; 6, 55 [72]).

d) In support of this result the legislative history of Article 2.2 sentence 1 of the Basic Law may be adduced here. After the German Party (DP) had made repeated moves to make explicit reference to "germinating life" in connection with the right to life and bodily inviolability (Federal Council Press 11.48 - 298 and 12.48 - 398), the Parliamentary Council deliberated on this circle of problems for the first time in its Committee for Fundamental Questions, the 32nd session, held on January 11, 1949. In the discussion of the question, "whether a provision should be incorporated into the Basic Law which would forbid medical operations which do not serve health," Representative Dr. Heuss (FDP) explained, without encountering opposition, that compulsory sterilization and abortion in connection with the right to life were at issue. The Main Committee of the Parliamentary Council in its 42nd session on January 18, 1949, thoroughly dealt with, during the second reading on fundamental rights (proceedings of the Chief Committee of the Parliamentary Council, Stenographic Reports, p. 529 seq.), the question of the inclusion of developing life in the protection of the constitution. Parliamentary Representative Dr. Seebohm (DP) proposed to add both of the following sentences to Article 1.1 of the Basic Law as it existed at that time: "Germinating life is protected" and "the death penalty is abolished." At the least, he continued, one must expressly enter into the record that germinating life is explicitly included in the right to life and bodily inviolability, if another interpretation is possible. Parliamentary Representative Dr. Weber explained in the name of the CDU/CSU that her faction, when it intercedes for the right to life, means life simply; and, in the faction's view, germinating life, and above all, the defence of germinating life is contained in the right (bc. cit., p. 534). Dr. Heuss (FDP) agreed with Dr. Weber that the concept of life also embraces developing life; however, matters should not be placed in the constitution, which are regulated in the criminal law. As a consequence, he considered both the mention of germinating life as well as the death penalty as a special question to be superfluous (bc. cit., p. 535)." After the unopposed explanations according to which germinating life is embraced in the right to life and bodily inviolability," Dr. Seebohm desired to withdraw his motion (bc. cit., p. 535). However Parliamentary Representative Dr. Greve (SPD) declared: "I must explicitly say here, for the record, that at the least as far as I am concerned, I do not understand the right of germinating life to be within the right to life. I would also like on behalf of my friends, at least for the great majority of them, to deliver a clarification of like content in order to establish for the minutes that the Main Committee of the Parliamentary Council in its entirety does not adopt the standpoint which my colleague Dr. Seebohm just expressed." The motion of Dr. Seebohm was presented once again at that point but was indeed rejected by eleven votes to seven (bc. cit., p. 535). In the written report of the Main Committee (page 7), however, Parliamentary Representative Dr. von Mangoldt (CDU) explained with regard to Article 2 of the Basic Law: "With the guaranteeing of the right to life, germinating life should also be protected. The motions

introduced by the German Party in the Main Committee to attach a particular sentence about the protection of germinating life did not attain a majority only because, according to the view prevailing in the Committee, the value to be protected was already secured through the present version. The plenary Parliamentary Council concurred in Article 2.2 of the Basic Law on May 6, 1949, in the second reading, there being two votes in opposition. At the third reading on May 8, 1949, both Parliamentary Representatives Dr. Seebohm as well as Dr. Weber stated that, according to their conception, Article 2.2 of the Basic Law would also include germinating life within the protection of this fundamental right (proceedings of the Parliamentary Council, Stenographic Reports, p. 218, 223). The comments of both speakers stood without opposition. The history of the origin of Article 2.2 sentence 1 of the Basic Law suggests that the formulation "everyone has the right to life" should also include "germinating" life. In any case, even less can be concluded from the materials on behalf of the contrary point of view. On the other hand, no evidence is found in the legislative history for answering the question whether unborn life must be protected by the criminal law.

e) Furthermore, in the deliberations on the Fifth Statute to Reform the Criminal Law there was unity regarding the value of protecting unborn life, although, to be sure, the constitutional structure of the problem has not been treated definitively. In the report of the Special Committee for the Reform of the Criminal Law on the statutory draft introduced by the Factions of the SPD and FPD, *inter alia,* it was stated on this point: The legal value of unborn life is to be respected in principle equally with that of born life. This determination is self-evident for the stage in which unborn life would also be capable of independent life outside of the mother's womb. The determination, however, is already justified for the earlier stage of development which begins approximately 14 days after conception, as, among others, Hinrichsen convincingly established in the public hearing (AP, VI, p. 2142 et seq.). … Therefore, it is impermissible to deny the existence of unborn life from the end of nidation on or to contemplate it merely with indifference. The question debated in the literature whether, and if the occasion arises, to what extent the Basic Law should include unborn life in its protection, need not be answered at this point. In any case, if one disregards the extreme ideas of individual groups, the concept of unborn life as a legal value of high rank corresponds to the general public's understanding of the law. This understanding of the law also lies at the basis of this draft. (Federal Parliamentary Press, 7/198 1, new, p. 5) Nearly of the same tenor are, to an extent, the committee reports regarding the remaining drafts (Federal Parliamentary Press, 7/1982, p. 5, Federal Parliamentary Press, 7/1983, p. 5, Federal Parliamentary Press, 7/1984, new, p. 4).

2. The duty of the state to protect every human life may therefore be directly deduced from Article 2.2 sentence 1, of the Basic Law. In addition to that, the duty also results from the explicit provision of Article 1.1 sentence 2 of the Basic Law since developing life participates in the protection which Article 1.1 of the Basic Law guarantees to human dignity. Where human life exists, human dignity is present to it; it is not decisive that the bearer of this dignity himself is conscious of it and knows personally how to preserve it. The potential faculties present in the human being from the beginning suffice to establish human dignity.

3. On the other hand, the question disputed in the present proceeding as well as in judicial opinions and in scientific literature, whether the one about to be born himself is a bearer of the fundamental right or, on account of a lesser capacity to possess legal and fundamental rights, is "only" protected in his right to life by the objective norms of the constitution, need not be decided here. According to the constant judicial utterances of the Federal Constitutional Court, the fundamental legal norms contain not only subjective rights of defence of the individual against the state but embody, at the same time, an objective ordering of values, which is valid as a constitutionally fundamental decision for all areas of the law and which provides direction and impetus for legislation, administration, and judicial opinions (BVerfGE 7, 198 [205]--Lueth--; 35, 79 [114]--High School Decisions--for further sources). Whether and, if so, to what extent the state is obligated by the constitution to legal protection of developing life can therefore be concluded from the objective-legal content of the fundamental legal norms.

II.

1. The duty of the state to protect is comprehensive. It forbids not only self-evidently direct state attacks on the life developing itself but also requires the state to take a position protecting and promoting this life, that is to say, it must, above all, preserve it even against illegal attacks by others. It is for the individual areas of the legal order, each according to its special function, to effectuate this requirement. The degree of seriousness with which the state must take its obligation to protect increases as the rank of the legal value in question increases in importance within the order of values of the Basic Law. Human life represents, within the order of the Basic Law, an ultimate value, the particulars of which need not be established; it is the living foundation of human dignity and the prerequisite for all other fundamental rights.

2. The obligation of the state to take the life developing itself under protection exists, as a matter of principle, even against the mother. Without doubt, the natural connection of unborn life with that of the mother establishes an especially unique relationship, for which there is no parallel in other circumstances of life. Pregnancy belongs to the sphere of intimacy of the woman, the protection of which is constitutionally guaranteed through Article 2.1 in conjunction with Article 1.1 of the Basic Law. Were the embryo to be considered only as a part of the maternal organism the interruption of pregnancy would remain in the area of the private structuring of one's life, where the legislature is forbidden to encroach (BVerfGE 6, 32 [41] ; 6, 389 [433] ; 27, 344 [350] ; 32, 373 [379]). Since, however, the one about to be born is an independent human being who stands under the protection of the constitution, there is a social dimension to the interruption of pregnancy which makes it amenable to and in need of regulation by the state. The right of the woman to the free development of her personality, which has as its content the freedom of behaviour in a comprehensive sense and accordingly embraces the personal responsibility of the woman to decide against parenthood and the responsibilities flowing from it, can also, it is true, likewise demand recognition and protection. This right, however, is not guaranteed without limits - the rights of others, the constitutional order, and the moral law limit it. A priori, this right can never include the authorization to intrude upon the protected sphere of right of another without justifying reason or much less to destroy that sphere along with the life itself; this is even less so, if, according to the nature of the case, a special responsibility exists precisely for this life. A compromise which guarantees the protection of the life of the one about to be born and permits the pregnant woman the freedom of abortion is

not possible since the interruption of pregnancy always means the destruction of the unborn life. In the required balancing, "both constitutional values are to be viewed in their relationship to human dignity, the centre of the value system of the constitution" (BVerfGE 35, 202 [225]). A decision oriented to Article 1, Paragraph 1, of the Basic Law must come down in favour of the precedence of the protection of life for the child *en ventre sa mere* over the right of the pregnant woman to self-determination. Regarding many opportunities for development of personality, she can be adversely affected through pregnancy, birth and the education of her children. On the other hand, the unborn life is destroyed through the interruption of pregnancy. According to the principle of the balance which preserves most of competing constitutionally protected positions in view of the fundamental idea of Article 19.2 of the Basic Law; precedence must be given to the protection of the life of the child about to be born. This precedence exists as a matter of principle for the entire duration of pregnancy and may not be placed in question for any particular time. The opinion expressed in the Federal Parliament during the third deliberation on the Statute to Reform the Criminal Law, the effect of which is to propose the precedence for a particular time "of the right to self-determination of the woman which flows from human dignity *vis-a-vis* all others, including the child's right to life" (German Federal Parliament, Seventh Election Period, 96th Session, Stenographic Reports, p. 6492), is not reconcilable with the value ordering of the Basic Law.

3. From this point, the fundamental attitude of the legal order which is required by the constitution with regard to the interruption of pregnancy becomes clear: the legal order may not make the woman's right to self-determination the sole guideline of its rulemaking. The state must proceed, as a matter of principle, from a duty to carry the pregnancy to term and therefore to view, as a matter of principle, its interruption as an injustice. The condemnation of abortion must be clearly expressed in the legal order. The false impression must be avoided that the interruption of pregnancy is the same social process as, for example, approaching a physician for healing an illness or indeed a legally irrelevant alternative for the prevention of conception. The state may not abdicate its responsibility even through the recognition of a "legally free area," by which the state abstains from the value judgment and abandons this judgment to the decision of the individual to be made on the basis of his own sense of responsibility.

III.

How the state fulfils its obligation for an effective protection of developing life is, in the first instance, to be decided by the legislature. It determines which measures of protection are required and which serve the purpose of guaranteeing an effective protection of life.

1. In this connection the guiding principle of the precedence of prevention over repression is also valid particularly for the protection of unborn life (BVerfGE 30, 336 [350]). It is therefore the task of the state to employ, in the first instance, social, political, and welfare means for securing developing life. What can happen here and how the assistance measures are to be structured in their particulars is largely left to the legislature and is generally beyond judgment by the Constitutional Court. Moreover, the primary concern is to strengthen readiness of the expectant mother to accept the pregnancy as her own responsibility and to bring the child *en ventre sa mere* to full life. Regardless of how the state fulfils its obligation to protect, it should not be forgotten that the developing life itself is entrusted by nature in the first place to the

protection of the mother. To reawaken and, if required, to strengthen the maternal duty to protect, where it is lost, should be the principal goal of the endeavours of the state for the protection of life. Of course, the possibilities for the legislature to influence are limited. Measures introduced by the legislature are frequently only indirect and effective only after completion of the time-consuming process of comprehensive education and the alteration in the attitudes and philosophies of society achieved thereby.

2. The question of the extent to which the state is obligated under the constitution to employ, even for the protection of unborn life, the criminal law, the sharpest weapon standing at its disposal, cannot be answered by the simplified posing of the question whether the state must punish certain acts. A total consideration is necessary which, on the one hand, takes into account the worth of the injured legal value and the extent of the social harm of the injurious act - in comparison with other acts which socio-ethically are perhaps similarly assessed and which are subject to punishment - and which, on the other hand, takes into account the traditional legal regulation of this area of life as well as the development of concepts of the role of the criminal law in modern society; and, finally, does not leave out of consideration the practical effectiveness of criminal sanctions and the possibility of their replacement through other legal sanctions. The legislature is not obligated, as a matter of principle, to employ the same penal measures for the protection of the unborn life as it considers required and expedient for born-life. As a look at legal history shows, this was never the case in the application of penal sanctions and is also true for the situation in the law up to the Fifth Statute to Reform the Criminal Law.

a) The task of criminal law from the beginning has been to protect the elementary values of community life. That the life of every individual human being is among the most important legal values has been established above. The interruption of pregnancy irrevocably destroys an existing human life. Abortion is an act of killing; this is most clearly shown by the fact that the relevant penal sanction, even in the Fifth Statute to Reform the Criminal Laws, contained in the section "Felonies and Misdemeanors against Life" and, in the previous criminal law, was designated the "Killing of the Child *en ventre sa mere*." The description now common, "interruption of pregnancy," cannot camouflage this fact. No legal regulation can pass over the fact that this act offends against the fundamental inviolability and indisposability of human life protected by Article 2.2 sentence 1 of the Basic Law. From this point of view, the employment of penal law for the requital of "acts of abortion" is to be seen as legitimate without a doubt; it is valid law in most cultural states - under prerequisites of various kinds - and especially corresponds to the German legal tradition. Therefore, it follows that the law cannot dispense with clearly labelling this procedure as "unjust."

b) Punishment, however, can never be an end in itself. Its employment is in principle, subject to the decision of the legislature. The legislature is not prohibited, in consideration of the points of view set out above, from expressing the legal condemnation of abortion required by the Basic Law in ways other than the threat of punishment. The decisive factor is whether the totality of the measures serving the protection of the unborn life, whether they are in civil law or in public law, especially of a social-legal or of a penal nature, guarantees an actual protection corresponding to the importance of the legal value to be secured. In the extreme case, namely, if the

protection required by the constitution can be achieved in no other way, the lawgiver can be obligated to employ the means of the penal law for the protection of developing life. The penal norm represents, to a certain extent, the "ultimate reason" in the armory of the legislature. According to the principle of proportionality, a principle of the just state, which prevails for the whole of the public law, including constitutional law, the legislature may make use of this means only cautiously and with restraint. However, this final means must also be employed, if an effective protection of life cannot be achieved in any other way. The worth and the importance of the legal value to be protected, demand this. It is not a question of an "absolute" duty to punish but rather one of a "relative" duty to use the penal sanction, which grows out of the insight into the inadequacy of all other means. On the other hand, the objection that a political duty to punish can never be deduced from a norm of the Basic Law which guarantees freedom, is not decisive. If the state is obligated by a fundamental norm which determines value to protect an especially important legal value effectively even against the attacks of third parties, measures will often be unavoidable which touch upon the areas of freedom of other bearers of fundamental rights. In this respect, the legal situation in the employment of social-legal or civil law means is not fundamentally different than the enactment of a penal norm. Differences exist, perhaps, with respect to the intensity of the required interference. In any case, the legislature must resolve the conflict which arises from this situation through a balancing of both of the fundamental values or areas of freedom which are in opposition to each other according to the standard of the ordering of values in the Basic Law and in consideration of the constitutional principle of proportionality. If one were to deny that there was any duty to employ the means of the criminal law, the protection of life which is to be guaranteed would be essentially restricted. The seriousness of the sanction threatened for the destruction is to correspond to the worth of the legal value threatened with destruction. The elementary value of human life requires criminal law punishment for its destruction.

3. The obligation of the state to protect the developing life exists, as shown, against the mother as well. Here, however, the employment of the criminal law may give rise to special problems which result from the unique situation of the pregnant woman. The incisive effects of a pregnancy on the physical and emotional condition of the woman are immediately evident and need not be set forth in greater detail. They often mean a considerable change of the total conduct of life and a limitation of the possibilities for personal development. This burden is not always and not completely balanced by a woman finding new fulfilment in her task as mother and by the claim a pregnant woman has upon the assistance of the community (Article 6.4 of the Basic Law). In individual cases, difficult, even life-threatening situations of conflict may arise. The right to life of the unborn can lead to a burdening of the woman which essentially goes beyond that normally associated with pregnancy. The result is the question of enforceability, or, in other words, the question of whether the state, even in such cases, may compel the bearing of the child to term with the means of the criminal law. Respect for the unborn life and the right of the woman not to be compelled to sacrifice the values in her own life in excess of an exactable measure in the interest of respecting this legal value are in conflict with each other. In such a situation of conflict which, in general, does not allow an unequivocal moral judgment and in which the decision for an interruption of pregnancy can attain the rank of a decision of

conscience worthy of consideration, the legislature is obligated to exercise special restraint. If, in these cases, it views the conduct of the pregnant woman as not deserving punishment and forgoes the use of penal sanctions, the result, at any rate, is to be constitutionally accepted as a balancing incumbent upon the legislature.

In determining the content of the criterion of non-exactability, circumstances, however, must be excluded which do not seriously burden the obligated party, since they represent the normal situation with which everyone must cope. Rather, circumstances of considerable weight must be present which render the fulfilment of the duty of the one affected extraordinarily more difficult, so that fulfilment cannot be expected from him in fairness. These circumstances are especially present if the one affected by fulfilling the duty is thrown into serious inner conflicts. The solution of such conflicts by criminal penalty does not appear in general to be appropriate (BVerfGE 32, 98 [109] - Gesundbeter), since it applies external compulsion where respect for the sphere of personality of the human being demands full inner freedom of decision.

A continuation of the pregnancy appears to be non-exactable especially when it is proven that the interruption is required "to avert" from the pregnant woman "a danger for her life or the danger of a grave impairment of her condition of health" (s. 218b no. 1 of the Criminal Code in the version of the Fifth Statute to Reform the Criminal Law). In this case her own "right to life and physical integrity" (Article 2.2 sentence 1 of the Basic Law) is at stake, the sacrifice of which cannot be expected of her for the unborn life. Beyond that, the legislature has a free hand to leave the interruption of the pregnancy free of punishment in the case of other extraordinary burdens for the pregnant woman, which, from the point of view of non-exactability, are as weighty as those referred to in s. 218b no. 1. In this category can be counted, especially, the cases of the eugenic (cf. s. 218b no. 2 of the Criminal Code), ethical (criminological), and of the social or emergency indication for abortion which were contained in the draft proposed by the Federal Government in the sixth election period of the Federal Parliament and were discussed both in the public debate as well as in the course of the legislative proceedings. During the deliberations of the Special Committee for the Reform of the Criminal Law (Seventh Election Period, 25th Session, Stenographic Reports, p. 1470 et seq.), the representative of the Federal Government explained in detail and with convincing reasons why, in these four cases of indication, the bearing of the child to term does not appear to be exactable. The decisive viewpoint is that in all of these cases another interest equally worthy of protection, from the standpoint of the constitution, asserts its validity with such urgency that the state's legal order cannot require that the pregnant woman must, under all circumstances, concede precedence to the right of the unborn. Also, the indication arising from general emergency (social indication) can be integrated here. Finally, the general social situation of the pregnant woman and her family can produce conflicts of such difficulty that, beyond a definite measure, a sacrifice by the pregnant woman in favour of the unborn life cannot be compelled with the means of the criminal law. In regulating this case, the legislature must so formulate the elements of the indication which is to remain free of punishment that the gravity of the social conflict presupposed will be clearly recognizable and, considered from the point of view of non-exactability, the congruence of this indication with the other cases of indication remains guaranteed. If the legislature removes genuine cases of conflict of this kind from the protection of the Criminal law, it does not violate its duty to protect life. Even in these cases the state may not be content merely to examine, and if the occasion arises, to certify that the statutory

prerequisites for an abortion free of punishment are present. Rather, the state will also be expected to offer counselling and assistance with the goal of reminding pregnant women of the fundamental duty to respect the right to life of the unborn, to encourage her to continue the pregnancy and - especially in cases of social need - to support her through practical measures of assistance. In all other cases the interruption of pregnancy remains a wrong, deserving punishment since, in these cases, the destruction of a value of the law of the highest rank is subjected to the unrestricted pleasure of another and is not motivated by an emergency. If the legislature wants to dispense (even in this case) with criminal law punishment, this would be compatible with the requirement of protecting Article 2.2 sentence 1 of the Basic Law, only on the condition that another equally effective legal sanction stands at its command, which would clearly bring out the unjust character of the act (the condemnation by the legal order) and likewise prevent the interruption of pregnancy as effectively as a penal provision.

D.

If the challenged regulation of terms of the Fifth Statute to Reform the Criminal Law is examined according to these standards, the result is that the statute does not do justice, to the extent required, to the obligation to protect developing life effectively which is derived from Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law.

I.

The constitutional requirement to protect developing life is directed in the first instance to the legislature. The duty is incumbent on the Federal Constitutional Court, however, to determine, in the exercise of the function allotted to it by the Basic Law, whether the legislature has fulfilled this requirement. Indeed, the Court must carefully observe the discretion of the legislature which belongs to it in evaluating the factual conditions which lie at the basis of its formation of norms, which discretion is fitting for the required prognosis and choice of means. The court may not put itself in the place of the legislature; it is, however, its task to examine carefully whether the legislature, in the framework of the possibilities standing at its disposal, has done what is necessary to avert dangers from the legal value to be protected. This is also fundamentally true for the question whether the legislature is obligated to utilize its sharpest means, the criminal law, in which case the examination can extend beyond the individual modalities of punishment.

II.

It is generally recognized that the previous s. 218 of the Criminal Code, precisely because it threatened punishment without distinction for nearly all cases of the interruption of pregnancy, has, as a result, only insufficiently protected developing life. The insight that there are cases in which the penal sanction is not appropriate has finally led to the point that cases actually deserving of punishment are no longer prosecuted with the necessary vigor. In addition, with respect to this offence, there is, in the nature of the case, the frequently difficult clarification of the factual situation. Certainly, the statistics on the incidence of illegal abortion differ greatly and it may hardly be possible to ascertain reliable data on this point through empirical investigations. In any case, the number of the illegal interruptions of pregnancy in the Federal Republic was high. The existence of a general penal norm may have contributed to that, since the state had neglected to employ other adequate measures for the protection of developing life. The legislature,

in the final version of the Fifth Statute to Reform the Criminal Law, proceeded from the guiding consideration of the primacy of preventive measures over repressive sanctions, in this regard, the motions of the factions of the SPD and FDP for resolution which were accepted by the Federal Parliament in connection with the enactment of the Fifth Statute to Reform the Criminal Law Federal Parliamentary Press, 7/2042). The statute is based upon the idea that developing life would be better protected through individual counselling of the pregnant woman than through a threat of punishment, which would remove the one determined upon the abortion from every possible means of influence, which from a criminological point of view would be mistaken and, in addition, has proven itself without effect. On this basis the legislature has reached the decision to abandon the criminal penalty entirely for the first twelve weeks of pregnancy under definite prerequisites and, in its place, to introduce the preventive counselling and instruction (ss. 218a and 218c). It is constitutionally permissible and to be approved if the legislature attempts to fulfil its duty to improve protection of unborn life through preventive measures, including counselling to strengthen the personal responsibility of the woman. The regulation in question, however, encounters decisive constitutional problems in several respects:

1. The legal condemnation of the interruption of pregnancy required by the constitution must clearly appear in the legal order existing under the constitution. Therefore, as shown, only those cases can be excepted in which the continuation of the pregnancy is not exactable from the woman in consideration of the value decision made in Article 2.2 sentence 1 of the Basic Law. This absolute condemnation is not expressed in the provisions of the Fifth Statute to Reform the Criminal Law with regard to the interruption of pregnancy during the first twelve weeks because the statute leaves unclear whether an interruption of pregnancy which is not "indicated" is legal or illegal after the repeal of the criminal penalty through s. 218a of the Criminal Code. This is true without reference to the fact that s. 218a of the Criminal Code presents itself technically as the creation of an exception to the general penal provision of s. 218 of the Criminal Code. It is also true, independent of the view one should take in this question whether the provision factually restricts s. 218 of the Criminal Code or whether it creates a legally justifying reason or finally has as its content only a basis for excluding guilt or punishment. With the unbiased reader of the statute the impression must arise that s. 218a completely removes, through the absolute repeal of punishability, the legal condemnation - without consideration of the reasons - and legally allows the interruption of pregnancy under the prerequisites listed therein. The elements of s. 218 of the Criminal Code recede into the background since by far most interruptions of pregnancy, experience shows, are performed in the first twelve weeks - over nine out of ten cases according to the statements of the representative of the government (bc. cit., p. 1472). The picture which results is of a nearly complete decriminalization of the interruption of pregnancy (see also *Roxin* in: J. Baumann, editor, "The Proscription of Abortion, L s. 218, p. 185). Also in no other provision of the Fifth Statute to Reform the Criminal Law is the notion expressed that the interruption of pregnancy which is not indicated in the first twelve weeks will be legally condemned for the future. Even Article 2 of the statute, according to which no one in principle is obligated to participate in an interruption of pregnancy, mentions nothing about the legality or illegality of such a measure; this provision aims in the first place at making allowance for the freedom of conscience of the individual and at protecting the freedom of the ethical conviction of one who sees himself faced with the question whether he can and should actively participate in an interruption of pregnancy which is free of punishment in

conformity with s. 218a of the Criminal Code. A look at the proposed regulations in the Statute to Supplement the Criminal Law Reform for the area of social law further compels the conclusion that in the case of an interruption of pregnancy in the first twelve weeks, a procedure is involved which is apparently legally unobjectionable and which therefore should be socio-legally promoted and facilitated. Legal claims under statutes for social services presuppose that the elements, upon the fulfilment of which the services are guaranteed, do not represent a legally-prohibited (condemned) act. The proposed regulation, as a whole, can therefore only be interpreted to mean that an interruption of pregnancy performed by a physician in the first twelve weeks of pregnancy is not illegal and therefore should be allowed (under law). The Federal Government also proposed this concept in the statutory bill introduced in the sixth election period of the German Federal Parliament; there, in the commentary to Article 1, one reads as follows (Federal Parliamentary Press, VI/3434, p. 9): Although the legislature may trust in other areas that a repeal of penal prohibitions will not be understood as legal approbation of the behaviour previously punishable, special points are to be considered in the new regulation of the interruption of pregnancy: the term solution can only fulfil the public health task expected of it, if every interruption of pregnancy during the first three months appears as legally approved. The operation must be performed within the framework of general medical care. The contract for medical treatment must be effective. Not least, because of the inapplicability of ss. 134-138 of the Civil Code, these and other circumstances can only be interpreted in the sense that the legal order recognizes the operation, before the expiration of the three month period, in every case as a normal social process. The representative of the Government expressed himself similarly before the Special Committee for Criminal Law Reform (Seventh Election Period, 25th Session, Stenographic Reports, p. 1473): It is important to keep this much in mind: medical interruption of pregnancy during the first trimester of pregnancy is, within the framework of the regulation of terms, not contrary to law; it is permitted. Only in this way can its integration into the system of the penal law - with freedom from punishment even for the participants (exception of emergency service) - be justified and only in such a way can the civil law implications - the validity of the contract for treatment in spite of s. 134 -, the promotion of the procedure through public health measures and, above all else, the social insurance planned in the Statute to Supplement the Criminal Law Reform, be established.

2. A formal statutory condemnation of the interruption of pregnancy would, furthermore, not suffice because a woman determined upon abortion, would disregard it. The legislature which passed the Fifth Statute to Reform the Criminal Law has replaced the penal norm with a counselling system in s. 218c of the Criminal Code on the judgment that positive measures to protect developing life are also required for an interruption of pregnancy performed by a physician with the consent of the pregnant woman. Through the complete repeal of punishability, however, a gap in the protection has resulted which completely destroys the security of the developing life in a not insignificant number of cases by handing this life over to the completely unrestricted power of disposition of the woman. There are many women who have previously decided upon an interruption of pregnancy without having a reason which is worthy of esteem within the value order of the constitution and who are not accessible to a counselling such as s. 218c.1, proposes. These women find themselves neither in material distress nor in a grave situation of emotional conflict. They decline pregnancy because they are not willing to take on the renunciation and the natural motherly duties bound up with it. They have serious reasons

for their conduct with respect to the developing life; there are, however, no reasons which can endure against the command to protect human life. For these women, pregnancy is exactable in line with the principles reiterated above. The behaviour even of this group of women, legitimatized by law through the absence of a constitutionally important motive for the interruption of pregnancy, is fully covered under s. 218a of the Fifth Statute to Reform the Criminal Law. The life developing itself is abandoned without protection to their arbitrary decision. The objection against this is that women not subject to influence understand best from experience how to avoid punishment so that the penal sanction is often ineffective. Furthermore, the legislature is confronted with the dilemma that preventive counselling and repressive threat of punishment in their life protecting effect are necessarily partially exclusive: the penal sanction of the indication solution would, in truth, through its deterrent effect prevent unmotivated interruptions of pregnancy to an extent not exactly ascertainable. At the same time, according to this objection, the threat of punishment, by discouraging counselling of women susceptible of influence, impedes saving life in other cases because it is precisely women, in whose cases the prerequisites of an indication are absent and, beyond that, also those who do not trust the result of a procedure to determine an indication who will, in the face of the penal threat, carefully keep the pregnancy secret and who to a large extent withdraw themselves from helpful influence available through counselling centres and surroundings. On the basis of such an analysis, there could not be a defence of unborn life which was free of gaps. The legislature, so this objection continues, would have no other choice than to weigh off life against life, namely the life which through a definite regulation of the abortion question could probably be saved against the life which would probably be sacrificed on account of the same regulation, since the penal sanction would not only protect but at the same time destroy unborn life. Thus, since no solution would unequivocally better serve the protection of the individual life, the legislature would not have transgressed its constitutionally drawn boundaries with the regulation of terms.

a) To begin with, this concept does not do justice to the essence and the function of the penal law. The penal norm directs itself fundamentally to all subjects of the law and obligates them in like manner. It is true that public prosecutors practically never succeed in administering punishment to all those who have broken the criminal law. The unknown incidence is variously high for the various offences. It is uncontested that the unknown incidence of acts of abortion is especially high. On the other hand, the general preventive function of the criminal law ought not be forgotten. If one views as the task of the criminal law the protection of especially important legal values and elementary values of the community, a great importance accrues to its function. Just as important as the observable reaction in an individual case is the long range effect of a penal norm which in its principal normative content ("abortion is punishable") has existed for a very long time. No doubt, the mere existence of such a penal sanction has influence on the conceptions of value and the manner of behaviour of the populace (cf. the report of the Special Committee for the Criminal Law Reform, Federal Parliamentary Press, 7/1981 new p. 10). The consciousness of legal consequences which follows from its transgression creates a threshold which many recoil from crossing. An opposite effect will result if, through a general repeal of punishability, even doubtlessly punishable behaviour is declared to be legally free from objection. This must confuse the concepts of "right" and "wrong," dominant in the populace. The purely theoretical announcement that the interruption of pregnancy is "tolerated," but not "approved,"

must remain without effect as long as no legal sanction is recognizable which clearly segregates the justified cases of abortion from the reprehensible. If the threat of punishment disappears in its entirety, the impression will arise of necessity in the consciousness of the citizens of the state that in all cases the interruption of pregnancy is legally allowed and, therefore, even from a socio-ethical point of view, is no longer to be condemned. The "dangerous inference of moral permissibility from a legal absence of sanction" (*Engisch*, "In the Quest for Justice", 1971, p. 104) is too near not to be drawn by a large number of those subject to the law. Also corresponding to this is the view of the Federal Government in the commentary to the draft of the statute introduced in the sixth election period of the German Federal Parliament (Federal Parliamentary Press, VI/3434, p. 9): The term solution would lead to the disappearance of the general awareness of the worthiness of protection of unborn life during the first three months of pregnancy. It would lend support to the view that the interruption of pregnancy, in any case in the early stage of pregnancy, is as subject to the unrestricted right of disposition of the pregnant woman as the prevention of pregnancy. Such a view is not compatible with the constitutional classification of values.

b) The weighing in bulk of life against life which leads to the allowance of the destruction of a supposedly smaller number in the interest of the preservation of an allegedly larger number is not reconcilable with the obligation of an individual protection of each single concrete life. In the judicial opinions of the Federal Constitutional Court the principle has been developed that the unconstitutionality of a statutory provision, which in its structure and actual effect prejudices a definite circle of persons, may not be refuted with the showing that this provision or other regulations of the statute favour another circle of persons. The emphasis of the general tendency of the statute as a whole to favour legal protection is even less adequate for this purpose. This principle (cf. BVerfGE 12, 151 [168]; 15, 328 [333]; 18, 97 [108]; 32, 260 [269]) is valid in special measure for the highest personal legal value, "life." The protection of the individual life may not be abandoned for the reason that a goal of saving other lives, in itself worthy of respect, is pursued. Every human life - the life first developing itself as well - is as such equally valuable and can not therefore be subjected to a discriminatory evaluation, no matter how shaded, or indeed to a balancing on the basis of statistics. In the basic legal political conception of the Fifth Statute to Reform the Criminal Law a concept, which cannot be followed, of the function of a constitutional statute is recognizable. The legal protection for the concrete individual human life required by the constitution is pushed into the background in favour of a more "socio-technical" use of the statute as an intended action of the legislature for the achievement of a definitely desired socio-political goal, the "containing of the abortion epidemic." The legislature may, however, not merely have a goal in view, be it ever so worthy of pursuit; it must be aware that every step on the way to the goal must be justified before the constitution and its indispensable postulates. The fundamental legal protection in individual cases may not be sacrificed to the efficiency of the regulation as a whole. The statute is not only an instrument to steer social processes according to sociological judgments and prognoses but is also the enduring expression of socio-ethical - and as a consequence - legal evaluation of human acts; it should say what is right and wrong for the individual.

c) A dependable factual foundation is lacking for "a total accounting" - which is to be rejected on principle. A sufficient basis is lacking for the conclusion that the number of interruptions of pregnancy in the future will be significantly less than with the previous statutory regulation. Rather, the representative of the government has come to the conclusion before the Special Committee for Criminal Law Reform (Seventh Election Period, 25th Session, Stenographic Reports, p. 1451), on the basis of detailed considerations and comparisons, that after the introduction of the regulation of terms into the Federal Republic a 40% increase of the total number of legal and illegal abortions should be expected. This calculation, to be sure, was brought into doubt by Professor Dr. Jürgens, who was heard in the oral proceedings. The available statistics from other countries, however, especially from England after the Abortion Act of 1967 went into effect (cf. the statement in the report of the Committee on the Working of the Abortion Act - Lane Report) and from the German Democratic Republic (East Germany) after the decreeing of the statute on the interruption of pregnancy of March 9, 1972 (cf. Journal of German Physicians, 1974, p. 2765), allow no certain conclusion that there will be a substantial decline in abortions. Experiments, however, are not permissible considering the great worth of the legal value to be protected. The representatives of all parties in the Special Committee for the Reform of the Criminal Law, however, declined systematically to apply statistics regarding abortion from other countries to the Federal German Republic (Seventh Election Period, 20th Session, Stenographic Reports, p. 1286 et seq.). The effects of varying social structures, mentalities, religious affiliations and modes of behaviour hardly permit such calculations. Even if one takes into account all of the peculiarities of the relationships in the Federal Republic of Germany only in favour of the regulation of terms, an increase in abortions is to be counted on because - as shown - the mere existence of the penal norm of s. 218 of the Criminal Code has exerted influence on the value conceptions and manner of behaviour of the populace. It is important that as a consequence of punishability the opportunity to obtain an abortion generally or indeed *lege artis* has up to this time been considerably limited (for, among other things, financial reasons). That even a mere quantitive strengthening of the protection for life could result from the term solution, is, in any case, not evident.

3. The counselling and instruction of the pregnant woman provided under s. 218c.1 of the Criminal Code cannot, considered by itself, be viewed as suitable to effectuate a of the pregnancy. The measures proposed in this provision fall short of the concepts of the Alternative Draft of the 16 criminal law scholars, upon which the conception of the Fifth Statute to Reform the Criminal Law is, after all, largely based. The counselling centres provided for in Article 105.1 no. 2, of the Fifth Statute to Reform the Criminal Law should themselves have the means to afford financial, social, and family assistance. Furthermore, they should provide to the pregnant woman and her relatives, emotional care through suitable co-workers and work intensively for the continuation of the pregnancy (cf. for particulars, above, p. 11 et seq.). So to equip the counselling centres, in the sense of this or similar suggestions, so that they are able to arrange direct assistance, would come much nearer the mark, since according to the report of the Special Committee for the Reform of the Criminal Law (Printed Materials of the Federal Parliament, 7/1981, new, p. 7, with evidentiary support from the hearings) the unfavourable living situation,

the impossibility of caring for a child while pursuing an education or working as well as economic need and special material reasons, and, especially in the case of single mothers, anxiety about social sanctions are supposed to be among the most frequently given causes and motives for the desire for the interruption of pregnancy. On the other hand, the counselling centres will give instruction about "the public and private assistance available for pregnant women, mothers, and children," "especially regarding assistance which facilitates the continuation of the pregnancy and alleviates the situation of mother and child." This could be interpreted to mean that the counselling centres should only inform, without exerting influence directed to the motivational process. Whether the neutral description of the task of the counselling centres may be attributed to the opinion advocated in the Special Committee for the Reform of the Criminal Law that the pregnant woman should not be influenced in her decision through the counselling (Representative von Schiler, FDP, Seventh Election Period, 25th Session, Stenographic Reports, p. 1473) can remain an open question. If a protective effect in favour of developing life is to accrue to the counselling, it will depend, in any case, decisively upon such an exertion of influence. s. 218c.1, Nos. i and 2, to be sure, allow the interpretation that counselling and instruction should motivate the pregnant woman to carry the pregnancy to term. The report of the Special Committee is probably to be understood in this sense (Printed Materials of the Federal Parliament, 7/1981 new, p. 16); accordingly, the counselling should take into account the total circumstances of life of the pregnant woman and follow up personally and individually, not by telephone or by distributing printed materials (cf. also the previously mentioned resolution of the Federal Parliament, Printed Materials of the Federal Parliament, 7/2042). Even if one might consider it thinkable that counselling of this kind could exercise a definite effect in the sense of an aversion from the decision for abortion, its structure, in particular, exhibits in any case deficiencies which do not allow the expectation of an effective protection of developing life.

a) The instruction about the public and private assistance available for pregnant women, mothers and children, according to s. 218c.1 no. 1, can also be undertaken by any physician. Social law and social reality are, however, very difficult for the technically-trained person to comprehend. A reliable instruction regarding the demands and possibilities in the individual case cannot be expected from a physician, especially since individual inquiries regarding need are frequently required (e.g., for assistance with rent or social assistance). Physicians are neither qualified for such counselling activity by their professional training nor do they generally have the time required for individual counselling.

b) It is especially questionable that the instruction about social assistance can be undertaken by the same physician who will perform the interruption of pregnancy. Through this provision the medical counselling under s. 218c.1 no. 2, which itself falls within the realm of medical competence will be devalued. The counselling should be structured in conformity with the views of the Special Committee for the Reform of the Criminal Law as follows: Therefore, what is meant is counselling regarding the nature of the operation and its possible consequences for health. That the counselling may however not be limited to this purely medical aspect is emphasized through the conscious choice of the term by a physician. Rather the counselling as far as possible and appropriate must speak to the present and future total situation of the pregnant woman to the extent that she can be affected by the interruption of pregnancy and, at

the same time, correspond to the other task of the physician, which is to work for the protection of the unborn life. The physician must, therefore, make it clear to the pregnant woman that human life is destroyed by the operation and explain its stage of development. Experience shows, as confirmed in the public hearing, for example, by Pross (AP, VI, p. 2255, 2256) and Rolinski (AP, VI, p. 2221) that in this respect many women do not have clear ideas and that this circumstance, if they later learn it, is frequently the occasion for burdening doubts and questionings of conscience. Accordingly, the counselling must be directed to preventing this kind of conflict situation. An explanation, in the manner proposed here, which has the required constitutional goal of working for a continuation of the pregnancy cannot be expected from the physician who has been sought out by the pregnant woman precisely for the purpose of performing the interruption of pregnancy. Since, according to the result of the previous inquiries and according to the position statements of representative medical professional panels, it must be assumed that the majority of physicians decline to perform interruptions of pregnancy which are not indicated, only those physicians will make themselves available who either see in the interruption of pregnancy a money-making business or who are inclined to comply with every wish of a woman for interruption of pregnancy because they see in it merely a manifestation of the right to self-determination or a means to the emancipation of women. In both cases, an influence by the physician on the pregnant woman for the continuation of the pregnancy is highly improbable. The experiences in England show this. There the indication (very broadly conceived) must be determined by any two physicians of the patient's choosing. This has led to the result that almost every desired abortion is carried out by private physicians specializing in such activity. The appearance of professional agents who guide women to these private clinics is an especially unfortunate by-product which is very difficult to avoid (cf. Lane Report, Vol. 1, No. 436 and 452).

c) Furthermore, the prospects for success are poor since the interruption of pregnancy can immediately follow the instruction and counselling. A serious exchange with the pregnant woman and others involved in which the arguments in the counselling are contrasted with hers is not to be expected under these circumstances. The alternative formulation proposed by the Federal Ministry of Justice to the Special Committee for Criminal Law Reform for s. 218c provided as a consequence that the interruption of pregnancy could first be performed after a minimum of three days had elapsed after the instruction about available assistance (s. 218.1 no. 1) (Special Committee, Seventh Election Period, 30th Session, Stenographic Reports, p. 1659). In conformity with a report of the Special Committee, however, "a waiting period, enforced by the criminal law, between the counselling and the operation ... was rejected. This could in individual cases bring with it unreasonable difficulties for the pregnant woman according to her place of residence and her personal situation, with the consequence that the pregnant woman will dispense with the counselling." (Printed Materials of Federal Parliament, 7/1981 new, p. 17). For the woman decided upon an interruption of pregnancy it is only necessary to find an obliging physician. Since he may undertake the social as well as the medical counselling and finally even carry out the operation, a serious attempt to dissuade the pregnant woman from her decision is not to be expected from him.

III.

In summary, the following observations should be made on the constitutional adjudication of the regulation of terms encountered in the Fifth Statute to Reform the Criminal Law:

That interruptions of pregnancy are neither legally condemned nor subject to punishment is not compatible with the duty incumbent upon the legislature to protect life, if the interruptions are the result of reasons which are not recognized in the value order of the Basic Law. Indeed, the limiting of punishability would not be constitutionally objectionable if it were combined with other measures which would be able to compensate, at least in their effect, for the disappearance of criminal protection. That is however - as shown - obviously not the case. The parliamentary discussions about the reform of the Abortion Law have indeed deepened the insight that it is the principal task of the state to prevent the killing of unborn life through enlightenment about the prevention of pregnancy on the one hand as well as through effective promotional measures in society and through a general alteration of social concepts on the other. Neither the assistance of the kind presently offered and guaranteed nor the counselling provided in the Fifth Statute to Reform the Criminal Law are, however, able to replace the individual protection of life which a penal norm fundamentally provides even today in those cases in which no reason for the interruption of pregnancy exists which is worthy of consideration according to the value order of the Basic Law. If the legislature regards the previously undifferentiated threat of punishment for the interruption of pregnancy as a questionable means for the protection of life, it is not thereby released from the obligation to undertake the attempt to achieve a better protection of life through a differentiated penal regulation by subjecting the same cases to punishment in which the interruption of pregnancy is to be condemned on constitutional grounds. A clear distinction of this group of cases in contrast to other cases in which the continuation of the pregnancy is not exactable from the woman will strengthen the power of the penal norm to develop a legal awareness. He who generally recognizes the precedence of the protection of life over the claim of the woman for an unrestricted structuring of her life will not be able to dispute the unjust nature of the act in those cases not covered by a particular indication. If the state not only declares that these cases are punishable but also prosecutes and punishes them in legal practice, this will be perceived in the legal consciousness of the community neither as unjust nor as antisocial. The passionate discussion of the abortion problematic may provide occasion for the fear that in a segment of the population the value of unborn life is no longer fully recognized. This, however, does not give the legislature a right to acquiesce. It rather must make a sincere effort through a differentiation of the penal sanction to achieve a more effective protection of life and formulate a regulation which will be supported by the general legal consciousness.

IV.

The regulation encountered in the Fifth Statute to Reform the Criminal Law at times is defended with the argument that in other democratic countries of the Western World in recent times the penal provisions regulating the interruption of pregnancy have been "liberalized" or "modernized" in a similar or an even more extensive fashion; this would be, as the argument goes, an indication that the new regulation corresponds, in any case, to the general development of theories in this area and is not inconsistent with fundamental socio-ethical and legal principles. These considerations cannot influence the decision to be made here. Disregarding the fact that

all of these foreign laws in their respective countries are sharply controverted, the legal standards which are applicable there for the acts of the legislature are essentially different from those of the Federal Republic of Germany. Underlying the Basic Law are principles for the structuring of the state that may be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism. In opposition to the omnipotence of the totalitarian state which claimed for itself limitless dominion over all areas of social life and which, in the prosecution of its goals of state, consideration for the life of the individual fundamentally meant nothing, the Basic Law of the Federal Republic of Germany has erected an order bound together by values which places the individual human being and his dignity at the focal point of all of its ordinances. At its basis lies the concept, as the Federal Constitutional Court previously pronounced (BVerfGE 2, 1 [12]), that human beings possess an inherent worth as individuals in order of creation which uncompromisingly demands unconditional respect for the life of every individual human being, even for the apparently socially "worthless," and which therefore excludes the destruction of such life without legally justifiable grounds. This fundamental constitutional decision determines the structure and the interpretation of the entire legal order. Even the legislature is bound by it; considerations of socio-political expediency, even necessities of state, cannot overcome this constitutional limitation (Decisions of the Federal Constitutional Court, 1, 14 36). Even a general change of the viewpoints dominant in the populace on this subject - if such a change could be established at all - would change nothing. The Federal Constitutional Court which is charged by the constitution with overseeing the observance of its fundamental principles by all organs of the state and, if necessary, with giving them effect, can orient its decisions only on those principles to the development of which this Court has decisively contributed in its judicial utterances. Therefore, no adverse judgment is being passed about other legal orders "which have not had these experiences with a system of injustice and which, on the basis of an historical development which has taken a different course and other political conditions and fundamental views of the philosophy of state, have not made such a decision for themselves" (BVerfGE 18, 112 [117]).

E.

On the basis of these considerations, s. 218a of the Criminal Code in the version of the Fifth Statute to Reform the Criminal Law is inconsistent with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that it excepts interruption of pregnancy from punishability if no reasons are present which, according to the present opinion, have standing under the ordering of values of the Basic Law. Within this framework, the nullity of the provision is to be determined. It is a matter for the legislature to distinguish in greater detail the cases of indicated interruption of pregnancy from those not indicated. In the interest of legal clarity, until a valid statutory regulation goes into effect, it appeared necessary, under s. 35 of the Statute for the Federal Constitutional Court, to issue a directive, the contents of which are obvious from the tenor of this judgment.

There is no occasion to declare further provisions of the Fifth Statute to Reform the Criminal Law to be invalid.

Extracts from the Dissenting Opinion of Justice Rupp von Brunneck and Justice Dr. Simon

The life of each individual human being is self-evidently a central value of the legal order. It is uncontested that the constitutional duty to protect this life also includes its preliminary stages before birth. The debates in Parliament and before the Federal Constitutional Court dealt not with the "whether" but rather only the "how" of this protection. This decision is a matter of legislative responsibility. Under no circumstances can the duty of the state to prescribe punishment for abortion in every stage of pregnancy be derived from the constitution. The legislature should be able to determine the regulations for counselling and the term solution as well as for the indications solution. A contrary construction of the constitution is not compatible with the liberal character of the fundamental legal norms and shifts the competence to decide, to a material extent, onto the Federal Constitutional Court (A). In the judgment on the Fifth Statute to Reform the Criminal Law, the majority neglects the uniqueness of abortion in relation to other risks of life (B.I.1. = p. 671 et seq.). It insufficiently appreciates the social problematic previously found by the legislature as well as the aims of urgent reform (B.I.2. p. 673 et seq.). Because each solution remains patchwork, it is not constitutionally objectionable that the German legislature - in consonance with the reforms in other western civilized states (B.III. = p. 683 et seq.) - has given priority to social-political measures over largely ineffective penal sanctions (B.I.3.-5. - p. 675 et seq.). The constitution nowhere requires a legal "condemnation" of behaviour not morally respectable without consideration of its actual protective effect (B.II. = p. 681 et seq.).

…

b) Translation of the Abortion II Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 88, 203

Headnotes:

1. The Basic Law imposes a duty on the state to protect human life, even the unborn human life. This duty flows from Article 1.1 of the Basic Law. Its content and - based on this - its extent are further determined by Article 2.2 of the Basic Law. Human dignity inheres already in the unborn human life. The state law has to set the stage for its development, respectively for a right to life for the unborn. This right exists without regard of the mother's acceptance of the unborn child.

2. The duty to protect the unborn human life relates to the individual life, not only to human life in general.

3. There is a duty to protect the unborn life, against its mother as well. Such a protection is only possible if the legislator generally bans her from an interruption of pregnancy, therewith imposing an "in principle" statutory duty on her to carry the child to term. The general ban from interruption of pregnancy and the "in principle" duty to carry the child to term are two intrinsically tied aspects of the protection required under constitutional law.

4. There must be an "in principle" ban from the interruption of pregnancy for its entire duration because it must be regarded as in principle legally wrong (Confirmation of BVerfGE 39, 1 [44]). The right to life of the unborn child must not, although just for a limited period of time, be given over to the legally unbound decision of a third party, even if it is the mother.

5. The extent of the duty to protect the unborn human life is to be determined with regard to the importance and vulnerability of the object of legal protection on the one hand and conflicting legal interests on the other hand. As conflicting legal interest regarding the right to life of the unborn child there is to consider the pregnant woman's right to life and to physical integrity (Article 2.2 of the Basic Law) as well as her right to personality. All these rights of the pregnant woman are based on her right to human dignity. But for the killing of the unborn child that goes along with the interruption of pregnancy, the pregnant woman cannot rely on a legal position under Article 4.1 of the Basic Law.

6. To comply with its duty to protect the unborn life, the state has to take sufficient normative and *de facto* action leading to an adequate and efficient protection while considering conflicting legal interests (prohibition of insufficient means). Therefore a concept of protection is required combining pre-emptive and repressive elements of protection.

7. The woman's basic rights do not justify to generally suspend her duty to carry the child to term, even if it is just for a certain period of time. But the woman's basic rights lead to the effect that under certain exceptional circumstances it might be permissible or in some cases even required, not to impose such a statutory duty. It is up to the legislator to determine these exceptional cases with full details, according to the criterion of unreasonableness. Therefore there must be given burdens, that require such an extent of sacrifice, that the woman cannot be expected to accept them (Confirmation of BVerfGE 39, 1 [48 seq.]).

8. The prohibition of insufficient means does not allow for abstaining from the means of criminal law and its protective effects for human life.

9. The state's duty to protect also includes the protection from threats for the unborn human life, emanating from influences exerted by members of the pregnant woman's family or of her social environment. It also includes the protection from threats emanating from the present and foreseeable living conditions of the woman and her family, countervailing her willingness to carry the child to term.

10. Furthermore the duty to protect obliges the state to maintain and to foster the public awareness of the unborn human life's right to be protected.

11. The legislature may express the legal condemnation of the interruption of pregnancy required by the Basic Law through measures other than the threat of punishment, depending on whether there is a medical indication, which has to be determined by a third party. Constitutional law allows for a concept of protection that in the early stages of an unwanted pregnancy focuses on a counselling programme for the pregnant woman to make her carry the child to term.

12. Such a counselling programme requires a regulatory framework that provides for beneficial premises, encouraging the woman to act for the benefit of the unborn life. The state bears the full responsibility for its implementation.

13. The state's duty to protect requires the medical attendance to secure the protection of the unborn life although the necessary medical attendance is primarily arranged for in the woman's interest.

14. To legally classify the existence of a child as a cause of damage is out of the question under constitutional law (Article 1.1 of the Basic Law - GG). This implication not to take the obligation to support a child as damage.

15. Interruptions of pregnancy that are executed according to the counselling programme, without diagnosis of an indication, may not be declared as being justified (not contrary to law). As an indispensable legal requirement an exception from a legal provision can only have inherent justifying effects, if the state determines the incident of its preconditions.

16. The Basic Law does not allow for granting a legal claim to payment against the compulsory health insurance for an interruption of pregnancy that is not proved to be legal. In contrast the granting of social aid for abortions that are not punishable and that are executed according to the counselling programme is in accordance to constitutional law where there is a need for pecuniary help. This is also true for continued payment.

17. The principle that the federal states have the power to organize the implementation of Federal laws has to apply without exemptions if a regulation of Federal law only provides for a state's task that is to perform by the federal states without making detailed arrangements that could be executed by the administration.

Order of the Second Senate of 28 May 1993 - 2 BvF 2/90 and 4, 5/92 -

Facts:

The matter submitted for judicial review is primarily the question whether several different criminal, social-insurance related and organizational regulations concerning the interruption of pregnancy comply with the state's duty under constitutional law to protect the unborn human life. The provisions are either part of the new regulations in the Fifth Statute to Reform the Criminal Law and in the Statute supplementing the Reform of the Criminal Law or part of the statute for the benefit of pregnant women and family benefits that was passed for reunified Germany just after the reunion. The new regulations in the Fifth Statute to Reform the Criminal Law and in the Statute supplementing the reform of the Criminal Law were initiated by the Federal Constitutional Court's judgment of 25th February 1975 (BVerfGE 39, 1).

According to the Fifth Statute to Reform the Criminal Law of 18th May 1976 anyone who interrupts a pregnancy after the 13th day following conception shall be punished (s. 218.1, 3 sentence 1, s. 219d of the Criminal Code, old version).

But within a fixed time limit the interruption of pregnancy is not punishable if it is performed by a physician with the consent of the pregnant woman and if, according to the judgment of medical science, the interruption is indicated to avoid specific extra legal emergencies for the pregnant woman (medical indications for the interruption of pregnancy).

Furthermore, although the interruption of pregnancy is not indicated, the pregnant woman is not punishable if a physician performs the abortion within 22 weeks after conception and after undergoing counselling in terms of s. 218b of the Criminal Code (StGB), old version (s. 218.3 sentence 2 of the Criminal Code, old version).

If these conditions are not fulfilled, however, the court may abandon the woman's penalty provided she was in a specific trouble at the time of the surgical intervention (s. 218.3 sentence 3 of the Criminal Code, old version).

If so, only the consulted physician will be punished. To the physician, however, stricter rules apply: A physician who interrupts a pregnancy shall be punished if he or she performs the abortion without making sure that the pregnant woman has received social and medical counselling at a counselling centre and by a physician, at least 3 days before the abortion. He or she is also punishable for interruption of pregnancy without counselling, if there is a medical indication for the abortion. Furthermore, even if there is a medical indication, anyone is punishable for interruption of pregnancy if the indication is not confirmed in writing by a second physician (s. 219 of the Criminal Code, old version).

Social and medical counselling may also be done by the physician who speaks out on the indication; the medical counselling may also be done by the physician performing the abortion. The pregnant woman is not punishable under ss. 218b, 219 of the Criminal Code, old version.

The Statute supplementing the Reform of the Criminal Law of 28th August 1975 (BGBl. I p. 2289) aims to support the reform efforts of the Fifth Statute to Reform the Criminal Law by accompanying socio-political measures (see BTDrucks. 7/376 p. 1). It is following an initiative of the social democratic faction and the liberal faction (BTDrucks. 7/376), resuming a government draft of 1972 (BTDrucks. 104/72). The draft i.a. provides for financial compensation from the compulsory health insurance in case of an interruption of pregnancy, if it is performed by a physician.

Extract from the Grounds:

…

D. I.

…

(The explanations given in paragraph I. list the core statements of the Abortion I decision (BVerfGE 39, 1). For details it is referred to this decision, see p. 185-188.

II.

After all, the legislature may express the legal condemnation of the interruption of pregnancy required by the Basic Law through measures other than the threat of punishment, depending on whether there is a medical indication, which has to be determined by a third party. Constitutional law allows for descending to a concept of protection that, in the early stages of pregnancy in case that unwanted, focuses on consulting service for the pregnant woman to make her carry the child to term.

The legislator's change in protection concept regarding the statute for the benefit of pregnant women and family benefits was tenable.

…

4. To pay tribute to a pregnant woman, the state is allowed to try to convince her of not abdicating from her responsibility towards the child other than by threat of punishment. The state is allowed to rather, use the means of individual counselling, appealing to her responsibility towards the unborn child, financial and social support, including providing the information needed.

The legislator may assume that it is rather prejudicial to achieving this aim, if a third party is asked to evaluate the woman's motivation for regarding the birth giving as being unacceptable.

5. If the legislator leaves the final decision on whether an interruption of pregnancy should be performed to the women who undergo the counselling and if the legislator provides for the possibility of medical attendance, should the situation arise, he may arguably demand of the pregnant woman to undergo the counselling and to reveal her motivations.

…

III.

If the legislator, in compliance with his duty to protect, changes his protection concept to a counselling programme, protection for the unborn human life primarily results from pre-emptive measures, i.e. counselling with the objective to convince the pregnant woman to carry the pregnancy to term.

The counselling concept aims at strengthening the woman's sense of responsibility. This is because in the end it is the woman who decides on whether the interruption of pregnancy will be performed and therefore she is the primarily responsible person, although her family and her

social environment as well as her physician bear a certain responsibility, too (ultimate responsibility). Therefore, some basic conditions have to be fulfilled, in order to encourage the woman to decide in favour of the unborn life.

If there is no medical indication, which is required for an interruption of pregnancy, it is only on these conditions that the consulting programme can be considered to protect the unborn life (1.). But it is not acceptable to declare interruptions of pregnancy that are not medically indicated to be justifiable (not contrary to law), if they were performed by a physician on demand of the pregnant woman, after counselling and within the first twelve weeks of pregnancy (2.). However, the legislator is not obliged to follow the general prohibition of interruption of pregnancy without exception. If the counselling programme's effectiveness requires so, he may exclude certain circumstances (3.).

…

2. The implementation of the counselling concept aims at making sure that a woman does not face legal sanctions if she, after undergoing mandatory counselling, asks for an interruption of pregnancy and if this interruption is performed by a physician within the first twelve weeks of pregnancy, even if there is no medical indication. This statutory effect can only occur, if the legislator excludes those cases from the elements of crime under s. 218 of the Criminal Code; they may not be declared to be justified (not illegal).

a) If the constitution only allows for an interruption of pregnancy under specific exceptional circumstances, criminal law cannot provide a wider range of circumstances under which an interruption of pregnancy is considered to be allowed. The state law has to confirm and to clarify the prohibition of interruption of pregnancy under constitutional law.

b) Interruptions of pregnancy that are executed according to the counselling programme, without diagnosis of an indication, may not be declared as being justified (not contrary to law). As an indispensable legal requirement an exception from a legal provision can only have inherent justifying effects, if the state requires the incident of its preconditions to be determined, whether by the court or by a third party in whom the state may trust and whose decision is subject to a certain public control.

   The legislator must not declare the interruption of pregnancy to be justified if he cannot provide for regulations of medical indication. The legislator's counselling concept does not allow for the recognition of a general emergency as a medical indication because doing so could hinder the counselling's effectiveness. This is why in those cases a justification is not possible.

   …

   cc) The protective effects of the counselling programme do not depend on whether the woman's demand after counselling justifies an interruption of pregnancy. There is no evidence that the counselling can be effective only if the woman is assured that an interruption of pregnancy after undergoing the counselling will be legally approved.

> To the contrary, it would undermine the objective of the counselling to protect unborn life if the legal order would approve of every demand for an interruption of pregnancy in any event. This is because the counselling could not strengthen the woman's responsibility, if her decision in favour of an interruption after counselling was approved in any event.

3. To declare the interruption of pregnancy not to be punishable under certain conditions, allows to uphold the in principle prohibition of an interruption of pregnancy in the other areas of law.

At this, the counselling concept requires to provide such conditions that do not prevent the woman from being willing to accept the counselling that aims at protecting a life, from revealing her conflict and from responsibly contributing to a solution in a responsible manner.

This is why the woman must face a law that makes the acceptance of counselling preferable, to avoiding it and switching to illegality. Beyond the decision to make the interruption of pregnancy not punishable, the legislator must assure that emergency assistance by a third party in favour of the unborn child is not justifiable, if it aims to undermine the woman's and the physician's action. The woman must also be enabled to conclude a contract with a physician for an interruption of pregnancy that is classed as binding (see D.V.6.). Furthermore she needs legal protection against an eventual need to reveal the matter of her interruption of pregnancy and the reasons for it, leading to an infringement of her right to personality (see E.V.3.b and 4.b).

4. After all, the counselling programme makes an interruption of pregnancy, chosen by the woman after undergoing the counselling, illegal. The counselling concept cannot provide the woman with a legal justification as considering her being in an emergency situation because this would contradict its protection concept. This is just and reasonable and does not make the woman a bare object of the counselling concept. The counselling concept takes the woman serious as an acting person. It tries to persuade her of protecting the unborn life and expects her to exhibit responsible cooperation. It provides for conditions that attach much value to the legal position of the woman (see above, 3.). These conditions avoid any legal prejudice that could prevent the woman from undergoing the counselling and conversation with the doctor. It is only beyond these conditions that the "in principle" prohibition of an interruption of pregnancy must apply. That means, for example, that for those interruptions of pregnancy which are performed in accordance with the counselling programme, cannot be granted all those legal benefits that can be granted for legal abortions.

IV.

If the legislator chooses the counselling concept, the duty to protect the unborn human life also implicates certain limits for him concerning the legal organization of the counselling programme (see above III.1.a). This programme is of special importance for the protection of human life because its main focus lay on preventive protection. This is why the legislator, in light of the prohibition of insufficient means, must provide for effective and sufficient regulations to make a woman who is considering an interruption of pregnancy carry her child to term.

Those provisions must be imposed for the subject matter of the counselling (1), its performance (2.) and its organization, including the participating persons (3). It is only under these conditions that the legislator may assume the counselling programme to be of protecting effect for life.

1. As regards to the content of the counselling, the legislator may assume that counselling can only be effective in protecting the unborn life, if it is not focused on results. In order to succeed, the counselling must aim at gaining the woman's cooperation in search of a solution. This also justifies the desistance from forcing the woman to discuss and to co-operate or from committing her to identify herself for the counselling.

The counselling is to encourage and not to intimidate the woman; to inspire her with sympathy and not to teach her; to strengthen the woman's responsibility and not to dominate her. This makes high demands on the counselling programme and the persons implementing it. Therefore it requires respective statutory provisions.

a) If the pregnant woman's responsibility for the unborn life is to be the basis of a conscientious decision, the woman must be aware of this responsibility she bears due to the counselling concept. In doing so she must appreciate the unborn child's right to life that it is entitled to, even against its mother. That means, the woman must be aware that even in the early stages of pregnancy, the unborn life is specially protected by the state law. Consequently the woman must be aware that the state law only allows for considering an interruption of pregnancy under exceptional circumstances. This is if the woman faces heavy and exceptional burdens, exceeding the sacrificial limit. The consultant must assure his or herself of this awareness and must explain possible misconceptions in an understandable way.

b) Science has developed methods for assisting in conflict resolution; those are also practiced. A concept that aims at guaranteeing the protection of the unborn human life in the first twelve weeks of pregnancy primarily by means of counselling, cannot do without it. This is why every counselling must be aimed at holding a conversation whereby applying the methods of counselling. As a first precondition, consultants must have the respective skills and a sufficient amount of time for every pregnant woman. Furthermore, from the very beginning counselling is only possible, if the pregnant woman communicates to the consultant her reasons for considering an interruption of pregnancy.

   Although the nature of counselling excludes the enforcement of the pregnant woman's willingness to communicate and to cooperate for a counselling that aims to meet the goal of protecting life, it is indispensable to reveal the reasons for considering an interruption of pregnancy.

   To ask this of a pregnant woman does not lead to a counselling process that is focused on results. Neither does it depreciate the woman's responsibility. The crucial point is that the counselling concept dispenses from medical indications to be determined by a third party in order to verify and evaluate the woman's reasons for the interruption. It also dispenses from sanctioning the woman's decision against the child if it is taken

after undergoing the counselling. If in context of such a concept the counselling is meant to make the woman disclose her reasons for the interruption, this is just based on the assumption that the pregnant woman bears a responsibility and that she is able to make a conscientious decision.

c) To comply with the duty to protect the unborn life, counselling must include information about possible social and other supporting measures provided by the state. Furthermore, for claiming these benefits the woman must get the most effective support. This also applies to third parties, for example churches or foundations providing any means to protect life. Only in doing so, it can be guaranteed that all aid especially reaches those women who need it most, fostering their willingness to carry the child to term.

d) The counselling programme would not provide a sufficient solution to its task if it did not take into consideration those persons associated with the pregnant woman in particular the father of the unborn child and the parents of an underage pregnant person who are in charge of supporting her and could possibly influence her decision for or against the child.

This is why each consultant has to clarify whether it seems appropriate to consult the father, other family members or persons of trust and whether the pregnant woman can be convinced to do so.

But, in case that from the outset the pregnant woman is accompanied by such an associated person, it is necessary to check whether this person must be expected to take influence on the pregnant woman in a damaging way. This would make it necessary to ask the pregnant woman to undergo the counselling again without any company.

…

e) The interruption of pregnancy must not immediately follow the education and the counselling. In many cases the woman might only be able to deal with the issues of counselling after a certain period of time. The woman must be given the opportunity to talk to her persons of trust about the decision. This is if the decision is to be taken in a responsible manner (see BVerfGE 39, 1 [64]).

3. If the state seeks to protect the unborn human life by means of a counselling programme, it bears the full responsibility for its implementation. It is on the state to assure an appropriate range of consulting programmes, and it must not leave it to any private organization to uncoordinatedly implement it, pursuant to any religious, ideological or political objective.

…

V.

The protection concept of a counselling programme also regards the physician, who is liable to the woman for advice and support from the medical perspective. The physician must not just perform an interruption of pregnancy but has to bear the responsibility for his action. He is bound to the protection of health and life. This is why he must not straight away assist in an interruption of pregnancy.

1. In particular the statutory provisions applying to a physician performing an interruption of pregnancy can begin with the physician's general duties in performing a surgical intervention. But his general duties of raising an indication, of education and counselling are to adapt to the characteristics of an interruption of pregnancy according to the counselling programme.

On the other hand, in order to protect the unborn life there must be limits to medical examination and information. This is to meet the danger of sexual choice that is disapproved by the constitution. This is why in the early stages of pregnancy the gender of the child must not become known to anyone else but the physician and his staff, unless the information was medically indicated.

…

c) As responsible medical action is legally bound to the protection of the unborn life, the physician must take into consideration, under which circumstances the state law considers an interruption of pregnancy not to be illegal.

Therefore it needs a medical report on the woman's situation, in compliance with law, that can serve as a basis for the exchange with the woman and for the physician's own decision. In doing so, the physician must inform the woman on the decisive aspects determining his decision.

…

2b) If the physician considers the abortion to be justifiable from the medical point of view, he must be able to assist in it without the threat of punishment. If he considers the abortion not to be justifiable from the medical perspective he is obliged to refuse his assistance according to his general duties. But sanctions for the infringement of those duties are hard to enforce in legal practice. The constitutional duty to protect the unborn life does not require to employ criminal law in case of an infringement.

To comply with the duty to protect it seems to be sufficient but also necessary, that the mentioned commitment and its enforcement is regulated in the medical code of conduct; this must happen irrespective of any criminal sanction.

…

6. The duty of the State to protect the unborn life does not require that contracts are classed as non-binding which were concluded with physicians and hospitals for interruptions of pregnancy which are not punishable under the (new) counselling programme. The program rather requires that the mutual tie of obligations between physician and patient take the form of a legal

relationship so that all obligations are fulfilled for valid legal reasons. Irrespective of any specific contractual consequences, ss. 134, 138 of the Civil Code are inapplicable. Doctors and hospitals only take part in abortions on the basis of a valid contract which safeguards their claim for payment and outlines their duties. It is in particular the doctor's duty towards the unborn child and the patient's health which needs contractual safeguards. As a consequence, faulty performance of the duties to provide counselling and treatment must in principle be able to trigger contractual and tortious sanctions.

However, in the light of the Constitution this result needs to be differentiated. A civil law sanction for faulty performance of the contract or for tortious infringement of the patient's physical integrity is basically necessary; this entails not only the duty to pay back any wasted fees, but also the duty to compensate for damage under the provisions of ss. 823, 847 of the Civil Code, including compensation for pain and suffering resulting from a failed abortion or from the birth of a incapacitated child. But as a result of Article 1.1 of the Basic Law, the child's existence cannot legally be classified as a damage. The duty of all public bodies to respect every human being for its own sake prohibits maintenance for a child to be classified as a damage. In the light of this fact, the case law of the civil courts on liability for medical mistakes in counselling or in performing failed abortions needs to be reconsidered (see for abortion BGHZ 86, 240 et seq.; 89, 95 et seq.; BGH NJW 1985, 671 et seq.; VersR 1985, 1068 et seq.; VersR 1986, 869 et seq.; VersR 1988, 155 et seq.; NJW 1992, 1556 et seq.; for sterilisations see BGHZ 76, 249 et seq.; 76, 259 et seq.; BGH NJW 1984, 2625 et seq.). However, the doctor's duty to pay damages to the child for damage caused in the course of an unskillfully attempted and thus failed abortion remains unaffected (see BGHZ 58, 48 [49 et seq.]; BGH NJW 1989, 1538 [1539]).

VI.

The state's duty to protect the unborn life also includes the protection from threats for the unborn human life, emanating from influences exerted by third parties such as members of the pregnant woman's family or of her social environment (see above, I.2 and III.1.b).

This gains special importance in the case of descending to a concept of protection that in the early stages of an unwanted pregnancy focuses on a counselling programme for the pregnant woman to make her carry the child to term.

1. This concept's effectiveness particularly requires the woman's protection against any unreasonable demands, leading to difficulties for the woman or imposing pressure upon her to interrupt the pregnancy. Such influences are also able to undo the counselling's success if the persons of her social environment press the woman even harder to make her interrupt the pregnancy, referring to impunity and the woman's responsibility, whereby abdicating from their own responsibility.

…

2. a) Thus, it would not comply with a counselling concept aiming at the protection of the unborn life, just to call upon the respective persons' responsibility. Rather one needs to work towards new statutory provisions or towards the implementation of existing norms guaranteeing the framework conditions to ask for the family's responsibility as well as for the social environment's consideration (see above I.3.a).

b) Furthermore there is an indispensable requirement for certain commands and prohibitions for family members under penalty of law. On the one hand these commands and prohibitions need to aim at ensuring that the respective persons give the necessary and reasonable support to the woman, at least if the denial was condemnable. On the other hand they need to aim at preventing these persons from pressing the woman to interrupt the pregnancy. Thereby the criminal liability may depend on whether an interruption of pregnancy was performed or not. Provisions of this kind would link to considerations of s. 201 of the 1962 Draft Statute to Reform the Criminal Law (see BRDrucks. 200/62 p. 45).

E.

Using these criterions to check the questioned provisions of the statute for the benefit of pregnant women and family benefits, it turns out that by descending to a counselling concept for the first twelve weeks of pregnancy, which is acceptable in principle, the statute does not sufficiently comply with its duty to effectively protect the unborn life, emanating from Article 1.1, in conjunction with Article 2.2 sentence 1 of the Basic Law. In contrast, the concerns about legal competence that were raised over particular regulations are only partly convincing as regards s. 4 of the Fifth Statute to Reform the Penal Law.

1. S. 218a.1 of the Criminal Code (new version) that states that abortions performed by a physician on demand of the pregnant woman after undergoing a counselling according to s. 219 of the Criminal Code (new version) and within the first twelve weeks of pregnancy are not "illegal", does not comply with the duty to protect the unborn human life (Article 1.1 Basic Law, in conjunction with Article 2.2 sentence 1 of the Basic Law) and is null and void. …

2. If s. 218a.1 of the Criminal Code (new version) establishes a general justification for interruptions of pregnancy, its requirements in respect of content do not comply with the constitutional standards (see above D.I.2.c) bb)). A justification of an interruption of pregnancy can only be possible, if a specified emergency occurs - which has to be determined. The emergency must be so severe, that the pregnant woman cannot be expected to carry the child to term, comparable to cases of medical, embryopathical or criminal indication. S. 218a.1 of the Criminal Code (new version) does not require such an emergency. …

II.

S. 219 of the Criminal Code (new version) does not comply with the requirements of the unborn human life's protection (Article 1.1, Article 2.1 of the Basic Law); therefore it is contradicting the Basic Law and is void.

The counselling is of fundamental importance within the protection concept of the statute. The legislator must organize the counselling as a public duty in a way that the state can assume

full responsibility for its implementation (see above D.IV.3.). In doing so the legislator must regulate the aim and the content of the counselling as well as the procedure to be observed in compliance with the principles derived from the constitution (see above D.IV.1. and 2.). Given the importance of the object of legal protection and given the high level of its endangerment at the time when the pregnant woman is considering an interruption of pregnancy and when she is therefore frequenting a counselling service, the legislator must regulate task and implementation of the counselling in a clear and coherent way enabling to understand the law without needing explanations.

1. The regulation for a pregnant woman's counselling in case of an emergency or conflict situation (s. 219 of the Criminal Code, new version) is already insufficient under constitutional law because the counselling which is conceptually required and which aims to protect the life is not guaranteed by sufficient public competences and duties as regards the organization and surveillance of the counselling institution; based on this regulation the state cannot comply with its responsibility for offering such counselling institutions that leave one with the expectation of effectiveness according to its aim and content.

2. With this in mind there is no need to finally decide on whether the provisions of s. 219 of the Criminal Code (new version) on aim, content and implementation of the counselling bear up against a control of constitutionality. However, considering that there is a need for a new statutory law anyway, the new provision must be conceptualized in a way that it is clear and coherent by itself. It must be possible to apply it without needing further explanations, so that it complies with all the constitutional requirements from the state's duty to protect as stated under D.IV.1.and 2.

…

d) S. 219.1 sentence 3 of the Criminal Code (new version) describes the decision that the woman has to take after undergoing the counselling as a "matter of conscience". The legislator thereby obviously seeks to refer to a phrasing by the Federal constitutional Court (see BVerfGE 39, 1 [48]), stating that the decision in favour of an interruption of pregnancy may be considered a conscientious decision that has to be respected. However, the woman who decides in favour of an interruption of pregnancy after undergoing the counselling cannot claim an infringement of her basic right emanating from Article 4.1 of the Basic Law for the involved killing of the unborn child. To meet the requirements by constitutional law the statute can only mean a conscientiously taken and therefore estimable decision. This is to be clarified accordingly.

III.

Irrespective of the lack of constitutionality in s. 218a.1 and s. 219 of the Criminal Code (new version), the regulation in the statute for the benefit of pregnant women and family benefits concerning interruptions of pregnancy according to the counselling concept do not comply with the duty to protect the unborn human life. This is because the legislator failed to determine the special commitments of the woman and her family to the necessary extent (see D.VI.2.) and failed to put it under the threat of punishment. The legislator has to catch up on the missing regulations together when doing the readjustment that became necessary after the invalidation of s. 218a.1, 219 of the Criminal Code (new version).

IV.

Article 15 no. 2 of the Statute for the benefit of pregnant women and family benefits is contradicting Article 1.1, in conjunction with Article 2.2 sentence 1 of the Basic Law and is therefore void as far as the provision in Article 4 of the Fifth Statute to Reform the Penal Law concerning the Federal Statistics on interruptions of pregnancy is nullified thereby.

1. a) The legislator does not fulfil his duty to protect the unborn human life only by enacting a law regulating interruptions of pregnancy, aiming at this kind of protection and being appropriate to guarantee the degree of protection required by the Basic Law, according to his estimation which is acceptable from the constitutional law perspective.

   Rather, because of his duty to protect he remains responsible for the effectiveness of the law in terms of ensuring reasonable and by itself effective protection against interruptions of pregnancies, taking into consideration other legal interests. …

   He must therefore frequently and appropriately reassure himself, whether the law really has the expected protective effects or whether deficits can be noticed, in terms of the concept or its implementation, leading to an infringement of the prohibition of insufficient means (see BVerfGE 56, 54 [82 seq.]). One opportunity is a frequent report to the government. The duty to monitor exists as well and even more precisely after a change in the protection concept.

   …

2. According to this constitutional standard, the abolition of the previous provision on the Federal Statistics in Article 4 of the Fifth Statute to Reform the Penal Law is not incompatible with the duty to protect the unborn human life.

…

Indeed constitutional law did not require the legislator to retain the previous provision on the Federal Statistics unchanged. But he is denied to delete it without replacement. This deletion is void. A new regulation is necessary to comply with the duty to protect yet because the scope of the regulation does not reach out to the new Federal states, where previously it was only applicable because of an interim order of the senate (BVerfGE 86, 390 seq.).

V.

The provision of s. 24b of the Fifth Code of Social Law is compatible with the Basic Law (1. and 2. a). But it would contradict the Basic Law to grant a legal claim for benefits from the compulsory health insurance for the performance of an interruption of pregnancy which was not proved to be legal before in a way that meets the above-stated constitutional requirements (2.b.). In contrast the granting of social aid for abortions that are not sconced and that are executed according to the counselling programme is compatible with constitutional law where there is a need for pecuniary help. The same is true for continuous payment of wages (3. and 4.). The duty under constitutional law to protect the unborn human life does not conflict with the granting of financial benefits from the social health insurance for an interruption of pregnancy because of the general indication of an emergency according to the previous law. If it was compatible

with constitutional law on other aspects to grant benefits from the social insurance even if the interruption of pregnancy was based on s. 218a. 2 no. 3 of the Criminal Code (old version), does not need to be decided on (5.).

…

b) If the legality of the interruption of pregnancy is not proven, the duty under constitutional law to protect life prohibits an interpretation of s. 24b of the Fifth Code of Social Law (SGB V) that allows for the granting of benefits from the social insurance if these benefits are equal to those granted for legal abortions. The state under the rule of law may only pay for an act of killing if the killing is legal and if the state insured itself of its legality in a way that is complying with standards of reliability under the rule of law.

…

cc) According to the protection concept of the counselling programme the pregnant woman, after undergoing a social and medical counselling, bears the responsibility of whether a punishable interruption of pregnancy takes place or not. But the counselling programme does not require the acceptance of this responsibility by social law. It does not require to grant the same social benefits to women going through with a non-criminal interruption on the conditions of the counselling programme as to those for whom a medical, embryopatical or criminal indication, i. e. a justification has been notified.

…

dd) The granting of social benefits for interruptions of pregnancy that are not punishable, indeed but that are not proven to be legal is contradicting the state's duty to protect the unborn human life because it would also damage people's general awareness of an unborn child having a right to life even against its mother and the awareness that an interruption of pregnancy is wrong in principle.

…

c) After all, the constitution forbids the granting of benefits from the social insurance for the medical performance of an illegal interruption of pregnancy and the medical aftertreatment provided there were no complications.

…

3. a) After all the state is in principle prohibited by constitutional law from fostering interruptions of pregnancy that are not proven to be legal by granting social benefits or by setting laws granting a claim for benefits against a third party. The state is only allowed under constitutional law to breach this principle, as far as this is required by the concept for the protection of the unborn human life for its effectiveness. This is the case if only the performance of an interruption of pregnancy by a physician is in question.

If the state law requires the consultation of a doctor, on the one hand to protect the pregnant woman's health and on the other hand to protect the unborn child, this must

not fail because of a lack of financial means. In this case the state must not be prevented from providing these means by itself.

b) It is up to the legislator to provide regulations on how and under which circumstances the state should in case of the woman's need take over the costs, in case the concept of protection of the counselling programme requires so. …

4. In the law of wage continuation it is not required to exclude those interruptions of pregnancy which are excluded from the elements of crime in s. 218 of the Criminal Code (new version), from the duty to indemnify.

…

It does not contradict the duty to protect unborn human life under constitutional law, if those principles of employment law are interpreted in a way that a duty of wage continuation also exists, if the unemployability is consequence of an interruption of pregnancy under the counselling programme; under constitutional law it is not objectionable to also consider those cases of unemployability to be through no fault of her own, according to s. 1.2 of the German Law on Continuation of Payments for Employees on Medical Leave (LFZG).

…

5. a) The duty under constitutional law to protect Life does not prevent the legislator from granting benefits from the compulsory health insurance for an interruption of pregnancy that is not illegal, as it is stated in s. 24b of the Fifth Code of Social Law, following s. 200f RVO. This also applies to the regulations in ss. 218a seq. of the Criminal Code (old version), which are applicable until 15 June 1993 (see II.1. of the ruling).

…

Extracts from the dissenting opinion of Vice President Judge Mahrenholz and Judge Sommer

…

As for the Senate it is also out of question for us that there exists a state's duty to protect the unborn human life from its very beginning. We share the senate's opinion that the duty to protect does not prevent the legislator from changing to a protection concept that focuses on the counselling of the pregnant woman, abstaining from a threat of punishment determined by indication and from determining the elements of an indication.

But we are of the opinion that in fact the final responsibility of the woman for an interruption in the early stages of pregnancy, that is generally recognized by the senate as a last statutory means if the woman underwent counselling, is necessary to comply with the woman's basic rights and the duty to protect is therefore limited (I.).

In our opinion an effective protection for the unborn life in the counselling programme just calls for a normative clarification on the admissible and non-admissible elements of an interruption of pregnancy; thereby the Basic Law at least allows for a justification of the abortion after undergoing a counselling (II.). From this it follows that s. 218a.1 of the Criminal Code is

in compliance with the constitution and that benefits from the compulsory health insurance for interruptions of pregnancy are not to be excluded from s. 24b of the Fifth Code of Social Law (III.)

According to the senate's opinion, for the whole duration of the pregnancy the woman is bound to carry the child to term. After undergoing a counselling this duty only ends, if there is a justification by statutory law, complying with the criterion of unreasonableness (see judgment, D.I.2.c). We don't agree to this statement. Regarding the triangle given by constitutional law, comprising the woman, the prenatal life and the state, the duty to protect, deriving from the basic law, only calls upon the state, not directly upon the woman. Duties, imposed by statutory law of the state in order to protect the prenatal life, must at the same time consider the basic rights of the woman.

Every statutory provision regulating the interruption of pregnancy therefore does not only need to be in accordance with Article 2.2, in conjunction with Article 1.1 of the Basic Law, but it also needs to comply with the woman's right to protection of and respect for her human dignity (Article 1.1 Basic Law), her right to physical integrity (Article 2.2 of the Basic Law) and her right to personality (Article 2.1 of the Basic Law) (see judgment, D.I.2.b).

Irrespective of the submissions under I. in our opinion the Basic Law does not demand to refuse any justification (as for the question of criminal law), if the unreasonableness of the demand to carry the pregnancy to term was not confirmed by a third party.

…

The senate is of the opinion that the provision of s. 218a.1 of the Criminal Code (new version) as a justification is unconstitutional, because it neither requires a situation of emergency or conflict making it unreasonable for the woman to carry the child to term nor does it further determine such a situation. Nor it makes the determination of justification by a third party a precondition (see judgment, E.I.2.). According to our submissions under I and II, we hold that s. 218a.1 of the Criminal Code (new version) is compatible with the constitution.

In our opinion payments by the social insurance for interruptions of pregnancy that are performed by a physician within the first twelve weeks after conception are not contradicting the Basic Law. However we don't consider the legislator to be constitutionally bound to include legal interruptions of pregnancy that are not medically indicated but performed by a physician, in the list of services covered by the compulsory health insurance. But if he does so, what is suitable considering the protection of the woman's health, he is required to assure the equal allocation of benefits of the community based on the principle of mutual solidarity, organized in the health insurance. Distinctions must be justified.

We would not be able to follow the majority of the senate's opinion that s. 24b of the Fifth Code of Social Law is not applicable to interruptions of pregnancy after counselling, even if those interruptions of pregnancy were not justifiable (what is the case according to the judgment). For as much as this we agree with the dissenting opinion of our colleague Böckenförde.

Against the leading submissions of the senate to involve the physician in the protection concept of the counselling programme (see judgment, D.V.) we object in two points.

1. In our opinion, against the senate's view, the duty under constitutional law to protect does not require the legislator to put the infringement of the doctor's duties in context of an abortion or the previous counselling and education under the sanction of punishment.

2. The subjects of the action do not provide a reason for the senate's submissions in the judgment, stating that the obligation to support a child can never considered to be a damage (see judgment, D.V.6.). They are an *obiter dictum* and moreover lack the necessary examination of the submissions by the 6th Civil Senate of the Federal Court of Justice, stating under which specified circumstances one may consider something to be a damage (BGHZ 76, 249 [253 seq.]; BGH, NJW 1984, 2625 seq.).

Extracts from the dissenting opinion of Justice Böckenförde

…

I cannot agree with the explanations in the judgment that benefits from the social insurance for such abortions (in the following: counselled abortions) are excluded by constitutional law (under E.V.2.b), partially anticipated in D.III.1.c). To decide on this is up to the legislator.

Thereby it is not the point that such benefits are demanded by the constitution - they are certainly not -, but whether such benefits are constitutionally forbidden from the very beginning.

…

2. For the law of social insurance that is subsequent law in this case, the question arises how to deal with this entity of counseled abortions regarding the granting of insurance benefits.

…

The senate assumes that it is a requirement under the constitutional duty to protect the unborn human life, to consider every such abortion because it is not proved to be legal and its legality cannot be proven, must be considered not justified and therefore as a tort and must be excluded from benefits of the social insurance. Such an exclusion might be a possible result of legislative action. But it cannot be derived from the constitutional duty to protect the unborn human life or any other constitutional provision, that it is a compulsory demand of the constitution, making every other solution an infringement of the constitution.

…

3. However, the objections against the senate's opinion do not mean that the constitution requires the financing of counseled abortions.

This would contradict the principle rightly emphasized by the senate that illegal abortions must not be directly or indirectly financed by the state because of the protecting effects for the unborn life.

…

4. …

The decisive action taken by the senate was, from a constitutional point of view, the descent to a protection concept of counselling. This descent seems to be generally acceptable in light of the constitutionally demanded protection for the unborn life. The reason is that the state's duty to protect aims at ensuring an effective protection of the unborn life by implementing normative rules and *de facto* measures. Therefore it is not sufficient, if there is indeed a regulation at normative level, aiming at a closed and stringent protection of the unborn life but this regulation is on for whatever reasons failing to be implemented into a *de facto* effective protection also for the individual human life. The reasons for that are explained in the judgment.

But if this way is considered to be acceptable to meet the state's duty to protect the unborn life - regardless of the necessary requirements for its particular form, - it must on the one hand be accepted in its needs and conditions of efficiency, thereby striking the balance with other legal positions and aspects. …

c) Physical Restraints on Patients - BVerfG, 24.7.2018, 2 BvR BVerfG, 24.7.2018, 2 BvR 309/15, http://www.bverfg.de/e/rs20180724_2bvr030915en.html

Explanatory Annotation

This decision of the Constitutional Court deals with the scope of the habeas corpus guarantees of Article 2.2 and 104.1 and 104.2 of the Basic Law. The first article generally protects personal liberty, i.e., the freedom of movement as the freedom to move away from where one currently is. Article 104 of the Basic Law complements Article 2.2 by providing a detailed procedural framework for the deprivation of liberty, e.g. and among other things, making any deprivation of liberty beyond "midnight of the next day" (for a theoretical maximum of 48 hours) subject to a court order (Article 104.2 of the Basic Law). The context here, however, is not criminal law or procedure. Instead, the habeas corpus issue raised by the applicants in the two joined cases before the Constitutional Court revolve around persons confined in a psychiatric hospital under a valid court order and, while there, being physically restrained by the use of five-and seven-point restraints respectively. In one case, this restraint had a statutory legal base, which, however, authorized the medical doctors of the institution to order such restraints under certain circumstances. The second applicant had been kept fully restrained (both legs and arms, chest, torso and head) for eight hours in a psychiatric hospital after having been found by the police highly intoxicated and after having been diagnosed as potentially suicidal. The legal basis for this was the general necessity clause of § 34 of the German Criminal Code.[26]

26 § 34 of the German Criminal Code reads: "A person who, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger." English text of German Criminal Code available at https://www.gesetze-im-internet.de/englisch_stgb/ (last accessed on 20.8.2019).

The Constitutional Court found a violation of Articles 2.2 and 104.1, 104.2 of the Basic Law in both instances. The main significance lies in the finding that the physical restraining of patients for more than just a short time constitutes as separate act of deprivation of freedom of such magnitude that it cannot be regarded as covered by the legal act authorizing institutionalizing in a psychiatric hospital and that therefore a specific legal basis for such restraints must be present (Article 104.1 of the Basic Law), which must spell out the conditions of the specific measures in a precise manner[27] and also adhere to the stipulated in Article 104.2 that such acts require a judicial decision, i.e., a decision by an independent judge authorizing the restraint[28]. The procedural framework set by the Constitutional Court for the legislative acts governing the authorization of such restraining measure and the judicial decision on which they are contingent is very strict. The Court recognized that in these instances procedural requirements ranging from full and comprehensive documentation of the measures to ensure subsequent legal protection and the proportionality of the measures[29], complementary authorization by a doctor and a one-to-one supervision by medical staff[30] to the adequate staffing of the judiciary to have judges available to exercise judicial oversight in a meaningful way[31] are the cornerstone of keeping such severe restraining measures under check and guard given that the circumstances are marked by an inherent lack of transparency and the affected individual is under total control of the medical institution and out of sight. The Constitutional Court also spent great care in ascertaining that the requirements defined by the Court are in full compliance with the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities.[32]

Translation of "Physical Restraints on Patients" judgment, BVerfG, 24.7.2018, 2 BvR 309/15, http://www.bverfg.de/e/rs20180724_2bvr030915en.html

Headnotes:

1. a) The use of physical restraints on patients constitutes an interference with their fundamental right to freedom of the person (Art. 2(2) second sentence in conjunction with Art. 104 of the Basic Law).

   b) Both the use of five-point and seven-point restraints that goes beyond mere short-term application constitutes a deprivation of liberty within the meaning of Art. 104(2) of the Basic Law that is not covered by a judicial order of confinement in a psychiatric hospital. A short-term application can generally be presumed where it is foreseeable that the measure will not last longer than approximately half an hour.

2. The regulatory duty following from Art. 104(2) fourth sentence of the Basic Law obliges the legislature to enact provisions that specify the requirement of a judicial decision in

27 BVerfG, 24.7.2018, 2 BvR 309/15, http://www.bverfg.de/e/rs20180724_2bvr030915en.html, para. 80.

28 Id. at paras. 93 et seq.

29 Id. at para. 84.

30 Id. at para. 83.

31 Id. at para. 96.

32 Id. at paras. 86-92.

procedural terms in order to give consideration to the specific characteristics of the different contexts in which deprivations of liberty are applied.

3. In order to ensure the protection of the persons deprived of their liberty by the use of physical restraints, it is necessary that on-call judges be available on all days of the week from 6:00 a.m. to 9:00 p.m.

3. a) The Judgment of the Munich Higher Regional Court of 4 February 2016 - 1 U 2264/15 - violates complainant no. II's fundamental right under Article 2(2) second and third sentences in conjunction with Article 104(1) and (2) of the Basic Law. The Judgment of the Munich Higher Regional Court of 4 February 2016 - 1 U 2264/15 - is reversed. The matter is remanded to the Munich Higher Regional Court.

b) […]

4. Pursuant to § 35 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG), the following is ordered:

a) In the *Land* Baden-Württemberg, physical restraint measures on persons confined under public law in psychiatric hospitals remain permissible until 30 June 2019 pursuant to § 25 of the Baden-Württemberg Act regarding Assistance and Protective Measures for Persons with Mental Illnesses.

b) In the Free State of Bavaria, physical restraint measures on persons confined under public law in psychiatric hospitals remain permissible until 30 June 2019 to the extent that they are indispensable to avert an immediate and serious danger posed by the persons concerned to themselves or to significant legal interests of others.

c) The following applies with regard to both *Länder*: The use of fivepoint or seven-point restraints is subject to the requirement that a judicial decision be obtained pursuant to Article 104(2) first sentence of the Basic Law, unless the restraints are only applied for a short period of time, where it is foreseeable that the measure will not last longer than approximately half an hour. After any such physical restraint measure has ended, the persons concerned must always be informed about the possibility of seeking a subsequent judicial review of the measure.

Facts:

The constitutional complaints, combined for joint decision, concern the constitutional requirements regarding the ordering of the use of physical restraints on persons confined under public law in psychiatric hospitals. In particular, they raise the question whether the use of physical restraints - strapping the persons concerned, who are on their back, to a hospital bed by using a special type of straps in order to largely or completely restrict their ability to move - constitutes a deprivation of liberty (*Freiheitsentziehung*) that requires a judicial decision (*Richtervorbehalt*). **[1]**

I.

[Excerpt from press release no. 62/2018]

[I.] Regarding constitutional complaint 2 BvR 309/15, the person concerned was confined in a closed psychiatric hospital and subjected to a five-point restraint - i.e. strapped to a hospital bed, with restraints securing all limbs and the stomach - based on repeated doctors' orders over the course of several days. The complainant, the guardian ad *litem* (*Verfahrenspfleger*) of the confined person, directly challenges the local court order authorising the use of physical restraints, and indirectly challenges § 25(3) of the Baden-Württemberg Act regarding Assistance and Protective Measures for Persons with Mental Illnesses (*Baden-Württembergisches Gesetz über Hilfen und Schutzmaßnahmen bei psychischen Krankheiten* - PsychKHG BW), on which the court order was based.

[II.] Regarding constitutional complaint 2 BvR 502/16, the complainant was subjected to a seven-point restraint - i.e. strapped to a hospital bed, with restraints securing both arms, both legs, the stomach, chest and forehead -; the use of restraints was ordered by a doctor, lasted for eight hours, and took place while the complainant was confined in a psychiatric hospital for the duration of approximately twelve hours altogether. The Bavarian Confinement Act (*Bayerisches Unterbringungsgesetz* - BayUnterbrG), which served as the legal basis for the temporary confinement of the complainant, does not contain specific provisions providing legal authorisation for ordering the use of physical restraints. The complainant took legal action against the Free State of Bavaria, seeking material damages and damages for personal suffering in relation to injuries caused by the physical restraint measure. The action was unsuccessful. His constitutional complaint challenges the decisions rendered in the liability proceedings against the state (*Amtshaftungsverfahren*).

[End of excerpt]

[…] **[2-13]**

II.

1. The constitutional complaint in proceedings 2 BvR 309/15, lodged by complainant no. I in his own name and in the name of the person concerned, directly challenges the order of the Ludwigsburg Local Court (*Amtsgericht*) of 4 February 2015, and indirectly challenges § 25(3) of the Baden-Württemberg Act regarding Assistance and Protective Measures for Persons with Mental Illnesses. The complainant essentially claims a violation of Art. 2(2) second sentence in conjunction with Art. 104(1) and (2) of the Basic Law (*Grundgesetz* - GG) and Art. 3(1) GG. **[14]**

[…] **[15-16]**

2. Complainant no. II claims that the challenged judgments of the Munich I Regional Court (*Landgericht*) of 27 May 2015 and of the Munich Higher Regional Court (*Oberlandesgericht*) of 4 February 2016 violate his fundamental rights and rights equivalent to fundamental rights (*grundrechtsgleiche Rechte*) under Art. 1(1) and (3), Art. 2(1) and (2) second sentence, Art. 20(3) and Art. 104(1) and (2) GG. **[17]**

C.

With regard to the challenged decision of the Munich I Regional Court, the constitutional complaint of complainant no. II is inadmissible. For the rest, the constitutional complaints are admissible. **[50]**

I.

The constitutional complaint in proceedings 2 BvR 309/15 is not inadmissible because, based on a reasonable interpretation, complainant no. I has lodged the constitutional complaint in his own name for the person concerned (1.), or because the person concerned was discharged from hospital after the constitutional complaint was lodged (2.). **[51]**

1. In his capacity as guardian *ad litem* in the confinement proceedings, complainant no. I is entitled to exercise, in his own name, rights of person concerned no. I, including for the purposes of constitutional complaint proceedings, as a procedural party by virtue of his office (*Partei kraft Amtes*). **[52]**

a) Constitutional complaint proceedings are, in principle, only admissible where complainants assert their own rights in their own name (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* - BVerfGE 10, 229 <230>; 21, 139 <143>; 27, 326 <333>; 51, 405 <409>; 65, 182 <190>). However, it is established that in exceptional cases, rights on behalf of others can be asserted in one's own name also in constitutional complaint proceedings (cf. BVerfGE 10, 229 <230>; 21, 139 <143>; 27, 326 <333>; 51, 405 <409>; 65, 182 <190>). This holds true, in particular, in cases where otherwise there would be a risk that judicial decisions could never be challenged by means of a constitutional complaint (cf. BVerfGE 77, 263 <269>). **[53]**

Due to the serious mental illness of person concerned no. I, such a risk is ascertainable in the present case. **[54]**

[…] **[55-57]**

2. The fact that the order authorising the use of physical restraints was rendered moot when person concerned no. I was discharged from hospital does not cancel the recognised legal interest in bringing constitutional complaint proceedings (*Rechtsschutzbedürfnis*). **[58]**

The admissibility of a constitutional complaint requires that there is a recognised legal interest in seeking a reversal of the challenged act of public authority or, at the very least, a finding of unconstitutionality (cf. BVerfGE 81, 138 <140>). The recognised legal interest must persist at the time when the Federal Constitutional Court renders its decision (cf. BVerfGE 21, 139 <143>; 30, 54 <58>; 33, 247 <253>; 50, 244 <247>; 56, 99 <106>; 72, 1 <5>; 81, 138 <140>). This is the case where a serious interference with fundamental rights results in severe detriment and the direct impact of the challenged act of public authority is limited to such a short period of time that it would hardly be feasible, given the regular course of proceedings, to obtain a timely decision from the Federal Constitutional Court (cf. BVerfGE 81, 138 <140 and 141>; 107, 299 <311>; 110, 77 <85 and 86>; 117, 244 <268>; 146, 294 <309 para. 24>;

established case-law). Otherwise, the protection of fundamental rights of the person concerned would be unreasonably curtailed (cf. BVerfGE 34, 165 <180>; 41, 29 <43>; 49, 24 <51 and 52>; 81, 138 <141>). Serious interferences with fundamental rights are, most notably, interferences - like the deprivation of liberty challenged in the present proceedings - for which the Basic Law itself directly provides for the requirement of a judicial decision, in this case under Art. 104(2) GG (cf. BVerfGE 96, 27 <40>; 104, 220 <233>). The use of physical restraints, which, by its nature, will often already be terminated before a judicial review can take place, amounts to such a serious interference with fundamental rights. **[59]**

To the extent that the constitutional complaints are admissible, they are well-founded. **[62]**

The challenged decisions violate the fundamental rights of person concerned no. I and of complainant no. II under Art. 2(2) second and third sentences in conjunction with Art. 104(1) and (2) GG. In proceedings 2 BvR 309/15, § 25 PsychKHG BW does not satisfy the requirements of Art. 104(1) first sentence GG to the extent that it does not provide for an obligation to inform the persons concerned about the possibility of seeking a subsequent judicial review of the physical restraint measures. In proceedings 2 BvR 502/16, a statutory basis for the use of physical restraints and functionally equivalent measures is lacking altogether, contrary to the relevant requirement under Art. 104(1) GG. Moreover, in both proceedings, the physical restraint measures at issue constitute deprivations of liberty within the meaning of Art. 104(2) GG, yet the respective Land laws fail to specify a requirement that a judicial decision be obtained, as required under constitutional law. **[63]**

I.

The use of physical restraints on patients constitutes an interference with their fundamental right to freedom of the person (Art. 2(2) second sentence in conjunction with Art. 104 GG) (1.). Both five-point and seven-point restraint measures that go beyond mere short-term application constitute a deprivation of liberty within the meaning of Art. 104(2) GG (2.). This also applies in cases where the persons concerned are already subject to a deprivation of liberty by way of confinement in a psychiatric hospital (3.). **[64]**

1. Art. 2(2) second sentence GG states that freedom of the person is "inviolable". This fundamental constitutional decision enshrines the right to freedom as a particularly high-ranking legal interest; interferences can only be justified by important reasons (cf. BVerfGE 10, 302 <322>; 29, 312 <316>; 105, 239 <247>). This right protects the actual physical freedom of movement, as provided for in the existing general legal order, against state interference (cf. BVerfGE 94, 166 <198>; 96, 10 <21>), that means against arrest, detention or similar measures that entail direct coercion (cf. BVerfGE 22, 21 <26>; 105, 239 <247>). **[65]**

An interference with the personal (physical) freedom is contingent only upon the actual, natural will of the person concerned (cf. BVerfGE 10, 302 <309 and 310>). Lack of mental capacity does not preclude the protection of Art. 2(2) GG (cf. BVerfGE 58, 208 <224>; 128, 282 <301>); this protection is also guaranteed to persons with mental illnesses and persons who lack full legal capacity (cf. BVerfGE 10, 302 <309>; 58, 208 <224>). Mentally ill persons, in particular, often perceive restrictions of their liberty, the necessity of which cannot be conveyed to them, as especially threatening (cf. BVerfG, Order of the Second Chamber of the Second Senate of 10 June 2015 - 2 BvR 1967/12 -, juris, paras. 16 and 17). **[66]**

2. a) Art. 2(2) second sentence GG protects against both restrictions of liberty (*freiheitsbeschränkende Maßnahme*; Art. 104(1) GG) and deprivations of liberty (*freiheitsentziehende Maßnahme*; Art. 104(2) GG); the case-law of the Federal Constitutional Court distinguishes between the two types of measures based on the intensity of the interference (cf. BVerfGE 105, 239 <248>). An act constitutes a restriction of liberty if someone is prevented by public authority, against their will, from going to a place, or staying at a place, which would otherwise be (factually and legally) accessible to them (cf. BVerfGE 94, 166 <198>; 105, 239 <248>). An act constitutes a deprivation of liberty, the most serious form of liberty restriction, (cf. BVerfGE 10, 302 <323>) if it cancels the freedom of movement - that would generally exist under the relevant factual and legal circumstances - in every respect (cf. BVerfGE 94, 166 <198>; 105, 239 <248>). Deprivation of liberty is characterised by the particular weight of the interference as well as by the duration of the measure, which goes beyond mere short-term application (cf. BVerfGE 105, 239 <250>; BVerfG, Order of the Third Chamber of the Second Senate of 21 May 2004 - 2 BvR 715/04 -, juris, para. 20; Order of the First Chamber of the First Senate of 8 March 2011 - 1 BvR 47/05, juris, para. 26; […]). **[67]**

b) At least the use of five-point or seven-point restraints, which entails that all limbs of the person concerned are strapped to a bed, constitutes a deprivation of liberty within the meaning of Art. 104(2) GG, unless it is only applied for a short period of time. A short-term application can generally be presumed where it is foreseeable that the measure will not last longer than approximately half an hour. In the event that the person concerned is strapped to the bed by way of five-point or seven-point restraints, their freedom of movement is completely cancelled, taking away the remaining freedom to move within the closed psychiatric ward - or at least within the respective patient room -, a freedom that had still been available while they were confined in a psychiatric hospital. This type of physical restraint is imposed to keep the persons concerned in their hospital beds, completely unable to move. **[68]**

3. Where all limbs are physically restrained, and not merely for a short period of time, this qualifies as a separate act of deprivation of liberty due to the particular weight of the interference, even if the person concerned is already subjected to an ongoing deprivation of liberty; this type of restraint thus requires a separate judicial decision under Art. 104(2) first sentence GG. In the context of enforcing a confinement, the judicial order authorising the deprivation of liberty in the form of confinement does, in principle, cover disciplinary measures such as detention (cf. BVerfG, Order of the Second Chamber of the Second Senate of 8 July 1993 - 2 BvR 213/93 -, juris, para. 10) as well as special safety measures such as the confinement in a smaller restricted area within the institution; by resorting to stricter means, these measures merely change the manner in which the deprivation of liberty already imposed is enforced (cf. BVerfGE 130, 76 <111>; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* - BVerfGK 2, 318 <323>). **[69]**

However, compared to those measures, both five-point and seven-point restraints constitute interferences of such weight that they are not covered by the judicial order of confinement; and it is hence justified to qualify them as separate acts of deprivation of liberty (cf. Federal Court of Justice, *Bundesgerichtshof* - BGH, Order of 15 September 2010 - XII ZB 383/10 -, juris,

para. 27; Order of 12 September 2012 - XII ZB 543/11 -, juris, para. 14; […]). When these types of physical restraints are used, the freedom of movement of the persons concerned is completely cancelled in every respect. As a result, the freedom of movement is curtailed beyond the restrictions resulting from the confinement in a closed institution, i.e. the restriction of movements to the premises of the institution where the person is confined. **[70]**

In the case of five-point or seven-point restraints, the particular intensity of the interference furthermore follows from the fact that the persons concerned experience an intentional interference with their freedom of movement as all the more threatening, the more the relevant situation makes them feel helpless and powerless (regarding coercive medical treatment cf. BVerfGE 128, 282 <302 and 303>). In addition, interferences that take place during confinement will often affect persons who, due to their psychological constitution, will be particularly sensitive to measures disregarding their will (cf. BVerfGE 128, 282 <302 and 303>). Furthermore, the persons concerned are completely dependent on timely assistance provided by care staff to deal with their bodily needs. Compared to other coercive measures, they therefore generally perceive the use of physical restraints as particularly harmful […]. In addition, even if restraints are applied correctly, there is a risk that the persons concerned suffer damage to their health, such as deep vein thrombosis or pulmonary embolism, due to the prolonged immobilisation […]. **[71]**

II.

The legislature may, in principle, permit serious interferences with fundamental rights such as the use of physical restraints (1.).Yet the fundamental right to freedom of the person, in conjunction with the principle of proportionality, gives rise to strict requirements regarding the justification of such interferences: the statutory basis for the interference (Art. 104(1) GG) must be sufficiently specific (2.) and satisfy the relevant substantive (3.) and procedural requirements (4.) in order to protect the fundamental rights of confined persons. These requirements are in line with the relevant provisions of international law, in particular with the European Convention on Human Rights (ECHR) (5.). **[72]**

1. a) Freedom of the person is such a high-ranking legal interest that interferences with it are only permissible for particularly weighty reasons (cf. BVerfGE 22, 180 <219>; 45, 187 <223>; 130, 372 <388>; established case-law). The restriction of this freedom must thus always be subjected to a strict review based on the principle of proportionality (cf. BVerfGE 58, 208 <224>; 128, 326 <372>). This applies in particular to preventive interferences that do not serve the purpose of retribution in terms of criminal justice. Such interferences are generally only permissible if they are necessary for the protection of others or the general public (cf. BVerfGE 90, 145 <172>; 109, 133 <157>; 128, 326 <372 and 373>). **[73]**

   b) However, the protection of the persons concerned themselves may also justify a restriction of freedom of the person. The fundamental right to life and physical integrity not only affords individuals a subjective right against state interferences with these legal interests. It also constitutes an objective decision on values enshrined in the Constitution that gives rise to duties of protection on the part of the state. Accordingly, the state is obliged to protect and promote the individual's right to life (cf. BVerfGE 39, 1 <42>; 46, 160 <164>; 90, 145 <195>; 115, 320 <346>; 142, 313 <337 para. 69>).

Art. 2(2) first sentence GG also provides protection against impairments of physical integrity and health (cf. BVerfGE 56, 54 <78>; 121, 317 <356>; 142, 313 <337 para. 69>). It is for the legislature to decide on a concept of protection and to implement it through legislation; even where the legislature is obliged to take measures to protect a legal interest, it still enjoys, in principle, a margin of appreciation and evaluation as well as a leeway to design (cf. BVerfGE 96, 56 <64>; 121, 317 <356>; 133, 59 <76 para. 45>; 142, 313 <337 para. 70>). The duty of care incumbent upon the state and society may thus include the authority to confine persons with mental illnesses in a closed institution against their will, and to physically restrain them, if this is absolutely necessary to avert imminent and serious damage to their health; this applies where persons with mental illnesses are, due to their condition and the resulting lack of mental capacity, not able to comprehend the seriousness of their illness and the necessity of treatment, or if their illness prevents them from accepting treatment despite their understanding of the situation (regarding confinement cf. BVerfGK 11, 323 <329>). **[74]**

c) According to these standards, the use of physical restraints on confined persons may be justified to avert imminent and serious damage to the health of the persons concerned themselves or other persons such as care staff or doctors. **[75]**

2. Under Art. 104(1) first sentence GG, restrictions of the freedom guaranteed by Art. 2(2) second sentence GG require a formal statutory provision and must observe the formal requirements set out therein (cf. BVerfGE 58, 208 <220>; 105, 239 <247>). The formal guarantees of Art. 104 GG are inextricably linked to the substantive guarantee of freedom under Art. 2(2) second sentence GG (cf. BVerfGE 10, 302 <322>; 58, 208 <220>; 105, 239 <247>). **[76]**

a) The general requirement under the rule of law (Art. 20(3) GG) that legal provisions be sufficiently specific already entails that the legislature must make provisions as specific as possible with regard to the particular nature of the subject matter to be regulated and in consideration of the legislative objective pursued (cf. BVerfGE 49, 168 <181>; 59, 104 <114>; 78, 205 <212>; 103, 332 <384>; 134, 141 <184 para. 126>; 143, 38 <60 and 61 paras. 55 et seq.>). […] **[77]**

[…] **[78]**

b) Art. 104(1) first sentence GG sets out more detailed standards regarding the requirement of legal specificity deriving from the principle of the rule of law and reinforces the requirement of a statutory provision already contained in Art. 2(2) third sentence GG (cf. BVerfGE 29, 183 <195>; 134, 33 <81 para. 111>). In particular, the constitutional provision obliges the legislature to specify, in a sufficiently clear manner, the cases in which a deprivation of liberty is to be permissible. Deprivations of liberty must be regulated in a predictable manner that allows for evaluation and review (cf. BVerfGE 29, 183 <196>; 109, 133 <188>; 131, 268 <306>; 134, 33 <81 para. 111>). In this regard, it must be taken into account that the interference with the fundamental right under Art. 2(2) second sentence GG resulting from preventive deprivations of liberty is as serious as the interference resulting from

prison sentences (cf. BVerfGE 134, 33 <81 para. 111>). To this extent, the requirement of specificity provided for under Art. 104(1) GG is comparable to the one in Art. 103(2) GG (cf. BVerfGE 29, 183 <196>; 78, 374 <383>; 96, 68 <97>; 131, 268 <306>; 134, 33 <81 para. 111>). **[79]**

3. The principle of proportionality gives rise to substantive requirements regarding the content of the relevant statutory basis. Physical restraints may only be used as an ultima ratio where less restrictive means are not available (anymore) (regarding coercive medical treatment cf. BVerfGE 128, 282 <309> with further references). In this respect, it must be taken into account that placing the persons concerned in seclusion may not always be considered a less restrictive means, since the intensity of its effects in the specific case can be equal to those of five-point or seven-point restraints. If persons placed in seclusion are not sufficiently monitored, seclusion also entails the risk of considerable damage to their health […]. **[80]**

4. The fundamental rights guarantees, in conjunction with the principle of proportionality, also give rise to procedural requirements for the authorities and the courts (cf. BVerfGE 51, 150 <156>; 52, 380 <389>; 52, 391 <407>; 101, 106 <122>; 128, 282 <311>; established case-law). In this respect, the requirements developed by the Federal Constitutional Court for ordering coercive medical treatment (cf. BVerfGE 128, 282 <311 et seq.>) largely apply accordingly to ordering the use of physical restraints. **[81]**

a) Where persons confined in a closed institution are to be subjected to physical restraints, they are particularly in need of procedural safeguards with respect to their right to freedom of the person. The fact that the person concerned is confined in a closed institution and that for all parties involved, the possibility to rely on external support and assistance is limited creates an environment where confined persons are extremely vulnerable and in need of particular protection. In particular, they must be protected against the risk that only insufficient consideration is given to their fundamental rights, for instance due to vested interests of the institution or staff members - in particular in situations where staff members are overwhelmed when caring for patients that may at times be challenging -; due to a lack of adequate staffing to fulfil the tasks at hand; or due to the work routines in the respective institution (regarding coercive medical treatment cf. BVerfGE 128, 282 <311, 315>). **[82]**

b) In order to ensure compliance with the principle of proportionality, it is indispensable that the use of physical restraints on persons confined in a closed psychiatric institution be ordered and supervised by a doctor (regarding coercive medical treatment cf. BVerfGE 128, 282 <313>; 129, 269 <283>; 133, 112 <138 para. 67>). This is also imperative for satisfying the requirements under international law, international human rights standards and the professional standards of psychiatry (cf. Art. 27(2) Recommendation No. R (2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorder of 22 September 2004; according to this recommendation, the use of physical restraints requires medical supervision […]). At least the use of five-point or seven-point restraints in confinement generally requires one-to-one supervision by medical or care staff for the entire duration of the measure, given the weight of the interference and the health risks associated with it. As a special safety measure for averting a

danger posed by the persons concerned to themselves or others due to an underlying medical condition, the use of physical restraints must be closely linked to the psychiatric treatment provided in confinement in relation to the underlying medical condition. The necessity of such measures must be assessed in consideration of the psychiatric treatment measures - for instance prospects of success of talking to the patient or of providing medication - and must be reviewed in short intervals. **[83]**

c) In order to pre-emptively safeguard the guarantee of effective legal protection under Art. 2(2) second and third sentences in conjunction with Art. 104(1) first sentence GG, it is necessary to document information on the ordering of the use of physical restraints against the natural will of confined persons; the relevant reasons for the measure; its implementation; its duration; and the type of supervision provided (regarding documentation requirements following from fundamental rights in other contexts cf. BVerfGE 65, 1 <70>; 103, 142 <160>; 128, 282 <313 and 314> with further references). On the one hand, documentation serves to ensure that legal protection is effective […]. On the other, it also ensures that the interference is proportionate. Professional and proportionate conduct can only be ensured on the basis of detailed documentation, especially in environments, typical of hospitals, where the staff responsible for the measure frequently changes (cf. BVerfGE 128, 282 <314>). This holds true in particular for measures carried out over a longer period of time, which only satisfy the principle of proportionality if their effects are closely monitored and the necessary consequences are drawn from the resulting observations. In addition, documentation is also an indispensable means for systematic quality assurance and evaluation aimed at improvement (cf. BVerfGE 128, 282 <314>; 146, 294 <312 para. 33> with further references). **[84]**

d) In addition, the fundamental right to freedom of the person (Art. 2(2) second and third sentences in conjunction with Art. 104(1) first sentence GG) gives rise to the obligation to inform the persons concerned about the possibility of having a court review the permissibility of the use of physical restraints after the measure has ended. […] **[85]**

5. The requirements set out above are in accordance with the European Convention on Human Rights, which serves as a guideline for interpretation when determining the content and scope of fundamental rights (cf. BVerfGE 111, 307 <317 and 318>; 142, 313 <345 para. 88>). The UN Convention on the Rights of Persons with Disabilities also does not give rise to a different conclusion. **[86]**

a) The European Court of Human Rights measures the use of physical restraints on persons with mental illnesses against Art. 3 of the European Convention on Human Rights (ECHR) (cf. ECtHR <GC>, Jalloh v. Germany, Judgment of 11 July 2006, No. 54810/00, §§ 79, 106; ECtHR, Wiktorko v. Poland, Judgment of 31 March 2009, No. 14612/02, § 55), which includes an absolute prohibition of torture and inhuman or degrading treatment (cf. ECtHR <GC>, Labita v. Italy, Judgment of 6 April 2000, No. 26772/95, § 119; ECtHR <GC>, Kud?a v. Poland, Judgment of 26 October 2000, No. 30210/96, § 90; established case-law), irrespective of the conduct of the person concerned (cf. ECtHR, Raninen v. Finland, Judgment of 16 December 1997, No. 152/1996/771/972, § 55; ECtHR <GC>, Labita v. Italy, Judgment of 6 April 2000,

No. 26772/95, § 119; ECtHR <GC>, Kud?a v. Poland, Judgment of 26 October 2000, No. 30210/96, § 90; ECtHR, Nevmerzhitsky v. Ukraine, Judgment of 5 April 2005, No. 54825/00, § 79; established case-law). **[87]**

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of protection of this provision. In this regard, the circumstances of the case, in particular the duration of the treatment, its physical or mental effects, the sex, age and state of health of the persons concerned must be taken into account (cf. ECtHR, Raninen v. Finland, Judgment of 16 December 1997, No. 152/1996/771/972, § 55; ECtHR <GC>, Labita v. Italy, Judgment of 6 April 2000, No. 26772/95, § 120; ECtHR <GC, Kud?a v. Poland, Judgment of 26 October 2000, No. 30210/96, § 91; ECtHR <GC>, Jalloh v. Germany, Judgment of 11 July 2006, No. 54810/00, § 67; established case law). Treatment is degrading where it arouses in the persons concerned feelings of fear, anguish and inferiority, which goes beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment; the question whether the purpose of the treatment was to humiliate or debase the person concerned is a further factor to be taken into account (cf. ECtHR <GC>, Labita v. Italy, Judgment of 6 April 2000, No. 26772/95, § 120; ECtHR <GC>, Kud?a v. Poland, Judgment of 26 October 2000, No. 30210/96, § 92; EGMR, Keenan v. The United Kingdom, Judgment of 3 April 2001, No. 27229/95, § 110; ECtHR, Price v. The United Kingdom, Judgment of 10 July 2001, No. 33394/96, § 24; ECtHR, Mouisel v. France, Judgment of 14 November 2002, No. 67263/01, § 37). **[88]**

According to the ECtHR's case-law, in respect of persons deprived of their liberty, recourse to physical force which is not strictly necessary due to their own conduct diminishes human dignity (cf. ECtHR <GC>, Labita v. Italy, Judgment of 6 April 2000, No. 26772/95, § 120; ECtHR, Keenan v. The United Kingdom, Judgment of 3 April 2001, No. 27229/95, § 113; ECtHR, Bureš v. The Czech Republic, Judgment of 18 October 2012, No. 37679/08, § 86). In the context of detention, the ECtHR held that it is up to the public authorities to justify the use of restraints on a detained person. The ECtHR further held that the use of restraining belts in cases of aggressive behaviour on the part of the persons concerned requires that checks be periodically carried out on the health and welfare of the persons concerned. The use of such restraints must be necessary and its length must not be excessive (ECtHR, Wiktorko v. Poland, Judgment of 31 March 2009, No. 14612/02, § 55; ECtHR, Bureš v. The Czech Republic, Judgment of 18 October 2012, No. 37679/08, § 86). These requirements do not go beyond the standards deriving from Art. 2(2) second sentence GG. **[89]**

b) The provisions of the UN Convention on the Rights of Persons with Disabilities (CRPD) does also not suggest a different conclusion. Firstly, these provisions only have the rank of a federal statute (cf. Act on the Convention of the United Nations of 13 December 2006 on the Rights of Persons with Disabilities as well as on the Optional Protocol of 13 December 2006 to the Convention of the United Nations on the Rights of Persons with Disabilities of 21 December 2008, Federal Law Gazette,

Bundesgesetzblatt - BGBl II p. 1419). Secondly, they do not generally rule out the permissibility of the use of physical restraints that goes beyond mere short-term application in substance. Both persons with mental illnesses and persons with drug addictions are persons with disabilities within the meaning of Art. 1(2) CRPD […]. Therefore, coercive measures directed at them fall within the scope of application of the Convention. However, the Federal Constitutional Court has already established that the provisions of the Convention - in particular Art. 12 CRPD -, which aim to safeguard and strengthen the autonomy of persons with disabilities, do not give rise to a general prohibition of measures carried out against the natural will of the persons concerned and tied to their limited capacity for self-determination resulting from their illness (regarding coercive medical treatment cf. BVerfGE 128, 282 <306 and 307>; 142, 313 <345 para. 88>). Nevertheless, the Convention requires States parties to create appropriate safeguards protecting the persons concerned against conflicts of interest, abuse and disrespect of their rights, and to ensure proportionality (cf. BVerfGE 128, 282 <307>; 142, 313 <345 para. 88>). Pursuant to Art. 12(4) second sentence CRPD, these safeguards also include that such [coercive] measures "apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body". In addition, pursuant to Art. 15(2) CRPD, States parties must take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment. **[90]**

In its concluding observations on the initial report of Germany, the Committee on the Rights of Persons with Disabilities recommended that Germany carry out a review with a view to formally abolishing all practices regarded as acts of torture, namely prohibit the use of physical and chemical restraints in institutions for persons with disabilities (cf. UN document CRPD/C/DEU/CO/1 of 13 May 2015, p. 6 § 34). In this respect, the Committee refers to the view of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Juan E. Mendéz, according to which any use of restraints - even for a short period of time - can be considered an act of torture and ill-treatment (cf. the report of the UN Special Rapporteur of 1 February 2013, which calls for an absolute ban on the use of physical restraints [UN Doc. A/HRC/22/53, p. 16, 26], available at www.ohchr.org). However, according to Arts. 34 et seq. CRPD, the Committee has no mandate to issue binding interpretations of the text of the Convention. It is also not competent to further develop international conventions beyond the agreements and practices of the treaty parties (cf. Art. 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, UNTS 1155, 331 <340>, BGBl II 1985 p. 926, affirming customary international law; [...]). While its statements have significant weight, they are not binding on international tribunals or domestic courts (cf. BVerfGE 142, 313 <346 para. 90> with further references). **[91]**

In respect of an immediate danger posed by persons with mental illnesses to the life and physical integrity of themselves and of third parties, the blanket assumption that qualifies any type of physical restraint as torture or degrading and inhuman treatment seems to go too far. The medical practitioners who testified in the oral hearing before

the Court all agreed that it was not possible to completely forgo the use of physical restraints or functionally equivalent measures in certain situations of immediate danger. The Committee, which also rejects other safety measures such as sedation and seclusion, does not provide any answers, based on its interpretation of the text of the Convention, to the question of how to deal with persons who cannot (or no longer) be reached by means of communication and who pose an immediate danger to themselves or others - in this regard, the Committee mirrors its approach regarding coercive medical treatment (cf. BVerfGE 142, 313 <347 and 348 para. 91>). In any case, the strict requirements under constitutional law for the use of physical restraints on confined persons - i.e. a sufficiently specific legal basis, procedural safeguards and strict compliance with the principle of proportionality - ensure that the Federal Republic of Germany can meet its obligations under Art. 12(4) in conjunction with Art. 15 CRPD. **[92]**

III.

1. For measures amounting to a deprivation of liberty, Art. 104(2) GG adds the additional procedural requirement that a judicial decision be obtained; this requirement, which is not subject to legislative discretion, applies in addition to the requirement of a (formal) statutory provision applicable to interferences with the fundamental right to inviolable freedom of the person under Art. 2(2) third sentence GG (cf. BVerfGE 105, 239 <248>). **[93]**

Art. 104(2) fourth sentence GG obliges the legislature to enact provisions that specify the requirement of a judicial decision in procedural terms. The effectiveness of the protection of fundamental rights afforded by the requirement that a judicial decision be obtained depends, to a significant extent, on the procedural regulations governing the respective subject area […]. In order to give consideration to the specific characteristics of the different contexts in which such measures are applied, the legislature must provide for a procedural regime that is tailored to the respective measure of deprivation of liberty. It must also ensure that before the deprivation of liberty is enforced, persons concerned are afforded all safeguards deriving from the rule of law that are provided in judicial proceedings (cf. BVerfGE 83, 24 <32>). **[94]**

Even though Art. 104(2) GG already contains a directly applicable legal guarantee (cf. BVerfGE 10, 302 <329>; on Art. 13(2) GG see also BVerfGE 51, 97 <114>; 57, 346 <355>), the legislature's regulatory duty to set out the requirement of a judicial decision following from Art. 104(2) fourth sentence GG is by no means obsolete. For reasons of legal certainty, this particularly applies where it is necessary to distinguish between a mere restriction of liberty or an existing deprivation of liberty that is only further intensified on the one hand, and a (new) deprivation of liberty on the other hand. If this distinction is not specified in a legal provision, it will be left to the attending doctors as private actors to determine whether the use of physical restraints requires a judicial decision. Where the legislature fails to fulfil its constitutional duty and, as a consequence, a statutory legal basis does not include provisions setting out the requirement of a judicial decision, which would be required under constitutional law, the legal provision is unconstitutional (cf. BVerfGE 141, 220 <294 para. 174>). **[95]**

2. The requirement that a judicial decision be obtained serves to strengthen and safeguard the fundamental right of Art. 2(2) second sentence GG (BVerfGE 105, 239 <248>). It aims at preventive oversight of the measure by an independent and neutral body (on Art. 13(2) GG cf. BVerfGE 57, 346 <355 and 356>; 76, 83 <91>; 103, 142 <151>). The Basic Law rests on the assumption that judges are the best and most reliable guarantors for ensuring that the rights of the persons concerned are respected in the individual case, due to the personal and professional independence of judges and the fact that they are bound only by the law (Art. 97 GG) (cf. BVerfGE 77, 1 <51>). It is incumbent upon all state organs to ensure that the requirement that a judicial decision be obtained, as a means of safeguarding fundamental rights, takes effect in practice (cf. BVerfGE 103, 142 <151 and 152>; 105, 239 <248>). As a result, the state is obliged under constitutional law to guarantee that a competent judge is available - at least during daytime hours - and to provide the judges with the means to adequately exercise their judicial functions in this regard (cf. BVerfGE 103, 142 <156>; 105, 239 <248>; 139, 245 <267 and 268 paras. 62 et seq.>; […]). **[96]**

Pursuant to Art. 104(2) first sentence GG, only judges are allowed to decide whether a deprivation of liberty is permissible and whether it may be continued. The term "decision" entails that judges take complete responsibility for the measure (cf. BVerfGE 10, 302 <310>; 22, 311 <317 and 318>). […] As a neutral oversight body, they are obliged to ensure, within the limits of what is possible and reasonable, that the interference with fundamental rights remains subject to evaluation and review, including in terms of its duration and intensity (cf. BVerfGE 103, 142 <151>). This also applies if the deprivation of liberty is ordered by private actors, as in the present case. **[97]**

3. The deprivation of liberty must, in principle, be authorised by prior judicial order (cf., e.g., BVerfGE 10, 302 <321>; 22, 311 <317>; 105, 239 <248>; […]). Seeking a judicial decision only after the measure has already begun is permissible solely in cases where the deprivation of liberty serves a legitimate constitutional goal that could not be achieved if a judicial decision had to be obtained first (cf. BVerfGE 22, 311 <317>; 105, 239 <248> with further references). Yet this will frequently be the case where the use of five-point or seven-point restraints is ordered to avert an immediate danger posed by the persons concerned to themselves or others. **[98]**

4. In such cases, Art. 104(2) second sentence GG requires that a judicial decision be obtained without undue delay (*unverzüglich*) (cf. BVerfGE 10, 302 <321>; 105, 239 <249>). The constituent element "without undue delay" must be interpreted as requiring that a judicial decision be obtained without any delay not justified by factual reasons (cf. BVerfGE 105, 239 <249>; […]). Delays that cannot be avoided are, for instance, delays caused by distances, difficulties regarding transport, fulfilling the necessary registration and documentation requirements, or disruptive behaviour of the persons concerned (cf. BVerfGE 105, 239 <249>; BVerfGK 7, 87 <99>; […]). **[99]**

Factual reasons justifying delays in obtaining a judicial decision may also arise from necessary procedural safeguards that serve to protect the person concerned. In confinement proceedings, the persons concerned must be heard in person (§ 319 of the Act on Proceedings in Family

Matters and in Matters of Non-Contentious Jurisdiction, *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* - FamFG). The guardian *ad litem* must generally be involved (§ 315(2) FamFG). In the interests of the persons concerned, family members or other close persons may also be involved (§ 315(4) FamFG). Other parties to the proceedings must also be heard (§ 319 and 320 FamFG). In some cases, it may be necessary to provide an interpreter for the hearings. Where the use of five-point or seven-point restraints subjects persons already confined to an (additional) deprivation of liberty, these procedural safeguards must apply accordingly. If a doctor orders, on permissible grounds, the use of physical restraints during night time without obtaining a prior judicial decision, it will therefore generally only be possible to obtain a subsequent judicial decision without undue delay the following morning (from 6:00 a.m.). In this context, on-call duty performed by judges on all days of the week is im- perative for ensuring the protection of the persons concerned; taking guidance from § 758a(4) second sentence of the Code of Civil Procedure (*Zivilprozessordnung* - ZPO), the judicial on-call duty must cover the time period from 6:00 a.m. to 9:00 p.m. (cf. BVerfGE 105, 239 <248>; 139, 245 <267 and 268 para. 64>, still referring to § 104(3) of the Code of Criminal Procedure, *Strafprozessordnung* - StPO). **[100]**

5. A judicial decision is not required (anymore) in cases where it is foreseeable at the beginning of the measure that a decision cannot be obtained in time before the reason for the measure becomes moot. The same holds true where the measure will have been terminated before a decision can be obtained and it is not expected that the measure will be repeated [...]. In such a case, compliance with the procedure set out in Art. 104(2) GG would not put the persons concerned in a better, but rather in a worse position, since a deprivation of liberty no longer justified by a factual reason would be prolonged due to the necessity of obtaining a subsequent judicial decision (cf. BVerfGE 105, 239 <251>). A subsequent judicial decision under Art. 104(2) second sentence GG concerns the question whether the deprivation of liberty may be continued; it does not, however, serve to only provide an ex-post review of the non-judicial order of a deprivation of liberty that has become moot […]. […] **[101]**

Accordingly, in cases where five-point or seven-point restraints are used on patients beyond mere short-term application (cf. para. 68 above), hospitals have to take the necessary steps for obtaining a judicial decision without undue delay unless it is clearly foreseeable that the use of restraints will be terminated before a judicial decision can be obtained. If hospital staff, after having applied for a judicial decision, finds that further restraining is no longer necessary to avert a danger posed by the patient to him or herself or others, and if the restraint measure is thus terminated, the application to the court can be withdrawn [...]. Art. 104(2) second sentence GG aims to achieve subsequent oversight without undue delay of an - ongoing - deprivation of liberty; such oversight can no longer be achieved by means of a judicial decision once the measure is terminated because the factual reason justifying it no longer exists […]. **[102]**

This interpretation of Art. 104(2) GG is in accordance with the European Convention on Human Rights and the case-law of the European Court of Human Rights. The Convention does also not require that retroactive legal protection in respect of deprivations of liberty be provided *ex officio*. This is illustrated by the fact that Art. 5(4) ECHR guarantees a judicial review regarding the lawfulness of a deprivation of liberty only on the initiative of the person concerned (cf. ECtHR, Shchebet v. Russia, Judgment of 12 June 2008, No. 16074/07, § 77: […]). **[103]**

6. Nonetheless, the persons concerned are not precluded from having a court retroactively review the lawfulness of the measure as the recognised legal interest in bringing judicial proceedings persists in cases of serious interferences with fundamental rights (see para. 59 above). The persons concerned must furthermore be informed about the possibility of having a court review the permissibility of the use of physical restraints after the measure has ended (see para. 85 above). **[104]**

IV.

According to these standards, the constitutional complaints are well-founded. The decision of the Local Court on the basis of § 25 PsychKHG BW violates the fundamental right of person concerned no. I arising from Art. 2(2) second and third sentences in conjunction with Art. 104(1) first and second sentences GG (1.) The decision of the Higher Regional Court on the basis of Art. 12(1) in conjunction with Art. 19 BayUnterbrG violates the fundamental right of complainant no. II arising from Art. 2(2) second and third sentences in conjunction with Art. 104(1) first and second sentences GG (2.). **[105]**

1. For the most part, § 25 PsychKHG BW satisfies the requirements of Art. 2(2) second and third sentences in conjunction with Art. 104(1) first sentence GG (a). However, § 25 PsychKHG BW does not set out any requirement that the person concerned be informed, upon termination of the use of restraints or a functionally equivalent measure, about the possibility to seek a judicial review of the lawfulness of the relevant measure (b). Moreover, the legislature did not fulfil its regulatory duty deriving from Art. 104(2) fourth sentence GG to the extent that even for five-point or seven-point restraints, § 25(3) PsychKHG BW requires only a doctor's order, rather than a judicial decision (c). The decision of the Local Court rejecting the action seeking a declaration that the doctor's order authorising the use of five-point restraints was unlawful violates the fundamental right of person concerned no. I under Art. 2(2) second and third sentences in conjunction with Art. 104(1) first and second sentences GG, since there was no constitutional statutory basis for the use of five-point restraints on the person concerned (d). **[106]**

a) § 25 PsychKHG BW does not fully satisfy the formal and substantive requirements deriving from Art. 2(2) second and third sentences in conjunction with Art. 104(1) first sentence GG and the principle of proportionality. **[107]**

aa) The provision governs the restriction of liberty based on an important reason. [...] The safety of the institution, and in particular the required protection of the life and physical integrity of the person concerned or third parties, would not be sufficiently guaranteed if hospital staff were not allowed to restrict the personal freedom of the person concerned where necessary. **[108]**

bb) Moreover, the requirement of an immediate and serious danger in § 25 PsychKHG BW sets a high threshold for interferences. [...] **[109]**

cc) The procedural provisions of § 25(3) and (4) PsychKHG BW - namely the requirement that physical restraint measures be ordered by a doctor, the documentation requirements and the requirement that the measure be accompanied by direct, personal and, in principle, constant supervision by means of visual and

voice contact to the person concerned (cf. Baden-Würtemberg *Landtag* document, *Landtagsdrucksache* - LTDrucks 15/5521, p. 44) - satisfy the requirements arising under the principle of proportionality. **[110]**

b) Contrary to the obligation arising from the fundamental right to freedom of the person, however, § 25 PsychKHG does not set out any requirement that the person concerned be informed, upon termination of the use of restraints or a functionally equivalent measure, about the possibility to seek a judicial review of the lawfulness of the relevant measure. In this respect, § 25 PsychKHG BW does not satisfy the requirements of Art. 2(2) second and third sentences in conjunction with Art. 104(1) first sentence GG. **[111]**

c) Furthermore, the Baden-Württemberg legislature did not fulfil its constitutional regulatory duty under Art. 104(2) fourth sentence GG, since it has not enacted provisions regarding judicial orders authorising the use of physical restraints that amount to a deprivation of liberty. Even [...] for five-point and seven-point restraints, insofar as they constitute a deprivation of liberty within the meaning of Art. 104(2) first sentence GG (see para. 68 above), the Baden-Württemberg legislature only provided for the requirement of a doctor's order, rather than for the requirement of a judicial decision. To that extent, § 25 PsychKHG BW is not compatible with Art. 2(2) second and third sentences in conjunction with Art. 104(2) GG. **[112]**

d) According to these standards, the challenged order of the Ludwigsburg Local Court in proceedings 2 BvR 309/15 violates the fundamental right of person concerned no. I under Art. 2(2) second and third sentences in conjunction with Art. 104(1) and (2) GG, because the use of physical restraints on him, which the court had confirmed as lawful, was not based on a constitutional statutory basis. It is primarily incumbent upon the regular courts to also review the compatibility of the invoked legal basis with the Basic Law, to grant preliminary legal protection where necessary and, if the outcome of the review [of constitutionality] is negative, to refer the matter to the Federal Constitutional Court by way of an application for specific judicial review of statutes (*konkrete Normenkontrolle*, Art. 100(1) GG). […] **[113]**

The Local Court expressly pointed out that the Baden-Württemberg legislature had granted doctors of recognised institutions the authority to order special safety measures but, in contrast to the provisions governing coercive medical treatment in § 20 PsychKHG BW, had not provided for the requirement of a judicial decision in relation to special safety measures. The court held that it could therefore only review the use of physical restraints, as a measure in the context of enforcing a confinement pursuant to § 327(1) FamFG, as to whether the doctors had observed the provision of § 25 PsychKHG BW when ordering the measure in question. It thus only reviewed whether the ordering of the use of restraints had been lawful on the part of the doctors without calling into question the constitutionality of the legal basis on the grounds that it did not provide for a requirement of a judicial decision. **[114]**

2. The challenged decision of the Munich Higher Regional Court on the basis of Art. 12(1) in conjunction with Art. 19 BayUnterbrG violates the fundamental right of complainant no. II arising from Art. 2(2) second and third sentences in conjunction with Art. 104(1) and (2) GG. Contrary

to the view of the Higher Regional Court, Art. 12(1) in conjunction with Art. 19 BayUnterbrG provides no sufficient statutory basis for using physical restraints on complainant no. II, since the provisions neither satisfy the requirements of legal specificity under Art. 104(1) GG (a), nor require a judicial decision for the deprivation of liberty resulting from the use of seven-point restraints in the present case (b). **[115]**

[…] **[116-118]**

E.

I.

The fact that § 25 PsychKHG BW is partially unconstitutional as regards the use of physical restraints does not lead to the provision being partially void. Under the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG), the unconstitutionality of a law does not always result in the law being void (§ 95(3) first sentence BVerfGG); rather, it also allows for a mere declaration that the law is incompatible with the Basic Law (§ 31(2) third sentence BVerfGG). A declaration of incompatibility, together with an order to temporarily continue the application of the unconstitutional provision, may be considered in cases where the immediate invalidity of the objectionable provision would eliminate the basis for the protection of paramount public interests, or of interests on the part of the persons concerned or third parties protected by fundamental rights, and the outcome of a balancing of these interests against the affected fundamental rights suggests that the interference be tolerated for a transitional period (cf. BVerfGE 85, 386 <400 and 401>; 141, 220 <351 para. 355>). **[119]**

This is the case here. The use of physical restraints generally serves to counter, in exceptional circumstances, an immediate and serious danger to the life and physical integrity of the persons concerned and third parties. For this purpose, it may be permissible where the person concerned poses such a danger to him or herself or others and it is not possible to handle the situation without the use of physical restraints. If § 25 PsychKHG BW, insofar as it concerns the ordering of physical restraints, were declared void with immediate effect, this would result in such measures no longer being permissible in Baden-Württemberg under any circumstances until a legal basis that satisfies the constitutional requirements was enacted, leaving the legislature and professionals in the field no possibility to adapt to the new situation and to develop alternative means providing equivalent protection. This would result in a gap in protection as it would put at risk the fundamental rights of confined persons, hospital staff and other patients, and would likely impair them during this period. **[120]**

When balancing the constitutional shortcomings of § 25 PsychKHG BW against the constitutional shortcomings resulting from the lack of protection of life and physical integrity in the event that physical restraints could not be used on a confined person posing an immediate danger to him- or herself or others, the protection of the legal interests under Art. 2(2) first sentence GG prevails. The shortcomings of the Baden-Württemberg Act regarding Assistance and Protective Measures for Persons with Mental Illnesses […] concern the procedural requirements of a measure that is, in principle, permissible in substantive terms. If the provision was declared partially void, the substantive protection of the fundamental rights of the persons concerned and third parties as such would be jeopardised. Therefore, the ordering of the use of physical

restraints on the basis of § 25 PsychKHG must be tolerated for a transitional period subject to the transitional arrangements set out by the Court (see paras 124 et seq. below). **[121]**

II.

There is no basis for reversing the order of the Ludwigsburg Local Court of 4 February 2015. The challenged order became moot when person concerned no. I was discharged from hospital. [...] **[122]**

The judgment of the Munich Higher Regional Court of 4 February 2016 is reversed. The matter is remanded to the Munich Higher Regional Court (§ 95(2) BVerfGG). **[123]**

III.

1. In the *Land* Baden-Württemberg, the requirement that a judicial decision be obtained, deriving from Art. 104(2) GG and applicable at least to five-point and seven-point restraints, must be directly applied during a transitional period until 30 June 2019. During this period, the procedural regulations in §§ 312 et seq. and §§ 70 et seq. FamFG can be applied accordingly. […] **[124]**

In addition, during the transitional period, the fundamental right to freedom of the person (Art. 2(2) second sentence in conjunction with Art. 104 GG) directly imposes an obligation on the attending doctors to inform the persons concerned about the possibility to seek a judicial decision after the end of the measure. **[125]**

2. In the Free State of Bavaria, there is currently no constitutional statutory basis at all for ordering the use of physical restraints on persons confined under public law in a psychiatric hospital. Nevertheless, the use of such measures may be permissible during a transitional period until 30 June 2019. **[126]**

a) The Federal Constitutional Court may temporarily tolerate an unconstitutional situation in order to avoid a situation that would be even more at odds with the constitutional order than the current situation (cf. BVerfGE 33, 1 <12 and 13>; 33, 303 <347>; 41, 251 <267>; 45, 400 <420>; 48, 29 <37 and 38>; 85, 386 <401>). **[127]**

As long as the Bavarian legislature has not yet decided how it intends to remedy the situation of unconstitutionality and whether it wants to continue the practice of using physical restraints as a special safety measure, a gap in protection would also arise in the Free State of Bavaria given the lack of a statutory basis authorising such measures in the context of confinement under public law [...] (see para. 120 above). In that respect as well, it is necessary to balance the established constitutional short-comings against the consequences of an immediate ban on physical restraints: in this regard, the interest in permitting, temporarily, the use of physical restraints for the purposes of protecting the legal interests deriving from Art. 2(2) first sentence GG prevails. [...] **[128]**

b) However, this does not mean that, during the transitional period, it would be permissible to use physical restraints on confined persons at will in the Free State of Bavaria. Rather, given the high value attached to the fundamental right to freedom of the

person, any use of physical restraints must be subject to close monitoring with regard to whether and how long the measure is indispensable to avert an immediate and serious danger posed by the persons concerned to themselves or to significant legal interests of others. Additionally, at least for the use of five-point or seven-point restraints, the requirement deriving from Art. 104(2) GG that a judicial decision be obtained is directly applicable, as set out above for the *Land* Baden-Württemberg (see para. 124 above). The persons concerned must also be informed about the possibility of seeking a judicial review of the measure after it has ended (see para. 125 above). **[129]**

d) Therapeutic Confinement Act - BVerfG, 11.7.2013, 2 BvR 2302/11, http://www.bverfg.de/e/rs20130711_2bvr230211en.html.

Explanatory Annotation

In another decision from the year 2013 dealing with the *habeas corpus* guarantee of Article 2.2 of the Basic Law, the Constitutional Court had to deal with the constitutionality of the Therapeutic Confinement Act 2010.[33] This Act was the reaction to a decision by the European Court of Human Rights in which Germany had been found in violation of Articles 5.1 (*habeas corpus*) and 7.1 (retroactive punishment) of the European Convention of Human Rights for its system of preventive detention of prisoners deemed continuously dangerous ("*Sicherungsverwahrung*"), which at the time allowed preventive detention to be continued beyond the time originally stated in the criminal court's sentencing decision under certain conditions.[34] One consequence of the ECtHR's decision was that the Constitutional Court itself reacted by declaring the system of retrospective extension of preventive detention under certain conditions unconstitutional[35], even though the Constitutional Court, in a 2004 decision, had found this approach to be constitutional.[36]

The decision of the Constitutional Court concerned a case where the affected individual who was prone to serial and violent breaches of criminal law had to be released from preventive detention because of the ECtHR's decision and was subsequently preventively confined to therapeutic detention under the new Act. The Court held the new Act to be constitutional but only if, *inter alia*, interpreted restrictively to ensure that such post-factum preventive confinement is only possible against individuals "whose conduct suggests a high risk that he or she will commit the most serious violent crimes or sexual offenses"[37], in other words, where the individual poses a severe threat to the core physical integrity or even the life of other people.

33 BVerfG, 11.7.2013, 2 BvR 2302/11, http://www.bverfg.de/e/rs20130711_2bvr230211en.html.

34 ECtHR, Appl. No. 19359/04, 17.12.2009, M. v. Germany, http://hudoc.echr.coe.int/eng?i=001-96389 (last accessed 21.8.2019).

35 BVerfG, 4.5.2011, 2 BvR 2365/09, http://www.bverfg.de/e/rs20110504_2bvr236509en.html.

36 BVerfG, 5.2.2004, 2 BvR 2029/01, http://www.bverfg.de/e/rs20040205_2bvr202901.html (available only in German).

37 BVerfG, 11.7.2013, 2 BvR 2302/11, http://www.bverfg.de/e/rs20130711_2bvr230211en.html, para. 69.

The conflict with the ECtHR around the German concept of preventive detention ("*Sicherungsverwahrung*") demonstrates the difficulties of bringing various systems and approaches to achieve a certain political goal under a common denominator. Generally speaking, prison sentences for violent crimes would probably be regarded as rather lenient in many other countries. The jurisprudence of the Constitutional Court has practically reduced even the possibility of lifelong imprisonment. However, that system was complemented by a perhaps somewhat more lenient system of the imposition and extension of preventive, i.e., not related to the crime and degree of culpability or guilt, detention of persons deemed to constitute a danger for the outside world. The Therapeutic Confinement Act is the attempt to close that gap in line with constitutional obligations and those under the European Convention on Human Rights.

Translation of "Therapeutic Confinement Act" decision, BVerfG, 11.7.2013, 2 BvR 2302/11, http://www.bverfg.de/e/rs20130711_2bvr230211en.html.

Facts:

The complainant directly challenges his court-ordered confinement under the Therapeutic Confinement Act. Indirectly, he challenges the provisions of the Therapeutic Confinement Act themselves. **[1]**

I.

1. The Act on Reforming the Law of Preventive Detention and Accompanying Legislation (*Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen*) of 22 December 2010 introduced the "Act on Therapy and Confinement of Mentally ill Violent Offenders" (*Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter - Therapieunterbringungsgesetz* - ThUG), which entered into force on 1 January 2011, the day after its promulgation (Federal Law Gazette - *Bundesgesetzblatt* - BGBl I p. 2300 <2305>). The legislative aim of this act was to deal with "gaps of protection" under the former arrangements on preventive detention, gaps that arose following the decision of the European Court of Human Rights in the case of *Mücke v. Germany* (European Court of Human Rights - ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*). The intention was to create a legal basis for certain cases allowing the authorities to securely confine the criminal offenders in question without violating the Convention for the Protection of Human Rights and Fundamental Freedoms - ECHR - (cf. *Bundestag* document, *Bundestagsdrucksache* - BTDrucks 17/3403, p. 14). This "requires limiting the new law's scope to cases, in which the dangerousness of the criminal offenders who are to be released or already have been released from preventive detention follows from a mental disorder" (BTDrucks 17/3403, p. 14). By requiring a mental disorder, the legislature reacted to the European Court of Human Rights, which had found that there had been a violation of Art. 5 sec. 1 ECHR (cf. BTDrucks 17/3403, p. 14, 53 and 54). The additional requirement of confinement with a therapeutic focus was meant to address the European Court of Human Rights' finding of a violation of Art. 7 sec. 1 sentence 2 ECHR with regard to retrospectively extended preventive detention (cf. BTDrucks 17/3403, p. 14, pp. 54 and 55). **[2]**

The Act on the Federal Implementation of the *Abstandsgebot* in the Law of Preventive Detention (*Gesetz zur bundesrechtlichen Umsetzung des Abstandsgebots im Recht der Sicherungsverwahrung*) of December 2012 added a second section to § 2 ThUG; the amendment entered into force on 1 June 2013 (BGBl I p. 2425 <2430>). **[3]**

2. Key provision of the Therapeutic Confinement Act is § 1 ThUG, which governs the scope of the Therapeutic Confinement Act and contains the substantive requirements for a confinement. Since its entry into force, it has read as follows: **[4]**

§ 1

Therapeutic Confinement

(1) If a final and binding decision by a court has established that a person convicted of a crime of the kind mentioned in § 66 sec. 3 sentence 1 of the German Criminal Code (*Strafgesetzbuch*) can no longer be confined in preventive detention because the law of preventive detention must respect the prohibition on retrospectively increasing the severity of a sentence, the competent court may order that this person be confined in an appropriate closed institution if

1. the person suffers from a mental disorder and, taking into consideration his or her personality, prior life and situation as a whole, there is a high probability that he or she will, as a consequence of this mental disorder, cause considerable harm to the life, physical integrity, personal freedom or sexual self-determination of another person, and

2. for the reasons stated in no. 1, confinement is necessary to protect the general public.

(2) Section 1 shall be applicable irrespective of whether the convicted person is still in preventive detention or has already been released. **[5]**

§ 2 ThUG further defines the above-mentioned "appropriate closed institution". In the amended version (prior, § ThUG had only one section), in force since 1 June 2013 (BGBl 2012 I p. 2425 <2430>), § 2 ThUG reads as follows: **[6]**

§ 2

Appropriate Closed Institutions

(1) Only such closed institutions are appropriate for therapeutic confinement pursuant to § 1 of the Therapeutic Confinement Act that

1. can, due to their medical-therapeutic focus, guarantee to provide adequate treatment of the respective mental disorder, with treatment that is based on an individual treatment plan and is aimed at the shortest possible duration of confinement,

2. taking into account therapeutic considerations as well as the security interests of the general public, allow for accommodation of the confined persons that causes them the least hardship, and

3. are separated from penal institutions both spatially and organisationally.

(2) Institutions within the meaning of § 66c sec. 1 of the German Criminal Code are also appropriate for therapeutic confinement if they meet the requirements of section 1 nos. 1 and 2. **[7]**

With regard to the appropriate institutions, the new section 2 refers to § 66c of the German Criminal Code (*Strafgesetzbuch* - StGB), which was also introduced by the Act on the Federal Implementation of the *Abstandsgebot* in the Law of Preventive Detention of 5 December 2012 (BGBl I p. 2425 <2425>), and the purpose of which was to ensure that the design of preventive detention meet the requirements of the constitutional requirement for a clear differentiation between prison sentences and preventive detention (*Abstandsgebot*). **[8]**

In addition to these central provisions, the Therapeutic Confinement Act contains provisions on procedure (§§ 3, 4 ThUG), legal remedies (§§ 16, 17, 18 ThUG), medical assessments (§ 9 ThUG), preliminary injunctions (§ 14 ThUG), duration and extension of confinement (§ 12 ThUG), and reversal of therapeutic confinement (§ 13 ThUG). **[9]**

3. The legislature explicitly included in the scope of the Therapeutic Confinement Act certain cases in which a person had previously only preliminarily been placed in preventive detention, by introducing Art. 316e sec. 4 of the Introductory Act to the German Criminal Code (*Einführungsgesetz zum Strafgesetzbuch* - EGStGB) via the Second Amendment of the Introductory Act to the German Criminal Code (*Zweites Gesetz zur Änderung des Einführungsgesetzes zum Strafgesetzbuch*) of 20 December 2012 - in force since 28 December 2012 - (BGBl I p. 2756). Art. 316e sec. 4 EGStGB reads as follows: **[10]**

(4) § 1 of the Therapeutic Confinement Act of 22 December 2010 (BGBl. I p. 2300, 2305) is also to be applied under the conditions mentioned therein in cases in which the individual in question had not been placed in preventive detention, but his preventive detention had been ordered by a court of first instance, and an appellate decision rendered before 4 May 2011 held that the individual could not be placed in preventive detention only because the prohibition on retroactive aggravations in the law of preventive detention precluded such a final decision and had to be respected, without considering the degree of threat to the general public that the individual in question may pose. **[11]**

II.

The background of the initial proceedings was as follows: **[12]**

[The following summary is for the most part taken from press release no. 50/2013 of 8 August 2013.]

[The complainant had] committed several violent offences, mostly with a sexual component and under the influence of alcohol. In 1989, the Regional Court [*convicted him of committing offences in a senselessly drunken state (Vollrausch), sentenced him to imprisonment, and*] ordered him to be confined in a psychiatric hospital because his criminal incapacity could not be ruled out. In 2005, the Regional Court declared that he was to be no longer confined; although he was still dangerous, his criminal capacity was no longer significantly impaired. In April 2007, before the complainant had completed his sentence, the Regional Court ordered for the first time his subsequent

preventive detention. In May 2010, in light of the jurisprudence of the European Court of Human Rights (ECtHR), the Federal Court of Justice (*Bundesgerichtshof* - BGH) ordered the immediate release of the complainant. Following this decision, the city of S. applied for his therapeutic confinement.

Subject-matter of the proceedings 2 BvR 2302/11 are orders concerning the complainant's provisional therapeutic confinement for three months, issued by the Regional Court on 2 September 2011 and by the Higher Regional Court on 30 September 2011. Subject-matter of the proceedings 2 BvR 1279/12 are the orders of the Regional Court (17 February 2012) and of the Higher Regional Court (14 May 2012), which concern the complainant's confinement in the principal proceedings until 1 March 2013. **[13-30]**

[End of summary]

[…]

III.

In both proceedings, the complainant's largely identically worded constitutional complaints claim that the Federation did not have the competence to enact federal legislation under Art. 74 sec. 1 of the Basic Law (1.), as well as that the legislation violates the principles of non-retroactivity (*Rückwirkungsverbot*) (2.) and legal specificity (*Bestimmtheitsgebot*) (3.), which both follow from Art. 103 sec. 2 GG. He further claims that because there was no legal basis for his confinement, Art. 2 sec. 2 sentence 2 in conjunction with Art. 104 GG was violated (4.). **[31]**

1. According to the complainant, the Federation lacks the legislative competence for the Therapeutic Confinement Act because the law's concept, as laid down in the reasons provided during the legislative process, shows that it can precisely not be considered part of "criminal law" and that it can thus not be based on the competence for "criminal law" under Art. 74 sec. 1 no. 1 GG. […] **[32]**

2. If, however, the Federation were competent under its competence for criminal law, the Therapeutic Confinement Act, as well as the comparable provisions on retrospective preventive detention, would still violate the principle of non-retroactivity under Art. 103 sec. 2 GG. […] **[33]**

3. The complainant further alleges that the requirements of legal specificity under Art. 103 sec. 2 GG were violated because § 1 sec. 1 no. 1 ThUG did not in a sufficiently precise way define the criteria for a "mental disorder". According to him, the term was too broad because it went clearly beyond the reasons for detention described in Art. 5 sec. 1 sentence 2 letter e ECHR, which only covers the mentally ill and those not legally responsible for their actions. The complainant particularly stresses that in connection with his termination of confinement in a psychiatric hospital he was held to no longer be in a state of greatly diminished criminal responsibility or even exempt from criminal responsibility, and that he could thus not be considered a person "of unsound mind" within the meaning of Art. 5 sec. 1 sentence 2 letter e ECHR. The reference to one of the crimes enumerated in § 66 sec. 3 StGB (so-called "*Katalogtat*") was also too vague, the complainant states, because there is no indication whether

any conviction for such a crime suffices or whether such a crime also needs to be the qualifying offence for ordering preventive detention. **[34]**

4. Finally, the complainant claims that the provisions of the Therapeutic Confinement Act could not apply to him because he had not previously been placed in preventive detention. Therefore, he claims that still having been placed in therapeutic confinement violates Art. 2 sec. 2 sentence 2 in conjunction with Art. 104 GG because there was no formal law that justified this deprivation of liberty. […] **[35]**

III.

Interpreted in conformity with the Constitution, confinement pursuant to § 1 sec. 1 ThUG is consistent with the protection of legitimate expectations under the rule of law pursuant to Art. 2 sec. 2 sentence 2 in conjunction with Art. 20 sec. 3 GG. **[66]**

1. a) Standard for the constitutional review of § 1 sec. 1 ThUG is Art. 2 sec. 2 sentence 2 GG in conjunction with the principle of the protection of legitimate expectations (cf. BVerfGE 72, 200 <242>; 128, 326 <390>). These provisions set limits for the legislative powers when the legislature acts out of concern for the public interest (cf. BVerfGE 14, 288 <300>; 25, 142 <154>; 43, 242 <286>; 43, 291 <391>; 75, 246 <280>; 109, 133 <182>; 128, 326 <390>). The importance of the respective legitimate expectations increases with the severity of the encroachment upon the affected fundamental rights (for an earlier decision, see BVerfGE 109, 133 <186 and 187>; 128, 326 <390>). **[67]**

   Since the Therapeutic Confinement Act authorises ordering potentially indefinite detention, confinement pursuant to § 1 Abs. 1 ThUG constitutes one of the most serious encroachments upon the fundamental right to liberty (Art. 2 sec. 2 sentence 2 GG) - even if the requirement of distinguishing the circumstances of confinement from those of prison sentences is fulfilled. It thus encroaches upon a right that already on its own holds particular weight among the fundamental rights (cf. BVerfGE 128, 326 <390>). **[68]**

   b) Against this backdrop and considering the values of the Convention for the Protection of Human Rights and Fundamental Freedoms (cf. BVerfGE 111, 307 <315 et seq.>; 128, 326 <366 et seq.>; 131, 268 <295 et seq.>) which, via Art. 5 and Art. 7 sec. 1 ECHR, limit the retrospective imposition or extension of preventive measures that involve deprivation of liberty (cf. on this BVerfGE 128, 326 <391 et seq.>, with further references), the interference with the right to liberty that therapeutic confinement entails, and which is made more severe by concerns regarding the protection of legitimate expectations, is only proportionate if the requirement of distinguishing the circumstances of confinement from those of prison sentences is fulfilled, specific circumstances directly related to the confined person or his or her conduct suggest a high risk that he or she will commit the most serious violent crimes or sexual offences (*hochgradige Gefahr schwerster Gewalt- oder Sexualstraftaten*), and if the requirements of Art. 5 sec. 1 sentence 2 letter e ECHR are met (cf. on preventive detention BVerfGE 128, 326 <399>; 129, 37 <46 and 47>; BVerfG, order of the Second Senate of 6 February 2013 - 2 BvR 2122/11 et al. -, juris, para. 27). **[69]**

2. Pursuant to the standards developed for the law of preventive detention, which also apply to therapeutic confinement being a retrospective measure involving deprivation of liberty (a), confinement pursuant to § 1 sec. 1 ThUG is compatible with Art. 2 sec. 2 sentence 2 in conjunction with Art. 20 sec. 3 GG. In this context, the risk assessment under § 1 sec. 1 no. 1 ThUG only meets the standards set by the Constitution if it can be established that there is a high risk that the most serious violent crimes or sexual offences will be committed. This result can be achieved by interpreting the provision in a way that conforms to the Constitution (b). § 2 ThUG takes into account the values of Art. 7 sec. 1 ECHR and describes the necessary distance to the enforcement of criminal detention (c). Taking into account the jurisprudence of the European Court of Human Rights and the margin of appreciation awarded to the states parties, the term "mental disorder" within the meaning of § 1 sec. 1 ThUG is compatible with the requirements of Art. 5 sec. 1 sentence 2 letter e ECHR (d). **[70]**

a) Therapeutic confinement is a deprivation of liberty that is ordered retrospectively. The intensity of this interference with fundamental rights corresponds to that of preventive detention. **[71]**

While the legislative purpose is forward-oriented since the Therapeutic Confinement Act, based on a current anticipation of dangerousness, aims at protecting the public from serious violations of their legal interests by mentally ill violent criminals and sexual offenders (cf. BTDrucks 17/3403, p. 53), this does not change the fact that therapeutic confinement is connected with the past nor the necessity for protecting legitimate expectations that is established by this connection. (cf. BVerfGE 109, 133 <184>, for preventive detention). However, § 1 sec. 1 ThUG does not provide for retroactivity of legal consequences (*Rückbewirkung von Rechtsfolgen* so-called "true retroactivity" ["*echte Rückwirkung*"]). It limits the expectations of those affected only in the form of a factual link to the past (*tatbestandliche Rückanknüpfung* or so-called "quasi retroactivity" ["*unechte Rückwirkung*"]; regarding this terminology see BVerfGE 127, 1 <16 and 17>; also 131, 20 <36 and 37>). While the onerous legal consequences of the confinement only come into action after the promulgation of the law, they are factually triggered by legally relevant behaviour that happened before the law's promulgation. **[72]**

Confinement pursuant to § 1 sec. 1 ThUG allows for potentially unlimited deprivation of liberty, which, regarding the deprivation of liberty, is comparable to a prison sentence or preventive detention. The fact that the law's explanatory memorandum states that "therapeutic confinement is fundamentally different from punishment, but also from preventive detention" (BTDrucks 17/3403, pp. 20 and 21), clearly refers to the punishment-like conditions of preventive detention that the European Court of Human Rights found (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, paras. 127 et seq.). As long as the constitutional requirement of distinguishing the circumstances of confinement from those of prison sentences is observed, there is no fundamental difference between confinement under the Therapeutic Confinement Act and preventive detention. **[73]**

The intensity of its interference with fundamental rights does not differ from the interference caused by preventive detention, just because § 2 ThUG prescribes confinement in an appropriate therapeutic institution and a freedom-oriented therapeutic

concept. The law of preventive detention, too, must comply with certain requirements regarding its implementation ("*Abstandsgebot*", cf. BVerfGE 128, 326 <374 et seq.>), since imprisonment, which serves to make amends for a crime, and preventive detention, which entails preventive deprivation of liberty and is independent of individual guilt (cf. BVerfGE 128, 326 <376 and 377>), differ in their aims and objective justifications. This holds true notwithstanding the deficits of the legal concept of preventive detention that have been observed in the past (cf. BVerfGE 128, 326 <382 et seq.>) and the problems with its actual implementation (cf. BVerfGE 128, 326 <384 et seq.>; also ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, paras. 127 et seq.). Accordingly, confinement in preventive detention must - in clear contrast to prison sentences - be freedom-oriented and have a clear therapeutic dimension, so as to minimise the threats posed by the detainee and in order to reduce the duration of the deprivation of liberty to the amount strictly necessary (BVerfGE 128, 326 <374 and 375>). Based on the requirements for a freedom-oriented overall concept for implementing preventive detention, which have since been further specified (cf. BVerfGE 128, 326 <378 et seq.>), there are no serious reasons that would make confinement in an appropriate institution within the meaning of § 2 ThUG appear as a less intensive interference with the fundamental right to liberty than preventive detention. **[74]**

b) Taking into consideration the requirements under the European Convention on Human Rights, the principle of proportionality demands that when a decision on therapeutic confinement is made, the protection of the affected person's legitimate expectations be sufficiently considered in the balancing of interests, and that therapeutic confinement only be ordered if specific circumstances related to the confined person or to his or her conduct suggest a high risk that the most serious violent crimes or sexual offences will be committed. **[75]**

The wording of § 1 sec. 1 no. 1 ThUG itself does not provide for such a narrow prediction of dangerousness but merely requires that an assessment of the affected person's personality, prior life, and life situation as a whole lead to the conclusion that there is a high probability that he or she will cause considerable harm to the life, physical integrity, personal freedom or sexual self-determination of another person. However, a restrictive interpretation in conformity with the Constitution is possible. **[76]**

aa) The requirement of interpretation in conformity with the Constitution demands that when there are several possible interpretations of a provision, some of which lead to a constitutional result, while others lead to an unconstitutional result, preference be given to the interpretation that is in conformity with the Basic Law (cf. BVerfGE 119, 247 <274>; established jurisprudence). Thus, a provision may only be declared unconstitutional if there is no possible interpretation that is in accordance with the recognised principles of interpretation and in conformity with the Constitution. Respect for the legislative authority commands that, within the limits of the Constitution, the maximum of what the legislature intended be maintained (cf. BVerfGE 86, 288 <320>). Interpretation in conformity with the Constitution finds its limits where it would conflict with the wording of the

provision and the legislature's clearly identifiable intention (BVerfGE 110, 226 <267>, with further references). **[77]**

bb) Pursuant to these standards, a - restrictive - interpretation of § 1 sec. 1 no. 1 ThUG in conformity with the Constitution is possible to the effect that, with regard to the prediction of dangerousness, confinement is only ordered if specific circumstances related to the confined person or to his or her conduct suggest a high risk that the most serious violent crimes of or sexual offences will be committed. **[78]**

(1) The wording of the provision does not conflict with this interpretation. § 1 sec. 1 ThUG requires a high probability that the life, physical integrity, personal freedom, or sexual self-determination of another person will be severely harmed. The Court need not decide whether there are qualitative differences between the terms of "high probability" ("*hohe Wahrscheinlichkeit*") and "high risk" ("*hochgradige Gefahr*") since in any case the provision's wording covers the necessary limitation to the criterion of "high risk". Nor does the fact that § 1 sec. 1 no. 1 ThUG requires a "considerable" interference with the legal interests enumerated therein preclude an interpretation in conformity with the Constitution in the way described above. Since the legal interests mentioned in § 1 sec. 1 no. 1 ThUG are always significantly affected in cases of serious violence or sexual offences, the legislative intent clearly covers these cases. **[79]**

(2) The legislative purpose does not conflict with such an interpretation in conformity with the Basic Law. According to the explanatory memorandum, the aim of therapeutic confinement is "the protection, as effective as possible, of the public from serious violations of their legal interests by mentally ill violent criminals and sexual offenders" (BTDrucks 17/3403, p. 53). The explanatory memorandum accepts at the same time that the legislature acts within a "narrow range that is shaped both by a connection to crimes and by preventive objectives, and on which both the Basic Law and the ECHR impose strict requirements" (BTDrucks 17/3403, p. 19). If the legislature thus explicitly recognises the limits imposed on its stated aims by the Basic Law and the European Convention on Human Rights, it is not contrary to the law's purpose if, via an interpretation in conformity of the Constitution, a protection of the public from serious violations of their legal interests by mentally ill violent criminals and sexual offenders is guaranteed that is both compatible with the Basic Law and as effective as possible. **[80]**

Nor does the argument that the Therapeutic Confinement Act is left without any area of application if it is interpreted according to the Federal Constitutional Court's strict standards on retrospectively ordered or extended preventive detention stand in the way of interpretation in conformity with the Basic Law. This holds true independent of the question, to which degree the Therapeutic Confinement Act is still applicable if the strict proportionality standards are used, now that the standards set by the Federal Constitutional

Court on retrospectively ordered or extended preventive detention have been promulgated as a statutory transitional arrangement in Art. 316f sec. 2 sentence 2 EGStGB via the Act on the Federal Implementation of the *Abstandsgebot* in the Law of Preventive Detention of 5 December 2012 (BGBl I p. 2425). According to the wording of § 1 sec. 1 ThUG and the legislature's intent (BTDrucks 17/3403, p. 53), therapeutic confinement is subsidiary to preventive detention, meaning that the law itself stipulates that confinement in preventive detention takes precedence over therapeutic confinement. Moreover, one should also take into consideration that the Therapeutic Confinement Act was passed at a time when - following the decision of the European Court of Human Rights (ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*) - it had not yet been clarified in the jurisprudence of the Federal Court of Justice whether and if so, under which conditions preventive detention that affected protected legitimate expectations could be ordered. […] At that time, the Federal Constitutional Court had not yet spoken on the matter either. The legislature's concern at the time was thus to create with the Therapeutic Confinement Act a narrowly defined transitional arrangement until the new provisions for preventive detention came into effect (BTDrucks 17/3403, p. 19). Following this line of argument, no recourse to the Therapeutic Confinement Act is necessary in so far as subsequent developments granted the opportunity, within the boundaries of the Constitution and the European Convention Human Rights, to protect the public from dangerous violent criminals or sexual offenders via the law of preventive detention. It is not contrary to the legislature's intention if the law of preventive detention limits the act's scope of application. **[81]**

c) § 2 ThUG contains the constitutionally-mandated differentiation from the serving of a prison sentence. **[82]**

aa) § 2 sec. 1 no. 3 ThUG in the version in force since 1 June 2013 (cf. BGBl 2012 I p. 2425 <2430>) explicitly prescribes spatial and organisational separation from penal institutions. Pursuant to § 2 sec. 1 no. 1 ThUG, confinement is limited to institutions that can, due to their medical-therapeutic focus, guarantee to provide adequate treatment of the respective mental disorder, treatment that is based on an individual treatment schedule and is aimed at the shortest possible duration of confinement. Moreover, while taking into account therapeutic needs as well as the safety interests of the general public, confinement shall burden the confined persons as little as possible (§ 2 sec. 1 no. 3 ThUG). **[83]**

bb) With these provisions, the act ensures compliance with the requirement of clearly differentiating between prison sentences and therapeutic confinement, which applies not only to preventive detention but also to therapeutic confinement, since the latter is a preventive measure that extends the deprivation of liberty irrespective of individual guilt (cf. BVerfGE 128, 326 <374 et seq.>). Thereby the act at the same time creates a necessary element to ensure that therapeutic confinement is not classified as punishment within the meaning of Art. 7 sec. 1 ECHR. **[84]**

(1) The European Court of Human Rights defines the concept of punishment autonomously, i.e. independent of how a measure is classified under domestic law. Starting point of its evaluation is thus whether the measure in question was imposed as a consequence of or following a criminal conviction. Other relevant factors are how the measure in question is characterised under domestic law, the nature and purpose of the measure, the procedure for its imposition and execution as well as its severity (cf. only ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 120). Using these criteria in the decision *Mücke v. Germany*, the European Court of Human Rights came to the conclusion that preventive detention must be considered a punishment within the meaning of Art. 7 sec. 1 ECHR. In addition to the reference to the qualifying offence which, along with other requirements, is essential for confinement in preventive detention, the European Court of Human Rights particularly stressed that the way a measure is enforced in practice is relevant for how it is classified: The relatively minor differences of the detention regime compared to that of an ordinary prisoner serving his sentence - for example the right to wear one's own clothes and to further equip one's more comfortable prison cells - could not mask the fact that there was no substantial difference between execution of a prison sentence and of a preventive detention order. There were no special measures, instruments or institutions in place that were directed at persons in preventive detention and aimed at reducing the threat they present and thus at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences. Moreover, the court stressed the fact that preventive detention is ordered in criminal proceedings and is, considering the potential duration of the deprivation of liberty, among the most severe interferences with a person's rights (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, paras. 124 et seq.; see also ECtHR, judgment of 13 January 2011 - Application no. 20008/07 - *Mautes ./. Germany*, para. 55; judgment of 13 January 2011 - Application nos. 27360/04 and 42225/07 - *Schummer ./.* Germany, para. 67; judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit ./. Germany*, para. 68). **[85]**

(2) Against this backdrop, the Second Senate of the Federal Constitutional Court has specified the constitutional requirements for preventive deprivation of liberty that is independent of individual guilt and qualitatively different from punishment (BVerfGE 128, 326 <374>). The European Court of Human Rights' interpretation of Art. 7 sec. 1 ECHR does not, however, require adjusting the Basic Law's concept of "punishment" under Art. 103 sec. 2 GG to the concept of "punishment" under Art. 7 sec. 1 ECHR, but suggests that the "*Abstandsgebot*" must be defined more clearly (BVerfGE 128, 326 <392 and 393>). **[86]**

(3) In the following, the European Court of Human Rights repeated the criteria from its decision in *Mücke v. Germany* and referred to the conclusions it had made in this judgment, namely the quality of preventive detention as

punishment within the meaning of the European Convention on Human Rights (cf. ECtHR, judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, paras. 103 et seq.). At the same time, however, it specified its reasons for considering the measure in question a punishment to the effect that, most importantly, it was not convinced that the challenged conditions of preventive detention, which were largely identical to those of an ordinary prisoner serving his sentence, had changed (cf. ECtHR, judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, para. 106; for the latest decision see also ECtHR, judgment of 7 June 2012 - Application no. 61827/09 - *K. ./. Germany*, paras. 82 and 83; judgment of 7 June 2012 - Application no. 65210/09 - *G. ./. Germany*, paras. 73 and 74). The focus on the implementation deficit, which could be established at least for the past, fits in with the European Court of Human Rights' subsequent reasoning because the court mentions in connection with Art. 46 ECHR that with its judgment of 4 May 2011, the Federal Constitutional Court implemented the findings the European Court of Human Rights had made in its above-mentioned judgments on German preventive detention in the German domestic legal order and thereby fully met its respective obligations (cf. ECtHR, judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, paras. 117 and 118; see also the identically worded statements in the ECtHR's later decision, judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner ./. Germany*, paras. 101 and 102). With a view to the set time-frame, the judgment further states that the Federal Constitutional Court found an adequate solution to put an end to ongoing violations of the convention (cf. ECtHR, judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, para. 118; ECtHR, judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner ./. Germany*, para. 102). **[87]**

d) The statutory requirement of a "mental disorder" within the meaning of § 1 sec. 1 ThUG does not conflict with the values of Art. 5 sec. 1 sentence 2 letter e ECHR. **[88]**

aa) The Therapeutic Confinement Act itself does not provide a definition of the term "mental disorder" as used in § 1 sec. 1 no. 1 ThUG. However, the meaning of the words and the act's genesis provide a sufficiently clear indication of how it should be understood. **[89]**

According to the act's explanatory memorandum, the term "mental disorder" follows the jurisprudence of the ECtHR on Art. 5 sec. 1 sentence 2 letter e ECHR, which explicitly allows a deprivation of liberty for "persons of unsound mind" (French: aliéné). This also covers abnormal personality traits that do not amount to mental illness. Ongoing abnormally aggressive and seriously irresponsible behaviour of a convicted criminal could be sufficient. Nor does the individual criminal responsibility of the respective person stand in the way of detention based on Art. 5 sec. 1 sentence 2 letter e ECHR (cf. BTDrucks 17/3403, pp. 53 and 54; with references to the jurisprudence of the European Commission of Human

Rights and the European Court of Human Rights). The term "mental disorder" also follows the choice of words of the diagnostic classification systems ICD-10 (WHO International Statistical Classification of Diseases and Related Health Problems, 10th revision, chapter V) and DSM-IV (Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, 4th ed.), which are nowadays used in the field of psychiatry (cf. BTDrucks 17/ 3403, p. 54). **[90]**

The act's explanatory memorandum further states that the disorder need not be of a kind that excludes criminal responsibility of the perpetrator or is assessed as a mental illness in psychiatric-forensic assessment practice. However, there must be a clinically recognisable complex of such symptoms or disturbed behaviours that are accompanied by stress and impairment at the individual level, as well as - not always, but frequently - at the collective or social level. Mere social deviations or social conflicts, which do not affect the individuals in question on a personal level, are thus not covered. Specific disorders of the personality, behaviour, sexual preference, or impulse control could constitute mental disorders; this applies in particular to the dissocial personality disorder and various disorders of sexual preference, for instance paedophilia or sado-masochism (cf. BTDrucks 17/3403, p. 54). **[91]**

This alone shows that the statutory content of a mental disorder pursuant to § 1 sec. 1 no. 1 ThUG is meant to be in conformity with the justification for deprivation of liberty under Art. 5 sec. 2 letter e ECHR. It is primarily the responsibility of the regular courts to ensure this conformity when applying the Therapeutic Confinement Act to individual cases. **[92]**

bb) Notwithstanding these considerations, from the perspective of legal systematics, therapeutic confinement differs from the previous two-track system of confinement in a psychiatric hospital (§ 63 StGB) on the one hand, and preventive detention (§ 66 StGB) on the other. The legislature has installed a "third way", which cannot be distinguished on the basis of criminal responsibility (§§ 20,21 StGB). Not requiring a lack of criminal responsibility for therapeutic confinement does not conflict with the values under Art. 5 sec. 1 sentence 2 letter e ECHR, nor with the respective jurisprudence of the European Court of Human Rights. **[93]**

(1) According to the jurisprudence of the European Court of Human Rights on Art. 5 sec. 1 sentence 2 letter e ECHR, this provision must be interpreted as requiring a finding, based on an objective medical assessment, that the person concerned suffers from a "real" or "true" mental disorder that, due to its "kind or degree", requires compulsory admission either in the best interests of the affected person or in the interest of the public. The duration of deprivation of liberty which, according to its cause, must take place in a psychiatric hospital or other appropriate institution (for the latest decision on this aspect see ECtHR, judgment of 19 April 2012 - Application no. 61272/ 09 - *B. ./. Germany*, para. 69, with further references), must be subject to the continued existence of this disorder (cf. only ECtHR, judgment of 24 October 1979 - Application no. 6301/73 - *Winterwerp ./. Netherlands*, paras. 37 et seq.;

established jurisprudence). What is thus required is a relationship between the mental disorder and a certain threat, and that the deprivation of liberty - provided that it is enforced in an appropriate psychiatric facility - can be justified with countering this threat. This also requires that the mental disorder be of a corresponding intensity (cf. Schöch, Goltdammer's Archiv für Strafrecht - GA 2012, p. 14 <28>; Meyer-Ladewig, Europäische Menschenrechtskonvention - EMRK, 3rd ed. 2011, Art. 5 para. 45). In assessing whether the requirements of a mental disorder within the meaning of Art. 5 sec. 1 sentence 2 letter e ECHR and its continued existence are satisfied, the state parties also have a certain margin of appreciation (for the latest judgment on this issue, see the judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner ./. Germany*, para. 71). **[94]**

By requiring that the deprivation of liberty be "lawful" and carried out "in accordance with a procedure prescribed by law", Art. 5 sec. 1 ECHR in essence refers to domestic law and demands that the deprivation of liberty conform to domestic substantive and procedural rules (cf. ECtHR, judgment of 24 October 1979 - Application no. 6301/73 - *Winterwerp ./. Netherlands*, paras. 39, 45; judgment of 25 June 1996 - Application no. 19776/92 - *Amuur ./. France*, para. 50; judgment of 9 July 2009 - Application no. 11364/03 - Mooren ./. Germany, para. 72). *Inter alia*, this requires that any arrest or detention have a legal basis in domestic law (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 90, with further references). **[95]**

However, compliance with national law does not suffice to comply with the general principle of legality. Any deprivation of liberty must also comply with the purpose of Art. 5 sec. 1 ECHR, i.e. protecting individuals from arbitrariness (cf. only ECtHR, judgment of 9 July 2009 - Application no. 11364/03 - *Mooren ./. Germany*, para. 72, with further references). Accordingly, domestic law must have a certain "quality", requiring it in particular to be "sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness" (cf. ECtHR, judgment of 9 July 2009 - Application no. 11364/03 - *Mooren ./. Germany*, para. 76; judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 90, with further references). Moreover, it must provide "adequate legal protections" as well as "fair and proper procedures" (cf. ECtHR, judgment of 24 October 1979 - Application no. 6301/ 73 - *Winterwerp ./. Netherlands*, para. 45; judgment of 25 June 1996 - Application no. 19776/92 - *Amuur ./. France*, para. 53; judgment of 5 October 2004 - Application no. 45508/99 - *H.L. ./. United Kingdom*, para. 115). Finally, for a depravation of liberty to be compatible with the European Convention on Human Rights, there must be some relationship between the reasons for the deprivation of liberty and the place and conditions of detention. Thus, in principle, it is "lawful" within the meaning of Art. 5 sec. 1 sentence 2 letter e ECHR to deprive a person of his or her liberty on the basis of mental illness only if such deprivation of

liberty is effected in a hospital, a clinic or another appropriate institution (for the latest decision on this aspect see ECtHR, judgment of 19 April 2012 - Application no. 61272/09 - *B. ./. Germany*, para. 69, with further references). **[96]**

(2) Pursuant to these standards, the statutory requirement of a "mental disorder" in §97 1 sec. 1 no. 1ThUG does not conflict with the values of the ECHR. To comply with the legal requirements of the convention, it is in particular not necessary to have a mental disorder that reaches the level of severity of §§ 20, 21 StGB ((a)). The conditions for foreseeability are met ((b)), as are the other requirements ((c)). **[97]**

(a) (aa) A decision by the European Commission on Human Rights of 12 July 1976 already clarified that the concept of "mental disorder" is to be understood in a broader sense that includes abnormal personality traits that do not amount to mental illness. While it is apparent from the facts of the case provided in the decision that the national courts had classified the person concerned as not criminally liable (cf. decision of the European Commission on Human Rights of 12 July 1976 - Application no. 7493/ 76 - *X ./ . Germany*, Decisions and Reports, volume 6, pp. 182 and 183), the European Court of Human Rights in two further decisions approved of persons who had at least diminished criminal responsibility being confined on the basis of Art. 5 sec. 1 sentence 2 letter e ECHR. While one of these decisions stated that the challenged confinement was lawful because of a "mental illness", it must be noted that the case involved a person who under English criminal law - which, except in murder cases, only distinguishes between (full) responsibility and insanity and only differentiates according to possible gradations of guilt in the sentencing stage (cf. Albrecht, in: Kröber/Dölling/Leygraf/Sass, Handbuch der forensischen Psychiatrie, volume 1 (2007), p. 547) - had been considered criminally responsible and had thus served a prison sentence before he had been placed in confinement (cf. ECtHR, judgment of 20 February 2003 - Application no. 50272/99 - *Hutchinson Reid ./. United Kingdom*, paras. 14, 50). Also the second proceedings concerned the detention of a criminal who had been found to have (only) diminished criminal responsibility and who had been sentenced to imprisonment in combination with psychiatric confinement (cf. ECtHR, judgment of 11 May 2004 - Application no. 48865/99 - *Morsink ./. Netherlands*, paras. 9, 62). **[98]**

(bb) In its decisions on preventive detention, the European Court of Human Rights does not rule out the possibility that placing certain offenders in preventive detention may meet the conditions of Art. 5 sec. 1 sentence 2 letter e ECHR (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./.*

Germany, para. 103). This is important because offenders in preventive detention do not typically have significantly impaired criminal responsibility. If the conditions of both confinement in preventive detention (§ 66 StGB) and of confinement in a psychiatric hospital (§ 63 StGB) are met because the person concerned suffers from a mental disorder that leads to considerably diminished criminal responsibility, and if the propensity to commit certain crimes that is required for placement in preventive detention results from the psychological defect, confinement in a psychiatric hospital usually takes priority (cf. BGH, order of 6 August 1997 - 2 StR 1999/97 -, Neue Zeitschrift für Strafrecht - NStZ 1998, p. 35 <36>; BGH, judgment of 20 February 2002 - 2 StR 486/ 01 - juris, para. 15; similarly, with reference to the ultima-ratio character of preventive detention, BGH, judgment of 20 September 2011 - 1 StR 71/11 -, juris, para. 21). **[99]**

When the European Court of Human Rights' decisions on preventive detention rejected a justification under Art. 5 sec. 1 sentence 2 letter e ECHR, the court did not base its findings on the argument that a mental disorder within the meaning of this provision must at least be accompanied by an impairment of criminal responsibility. In some cases, the European Court of Human Rights found that there was no mental disorder (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/ 04 - *Mücke ./. Germany*, para. 103), and in other cases it doubted the existence of a mental disorder (cf. ECtHR, judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit ./. Germany*, para. 55; judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, para. 86; judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner ./. Germany*, para. 79). In doing so, the European Court of Human Rights followed the distinctions made at that time in the German legal system, namely that a difference is made between the placement of dangerous offenders in preventive detention and the placement of mentally ill persons, who committed criminal acts without or with diminished criminal responsibility, in a psychiatric hospital (cf. ECtHR, judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit ./. Germany*, para. 55). The Court based this assessment on the findings of the domestic courts, which had refused to order the concerned persons' placements in a psychiatric hospital pursuant to § 63 StGB (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, paras. 22, 103; judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit ./. Germany*, para. 55; judgment of 13 January 2011 - Application no. 6587/04 - *Haidn ./. Germany*, para. 92, on provisions under the laws of the federal states). **[100]**

Without always rendering a final decision on the question of a mental disorder, the European Court of Human Rights also considered the fact that the domestic courts did not have the authority to review the existence of a mental disorder, and that they did not base their decisions on the persons in question being of unsound mind (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke* ./. *Germany*, para. 103; judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit* ./. *Germany*, para. 56; judgment of 13 January 2011 - Application no. 6587/04 - *Haidn* ./. *Germany*, para. 93; judgment of 24 November 2011 - Application no. 4646/08 - *O.H.* ./. *Germany*, para. 86; judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner* ./. *Germany*, para. 79). In addition to this - and again independent of the existence of a mental disorder - there could be no justification under Art. 5 sec. 1 sentence 2 letter e ECHR, because the detention had not been effected in an institution that was appropriate for mentally ill persons (cf. ECtHR, judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit* ./. *Germany*, para. 57; judgment of 13 January 2011 - Application no. 6587/04 - *Haidn* ./. *Germany*, para. 94; judgment of 24 November 2011 - Application no. 4646/08 - *O.H.* ./. *Germany*, paras. 87 et seq.; judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner* ./. *Germany*, paras. 80 et seq.). **[101]**

Detention that is consistent with the convention requires that there be a certain relationship between reasons, place, and conditions of the deprivation of liberty. In this context, the European Court of Human Rights considered the fact that the domestic courts had made no use of the possibility granted them by law to have the preventive detention take place in a psychiatric hospital (§ 67a sec. 2 StGB). Discussing the differing national rules under § 67a sec. 2 StGB, which imply better promotion of rehabilitation via the transfer to a different measure, the European Court of Human Rights held that in order to be justified under Art. 5 sec. 1 sentence 2 letter e ECHR, even those who are unwilling to undergo therapy but have been deprived of their liberty because of their mental illness, have to be placed in a medical therapeutic facility that is appropriate for their condition (cf. ECtHR, judgment of 24 November 2011 - Application no. 4646/08 - *O.H.* ./. *Germany*, para. 89; judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner* ./. *Germany*, para. 82). However, one cannot draw conclusions about the existence or absence of a mental disorder from the fact that a person has not been transferred to a psychiatric hospital. **[102]**

(cc) As a result, the decisions on the law of preventive detention are to be understood as meaning that the European Court of Human Rights follows the findings of the domestic courts concerning the

degree of severity required for a mental disorder, findings which the domestic courts of the respective states parties have made based on the system of their respective national law. Before the Therapeutic Confinement Act entered into force, under German law, the only reasons why the mental state of a dangerous criminal was relevant to the decision of whether he or she was to be placed in preventive detention was to distinguish between full criminal responsibility, diminished criminal responsibility or no criminal responsibility (§§ 20, 21 StGB) - if the offender was fully criminally responsible, he or she could only be placed in preventive detention, if not, the only option was to confine him or her to a psychiatric hospital. With regard to the existence of a mental disorder, the European Court of Human Rights thus had to rely on the findings by the German courts, which were made on the basis of the above-mentioned distinction. **[103]**

This does not mean, however, that the national legislature cannot alter the system of national law, as has happened with the Therapeutic Confinement Act, and introduce the criterion of a "mental disorder" as a "third way" that is independent of significantly diminished criminal responsibility, and make this criterion the statutory requirement for placement in therapy-focussed confinement. Accordingly, the European Court of Human Rights repeatedly emphasised in recent decisions that when the domestic courts ruled on the continuation of confinement of people who were placed in preventive detention - and thus outside of the scope of § 63 StGB - they did not have to decide on the question of whether the person concerned had a mental disorder. This is where the Therapeutic Confinement Act comes into play. For the first time, it has made the existence of a mental disorder - in addition to certain requirements regarding an ensuing threat - a statutory requirement for confinement, and has thus established judicial obligations to scrutinise this decision that are independent of the conditions of §§ 20, 21 StGB. **[104]**

(b) To the extent that the European Court of Human Rights also places qualitative requirements on national law regarding a lawful deprivation of liberty, the Therapeutic Confinement Act satisfies these, especially with regard to predictability. The European Court of Human Rights demands that all law be sufficiently "precise", a requirement that does not differ noticeably from the domestic requirements of legal specificity (on this, see IV.). It also requires a "foreseeable" application of the law, meaning that the provision in question must be in force at the relevant point in time, in order to avoid all risk of arbitrariness (cf. only ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 90, with further references). **[105]**

So far, the European Court of Human Rights has not expressly decided on the relevant time for predictability under Art. 5 sec. 1 sentence 2 letter e ECHR. The decisive moment for deprivation of liberty under Art. 5 sec. 1 sentence 2 letter e ECHR, which does not - as do Art. 7 and Art. 5 sec. 1 sentence 2 letter a ECHR - concern deprivation of liberty that results from past behaviour and the ensuing criminal conviction, but deprivation of liberty that results from a present state (in this case a mental disorder and the threat to the public that results from it) (cf. BVerfGE 128, 326 <398>), is the time it was ordered. At this point in time, there must also be clear evidence of a mental disorder (cf. ECtHR, judgment of 23 February 1984 - Application no. 9019/80 - *Luberti ./. Italy*, para. 28; judgment of 19 April 2012 - Application no. 61272/09 - *B. ./. Germany*, para. 68). **[106]**

In this context, the Senate does not fail to see that in the decision *Mücke v. Germany* and with regard to Art. 5 sec. ECHR, the European Court of Human Rights somewhat broadly voiced "serious doubts" with regard to foreseeability, and that it seemed to consider as the relevant point in time the moment the crime was committed (cf. only ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 104). However, the statement made in that decision cannot be generalised as meaning that one must always look to this point in time when ordering deprivation of liberty pursuant to Art. 5 ECHR. This would also be problematic from a systematic point of view, because such a generalised statement about Art. 5 sec. 1 ECHR as a whole would ultimately mean that the specific prohibition of retroactivity in criminal cases within the meaning of Art. 7 sec. 1 ECHR would be transferred to all justifications under Art. 5 sec. 1 ECHR. Moreover, this interpretation would not fit in with the jurisprudence of the Grand Chamber of the European Court of Human Rights, according to which predictability and the relevant point in time, which are meant to help avoid arbitrariness, must be considered in the light of the particular reason for detention and its objectives (cf. ECtHR, judgment of 9 July 2009 - Application no. 11364/03 - *Mooren ./. Germany*, para. 77; see also ECtHR, judgment of 29 January 2008 - Application no. 13229/03 - *Saadi ./. United Kingdom*, para. 68). If one includes in the consideration that detention under Art. 5 sec. 1 sentence 2 letter e ECHR constitutes deprivation of liberty resulting from a present condition and aiming at protecting the general public (cf. ECtHR, judgment of 4 April 2000 - Application no. 26629/95 - *Litwa ./. Poland*, para. 60) and is not primarily the response to previous behaviour, one must, in light of the provision's purpose and in keeping with the national margin of appreciation, take the time at which the detention was ordered as the relevant point in time, and not, in the sense of an absolute prohibition of retroactivity, a certain point in the past. **[107]**

(c) The Therapeutic Confinement Act also satisfies the convention's other requirements for lawful confinement pursuant to Art. 5 sec. 1 sentence 2 letter e ECHR. The existence of a mental disorder has to be proven through expert assessments (§ 9 ThUG). The limit on the duration of compulsory confinement (§ 12 sec. 1 ThUG) and the requirement of a new medical assessment for an extension (§ 12 sec. 2 in conjunction with § 9 ThUG) ensure that the extension of the deprivation of liberty depends on the existence of a mental disorder. From § 1 sec. 1 no. 1 ThUG follows the necessity of compulsory confinement, which may be necessary not only where a person needs therapy, medication or other clinical treatment but also where the person needs supervision to prevent him or her, for example, from causing harm to him - or herself or other persons (cf. ECtHR, judgment of 20 February 2003 - Application no. 50272/99 - *Hutchison Reid ./. United Kingdom*, para. 52). Interpreted in conformity with the Basic Law, § 1 sec. 1 no. 1 ThUG requires a high risk that the most serious violent crimes or sexual offences will be committed and thus a qualified interference with high-ranking legal interests of third parties. The specifications for appropriate institutions (§ 2 ThUG) guarantee the nexus between the reason for the deprivation of liberty and the place and conditions of the confinement that the convention demands. Finally, in order to secure a fair trial, the person concerned must be provided with a lawyer to assist his or her cause (§ 7 ThUG), and he or she must be heard separately and in person (§ 8 sec. 2 ThUG). The Regional Courts (*Landgerichte*, § 4 ThUG) decide on the confinement by way of an order (*Beschluss*, § 10 ThUG) that can be challenged by complaint (*Beschwerde*, § 16 ThUG). **[108]**

IV.

When interpreted in conformity with the Basic law, which is necessary due to concerns regarding the protection of legitimate expectations (see above), confinement pursuant to the Therapeutic Confinement Act does not for other reasons interfere with the right to liberty under Art. 2 sec. 2 sentence 2 in conjunction with Art. 104 sec. 1 GG; in particular, the principle of legal specificity is satisfied. **[109]**

1. Art. 103 sec. 2 GG does not apply to therapeutic confinement because, just like preventive detention, this kind of confinement does not constitute punishment within the meaning of Art. 103 sec. 2 GG (cf. BVerfGE 109, 133 <187 and 188>; 128, 326 <376 and 377, 392 and 393>; all cases being on preventive detention). Punishment under Art. 103 sec. 2 GG requires that the burden imposed be accompanied by a disapproval of culpable conduct and that it aim (at least to some degree) at compensation for criminal guilt (BVerfGE 109, 133 <172 et seq.>; 128, 326 <376 and 377, 392 and 393>). The purpose of therapeutic confinement, however, is solely to protect in the future society and its members from individual offenders who, based on their previous behaviour, are deemed to be highly dangerous. **[110]**

In the case at hand, the standards for legal specificity are set by Art. 104 sec. 1 sentence 1 GG. This provision requires that the legislature describe with sufficient clarity the cases in

which deprivation of liberty is permissible. Deprivation of liberty must be regulated in a predictable, measurable and reviewable manner. In this respect, Art. 104 sec. 1 sentence 1 GG substantiates the requirements for legal specificity that follow from the rule of law (cf. BVerfGE 29, 183 <195 and 196>; 76, 363 <387>; 109, 133 <188>). The more severe the interference with fundamental rights, and the more serious the consequences of the provision, the more accurate the requirements set by the legislature must be (cf. BVerfGE 86, 288 <311>; 93, 213 <238>, with further references; 109, 133 <188>). Since preventive deprivation of liberty interferes with the fundamental right of Art. 2 sec. 2 sentence 2 GG just as strongly as prison sentences, Art. 104 sec. 1 GG leads to similar requirements for legal specificity as Art. 103 sec. 2 GG (BVerfGE 29, 183 <196>; 78, 374 <383>; 96, 68 <97>; 131, 268 <306>). **[111]**

The principle of legal specificity does not preclude the use of terms requiring further clarification (cf. BVerfGE 11, 234 <237>; 28, 175 <183>; 48, 48 <56>; 92, 1 <12>; 126, 170 <196>). The legislature must remain in a position to master the diversity of life (with regard to Art. 103 sec. 2 GG, cf. BVerfGE 28, 175 <183>; 47, 109 <120 and 121>; 126, 170 <195>). The degree of specificity required of a given provision cannot be defined in the abstract, but depends on the specifics of the particular fact pattern including the circumstances that led to the statutory regulation (BVerfGE 28, 175 <183>; 86, 288 <311>; 126, 170 <196>). As long as it is possible to arrive at a reliable basis for interpreting and applying the provision via the usual methods of interpretation, in particular by reference to other provisions of the same act, by considering the context of the provision, or as a result of established jurisprudence, there are no concerns against using vague legal terms (BVerfGE 45, 363 <371 and 372>; 86, 288 <311>). Moreover, it is the task of the courts to dispel any questions remaining regarding the scope of a provision by interpreting this provision as well as possible and thus making it more precise and concrete (cf. BVerfGE 126, 170 <198> regarding the obligation to specify which Art. 103 sec. 2 GG imposes on the courts). **[112]**

2. Pursuant to these standards, there are no concerns against § 1 sec. 1 ThUG. Via the links contained in the explanatory memorandum on the Therapeutic Confinement Act (cf. BTDrucks 17/3403, pp. 53 and 54), which refer to the requirements developed in the context of Art. 5 sec. 1 sentence 2 letter e ECHR, and to the language of contemporary diagnostic classification systems used in the field of psychiatry, the vague legal term of "mental disorder" (cf. BVerfG, order of the Third Chamber of the Second Senate of 15 September 2011 - 2 BvR 1516/11 -, juris, para. 39) is specified in a way that - together with the other statutory criteria - is available to an interpretation specifying its content and meeting the requirements of legal specificity. **[113]**

a) aa) Even without any final definition of the term, the jurisprudence of the European Court of Human Rights on Art. 5 sec. 1 sentence 2 letter e ECHR establishes a restrictive interpretation to the effect that a "mental disorder" must meet at least certain qualitative minimum requirements. One of these requirements demands an objective medical opinion establishing that the person suffers from a "true mental disorder", the "kind or degree" of which requires involuntary commitment to an institution, either in the interest of the affected person, or in the public interest. The duration of the deprivation of liberty must also depend on the continued existence of this disorder and the confinement must - in accordance with its cause

- take place in a psychiatric hospital or institution (cf. only ECtHR, judgment of 24 October 1979 - Application no. 6301/73 - *Winterwerp ./. Netherlands*, paras. 37 et seq.; established jurisprudence). In addition to the formal aspect that the diagnosis may only be based on an objective medical opinion, there is also a substantive requirement, namely that there is a "true" mental disorder which, due to the way it presents itself, requires compulsory confinement. Thus, Art. 5 sec. 1 sentence 2 letter e ECHR - like § 1 sec. 1 ThUG itself (cf. on this below at (b)) - links the mental disorder to the purpose of the confinement and thus imposes requirements on the intensity of the mental disorder (cf. Schöch, GA 2012, p. 14 <28>; Meyer-Ladewig, ECHR, 3rd ed. 2011, Art. 5 para. 45), because the mental disorder must be reflected in the reason for the deprivation of liberty. The latter is also reflected in the fact that, in accordance with its cause, the confinement must take place in an appropriate institution. **[114]**

bb) Moreover, for determining whether there is a mental disorder, the explanatory memorandum follows the classification systems ICD-10 (International Statistical Classification of Diseases and Related Health Problems of the WHO, 10th revision, chapter V) and DSM-IV (Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, 4th ed.), which are recognised in the field of psychiatry (cf. BTDrucks 17/3403, p. 54). **[115]**

(1) With regard to the criticism that the diagnosis of "antisocial personality disorder" pursuant to DSM-IV is controversial because its criteria are already met by repeated violations of rules and behavioural problems without need for psychopathological symptoms (cf. statement of the DGPPN of 6 March 2012, p. 4), the Court points out that at least according to the explanatory memorandum (BTDrucks 17/3403, p. 54) and the reference to the classification system ICD-10, which is also made, it cannot be doubted that mere social deviations or conflicts are not sufficient for a mental disorder within the meaning of § 1 sec. 1 ThUG. **[116]**

(2) The usual methods of interpretation can also answer the question of whether it is a requirement for confinement pursuant to § 1 sec. 1 ThUG that there be subjective distress on the part of the person involved. Existing disagreements over this question do also not establish insufficient specificity of this provision. **[117]**

[…] **[118]**

As for psychiatry's view of the relationship between subjective distress and mental disorders there is an empirical, but no conceptual connection. While it is argued that suffering is usually or always indicative of a mental disorder (cf. Merkel, Betrifft Justiz 2011, p. 202 <205>; Morgenstern, Zeitschrift für Internationale Strafrechtsdogmatik - ZIS 2011, p. 974 <977>), it is also conceded that, alternatively, merely objective limitations of important functions could be enough (Mahler/Pfäfflin, Recht und Psychatrie - R&P 2012, p. 130 <131>; probably also Morgenstern, ZIS 2011, p. 974 <978>). Accordingly,

even though subjective distress is a frequent or typical side effect of a mental disorder, it is no precondition by definition for its existence. In keeping with this, it fits that the preface on personality and behavioural disorders (F60-F69) pursuant to ICD-10 mentions that they are often - and therefore not always - accompanied by varying degrees of personal distress and impaired social functioning (cf. International Statistical Classification of Diseases and Related Health Problems of the WHO, 10th revision, version 2013, chapter V, personality and behavioural disorders (F60-F69), p. 297). **[119]**

In addition, while the legal concept of mental disorders pursuant to § 1 sec. 1 ThUG is modelled on the diagnostic classification systems used in psychiatry, the purpose of the provision cannot be disregarded when interpreting it as a legal concept. This is different from a hippocratic approach, which uses distress as justification for therapeutic intervention (cf. Kröber, Forensische Psychatrie, Psychologie, Kriminologie - FPPK 2012 p. 60 <61>). In accordance with the requirements of Art. 5 sec. 1 sentence 2 letter e ECHR, § 1 sec. 1 ThUG aims at protecting the public as effectively as possible from serious violations of their legal interests by mentally ill violent criminals and sexual offenders (cf. BTDrucks 17/3403, p. 53). It would not be compatible with this legislative concept to focus on subjective distress and thus to preclude the possibility of confining people who, according to their own perception, do not suffer from their psychological condition - a condition that makes them commit the most serious violent and/or sexual offences (cf. Merkel, Betrifft Justiz 2011, p. 202 <206>). **[120]**

Nor does the wording of § 1 sec. 1 no. 1 ThUG, according to which an order of confinement requires that the person concerned "suffer from a mental disorder" warrant such inappropriate interpretation. The verb "to suffer (from)" ("*leiden (an)*") can stand for a mere affliction that has a negative connotation for the person using the word, but not necessarily for the afflicted person him- or herself (cf. Duden, Deutsches Universalwörterbuch, 5th ed. 2003, p. 1008). […] Often the phrase is used in personal, especially medical, contexts in a way that says nothing about the subjective feelings of the person concerned, and that does not require any determinations on this issue (cf. only, e.g., § 21 sec. 2 no. 6 of the Medicinal Products Act - Arzneimittelgesetz). § 1 sec. 1 no. 1 ThUG is an example of such use (cf. also Nußstein, Strafverteidiger - StV 2011, p. 633 <634>). **[121]**

b) The possibility of therapeutic confinement is further significantly limited by the fact that apart from a mental disorder, the law also expressly requires a causal link between the mental disorder and the threat. Pursuant to § 1 sec. 1 no. 1 ThUG, the competent court may order a person to be confined if he or she suffers from a mental disorder and if, taking into consideration his or her personality, prior life and life situation as a whole, there is a high probability that he or she will, as a consequence of this mental disorder, cause considerable harm to the life, physical integrity, personal freedom or sexual self-determination of another person. With regard to this causality, the explanatory memorandum remarks that the requirement of performing a prediction of

dangerousness, which requires a high degree of probability, ensures that confinement is only an option if it is very likely that the disorder will result in serious threats to particularly significant legal interests of third parties; there must be a causal link between the mental disorder and the resulting dangerousness of the person concerned (cf. BTDrucks 17/3403, p. 54). This link implements the legal requirement of the convention that the degree or type of the disorder must justify the involuntary confinement (cf. only ECtHR, judgment of 19 April 2012 - Application no. 61272/09 - *B. ./. Germany*, para. 69, with further references; consistent jurisprudence). **[122]**

It does not matter that, based on the diagnostic manuals, the term "mental disorder" covers diverse disorders that have very different effects, and that it thus encompasses a wide range of people who rarely also pose a threat, let alone a considerable threat. The fact that the provision's requirements refer to a mental disorder does not contain a stigmatising attribution to the effect that persons who suffer from a mental disorder are at the same time dangerous in a way that warrants confinement. To the contrary, the additional requirement of a mental disorder that results in a particular level of dangerousness implies that the threat is very much not seen as automatically connected with a mental disorder. By demanding a causal link between the mental disorder and the additionally required dangerousness, the legislature implemented the requirement of the convention that the degree or type of the disorder must justify the involuntary confinement (cf. only ECtHR, judgment of 19 April 2012 - Application no. 61272/09 - *B. ./. Germany*, para. 69 with further references; established jurisprudence). **[123]**

c) Moreover, the scope of the interfering provision is further restricted by the formal requirements of therapeutic confinement, which in turn are sufficiently specific. This applies above all to the requirement of a conviction for one of the enumerated criminal acts of § 66 sec. 3 StGB that, according to the explanatory memorandum, clearly does not need to have been the qualifying offence for the preventive detention (cf. BTDrucks 17/3403, p. 53), and to the requirements of previous preventive detention. **[124]**

Ultimately, the Therapeutic Confinement Act also satisfies the special requirements that apply to the legal specificity of predictive decisions. If preventive deprivation of liberty is at stake, they require that the legislature not only determine the statutory requirements of the custodial measure but, in view of the uncertainty related to making predictions, that it also determine how long the predictive decision shall be valid and when it must be re-assessed (cf. BVerfGE 109, 133 <188>). In § 12 sec. 1 ThUG, the legislature limited the validity of the predictive decision to no more than 18 months, and in § 12 sec. 2 sentence 1 ThUG it declared that the provisions regarding the first decision ordering confinement apply accordingly to a decision on its extension (with some adaptions regarding medical assessment) (§ 12 sec. 2 sentences 2 to 4 ThUG). **[125]**

V.

In the version relevant for this case, the Therapeutic Confinement Act does not violate the prohibition of laws that are merely applicable to a single case (*Verbot des Einzelfallgesetzes*) under Art. 19 sec. 1 sentence 1 GG. **[126]**

1. Within its scope of application in the case at hand (cf. on the scope of application, BVerfGE 24, 367 <396>; 83, 130 <154>; 95, 1 <17>), Art. 19 sec. 1 GG prohibits laws that restrict fundamental rights not in a general way but only for individual cases. A law fulfils the requirement of being "general" if, due to its abstract constituent elements, one cannot tell to how many and which cases it applies (BVerfGE 121, 30 <49>, with further references). **[127]**

This does not, however, preclude the possibility that a law applies only to a single case, if the facts are such that there is just one case of this kind and there are objective reasons for regulating this individual case (cf. BVerfGE 25, 371 <399>; 85, 360 <374>). Ultimately, Art. 19 sec. 1 sentence 1 GG contains a substantiation of the general principle of equality (cf. BVerfGE 25, 371 <399>; Jarass, in: Jarass/Pieroth, Grundgesetz, 12th ed. 2012, Art. 19 para. 2; cf. also Dreier, in: Dreier, Grundgesetz, 2nd ed. 2004, volume I, Art. 19 I para. 16 ("*Verschärfung oder Konkretisierung*"); Hufeld, in: Bonner Kommentar, Art. 19 sec. 1 sentence 1 para. 8 (156th shipment 2012) ("*Verschärfung*")), which forbids the legislature to pick one case from a number of similar ones and make this case the subject of an exception (cf. BVerfGE 25, 371 <399>; 85, 360 <374>). The prohibition of laws that apply only to a single case aims at ensuring equality. This aim is also met if the prohibition is read to include the task of safeguarding the principle of separation of powers by leaving specific-individual provisions to the executive branch and by reserving general-abstract provisions for the legislature (cf. Sachs, in: Sachs, Grundgesetz, 6th ed. 2011, Art. 19 para. 20). Here, the principle of separation of powers applies specifically in its equality-ensuring function. **[128]**

Without such a limitation, which is based on the provision's purpose, and according to which regulating an individual fact pattern can be permissible if there is sufficient justification, Art. 19 sec. 1 sentence 1 GG could potentially conflict with other principles of the Constitution. Since the legislature may enact legislation only in the form of formal laws, this applies in particular to the requirement of a statutory provision (*Vorbehalt des Gesetzes*) in the form of the requirement of parliamentary approval (*Parlamentsvorbehalt*), which follows from the principle of democracy of Art. 20 sec. 1 and sec. 2 GG and the principle of the rule of law of Art. 20 sec. 3 GG (cf. Remmert, in: Maunz/Dürig, Grundgesetz, Art. 19 sec. 1 para. 15 (66th shipment 2012); Krebs, in: von Münch/Kunig, Grundgesetz, 6th ed. 2012, Art. 19 paras. 8 et seq.). It is up to the legislature to resolve this tension. This is a way to avoid a situation in which the authorities would otherwise have to remain inactive because an individual fact pattern required statutory regulation. **[129]**

2. Pursuant to these standards, the Therapeutic Confinement Act does not violate Art. 19 sec. 1 sentence 1 GG. **[130]**

In its wording, § 1 sec. 1 ThUG is phrased in an abstract way and thus complies with the requirement of generality (*Allgemeinheitsgebot*) of Art. 19 sec. 1 sentence 1 GG. It is true that the scope of application of the act concerns a closely limited group of persons, because from the outset it affects only those persons in preventive detention who, as a result of the judgment of the European Court of Human Rights of 17 December 2009, had to be dismissed from preventive detention or who had already been dismissed (cf. BTDrucks 17/3403, p. 19). However, this abstract limitation does not individually target the affected persons. At the time of legislative proceedings, the legislature did not know the exact number of persons affected by the scope of § 1 sec. 1 ThUG. *A fortiori*, the legislature could not know which individuals would be

affected. Since at the time, the regular courts had not yet clarified how the judgment of the European Court of Human Rights (ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*) was to be taken into account in the national context (cf., on the one hand, BGH, order of 12 May 2010 - 4 StR 577/09 -, juris; on the other hand BGH, order of 21 July 2010 - 5 StR 60/10 -, BGHSt 55, 234), there had not been a determination for which group of persons in preventive detention the protection of legitimate expectations would end their preventive detention, and would render the Therapeutic Confinement Act applicable. Moreover, § 1 sec. 1 ThUG did not establish an automatism to the effect that all people in preventive detention who were still classified as dangerous, but who were released or were to be released as a result of the judgment of the European Court of Human Rights of 17 December 2009, were to be transferred into therapeutic confinement. **[131]**

VI.

The decisions by the regular courts challenged by the constitutional complaints are not consistent with the requirements set by the Basic Law for applying the Therapeutic Confinement Act. The orders violate the complainant's fundamental right under Art. 2 sec. 2 sentence 2 in conjunction with Art. 20 sec. 3 GG, because the regular courts did not base their decisions on the requisite standards of proportionality as warranted by the Constitution. What is decisive for finding a violation of fundamental rights is alone the objective unconstitutionality of the challenged decisions of the regular courts at the time of the decision of the Federal Constitutional Court; it is irrelevant whether the regular courts can be blamed for the violation of the fundamental rights (cf. BVerfGE 128, 326 <407 and 408>). **[132]**

1. a) The challenged decision of the Saarland Higher Regional Court of 30 September 2011 in proceedings 2 BvR 2302/11 does not meet the requirements of the protection of legitimate expectations. **[133]**

   Having quoted the text of the statute, the Higher Regional Court uses as standard of review whether, on the basis of expert opinions, there is a "high likelihood that there will be other serious (sexual) offences" and refers to the "higher standard of dangerousness" mentioned in the decision of the Federal Constitutional Court of 4 May 2011. However, the court did not apply the part of this higher standard of dangerousness that requires a high risk of the most serious violent crimes or sexual offences being committed (cf. BVerfGE 128, 326 <332>). Rather, the Higher Regional Court only referred to "serious (sexual) offences". Nor can it be concluded from its other statements that the Higher Regional Court applied the strict standards for retrospectively ordering or extending preventive detention that also follow from the Federal Constitutional Court's decision. In particular, saying that "one must assume that there is a very high probability of renewed offences of the same overall category being committed" does not indicate that "overall category" only encompassed "the most serious" violent crimes or sexual offences. **[134]**

   b) Nor does the decision of the Saarbrücken Regional Court of 2 September 2011, which preceded the constitutional complaint, use the standards that follow from the protection of legitimate expectations. Instead, following the expert opinions submitted in this case, the decision relies on its finding that "the person concerned continues to pose a risk

of committing serious violent crimes and/or sexual offences of the kind mentioned in § 66 sec. 3 sentence 1 StGB" without giving reasons for its choice of standard of review. This does not meet the constitutional requirements because not all crimes of the referenced (broad) list of cases of § 66 sec. 3 sentence 1 StGB belong to the category of the most serious violent crimes or sexual offences, and because the probability of such crime being committed has not been addressed. **[135]**

2. a) With regard to the decision of the Saarland Higher Regional Court of 14 May 2012, which was challenged in proceedings 2 BvR 1279/12, the combination of the referenced results of the medical assessments, of the statements regarding standards differing from the ones contained in the Federal Constitutional Court's order on continued validity (*Fortgeltungsanordnung*), and of the court's application of the law to the facts does also not show whether the Higher Regional Court applied the standards of proportionality that are required for ordering therapeutic confinement. Following the wording of § 1 sec. 1 ThUG, the Higher Regional Court points out that the "high probability" within the meaning of the Therapeutic Confinement Act is not the same as the "high risk that the most serious violent crimes or sexual offences will be committed", as is required for retrospectively ordered or extended preventive detention. **[136]**

It need not be decided at this point to what extent the statements of the Higher Regional Court regarding the appropriate standard of probability are, *per se*, compatible with the constitutional requirements. Not objectionable under constitutional law is the Higher Regional Court's approach, according to which no fixed percentage can be used for determining the required degree of probability, and which states that one must instead consider the weight of the predicted offences. This correlation is based on the fact that the mentioned strict requirements are a manifestation of the protection of legitimate expectations of the person concerned, which has to be considered when performing the proportionality test, and which has to be balanced against the security interests of the general public. Two criteria determine the weight of the general public's interest - the severity of the expected offences and the probability that these offences will actually be committed. Accordingly, when determining the weight of the interests of the general public, and within narrow limitations, a lesser pronounced criterion can be offset by the other, more strongly pronounced criterion. In this context, offences below the threshold of "most serious violent crimes or sexual offences" must not be taken into consideration. Due to the normative correlation described above, the establishment of a "high risk" can vary within the range of this group of offences, but even with regard to the most serious violent crimes or sexual offences conceivable, there always has to be a significant probability of them actually being committed. **[137]**

The challenged decision of the Saarland Higher Regional Court does not meet the constitutional requirements, because the decision does not show that the standard used for the prediction only refers to the "most serious violent crimes or sexual offences", which alone are to be considered in this context. Both the account of the findings of the medical assessments that had previously been made, and the account of the medical assessments made specifically for the judicial proceedings, do not refer in their prediction of probability to the field of the "most serious violent crimes or sexual

offences", but refer more generally to "violent offences against women", "further sexual or violent offences", "crimes belonging to the same general category", "further crimes", "violent sexual offences", or "sudden aggressive behaviour". Because these terms can also include types of offences that do not belong to the category of the "most serious violent crimes or sexual offences", it is not enough that the Higher Regional Court comes to the conclusion that there is a "high probability" that "the most serious crimes" will be committed, even though there is no basis for this conclusion in the medical assessments referred to. In particular, one cannot simply refer in this context to previously committed offences. While among them there are undoubtedly some of the "most serious" type, the court failed to specifically indicate which previous offences belonged to the "most serious" type of crimes and what the degree of probability was that specifically these crimes - which alone are to be considered in this context - would be committed. **[138]**

b) The preceding order of the Saarbrücken Regional Court of 17 February 2012 also violates Art. 2 sec. 2 sentence 2 in conjunction with Art. 20 sec. 3 GG, because it is likewise not based on the standards required by the Constitution. Instead, with regard to substance, the order refers to (only) "severe" violent crimes, and the order also explicitly rejects the idea that, with regard to legitimate expectations, the more exacting standards of the law of preventive detention be used. **[139]**

3. There is no need to decide whether, in addition to this, the challenged orders also violate the prohibition of analogy of Art. 2 sec. 2 sentence 3 in conjunction with Art. 104 sec. 1 GG because the Therapeutic Confinement Act was used in the case of the complainant by way of interpretation even though, lacking a final decision on his preventive detention, he had not yet been placed in preventive detention but instead, the legal basis for executing the confinement was merely preliminary confinement pursuant to § 275a sec. 5 StPO (old version). The orders challenged in this case are already unconstitutional due to the stated violation of Art. 2 sec. 2 sentence 2 in conjunction with Art. 20 sec. 3 GG. **[140]**

4. Pursuant to § 95 sec. 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG), it is sufficient to declare the challenged decisions unconstitutional. It is not necessary to annul the challenged decisions since they are no longer the basis for the current confinement and thus no longer impact the complainant (cf. BVerfGE 50, 234 <243>; BVerfG, order of the Third Chamber of the Second Senate of 17 April 2012 - 2 BvR 1762/10 -, juris, para. 18). **[141]**

IV. Equality and Non-Discrimination - Article 3 of the Basic Law

1. Prohibition of Nocturnal Employment, BVerfGE 85, 191

Explanatory Annotation

Gender discrimination was the issue in this case where the applicant complained against legislation prohibiting the employment of women between 10 pm and 6 am. The legislation's object and purpose was to protect women from night work because the factual reality of working and often taking care of the household and family made women especially susceptible for the health risks associated with working at night. Article 3.1 stipulates that all persons are equal before the law. This means in essence that differentiation between two comparison groups, such as men and women, requires a reasonable justification. The legislation in question in this case differentiated between female workers and female salaried employees. Only the former were not allowed to work at night. The two comparison groups are workers and office employees but there are no reasonable arguments to justify differentiation between these two groups.

Article 3.2 obligated the government to pro-actively promote gender equality.

Article 3.3 prohibits discrimination on a number of grounds specifically listed, gender (sex) being one of them. The Court has interpreted this provision as going beyond Article 3.1 and prohibiting in principle of any differential treatment of people on account of the attributes listed in Article 3.3. However, Article 3.3 does not absolutely prohibit differentiating between the sexes. If the differentiation addresses a problem that is inherently connected to one's gender and if the different treatment is absolutely necessary to resolve the problem, then differential treatment is still possible. That would, for example, certainly be the case for protective measures during pregnancy. The prohibition to work at night, on the other hand, obviously did not pass this threshold. Working at night poses equal health risks for men and women and there is no compelling reason to exempt only women from working at night and thus excluding them from employment opportunities.

Translation of the Prohibition of Nocturnal Employment Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 85, 191*

Headnotes:

1. Under Article 100.1 sentence 1 of the Basic Law (Grundgesetz - GG) a law may not be used as the basis for a decision if it conflicts with European Community law.

2. Unequal treatment on the basis of gender is compatible with Article 3.3 of the Basic Law only if absolutely required to resolve problems that because of their nature can occur only in the case of men or women.

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

3. The regulative import of Article 3.2 of the Basic Law that goes beyond the scope of the prohibition of discrimination under Article 3.3 of the Basic Law lies in the fact that it establishes a doctrine of equality and extends it to societal reality.

4. The prohibition of nocturnal employment under s. 19 of the Working Time Ordinance (Arbeitszeitordnung - AZO) discriminates against female hourly employees as compared with male hourly paid employees and female salaried-employees; it is therefore in violation of Articles 3.1 and 3.2 of the Basic Law.

Judgment of the First Senate of 28 January 1992 on the basis of the oral hearing of 1 October 1991 - 1 BvL 1025/82, 1 BvL 16/83 and 10/91 -

Facts:

S. 19.1 of the Working Time Ordinance of 1938, most recently amended by the Act of 10 March 1975 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 685), prohibits, *inter alia*, paid employment at night between the hours of 8:00 p.m. and 6:00 a.m. A series of economic sectors, in particular agriculture and forestry, are exempted from this provision. S. 19.2 of the Working Time Ordinance contains special provisions for multiple-shift enterprises; s. 19.3 of the Working Time Ordinance makes provision for further general exceptions to the prohibition of nocturnal employment, for example, in the case of transport undertakings and eating and drinking establishments.

The complainant was employed in a managerial capacity by a baked goods factory; she was fined for paid employing in her enterprise during the night.

In response to her constitutional complaint, the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) reversed the court decisions that had confirmed the imposition of the fine and found s. 19.1 of the Working Time Ordinance incompatible with Articles 3.1 and 3 of the Basic Law.

Extract from the Grounds:

…

B. II.

The constitutional complaint is admissible.

On the basis of the submissions of the complainant, a violation of her fundamental rights is possible. She is to be sure not personally discriminated against by the prohibition of nocturnal employment, which applies only to paid employees. As a result, a violation of her fundamental right under Article 3 of the Basic Law is not at issue. However, there may exist a violation of her fundamental right to general freedom of action if the prohibition of nocturnal employment under s. 19.1 of the Working Time Ordinance is in violation of Articles 3.1 and 3 of the Basic Law since it discriminates against paid employees as compared with other employees without sufficient reason. In any case, a provision that compels a citizen to treat others in a discriminatory manner directly compromises that person's general freedom of action. Insofar as the decision BVerfGE 77, 84(101) concludes otherwise, it may not be relied upon.

C.

The constitutional complaint is founded. The decisions under challenge are based on the prohibition of paid nocturnal employment of under s. 19.1 of the Working Time Ordinance. This prohibition is, however, not compatible with Articles 3.1 and 3 of the Basic Law. The imposition of a fine on this unconstitutional basis violates the complainant's fundamental right to general freedom of action (Article 2.1 of the Basic Law).

I.

The prohibition of nocturnal employment for female hourly employees (s. 19.1 first alternative of the Working Time Ordinance) is in violation of Article 3.3 of the Basic Law.

1. According to this article of the Basic Law, no one may be discriminated against or privileged on the basis of gender. It reinforces the general principle of equality under Article 3.1 of the Basic Law by narrowing the operating freedom afforded the legislature therein. Gender may in principle - like the other attributes mentioned in s. 3 - not be used as the basis for unequal treatment under the law. This also applies when a provision is not intended to have for effect unequal treatment of a nature prohibited under Article 3.3 of the Basic Law, but rather to pursue other objectives (Clarification of BVerfGE 75, 40 [70]).

Article 3.2 of the Basic Law contains no more exhaustive or more specific requirements in respect of the question as to whether a provision of law wrongfully discriminates against women on the basis of gender. The regulative import of Article 3.2 of the Basic Law that goes beyond the scope of the prohibition of discrimination under Article 3.3 of the Basic Law lies in the fact that it establishes a doctrine of equality and extends it to societal reality. The sentence "men and women shall have equal rights" is intended not only to set aside laws that discriminate against or favour individuals on the basis of gender related attributes, but also to achieve equal rights for both genders in the future (see BVerfGE 15, 337 [345]; 48, 327 [340]; 57, 335 [345, 346].

It is intended to achieve equality in living conditions. For example, women must have the same employment opportunities as men (see BVerfGE 6, 55 [82]).

Traditional role models that result in greater burdens upon or other disadvantages for women may not be reinforced by measures of the state (see BVerfGE 15, 337 [345]; 52, 369 [376, 377]; 57, 335 [344]). The actual disadvantages that women typically experience may be compensated by preferential treatment under the law due to the principle of equal rights embodied in Article 3.2 of the Basic Law (BVerfGE 74, 163 [180]).

The case at hand does not involve the equalization of conditions, but rather the elimination of the existence of unequal treatment under the law. s. 19.1 of the Working Time Ordinance treats paid unequally "due to" their gender. This provision is to be sure addressed at employers. However, the implications of the prohibition of nocturnal employment directly affect paid. Unlike male employees, they are deprived of the possibility of working at night. This constitutes unequal treatment under the law that was originally associated with their gender affiliation.

2. However, not every instance of unequal treatment based on gender is in violation of Article 3.3 of the Basic Law. Rather, provisions that make distinctions may be permissible if compellingly required to resolve problems, that because of their nature, can occur only in the case of men or women. Such a case is not at issue here.

a) Research in the area of occupational medicine has produced no reliable basis for the original assumption underlying the prohibition of nocturnal employment to the effect that such employment was more deleterious to female hourly paid employees by virtue of their constitution than to male employees. Nocturnal employment is in principle harmful to everyone.

…

Specific health risks inherent in the female constitution cannot be recognized with sufficient certainty.

b) Insofar as investigations have shown, women are more adversely affected by nocturnal employment, this is generally attributed to the additional burden of housework and childcare.

…

This cannot serve to support the prohibition of nocturnal employment for all female hourly paid employees, for the additional burden of housework and childcare is not a sufficiently gender-specific characteristic. The traditional perception of the roles of men and women is to be sure such that women manage the household and take care of children, and there is no disputing the fact that that role is very often assumed by women even if they, like their male partners, are also employed. However, the full impact of this twofold burden affects only those women with children that require care, who are either single or have male partners who leave responsibility for childcare and the household to them despite the fact that they work at night. It also affects single male parents in the same manner as well, as to a lesser extent men and women who share the burden of housework and childcare.

Such social findings do not suffice - irrespective of the precise number of those affected - to justify unequal treatment on the basis of gender. The undeniable need for protection of female and male hourly paid employees who work at night and at the same time also have children to care for and a multiple-person household to manage can be more appropriately addressed by provisions that take these circumstances into account.

c) In support of the prohibition of nocturnal employment, the argument is also advanced that women are especially exposed to danger on the way to and from their places of employment at night. This is undoubtedly true in many cases. However, this can also not justify prohibiting all female hourly paid employees from working at night. The state may not absolve itself of its responsibility to protect women from being physically attacked in public streets by restricting their freedom of employment in order to keep them from leaving their homes at night (similarly also ECJ, *Em*GRZ 1991, p. 421 [422]).

> In addition, this argument also does not apply to the class of female hourly employees in general to an extent that would warrant discrimination of all female hourly employees. For example, excessive danger can be precluded by providing a company bus for the way to the place of employment.

3. Violation of the prohibition of discrimination on the basis of gender (Article 3.3 of the Basic Law) is not justified by the doctrine of equal rights contained in Article 3.2 of the Basic Law. The prohibition of nocturnal employment under s. 19.1 of the Working Time Ordinance does not serve to further the purposes of Article 3.2 of the Basic Law. It certainly protects many women against the deleterious effects of nocturnal employment, who in addition to bearing responsibility for childcare and management of a household, are also employed. This protection is, however, accompanied by significant disadvantages; women are discriminated against when they seek employment. They cannot accept employment that also involves occasional work at night. In a few industries, this has resulted in a significant decrease in the training and employment of female workers. In addition, female hourly paid employees are prevented from freely choosing their working hours. They cannot earn the supplementary income associated with night work. This may result in women continuing to be burdened by childcare and housework in addition to employment more than men, which would reinforce the traditional assignment of gender roles. The prohibition of nocturnal employment therefore inhibits mitigation of the societal disadvantages of women.

II.

S. 19.1 of the Working Time Ordinance is also in violation of Article 3.1 of the Basic Law since the provision treats female hourly paid employees differently from female salaried employees without sufficient reason.

1. The general principle of equality under Article 3.1 of the Basic Law prohibits the legislature from making distinctions in the treatment of the legal situations of different classes of persons in the absence of any differences of such nature and weight as could justify such unequal treatment (see BVerfGE 55, 72 [88]; 68, 287 [301]; 81, 156 [205]; 81, 228 [236] 82, 126 [146]). The difference in the treatment of female hourly paid employees and female salaried-employees as regards nocturnal employment cannot be reconciled with this standard.

2. Unequal treatment of the two classes of female employees could be justified only if female salaried-employees were less subject to the deleterious effects of nocturnal employment than female hourly paid employees. There is, however, no evidence of this. Moreover, relevant investigations in the area of occupational medicine indicate that both groups suffer equally from such deleterious effects (see Rutenfranz, op. cit. p. 31; Rutenfranz/Beermann/Löwenthal, op. cit. p. 59). The question as to whether this is due to increasing similarity in the occupational activities of female hourly paid employees and female salaried-employees in the wake of technical progress or whether the occupational activities had in the first place no influence on the deleterious effects of nocturnal employment can be ignored. In any case, there is no evidence of any difference between the need for protection of female hourly paid employees and that of female salaried employees that could alone justify distinctions in the regulation of nocturnal employment in view of the general principle of equality under Article 3.1 of the Basic Law.

...

III.

The constitutional violation makes s. 19.1 first alternative of the Working Time Ordinance incompatible with the Basic Law. This finding also holds for the remaining regulations of the above provision (s. 19.1 second alternative subsections 2 and 3 of the Working Time Ordinance). They are non-independent supplements to the general prohibition of nocturnal employment for female hourly paid employees that is expressed in the first alternative of the first paragraph and therefore share its legal fate. The same applies to s. 25 of the Working Time Ordinance since it contains reference to s. 19 of the Working Time Ordinance.

1. If a law is incompatible with the Basic Law, it must in principle be nullified (s. 82.1 in conjunction with s. 78.1 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG). However, in view of the operating latitude of the legislature, a declaration of nullity is to be avoided if several possibilities exist for remedying the constitutional violation (see BVerfGE 28, 324 [362]; 52, 369 [379]; 55, 100 [113]; 77, 308 [337]). This regularly occurs in the case of violations of Article 3 of the Basic Law (see BVerfGE 22, 349 [361]). In such cases, a provision must be declared void only if it can be assumed with certainty that the legislature would in view of Article 3 of the Basic Law choose the version of the law remaining after the declaration of nullity, which in this case would therefore mean completely forgoing any prohibition of nocturnal employment (BVerfGE 27, 391 [399]).

...

3. It follows directly from this finding of incompatibility that violations of s. 19 of the Working Time Ordinance may not be prosecuted. The legislature must formulate a new provision for the protection of employees against the deleterious effects of nocturnal employment. Such a provision is necessary to satisfy the substantive content of the fundamental rights, in particular that of the right to physical integrity (Article 2.2 sentence 1 of the Basic Law). The state has a special obligation to provide protection as regards this fundamental right (see BVerfGE 77, 170 [214] with further references; established case law).

In the context of fulfilling this duty, the legislature certainly does have a broad latitude for assessment, evaluation and operation that also leaves room for taking into account competing public and private interests. Measures adopted by the legislature may, however, not be totally unsuitable for ensuring protection of fundamental rights (see BVerfGE 77, 170 [214, 215]).

The new provision for the protection of employees against the deleterious effects of nocturnal employment must also meet this standard.

Special protection under the law cannot be considered dispensable because nocturnal employment is generally performed on the basis of voluntary agreements. The principle of personal autonomy underlying contract law can provide adequate protection only if the conditions for free self-determination exist. When the positions of the parties involved are not approximately equal, the provisions of contract law cannot on their own guarantee an equitable balance of interests. This is typically the case when employment contracts are concluded. In such situations, the objective fundamental decisions of the Basic Law in the section devoted to fundamental rights and the imperative of the social welfare state are to be implemented by provisions of law that work counter to social and economic inequality (see BVerfGE 81, 242 [214, 215]).

...

2. Rubble Women, BVerfGE 87, 1

Explanatory Annotation

Under the mandatory German public pension scheme the retirement payments depend on the number of years spent in the active workforce and on the income level achieved during that time. Parents, who opted to stay at home with their children, in the vast majority of cases the mothers, consequently lost active income years and hence would receive lower retirement pensions. This was regarded as unfair and in 1986 legislation was passed to recognize child-rearing time as active income time in the retirement pension calculation. This benefit was limited to women born after 1920. In 1987 additional legislation was passed with the aim of providing a similar benefit for women born before 1921, who, because of their role of removing the debris of the ruins left by the bombing campaigns on German cities directly after World War II were often as a whole referred to as "debris-women". This benefit for the "debris-women was calculated differently as a direct benefit to the pension entitlement and amounted to slightly less than under the calculation formula chosen for women born post 1920 and it was only paid out after 1987. The government justified this with budget constraints. The Constitutional Court regarded this approach as in principle compatible with the Basic Law. However it regarded the steps taken to alleviate the discrimination of those women who opted for child-rearing in comparison to those who opted for income generating activities as insufficient and pointed out that measures could be taken within the system to alleviate the inequality, for example by reducing certain pension entitlements or tying them to tougher conditions, for example reducing entitlements for surviving stay-at-home spouses when there were no children.

The decision illustrates the difficulty of applying the equal protection/non-discrimination clause in the context of financial entitlements. In areas such as pension entitlements the potentially huge financial consequences are obvious. The Court has always taken a cautious approach in this respect. Equality can also be created by not giving any recognition to certain circumstances, such as child-rearing in this case. The Court also invoked the family protection guarantee of Article 6.1 of the Basic Law to argue that some form of recognition for child rearing must be provided for. However, it left it to the government to find 'intra-system' solutions that do not necessarily increase the total amount of entitlements owed and rather lead to a redistribution of the available monies. The government could have stayed away from introducing child-rearing benefits in the first place but once it chose to do so it had to choose a systematically coherent approach giving due regard to the equality clause of Article 3 and the family protection clause of Article 6.1 of the Basic Law.

Translation of the Rubble Women Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 87, 1*

Headnotes:

1. The legislative power of the federal government to recognize child raising time for purposes of statutory pension insurance derives from Article 74 no. 12 of the Basic Law (Grundgesetz - GG). The federal government was empowered to enact the Child Raising Benefits Act (Kindererziehungsleistungs-Gesetz - KLG) under Article 74 no. 7 of the Basic Law.

2. The Widows' and Surviving Dependants' Pension and Periods of Child Raising Act (*Hinterbliebenenrenten- und Erziehungszeiten-Gesetz* - HEZG) and the Child Raising Benefits Act did not violate the Basic Law (Grundgesetz - GG) by generally failing to equate child raising time with periods of contribution to the statutory pension insurance system. The legislature must, however, pursuant to Article 3.1 of the Basic Law in conjunction with Article 6.1 of the Basic Law compensate to a greater extent than in the past for the deficiency in the pension insurance system that lies in the disadvantages in respect of pension benefits due to child raising.

3. Exclusion of mothers born prior to 1921 from credit for child raising time under the statutory pension insurance system by the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act was compatible with Article 3.1 of the Basic Law. As regards Article 3.1 of the Basic Law, entitlement of mothers born in the years prior to 1921 to benefits for child raising, albeit only incrementally, and concurrent exclusion of fathers from eligibility for benefits by the Child Raising Benefits Act were also justified for objective reasons.

Judgment of the First Senate of 7 July 1992 on the basis of the oral hearing of 28 April 1992 - 1 BvL 51/86, 50/87 and 1 BvR 873/90, 761/91 -

Facts:

The decision relates to several constitutional complaints and petitions for concrete judicial review that questions the constitutionality of the provision of law that governs recognition of child raising time under the statutory pension insurance system. Since the 1957 pension reform, wage earners and salaried employees have been provided with statutory pension insurance based on the principle of dynamic income based retirement benefits and financed under what is referred to as the generational compact. That means that expenditures of the pension insurance system are in principle covered by revenues from the same calendar year. These revenues are obtained through compensation based contributions made by the insured and their employers as well as through a federal subsidy. As a result, each employed generation finances pensions to be paid during a given period on a pay-as-you-go basis through contributions made during the same period.

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Selected Fundamental Decisions of the Federal Constitutional Court

The Act on the Reform of Widows' and Surviving Dependants' Pensions and Recognition of Child Raising Time for Purposes of Statutory Pension Insurance (Gesetz zur Neuordnung der Hinterbliebenenrenten sowie zur Anerkennung von Kindererziehungszeiten in der ge-setzlichen Rentenversicherung - HEZG) of 11 July 1985 (Federal Law Gazette [*Bundesgesetz-blatt* - BGBl.] I p. 1450), which went into force on 1 January 1986, not only introduced a fundamental reform of survivors' benefits, but also recognition of child raising years for the purposes of establishment of entitlement to and increases in pension benefits. Under this law, child raising time affected the pension insurance system for wage earners and salaried employees, in that the first 12 calendar months following the end of the month of birth were counted as time covered by compulsory insurance. Childraising time prior to 1 January 1986 thereby became important under the law governing pension insurance since the legislature qualified the first 12 calendar months of child raising following the end of the month of birth as part of the insured period with special status. This was complemented by the Act on Child Raising Benefits under the Statutory Pension Insurance System for Mothers Born in the Years Prior to 1921 (Gesetz über Leistungen der gesetzlichen Rentenversicherung für Kindererziehung an Mütter der Geburtsjahrgänge vor 1921 - KLG) of 12 July 1987 (Federal Law Gazette (*Bundesgesetzblatt* - BGBl.) I p.1585 which went into effect on 17 July 1987. The legislation accorded mothers born in the years prior to 1921, frequently often referred to as the "rubble women", who were not covered by the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act independent benefits for child raising. Under the Child Raising Benefits Act, benefits were provided from federal funds without regard to fulfilment of the prerequisites under legislation governing pension insurance and were equal in amount to the benefits accorded younger mothers under the Widows' and Surviving Dependants' Pension and Periods of ChildRaising Act. Payment of child raising benefits for older mothers commenced with effect as of 1 October 1987 and was then gradually expanded in increments of one year at a time to include all mothers born in the years up to 1920. The above provisions of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act were replaced by the corresponding regulations of the Sixth Book of the Social Code (Sozialgesetzbuch) with effect as of 1 January 1992 along with the Reich Insurance Code (Reichsversicherungsordnung - RVO) and the Salaried Employees Insurance Act (Angestelltenversicherungsgesetz - AVG).

The constitutional complaints and several petitions for concrete judicial review relate to the period of application of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act and the Child Raising Benefits Act; they challenge recognition of child raising time under this legislation as a whole because it fails to take into account the fact that child raising represents a form of contribution that is the equivalent of monetary contribution by virtue of its importance for what is referred to as the generational compact in the context of the statutory pension insurance system. In any case, it is argued, child raising time should also have been taken into account under the statutory pension insurance system in the case of those born in the years prior to 1921 and that the latter should at least also have been accorded corresponding benefits.

In this matter, the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) did establish the existence of discrimination of families with children under the pension system in effect that the legislature must eliminate; the constitutional complaints themselves were, however, dismissed, and the Federal Constitutional Court also found the challenged provisions to be compatible with the Basic Law.

Extract from the Grounds:

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C. II.

The Widows' and Surviving Dependants' Pension and Periods of Child Raising Act and the Child Raising Benefits Act did not violate the Basic Law by generally failing to equate child raising time with periods of contribution to the statutory pension insurance system. The legislature must, however, compensate to a greater extent than in the past for the deficiency in the pension insurance system that is manifested in the disadvantages as regards pension benefits resulting from child raising.

1. It is not possible to infer an obligation from Article 6.1 of the Basic Law that would compel the legislature to make provision for greater retirement benefits for child raising than those provided under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act and the Child Raising Benefits Act.

Article 6.1 of the Basic Law constitutes a right of freedom that obligates the state to refrain from encroaching on family matters (see BVerfGE 6, 55 [76]; 80, 81 [92]). Article 6.1 of the Basic Law also contains an "underlying valuebased decision" that establishes the duty of the state to protect and promote the family (see BVerfGE 6, 55 [76]; 82, 60 [81]; established case law).

However, the state is not bound to compensate for every burden affecting the family or alleviate the burdens of everyone with maintenance obligations (see BVerfGE 82, 60 [81] with further references).

It is equally impossible to infer an obligation from Article 6.1 of the Basic Law to the effect that the state must promote the family without regard for other public interests. State promotion of the family through financial benefits is contingent upon what is feasible in the sense of what the individual can reasonably expect from society. The legislature must in the interest of the common good also take into account other social needs besides promotion of the family in its budget and in so doing respect in particular overall viability and equity. Only if these principles are taken into account is it possible to establish whether promotion of the family by the state is manifestly inappropriate and no longer satisfies the promotion requirement of Article 6.1 of the Basic Law (see BVerfG, op. cit., 8182). Accordingly, it is indeed possible to infer a general duty on the part of the state to compensate for burdens on families from the value-based decision in Article 6.1 of the Basic Law in conjunction with the principle underlying the social welfare state, but not, however, a decision as to the scope of such social compensation and the form it must take. Concrete implications with respect to the specific areas of law and subsystems in which relief is to be provided for families, cannot be inferred from the constitutional mandate. In fact, the legislature has an "in principle" operating latitude in that regard (see BVerfGE 39, 316 [326]; 82, 60 [81] with further references).

2. Moreover, Article 3.1 of the Basic Law, which must, however, be considered in conjunction with Article 6.1 of the Basic Law, must be considered the primary standard of review.

a) Article 3.1 of the Basic Law prescribes equal treatment for all persons under the law.

This does not, however, completely prevent the legislature from making distinctions. Indeed, the principle of equality is intended to prevent any class of persons addressed by a statute from being treated differently from any other persons addressed by that statute despite the fact that no difference exists between the two classes of such nature or weight as to justify such unequal treatment (BVerfGE 55, 72 [88]). The legal distinction must therefore also be sufficiently supported by objective differences. Application of this principle requires comparison of personal circumstances, which will be identical in certain respects, but never in all respects. Given this situation, it is in principle the task of the legislature to decide which of these attributes it considers to be determinative for purposes of making provision for equal or unequal treatment (see BVerfGE 83, 395 [401]). Article 3.1 of the Basic Law prohibits the legislature only from improperly ignoring the nature and weight of actual differences. It is free to make its decisions within these limits. However, other articles of the Basic Law may give rise to further restriction. If the legislature makes distinctions to the disadvantage of the family, then it is necessary to take into account the special protection the state affords the family under Article 6.1 of the Basic Law (see BVerfGE 18, 257 [269]; 67, 186 [195, 196]).

b) The existing old-age insurance system results in disadvantages for persons who devote themselves to child raising within the family as compared with childless persons, who can generally pursue employment. Pension law does not to be sure make any distinction between persons with families and those with none. Moreover, payment of pension benefits is independent of familial status and contingent exclusively upon previous payment of contributions from income from employment. This is what determines pension entitlement. The reasons for separation from employment and the resultant failure to make such contributions are immaterial. Under pension law, persons who separate from employment for reasons having to do with child raising are treated the same as non-employed persons.

   However, unlike the reasons that might otherwise be responsible for unemployment and the resultant failure to make contributions, child raising is important in terms of securing the existence of the pension system. For the pension insurance system, which takes the form of a generational compact, cannot be maintained without the ensuing generation. This is the generation that will provide the funds for the pension benefits of the generation that is currently employed. Without a subsequent generation, the current generation would to be sure have paid contributions towards pension insurance, but could not expect to receive benefits from that insurance system. Due to the effect of the broad base of the pension insurance system, the fact that not every child will ultimately become a contributor can be ignored in this context.

   The nature of pension insurance up to now has been such that it in effect leads to discrimination of families, in particular those with several children. Families with one parent who leaves its employment for child raising purposes, not only accept less income as compared with childless persons, but must in fact also share that reduced income with several persons. When their children enter employment and help to maintain the old-age security of their parents' generation through their contributions, the parents themselves must expect lower pensions.

c) Discrimination of families with one parent who assume responsibility for child raising is not compensated for through state benefits or in any other manner.

It is precisely the system of compulsory insurance that is responsible for the significant decrease in old-age support that used to be provided by children prior to the introduction of pension insurance. The obligation to make insurance contributions reduces the financial resources of the children. Money that they could otherwise have used to support their parents when they were no longer employed if it were not for the compulsory contributions is taken away from them and transferred to the shared risk pool, which uses these funds to pay pension benefits to the insured community as a whole.

Widows' and surviving dependants' pensions, which used to compensate women to a certain extent for the lack of their own retirement benefits due to child raising when women were typically not employed, have for the most part lost this function since employment of both spouses has become more common and the number of children has decreased. The various allowances that exist in connection with the equalization of family related burdens (child raising allowance, family allowance, tax exemption for dependent children and educational assistance) also do not make up for the deficits that parents incur in terms of old-age security as compared with childless couples. The same applies to the "baby year" provisions of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act and the Child Raising Benefits Act. They have also compensated for the discriminatory effect on families only to a relatively modest extent.

This means in essence that despite the state's efforts to equalize family burdens child raising is considered a private matter, whereas old-age security is considered to be the responsibility of society. The existence of discrimination of families under legislation regarding social transfers that the complainants have set forth was also not "in principle" refuted during the oral hearing.

d) In view of the mandate to provide protection under Article 6.1 of the Basic Law, which restricts the scope of operation under Article 3.1 of the Basic Law, an adequate reason for the discrimination of families under existing legislation is lacking. In particular, the current nature of the pension insurance system, which is based on the principle of insurance and the function of a pension as a substitute for earnings which is a system that finances the benefits it pays out on a pay-as-you-go basis, does not constitute an adequate reason for the significant discrimination that ultimately results for those who raise children as compared with those who remain childless. As is illustrated by the provisions of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act, ways exist to incorporate recognition of child raising activities into the structure of the pension insurance system. This finding does not, however, lead to objection on constitutional grounds to the provisions of applicable legislation pertaining to pension insurance submitted for review and challenged in the constitutional complaints, but only to an obligation on the part of the legislature to gradually eliminate discrimination to a greater extent than has been the case up to now.

The disadvantages ascertained are rooted not solely in pension law and therefore must also not only be eliminated there. The fact advanced by the complainants that social transfers are effected from families with several children to families with a single child, which are in any case already in a better position, and childless couples as a result of the current legal situation relate not only to pension law, but also to equalization of family burdens in general. This does indeed make it possible to conclude that the legislature has up to now only incompletely fulfilled its protective mandate under Article 6.1 of the Basic Law. It is not, however, possible to draw concrete conclusions from this in respect of the statutory pension insurance system. The legislature is, moreover, in principle free to eliminate discrimination of families as it sees fit.

Insofar as discrimination is specifically reflected in the old-age benefits of those family members who assume responsibility for child raising, it must be compensated for principally through provisions of pension law. Here too, the operating latitude of the legislature is not insignificant. In particular, it does not follow from Article 3.1 of the Basic Law in conjunction with Article 6.1 that the legislature is under any obligation to equate child raising with the payment of contributions for purposes of establishing pension entitlement. Under the pay-as-you-go system employed by the pension insurance system since 1957, which cannot be objected to on constitutional grounds, child raising and the payment of contributions are not analogous. Unlike the monetary contributions of the employed population, contributions to the maintenance of the pension insurance system made in the form of child raising cannot be immediately redistributed to the older generation in the form of pension payments. The different functions the two forms of contribution have for the pension system also justify different treatment when it comes to the establishment of entitlement to pension benefits.

On the other hand, taking into account child raising under pension law does represent an appropriate way - and one that is compatible with the system - to compensate for discrimination at the level of old-age security. By recognizing child raising time for the purposes of establishing entitlement to and determining increases in pension benefits under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act, the legislature has already taken an initial step in the direction of improving the old-age security of child raisers under the statutory pension insurance system although there is no immediately apparent reason for limitation to an amount equal to 75 per cent of the average income. The increase in the duration of child raising time that is credited which resulted from the 1992 Pension Reform Act (Rentenreformgesetz - RRG) represents a further step. This reform, which will not result in higher old-age pensions until some time in the more remote future, is not intended to represent the end of efforts to achieve further compensation, as the motion of 21 June 1991 submitted by the CDU/CSU, SPD and FDP parties (*Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 12/837) and adopted by the Bundestag shows according to which period up to the expiration of the safeguard provisions of the Pension Transition Act (Rentenüberleitungsgesetz - RÜG) is to be used in particular to improve the old-age security of women under the performance based pension insurance system. This is intended to include in particular broader recognition of child raising time.

e) The legislature is entitled to an adequate transitional period for fulfilment of its constitutional mandate (see BVerfGE 54, 11 [37]; 80, 1 [26]). This applies in particular to reforms that, as in the present case, require considerable legislative effort in various areas of law and substantial financial means. The operating latitude of the legislature would be impermissibly restricted if it were to be prevented from implementing such a complex reform as that involving the assessment of child raising time for the purposes of old-age insurance in several phases in order to limit the regulatory effort and financial implications and take advantage of the experience gained in the course of the reform (see BVerfG, Order of 5 November 1991 1 BvR 1256/89, *Fam*RZ 1992, p. 157 [160]).

When planning the various phases of the reform, the legislature may take into account the current state of the budget and the financial situation of the statutory pension insurance system. The federal government and legislative bodies must, however, consider the constitutional mandate in connection with both the future development of the pension insurance system and medium and longer-term financial planning. In this context, they are not limited by the Basic Law exclusively to the use of federal funds for the purposes of compensation. The protection of earned pension benefits afforded under Article 14.1 of the Basic Law does not preclude moderate reallocation within the statutory pension insurance system at the expense of persons with no or few children. The Basic Law also leaves room for change in survivors' benefits in order to attach greater weight to the duration of marriage in the case of pensions for widows and widowers and to take into account whether a surviving spouse was prevented from acquiring independent entitlement to retirement benefits through child raising or care within the family. Apart from the way in which funds for compensatory provisions are obtained, it is in any case necessary to ensure that each step of the reform actually results in less discrimination of families. The legislature, which is bound by its constitutional mandate, must take this into account in a recognisable manner.

3. Article 6.4 of the Basic Law does not come into question as a standard of review. The issue as to whether this provision entitles mothers to protection beyond pregnancy and the initial months following birth need not be addressed. In any case, no special rights can be inferred from this provision that do not pertain exclusively to mothers. Interpretation of Article 6.4 of the Basic Law to the effect that compensation for child raising activities may be granted (only) to mothers is also in contradiction with Article 3.2 of the Basic Law, which prohibits the reinforcement of traditional gender roles (see BVerfG, Judgment of 28 January 1992 - 1 BvR 1025/82 *inter alia*, *Eu*GRZ 1992, p. 17 [21]).

However, the fact that child raising is not adequately taken into account under the statutory pension insurance system is in fact disadvantageous primarily to mothers since they fill today assume most of the responsibility for raising children and therefore limit, interrupt or completely abandon their employment. This does not, however, affect the protection afforded by Article 6.4 of the Basic Law. Moreover, since significantly more women are affected, this provides reason for the legislature to fulfil its mandate to promote equality between men and women under Article 3.2 of the Basic Law (see BVerfG, loc. cit.).

The legislature will also have to take this into account.

4. The provisions under challenge do not constitute an encroachment on the part of the legislature on the legal rights protected by Article 14.1 of the Basic Law. The protection of property presupposes the existence of a legal right recognized by statute (see BVerfGE 83, 201 [208, 209]).

However, prior to the enactment of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act, no personal legal right existed in respect of credits for child raising time that could have been the object of any encroachment by the legislature. It was the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act that created these rights in the first place. The same applies as regards child raising benefits under the Child Raising Benefits Act.

5. There is no occasion to make any decision here as regards the details of the provisions adopted under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act that does not affect the Child Raising Benefits Act such as, for example, provisions that govern the concurrence of child raising time and periods of contribution. The complainants and petitioners in the initial proceedings for concrete judicial review are constitutionally excluded from the scope of application of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act. Only the Child Raising Benefits Act applies to them.

III.

The provisions of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act were also compatible with the Basic Law in that child raising time was not taken into account in the calculation of old-age benefits paid to mothers born in the years prior to 1921 since they had reached the age of 65 and no provision had also been made for general benefits for child raising for this class of persons. The Child Raising Benefits Act was compatible with the Basic Law insofar as it does not accord the above class of persons benefits for child raising until a time subsequent to 1 January 1986. The unequal treatment of mothers born in the years prior to 1921 on the one hand and after 1921 on the other hand cannot be objected to on constitutional grounds.

1. The provision of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act (s.1a.1 of the Reich Insurance Code and s. 28a.1 of the Salaried Employees Insurance Act) to be reviewed in this regard is based on a cut-off date. Under this provision, credit for child raising time was accorded under the statutory pension insurance system only in the case of mothers and fathers born after 31 December 1920. In this context, Article 2.5c and Article 2.6c of the Salaried Employees' Pension Insurance (Reform) Act (Arbeiterrentenversicherungs-Neuregelungsgesetz - AnVNG) made provision for taking into account child raising time prior to 1 January 1986 only in the case of insurance claims occurring after 30 December 1985.

The legislature is in principle not prohibited by Article 3.1 of the Basic Law from introducing cut-off dates for the purposes of regulating certain circumstances affecting the lives of individuals although any cut-off date will inevitably result in certain hardships.

The choice of point in time must, however, be based on the given facts of the situation (BVerfGE 75, 108 [157]), which that is the case here.

a) Since the legislature wanted to gradually eliminate a deficiency in the statutory pension insurance system, it was natural and objectively justified to situate the measure in the area of pension insurance. In so doing, it was necessary to take into account the structures of the pension insurance system. This was achieved by restricting the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act to new pensions and consequently to persons born from 1921 on and not on the other hand reopening pension biographies that had already been closed. Due to the traditional gender roles of men and women, mothers born in the years prior to 1921 had also in many cases not been employed and therefore not acquired entitlement to a pension (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 60/87, p. 20).

It would have been possible only to an unsatisfactory extent to achieve the legislature's goal of having them accorded benefits for child raising with the solution for determining entitlement to and increases in retirement benefits under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act, which - as was set forth above - would as such have been justified. Women born after 1921 onwards are also to be sure in some cases not entitled to a pension, but they were nevertheless able to close gaps in their pension biographies by making voluntary contributions (see s. 1233 of the Reich Insurance Code and s. 10 of the Salaried Employees Insurance Act, now: s. 7 of the Social Code VI) and at least in this way receive benefits under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act in the event of an insurance claim. In the case of mothers born in the years prior to 1921, who had already reached retirement age, this possibility was excluded.

In the case of a cut-off provision other than that adopted by the legislature, pension insurance providers would also have been confronted with virtually insurmountable practical difficulties. When the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act went into effect on 1 January 1986, the pension biographies of mothers and fathers born in the years prior to 1921 had already been closed. According to the expert opinion of the Association of German Pension Providers (Verband Deutscher Rentenversi-cherungsträger - VDR), a total of 1,624,671 cases involving payment of child raising benefits were counted in September 1989 for persons born in the years 1907 to and including 1911. Taking into account those born in the years thereafter up to the end of the year 1920, it was possible to assume the existence of 3.7 million such cases. In terms of the personnel resources required, the pension insurance providers would not have been in a position to reprocess such a large number of pension files that had already been closed, to recalculate pensions to take into account child raising time or to determine new pensions for mothers who had previously not been insured under the statutory pension insurance system.

b) Although a solution was chosen under pension insurance law in the form of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act, the fact that financing was lacking, which the legislature assumed by virtue of its discretionary prerogative powers, also represented an objective ground for not including mothers born in the years prior to 1921 under this provision. Financial considerations are permissible, especially in the case of legislation involving entitlements (see BVerfGE 75, 40 [72] with further references).

A provision that applies only to the class of persons who are not yet receiving a pension (new pensions) takes effect only gradually. Such a provision does not directly affect a person until an insurance claim occurs (regularly upon reaching the age of 65). The benefits to be provided then fall due only gradually. If on the other hand recipients of pension benefits (current pensions) were also to be covered by the provision, the benefits for this class of individuals would become due as soon as the legislation entered into force. The cost would then be much higher than in the case of a provision that is limited to new pensions. This also justifies the fact that the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act makes no provision for general child raising benefits for those born in the years prior to 1921, which the Child Raising Benefits Act did do at a later time.

2. The provision governing child raising introduced under the Child Raising Benefits Act granted mothers born in the years covered entitlement to benefits in an amount commensurate with that afforded on the basis of child raising time under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act. However, unlike the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act, which went into effect on 1 January 1986, the Child Raising Benefits Act makes provision for commencement of benefits only as of 1 October 1987. As a result, benefits of the class of persons affected are interrupted for at least 21 months. In addition, since the legislature had made provision for the phased commencement of benefits for those born in the years that qualified for eligibility under the Child Raising Benefits Act, only those mothers born prior to 1907 started to receive benefits based on child raising as of 1 October 1987. Mothers born in subsequent years, on the other hand, only started to receive benefits based on child raising thereafter. The legislature therefore made distinctions as regards the commencement of benefits on the basis of age among those belonging to the class of persons who benefited from the Child Raising Benefits Act. These distinctions are also objectively justified.

   It is necessary to proceed on the basis of the estimate of the legislature, according to which only limited funds in an amount estimated at DM 6.05 billion were available for the period up to 1991. By adopting a phased approach, the legislature privileged those born in the earlier of the classes of years affected, which was as a result disadvantageous in particular for the class of persons born in the years 1917 to 1920. Although fiscal efforts to reduce expenditure do not as a general rule in and of themselves constitute sufficient justification for unequal treatment of different classes of persons (see BVerfGE 19, 76 [84]), the solution must be accepted in this case since no other practicable solutions are apparent. The only other possibility available to the legislature would otherwise have been to distribute the limited public funds on the basis of the "watering can" principle (see BVerfGE 75, 40 [72] with further references).

   In the case of such a provision, the potential benefits per child would have been significantly lower than under the Child Raising Benefits Act. As the Federal Minister for Labour and Social Affairs (Bundesminister für Arbeit und Sozialordnung) set forth in his opinion, the introduction of benefits based on child raising as of 1 January 1986 for all mothers affected would have resulted in payments in the amount of only DM 1.13 per month in the year 1986. The amount of benefits would have increased only

slightly in the years thereafter and would not have reached the amount planned when the Child Raising Benefits Act entered into effect until the year 1990. The situation is similar in the case of uniform entitlement of benefits based on child raising for all mothers from 1 October 1987 on.

In the end, uniform distribution of funds available for implementation of the Child Raising Benefits Act for the years 1986 to 1989 to all mothers born in the years affected would not have produced a situation comparable with that based upon credit for child raising time under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act, for the benefits would have been substantially lower for a prolonged period of time. Mothers born in the years prior to 1907 would in effect have been at a significant disadvantage as compared with younger mothers in the case of such distribution due to their lower life expectancy. Apart from mere fiscal considerations, the legislature did, however, intentionally employ available funds to accord the oldest of those born in the relevant years chronological preference in view of their advanced age. There can be no objection to this.

The phased approach adopted under the Child Raising Benefits Act was of course especially disadvantageous for mothers born in 1920 as compared with those born in 1921, who had already benefited from the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act. However, this constitutes a hardship that is necessarily inherent in any regulation involving a cut-off date and must therefore be accepted (see BVerfGE 3, 58 [148]; 49, 260 [275]; 80, 297 [311]).

It is, however, necessary to consider whether the legislature used its vested operating latitude in an appropriate manner, whether it adequately weighed the factors involved in the use of a chronological standard and whether the solution arrived at can be justified on objective grounds in view of the facts of the situation and the overall system in which the provision is embedded or whether it seems arbitrary (see BVerfGE 44, 1 [21, 22]; 80, 297 [311]).

However, the provision withstands examination in light of these criteria also in respect of mothers born in the years 1917 to 1920. When the law was enacted, the legislature was justified in taking into account that this class of persons would be likely to receive benefits based on child raising for a longer period of time, whereas this could not be assumed to the same extent in the case of mothers born in the preceding years due to their general life expectancy.

IV.

Finally, the provision is also not in violation of Article 3.1 and 3.3 of the Basic Law because fathers born in the years prior to 1921 are not entitled to benefits under the Child Raising Benefits Act whereas mothers born during those years do receive benefits based on child raising and younger fathers are included under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act.

When the provision embodying these distinctions was enacted, the legislature proceeded on the assumption that fathers would typically not have assumed responsibility for child raising in the cases covered by the Child Raising Benefits Act and would therefore have incurred no disadvantages in terms of retirement benefits based on child raising; this, in the opinion of the legislature, reflected the typical roles within the family at the time (*Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 60/87, pp. 20 et seq.).

It is not possible to ascertain any error in this assessment (see also BVerfGE 39, 169 [187, 188]).

It justifies exclusion of fathers from benefits based on child raising under the Child Raising Benefits Act, in particular in view of the goal of the legislature, which was to implement this law in a manner that would involve as little administrative effort as possible.

V.

Although the constitutional complaints were rejected, the complainants did succeed in compelling the legislature to take into account child raising as part of life under the statutory pension system to a greater extent in the future. It is therefore appropriate to order reimbursement of half of their necessary expenses incurred (s. 34a.3 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG)).

3. Transsexuals, BVerfGE 88, 87

Explanatory Annotation

The legislation at issue in this case allowed the name change for transsexual persons who had not undergone a sex-change operation only if the person in question was over 25 years old. The Court regarded this as a violation of the equality clause in Article 3.1 of the Basic Law. Interestingly the Court went beyond the classical interpretation of Article 3.1 according to which differentiation between two groups - in this case under 25 year old transsexuals and over 25 year old transsexuals - is possible and justified if based on reasonable grounds. The Court saw the discrimination based on age as being similar to the discrimination based on the list of attributes in Article 3.3. Age is not contained in that list but the Court drew on the fact that both age as a differentiating criterion and the criteria listed in Article 3.3 are person based criteria. In addition, the discrimination of the under 25 year old transsexuals had grave consequences for their personality rights as protected by Article 2.1 of the Basic Law. On this basis the Court resorted to the stricter "compelling reasons"-test employed under Article 3.3 rather than the more lenient 'reasonable justification'-test normally employed under Article 3.1. The justification given for the age discrimination, allowing for enough time for the decision to reflect the sex change in the name to settle with sufficient confidence, might have qualified under the more lenient basic test but it failed the stricter test as the Court saw no compelling reasons for this discrimination.

Translation of the Second Transsexuals Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 88, 87*

Headnote:

It is incompatible with Article 3.1 of the Basic Law (Grundgesetz - GG) to deny transsexuals under the age of 25 the right to change their first names that is afforded older transsexuals under s. 1 of the Transsexuals Act (Transsexuellengesetz - TSG).

Order of the First Senate of 26 January 1993 - 1 BvR 38, 40, 43/92 -

Facts:

The petitions concern the question as to whether denial of the possibility of a change of first names before the age of 25 under s. 1 of the Transsexuals Act is compatible with the Basic Law.

The Act on Changes of First Names and Establishment of Gender Identity in Special Cases (Transsexuals Act) of 10 September 1980 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 1654) was enacted pursuant to the order of the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) of 11 October 1978 to take into account the special situation of transsexuals (BVerfGE 49, 286).

In addition to a procedure that permits a change of first names following establishment of a change of gender affiliation after sex-reassignment surgery ("major solution"), the law makes provision for the possibility of a change in the first names of transsexuals who have not undergone previous surgical intervention ("minor solution").

a) Conditions, procedures and legal consequences of the minor solution are governed by ss. 1 to 7 of the Transsexuals Act. S. 1 is worded as follows: (1) The first names of persons who by reason of their transsexual nature no longer identify with the gender specified in their registration at birth, but rather with the opposite gender and have for at least three years felt compelled to live according to their preferences must upon application be changed by the court if:

    1. they are German within the meaning of the Basic Law or stateless or homeless aliens whose usual abode is within the jurisdiction of this Act or persons with the right to asylum or alien refugees whose residence is within the jurisdiction of this Act,

    2. it can be assumed with a high degree of probability that their sense of affiliation with the opposite gender will no longer change, and

    3. they are at least twenty-five years of age.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

(2) The first names the applicant desires to use in the future must be provided in the application. The initial proceedings relate to two female-to-male transsexuals and one male-to-female transsexual. The petitioners are German citizens between the ages of 22 and 24 years of age who seek a change of first names under s. 1 of the Transsexuals Act. The opinions obtained by the local courts from two experts in each case conclude that the petitioners have for at least three years felt compelled to live as persons of the opposite gender and that it is highly probable that this transsexuality is no longer reversible.

2. The local courts stayed the proceedings and submitted the question as to whether s. 1.1 no. 3 of the Transsexuals Act is compatible with the Basic Law to the Federal Constitutional Court for decision.

Extract from the Grounds:

B.

S. 1.1 no. 3 of the Transsexuals Act is incompatible with Article 3.1 of the Basic Law and void.

I.

1. Depending on the object of regulation and the distinguishing characteristics involved, the constraints imposed upon the legislature by the general principle of equality vary, ranging from mere prohibition of arbitrariness to strict compliance with the requirements of proportionality. The gradation of these requirements follows from the wording and meaning of Article 3.1 of the Basic Law and its context in combination with other provisions of the Basic Law.

Since the principle to the effect that all persons are equal before the law is primarily intended to prevent unjustifiable differences in the treatment of individuals, the legislature is regularly bound to strict compliance when dealing with the unequal treatment of different classes of persons (see BVerfGE 55, 72 [88]). The greater the affinity between the personal attributes and those specified in Article 3.3 of the Basic Law and the greater therefore the danger that unequal treatment based on such attributes will result in discrimination of a minority, the stricter the constraints upon the legislature become. Stricter compliance is, however, not limited to differences that relate to persons. Indeed, it also applies if the unequal treatment of situations results indirectly in unequal treatment of different classes of persons. In the case of distinctions made exclusively on the basis of conduct, the degree of constraint imposed on the legislature varies as a function of the extent to which the affected persons are able through their conduct to influence the manifestation of the attributes on the basis of which such distinctions are made, (see BVerfGE 55, 72 [89]). Moreover, the more unequal treatment of individuals or situations can negatively impact the exercise of freedoms that enjoy constitutional protection, the narrower the operating latitude of the legislature becomes (see BVerfGE 60, 123 [134]; 82, 126 [146]).

The variance in the scope of operating latitude of the legislature is reflected in the gradation of the intensity of control in the case of constitutional review. If prohibition of arbitrary treatment is the only standard involved, violation of Article 3.1 of the Basic Law can be established only if a lack of objectivity is evident in the distinctions made (see BVerfGE 55, 72 [90]).

In the case of provisions of law that stipulate different treatment for different classes of persons or negatively affect the exercise of fundamental rights, on the other hand, the Federal Constitutional Court examines in detail whether reasons of such nature and importance exist for the distinctions made as to justify the unequal legal consequences (see BVerfGE 82, 126 [146]).

The considerations underlying this gradated approach are also of importance in respect of the question as to the extent to which the legislature may exercise its discretionary prerogative powers in its assessment of the original situation and the possible ramifications of the provisions it adopts. The standards for the review of such prognostic assessments also vary, extending from mere review of evidence to rigorous substantive control. In particular, the specific nature of the respective facts at issue and the importance of the legal interests at stake must be taken into account in this context; in addition, the latitude for prognosis varies as a function of the possibilities available to the legislature for forming a sufficiently certain judgment when the decision was made (see BVerfGE 50, 290 [332, 333]).

2. These standards require strict review of s. 1.1 no. 3 of the Transsexuals Act. The age limit for a change of first names involves making a distinction that is based on personal attributes and has a significant effect on the general right to personality. Article 2.1 in conjunction with Article 1.1 of the Basic Law protects the narrower personal sphere of life, including in particular the area of intimacy and sexuality (see BVerfGE 47, 46 [73]); 60, 123 (134)., and guarantees the right of persons to determine in principle when and to what extent they divulge personal information (see BVerfGE 65, 1 [41, 42]; 84, 192 [194].

The Transsexuals Act serves to protect these legal interests. The minor solution is intended to take into account the special situation of transsexuals prior to sex-reassignment surgery or if surgical intervention is foregone and enable them to live in their felt gender roles without having to make this known to third parties and public authorities in everyday life. The provision submitted for review would therefore be compatible with Article 3.1 of the Basic Law, only if there were reasons of such nature and importance for prohibiting transsexual inclined persons under the age of 25 years from changing only their names as to justify unequal treatment. This is, however, not the case.

a) The age limit results in serious discrimination of persons under the age of 25 who have been found by two experts to be with a high degree of probability irreversibly transsexual. After the Act went into effect, these persons had absolutely no way of changing their first names to names corresponding to their sensibilities and appearance before the age of 25. As per the order of the Federal Constitutional Court of 16 March 1982 (BVerfGE 60, 123), they have recourse to the possibility of declaratory proceedings under legislation governing civil status and as a result to a change of first names under s. 8 of the Transsexuals Act as soon as the required surgical intervention has been carried out. Unlike transsexuals who have reached the age of 25, they are denied the possibility of living in the role of the other gender prior to sex-reassignment surgery without having to constantly subject themselves to burdensome situations at work, at school, in their dealings with public authorities and in everyday life in general.

   This unequal treatment is especially serious in view of the purpose of the minor solution. The provision governing the change of first names is intended to create the general legal prerequisites for enabling transsexuals to cross-live early on in order to

provide them with help prior to surgical intervention and significantly alleviate the emotional pressure to which they are subjected. In addition, legal establishment of the change of roles is intended to enable them to experience life in the opposite gender role for a lengthier period of time before making a decision as regards for the most part irreversible medical measures and to ascertain with certainty whether this life really suits their sensibilities and is something they can cope with. This is intended therefore not only to achieve additional certainty as regards the diagnosis, but also to facilitate habituation to the new role prior to major surgical intervention.

Denial of these possibilities may have especially serious ramifications in the case of younger transsexuals. On the one hand, they are of an age at which they as a rule have to make plans for their future occupational lives, complete their education and often seek employment for the first time. It is therefore especially important for them to develop self-confidence in the role corresponding to their sensibilities and to be spared awkward situations that may arise if the names that appear in their identification do not correspond to their appearance. The purpose of the minor solution, which is to help avoid difficulties in everyday life, in particular as regards relations with employers, is of considerable importance to them. On the other hand, younger transsexuals in particular have an interest in cross-living before subjecting themselves to for the most part irreversible operations and not, the other way around, in being compelled by the legal situation to decide hastily to undertake such measures. A major concern of the legislature was therefore also to prevent decisions without sufficient reflection, especially on the part of younger people.

b) No reasons are apparent that would justify such serious discrimination of younger transsexuals.

There is no need here to address the question as to whether fears to the effect that the transsexual inclination of younger people with a certain such inclination could be prematurely fixed if it were easier to obtain a change of first names lay within the purview of the discretionary prerogative powers of the legislature when the law was enacted. It is equally unnecessary to examine more closely the question as to whether the minimum age of 25 years for a change of first names could on the basis of the state of knowledge at the time have seemed to constitute a suitable measure for discouraging decisions that were unreflected and based on insufficiently certain diagnosis. The assumption that the age limit prescribed in s. 1.1 no. 3 of the Transsexuals Act was required to protect younger people against an overly hasty change of roles and the ramifications of a possible error in prognosis can in any case no longer be justified today. Moreover, younger people are not better, but rather less well protected against the risk of an error under the current law.

Following the decision of the Federal Constitutional Court that declared void the minimum age for declaratory proceedings under legislation governing civil status contained in s. 8 of the Transsexuals Act, the legislature saw no occasion for the introduction of an age limit for sex-reassignment surgery (cf. A I 3). It did not therefore - no doubt in view of the expert opinions obtained - consider it necessary to

protect younger people who were diagnosed as being with a high degree of probability irreversibly transsexual and for whom surgical intervention was considered medically indicated against unreflected decisions due to the possibility of an error in prognosis.

Under these circumstances, there is no obvious reason to protect the same class of persons against a decision that is much less incisive and can be reversed if the diagnosis in the individual case should happen - despite the protective procedural measures provided for in ss. 1 to 4 of the Transsexuals Act - to be in error. Moreover, the age limit for a change of first names is more likely to be such as to make life in the other gender role for a lengthier period of time - and as a result further confirmation of the diagnosis - more difficult prior to surgery and encourage younger transsexuals to opt for sex-reassignment surgery as early as possible since this is the only way they can fulfil the conditions for a change of first names under the major solution. The argument to the effect that the risk of misdiagnosis is greater than originally assumed and that transsexuality is today viewed as a whole differently therefore also cannot be used to justify denial of a change of first names in the case of younger people with a transsexual inclination. It may be true that the prognosis of irreversible transsexuality presents difficulties, but this does not speak against making the minor solution available to younger transsexuals, but rather in favour of also making it easier for them to acquire the experience of cross-living before taking irreversible measures. It is just as impossible to infer from a more differentiated view of transsexuality that younger transsexuals should be deprived of the possibility of a change of first names. For the minor solution was created precisely in view of the fact that physicians and psychologists consider further latitude for treatment and decision making necessary prior to irreversible operations (see Pfäfflin, *StAZ* 1986, p. 199 (201); see also Ehrhardt, in: *Festschrift für Volrad Deneke*, 1985, p. 272 [280, 281]; Sigusch, *Zeitschrift für Sexualforschung* 1991, p. 309 [p. 337, fn. 5]).

3. Since s. 1.1 no. 3 of the Transsexuals Act is already unconstitutional because it is in violation of Article 3.1 of the Basic Law, the question as to the existence of reservations with respect to the provision in view of Article 2.1 in conjunction with Article 1.1 of the Basic Law need not be resolved.

II.

If a statute is incompatible with the Basic Law, it must in principle be declared void (s. 82.1 in conjunction with s. 78 sentence 1 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG)). Because of the operating latitude of the legislature, the situation is different if a violation of Article 3.1 of the Basic Law can be eliminated in various ways. If, however, it can be assumed with certainty that the legislature would, taking into account the general principle of equality, choose the provision remaining after the declaration of nullity, the Federal Constitutional Court may void a provision that is incompatible with Article 3.1 of the Basic Law (see BVerfGE 27, 391 [399]).

This is not the case here. Since, after obtaining expert opinions, the legislature refrained from making provision for an age limit for sex-reassignment surgery, it cannot be assumed that it would introduce a new age limit for a change of first names. The question as to whether a

significantly lower age limit than that provided for up to now under s. 1.1 no. 3 of the Transsexuals Act would be compatible with the principle of equality need not therefore be examined.

The possibility that the legislature would choose to eliminate the constitutional violation by completely eliminating the provision governing the change of first names and limit the Transsexuals Act to the major solution can also be excluded; the question as to whether such a decision would adequately respect the general right to personality need therefore also not be clarified in this context. The decision to make provision for a minor solution in addition to the major solution was made in 1980 following thorough debate. No reasons can be discerned that would indicate that this provision has not proven its worth or led to abuse. The opinions of the Federal Medical Association (Bundesärztekammer) and the German Society for Sex Research (Deutsche Gesellschaft für Sexualforschung) from the years 1983 and 1984 speak against such an assumption; the Federal Minister of the Interior (Bundesminister des Innern) also mentioned no indication of disadvantageous effects of the minor solution in his statement on this procedure. Rather, the expectation associated with this solution to the effect that facilitation of the change of first names could in itself contribute to a significant improvement in the situation of transsexuals prior to surgery and give physicians and transsexuals themselves greater latitude for making decisions would seem to have been confirmed (see Cabanis, in: *Festschrift für Horst Leithoff*, 1985, p. 487 [491]; Pfäfflin, *StAZ* 1986, p. 190 [201, 202]). The legislature obviously also proceeded on the basis of a positive assessment since it reconfirmed the minor solution when the Passport Act (Passgesetz - PassG) was revised in the year 1986. Under s. 4.1 sentence 3 of the Passport Act, temporary passports represent an exception to the provision contained in s. 4.1 sentence 2 no. 6 of the Passport Act in that they contain no indication of gender; this is intended to ameliorate the situation of transsexuals who have already obtained a change of first names, but who have not yet brought declaratory proceedings pursuant to legislation governing civil status under s. 8 of the Transsexuals Act (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 10/5128, p. 5).

4. Inclusive Education, BVerfGE 96, 288

Explanatory Annotation

Article 3.3 of the Basic Law stipulates that no person shall be disadvantaged because of disability. The issue in this case was whether the denial of inclusive education for a child with a disability against her and her parents will and her transfer to a special school for children with disabilities constituted such a disadvantage. The relevant authorities justified the denial and the transfer with a lack of supporting resources at the regular school such as individual tuition for several hours and special support staff. The core problem was the question whether and to what degree the special non-discrimination clause of Article 3.3 of the Basic Law demands from the government not only to refrain from discriminating action but also to actively allocate significant resources to create a situation where potentially disadvantageous steps, such as transfer to a special school for the disabled rather than participation in general schools, can be avoided.

The question of whether fundamental rights can be used to create resource relevant entitlements is of utmost significance. An affirmative answer would have grave consequences for the democratic process because the available resources and their allocation would, as resources

are limited, become a matter of judicial decision rather than parliamentary allocation. It is largely for this reason that there has been great reluctance to interpret fundamental rights in this fashion. It should be noted that on the international plane, economic and social rights have always been treated differently, for example with a view to enforcement, than the rights found in the traditional liberal canon, for example in the International Covenant on Civil and Political Rights (ICCPR) and in many constitutions, the Basic Law among them. It should also be noted, however, that even the traditional liberal rights sometimes contain resource relevant implications. For example, the prohibition of inhumane or degrading treatment, which the Basic Law addresses under Article 1.1 (human dignity) in conjunction with Article 2.2 (life and health), requires that prison facilities meet certain minimum standards. The guarantee of access to courts or fair trial requires that the necessary judicial infrastructure is provided. This illustrates that, despite the reluctance to grant financially relevant entitlements on the basis of fundamental rights, similar effects are not *per se* impossible.

In this case, however, the reluctance prevailed. The Constitutional Court held that the transfer to the special school could only constitute a disadvantage in the sense of Article 3.3 of the Basic Law if the pedagogical needs of the child could have been met at the regular school with available resources. The Court thus linked the criterion of disadvantageous treatment to the availability of relevant resources. The question was not whether education at the special school constitutes a disadvantage as compared to education at the regular school. It may well have been. The question for the Court was whether the government contributed to the disadvantage by denying the child what could have been provided with the available resources and the answer to that question had to be negative in this case.

Translation of the Inclusive Education Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 96, 288*

Headnotes:

1. Judgment concerning the prohibition of discrimination of disabled persons (Article 3.1. sentence 2 of the Basic Law) in the area of education (Grundgesetz - GG).

2. The transfer of a disabled pupil to a special school against the will of the latter and his or her parents does not in and of itself constitute prohibited discrimination within the meaning of Article 3.1 sentence 2 of the Basic Law. Such discrimination does, however, exist if the transfer is made despite the fact that instruction in a mainstream school is possible with supplementary educational support, the requisite personnel and physical resources can be provided with available personnel and means, and organizational difficulties and the legitimate interests of third parties also do not stand in the way of inclusive education.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Order of the First Senate of 8 October 1997 - 1 BvR 9/97 -

Facts:

In Lower Saxony, the Lower Saxony School Act (Niedersächsisches Schulgesetz - NSchG) of 1993 stipulated that pupils in the differentiated school system of the Land who due to physical, intellectual or psychological impairment or impairment of their social behaviour require supplementary educational support were to receive education and instruction together with other pupils in all schools if it was possible in this manner to meet their needs for individual support and insofar as organizational, staffing and physical circumstances allowed. Pupils with special educational needs were as a result obliged to attend a special school only if they were unable to receive the necessary support at another type of school. Inclusive goal differentiated education in what is referred to as an integration class may also be considered as an alternative form of support.

After the disabled complainant had completed her primary education at a mainstream school and changed to the fifth grade of an inclusive comprehensive school, the school authority assigned her to a school for the physically disabled against the wishes of her parents since evaluation for this grade had determined that the complainant had special educational needs that could not have been satisfied by the comprehensive school. The proceedings before the administrative courts initiated to obtain injunctive relief against immediate enforcement of this measure were unsuccessful. After a petition for interim relief was accepted by the Federal Constitutional Court, the school authority waived immediate enforcement.

The constitutional complaint against the order of the Higher Administrative Court (Oberver-waltungsgericht) that dismissed the petition for interim relief was ultimately unsuccessful.

Extract from the Grounds:

B.

The constitutional complaint is admissible.

In view of the likely duration of the proceedings in respect of her action, the complainant could not reasonably be expected to exhaust all legal remedies prior to seeking a decision from the Federal Constitutional Court (see BVerfGE 86, 15 [22]).

Her interest in judicial relief also does not cease to exist because the local government rescinded the administrative order in respect of the transfer with immediate effect of the complainant to the school for the disabled during the constitutional complaint proceedings, and the complainant is now attending seventh grade at a general school. The interest in judicial relief remains intact despite disposition of the relief originally sought through the constitutional complaint since clarification of a constitutional issue of fundamental importance would otherwise be lacking and an especially serious encroachment on a fundamental right is challenged (see BVerfGE 91, 125 [133] with further references; established case law). This is the case here. The question as to whether and with what consequences Article 3.3 sentence 2 of the Basic Law must be taken into account in cases involving school law of the nature at issue here is of considerable constitutional importance and has not yet been decided by the Federal Constitutional Court.

C.

The constitutional complaint is, however, not founded. The challenged order cannot as a result be objected to on constitutional grounds.

I.

1. Under the provision contained in Article 3.3 sentence 2 of the Basic Law - newly created by the Act Amending the Basic Law (Gesetz zur Änderung des Grundgesetzes - GGÄndG) of 27 October 1994 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 3146) - persons may not be discriminated against because of a disability.

a) What qualifies as disability cannot be inferred directly from the legislative materials (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 12/6000, pp. 5253; 12/6323, pp. 1112.; 12/8165, pp. 2829).

The legislature that adopted the constitutional amendment did, however, obviously proceed from the common understanding of the term at the time the Basic Law was amended. This is evidenced in particular in s. 3.1 sentence 1 of the Severely Disabled Persons Act (Schwerbehindertengesetz - SchwbG). According to the above, a disability is the effect of a not merely temporary functional impairment that is based on an abnormal physical, intellectual or emotional condition. The same understanding of disability provides the basis for the definition of disability in the Third Report of the Federal Government on the Situation of the Disabled and the Development of Rehabilitation (Dritter Bericht der Bundesregierung über die Lage der Behinderten und die Entwicklung der Rehabilitation), which in turn coincides with the usual delimitations of the term employed internationally (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 12/7148, p. 2).

Nothing, on the other hand, speaks against also proceeding on the basis of this definition in principle for the purposes of interpretation of Article 3.3 sentence 2 of the Basic Law (see also Osterloh in: Sachs, *Grundgesetz, Kommentar*, 1996, Article 3 marginal no. 309310; Rüfner in: Bonner *Kommentar*, Article 3 marginal no. 870 [May 1996]).

It is not necessary to decide here whether this represents the conclusive definition of disability. The complainant's case provides no occasion for this.

b) The meaning of the term discrimination and the importance and scope of the prohibition of discrimination embodied in Article 3.3 sentence 2 of the Basic Law also can be inferred only incompletely from their historical development. They can, however, be inferred from the overall substantive content of Article 3.3 of the Basic Law.

aa) Article 3.3 sentence 2 of the Basic Law was to be sure intentionally aligned with the prohibition of discrimination under the former Article 3.3 and the current Article 3.3 sentence 1 of the Basic Law. This is evidenced by the fact that, like sentence 1, sentence 2 is intended to reinforce protection of the general principle of equality embodied in Article 3.1 of the Basic Law for specific classes of persons and for that reason is intended to prescribe narrower limits to

governmental authority such that disability may not serve as a ground for - discriminatory - unequal treatment (see BVerfGE 85, 191 [206] and thereafter in particular *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 12/6323, p. 12.). However, the legislature that adopted the constitutional amendment also intentionally refrained from simply expanding the attributes mentioned in the previous Article 3.3 of the Basic Law to include disability. This indicates that Article 3.3 sentence 2 of the Basic Law is also important in its own right. This obviously has to do with the special nature of disability. As in the case of the attributes such as gender, origin, race and language already covered by Article 3.3 sentence 1 of the Basic Law, disability is a personal characteristic, the existence or absence of which an individual can influence, either not at all or only to a limited extent. However, disability not only denotes a mere condition of being different, which is frequently disadvantageous for the persons affected only in connection with the effect of corresponding attitudes and prejudices in that person's societal environment, but can also lose this disadvantageous effect if such attitudes are changed. Moreover, disability is a characteristic that, apart from any such change in attitudes, in principle makes life more difficult for the person affected as compared to those with no such disability. It was the will of the legislature that this special situation leads to neither social nor legal exclusion. To the contrary, such exclusion is to be prevented or overcome (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 12/8165, p. 28). This explains the fact that sentence 2 of Article 3.3 of the Basic Law, unlike sentence 1, does not simply prohibit discrimination. The revised provision prohibits only disadvantageous discrimination on the basis of disability. Preferential treatment intended to equalize the situations of the disabled and those who are not disabled is, on the other hand, permitted, albeit not necessarily constitutionally mandated.

bb) Given this background, discrimination exists not only in the case of provisions and measures that aggravate the situation of disabled persons because of their disability, for example, by preventing access to public facilities that would otherwise actually be possible or by denying services that are in principle available to everyone. Moreover, exclusion from opportunities for personal development and activities by public authorities may also constitute discrimination if not adequately compensated by supportive measure commensurate with the disability. It is not possible to determine generally and in the abstract when such exclusion has been compensated to such an extent by supportive measures. Whether refusal to provide a compensatory service desired by a disabled person and referral to another, alternative possibility for personal development are to be considered discriminatory will regularly depend upon assessment, scientific findings and prognostic estimates. It is possible to decide whether a measure is discriminatory in the individual case only on the basis of the overall conclusions of such assessment.

2. In principle, the same applies in the area of education.

a) aa) Under the provision governing state supervision of schools, Article 7.1 of the Basic Law does to be sure grant the state the authority to plan and organize education with a view to ensuring the existence of a school system that offers all young

people educational opportunities that reflect the needs of contemporary society commensurate with their abilities. The organizational structure of the schools, decisions as regards the formal nature of the educational system and the choice of courses of instruction and educational goals, for example, are therefore the affair of the state (see BVerfGE 34, 165 [182]; 45, 400 [415]); 53, 185 [196]). In this context, the *Länder*, which are responsible for schooling, have extensive discretionary latitude (see BVerfGE 59, 360 [377] with further references). This latitude is, however, restricted to the extent that overriding norms of the Basic Law impose limits (see BVerfGE 6, 309 [354]; 34, 165 [181]; 59, 360 [377]). This is achieved not only through the right of pupils - which may also be restricted - to develop their personalities, aptitudes and abilities with as little interference as possible under Article 2.1 of the Basic Law (see on this BVerfGE 45, 400 [417] with further references) and the right of parents to raise their children arising from Article 6.2 sentence 1 of the Basic Law, which accompanies and has equal status with the responsibility of the state for education under Article 7.1 of the Basic Law (see BVerfGE 52, 223 [236]; established case law). Moreover, the prohibition of discrimination newly created under Article 3.3 sentence 2 of the Basic Law also sets limitations.

Apart from whether it is possible to derive any inherent entitlement to services from this fundamental right (consistently contested in the literature; see, for example, Osterloh, loc. cit., Article 3 marginal no. 305; Scholz in: Maunz/Dürig, *Grundgesetz, Kommentar*, Article 3.3 marginal no.174 [October 1996]), it does follow, especially in conjunction with the above-mentioned freedoms from Article 2.1 and Article 6.2 sentence 1 of the Basic Law, that the state and the legislatures of the *Länder* responsible for education do have a special responsibility towards disabled pupils. The state also has an at least constructive monopoly as regards their education and instruction at the level of the schools; like non-disabled pupils, they are in principle compelled to attend public schools. Taking this into account, the state is in principle obligated under Article 2.1 and Article 6.2 sentence 1 in conjunction with Article 3.3 sentence 2 of the Basic Law to make available educational facilities for disabled children and youth that also allow them to obtain proper education, instruction and training through school attendance. The nature and degree of disability and the requirements of the type of school and the level of instruction must be taken into account in this context, as must the current state of scientific pedagogical knowledge.

bb) Given the current state of pedagogical knowledge, general exclusion of the possibility of education and instruction of disabled pupils together with non-disabled pupils would not seem justifiable under the Basic Law. Despite the existence of critical opinions, inclusive education is, as is documented by the statements cited in A I 1 and 2, also considered for the most part positive by pedagogical science as well as by relevant political bodies and advocated as an alternative to education and instruction in special and remedial schools that is deserving of implementation. The state legislature of Lower Saxony took this into account by creating the possibility for education and instruction of pupils with special educational needs "in all schools" (s. 4 of the Lower Saxony School Act) and in integration classes for

goal differentiated education (s. 23.4 of the Lower Saxony School Act) in addition to special schools (s. 14 of the Lower Saxony School Act). According to s. 4 in conjunction with s. 68.1 of the Lower Saxony School Act, instruction is to be inclusive and pursue the same goals for all pupils if it is possible in this way - if necessary with provision of supplementary educational support (cf. in particular s. 14.4 sentence 2 of the Lower Saxony School Act) - to accommodate the individual needs for support of pupils requiring such support and insofar as organizational, staffing and physical circumstances permit. These provisions enable children and youth with special educational needs and their guardians to opt, under the conditions set forth in the law, either for one of the forms of inclusive education or for instruction in special schools, the continued existence of which as an independent type of school within the differentiated school system of the Land may therefore, quite properly, not be called into question.

There are no constitutional grounds for objecting to the fact that under this approach inclusive education and instruction, whether in the form of individual integration or integration classes, are subject to the limits of what is feasible in terms of organizational, staffing and physical circumstances (see ss. 4 and 23.4 in conjunction with 23.5 of the Lower Saxony School Act). This proviso is indicative of the fact that the state can from the very outset meet its responsibility to provide a school system to accommodate differences in abilities only within the limits of its financial and organizational resources (see BVerfGE 34, 165 [183, 184]) and explains why the legislature must take into account other needs of society in its decisions and retain the possibility of using limited available public funds for such other interests as it considers necessary (see BVerfGE 40, 121 [133]; 75, 40 [68]; 82, 60 [80]; 90, 107 [116]). If the legislature decides in favour of offering both individual integration and integration classes in its regulatory plan for inclusive education, it is not prevented under the Basic Law from making actual implementation of these forms of integration dependent upon restrictive conditions of the nature at issue here. Discretionary latitude and the possibility of restriction to what is actually feasible and financially justifiable also exist, however, as regards implementation of the regulatory plan by the legislature. Article 2.1, Article 6.2 sentence 1 and Article 3.3 sentence 2 of the Basic Law do not obligate the legislature of every Land to make all forms of inclusive education available in every Land. Moreover, acting within the limits of its discretionary latitude, the legislature may forgo the introduction of such forms of integration that would not seem to warrant implementation not only on pedagogical grounds, but also for organizational, staffing and financial reasons. This presupposes that the remaining opportunities for inclusive education and instruction adequately take into account the interests of disabled children and youth.

b) The interpretation and application of legislation governing education are subject to the prohibition of discrimination contained in Article 3.3 sentence 2 of the Basic Law.

aa) The decision of school authorities as to the schools chosen to educate, instruct and prepare disabled children and youth for their future lives in society together with non-disabled children and youth must take into account in each individual case

not only the right of pupils to receive training commensurate to the greatest extent possible with their aptitudes and abilities (Article 2.1 of the Basic Law) and the right of parents under Article 6.2 sentence 1 of the Basic Law to freely choose the educational path for their children in school on the basis of their aptitude (see BVerfGE 34, 165 [184]). It is, furthermore, also necessary to take into account additional constraints upon school authorities arising from Article 3.3 sentence 2 of the Basic Law.

Since, as was set forth above under C.I.1.b.bb, the discriminatory nature of a measure cannot be assessed without taking into account specific accompanying support, the prohibition against discrimination contained in this provision does not mean, however, that the transfer of a disabled pupil to a special school constitutes in and of itself prohibited discrimination. This also applies if the decision of the school authority is made against the will of the disabled child or youth or his or her guardians. Only decisions to effect such a transfer that obviously fail to do justice to the circumstances and conditions involved in the individual case under consideration are prohibited by Article 3.3 sentence 2 of the Basic Law. The existence of such a decision must be assumed not only if a child or youth is assigned to a special school because of a disability despite the fact that education and instruction in a mainstream school would have been suited to his or her abilities and would have been possible without any special resources. Indeed, discrimination within the meaning of Article 3.3 sentence 2 of the Basic Law may also exist if the transfer to a special school is effected despite the fact that attendance of a mainstream school could have been made possible through the reasonable use of supplementary educational support.

Whether this is the case, that is whether, for example, assignment of an additional special education teacher or, insofar as provided for by law, the creation of an integration class would make it possible to achieve inclusive education that the disabled child can absolve with prospects of success, must be determined on the basis of overall assessment in the individual case, taking into account the nature and severity of the specific disability as well as the respective advantages and disadvantages of inclusive education and instruction in a regular school on the one hand, and attendance of a special school or remedial school on the other hand. In this context, overall comparison as regards the assessment of inclusive education must take into account not only the opportunities made available to the disabled child or youth for his or her education and future life as an adult, but also any burden that may be associated with such a measure. This applies as regards the disabled child, who especially in the case of individual integration will be confronted with higher standards of performance, but this is not the only consideration. In addition, overall assessment must also take into account conceivable burden upon fellow pupils and teaching staff as well as the nature of common instruction typically practiced in classes or courses in schools. Finally, it is also necessary to take into account that governmental measures to compensate for disabilities may be requested and granted only within the limits of available financial, staffing, physical and organizational possibilities (see BVerfGE 40, 121 [133]). The resources required for inclusive education in mainstream schools may not be made available

at the expense of those children whose participation in common instruction is excluded due to the nature or degree of their disability or whose participation in common instruction seems undesirable for pedagogical reasons and who are therefore dependent upon the availability of special and remedial schools with the appropriate staffing and material means required for their special educational task.

The respective advantages and disadvantages of inclusive or separate education must be assessed neither exclusively from the point of view of the disabled pupil and his or her parents nor solely from the point of view of the school administration. The preferences of parents and children and youth as to the nature of their formal education and instruction and the schools at which they commence or pursue such education and instruction are, however, of considerable importance under constitutional law in view of the fundamental rights guaranteed under Article 6.2 sentence 1 and Article 2.1 of the Basic Law. When parents decide in favour of education together with children without disabilities in the interest of their child as seen from their point of view, the school authority may not simply disregard this, claiming, for example, without further justification that assignment to a special school and instruction at such a school would in fact be better suited to serving the well-considered interests of the disabled child. Rather, it is necessary to examine the wishes of the parents thoroughly and consider the educational plans of the parents as manifested in these wishes.

In the Lower Saxony Ordinance Governing Supplementary Educational Services for Children with Special Needs (Verordnung über sonderpädagogische Förderung) of 16 November 1994 (Bavarian Law Gazette [*Bayerisches Gesetz und Verordnungsblatt* - GVBl.] p. 502), for example, provision is made for the school authority to have a teacher who has taught or is likely to teach the child prepare a report and have a special education teacher produce an advisory opinion (s. 2 of the Ordinance) before it rules on an application for recognition of a need for supplementary educational support. Provision is also made for appointment of a special needs committee upon application of the guardians, which committee also includes the guardians and on the basis of the report and advisory opinion submits recommendations for recognition of a need for supplementary educational support and future school attendance and in the event of failure to reach a mutual agreement informs the school authority of the various positions (s. 3 of the Ordinance). The report, the advisory opinion and, if appropriate, the recommendation or the various positions of the special needs committee are taken into account by the school authority in its decision concerning supplementary educational support (s. 4 of the Ordinance).

This procedure, which is on the one hand intended to make the official decision making process as objective as possible and on the other hand involves the guardians in the decision making process, obviously with the intention of arriving at a decision that is also acceptable to them, adequately takes into account the potential conflict between parents and their children and the school administration. It not only creates an external framework within which the positions of the disabled pupil and his or her parents in respect of fundamental rights under

Article 2.1 and Article 6.2 sentence 1 of the Basic Law can be appropriately advanced; moreover, it also seems to be a basically suitable procedural and organizational means of enforcing the prohibition of discrimination against disabled persons contained in Article 3.3 sentence 2 of the Basic Law in the area of education (on the protection of fundamental rights through procedural operations, see, for example, BVerfGE 53, 30 [65]; 84, 34 [45, 46]).

The ultimate responsibility of the school authority for deciding whether to recognize needs for supplementary educational support and the form of school attendance for children and youth with special needs is, however, not affected by the provisions of the Ordinance. The school authority is not bound by the content and findings of the report on an individual pupil and the advisory opinion, and this applies equally to the recommendations of the special needs committee. It is therefore also not prevented under the Basic Law from ordering a transfer to a special school even if these decision making aids speak - exclusively or alternatively - in favour of an inclusive form of education in the individual case. In light of Article 3.3 sentence 2 of the Basic Law, the authority is, however, under a greater obligation to justify its position.

The prohibition of discrimination of disabled persons requires, as regards its constitutionality that decisions that are made in respect of a disability and could constitute discrimination against a disabled person be substantiated with reasons, which in the case of a disabled child or youth interested in inclusive education means they must be such that it is possible to recognize in detail the considerations upon which the school authority bases a transfer to a special school. This entails elaboration of those aspects that must be taken into account under Article 3.3 sentence 2 of the Basic Law. Depending on the situation in the individual case, the nature and severity of the disability must be indicated as well as the reasons that may have led the authority to conclude that education and instruction of the disabled child would seem to be best ensured in a special school. If applicable, organizational, staffing or physical difficulties and the reasons why these difficulties cannot be overcome in the concrete case must also be set forth. Finally, consideration of the opposing educational wishes of the disabled child and his or her guardians is in either case a prerequisite to adequate justification of a decision in favour of instruction in a special school or remedial school. They must be juxtaposed with the considerations of the school authority and weighed against its views in such a manner that the governmental measure becomes comprehensible and therefore also verifiable by the courts.

bb) The decision of the administrative courts to the effect that a transfer ordered by a school authority meets these requirements is only to a limited extent subject to constitutional control. The determination and evaluation of the facts pertinent to the decision as well as interpretation and application of the relevant provisions of the school law of the *Länder* are the responsibility of the administrative courts and

in principle removed from review by the Federal Constitutional Court (see BVerfGE 18, 85 [92, 93]; 86, 122 [128, 129]). It is also not the task of the Federal Constitutional Court to control the manner in which the courts render concrete and implement in detail on the basis of ordinary law the protection that fundamental rights - in addition to Article 2.1 and Article 6.2 sentence 1 of the Basic Law, in particular in this context Article 3.3 sentence 2 of the Basic Law - afford the parties to a legal dispute and whether the best possible protection is achieved in so doing (see BVerfGE 89, 276 [286]; 92, 140 [153]. Rather, the Federal Constitutional Court intervenes correctively only if contested decisions violate the general principle of equality embodied in Article 3.1 of the Basic Law as regards its importance in terms of prohibiting arbitrariness (see on this BVerfGE 89, 1 [13, 14]) or reveal errors that are based on a fundamentally erroneous view of the importance and reach of a fundamental right, in particular the scope of the area of protection, and are also of a certain material importance for the concrete legal case (see BVerfGE 89, 1 [910] with further references).

II.

Given this background, the order under challenge cannot in the end be objected to on constitutional grounds. It does not to be sure, do justice to the constitutional standards elaborated under C I (1.) in all respects. However, this does not affect the judgment of the Higher Administrative Court to the effect that in view of the concrete actual circumstances of the case of the complainant, more speaks in favour of the conclusion that the transfer order contested by the action is legal (2.).

…

5. Gender Identity - BVerfG, 10.10.2017, 1 BvR 2019/16, http://www.bverfg.de/e/rs20171010_1bvr201916en.html

Explanatory Annotation

The decision on the right of persons who do not identify as either male or female to be able to register their gender in a distinct category speaks for itself. It should be noted, however, that the decision of the Constitutional Court did not only stipulate that the binary legal framework allowing only for male or female (or none at all) gender identifications the prohibition of discrimination based on gender under Article 3.3 of the Basic Law. The Court also held that gender identity is a separate right emanating from the general right of personality in Article 2.1 read in conjunction with the human dignity clause in Article 1.1 of the Basic Law. That is an important point because it elevates gender identity questions from general (anti-)discrimination law and creating an independent constitutional anchor right for gender identity issues that might arise in the future. Hence this decision could well have been reported above under Article 2.1 of the Basic Law.

Translation of "Gender Identity" decision, BVerfG, 10.10.2017, 1 BvR 2019/16, http://www.bverfg.de/e/rs20171010_1bvr201916en.html

Headnotes:

1. The general right of personality (Article 2(1) in conjunction with Article 1(1) of the Basic Law, *Grundgesetz* – GG) protects the gender identity. It also protects the gender identity of those who cannot be assigned either the gender "male" or "female" permanently.
2. Article 3(3) first sentence GG also protects persons who do not permanently identify as male or female against discrimination based on gender.
3. Both of these fundamental rights of persons who do not permanently identify as male or female are violated if the civil status law requires that the gender be registered but does not allow for a further positive entry other than male or female.

Facts:

[Excerpt from press release no.29/2018 of 27 April 2018]

The complainant filed a request with the competent registry office for correcting the complainant's birth registration by deleting the previous gender entry "female" and replacing it with "inter/diverse", alternatively only with "diverse". The registry office rejected the request and pointed out that under German civil status law a child needs to be assigned either the female or the male gender in the birth register, and emphasised that – if this is impossible – no gender entry is made (§ 21(1) no. 3, § 22(3) PStG). The request for correction filed thereupon with the Local Court (Amtsgericht) was rejected; the complaint filed against this decision was unsuccessful. […].

[End of Excerpt]

I.

1. a) […] The two provisions of the Civil Status Act that are indirectly challenged read as follows: **[2]**

§ 21 Entry in the birth register

(1) The following information is documented in the birth register:

3. the child's gender,

§ 22 Missing data

(3) If the child can be assigned neither the female nor the male gender, that person's civil status shall be documented in the birth register without indicating the person's gender.

b) § 22(3) PStG was introduced in the context of the reform of civil status law in 2013. Previously, since 1875 there had been no legal provision on persons whose gender is not clearly female or male. The General State Law for the Prussian States (*Allgemeines*

Landrecht für die preußischen Staaten – ALR) of 1794 still provided for gender classification of hermaphrodites: "If hermaphrodites are born, their parents determine in which gender they are raised" (§ 19(I) first sentence ALR). "However, after having turned eighteen, these persons are free to choose which gender they want to belong to" (§ 20(I) first sentence ALR). This provision was omitted without replacement when registry offices and birth registers were introduced by the "Act on Documenting Civil Status and Marriage" (*Gesetz über die Beurkundung des Personenstandes und die Eheschließung*) of 6 February 1875 (Reich Law Gazette, *Reichsgesetzblatt* – RGBl p. 23). A regulatory gap resulted that ultimately persisted until civil status law was reformed in 2013 (see Wacke, in: Festschrift für Kurt Rebmann, 1989, pp. 861, 868 et seq.; Kolbe, Intersexualität, Zweigeschlechtlichkeit und Verfassungsrecht, 2010, p. 81; Lettrari, Aktuelle Aspekte der Rechtslage zur Intersexualität, 2015, p. 6). **[3]**

c) The new provision of § 22(3) PStG was preceded by the concluding observations of the Committee on the Elimination of Discrimination against Women of 10 February 2009 in which the committee requested the Federal Republic of Germany "(…) to enter into dialogue with non-governmental organizations of intersexual and transsexual people in order to better understand their claims and to take effective action to protect their human rights" (CEDAW/C/DEU/CO/6 para. 62). **[4]**

In 2010, the Federal Ministry of Education and Research and the Federal Ministry of Health instructed the German Ethics Council to prepare an opinion on the situation of intersexual persons in Germany in dialogue with persons concerned by intersexuality. In February 2012, the German Ethics Council submitted its opinion. Its summary is as follows (Bundestag document, *Bundestagsdrucksache* – BTDrucks 17/9088, p. 59 [translation by the German Ethics Council]): **[5]**

"The German Ethics Council takes the view that personal rights and the right to equality of treatment are unjustifiably infringed if persons whose physical constitution is such that they cannot be categorized as belonging to either the female or the male sex are compelled by law to be designated in one of these categories in the civil register.

1. Provision should be made for persons whose sex cannot be unambiguously determined to register not only as "female" or "male" but also as "other".

   Provision should also be made for individuals' sex not to be registered until they have decided for themselves. A maximum age for affected people to decide should be laid down in law.

2. In addition to the existing possibility of amendment of one's registered sex under Section 47(2) of the Act on Civil Status (PStG), provision should be made for affected individuals to request amendment of their registered sex should the original entry prove to be incorrect.

4. As a basis for future decisions on legislation, the purposes of compulsory registration as provided by current law should be evaluated. A review should be undertaken to determine whether the recording of a person's sex in the civil register is in fact still necessary."

d) The Government's Draft Act to Amend Civil Status Law (Civil Status Law Amending Act, *Personenstandsrechts-Änderungsgesetz* – PStRÄndG) of 25 May 2012 did not follow the recommendations of the German Ethics Council (*Bundesrat* document, *Bundesratsdrucksache* – BRDrucks 304/12; BTDrucks 17/10489, pp. 5 et seq.). In a statement of 6 July 2012, the *Bundesrat* called on the Federal Government to review the recommendations of the German Ethics Council on intersexuality, which the *Bundesrat* endorsed, in the context of the draft law (BTDrucks 17/10489, p. 56). In its reply, the Federal Government confirmed that it took the problems of those concerned and the opinion of the Ethics Council very seriously. However, according to the Federal Government, in this very advanced stage of the legislative procedure, the complex problems, particularly when taking into account medical aspects, cannot be solved in the short term. Comprehensive consultations with persons concerned and experts would have to be held before new provisions could be enacted, the Federal Government argued. In this respect, it would also be necessary to review which amendments to other laws would be required (BTDrucks 17/10489, p. 72; *Bundestag* Minutes of Plenary Proceedings, *BT-Plenarprotokoll* 17/219, p. 27222). The *Bundestag* Committee on Internal Affairs recommended adopting the current § 22(3) PStG (BTDrucks 17/12192, pp. 3, 11). In the second and third deliberations, the Committee's proposal was adopted unanimously (cf. Bundestag Minutes of Plenary Proceedings 17/219, pp. 27217 et seq.). For the time being, further provisions should be subject to further discussions in the expert committees (cf. *Bundestag* Minutes of Plenary Proceedings 17/219, p. 27222). **[6]**

e) In the coalition agreement for the 18th legislative term of 27 November 2013, the coalition parties committed to evaluating and extending the changes in civil status law for intersexual persons that had been enacted in the meantime. They also committed to "focussing on the special situation of transsexual and intersexual persons" (cf. coalition agreement among CDU, CSU and SPD, 18th legislative term, p. 105). For this purpose, an interministerial working group "Intersexuality/Transsexuality" was established, which was due to submit its report in the first half of 2017. This has not happened yet (cf. reply by the Federal Government to a minor interpellation of the parliamentary group BÜNDNIS 90/DIE GRÜNEN, BTDrucks 18/7310, p. 14). **[7]**

2. […] **[8]**

3. From a medical perspective, exclusively binary designations of gender are not maintained. In 2015, upon the recommendation of its scientific advisory board, the German Medical Association (*Bundesärztekammer*) submitted its opinion "Healthcare for children, youths and adults with differences/disorders of sex development (DSD)" ("*Versorgung von Kindern, Jugendlichen und Erwachsenen mit Varianten/Störungen der Geschlechtsentwicklung*"). In its opinion, the association states that disorders of sex development are heterogeneous deviations in gender determination or differentiation. Deviations in gender development include congenital variations in genetic, hormonal, gonadal and genital dispositions of a person due to which a person's gender does not unambiguously correspond to the biological categories of 'male' or 'female'. Equating this with a malformation or disease is not appropriate, the association holds […]. The 2016 "Guidelines by the German Society of Urology (DGU) e.V., the German Society of Paediatric Surgery (DGKCH) e.V., the German Society of Paediatric Endocrinology and Diabetology (DGKED)

e.V."(*Leitlinie der Deutschen Gesellschaft für Urologie (DGU) e.V., der Deutschen Gesellschaft für Kinderchirurgie (DGKCH) e.V., der Deutschen Gesellschaft für Kinderendokrinologie und -diabetologie (DGKED) e.V.*) note that the traditional prescriptive idea of men and women needs to be revisited in order to ensure adequate psychological and medical care for and treatment of persons with deviating gender development, due to the biological context and the experiences of these persons. Deviating gender development is not a disease. It is not possible to think about its "curability", the guidelines maintain. No medical or psychological intervention will change the ambiguous state *per se*. How people handle deviating gender development is in principle a socio-political issue and must be considered in the context of society as a whole […]. In addition, according to the opinion, medical and psychosocial science largely agree that gender cannot be determined, let alone created, by genetic, anatomical and chromosomal features alone, but is also dependent on social and psychological factors […]. **[9]**

4. […] **[10]**

II.

[…] **[11-14]**

III.

With the constitutional complaint, the complainant claims a violation of their general right of personality under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law (*Grundgesetz* – GG), discrimination based on gender under Art. 3(3) first sentence GG and a violation of the principle of equal treatment under Art. 3(1) GG. **[15]**

[…] **[16-17]**

IV.

[…]

B.

The admissible constitutional complaint is well-founded. § 21(1) no. 3 in conjunction with § 22(3) PStG is unconstitutional insofar as § 21(1) no. 3 PStG requires a gender entry under civil status law, but § 22(3) PStG does not allow for a further positive gender entry for persons whose gender development deviates from female or male gender development and who permanently identify with neither the male nor the female gender. The decisions challenged in the constitutional complaint are based on these provisions. They violate the complainant's general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG) and the prohibition to disfavour a person because of gender (Art. 3(3) first sentence GG). **[35]**

I.

§ 21(1) no. 3 in conjunction with § 22(3) PStG violates the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG) in its manifestation as protection of gender identity. The general right of personality also protects the gender identity of persons who can be assigned neither the male nor the female gender (1). Their fundamental right is interfered with

because current civil status law requires that gender must be registered, but does not allow a gender entry other than female or male (2). This interference with fundamental rights is not justified (3). **[36]**

1. The general right of personality protects the complainant's gender identity. **[37]**

   a) Art. 2(1) GG grants every person the right to free development of their personality. In addition to the general freedom of action, this fundamental right includes the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG). As a so-called "unspecified" fundamental freedom, the latter right complements the special ("specified") freedoms, which also protect constitutive elements of the personality (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 54, 148 <153>). One of the purposes of the general right of personality is to guarantee the basic conditions enabling individuals to develop and protect their individuality in a self-determined way (cf. BVerfGE 35, 202 <220>; 79, 256 <268>; 90, 263 <270>; 117, 202 <225>). However, the general right of personality only protects those elements of development of one's personality which – without already being covered by the specifically guaranteed freedoms under the Basic Law – are equal to these freedoms in terms of their constitutive importance for personality (cf. BVerfGE 79, 256 <268>; 99, 185 <193>; 120, 274 <303>; established case-law). Hence, it does not guarantee protection against anything that could in any way impair the self-determined development of one's personality; in any case, no person is able to develop their individuality independent of external conditions and affiliations. However, where the self-determined development and protection of personality is specifically threatened, it is covered by the protection of the general right of personality, which serves to close legal gaps (BVerfGE 141, 186 <201 and 202 para. 32>). **[38]**

   b) Accordingly, the general right of personality also protects gender identity (cf. BVerfGE 115, 1 <14 et seq.>; 116, 243 <259 et seq.>; 121, 175 <190 et seq.>; 128, 109 <123 et seq.>), which is regularly a constitutive element of an individual's personality. Under the given circumstances, the assignment of gender is of paramount importance for individual identity; it typically occupies a key position both in a person's self-image and in the way this person is perceived by others. Gender identity plays an important role in everyday life: In part, gender determines entitlements and obligations provided for by law; furthermore, it often forms the basis for the identification of a person, and gender identity is also significant in everyday life irrespective of legal provisions. To a large extent it determines, for instance, how persons are addressed or what is expected of a person in terms of their appearance, upbringing or behaviour. **[39]**

   The gender identity of persons who can be assigned neither the male nor the female gender is protected as well. These persons might be able to develop their personality more freely if less significance was attributed to gender assignment in general. Yet under the given circumstances, gender assignment is a particularly relevant factor for how persons are perceived by others and for how they see their own personality. The complainant emphasises the practical importance of gender assignment, too, and argues that under these circumstances, gender identity is a constitutive element of their personality. **[40]**

2. The provision of § 21(1) no. 3 in conjunction with § 22(3) PStG interferes with the general right of personality in its manifestation as protection of gender identity (a) and specifically threatens the development and protection of the complainant's personality in their gender identity (b). **[41]**

a) The provisions indirectly challenged interfere with the general right of personality in its manifestation as protection of gender identity. Civil status law requires that gender must be registered, but does not allow the complainant, whose gender development deviates from female or male gender development and who permanently identifies with neither the male nor the female gender a gender entry under civil status law that corresponds to their gender identity (on the existence of an interference see BVerfGE 49, 286 <298>; 60, 123 <132 et seq.>; 116, 243 <259 et seq.>; 121, 175 <190 et seq.>; 128, 109 <124>). Under civil status law, a person's gender needs to be documented in the birth register pursuant to § 21(1) no. 3 PStG. The only positive options available for this are the gender "female" and the gender "male"; there is, however, no further option for a gender entry. This follows from § 22(3) PStG ("missing data"), according to which the gender entry in the birth register should be left blank if the child can be assigned neither the female nor the male gender. In this case, no positive entry can be made in the birth register. Accordingly, the complainant must tolerate an entry that does not correspond to their constitutionally protected gender identity. **[42]**

Pursuant to § 22(3) PStG, the complainant has the option of deleting their female gender entry in the birth register. However, this does not eliminate the interference with fundamental rights: The complainant's gender identity is not only impaired by their incorrect assignment to the female gender, but also by the currently stipulated choice of the legal alternative "missing data" (§ 22(3) PStG). The missing gender entry would not show that, while indeed not identifying as a man or a woman, the complainant does not identify as genderless either and sees themself as having a gender beyond male or female. The "missing data" option does not alter the exclusively binary pattern of gender identity; it gives the impression that legal recognition of another gender identity is ruled out and that the gender entry has simply not been clarified yet, that a solution has not been found yet or even that it has been forgotten. This does not amount to recognition of the complainant in their perceived gender. From the complainant's view, the entry remains inaccurate, because just deleting a binary gender entry creates the impression of not having a gender (cf. Althoff/Schabram/Follmar-Otto, loc. cit., pp. 24, 44; see also Vöneky/Wilms, Stellungnahme zur Situation von Menschen mit Intersexualität in Deutschland im Deutschen Ethikrat, 2011, p. 3; Siebericchs, FamRZ 2013, p. 1180 <1181>; Gössl, NZFam 2016, 1122 <1123>). **[43]**

b) If civil status law requires a gender entry, but at the same time denies persons recognition of their gender identity under civil status law, it specifically threatens the self-determined development and protection of these persons' personality: **[44]**

aa) Under the given circumstances, the recognition of gender under civil status law has an identity-building and expressive effect. Civil status is not a marginal issue; rather, it is the "position of a person within the legal system", as stated by the

law (§ 1(1) first sentence PStG). With civil status, a person is measured according to the criteria provided for by law; it defines the central aspects of the legally relevant identity of a person. Thus denying the recognition of gender identity under civil status law in itself, i.e. irrespective of the consequences associated with the gender entry outside of civil status law, specifically threatens the self-determined development and protection of a person's personality. **[45]**

The entry under civil status law in itself only takes on specific significance for gender identity because civil status law requires that a gender must be stated in the first place. If it did not require a gender entry, it would not specifically threaten the development and protection of personality as the specific gender identity of a person would not be recorded under civil status law. […] **[46]**

However, pursuant to § 21(1) no. 3 PStG, civil status currently also includes a person's gender. Despite several reforms of civil status law, the legislature has maintained the registration of gender as an identifying feature under civil status law. As the legislature regards gender as so crucially important for describing a person and their legal status by way of civil status law, the recognition of a person's specific gender identity under civil status law has an identity-building and expressive effect in itself, with the material and legal consequences of the civil status entry outside of civil status law being irrelevant in this respect (on the independent fundamental rights relevance of the register entry in the case of transsexuality see BVerfGE 49, 286 <297 and 298>; on naming see also BVerfGE 104, 373 <385>; 109, 256 <266>; 115, 1 <14>). If, under these circumstances, the gender identity of a person is not recognised under civil status law, it specifically threatens the self-determined development and protection of their personality. **[47]**

bb) In particular, the requirement of a gender entry under civil status law in combination with the limited entry options make it difficult for those concerned to move about in public and be seen by others as the persons they are with regard to their gender. Yet the way a person is depicted and perceived in public and by others is significant for the free development of their personality and may result in specific threats [to fundamental rights] (cf. BVerfGE 99, 185 <193>; 114, 339 <346>; 119, 1 <24> […]). Civil status law requires a gender entry, but does not allow those concerned a gender entry in the birth register which is in line with their self-image. This contributes to the fact that their individual identity is not perceived and recognised in the same way and as naturally as that of female or male persons. The complainant plausibly argues that an individual often cannot just pass over their gender entry under civil status law when appearing in public. **[48]**

3. The interference is not justified. The court decisions are based on an unconstitutional legal provision, because compelling persons to have a gender entry under civil status law while denying them a further positive entry other than "female" or "male" is not based on a legitimate aim for which the provision would be suitable, necessary and appropriate. **[49]**

a) The Basic Law does not require that civil status be exclusively binary in terms of gender. It neither requires that gender be governed as part of civil status, nor is it opposed to the civil status recognition of a third gender identity beyond male and female. It is true that Art. 3(2) first sentence GG refers to "men" and "women". However, a conclusive determination that the term "gender" only means men and women does not arise [from this wording]. It follows from the requirement of equal rights under Art. 3(2) GG that existing social disadvantages between men and women need to be eliminated. The purpose of this provision is mainly to eliminate gender-based discrimination against women (cf. BVerfGE 85, 191 <207>), but its aim is not to enshrine gender identity in civil status law or to rule out introducing another gender category in addition to "male" and "female. […] **[50]**

b) The interests of third parties cannot justify that § 22(3) PStG does not offer a third option allowing for a positive entry in the birth register. The status of men and women under civil status law remains unaffected by a further entry option. The same also applies to persons with deviating gender development who still identify with either the male or female gender and who are and want to be registered accordingly. The mere possibility of entering a further gender does not oblige anyone to identify with this third gender. […] In a regulatory system that requires information on gender, the existing options for persons with deviating gender development to be registered as male or female or omit the gender entry altogether need to be preserved. **[51]**

c) The fact that the introduction of a third positive entry may be associated with bureaucratic and financial costs during a transitional period does not justify denying the option of a further gender entry. At first, the formal and technical preconditions necessary for registering another gender of course need to be created. However, the additional effort associated with allowing for a standardised third gender designation would have to be accepted, given the interference with fundamental rights that arises from being ignored by law in one's own gender identity. The general right of personality does not, however, grant a claim to the entry of random gender-related identity features as civil status information. Besides, the legislature is free to completely dispense with a gender entry in matters under civil status law. **[52]**

d) Organisational interests of the state cannot justify the denial of a third standardised and positive entry option, either. Insofar as the legal identification of persons is de lege lata carried out on the basis of their gender and individual legal obligations and claims are attributed based on gender under current law, the registration of gender under civil status law contributes to an accurate and unambiguous identification and attribution (cf. BVerfGE 128, 109 <129 and 130>). However, this does not justify that under § 22(3) PStG no gender other than male or female can be entered in the civil register. **[53]**

Allowing a positive entry for a third gender with a standardised third designation (for suggestions see, e.g., the opinion of the German Ethics Council, BTDrucks 17/9088, p. 59) does not result in any assignment difficulties that do not already exist under current law anyway. Uncertainties may occur where a provision outside of civil status law is linked to gender and presumes that a person is either female

or male. In that case it would indeed be unclear how a person assigned to a third gender should be treated. However, the same issue exists already under current law if the gender entryis left blank pursuant to § 22(3) PStG. In this case, assigning a person to the male or female gender is not possible either: In this respect, material law neither regulates which gender-based provisions apply, nor has the legislature created specific provisions for persons without gender entry. If a further positive gender entry is allowed for, the questions to be clarified are thus the same as those that already arise when opting for no gender entry, which is possible de lege lata. In fact, the positive entry of a third gender could provide greater clarity given that it does not – unlike a gender entry that is permanently left blank – convey the wrong impression that the entry was left blank inadvertently. **[54]**

The permanent nature of civil status is not affected by the option of a third gender entry, either, because just creating another entry option is not a statement on the requirements for changing civil status. **[55]**

II.

Insofar as § 21(1) no. 3 in conjunction with § 22(3) PStG excludes a gender entry other than "male" and "female", it also violates the ban on discrimination of Art. 3(3) first sentence GG. The provisions that are indirectly challenged disadvantage persons who are neither male nor female and who permanently identify with another gender (1). Article 3(3) first sentence GG protects not only men and women against discrimination based on gender, but also persons who do not permanently identify with these two categories (2). The disadvantaging is not justified (3). **[56]**

1. § 21(1) no. 3 in conjunction with § 22(3) PStG disadvantages persons based on their gender who are neither male nor female and who permanently identify with another gender. Under Art. 3(3) first sentence GG, gender may generally not serve as a basis for unequal legal treatment. This holds true also in the case that a provision does not actually aim at an unequal treatment which Art. 3(3) GG prohibits, but primarily pursues other goals (BVerfGE 85, 191 <206>; established case-law). § 21(1) no. 3 in conjunction with § 22(3) PStG treats persons who are neither male nor female unequally and disadvantages them on the basis of their gender insofar as these persons cannot be registered in accordance with their gender, unlike men and women. § 22(3) PStG explicitly only allows for entries in the categories female or male. Under current civil status law, other persons must accept that they are either incorrectly assigned to one of the two above-mentioned genders or have an entry that creates the impression that they have no gender at all. **[57]**

2. Article 3(3) first sentence GG protects not only men against discrimination based on their male gender and women against discrimination based on their female gender; it also protects persons who do not permanently identify with these two categories against discrimination based on their gender, which is neither exclusively male nor exclusively female […]. **[58]**

The purpose of Art. 3(3) first sentence GG is to protect persons from being disfavoured that belong to groups structurally prone to being discriminated against (cf. BVerfGE 88, 87 <96> […]).Persons who identify as neither female nor male are particularly vulnerable in a society primarily organised according to binary gender patterns. The wording of Art. 3(3) first sentence GG readily permits including them in its protection. Art. 3(3) first sentence GG generally refers to "gender" without stipulating any restrictions in that respect; [the reference to "gender"] may thus also mean a gender other than male or female. **[59]**

There is no systematic contradiction to the requirement of equal rights under Art. 3(2) GG, which only refers to men and women […].The wording of Art. 3(3) GG, unlike Art. 3(2) GG, does not refer to men and women, but to gender in general. Above all, Art. 3(2) GG is of distinct relevance and independent of Art. 3(3) first sentence GG, which explains the narrower wording of Art. 3(2) GG. The regulatory content of Art. 3(2) GG exceeds the prohibition of discrimination under Art. 3(3) GG; it sets out the requirement of gender equality and applies it to social reality (BVerfGE 85, 191 <206 and 207>). Since 1994, Art. 3(2) second sentence GG emphasises the actual enforcement of equal rights between the genders. **[60]**

The legislative history of the provision does not run counter to the assumption that Art. 3(3) first sentence GG includes the prohibition of discrimination based on a further gender, either. While the constitutional legislature (*Verfassungsgeber*) did not have persons of another gender in mind in 1949 when drawing up Art. 3(3) first sentence GG, this does not preclude interpreting the Constitution in such a way that these persons are included in the protection against discrimination, given today's knowledge of other gender identities. **[61]**

The decision of the constitution-amending legislature not to include the element of "sexual identity" in Art. 3(3) GG does not run counter to a broad interpretation of the element "gender" – irrespective of differences of meaning between gender identity and sexual identity. Most recently, an insertion of the element of sexual identity was declined not because of concerns linked to the content of the protection of sexual identity against discrimination. Rather, it was argued that this protection had already become a legal reality. Further it was claimed that, according to the case-law of the Federal Constitutional Court, the protection against discrimination based on sexual identity under Art. 3(1) GG by now corresponds to the protection under Art. 3(3) GG (cf. BTDrucks 17/4775, p. 5). **[62]**

Moreover, the Court of Justice of the European Union has also defined protection against gender-based discrimination broadly by including discriminations that are linked to a person's gender reassignment (fundamentally ECJ, Judgment of 30 April 1996, P v S and Cornwall County Council, C-13/94, ECR 1996, I-2143, para. 20). **[63]**

3. The disadvantaging is not justified. As shown above, there is no valid reason for it (see I 3 above). **[64]**

V. Freedom of Religion (Faith), Conscience and Creed - Article 4 of the Basic Law

Some General Comments

The protection of freedom of faith, conscience and creed comprises of two main aspects. Firstly, the provision guarantees the individual liberty to choose and profess any religion or philosophical creed, and the freedom to ensue one's own conscience. That relates mainly to the scope of such liberties and the distinction against other rights.

Secondly, it also includes questions arising from the relationship between the individual and the state or society as far as belief and conscience are concerned. The Constitution had for instance to deal with freedom of religion issues in public schools in several high profile cases. The relationship between the various churches and the state in Germany is noticeably different than the separation of church and state approach taken under the Constitution of the USA or under the laicist approach under the French Constitution. This is evidenced by the fact that the drafters of the Basic Law incorporated the church-state articles of the previous Weimar Constitution of 1919 into the Basic Law.[38] The differences are quite remarkable. For example, Article 137.5 of the Weimar Constitution provides for the possibility of religious societies (churches) to either maintain or apply for corporate status under public law in which case they can use the state's revenue service to collect a 'church tax' from their members. Article 138 implies a right to subsidies from the state and - still very important - Article 139 requires that "Sunday and holidays recognized by the state shall remain protected by law as days of rest from work and of spiritual improvement." To this day this provision makes it difficult or even impossible to treat Sundays and other religious holidays as regular working days with regular opening hours of shops and businesses. The Constitutional Court in a very recent decision regarded as unconstitutional regulations in Berlin allowing for the opening of stores on the four Sundays before Christmas.[39]

38 See Article 140 of the Basic Law with reference to Articles 136 to 139 and Article 141 of the Weimar Constitution.

39 BVerfG, 1 BvR 2857/07 of 1.12.2009 at:
http://www.bverfg.de/entscheidungen/rs20091201_1bvr285707.html;
Press release in English available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2009/bvg09-134.html (last accessed on 21.10.2019.

1. The Scope of Religious Freedom and Freedom of Conscience

a) Lumber Room, BVerfGE 24, 236

Explanatory Annotation

In this 1965 case the Constitutional Court had to determine the scope of religious freedom. The question arose from a regular court decision where the applicants, a *de facto* catholic youth association[40] with close ties but independent from the Catholic Church were ordered to stop plans of collecting of old rags and clothes for the purpose of helping the poor. This fundraising drive had been announced ("advertised" in the words of the respondent) from church pulpits. The case had been brought by a commercial collector of rags and old clothes who regarded the competition by the association with the help of the catholic church as a violation of the German fair trade practices legislation, pointing to the fact that several million German Marks (as the currency then was) had been earned by the association by essentially taking away his business.

The Constitutional Court had to determine whether the *de facto* association fell within the personal scope of the freedom of religion and whether the organization and the conducting of such collections was an exercise of religion. Only if these questions were answered in the affirmative could the Court engage with the regular court's decision to see if its interpretation of the relevant provision in the trade practices legislation did indeed take into account the freedom of religion guarantee of Article 4 of the Basic Law.

The Court stated, without any further explanation, that the freedom of religion clause can be invoked by *de facto* associations, rather than just individually by the members. Religious freedom can obviously be invoked by organizations because churches would otherwise not be able to invoke this freedom. The fact that the association here was a *de facto* one is irrelevant if the degree of organization of the association is sufficient to create an entity that exists independently of the will of its members. More importantly the Court held that the conduct of such collections to help the poor is a quintessential part of the exercise of any Christian religion and that one cannot delineate the conduct from announcement in and by the church. Freedom of religion is not limited to church services and religious rites it also includes transporting the message into the world for example by way of aid projects. The court also defined some outer limits for this exercise of Christian "caritas". The collections must be free of charge, i.e. no money must be paid to the donors. The religious motive must be expressed and communicated and the use of the donated goods or the use of the proceeds achieved from them must be transparent.

40 As opposed to a de jure registered and therefore incorporated association.

Translation of the Lumber Room Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 24, 236*

Headnotes:

1. The fundamental right under Articles 4.1 and 4.2 of the Basic Law (Grundgesetz) is afforded not only churches, religions and groups that share other beliefs, but also associations that have set themselves the goal of cultivating, not completely, but only partially, a religious life or a life based on other beliefs.

2. Article 4.2 of the Basic Law also guarantees the right to take collections for ecclesiastical or religious purposes. The same applies to supportive activities related to usual religious life such as publicity from the pulpit.

Order of the First Senate of 16 October 1968 - 1 BvR 241/66 -

Facts:

The Catholic Rural Youth Movement of Germany (Katholische Landjugendbewegung Deutschlands), a national association with no legal personality, was the complainant. In the year 1965, the Catholic Rural Youth sponsored a "Lumber Room Campaign" throughout the country; it collected used clothing, rags and scrap paper and sold these materials to large dealers. The proceeds in the amount of several million deutschmarks were intended for rural youth in underdeveloped countries. The complainant publicized the individual campaign activities in various ways, which included announcements from the pulpit in Catholic Churches. In response to an action brought by a commercial enterprise operated in Noerdlingen for the purposes of the collection of scrap, whose operations at times almost came to a standstill because of the campaign, the Regional Court (Landgericht) ordered the complainant to cease preparation for the collection of scrap materials within the operational area of the plaintiff through publicity from the pulpit of Catholic churches. The Regional Court based its judgment on the fact that the plaintiff was competing with the complainant and that publicity from the pulpit constituted in this case an advertising activity that amounted to a violation of public policy.

In response to the constitutional complaint, the judgment was reversed and the matter referred to the Regional Court.

Extract from the Grounds:

III.

The constitutional complaint of the complainant is founded. The challenged decision violates the complainant's fundamental right to the undisturbed practice of religion (Article 4.2 of the Basic Law) since the interpretation and application of the term "public policy" therein failed to adequately take into account the nature and reach of this fundamental right.

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

1. It is not the task of the Federal Constitutional Court to decide whether the Regional Court was correct in its assessment to the effect that the collections and subsequent sale of the materials collected by the complainant represented an act of commercial competition. The interpretation of s. 1 of the Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb - UWG), insofar as it serves as the basis for the decision, is according to the established case law of the Federal Constitutional Court an interpretation of ordinary law and as such exclusively the affair of the ordinary courts as long as the latter have not failed to recognize the force and reach of the provisions of the Basic Law and in so doing violated the fundamental rights of the parties involved (BVerfGE 18, 85 [9293]).

The very qualification of the collection activities as an activity that constitutes commercial competition precludes the existence of any violation of the fundamental rights of the complainant since the Regional Court basically considers such collections permissible. However, since only aspects having to do with commercial trade are considered relevant for the purposes of prohibition of announcements from the pulpit in the judgment under challenge, this perspective fails to take into account the influence exerted by the right to the undisturbed practice of religion from which the complainant as a religious association involved in a charitable cause can benefit.

2. a) The fundamental right to the undisturbed practice of religion (Article 4.2 of the Basic Law) is actually covered by the freedom of faith and conscience (Article 4.1 of the Basic Law). For this term encompasses - irrespectively of whether applied to a religious faith or religious or non-religious belief - not only the personal freedom to believe or not to believe, i.e., to profess a faith, to harbour a faith in secret or to renounce a previous faith and turn to another faith, but equally so the freedom to worship, proselytize and propagate (BVerfGE 12, 1 [34]).

In that regard, the undisturbed practice of religion is only part of the freedom of faith and conscience afforded individuals as well as religious associations or associations based on other beliefs (BVerfGE 19, 129 [132]).

At least since the Weimar Constitution, the freedom of the practice of religion has been substantively subsumed under freedom of conscience (see Hamel in: BettermannNipperdey-Scheuner, Die Grundrechte, vol. IV 1, 1960, pp. 62, 54). The special guarantee of protection of the practice of religion against encroachment and interference by the state under Article 4.2 of the Basic Law can be explained historically by the notion of a special *exercitium religionis*, but in particular by rejection of the interference with the practice of religion under the National Socialist rule of force. In view of this development, the intention of Article 4.2 of the Basic Law is in particular to make it clear that the holder of the fundamental right can also be a community, whose right to religious existence and activity is protected as regards the form and content of participation and the nature of its exercise - in the family, in the home and in public - as long as that community remains within the bounds of certain basic common moral notions of contemporary civilized peoples.

Since the "practice of religion" is of central importance for every faith and belief, the content of this term must be exhaustively interpreted against its historic background. This is supported by the fact that freedom of religion is no longer restricted by an

explicit reservation of legislative power such as that contained in Article 135 of the Weimar Imperial Constitution (Weimarer Reichsverfassung), is no longer associated with other provisions governing the relations between church and state (BVerfGE 19, 206 [219, 220]), cannot be forfeited pursuant to Article 18 of the Basic Law and is also protected by special provisions of the Basic Law (see Article 3.3, Article 33.3 of the Basic Law, Article 140 of the Basic Law in conjunction with Article 136.3 sentence 1 of the Weimar Imperial Constitution; Article 136.4 of the Weimar Imperial Constitution, Article 7.3 sentence 3 of the Basic Law and Article 7.2 of the Basic Law). This freedom of the practice of religion also extends not only to Christian churches, but also to other religions and groups that share other beliefs. This follows from the state's obligation to remain neutral as regards belief and religion (BVerfGE 18, 385 [386]; 19, 206 [216]) as well as from the principle of equal treatment of churches and beliefs (BVerfGE 19, 1 [8]).

There can therefore be no justification for an interpretation of freedom of worship that is narrower than the freedom of faith and conscience.

Accordingly, the practice of religion includes not only acts of worship and the practice and observance of religious customs such as worship services, church collections, prayers, the reception of sacraments, processions, the display of church banners and the ringing of church bells, but also religious education, non-religious and atheistic celebrations as well as other expressions of religious life and life based on other beliefs.

b) The fundamental right under Articles 4.1 and 4.2 of the Basic Law is afforded not only churches, religions and groups that share other beliefs, but also associations that have set themselves the goal of cultivating, not completely, but only partially, a religious life or a life based on other beliefs. However, this presupposes that the purpose of any such association is specifically directed towards the achievement of such goals. This applies without reservation to associations that are organizationally or institutionally affiliated with churches such as church orders, the purpose of whose existence includes more intensive pursuit of general ecclesiastical goals. However, it also applies as regards other independent or non-independent associations if and to the extent their purpose is to cultivate or promote a religious faith or preach the beliefs of their members. The extent of institutional affiliation with a religion or the nature of the goals pursued through the association can constitute a standard for determination of the existence of these prerequisites.

The complainant is to be sure not organizationally part of the Catholic Church. It is, however, institutionally associated with it: Catholic clergy are involved in all of its governing bodies by virtue of their ecclesiastical positions, and diocesan bishops can by virtue of their authority influence diocesan bylaws. The goals of the complainant are also of an ecclesiastical nature. Its bylaws explicitly state that its purpose is to do the work of the living Church worldwide and provide material support to alleviate the world's spiritual and corporeal needs. The complainant must therefore be afforded the fundamental right of undisturbed practice of religion.

c) The collections organized by the complainant for religiously motivated charitable purposes and the announcements made from the pulpit at the behest of the complainant fall under the practice of religion protected by Article 4.2 of the Basic Law.

When assessing what in any individual case is to be considered to constitute the practice of religion and belief, the self-identity of the religion or community of believers may also not be ignored. The religiously neutral state must to be sure in principle interpret constitutional terms on the basis of neutral, generally applicable criteria that are not associated with a particular confession or belief (BVerfGE 10, 59 [84, 85.]; 12, 45 [54]; 19, 1 [8]; 19, 226 [238 et seq.]; 19, 268 [278 et seq.]).

However, precisely in a pluralistic society with a legal order predicated on self-identity as regards religion or beliefs as well as freedom of worship, the state would violate the right of churches, religions and communities of believers to autonomy and independence within their own spheres that is guaranteed by the Basic Law if it did not take into account the self-identity of the adherents of a given faith or belief in its interpretation of their practice of their faith or belief (BVerfGE 18, 385 [386, 387]).

The self-identity of the Catholic and Protestant Churches is such that they view the practice of religion as encompassing not only the area of belief and religious services, but also the freedom to live and act according to their beliefs in the world outside in conformity with their religious and charitable duties. According to the New Testament, active love of neighbour is an important duty of Christians and is understood by both the Catholic and Protestant Churches as a basic ecclesiastical activity (Pastoral Constitution on the Church in the Modern World of the Second Vatican Council [*Pastoralkonstitution über die Kirche in der Welt von heute des 2. Vatikanischen Konzils*], Article 88, Rahner Vorgrimler, Kleines Konzilskompendium, 1966, pp. 547548. and Article 15.1 of the Basic Order of the Protestant Church in Germany [*Grundordnung der Evangelischen Kirche in Deutschland*] of 13 July 1948 - Abl. EKD 1948, p. 233).

Charitable activities, in particular the collection of donations for charitable purposes, is also recognized as a legitimate role of churches under governmental policy following World War II, and the right of the churches to pursue such activities is guaranteed in agreements and treaties with the churches (see Article 14.1 of the Lower Saxony Protestant Church Agreement (Niedersächsischer Evangelischer Kirchenvertrag) of 18 April 1955 (Lower Saxony Law Gazette [*Gesetzund Verordnungsblatt* - GVBl.] p. 159); Article 1.1 of the Lower Saxony Concordat (Niedersächsisches Konkordat) of 26 February 1965 (Lower Saxony Law Gazette p. 192); Article 16 of the SchleswigHolstein Protestant Church Agreement (Schleswig-Holsteinischer Evangelischer Kirchenvertrag) of 23 April 1957 (Schlesw.Holst. Law Gazette p. 73) and Article 19 Hessian Protestant Church Agreement (Hessischer Evangelischer Kirchenvertrag) of 18 February 1960 (Hess. Law Gazette p. 54).

How the limits to the fundamental right of freedom of religion and in particular those of the undisturbed practice of religion are circumscribed in a pluralistic society - be it on the basis of the principles of tolerance and equality or the core area of protection

or the guarantee of the essence of the fundamental right, on the basis of the relationship between state and church described in the Basic Law, on the basis of the human dignity of the individual or taking into account certain constraints inherent in the fundamental right - is of no importance here. In any case, for the purposes of the decision that must be made, it follows from the general considerations of the nature of the freedom of religion entertained here that a charitable collection is of a religious nature and may be afforded protection under Article 4.2 of the Basic Law only under certain conditions.

Donations must be made without receipt of consideration; they must be motivated by a certain religious spirit or attitude on the part of the donor, be it compassion or brotherly love, or be an expression of personal support for a just and good cause born of religious conviction. Christian love is according to the self-identity of the Christian churches therefore not the same thing as a social activity that is limited to concern for the poor, suffering and needy out of a sense of responsibility for one's neighbours in the interest of fostering peaceful coexistence within the state and providing minimum subsistence for others in order to make it possible for them to lead a life within the community that is commensurate with human dignity merely for social reasons. It follows from this characterization alone that Christian love must involve customary solicitude that is provided as a matter of course and in the vein of general religious awareness. The intended purpose and use of the collected materials must be obvious to the donors so that they do not make their decisions on the basis of mistaken ideas and the public is not deceived as to the purpose of the collection. It is irrelevant in this context whether the donations go directly to the needy or whether they receive some form of financial assistance from proceeds from the materials since the decisive criterion for qualification as a charitable religious collection is that a certain offering be made for charitable purposes. This applies all the more so when such sale is planned and announced from the outset. The collection and the realization of proceeds also cannot therefore be separated.

d) The "Lumber Room Campaign" collection conducted by the complainant remains within the framework of these general prerequisites - also as regards publicity from the pulpit.

The collection of in-kind donations to support the needy is one of the traditional forms of charity engaged in by church-related organizations. The nature of the sale of the donated materials was appropriate and in keeping with the special circumstances of the situation. Since the donations were intended for the needy overseas, maximum efficacy of the assistance could be more purposefully achieved through the sale of the collected materials than through costly shipment of usable clothing. In view of the general awareness of the extent of need in developing countries, expansion of the collection to include not only usable clothing, but also rags and scrap paper in general was also justified. Contrary to the opinion of the complainant, the donations were also of the beneficent nature required of the activities of religious charities. It may well be true that, except in the case of rags, commercial rag collectors in general also usually do not pay. The complainant has, however, itself submitted that the materials collected by

charitable organizations contain a higher percentage of usable clothing than the goods collected by commercial dealers. It follows from this that in view of the purpose intended by the collection - assistance for the needy - the donors gave more valuable items, which they would not to the same extent have given to commercial rag dealers. The challenged judgment did not contain any findings to the effect that the complainant misrepresented the intended use of the proceeds or that the donors were deceived as to the nature of the use of the collected materials.

The statement of the complainant to the effect that 90% of the rag collectors had to suspend their operations due to the charitable collections is irrelevant for the purposes of assessing whether the "Lumber Room Campaign" is an activity that falls under the practice of religion.

Apart from the fact that, according to the opinion of the Regional Court that is of importance to the Federal Constitutional Court in this respect, the scale of the collection carried out by the complainant was also permissible and that it is not certain whether the decrease in the rag collecting business is not due to structural changes of a general economic nature, even a change in the structure of this area of business due to charitable collections would have to be accepted. In a free market economy, individual businessmen do not have a constitutionally anchored right to any specific volume of business and further business opportunities.

e) Since the collection of the complainant was therefore part of the practice of religion protected under Article 4.2 of the Basic Law, the Regional Court should also have taken into account the influence exerted by this fundamental right in its assessment of publicity from the pulpit as an activity that constitutes "competition in violation of public policy."

If the collection itself enjoys special protection precisely because of its nature and purpose as religious charity, this must also hold for supportive activities in connection with usual religious life such as publicity from the pulpit. The sole relevant question is whether the complainant in particular had the right to instigate such announcements from the pulpit. In view of the fact that the collection falls into the area of religion, there can be no doubt about this. When it interpreted the term "violation of public policy" as applied to activity *vis-à-vis* competitors, the Regional Court should therefore have assessed the special nature of competition between a businessman and a "competitor" acting within the scope of the practice of religion on the basis of the legally protected undisturbed practice of religion, which enjoys precedence, and not qualified it as being contrary to public policy on the basis of the established facts.

Insofar as the Regional Court has ruled against the complainant, the judgment must be overturned (s. 95.2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerGG)).

3. Since the constitutional legitimacy of the conduct of the complainant can be inferred in particular from Article 4 of the Basic Law, there can be no question of any violation of general freedom of action (Article 2.1 of the Basic Law) by the complainant (BVerfGE 6, 32 [37]; 10, 55 [58]; 17, 302 [306]).

For the purposes of the present proceedings, it is therefore necessary to ignore the issue as to the extent to which collections by charitable organizations that do not benefit from the protection of Article 4.2 of the Basic Law are covered by Article 2.1 of the Basic Law.

b) Conscientious Objection II, BVerfGE 69, 1

Explanatory Annotation

To this day Germany is a country with a compulsory obligation on young males to military duty. Article 12a.1 of the Basic Law stipulates that such compulsory military or alternative civilian duty may be imposed on young males who have attained the age of 18. Article 12a.2 demands that for persons refusing to serve in the military on grounds of conscience an alternative civilian duty must be provided which must not exceed in length the duration of military service. This provision builds on Article 4.3, which guarantees that no person shall be compelled against his conscience to render armed military service. The statute governing the details as amended in 1983 stipulated that the alternative non-military service for conscientious objectors was one-third longer in time than the time span for the basic military service. The Constitutional Court had to decide whether this deviation of the length of service violated the rights to conscientious objection. The right to conscientious objection of military duty is an absolute right and is valid not only in times of peace but also in times of war. However, there is a limitation insofar as it is not a right to objection for any reason whatsoever. Only those for whom military duty is impossible as a matter of conscience are protected. The extended period of service for non-military alternative duty was justified on the very basis that the willingness to do the extra time was an indication for the validity of the conscientious objection.

The ostensible conflict with Article 12a.2 of the Basic Law was resolved by the Court by arguing that military duty can and - in some but not all cases - will extend beyond the time frame for the basic military duty because of periodic military exercises the conscripts might be called up for or for extra service in times of crises. It follows that Article 12a.2 cannot be interpreted as demanding two identical time periods as this is impossible. Rather the provisions seeks to balance the two alternatives for compulsory service in such a way that in general the burden imposed when rendering alternative non-military service for reasons of conscience is not higher than the burden imposed on those rendering military service.

Translation of the Second Conscientious Objection Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 69, 1*

Headnotes:

1. Provisions of law governing conscientious objection must respect the fundamental right guaranteed in Article 4.3 of the Basic Law (Grundgesetz - GG) and at the same time take into account the basic decision made under the constitution to provide for the effective military defence of the country.

2. The alternative service provided for under Article 12a.2 of the Basic Law is reserved for those persons subject to military service who refuse to render military service involving the use of arms on grounds of conscience. From this follows the legislature's duty to ensure that only those persons subject to military service are recognized as conscientious objectors who can with sufficient certainty be assumed to meet the conditions contained in Article 4.3 sentence 1 of the Basic Law (Confirmation of BVerfGE 48, 127). The Conscientious Objection Reform Act (Kriegsdienstver-weigerungs-Neuordnungsgesetz - KDVNG) satisfies these requirements.

3. According to Article12a.2 sentence 2 of the Basic Law, the duration of alternative service may not exceed the legally permissible duration of military service. The normative goal of Article 12a.2 sentence 2 of the Basic Law is to ensure a balance between the burden upon those who render military service and that upon those who perform alternative service. The legislature may therefore within the limits prescribed by Article 12a.2 sentence 2 of the Basic Law take into account differences between military service and alternative service for the purposes of establishing the duration of alternative service.

4.-7. …

8. The Basic Law requires that Article 1.8 sentence 2 of the Conscientious Objection Reform Act (conscription in the event of a state of tension and a state of defence) be interpreted to mean that persons subject to military service may be conscripted only for service not involving the use of arms until the recognition proceedings have been concluded with legal force. Under this interpretation, the provision does not affect the area protected by the fundamental right under Article 4.3 sentence 1 of the Basic Law. It protects only against such activities as are directly related to the use of military weapons as defined by the state of the respective weapons technology.

Judgment of the Second Senate of 24 April 1985 on the basis of the oral hearing of 30 January 1985 - 2 BvL 2, 3 and 4/83 BvR 2/84 -

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* Translation by Donna Elliott;

Facts:

The matter under constitutional review in several abstract judicial review proceedings involved numerous provisions of the Act on the Reform of the Right to Conscientious Objection and Civilian Service (Gesetz zur Neuordnung des Rechts der Kriegsdienstverweigerung und des Zivildienstes - KDVNG) of 28 February 1983 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I, p. 203).

The Conscientious Objection Reform Act was the legislature's response to BVerfGE 48, 127. In that decision, the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) had declared what is referred to as the "postcard amendment" to the Compulsory Military Service Act (Wehrpflichtgesetz - WPflG) void.

The Conscientious Objection Reform Act contains first of all in Article 1.1 (that deals with the Act on Conscientious Objection (Kriegsdienstverweigerungsgesetz - KDVG)) a provision taken over from s. 25 of the Compulsory Military Service Act (old version), pursuant to which only absolute conscientious objection is to be treated as protected under Article 4.3 of the Basic Law. As regards recognition proceedings, decisions as regards the right to refuse to render military service involving the use of arms are made only upon application (s. 2.1 of the Act on Conscientious Objection. The application must be accompanied by a complete curriculum vitae and a comprehensive personal presentation of the reasons for the decision of conscience and a certification of good conduct (s. 2.2 sentence 3 of the Act on Conscientious Objection. The applicant may in principle not be called up for military service during recognition proceedings unless he had already been called up or notified accordingly in writing prior to submission of the application (s. 3.2 of the Act on Conscientious Objection). This exemptive provision does not apply in the event of a state of tension or a state of defence (s. 8.2 of the Act on Conscientious Objection). The Federal Agency recognizes the applicant on the basis of the records unless the grounds advanced would seem to be unsuitable as justification of the right to conscientious objection. In such cases, the Federal Agency forwards the application to the committee for conscientious objectors, which performs a substantive examination of conscience. The same procedure is employed in the case of applications from individuals who have already been called up or soldiers.

The duration of civilian service is regulated by Article 2 of the Conscientious Objection Reform Act such that it always exceeds that of military service by a third.

In its decision, the Federal Constitutional Court found the provision under challenge to be compatible with the Basic Law.

Extract from the Grounds:

B. ... I.

All provisions of law governing the right to conscientious objection must on the one hand respect the fundamental right guaranteed under Article 4.3 of the Basic Law, which stipulates that no person may be compelled to render military service involving the use of arms against his conscience. On the other hand, they must also take into account that the framers of the

Basic Law decided to make provision for functional military defence of the country and in that connection empowered the legislature in Article 12a.1 of the Basic Law to introduce general military service. Implementation must satisfy the standard of universal military service (Article 3.1 of the Basic Law). The alternative service provided for under Article 12a.2 of the Basic Law is reserved for those persons subject to military service who refuse to render military service involving the use of arms on grounds of conscience. From this follows the duty of the legislature to ensure that only those persons subject to military service are recognized as conscientious objectors who can with sufficient certainty be assumed to meet the conditions contained in Article 4.3 sentence 1 of the Basic Law. The Senate upholds the principles developed in the previous case law of the Federal Constitutional Court (see BVerfGE 12, 45; 28, 243; 32, 40; 38, 154; 48, 127).

1. With the constitutional provisions governing defence issues that were subsequently incorporated into the Basic Law, in particular the currently valid provisions contained in Articles 12a, 73 no.1, 87a and 115b of the Basic Law, the framers of the Basic Law made a fundamental constitutional decision to provide for the effective military defence of the country. The establishment and functional viability of the Federal Armed Forces (Bundeswehr) enjoy constitutional status. In conformity with the prohibition of wars of aggression already included under Article 26.1 of the Basic Law, the above provisions include expression of the unambiguous and unmistakable intention of the framers of the Basic Law that the armed forces serve to defend against armed aggression (see BVerfGE 48, 127 [159, 128]).

With the enactment of the Compulsory Military Service Act of 21 July 1956 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 651) in the version promulgated on 6 May 1983 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 529), the legislature decided on the basis of the powers conferred by Article 12a.1 of the Basic Law to introduce general military service in the spirit of a free, democratic tradition that dates back to the French Revolution of 1789 and the period of reform in Germany in the early 19th century. Under the democratic constitutional order of the Basic Law, the fundamental right to protection of the individual and the duty of the citizenry towards the community to contribute to the maintenance of this constitutional order go hand in hand (see BVerfGE 48, 127 [161]).General military service is an expression of the general notion of equality. Its implementation is subject to Article 3.1 of the Basic Law (BVerfGE 48, 127 [162]); its fulfilment is democratic normalcy.

2. Article 4.3 of the Basic Law explicitly guarantees the right to refuse to render military service involving the use of arms on grounds of conscience as a fundamental right. The Basic Law proceeds from the dignity of free, independent persons as a supreme legal value (Articles 1.1 and 2. 1 of the Basic Law). In Article 4.1, it guarantees the inviolability of conscience and as a result the freedom not to be compelled to act contrary to dictates of conscience that are personally experienced as binding and absolute. Article 4.3 of the Basic Law then goes further and accords - to a remarkable extent as compared with other democratic constitutions predicated on the rule of law - precedence to protection of the free exercise of conscience on the part of the individual even in serious conflict situations in which the state makes special demands upon its citizens. The fundamental right of conscientious objection represents an insurmountable bar to enforcement of the constitutionally grounded obligation to contribute to the armed defence of the country and as a result to the maintenance of the existence of the state. The legislature may

also not restrict the substantive content of this fundamental right in provisions based on Article 4.3 sentence 2 of the Basic Law, but only promulgate the limits that are already contained in the terms employed in Article 4.3 sentence 1 of the Basic Law itself (see BVerfGE 48, 127 [163]; established case law). To also subsume decisions of conscience based as regards their substantive content exclusively on a concrete situation under the term conscience within the meaning of Article 4.3 of the Basic Law and grounds of conscience of Article 12a.2 sentence 1 of the Basic Law would of necessity have for effect that refusal to render military service on this basis would not be possible by virtue of these articles of the Basic Law as long as - especially in times of peace - the concrete situation, that is, the specific war or specific type of conduct of war has not occurred or the motive in the sense of a just or unjust ground cannot be discerned, and the situation in which the individual's conscience would forbid military service involving the use of arms has not yet materialized (see BVerfGE 12, 45 [56, 57]). It would not be possible to infer advance protection of such kind from either the fundamental right under Article 4.3 of the Basic Law or Article 12a.2 sentence 1 of the Basic Law.

The framers of the Basic Law granted and reserved for those who consider themselves unable to render military service involving the use of arms on grounds of conscience the right to refuse to render such service. Article 12a.2 of the Basic Law empowers the legislature to require that conscientious objectors perform alternative service in a form that complies with the provisions of Article 12a.2 sentences 2 and 3 of the Basic Law. It follows from this that the framers of the Basic Law did not by any means authorize compulsory service for the common good by all citizens (Article 12.2 of the Basic Law) - therefore also including the female portion of the population in compliance with Article 3.2 of the Basic Law. Moreover, in view of the constitutional decision made in an immediate temporal and substantive context, the Basic Law (Article 12a.1 of the Basic Law) makes provision for a duty to serve in the Armed Forces, the Federal Border Police or a civil defence organization as the only - primary - form of compulsory service for the military defence of the country. Alternative service under Article 12a.2 of the Basic Law is limited to conscientious objectors. It is intended, as is already implied in the choice of terms (alternative service, compulsory alternative service), to be performed only in place of the military service a person refuses to render. Indeed, the inherent justification for compulsory alternative service derives exclusively from the fact that Article 12a.2 of the Basic Law allows for refusal to render military service for the reasons contained in Article 4.3 of the Basic Law; notwithstanding differences as regards the nature of the areas of activity, civilian service replaces military service (BVerfGE 48, 127 [165]).

Constitutionally mandated equality as regards civic duty in the form of universal military service therefore gives rise to the duty of the legislature to ensure that only those persons are exempted from military service who have decided to refuse to render military service involving the use of arms on grounds of conscience under Article 4.3 sentence 1 of the Basic Law; this duty represents an obligation of high order towards the community. This means on the one hand that the state, which gives precedence to decisions to refuse to render military service involving the use of arms even in the event of a threat to its existence, must be protected against abusive invocation of this fundamental right. On the other hand, it is also necessary to protect the freedom of conscience itself, which is threatened precisely when it can be used to avoid fulfilment of general civic duties.

The legislature must therefore, if it introduces general military service, at the same time ensure that the responsible authorities are able to establish with a sufficient degree of certainty that conscientious objection is based upon a decision of conscience within the meaning of Article 4.3 of the Basic Law. Under constitutional law, this follows on the one hand from its responsibility to afford the holder of the fundamental right protection under Article 4.3 of the Basic Law and on the other hand from its duty to maintain both universal military service within the borders of the state as well as preparedness for defence of the state that guarantees this fundamental right. This does not restrict the fundamental right guaranteed under Article 4.3 of the Basic Law. Moreover, it only makes possible a procedure for ascertaining whether an individual subject to military service who invokes this fundamental right also in fact fulfils the prerequisites. In this - and only in this - regard, the fundamental right to conscientious objection is subject to procedural requirements. The legislature is explicitly empowered by Article 4.3 sentence 2 of the Basic Law to "regulate" - but not to "restrict" - the right to conscientious objection or, more precisely, the manner in which it is invoked. The procedure must be constitutionally objective, suitable and reasonable (see on the right of asylum BVerfGE 60, 253 [295]. Only if it fails to meet these requirements is it in violation of Article 4.3 of the Basic Law.

3. The legislature is in this regard free to choose the manner in which it chooses to have the existence of the elements of a decision of conscience established (see BVerfGE 48, 127 [169]). It is under no obligation to retain the customary recognition procedure (BVerfGE 28, 243 [259]; 48, 127 [166, 167]). It may replace it by a solution that it deems more appropriate to its purposes (BVerfGE 48, 127 [167]).The legislature may also avail itself of other appropriate means in place of a special recognition procedure (see BVerfGE 48, 127 [169]).

4. The legislature intended the provisions of the Conscientious Objection Reform Act under challenge to replace the previous procedure for examination of conscience, which was characterized by an oral hearing of the applicant, including in particular thorough questioning as to the motives for his decision, with another method for verification of the asserted decision of conscience: Knowing acceptance of civilian service, which is five months longer than active military service, is to be considered supportive evidence of the existence of a decision of conscience. The more onerous nature of the regulation of civilian service is primarily intended to ensure that the fundamental right under Article 4.3 sentence 1 of the Basic Law is invoked only by true conscientious objectors. It does to be sure constitute the actual "test of conscience" that gives effect to the will of the legislature, but not the only one. It is complemented by a recognition procedure, which may vary as a function of the respective circumstances:

> Persons subject to military service who have not served within the meaning of s. 4.1 of the Act on Conscientious Objection must undergo the procedure before the Federal Agency; such persons have accounted for approximately 85% of applicants in recent years. It does not - as can be inferred from its methodology and in particular the historical development of the Conscientious Objection Reform Act - constitute a recognition procedure in the conventional sense (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 9/2124, p. 9]): Recognition of the applicant is no longer dependent upon the results of an oral hearing, which was characteristic of the conventional procedure; the Federal Agency may not, except, if necessary, for a request for further information from the applicant, concern itself with the establishment of facts; a "merely formal examination" takes place (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks.] 9/2124, p.11); conclusive

evidence of or against a decision of conscience need not be produced; rather, the sole purpose of the procedure is to eliminate without an oral hearing applications that are obviously without merit due to the immediately apparent absence of a relevant decision of conscience.

If in the opinion of the legislature there is generally cause to assume that civilian service alone does not in its present form fulfil its function as supportive evidence of the existence of a decision of conscience, the procedure before the committees and chambers for conscientious objection pursuant to ss. 9 et seq. and 18.1 sentence 2 of the Act on Conscientious Objection is applicable. It corresponds in significant ways to the customary recognition procedure: The substantive criterion for recognition remains unchanged as compared with previous law. S. 14.1 sentence 1 of the Act on Conscientious Objection does not, however, require that the procedure result in conclusive establishment of the existence of a decision of conscience, but rather even allows a sufficiently certain assumption to suffice as evidence of such existence. The personal hearing by the committee may be dispensed with if the prerequisites pursuant to s. 14.3 of the Act on Conscientious Objection exist.

II.

The Conscientious Objection Reform Act guarantees to the extent required under constitutional law that only such individuals subject to military service are recognized as conscientious objectors as can with sufficient certainty be assumed to meet the conditions of Article 4.3 sentence 1 of the Basic Law; it may be assumed that only those who have actually made a decision of conscience against military service involving the use of arms will accept civilian service. Civilian service gives conscientious objectors an alternative to military service that is in any case not significantly less onerous. s. 24.2 sentence 1 of the Alternative Civilian Service Act (Gesetz über den Zivildienst der Kriegsdienstverweigerer - ZDG) stipulates that civilian service is to be a third longer than active military service. Since there are currently more positions available for civilian service than can be filled by persons obliged to perform such service and further civilian service positions are to be created in the future, conscientious objectors can today - unlike as recently as 1978 (see BVerfGE 48, 127 [171 et seq.]) - expect with a high degree of probability to be called up for civilian service. At the same time, certain, less appropriate positions - in particular in the area of administration and care - are to be done away with. When new positions of employment are recognized, it is necessary to ensure that the positions made available do not result in obviously unequal treatment of persons performing civilian service as compared with other persons performing such service or those rendering military service (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 9/2124, p. 10). The burdens inherent in civilian service as such have become more tangible, in particular due to the provisions contained in ss. 6.1 sentence 1, 19.3 and 25a.4 of the Alternative Civilian Service Act.

The organization of civilian service in this manner makes it possible, in any case together with the accompanying recognition procedure, to establish with sufficient reliability the existence of a decision of conscience. In the case of the proceedings before the committees and chambers for conscientious objection, this results from the very fact that it is similar to the previous verification procedure, which was compatible with the Basic Law (see BVerfGE 28, 243 [259-260]; 48, 127 [166]). In the case of the proceedings before the Federal Agency, it must be admitted that it is indeed of only limited evidentiary value; in the meantime, it has assumed an exclusively complementary function in that civilian service, as the actual test of conscience, is

intended to be combined with a minimum institutionalized procedural examination of individual cases. It can fulfil this limited function in an objective manner. More exhaustive examination by the Federal Agency is not required under constitutional law since civilian service in its present form seems to be generally suitable for preventing false conscientious objectors from abusively invoking the fundamental right under Article 4.3 sentence 1 of the Basic Law to avoid military service.

III.

The provisions of the Conscientious Objection Reform Act under challenge are also otherwise compatible with the Basic Law.

1. The fact that the duration of civilian service under s. 24.2 sentence 1 of the Alternative Civilian Service Act exceeds that of active military service by a third does not constitute a violation of Article 12a.2 sentence 2 of the Basic Law.

a) Under Article 12a.2 sentence 2 of the Basic Law, the duration of military service represents an independent upper time limit to the duration of alternative service. The duration of military service to be rendered in times of peace under legislation governing such service includes active military service, which is currently 15 months (s. 5.1 sentence 2 of the Compulsory Military Service Act), standby military service and military exercises (s. 4.1 of the Compulsory Military Service Act). Standby military service is credited towards the total duration of military exercises (s. 5a.3 of the Compulsory Military Service Act). The duration of such service may not exceed a maximum of nine months for enlisted personnel, 15 months for non-commissioned officers and 18 months for officers (s. 6.2 of Compulsory Military Service Act). The duration of military service may therefore extend up to 24 months in the case of enlisted personnel. In view of the legislation in effect at that time, the Senate therefore also established that extension of civilian service to 24 months could also come into question (BVerfGE 48, 127 [170-171]). This interpretation of Article 12a.2 sentence 2 of the Basic Law is consistent with the wording of the provision.

In any case, the materials (see the remarks of the Members of Parliament Dr. Arndt and Dr. Schwarzhaupt, Proceedings of the German Federal Assembly [*Verhandlungen des Deutschen Bundestages*], 2nd legislative period, record of the 110th session of the Committee for Legal Affairs and Constitutional Law of 20 February 1956, pp. 9-10, and its 111th session of 21 February 1956, pp. 12 and 14 et seq., as well as the Second Written Report of the Committee for Legal Affairs and Constitutional Law, Proceedings of the German Federal Assembly, 2nd legislative period, stenographic report p. 6857 do not refute this. They make it clear that active military service and military exercises together constitute the basis for determination of the length of alternative service. The legislature that adopted the constitutional amendment cannot therefore have assumed that the time burden would be completely identical for both those persons who render military service and those who perform alternative service; for it was at the time already certain that it was not possible to know whether and to what extent those performing military service would be called up for military exercises after completion of active military service.

Article 12a.2 sentence 2 of the Basic Law therefore prohibits in any case any legal provisions that call for civilian service that exceeds the legally permissible maximum duration of military service. The provision does not obligate the legislature to make provision for civilian service that falls within the legally permissible maximum duration of military service and corresponds exactly to the actual duration of military service. It also does not prohibit the legislature from making provision for the performance of civilian service that exceeds the actual average duration of military service to be rendered. Moreover, the legislature may establish the duration of civilian service as a function of a time span that it measures abstractly, i.e., on the basis of the legally permissible duration of military service and therefore independently of the actual duration of military service rendered. This follows from these considerations:

The normative goal of Article 12a.2 sentence 2 of the Basic Law is to achieve a balance between the burden imposed upon those who render military service and that imposed upon those who perform alternative service; those who perform alternative service may not be privileged over or placed at a disadvantage as compared with those who render military service. This precludes the possibility of making the actual duration of military service and that of alternative service completely and intrinsically identical. In view of the existing differences between military service and alternative service, the legislature can organize civilian service as a duty that represents a burden identical to that of military service (see BVerfGE 48, 127 [173]) only if it has certain latitude as regards establishment of the duration of alternative service. It would otherwise be possible to achieve identical burdens for those who render military service and those who perform alternative service only by adding "artificial" difficulty to alternative service that does not derive from the actual situation, i.e., from the nature of the service.

…

c) The legislature did not exceed the bounds of its operating freedom that it is therefore afforded as regards establishment of the duration of civilian service with the provision contained in s. 24.2 sentence 1 of the Alternative Civilian Service Act: The duration of civilian service is to be established so that it on the one hand does not exceed the permissible maximum time period, which is currently 24 months, and on the other hand is suitable for fulfilling its intended function as supportive evidence of the existence of a decision of conscience. This in particular also constitutes no violation of Article 12a.2 sentence 3 of the Basic Law. This article of the Basic Law prohibits legal provisions that discourage conscientious objectors from availing themselves of their fundamental right under Article 4.3 sentence 1 of the Basic Law and therefore exerting undue pressure on decisions of conscience. The Conscientious Objection Reform Act does not create any such pressure. The freedom of those who refuse to render military service involving the use of arms on grounds of conscience to make a decision of conscience is not compromised by the fact that in addition to presenting the reasons for such a decision in the context of a recognition procedure they must perform civilian service with a duration of 20 months. On the other hand, the existing differences between

military service and civilian service must be taken into account here. In the case of those who perform civilian service, such service is performed without interruption and ends conclusively at a specific time; it involves as a rule less stringent employment and is typically associated with less onerous living conditions.

1. Under the interpretation required by constitutional law, s. 8 sentence 2 of the Act on Conscientious Objection is compatible with the Basic Law.

a) Under s. 8 sentence 2 of the Act on Conscientious Objection, persons subject to military service who have not served in the military and who have not been called up or received preliminary notice may also be called up for military service during the recognition procedure in the event of a state of tension or a state of defence if they have applied for recognition as conscientious objectors. If the provision were to be interpreted on the basis of its wording to mean that it permits conscription for unrestricted military service, it would be incompatible with Article 4.3 sentence 1 of the Basic Law. The fundamental right of conscientious objection accords precedence to the protection of conscience over the duty anchored in the constitution to participate in the armed defence of the country and as a result in the protection of the existence of the state even in situations of serious conflict in which the state makes special demands upon its citizens (BVerfGE 12, 45 [54]; 28, 243 [260]; 48, 127 [163]).

Its core purview is the protection of conscientious objectors against being compelled to kill other human beings in connection with an act of war in violation of their conscience, which in principle and without exception categorically prohibits killing (BVerfGE 12, 45 [56-57]; 23, 191 [205]; 28, 243 [262]; 32, 40 [46-47]; 48, 127 [163-164]). Conscientious objectors are directly confronted by such compulsion if subjected to unrestricted service, especially in the case of a state of tension and in particular in the event of a state of defence. It cannot be justified under law that is subordinate to the constitution (BVerfGE 12, 45 [53]; 28, 243 [259]). Even conflicting fundamental rights of other parties and other legal values of constitutional rank may only limit the unconditional and unrestricted right to conscientious objection in individual respects, but not, however, its core purview (See BVerfGE 28, 243 [261]).

b) A law may be nullified only if no acceptable interpretation is possible on the basis of recognized principles of interpretation that is compatible with the Basic Law (BVerfGE 49, 148 [157]). If the wording, the historical development and the overall context of the relevant provisions and their purpose and intent admit of several meanings, of which at least one leads to a result that is compatible with the Basic Law, an interpretation is then available that is compatible with the Basic Law (see BVerfGE 19, 1 [5]; 30, 129 [148]; 32, 373 [383-384]; 49, 148 [157]).

s. 8 sentence 2 of the Act on Conscientious Objection must be interpreted to mean that persons subject to military service may be called up only for service that does not involve the use of arms.

This is not in contradiction with the wording of s. 8 sentence 2 of the Act on Conscientious Objection. The provision explicitly states only that "conscription" or, as the case may be, "draft into military service" is possible (see s. 3.2 of the Act on Conscientious Objection). It does not conclusively specify the type of service for which the applicant may be called up, that is, whether for unrestricted service or only for service that does not involve the use of arms.

The history of the development and the intent and purpose of s. 8 sentence 2 of the Act on Conscientious Objection also do not speak against a restrictive interpretation. In the interest of upholding a law, which in the case of doubt requires an interpretation in compliance with the Basic Law, whether an interpretation that goes further than the interpretation of the law that is in compliance with the Basic Law would better reflect the subjective will of the legislature cannot be considered to be of decisive importance (BVerfGE 49, 148 [157]). Of sole importance is that an interpretation not be in contradiction with the will of the legislature. This is not the case here. Indeed, the interpretation to the effect that conscription of an applicant only for service that does not involve the use of arms is permissible is essentially consistent with the will of the legislature. The intent of the latter was to ensure to the greatest extent possible the preparedness and capacity for defence of the Federal Armed Forces, especially in the event of a state of tension and a state of defence. To this end, the legislature wanted to preclude that a large number of persons subject to military service who have not served would under the impression of the greater dangers of military service file applications for recognition as conscientious objectors in abuse of the law in order to at least temporarily avoid conscription for military service. Conscription only for service that does not involve the use of arms also takes these goals into account to a considerable extent.

It does not follow that this interpretation runs counter to the will of the legislature, in particular not from Article 3 nos 4 and 7 of the Act on the Reform of the Right to Conscientious Objection and Civilian Service. By deleting the former s. 27 of the Compulsory Military Service Act and the words "or upon application for service that does not involve the use of arms" from s. 48.2 no. 2 of the Compulsory Military Service Act, the legislature simply indicated that there was no (longer) any intention of organizing any special form of service that does not involve the use of arms. This does not mean, quite apart from the fact that this decision can be reversed, that the possibility of conscripting individuals subject to military service for military service and occupying them in a manner that does not compel them to render service involving the use of arms is now excluded.

c) If persons subject to military service who have not served and have applied for recognition as conscientious objectors are called up for service in the Federal Armed Forces that does not involve the use of arms in the event of a state of tension and a state of defence - for example, in the military administration or the medical corps - this does not encroach upon the area protected by Article 4.3 sentence 1 of the Basic Law. The provision protects only against such activities as are directly related to the

use of military weapons as defined by the state of the respective weapons technology (Herzog in: Maunz/Dürig/Herzog/Scholz, *Grundgesetz*, October 1984, Article 4 marginal no. 171-172). It does not legitimize refusal to render any military service, but only refusal to render military service involving the use of arms (see BVerfGE 12, 45 [56]; 32, 40 [45]).

d) Conscription for service that does not involve the use of arms is permissible until such time as persons subject to military service have been officially recognized as conscientious objectors. In the event of a state of tension and a state of defence, in which cases the state is compelled to make use of all available resources to safeguard its existence, it is compellingly necessary that the state be able to make use of persons subject to military service in the Federal Armed Forces until such time as it is definitively established that they may rightfully claim the protection of the fundamental right under Article 4.3 sentence 1 of the Basic Law. In such situations, this is not countervailed by an equally valid interest on the part of persons subject to military service in being exempted from military service for, as it were, precautionary considerations, for such persons cannot in the course of rendering service that does not involve the use of arms find themselves in a situation of compulsion of the nature that the fundamental right under Article 4.3 sentence 1 of the Basic Law is intended to protect against. …

c) Ritual Slaughter, BVerfGE 104, 337

Explanatory Annotation

Both Islam and Judaism require that animals be slaughtered without prior stunning by severing certain major blood vessels to let the blood drain out. This method is controversial because it is alleged that this causes unnecessary suffering for the animal and this could violate animal welfare law. In Germany this approach to slaughtering animals had always been regarded as legal until the Nazi-regime changed this for reasons that had nothing to do with animal protection and everything with racism and bigotry. After 1945, ritual slaughtering became a tolerated practice. Animal welfare legislation passed in 1986 provided for a prohibition of slaughtering without prior stunning but contained an exception procedure for cases where "compulsory" religious rules require the ritual slaughtering. The necessary exceptional authorization was not granted to a Sunni Muslim butcher on the grounds that his religion does not *per se* prohibit the eating of meat of animals not slaughtered according to Islamic rites. The Constitutional Court objected to this narrow interpretation of the relevant norm in the animal welfare legislation. The question is not what the religion as a whole, i.e. Sunni or Shiite Islam, might generally say to this problem. It is sufficient that such rites can be shown to be part of a concrete religious community and to be of sufficient religious significance to warrant observance by the members of this community.

The decision was rendered in January 2002, just before an amendment to the Basic Law in which animal welfare became a constitutionally protected legal interest by being included in the "state objectives clause" of Article 20a.[41] However, this would not have changed the outcome of the decision. Either way the issue is a conflict between religious freedom and animal welfare. Resolution of this conflict is only possible by balancing both rights such that the broadest possible scope of both rights is achieved ("practical concordance"), i.e. the aggregate sum of the two balanced rights must larger than what could be achieved if one right were given absolute prevalence.[42] The absolute prevalence of animal welfare could not achieve that goal.[43]

Translation of the Ritual Slaughter Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 104, 337*

Headnotes:

1. If a non-German butcher who is a pious Muslim wants to slaughter animals without stunning them (ritual slaughter) in order to facilitate to his customers, in accordance with their religious conviction, the consumption of the meat of animals that were ritually slaughtered, the constitutionality of this activity is to be examined in accordance with Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law (Grundgesetz - GG).

2. In the light of these constitutional norms, s. 4a.1 in conjunction with s. 4a.2, number 2, part 2 of the Tierschutzgesetz (Animal Protection Act) is to be interpreted in such a way that Muslim butchers can be granted an exceptional permission for ritual slaughter.

Judgment of the first Senate of 15th January, 2002 - 1 BvR 1783/99 -

Facts:

The constitutional complaint concerns the grant of exceptional permissions for the so-called ritual slaughter, i.e., the slaughter of warm-blooded animals without previously stunning them.

After the end of the Second World War, ritual slaughter was, in most cases, tacitly tolerated (cf. Andelshauser, Schlachten im Einklang mit der Scharia, 1996, pp. 140-141). However, the first regulation with Germany-wide validity on slaughter that, for religious motives, is performed without stunning the animal, was only introduced when the Tierschutzgesetz (hereinafter: TierSchG,

41 Official Gazette of the Federal republic of Germany (BGBl.), Part I, p. 2862.

42 See Introduction at p. 67-72.

43 It should be noted that the Constitutional Court based its decision mainly on the subsidiary freedom of Article 2.1 of the Basic Law, taking into account the religious freedom clause of Article 4.1 only marginally because it saw the main gist of the case in the business interest of the Turkish butcher to supply his customers rather than in his own religious beliefs. This was arguably a dogmatically wrong approach, which is also evidenced by the fact that the Court mainly engaged in a religious freedom argument. It is for this reason that the decision is dealt with under the heading of religious freedom.

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Animal Protection Act) was amended by provisions on slaughter. Since the entry into force of the first amending law of the Animal Protection Act, dated 12th August, 1986 (Federal Law Gazette I, p. 1309; the latest amendments of the Act were promulgated on 25th May 1998, cf. Federal Law Gazette I, p. 1105 …), s. 4a of the Animal Protection Act contains, in s. 1, a general ban on the slaughter of warm-blooded animals without previously stunning them. s. 4a.2, number 2, however, provides the possibility of granting exceptional permissions for religious reasons. In the legislative procedure, the regulation contained in the second part of s. 4a.2, number 2, of the Animal Protection Act was seen in the context of Jewish as well as of Islamic dietary laws (cf. Bundestagsdrucksache [BT-Drucks, Records of the Bundestag] 10/5259, p. 38).

At present, the wording of s. 4a of the Animal Protection Act reads as follows:

(1) A warm-blooded animal may only be slaughtered if it was stunned before the draining of its blood begins.

(2) Notwithstanding s. 1, no stunning is required

…

2. if the responsible authority has granted an exceptional permission for slaughter that is performed without stunning the animal (ritual slaughter); the responsible authority may only grant the exceptional permission to the extent that this is necessary for meeting the needs of members of specific religious groups in the area of applicability of this law, to whom mandatory provisions of their religious group prescribe ritual slaughter or prohibit the consumption of the meat of animals that were not ritually slaughtered; or

3. if this has been established as an exception by a decree pursuant to s. 4b, number 3.

2. Pursuant to the judgment of the Bundesverwaltungsgericht (Federal Administrative Court) dated 15th June, 1995 (BVerwGE [Decisions of the Federal Administrative Court] 99, p. 1), ... s. 2, number 2 ... of the provision ... requires that for the grant of an exceptional permission, it must be objectively established that a religious group has mandatory provisions about the ban on stunning animals before slaughtering them. According to the Court, it is required (1) that definite norms that are issued by the respective religious group exist; and (2) that these norms are regarded as mandatory in the conception that the group has of itself; this conception is what the state can assess. The Court held that an individual view, which only focuses on the subjective religious conviction of the members of a religious group - even if they regard this conviction as mandatory - is not compatible with the wording, the purpose and the history of the origins of the law (cf. loc. cit., pp. 4 et seq.).

The complainant is a Turkish citizen and ... a pious Sunni Muslim. He has been living in the Federal Republic of Germany for 20 years and operates ... a butcher's shop that he ... took over from his father. Until September, 1995, he was granted, pursuant to s. 4a.2, number 2 of the Animal Protection Act, exceptional permissions for slaughter that is performed without previously stunning the animal for attending his Muslim customers. ... Afterwards, the complainant filed further applications for the grant of such permissions. They were unsuccessful due to the above-mentioned judgment of the Federal Administrative Court dated 15th June, 1995. The

action that the complainant brought, in the original proceedings, against the rejection order and against the order that ruled on the complainant's objection against the rejection order, was dismissed by the Administrative Court; in the grounds, also the Administrative Court referred to the above-mentioned judgment and, apart from this, to the appeal judgment in these proceedings.

Extracts from the Grounds:

B.

The constitutional complaint is well-founded. Certainly, s. 4a.1 in conjunction with s. 4a.2, number 2, second part, of the Animal Protection Act is compatible with the Basic Law. However, the challenged decisions that are based on this regulation do not stand up to review by the Federal Constitutional Court.

I.

1. The Federal Constitutional Court's basis for review is, first and foremost, Article 2.1 of the Basic Law. In the original proceedings, the complainant, a pious Sunni Muslim, sought an exemption from stunning prescribed by s. 4a.1 of the Animal Protection Act in order to facilitate to his customers, by practising his occupation as a butcher, the consumption of the meat of ritually slaughtered animals. In comparison to this, the complainant's providing of such meat for his own consumption comes second. The second part of s. 4a.2, number 2 of the Animal Protection Act, on the basis of which the administrative authorities and administrative courts examined the complainant's application, therefore primarily affects the complainant's occupational activity as a butcher.

Because the complainant is not a German but a Turkish citizen, this activity is not protected by Article 12.1 of the Basic Law. The relevant statute that provides protection in this context is Article 2.1 of the Basic Law in the form that results from the special link between Article 12.1 of the Basic Law, which only applies to Germans, and Article 2.1 of the Basic Law, which is only of subsidiary validity for foreigners (in this context, cf. BVerfGE 78, 179 [196-197]). For the complainant, however, ritual slaughter is not only a means for obtaining and preparing meat for his Muslim customers and for himself. It is, according to his statements, which have not been called into question in the challenged decisions, also an expression of a basic religious attitude that for the complainant as a pious Sunni Muslim, includes the obligation to perform the slaughter in accordance with the rules of his religion, which he regards as binding (in this context, cf. the general statements in: Andelshauser, loc. cit., pp. 39 et seq.; Jentzsch, Das rituelle Schlachten von Haustieren in Deutschland ab 1933, 1998, pp. 28 et seq.; Mousa, Schächten im Islam, in: Potz/Schinkele/Wieshaider, Schächten. Religionsfreiheit und Tierschutz, 2001, pp. 16 et seq.). Even if ritual slaughter itself is not seen as an act of religious practice, the above-mentioned statements are to be given due consideration by enhancing the protection of the complainant's occupational freedom under Article 2.1 of the Basic Law by the special liberty rights (Freiheitsgehalt) that are contained in the fundamental right of the freedom of religion under Articles 4.1 and 4.2 of the Basic Law.

2. The legal position which the complainant thus enjoys with a view to his occupational activity as a butcher, is, however, pursuant to Article 2.1 of the Basic Law, only guaranteed in the framework of the constitutional order. The constitutional order includes all legal norms that are, formally and as far as substance is concerned, compatible with the Basic Law (cf. BVerfGE 6, 32 [36 et seq.]; 96, 375 [397-398]; consistent case law). As concerns substance, this presupposes, above all, the safeguarding of the principle of proportionality and, in this context, the observance of the freedom of religion.

II.

S. 4a.1 in conjunction with s. 4a.2, number 2, part 2 of the Animal Protection Act lives up to these standards.

1. It is true that the regulation encroaches upon the fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law, because it permits slaughter without stunning, in the framework of the occupational activity of a Muslim butcher, only under the restricting preconditions established by the second part of s. 4a.2, number 2 of the Animal Protection Act as an exception from mandatory stunning stipulated by s. 4a.1 of the Animal Protection Act. This encroachment, however, is not objectionable because it can be sufficiently justified under constitutional law.

a) It is the purpose of the Animal Protection Act to protect the life and well-being of animals out of responsibility for animals as humankind's fellow creatures. No one may, without reasonable cause, inflict pain, suffering or damage upon an animal (s. 1 of the Animal Protection Act). The aim of a protection of animals that is based on ethical principles (cf. BVerfGE 36, 47 [56-57]; 48, 376 [389]; 101, 1 [36]) is also served by the regulation under s. 4a.1 in conjunction with s. 4a.2, number 2, part 2 of the Animal Protection Act. By incorporating in the Animal Protection Act the principle that warm-blooded animals are to be stunned before their blood is drained, the parliament intended to extend the fundamental concept of the Animal Protection Act, which is delimited in its s. 1, to the area of slaughter (cf. Records of the Bundestag 10/3158, p. 16). This is a legitimate aim of a regulation, which also takes the feelings of broad sections of the population into consideration (cf. BVerfGE 36, 47 [57-58], and especially with a view to ritual slaughter, Records of the Bundestag 10/5259, p. 32, under I 2a, no. 3).

b) S. 4a.1 in conjunction with s. 4a.2, no. 2, part 2 of the Animal Protection Act complies with the requirements of the principle of proportionality.

   aa) The regulation is suitable and necessary for achieving the purpose of the regulation, i.e., for extending a protection of animals that is based on ethical principles also to the slaughter of warm-blooded animals.

   As concerns the appraisal of the means that the parliament chooses for enforcing the legislative aims of regulations with a view to their suitability and requisiteness, the Constitution grants the parliament a certain discretion. This also applies to the appraisal of the factual basis of a legislative regulation. In this respect, it cannot

be assumed that an erroneous appraisal has occurred here. Certainly there are opinions that call into doubt that slaughter that is performed after the animal was stunned causes considerably less suffering and pain to the animal than slaughter without stunning (as concerns sheep and calves, see, e.g., the overview provided in the paper by Schulze/Schultze-Petzold/Hazem/Groß, Deutsche Tierärztliche Wochenschrift 85 [1978], pp. 62 et seq.). It seems, however, that there is no final scientific answer to this question as yet. For reasons of animal protection, other opinions, e.g., the one expressed by the German Association for the Protection of Animals during the oral argument, give a clear preference to slaughter that is performed with previous stunning. Article 12 of the European Convention for the Protection of Animals for Slaughter dated 10th May, 1979 (Federal Law Gazette 1983 II, p. 771) and Article 5.1, letter c of Directive 93/119/EC of the Council of the European Union on the protection of animals at the time of slaughter or killing dated 22nd December, 1993 (Official Journal L 340/21) proceed on the assumption that slaughter causes less pain and suffering to animals if they are stunned before their blood is drained. Under these circumstances, the German parliament's appraisal, which concurs with this opinion, and the parliament's assumption that mandatory stunning prescribed by s. 4a.1 of the Animal Protection Act is suitable for achieving the aims of s. 1 of the Animal Protection Act and is also necessary for lack of an equally effective alternative, is at least justifiable.

The same applies to the appraisal of the exemption provisions pursuant to s. 4a.2, no. 2, part 2 of the Animal Protection Act. The parliament placed the exemption from mandatory stunning prescribed by s. 4a.1 of the Animal Protection Act under the reservation that it requires an exceptional permission because the parliament wanted to submit ritual slaughter to an increased supervision by the state. In particular, the parliament intended to create, apart from examining the applicants' expertise and personal aptitude, the possibility to ensure, through collateral clauses to the exceptional permission, that the animals that are bound for slaughter are spared any avoidable pain and suffering during transport, immobilisation and the ritual slaughter itself. This was supposed to be achieved, for instance, by orders about suitable premises, equipment and other devices (cf. Records of the Bundestag 10/3158, p. 20 on no. 5). Thus, the regulation intends to prevent, wherever possible, domestic or other private slaughter, which often does not ensure due ritual slaughter and which therefore can result in particularly offensive suffering of the animals concerned; instead, it intends to promote slaughter in approved slaughterhouses (cf. Records of the Bundestag 10/5259, p. 39 on Article 1, no. 5).

Apart from this, the prerequisite for the grant of an exceptional permission pursuant to s. 4a.2, no. 2, part 2 of the Animal Protection Act is that in the specific case, the needs of adherents of a religious group are to be met, who are, by mandatory provisions of their religious group, prohibited from consuming the meat of animals that were not ritually slaughtered. The fact that the law permits only exemptions from the mandatory stunning prescribed by the Animal Protection Act if these prerequisites are met inevitably results in a decrease of the possible

exemptions. In the case of Islam, it must also be taken into account that this religion itself, as the Muslims' Central Council in Germany stated in its opinion, requires that the killing of animals be performed as gently as possible (also see Andelshauser, loc. cit., pp. 35, 62, 79-80). Ritual slaughter in accordance with the rules of Islam must be conducted in such a way that the death of the animal is effected as speedily as possible and that the animal's suffering is restricted to a minimum, with any kind of cruelty to the animal being avoided (also see Österreichischer Verfassungsgerichtshof [Austrian Constitutional Court], EuGRZ [Europäische Grundrechtszeitung] 1999, p. 600 [at p. 603]). Also on this basis, the parliament could proceed on the assumption that the reservation of an exemption under s. 4a.2, no. 2, part 2 of the Animal Protection Act constitutes a measure that is suitable, and also necessary, for ensuring a protection of animals that is based on ethical principles.

bb) The legal regulation that is in question here is also proportional in a narrower sense. In an overall weighing of the severity of the encroachment upon fundamental rights that is connected with s. 4a.1 in conjunction with s. 4a.2, no. 2, part 2 of the Animal Protection Act, and the importance and the urgency of the reasons that justify the encroachment, it can be reasonably required of the person concerned (cf. BVerfGE 90, 145 [173]; 101, 331 [350]), under the conditions established by the parliament, to conduct the slaughter of warm-blooded animals without stunning only on the basis of an exceptional permission.

(1) The encroachment upon Muslim butchers' fundamental right to occupational freedom, however, carries much weight. Without the reservation of an exemption, it would no longer be possible for pious Muslims like the complainant to practice the occupation of a butcher in the Federal Republic of Germany. If they want to maintain their businesses at least as sales outlets, and not, as the complainant stated with regard to himself, give up their businesses to gain their livelihood in a different manner, they would have to restrict themselves to either selling imported meat of ritually slaughtered animals or meat of animals that were not ritually slaughtered, i.e., that were slaughtered after having been stunned. Each of these decisions would lead to far-reaching consequences for the person concerned. The decision to only market the meat of ritually slaughtered animals as a salesperson would not only mean to forego the activity of a slaughterer but would also result in the uncertainty whether the meat that he offers really comes from ritually slaughtered animals and thus is suitable for consumption in accordance with the rules of the butcher's own faith and that of his customers. The decision to convert the butcher's business to selling the meat of animals that were not ritually slaughtered would mean that the owner of the business would have to win new customers. Finally, a complete occupational re-orientation, provided that it is still possible in the specific situation of the individual concerned, would mean that this person would have to make a completely new start.

The ban does not only concern the Muslim butcher but also his customers. When they demand meat of animals that were ritually slaughtered, this is obviously based on the fact that they are convinced that their faith prohibits them, in a binding manner, from

eating other meat. If they were required to, basically, forgo the consumption of meat, this would not sufficiently take the eating habits in the Federal Republic of Germany into consideration. In Germany, meat is a common food, and it can hardly be regarded as reasonable to involuntarily renounce its consumption. It is true that the consumption of imported meat makes such renunciation dispensable; however, due to the fact that in this case, the personal contact to the butcher and the confidence that goes with such contact do not exist, the consumption of imported meat is fraught with the insecurity whether the meat really complies with the commandments of Islam.

(2) These consequences for pious Muslim butchers and their pious customers must be weighed against the fact that the protection of animals constitutes a public interest that is attached high importance among the population. The parliament has taken this into consideration by not regarding animals as objects but as fellow creatures, which also feel pain, and by intending to protect them by special laws (cf. s. 90a, sentences 1 and 2 of the Civil Code (Bürgerliches Gesetzbuch - BGB), s. 1 of the Animal Protection Act). Such protection is, above all, enshrined in the Animal Protection Act.

However, the protection that is provided by the Animal Protection Act does not mean that animals, by virtue of law, must be spared any impairment of their well-being. Rather, the basic idea of the law merely is not to inflict, "without reasonable cause, pain, suffering or damage" upon an animal (cf. s. 1 of the Animal Protection Act and BVerfGE 36, 47 [57]; 48, 376 [389]).

Accordingly, the Animal Protection Act, not only in s. 4a.2, no. 2, provides exemptions from the obligation to kill animals only after previous stunning. Exemptions from mandatory stunning also exist in the case of emergency slaughter to the extent that stunning is not possible under the circumstances in the specific case (cf. s. 4a.2, no. 1 of the Animal Protection Act), and they can also be granted, for the slaughter of poultry, by an order pursuant to s. 4a.2, no. 3 in conjunction with s. 4b.1, no. 3 of the Animal Protection Act. Moreover, s. 4.1 sentence 1 of the Animal Protection Act generally permits the killing of vertebrate animals without stunning them to the extent that this is reasonable under the specific circumstances and to the extent that pain can be avoided. If the killing of a vertebrate animal without stunning is permissible in the framework of the huntsman-like performance of hunting or due to other legal provisions, or if it occurs in the framework of permissible measures of pest control, the killing may be performed pursuant to s. 4.1 sentence 2 of the Animal Protection Act, if it does not cause more than inevitable pain. Especially the exceptions that were mentioned last show that the parliament has regarded it as compatible with a protection of animals that is based on ethical principles to move away from mandatory stunning in cases where factual considerations or reasons of tradition and social acceptance suggest exemptions.

(3) Under these circumstances, an exemption from the mandatory stunning of warm-blooded animals before their blood is drained cannot be precluded if the intention connected with this exemption is to facilitate, on the one hand, the practice of a profession with a religious character, which is protected by fundamental rights, and, on the other hand, the observation of religious dietary laws by the customers of the person who practices

the occupation in question. Without such exemptions, the fundamental rights of those who want to perform slaughter without stunning as their occupation would be unreasonably restricted, and the interests of the protection of animals would, without a sufficient constitutional justification, be given priority in a one-sided manner. What is necessary instead is a regulation that, in a balanced manner, takes into consideration: (1) the fundamental rights that are affected; and (2) the aims of a protection of animals that is based on ethical principles.

(a) S. 4a.2, no. 2, part 2 of the Animal Protection Act basically complies with these requirements. The regulation intends to facilitate, with a view to dietary laws that are valid, in particular, in the spheres of the Jewish and the Islamic faith (cf. Records of the Bundestag 10/5259, p. 38), ritual slaughter for religious motives on the basis of exceptional permissions (cf. Records of the Bundestag 10/3158, p. 20, on no. 5). The instrument of exceptional permissions is supposed to open a way for counteracting public criticism of religiously motivated slaughter, in particular if it is performed in the shape of so-called domestic and private slaughter (cf. Records of the Bundestag 10/5259, p. 32, under I 2a, no. 3). As has already been mentioned, exceptional permissions allow, *inter alia* through collateral clauses, that the animals bound for slaughter are spared any avoidable pain and suffering (cf. Records of the Bundestag 10/3158, p. 20, on no. 5, and also Records of the Bundestag 10/5259, p. 39, on Article 1, no. 5). This shows that it is the aim of the regulation to guarantee the protection of the fundamental rights of pious Muslims without abandoning the principles and obligations of a protection of animals that is based on ethical principles. Thus, also the complainant's rights are given due consideration.

(b) The situation would be different, however, if … s. 4a.2 no. 2, part 2 of the Animal Protection Act were to be understood in the same way as it was construed by the Federal Administrative Court in its judgment dated 15th June, 1995 (BVerwGE 99, 1). The Federal Administrative Court held that the case at hand did not provide the legal elements required by this statute, because Sunnite Islam, of which the complainant is an adherent, just as Islam in general, does not mandatorily ban the consumption of the meat of animals that were not ritually slaughtered (cf. loc. cit., p. 9). The Court found that s. 4a.2 no. 2 of the Animal Protection Act requires the definite existence of mandatory provisions that a religious group issues about the ban on stunning before slaughter. The Court concluded that an individual view that only focuses on the subjective religious conviction of the members of such a group - although this conviction is regarded by them as mandatory - is not compatible with the scope of regulation of the law (cf. loc. cit., pp. 4 et seq.).

This interpretation does not live up to the meaning and the scope of the fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law. The result of this interpretation is that s. 4a.2, no. 2, part 2 of the Animal Protection Act is rendered ineffective for Muslims irrespective of their religious convictions. This interpretation prevents a butcher from exercising his occupation who intends to perform ritual slaughter because he, with a view to the faith that he and his customers adhere to, wants to ensure their supply with the meat of animals that were slaughtered without

being stunned. This is an unreasonable burden for the persons concerned, which, in a one-sided manner, only takes the interests of the protection of animals into account. If it were interpreted in this manner, s. 4a.2 no. 2, part 2 of the Animal Protection Act would be unconstitutional.

(c) This result, however, can be avoided by interpreting the legal elements "religious group" and "mandatory provisions" in a manner that takes the fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law into account.

As the Federal Administrative Court itself has, in the meantime, decided in its judgment dated 23rd November, 2000, (BVerwGE 112, 227), the concept of a "religious group" under s. 4a.2.2 of the Animal Protection Act does not require that such a group: (1) fulfils the prerequisites for the recognition as a religious body under public law pursuant to Article 137.5 of the Weimarer Reichsverfassung [WRV, Constitution of the German Reich of August 11, 1919]; or (2) is entitled to engage in imparting religious instruction pursuant to Article 7.3 of the Basic Law. The Court found that for granting an exemption pursuant to s. 4a.2 no. 2 of the Animal Protection Act, it is sufficient that the applicant belongs to a group of persons who are united by a common religious conviction (cf. loc. cit., pp. 234-235). This means that groups within Islam whose persuasion differs from that of other Islamic groups may also be considered as religious groups under the terms of s. 4a.2, no. 2 of the Animal Protection Act (cf. loc. cit., p. 236). This interpretation of the concept of a "religious group" is in accord with the Constitution and, in particular, takes Articles 4.1 and 4.2 of the Basic Law into consideration. This interpretation is also compatible with the wording of the above-mentioned provision and corresponds to the parliament's intention to extend the scope of application of s. 4a.2 no. 2 of the Animal Protection Act not only to members of the sphere of the Jewish faith, but also to members of Islam and its different persuasions (cf. Records of the Bundestag 10/5259, p. 38).

Indirectly, this interpretation has consequences also when it comes to dealing with the concept of "mandatory provisions" that prohibit the members of the religious group in question from the consumption of the meat of animals that were not ritually slaughtered. The competent authorities, and in the case of disputes, the courts, are to examine and to decide whether the religious group in question complies with this prerequisite, because this is the legal element that is required for the grant of the exceptional permission that is sought. In the case of a religion that, as Islam does, takes different views as regards mandatory ritual slaughter, the point of reference of such an examination is not necessarily Islam as a whole or the Sunnite or Shiite persuasions of this religion. The question whether mandatory provisions exist is to be answered with a view to the specific religious group in question, which may also exist within such a persuasion (also cf. BVerwGE 112, 227 [236]).

In this context, it is sufficient that the person who needs the exceptional permission pursuant to s. 4a.2 no. 2, part 2 of the Animal Protection Act in order to supply the members of a religious group, states, in a substantiated and understandable manner, that

> the common religious conviction of the religious group mandatorily requires the consumption of the meat of animals that were not stunned before they were slaughtered (cf. BVerwGE 94, 82 [87-88]). If such a statement has been made, the state, which may not fail to consider such a concept that the religious group has of itself (cf. BVerfGE 24, 236 [247-248]), is to refrain from making a value judgment concerning this belief (cf. BVerfGE 33, 23 [30]). In the light of Article 4 of the Basic Law, the state cannot negate the "mandatory" nature of a religious norm for the sole reason that the respective religion has also rules that take its adherents' pressure of conscience into consideration by admitting exemptions, e.g, with a view to present environment of its adherents and the dietary habits that prevail there. An applicant who seeks an exceptional permission is to be granted such a permission to the extent that such grant is not precluded for other reasons. In this context, (1) collateral clauses to the permission; (2) the control of the compliance of such clauses; and (3) the examination of the applicant's expertise and personal aptitude, also with a view to the special skills required in ritual slaughter, are to ensure that the interests of the protection of animals are safeguarded as comprehensively as possible (also cf. BVerwGE 112, 227 [236]).

2. If the possibility of an exemption that is regulated in the provision that was last referred to is interpreted in the above-mentioned sense, s. 4a.1 in conjunction with s. 4a.2 no. 2, part 2 of the Animal Protection Act is, also in its other aspects, in accord with the Basic Law. In particular, there is no room for assuming an infringement of the principle of equality enshrined in Article 3.1 of the Basic Law or for assuming an infringement of the ban on discrimination under Article 3.3(1) of the Basic Law; in accordance with this interpretation, also Muslims may be granted an exceptional permission pursuant to s. 4a.2 no. 2, part 2 of the Animal Protection Act who, as butchers, want to supply the meat of ritually slaughtered animals to their customers, who, by mandatory provisions of their religious group, are prohibited from the consumption of the meat of animals that were not ritually slaughtered.

III.

1. The challenged decisions that were issued by authorities and courts violate the complainant's fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law. The authorities and administrative courts misjudged the necessity and the possibility of a constitutional interpretation of s. 4a.2 no. 2, part 2 of the Animal Protection; they therefore restricted the above-mentioned fundamental right in a disproportionate manner when applying the exemption regulation concerning the ban on ritual slaughter. The denial of the exceptional permission that the complainant applied for and the confirmation of this decision in the objection proceedings and in the proceedings before the administrative courts are based on this circumstance. It cannot be ruled out that the complainant's customers, like the complainant himself, are members of a religious group in the above-mentioned sense that mandatorily requires that they observe ritual slaughter, and that, if the decision had been based on this fact, the complainant would have been granted the exceptional permission to facilitate the consumption of the meat of ritually slaughtered animals to his customers and to himself.

2. As regards the challenged decisions, the decisions made by the administrative courts are to be overturned pursuant to s. 95.2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG). The matter is referred back to the Administrative Court because it can be expected that the dispute on a point of administrative law will be terminated there on the basis of the present judgment. …

2. Religion and State under the Basic Law

a) School Prayer, BVerfGE 52, 223

Explanatory Annotation

The issue of communal school prayers in public schools has arisen not only in Germany. Unlike the Supreme Court of the USA, the German Constitutional Court, (on the basis of a much less stringent separation of church and state under the Basic Law) has ruled that such school prayers are not necessarily precluded under the Basic Law. There are certainly not in violation of the positive freedom of religion of those that want to pray as a manifestation of their belief. However, they might be problematic in the light of the negative freedom of religion of those students (and potentially teachers) who do not want to pray. The Constitutional Court therefore mandated that school prayers must be conducted in such a way that anyone is free to decide, without any pressure or even coercion, to participate in the prayer. In other words, the Court mandates tolerance from those who do pray and a certain degree of latitude to bear the exceptionality that might come with not participating in the prayer from those who do not want to pray. Only if exceptional circumstances to be determined on a case-by-case basis imply that this tolerance is not provided or that the pressure for those not wanting to participate is too high and that it therefore is in fact too difficult for those who do not want to pray to exercise their right will the school prayer become unconstitutional.

Translation of the School Prayer Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 52, 223*

Headnotes:

1. It is left to the *Länder* (states) in the framework of the supreme authority in school matters guaranteed by Article 7.1 of the Basic law (*Grundgesetz* - GG) to decide whether to permit voluntary, interdenominational school prayer outside religious instruction in interdenominational schools.

2. School prayer is in principle also constitutionally unobjectionable if a pupil or his or her parents object to the holding of the prayer: their fundamental right to negative freedom to profess a belief is not violated if they may choose freely and without coercion as to whether or not to participate in prayer.

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3. The voluntary aspect which as a rule can be presumed where the precept of tolerance is adhered to is exceptionally not safeguarded if due to the circumstances of the individual case the pupil is afforded no reasonable opportunity to avoid participation.

Order of the First Senate of 16 October 1979 -1 BvR 647/70 and 7/74 -

Facts:

The constitutional complaints relate to the matter of the permissibility of school prayer outside religious instruction in state compulsory schools if the parents of a pupil object to the prayer.

The constitutional complaints pursue opposite goals. Whilst the complainant in proceedings 1 BvR 647/70 object to the official prohibition of school prayer, the complainant in proceedings 1 BvR 7/74 complaints of his fundamental rights being violated precisely because school prayer was held, and he had allegedly been denied legal protection against it.

I. Constitutional complaint proceedings 1 BvR 647/70

The complainants (hereinafter referred to as: complainants *re* I) are the parents of school-age children who at the time of the filing of the constitutional complaints attended classes 3b and 5 of Eichendorff School, a Rural Primary School in Kirschhausen in Bergstraße district in Hesse. In this school, it was usual at that time for a joint interdenominational school prayer to be said daily at the start of lessons. A mother and father whose children attended these classes objected to school prayer, and applied to have it prohibited. The competent schools inspector thereupon ordered that there was to be no prayer in these classes in future. At the instruction of the head teacher, school prayers was ceased in classes 3b and 5.

The complainants re I) submitted an objection to the prohibition order of the schools inspector. The latter was rejected by the Administrative District Officer. The latter stated the following as grounds : The Hesse Constitutional Court (*Staatsgerichtshof*) had found in the judgment of 27 October 1965 that the fundamental rights of a pupil under Article 48.2 and Article 9 of the Constitutional of the *Land* Hesse (*Verfassung des Landes Hessen*) were violated if school prayer was said in the class despite his or her objection. The complainants re I) have filed and action to rescind on which no decision has yet been made.

The complainants re I) have submitted constitutional complaints against the orders of the schools inspector and of the head teacher. The complaint concerns the violation of Articles 3, 4, 6, 7 and 33 of the Basic Law and 140 of the Basic Law in conjunction with Articles 136.2 of the Weimar Constitution (*Weimarer Reichsverfassung - WRV*).

II. Constitutional complaint proceeding 1 BvR7/74

The complainant (hereinafter referred to as: complainant re II) is the father of a pupil who had initially commenced attendance at an Evangelical primary school in Aachen. He applied for cessation of school prayer in his daughter's class. The education authority did not comply with his request since it was a denominational school, and school prayer was a major element of the

children's education in the spirit of their faith. The complainant's objection was unsuccessful. Later, the Evangelical primary school was divided. Both successor schools were continued as interdenominational primary schools (*Gemeinschaftsgrundschulen*). The daughter of the complainant was now attending one of these schools, at which school prayer continued to be said at the start and end of lessons.

Before the school had been converted, the complainant had already filed an action to the Administrative Court (*Verwaltungsgericht*). The action with the goal of prohibiting school prayer in the Evangelical primary school; after conversion of the school, he requested prohibition of school prayer at the interdenominational primary school.

The Administrative Court largely upheld the major points of the action, invoking the negative freedom to profess a belief (right to remain silent). The respondent town was ordered to prohibit school prayer being ordered outside religious instruction or teachers calling to prayer in the class attended by the daughter of the complainant re II) in the interdenominational primary school insofar as this pupil attended lessons.

The Higher Administrative Court (*Oberverwaltungsgericht*) rejected the appeal on Points of fact and law of the education authority with the following reasoning: In the interdenominational schools of North-Rhine/Westphalia the children were said to be taught and brought up together on the basis of Christian educational and cultural values. The binding nature of these values, including the values described in the North-Rhine/Westphalia *Land* Constitution (*Landesverfassung*) by the words "respect for God" for teaching in interdenominational schools however allegedly did not mean that it was permissible to hold school prayer in lessons - outside religious instruction - despite the objection of a child or of his or her parents. …

In response to the education authority's appeal on points of law, by means of the impugned judgment (Decisions of the Federal Administrative Court (*Entscheidungen des Bundesverwal-tungsgerichts* - BVerwGE 44, 196), the Federal Administrative Court overturned the ruling of the Higher Administrative Court (*Oberverwaltungsgericht*) and rejected the action.

Extracts from the Grounds:

B.

The constitutional complaints are admissible.

I.

The constitutional complaint of the complainants re I) is directed prior to exhaustion of the appeals against the orders of the school authorities prohibiting school prayer. An action to rescind has been filed before the Administrative Court; however, in agreement between the parties these proceedings have been suspended pending a ruling of the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz -BverfGG*) are met for a ruling prior to exhaustion of the appeals.

II.

Even if the children of all complainants have now left the schools in question, their protectable interest in the determination of any violation of fundamental rights has not ceased to apply, particularly in the religious-ideological area which is particularly sensitive to constitutional violation by virtue of the passage of time on which they had no influence. If in such a case one were to deny the need for legal protection, the fundamental rights protection of the complainants would be unreasonably reduced (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* - BverfGE) 34, 165 (180) …; 41, 88 (105) …

C.

The constitutional complaint of the complainant re I) leads to the overturning of the impugned administrative acts; by contrast, the constitutional complaint of the complainant re II) cannot be successful.

I.

1. The standard for review of a judgment of the constitutional questions arising with school prayer are primarily Article 6.2 sentence 1 of the Basic Law (right of the parents to bring up their children), Article 4.1 and 4.2 of the Basic Law (freedom of faith and right to undisturbed practice of religion) as well as Article 7.1 of the Basic Law (state educational mandate).

Article 6.2 sentence 1 of the Basic Law grants to the parents the right and the duty to plan the care and upbringing of their children in accordance with their own ideas freely and - subject to Article 7 of the Basic Law - with priority over other educators (see BVerfGE 24, 119 [138, 143-144]; 47, 46 [69-70]). This also includes the right to educate the children in religious and ideological convictions that they regard as right (BVerfGE 41, 29 [47-48]).

On the other hand, Article 7.1 of the Basic Law grants to the state a constitutional educational mandate for schooling (BVerfGE 34, 165 [181-182]). The discretion open to the state in the school system, which is assigned to the *Länder* (see BVerfGE 6, 309 [355]), includes not only the organisational structure of the school, but also the content definition of the courses and educational objectives. The state may hence in principle pursue its own educational goals in schools independently of the parents (BVerfGE 34, 165 [182]; 47, 46 [71-72]). The state educational mandate is separate and equal to the right of the parents to bring up their children; neither the parents' right nor the state educational mandate has absolute priority (BVerfGE 41, 29 [44]; 47, 46 [72]).

2. The problem of school prayer is initially to be seen in the further framework of whether religious references in public interdenominational (compulsory) schools are permissible at all, or whether the state must refrain from any religious and ideological reference when organising schooling - with the exception of the religious instruction expressly guaranteed in Article 7.3 of the Basic Law - in those schools that are not denominational schools.

The Federal Constitutional Court dealt with this question in great detail in the orders of 17 December 1975 on interdenominational schools in the Baden tradition (BVerfGE 41, 29 [44 et seq.]) and on Bavarian interdenominational schools (BVerfGE 41, 65 [77 et seq.]).

…

Accordingly, the introduction of Christian references in organising state schools is not absolutely forbidden, even if a minority of persons with parental rights who cannot avoid these schools in the education of their children do not want them to have a religious education. The school however may not be a missionary school, and may not claim exclusive truth for Christian articles of faith; it must also be open to ideological and religious values. The educational objective of such a school may not be tied to a Christian denomination - outside religious instruction, which no one may be forced to attend. The affirmation of Christianity in the secular refers primarily to its recognition as the formative cultural and educational factor as which it has developed in Western history, not to its truths of faith, and is hence also legitimate in relation to non-Christians by the continuation of historical circumstances. This factor includes not lastly the concept of tolerance for persons holding different views.

In comparison to these specific constitutional requirements of the organisation of schooling by the *Länder* concerning the religious-ideological character of state schools, the institutional principles of the relationship between state and church set out in the Basic Law may not set a primary standard. Insofar as these church policy provisions lead to a principle of non-identification, this may certainly not determine the organisation of schooling if this corresponds to the specific requirements put forward in view of the express constitutional provisions.

On the basis of these considerations, the Federal Constitutional Court has considered the Christian interdenominational schools introduced in Baden-Württemberg and in Bavaria to be constitutional; there was also no constitutional objection to the North Rhine/Westphalia interdenominational schools (BVerfGE 41, 88).

3. If considering the principles developed by the Federal Constitutional Court religious references in public compulsory schools are not prohibited, the holding of school prayer is in principle constitutionally unobjectionable if its implementation also remains within the framework of the school organisation granted to the *Länder* in Article 7.1 of the Basic Law, and if other constitutional principles, in particular fundamental rights of participants under Article 4 of the Basic Law, are not violated thereby. In the judgment impugned by the complainant re II), the Federal Administrative Court has affirmed the permissibility of prayer, referring to Article 7 of the Basic Law, albeit based for the religious references of school on Article 7.3 and 7.5 of the Basic Law. These considerations are constitutionally unobjectionable.

a) School Prayer, as subject matter of the present constitutional complainant proceedings, constitutes an interdenominational (ecumenical) call to God held on the basis of the Christian faith. School prayer in this form - particularly because it should be acceptable for both major Christian denominations - is not the expression of the faith of a specific denomination in the framework of the respectively defined tenets of faith; it is hence not part of the exercise of the actual religious creed of the denomination to which the pupil belongs.

Nonetheless, this general prayer remains an act of religious profession, in that it takes the form of calling on God on the basis of the Christian faith. In this respect, prayer is a religious act (see on this BVerfGE 24, 236 [246]) in which no one is obliged to participate in accordance with Article 136.4 of the Weimar Constitution.

School prayer as an act of religious profession spoken outside religious instruction is not a part of general schooling given in the framework of the state educational mandate. It is not instruction as characterised by lessons as such, it is not a passing on of the knowledge to the pupils, and it is not targeted educational influence by the school and the teachers on the children, but is a religious act which as a rule is carried out together with the teacher. In this, school prayer also is not a part of teaching Christian cultural and educational values as considered permissible by the Federal Constitutional Court in the framework of general lessons at Christian interdenominational schools (BVerfGE 41, 29 [52]). The permissibility of such schools does not mean *per se* the constitutional permissibility of school prayer.

b) Since school prayer is not a part of lessons within the meaning of school teaching, it can also not be an element of a binding curriculum. It's implementation must be completely voluntary - a factor also generally undisputed in view of the provisions contained in Article 4.1 and 4.2 of the Basic Law, as well as in Article 140 of the Basic Law in conjunction with Article 136.4 of the Weimar constitution. This applies not only to pupils, but also to the teacher of each class in which school prayer takes place (see on this also Article 7.3 sentence 3 of the Basic Law).

   School prayer cannot therefore be held on the basis of instructions, but only of suggestions - which are ultimately not binding - which may emanate from the state's school administration, from the head teacher, from the teacher of the class in question, from the pupils themselves or from persons with parental rights. School prayer can take place during the time planned lessons, for instance immediately after the beginning of the first or shortly before the end of the last lesson, but also outside lesson time. It may take place in the classroom, or together for several classes or the whole school; the teacher may initiate the prayer, may sing it along with the pupils, or may leave it to the pupils altogether. The cases at hand relate to school prayer spoken during lesson time in the classrooms, with the participation of the teacher. It was manifestly a normal event in all classes of these schools.

   Even if school prayer is not and cannot be a part of the bindingly regulated lessons, it nevertheless remains - in each of the above forms - a school event to be attributed to the state. This certainly applies if school prayer takes place during lesson time at the suggestion of the teacher. The role of the state is however restricted to creating the organisational framework for school prayer and permitting prayer at the request of the parents or pupils or suggesting it itself. The state does not order it, it makes an offer which the school class may choose to take up.

c) If the state in the named sense permits school prayer outside religious instruction as a religious act and a "school event". It promoted, however, the view of Christianity and hence a religious element in the school over and above the religious references emerging

from recognition of the characterising cultural and educational factor of Christianity (BVerfGE 41, 29 [52]). Prayer links also in its interdenominational form to a faith-based truth, namely to faith that God can grant what is asked for. Nevertheless, permission of this religious element in the interdenominational (compulsory) school - if voluntary participation is adhered to - is still in the framework of the discretion which the *Länder* have as bearers of supreme authority in school matters in accordance with article 7.1 of the Basic Law, even if the fundamental right of dissenters is included in accordance with Article 4 of the Basic law to achieve concordance in the evaluation:

> Article 4 of the Basic Law grants not only the freedom to believe, but also the external freedom to profess faith in public (BVerfGE 32,98 [106]; 33,23 [28]; 41, 29 [49]);

Article 4.1 and 4.2 of the Basic Law ensures in this sense scope for the active exercise of religious conviction. If the state permits school prayer in interdenominational schools, it is doing no other than exercising the right of school organisation granted to it in accordance with Article 7.1 of the Basic law such that those pupils who so wish may give witness to their religious faith - even if only in the restricted form of general and interdenominational invocation of God. The state gives scope here to the positive freedom to profess a belief in an area which it has taken care of entirely and in which religious and ideological ideas have always been relevant (BVerfGE 41, 29 [49]).

From the outset, the state must however strike a balance between this scope to exercise positive freedom to profess a belief by permitting school prayer and the negative freedom to profess a belief of other parents and pupils who reject school prayer. The compensation takes place here in principle by guaranteeing the voluntary nature of participation for pupils and teachers. In contradistinction to the Christian-religious references of a school which determine its character as a whole, and - because they are a part of the lessons - permeate its educational goals, and hence the curriculum which is binding on all pupils, school prayer does not belong within compulsory instructions, but is a school event permitted in addition to this - characterised by volition. Even if school prayer, if it is to have a purpose, presumes a faith-based truth, the school in this instance does not claim absolute truth for the Christian faith; it merely enables those who so wish to profess such a faith. Subject to the completely voluntary nature of participation, hence, the permissibility of the religion element "school prayer" by the *Länder* in an interdenominational (compulsory) school organised by it not without a religious reference is in principle not constitutionally objectionable.

4. If the *Länder* may permit school prayer in the above sense for the organisation of schooling, they are on the other hand not forced to always permit the holding of school prayer in interdenominational schools.

Constitutionally the *Länder* are only obliged to provide for religious instruction in denominational schools as a standard subject (Article 7.3 sentence 1 of the Basic Law). The parents do not have a positive right of determination to the introduction of school prayer any more than they have such a right to the establishment of schools of a specific religious or ideological leaning; they also have no right to have their children brought up in the desired

ideological form (BVerfGE 41, 29 [46, 48]). The right of pupils to undisturbed practice of religion does not mean that they must be offered school prayer by the state in the area of school outside religious instruction. In designing schooling in the religious area within the meaning of its concordance of the constitutional values, the state has to strike a balance between the various fundamental rights, including between the right to carry out religious acts and the right of dissenters to be left in peace by them. How the state carries out this balancing out is left in the context of its supreme authority in school matters under Article 7 of the Basic Law in principle to its discretion: It can give interdenominational schools religious references, or it may forsake them. It may permit school prayer in those interdenominational schools which it provides with religious elements to the permissible degree (BVerfGE 41, 29[52]); it may however also - irrespective of whether it otherwise equips the school with religious references - choose to do without school prayer in general.

5. As the Federal Administrative Court rightly presumes in the judgment impugned by the complainant re II), the organisation of the schools in the individual *Länder* is also significant to the question of the permissibility of school prayer outside religious instruction; here lies the priority fundamental decision of the *Länder* as to whether or not they wish to permit generally religious references - over and above the religious instruction which the constitutional requires to be offered - in compulsory schools. Reservations against school prayer could certainly exist in an interdenominational school if the *Land* legislature had emphatically disfavoured religious references in the school from implemented by it. This is however not the case either in Hesse or in North-Rhine/Westphalia. In neither of the two *Länder* is the school to be adjusted a non-denominational school within the meaning of Article 7.3 of the Basic Law or a school which was emphatically kept free of Christian values; rather, both *Länder* have decided to maintain religious references in the interdenominational schools.

a) In North-Rhine/Westphalia (see on this BVerfGE 41, 88) in accordance with Article 12.3 of the *Land* Constitution of North-Rhine/Westphalia (*Landesverfassung -LV NW*) primary schools are interdenominational schools, denominational schools or ideological schools. In accordance with Article 12.6 of the *Land* Constitution of North-Rhine/ Westphalia, in interdenominational schools children are taught and brought up together on the basis of Christian educational and cultural values in openness to the Christian creeds and to other religious and ideological convictions. In accordance with Article 7.1 of the *Land* Constitution of North-Rhine/Westphalia, the goal of education is also to awaken respect for God. At the interdenominational schools in accordance with Article 14 of the *Land* Constitution of North-Rhine/Westphalia religious instruction is a standard subject of instruction.

   A provision corresponding to Article 12.6 of the *Land* Constitution of North-Rhine/ Westphalia is contained in s. 19 of the First Act on the Order of the School System in the *Land* North-Rhine/Westphalia in the *Landtag* ..., general agreement had been reached that interdenominational schools were not valued-neutral schools. Rather, they were schools in which Christian educational and cultural values had their place not only in the meaning of non-committal cultural Christianity. …

b) In Hesse, on the basis of Article 56.2 of the Hesse *Land* Constitution (*hessische Landesverfassung - HV*) children of all religious denominations and ideologies are as a rule taught together. In accordance with Article 56.3 of the Hesse *Land* Constitution, consideration should be given to the religious and ideological perceptions of all pupils. Article 56.7 of the Hesse *Land* Constitution provides that the details are to be governed by a statute which must take precautions against violating in school the religious and ideological principles in accordance with which the persons with parental rights seek to have their children educated. In accordance with s. 1.1 of the Hesse Act on Maintenance and Administration of State Schools and School Supervision (*hessisches Gesetz über die Unterhaltung und Verwaltung der öffentlichen Schulen und die Schulaufsicht - SchVG*) pupils are to be enabled to act on the basis of the Christian and Humanist tradition, as well as to respect religious and cultural values. In article 15.1 of the treaty between the Land Hesse and the Evangelical *Land* Churches in Hesse (*Vertrag des Landes Hessen mit den Evangelischen Landerskirchen in Hessen*) of 18 February 1960 state schools are referred to as interdenominational schools on a Christian basis. On the basis of these legal provisions, the Hesse school is largely regarded as a Christian interdenominational school.

…

II.

Were there to be no fundamental constitutional objections to school prayer, this could be judged differently if in the concrete case a pupil or his parents objected to prayer being held. This view was put forward by the Hesse Constitutional Court in the judgment of 27 October 1965, and, with different reasoning, by the Münster Higher Administrative Court in judgment of 28 April 1972. It is impossible to go along with the considerations of either court.

1. The Hesse constitutional Court opines that school prayer must be prohibited if a pupil rejects it because the pupil must not be placed in a situation of having to express his or her religiously or ideologically motivated rejection of school prayer through non-participation. Such an extension of the right to remain silent which was violated not only by virtue of being compelled to reveal what one oneself believes or thinks, but already by announcing a positive or negative attitude to denominational conduct of others, is not covered by the fundamental right to negative freedom to profess a belief … This is already shown by a consideration based on constitutional systematics: The freedom to decide for oneself whether to participate in a religious act is contingent on such religious acts taking place at all. By exercising the fundamental right *not* to participate, the person concerned reveals by that action that he or she does not agree with the conviction as precondition for the exercise of the fundamental right to refuse in particular, just as with non-participation in religious instruction (Article 7.2 of the Basic Law) or in refusal to render war service involving the use of arms (Article 4.3 of the Basic Law).

This is closely linked to the legal view of the Hesse constitutional Court, according to which negative freedom to profess a belief applies without restriction or exception, is neither restricted, nor can it be restricted, since it does not encroach on third-party legal spheres; by contrast, the positive freedom to profess a belief is alleged to be subject to the boundaries of Article 2.1 of

the Basic Law. This is not so. Article 4.1 of the Basic Law grants a special fundamental right which is *not* subject to the boundaries of Article 2.1 of the Basic Law (BVerfGE 23, 50 [55-56]; 32, 98 [107]); on the other hand, if a sovereign measure is compatible with Article 4 of the Basic Law (BVerfGE 6, 32 [37]; 17, 302 [306]; 28, 243 [264]). Having said that, the fundamental right under Article 4.1 and 4.2 of the Basic Law is not granted without restriction; this however applies both to the positive and to the negative freedom to profess a belief. However, this fundamental right is not subject to a constitutional requirement of the specific enactment of a statute. Boundaries may nevertheless be imposed on the freedoms of Article 4 of the Basic Law in accordance with the principle of the unity of the constitution by other provisions of the Basic Law (BVerfGE 32, 98 [107-108]; 33, 23 [29]; 44, 37 [50]). In particular, the freedom to profess a belief comes up against boundaries where the exercise of this fundamental right by a subject of fundamental rights meets the conflicting fundamental rights of dissidents (BVerfGE 28, 243 [260-261]; 32, 98 [108]; 41, 29 [50]). As part of the fundamental rights based system of values, the freedom to profess a belief is related to human dignity, which in turn is protected in Article 1.1 of the Basic Law, which prevails over the entire value system of fundamental rights as the supreme value (BVerfGE 6, 32 [41]; 27, 1 [6]; 32, 98 [108])., and hence is attributed to the precept of tolerance. In every case where conflicts occur between negative and positive freedom to profess a belief, particularly in schools, where such conflicts as to the joint education of children of widely differing ideological and faith based leanings are ultimately unavoidable (see BVerfGE 41, 29 [50]), a balance must be sought taking into consideration the precept of tolerance. By contrast, a misunderstood right to remain silent must not be given absolute priority over the practice of religion of others, as was done by the Hesse Constitutional Court.

2. The Münster Higher Administrative Court refers to school prayer said during lessons in its judgment of 28 April 1972 as a teaching and educational act of the school implemented with coercive participation from which dissident, objecting children were unable to remove themselves with regard to the general obligation to attend school. The Federal Administrative Court had already refuted this argument in the judgment impugned by the constitutional complaint. The general obligation to attend school is overlapped when it comes to participation in religious acts by the fundamental right of Article 4.1 of the Basic Law to be able to decide freely on participation in such a religious act ... . Moreover, school prayer as an act of religious profession is a school event, but is not a part of the lessons aimed to teach and instruct pupils.

3. The objection of a dissident pupil or of the persons with parental rights could only make school prayer non-permissible if the right of the deviating pupil to decide freely, with no coercion, on his or her participation in school prayer were not guaranteed. As a rule, however, a pupil can reasonably avoid participation, so that he or she may decide in complete freedom for non-participation in prayer.

a) Possible means of avoidance are: The pupil can leave the classroom during the prayer; he or she can for instance not enter the room until after the prayer has finished, or can leave the room at the end of the lesson, before the final prayer is said. The dissident pupil can however also remain in the classroom during the prayer, but not say the prayer; in doing so, he or she may remain seated - unlike the fellow pupils praying.

b) It must be admitted that each of these possibilities for avoidance always emphasises the conduct of the pupil in question when the school prayer takes place as against the praying pupils. This applies particularly if there is only one dissident pupil: He or she visibly acts differently than all fellow pupils. This emphasis could be unacceptable for the person concerned if it would of necessity place him or her in the role of an outsider and discriminate against him or her with regard to the rest of the class. Indeed, the position of the pupil in a class is different and much more difficult than that of an adult citizen who reveals their different conviction in public by not participating in certain events. This applies in particular to younger school children who as yet are hardly able to assert their own position critically towards their environment; in general, the child is placed into a conflict as to the matter of school prayers not by himself or herself, but by the persons with parental rights on the one hand, and the parents of other pupils or the teachers on the other.

4. Nevertheless, one may not presume that avoidance of school prayer pushes the dissident pupil as a rule or even only in a considerable number of cases into the depicted unreasonable position of an outsider. An evaluation of the framework conditions in which prayer is to take place, of the tasks which the teacher has to carry out in this context, and of the actual circumstances at school, means that certainly as a rule one need not fear discrimination of the pupil not participating in the prayer.

a) The Federal Administrative Court in the judgment impugned by the complainant re II) had already set conditions for the organisational holding of school prayer which is to prevent unsuitable burdens on dissident pupils. Firstly, the duration and frequency of school prayer should be within suitable limits; for instance, it may not be said at the beginning and end of every lesson. Indeed, it appears to be much less onerous on a non-participant for instance if a short prayer is said only at the start of each school day, as was evidently done in the cases to be ruled upon here. Secondly, with pupils who have not reached the age of personal determination in religious matters, as the subjects here, all persons with parental rights must be informed of the fact of the organisation of school prayer and the possibility to not participate. This requirement, intended to make participation truly voluntary, is also justified. The persons with parental rights can where necessary be informed that in a liberal legal and social order it is a natural right of each individual to decide completely freely on participation in a religious act, and that neither participation nor non-participation will be valued in any manner.

b) Over and above these external and organisational measures, discrimination of the pupils not participating in school prayer can be ruled out as a rule by teachers in line with the educational goal of the school encouraging all pupils to adhere to the principles of respect for one another's convictions, toleration and tolerance. Teachers are obliged to do so both in North-Rhine/Westphalia and in Hesse.

In accordance with Article 7.2 of the *Land* Constitution of North-Rhine/Westphalia, young people are to be taught in the spirit of freedom to show tolerance and to respect the conviction of others. In accordance with Article 7.2 of the *Land* Constitution of

North-Rhine/Westphalia, children are to be educated and brought up in openness to the Christian creeds and to other religious and ideological convictions. These educational goals are set out once more in s. 1.2 ... and ... s. 19 of the First Act on the Order of the School System in the *Land* North-Rhine/Westphalia goes on to provide that everything is to be avoided in education and lessons which might hurt the feelings of dissenters.

Article 56.3 of the Hesse *Land* Constitution provides as follows: The principle on which all teaching must be based is tolerance. The teacher shall in each subject respect the religious and ideological sensitivities of all pupils, and shall present the religious and ideological views in accordance with the facts. In accordance with Article 56.4 of the Hesse *Land* Constitution, young people are to be taught respect and tolerance amongst other things. In accordance with s. 1.1 of the Hesse Act on Maintenance and Administration of State Schools and School Supervision, schools should also enable pupils to have fundamental rights become effective for themselves and others and create relationships with other people in accordance with the principles of tolerance, justice and solidarity.

This binding educational goal of the spirit of tolerance must lead the teachers of a class in which one or several pupils - unlike their fellow pupils - do not participate in school prayer to teach the pupils in a suitable form and with the necessary pedagogical emphasis about the rights of each individual to freedom of faith and to participate or not to participate in religious acts; the teacher will have to strive to create such an atmosphere in the class that the praying pupils consider as natural the different conduct of their dissident fellow pupil and not treat him or her as an outsider. Where appropriate, the teacher will have to attempt to persuade those parents who - on the basis of their own intolerant religious attitudes - disapprove of the different conduct of a fellow pupil of their children not participating in the prayer.

On the other hand, the pupil not wishing to participate in the prayer, or who is not to participate according to his or her parents' instructions, will have to learn to show tolerance of the interests of the fellow pupils and their parents in holding school prayer, in their undisturbed practice of religion. They may not feel neglected because their fellow pupils follow a creed from which they wish to or are supposed to exclude themselves.

In this context, particular significance attaches to the fact that fundamental right of the positive and the negative freedom to profess a belief is associated with the precept of tolerance (see on this BVerfGE 32, 98 [109-110]; 41, 29 [51]; 47, 46[77]). The question of whether non-participation in school prayer is reasonable for dissenters cannot be solved without considering that two instances in which fundamental rights are exercised, collide which can only be balanced out if the Basic Law's precept of tolerance is respected. The effort to injure as little as possible the rights and feelings of the dissenter emerging from respect for this principle by all concerned, primarily by the teachers and parents of all the pupils in a class, as well as by the pupils themselves, as a rule precludes placing a pupil who not does participate in the prayer in a marginal position.

c) The dissident pupil will have to bear, and indeed will be able to bear, any elements nevertheless remaining of a special position as a result of his or her non-participation. To certain degree, there is also no express provision of the constitution to spare him or her from this situation in other circumstances: The pupil not participating in school prayer will as a rule also not attend religious instruction. In this case, the Basic Law manifestly requires in Article 7.2 that, in accordance with the precept of tolerance, there must be no discrimination.

d) Apart from this, it also may not be disregarded that it is hardly possible today to speak of a closed Christian stance on the part of pupils and their parents in a large number of school classes which would be suited to drive a dissident pupil into discriminatory isolation. In a pluralistic society, and in a time in which it is no longer an exception for people to resign church membership, in accordance with which many pupils remove themselves from religious instruction or are removed by their parents, a stance also externally expressed rejecting religion and the church is no longer unusual. Certainly, differences will be recorded between the circumstances in the cities, in small towns and in rural areas, possibly also between types of schools, as well as age groups, and in turn from one school to another. On the whole, however, the trend can probably not be doubted that a stance rejecting religious ties is less and less understood as a special characteristic deviating from "normal" conduct, even in schools.

5. Taking account of all these considerations, it will generally be possible to preclude a marginal role threatening to discriminate against a pupil not participating in school prayer. Certainly, one may not presume that avoiding school prayer is unreasonable and discriminatory for dissident pupil. There are neither factual nor legal preconditions for this presumption. Rather, one may conversely presume that an unreasonable situation leading to an impairment of fundamental rights for the dissident pupil does not occur.

On the other hand, it will also not be possible to rule out entirely that there may be exceptional circumstances in which a not inconsiderable emotional impairment of the dissident pupil could occur. It is conceivable for an emotionally particularly unstable pupil in a school atmosphere characterised by set prejudices which the teachers are unable to move towards tolerance, to be pushed into an exceptional situation which in this concrete case leaves no other option but to eliminate the occasion of the exceptional situation, in other words to completely eliminate school prayer. Whether the factual preconditions of such a situation apply, which would lead to a violation of a fundamental right by the continuing to permit school prayer, must be left to a decision to be taken in individual cases.

Apart from such exceptional cases, the objection of the dissident pupil or of his or her parents may not force the prohibition of school prayer which is still wished for by the fellow pupils or their parents.

III.

Measured against the standards of these principles, the judgment of the Federal Administrative Court impugned by the complainant (re II) is constitutionally unobjectionable. By contrast, the administrative acts impugned by the complaints (re I) violate fundamental rights of these complainants.

1. There are no constitutional reservations against the considerations with which the Federal Administrative Court in the proceedings of the complainant (re II) finds holding school prayer to be permissible despite the objection of this complainant. The fundamental rights of the complainant (re II) have not been violated. His children were free not to participate in school prayer. The decision on participation or non-participation could in this case be taken in complete discretion, with no coercion. The complainant (re II) has not submitted any indications that remaining away from school prayer would be unreasonable, and none are manifest, rather, his counsel, as specifically noted by the Federal Administrative Court, expressly denied in the oral hearing before the appeal on points of law court that such an unreasonable situation applied. The constitutional complaint of the complainant (re II) is hence unfounded.

2. By contrast, the notices of the schools inspector, of the head teacher and of the Administrative District officer acting in the objection proceedings impugned in proceedings 1 BvR 647/70, violate the complainants (re I) in their fundamental rights under Article 6.2 and Article 4.1 and 4.2 of the Basic Law. The persons with parental rights have no right safeguarded by the Basic Law to the holding of school prayer at state schools in Hesse on their request in the classes which their children attend. If however the state has generally permitted school prayer, and if prayer has thus far actually been held, it violates the above fundamental rights of the persons with parental rights concerned if the prayer is prohibited in specific classes with no justifying reason. This is the case here.

The prohibition orders are based neither on generally valid factual considerations, nor on the consideration that because of the concrete circumstances of the individual case it would be unreasonable for the objecting pupil to non-participate in school prayer; there is no manifest indication of an exceptional situation which would lead to unreasonableness. Rather, the prohibition is based exclusively on the judgment of the Hesse Constitutional Court of 27 October 1965, in accordance with which school prayer is said to be non-permissible *per se* in the event of an objection by a pupil or the persons with parental rights over him or her. The administrative authorities have considered themselves to be bound by the ruling of the Constitutional Court, without carrying out their own factual examination of the individual case. The prohibition orders hence do not have a tenable legal basis. The ruling of the Hesse Constitutional Court is not in compliance with federal constitutional law; for this reason, the judgment is null and void with regard to its binding effect (see BVerfGE 24, 289 [289]). The prohibition of school prayer, with the reasoning stated, and with no review of the individual case, encroaches on the fundamental rights of the complainants (re I) protected by Article 6.2 and Article 4.1 and 4.2 of the Basic law. The impugned administrative acts were therefore to be overturned.

b) Classroom Crucifix, BVerfGE 93, 1

Explanatory Annotation

In what was certainly one of the more (or even most) controversial decisions of the Constitutional Court the Court banned the Christian Cross from classrooms in obligatory state schools with no religious affiliation. Bavarian school regulations for those schools providing the basic 9-year minimum education mandated that a cross be present in each and every classroom.[44] The Court saw a violation of the negative freedom of religion of the children who did not want to learn "under the cross".[45] The issue here was again the balancing of the positive freedom of those who either do not mind at all or even wish for this Christian symbol to be present with the negative freedom of those who find this offensive. The difference to the school prayer case lies in the fact that the students cannot escape the cross in the classroom and it was this point that moved the Court to take a more pronounced approach in this instance. In this sense the decision of the Court is only consequent. Fundamental rights in general and freedom of religion in particular are rights protecting minorities, especially those perhaps regarded as somewhat obnoxious in the eyes of the majority. One wonders what the harsh critics of this decision would say if a school in Germany with a majority of Muslim students - not uncommon in bigger cities - were to request that Islamic symbols be put up in the classroom and the Christian children would just have to ignore that as it does not pertain to them.

Interestingly the Bavarian legislator reacted to the decision in a fashion more akin to the Court's approach in the school prayer case. The cross is still mandatory but can now be removed on a case-by-case basis if a student takes issue with it and no other solution can be found.[46]

Translation of the Classroom Crucifix Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 93, 1*

Headnotes:

1. The affixation of a cross or crucifix in the classrooms of a State compulsory school that is not a denominational school infringes Article 4.1 of the Basic Law.

2. s. 13.1 sentence 3 of the School Regulations for Elementary Schools in Bavaria is incompatible with Art. 4.1 of the Basic Law and is null and void.

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44 It is interesting to note that the Bavarian regulator saw the necessity of the cross in the class room in this lower tier of schools and not in those preparing children for tertiary education despite the fact that the children up to grade 9 will be the same age.

45 BVerfGE 91, 1 (18), see http://www.servat.unibe.ch/dfr/bv093001.html (last accessed on 21.10.2019).

46 Cf. BVerfG, 1 BvR 1604/97 of 27.10.1997, para. 4, http://www.bverfg.de/entscheidungen/rk19971027_1bvr160497.html.

Facts:

The constitutional complaint concerns the affixation of crosses or crucifixes in schoolrooms.

By s. 13.1 sentence 3 of the School Regulations for Elementary Schools in Bavaria (Volksschulordnung - VSO) of 21 June 1983 (GVBl. p. 597), a cross is to be affixed in every classroom in the public elementary schools. The Volksschulordnung is a legal regulation issued by the Bavarian State Ministry for Education and Cultural Affairs, based on a power delegated in the Bavarian Act on Education and Public Instruction (BayEUG) and in the (since repealed) Elementary Schools Act (VoSchG). S. 13.1 VSO reads:

> The school shall support those having parental power in the religious upbringing of children. School prayer, school services and school worship are possibilities for such support. In every classroom a cross shall be affixed. Teachers and pupils are obliged to respect the religious feelings of all.

Complainants (3) - (5) are the school age minor children of complainants (1) and (2). The latter are followers of the anthroposophical philosophy of life as taught by Rudolf Steiner, and bring up their children accordingly. Since their eldest daughter, complainant (3), went to school they have been objecting to the fact that in the schoolrooms attended by their children first of all crucifixes and later in part crosses without a body have been affixed. They assert that through this symbol, in particular through the portrayal of a "dying male body", their children are being influenced in a Christian direction; which runs counter to their educational notions, in particular their philosophy of life.

In February 1991 complainants (1) and (2) brought an action against the Free State of Bavaria before the administrative court, in their own behalf and that of their children, with the aim of having the crosses removed from all rooms frequented or yet to be frequented in public schools by their children in connection with attending school. At the same time they applied for the issuing of a temporary order pending conclusion of the action for removal of crucifixes. The administrative court refused the urgent request. The appeal against this was rejected by the Higher Administrative Court. The main case is pending before the appellate court since the administrative court rejected the suit. The constitutional complaint is brought directly against the orders issued in the summary proceedings and indirectly against s. 13.1 sentence 3 VSO. The complainants object to infringement of their fundamental rights under Article. 4.1, Article. 6.2, Article 2.1 and Article 19.4 of the Basic Law.

Extract from the Grounds:

B.

The constitutional complaint is admissible.

The complainants have exhausted the legal remedies (s. 90.2 sentence 1 of the Federal Constitutional Act - BVerfGG). With the order of the Higher Administrative Court, a decision of last instance terminating the procedure for temporary protection of rights is present. Certainly, the principle of subsidiarity may in such cases oppose admissibility of the constitutional complaint where constitutional infringements are complained of that do not specifically relate to the urgent procedure but raise questions that present themselves equally in the main proceedings, so that

the latter are capable of redressing the alleged constitutional grievance (see BVerfGE 77, 381 [401]; 80, 40 [45]). On the other hand, the complainant may not be remitted to the main proceedings when the infringement of fundamental rights is brought about through the urgent decision itself or where the decision does not depend on any further clarification as to facts or other than constitutional law and the preconditions are present whereby pursuant to s. 90.2 sentence 2 of the federal Constitutional Court Act the requirement for exhaustion of legal remedies may be disregarded (see BVerfGE 79, 275 [279]).

These prerequisites are present here. Insofar as the complainants assert infringement of Article 19.4 of the Basic Law through the refusal of provisional legal protection, they are making a fundamental rights complaint affecting the urgent proceedings specifically. As regards the other (substantive) fundamental rights complaint, no further clarification as to facts or other than constitutional law is required. In particular, the specialized courts have dealt comprehensively with the relevant legal questions in the decisions challenged. No further return is to be expected from the main proceedings. Nor can the complainants reasonably be expected, in view of the advance of time and the continuation of schooling, to be remitted to the conclusion of the main proceedings.

For the admissibility of the constitutional complaint it is irrelevant whether the child complainants are still attending elementary school (see BVerfGE 41, 29 [43]).

C.

The constitutional complaint is justified.

Insofar as the Higher Administrative Court denied a ground for an order, its decision infringes Article 19.4 of the Basic Law (I.). The denial of a claim to an order is incompatible with Article 4.1 and Article 6.2 sentence 1 of the Basic Law (II.).

I.

1. Art. 19.4 of the Basic Law opens up recourse to the law against any alleged infringement of subjective rights by an action of the public power. Not just the formal right to invoke the courts but also the effectiveness of the legal protection are guaranteed (cf. BVerfGE 35, 263 [274]); 35, 382 [401 seq.], with further references). Effective legal protection means also legal protection within an appropriate time. It follows that judicial legal protection, particularly in urgent proceedings, must as far as possible avert the creation of accomplished facts that can no longer be reversed if a measure proves unlawful on (final) judicial review (cf. BVerfGE 37, 150 [153]; 65, 1 [70]). There follow requirements on the courts as to the interpretation and application of the various statutory provisions on urgent legal protection (cf. BVerfGE 49, 220 [226]; 77, 275 [284]). Thus, the specialized courts are bound when, say, interpreting and applying s. 123 VwGO to grant provisional legal protection where the petitioner would otherwise be threatened with considerable infringement of rights, going beyond marginal areas, that could no longer be removed by the decision in the main case, unless, exceptionally, preponderant, particularly weighty grounds oppose this (cf. BVerfGE 79, 69 [74 seq.]).

2. These requirements are not met by the Higher Administrative Court's order. It denies the requisite ground of order for issuing the temporary order desired, and therefore the urgency of the matter, because the complainants had for years hesitated to invoke the courts and during that period put up with at least the affixing of crosses instead of the originally present crucifixes. It had been their aim to continue searching with the school administration for a transitional solution in this sense acceptable to them.

With this justification the Higher Administrative Court does justice neither to the actual course of events nor to the importance of the complainants' concern. In fact the complainants had since their eldest child went to school brought their demand before all levels of the school administration - from local up to ministerial. The fact that they originally hoped for an extra-judicial agreement and that time thereby elapsed ought not to count to their disadvantage; such conduct directed initially at avoiding conflict is rather that of a reasonable party. Further, the complainants had agreed to a compromise which however was called in question by the school administration repeatedly when the children changed classroom or school. A definitive concession in this sense has not been made by the school administration.

For this reason, the Higher Administrative Court's view that the complainants ought to have continued to strive for compromise also fails to do justice to the obligation to guarantee effective legal protection. It would rather have been a matter for the court to sound out whether the school administration was prepared to make a temporary order superfluous by giving an assurance along the lines of the compromise solution.

In answering the question whether grounds for an order were present, the Higher Administrative Court further failed to take adequate account of the fact that the matter was one of a provisional arrangement in the context of current school attendance, that is, of a life situation where the mere advance of time towards conclusion of school (complainant 3 is now sixteen years old) makes judicial legal protection particularly urgent. Legal disputes in school matters particularly are often decided only at the level of provisional legal protection, because the claim can often no longer, because of elapsed time, be asserted in the main proceedings. The specialized courts ought not to duck the need for effective legal protection by overstraining the requirements as to the existence of grounds for an order.

II.

The decisions challenged further infringe the fundamental rights of complainants (1) and (2) under Article 4.1 in conjunction with Article 6.2 sentence 1 of the Basic Law, and the fundamental rights of complainants (3) - (5) under Article 4.1 of the Basic Law. They are based on s. 13.1 sentence 3 VSO, which is itself incompatible with the Basic Law and is null and void.

1. Article 4.1 of the Basic Law protects freedom of religion. The decision for or against a faith is according to it a matter for the individual, not the State. The State may neither prescribe nor forbid a faith or religion. Freedom of religion does not however mean just the freedom to have a faith, but also the freedom to live and act in accordance with one's own religious convictions (cf. BVerfGE 32, 98 [106]). In particular, freedom of religion guarantees participation in acts of worship a faith prescribes or is expressed in. This implies, conversely, the freedom to stay away from acts of worship of a faith not shared. This freedom relates similarly to the

symbols in which a faith or religion presents itself. Art. 4(1) Basic Law leaves it to the individual to decide what religious symbols to acknowledge and venerate and what to reject. Certainly, in a society that allows room for differing religious convictions, the individual has no right to be spared from others manifestations of faith, acts of worship or religious symbols. This is however to be distinguished from a situation created by the State where the individual is exposed without possibility of escape to the influence of a particular faith, to the acts through which it is manifested and to the symbols in which it is presented. Accordingly, Article 4.1 of the Basic Law develops its effect of guaranteeing freedom in the very areas of life that are not left to society's spontaneous organization but taken in hand by the State (cf. BVerfGE 41, 29 [49]). Article 140 of the Basic Law in conjunction with Article 136.4 of the Weimar Constitution (WRV) takes account of this by explicitly prohibiting compelling anyone to take part in religious practices.

Article 4.1 of the Basic Law does not however confine itself to barring the State from intervening in the religious convictions, actions and presentations of individuals or of religious communities. Instead, it further imposes the duty on it to guarantee room for them to operate in which the personality can develop in the philosophical and religious area (cf. BVerfGE 41, 29 [49]), and to protect them against attacks or obstruction by adherents of other religious tendencies or competing religious groups. Article 4.1 of the Basic Law, however, does not confer on the individual or on religious communities any entitlement in principle to give expression to their religious conviction with State support. On the contrary, the freedom of religion of Article 4.1 of the Basic Law implies the principle of State neutrality towards the various religions and confessions. The State, in which adherents of different or even opposing religious and philosophical convictions live together, can guarantee peaceful coexistence only if it itself maintains neutrality in questions of belief. It may thus not itself endanger religious peace in a society. This precept finds its basis not only in Article 4.1 of the Basic Law, but also in Article 3.3, Article 33.1 and Article 140 of the Basic Law, in conjunction with Article 136.1 and 4 and Article 137.1 WRV. These bar the introduction of legal forms of establishment of religion and forbid the privileging of particular confessions or the exclusion of those of other beliefs (cf. BVerfGE 19, 206 [216]; 24, 236 [246]; 33, 23 [28]; consistent case law). Numerical strength or social importance does not come into it (cf. BVerfGE 32, 98 [106]). The State must instead ensure treatment of the various religious and philosophical communities on an equal footing (cf. BVerfGE 19, 1 [8]; 19, 206 [216]; 24, 236 [246]). Even where it cooperates with them or promotes them, this may not lead to identification with particular religious communities (cf. BVerfGE 30, 415 [422]).

Taken together with Article 6.2 sentence 1 of the Basic Law, which guarantees parents the care and upbringing of their children as a natural right, Article 4.1 of the Basic Law also covers the right to bring up children in religious and philosophical respects. It is a matter for the parents to convey to their children those convictions in matters of belief and philosophy of life that they find right (cf. BVerfGE 41, 29 [44, 47 seq.]). This implies the right to keep the children away from religious convictions that seem to the parents wrong or harmful.

2. This fundamental right is infringed by s. 13.1 sentence 3 VSO, and by the decisions challenged, which are based on this provision.

a) S. 13.1 sentence 3 VSO prescribes the affixing of crosses in all classrooms of the Bavarian elementary schools. The term cross, according to the interpretation by the courts in the initial case, covers crosses with and without a body. In reviewing the norm, accordingly, both meanings are to be included. It is true that in their application for provisional legal protection the complainants have according to the wording asked only for the removal of crucifixes. The Higher Administrative Court has however explicitly assumed that this may also mean crosses without a body, and rejected the application in this farther reaching meaning, too.

Taken together with universal compulsory schooling, crosses in schoolrooms mean that pupils are, during teaching, under State auspices and with no possibility of escape, confronted with this symbol and compelled to learn "under the cross". This distinguishes the affixing of crosses in classrooms from the frequent confrontation with religious symbols of the most varied religious tendencies arising in everyday life. Firstly, the latter does not proceed from the State but is a consequence of the spread of various religious convictions or religious communities in society. Secondly, it does not have the same degree of inescapability. Certainly, the individual cannot control encounters in the street, in public transport or when entering buildings with religious symbols or manifestations. As a rule, however, these are fleeting encounters, but even in the case of longer confrontation this is not based on a compulsion enforceable where necessary through sanctions.

In duration and intensity, the effect of crosses in classrooms is still greater than that of crosses in courtrooms. Yet the Federal Constitutional Court saw the compulsion to engage in legal proceedings under the cross, against one's own religious or philosophical convictions, as infringement of the religious freedom of a Jewish party to proceedings who saw that as identification of the State with the Christian faith (cf. BVerfGE 35, 366 [375]).

Nor is the inescapability of the encounter with the cross in schoolrooms removed by the setting up of private schools allowed by Article 7.4 of the Basic Law. First, the setting up of private elementary schools is tied in Article 7.5 of the Basic Law to particularly strict conditions. Secondly, since these schools are as a rule financed by fees paid by parents, a large part of the population lacks the possibility of recourse to them. Such is also the complainants' case.

b) The cross is a symbol of a particular religious conviction and not merely an expression of the Western culture marked partly by Christianity.

Undoubtedly, through the centuries numerous Christian traditions have been incorporated in the general cultural foundations of society, and even opponents of Christianity and critics of its historical heritage cannot elude them. These must however be distinguished from the specific content of beliefs of the Christian religion, and still more from a particular confession including its ritual presentation and symbolic portrayal. The State's professing of these contents of belief, to which third parties too are exposed in contacts with the State, affects religious freedom. The Federal Constitutional Court took that as a basis in the decision on the constitutionality of the

non-denominational schools of Christian character traditional in Baden, when it found that the admissible affirmation of Christianity related primarily to acknowledgment of the major cultural and educational factor it constituted in Western history, but not to the Christian religion's truths of faith. Only with such a limitation can this affirmation be legitimated, in relation to non-Christians too, through the continued operation of historical facts (cf. BVerfGE 41, 29 [52]).

The cross continues to be one of the specific faith symbols of Christianity. It is, indeed, its symbol of faith as such. It symbolizes the salvation of man from original sin brought about through Christ's sacrificial death, but at the same time also Christ's victory over Satan and death and his lordship over the world: suffering and triumph simultaneously (see the entry "Kreuz" in: Höfer/Rahner [eds.], Lexikon für Theologie und Kirche, 2nd ed. 1961, vol. 6, col. 605 et seq.; Fahlbusch et al. [eds.], Evangelisches Kirchenlexikon, 3rd ed. 1989, vol. 2 col. 1462 et seq.). For the believing Christian it is accordingly in many ways an object of reverence and of piety. The equipping of a building or a room with a cross is still today understood as an enhanced profession of the Christian faith by the owner. For the non-Christian or the atheist, just because of the importance that Christianity attaches to it and that it has had in history, the cross becomes a symbolic expression of particular religious convictions and a symbol of their missionary dissemination. It would be a profanation of the cross running counter to the self-perception of Christianity and the Christian churches to regard it, as the decisions challenged do, as a mere expression of Western tradition or cult token without a specific reference to faith. That the cross has a religious reference is also clear from the context of s. 13.1 VSO.

c) Nor can the cross be denied effect on pupils, as the decisions challenged do.

It is certainly true that the affixation of the cross in classrooms is not associated with compulsion to identification or with particular manifestations of reverence or modes of behaviour. It equally does not follow from it that specialized teaching in the profane subjects is marked by the cross or oriented to the Christian faith and the requirements as to conduct symbolized by it. But this does not exhaust the possibilities of the effect of the cross. School education is not just for learning basic cultural techniques and developing cognitive capacities. It is also intended to bring the pupils emotional and affective dispositions to development. Schooling is oriented towards encouraging their personality development comprehensively, and particularly also to influencing their social conduct. It is in this context that the cross in the classroom takes on its importance. It has appellant character and identifies the contents of belief it symbolizes as exemplary and worthy of being followed. This takes place, moreover, in relation to persons who because of their youth are not yet fixed in their views, still have to learn critical capacity and the formation of viewpoints of one's own, and are on that account particularly easily susceptible to mental influencing (cf. BVerfGE 52, 223 [249]).

The decisions challenged too do not completely disavow the appellant character of the cross. They do deny its specifically Christian significance in relation to other-minded pupils. For the Christian pupils, however, they see in it an essential expression of their

religious convictions. Similarly, the Bavarian Minister-President opines that in general teaching the cross has only non-specific symbolic value, whereas at school prayers and in religious instruction it turns into a specific symbol of faith.

3. The basic right to religious freedom is guaranteed without reservation. This does not however mean that it might not be subject to some sort of restrictions. These would, however, have to follow from the constitution itself. The setting up of limits not already laid out in the constitution is not something the legislature can do. Constitutional grounds that might have justified intervention are not however present here.

a) No such justification follows from Article 7.1 of the Basic Law.

Article 7.1 of the Basic Law certainly gives the State an educational mandate (cf. BVerfGE 34, 165 [181]). It has not only to organize schooling and itself set up schools, but may also establish the goals of education and the course of training. In that, it is independent of parents (cf. BVerfGE 34, 165 [182]; 47, 46 [71 seq.]). Accordingly, not only can schooling and family upbringing come into conflict. It is, rather, even inevitable that at school the differing religious and philosophical convictions of pupils and their parents confront each other particularly intensively.

This conflict among various bearers of a fundamental right guaranteed without reservation, and between that fundamental right and other constitutionally protected objects, is to be resolved on the principle of practical concordancy, which requires that no one of the conflicting legal positions be preferred and maximally asserted, but all given as protective as possible an arrangement (cf. BVerfGE 28, 243 [260 seq.]; 41, 29 [50]; 52, 223 [247, 251]).

This sort of arrangement does not require the State totally to abandon religious or philosophical references in carrying out the educational mandate bestowed by Article 7.1 of the Basic Law. Even a State that comprehensively guarantees religious freedom and thereby commits itself to religious and philosophical neutrality cannot divest itself of the culturally conveyed, historically rooted values, convictions and attitudes on which the cohesion of society is based and the carrying out of its own tasks also depends. The Christian faith and the Christian churches have in this connection, however one may today wish to assess their heritage, been of overwhelmingly decisive force. The traditions of thought, mental experiences and patterns of conduct deriving from them cannot be a matter of indifference for the State. This is particularly true for schools, where the cultural foundations of society are principally handed down and renewed. Moreover, a State that obliges parents to send their children to State schools may give consideration to the religious freedom of those parents who desire a religiously cast upbringing. The Basic Law has recognized this by allowing in Article 7.5 for State denominational or philosophically based schools, providing for religious instruction as an ordinary subject of teaching (Article 7.3 of the Basic Law) and over and above that allowing room for the active exercise of religious conviction (cf. BVerfGE 41, 29 [49]; 52, 223 [240 seq.]).

To be sure, it is impossible in a pluralistic society to take full account of all educational conceptions in designing the public elementary schools. In particular, the negative and positive sides of religious freedom cannot be realized without problems in one and the same State institution. It follows that the individual cannot in the school context appeal unrestrictedly to Article 4.1 of the Basic Law.

Resolving the unavoidable tension between negative and positive religious freedom while taking account of the precept of tolerance is a matter for the Land legislature, which must through the public decision-making process seek a compromise acceptable to all. In its arrangements it may take as a guide the fact that on the one hand Article 7 of the Basic Law allows religious and philosophical influences in the area of schooling, and on the other Article 4 of the Basic Law commands the exclusion as far as at all possible of religious and philosophical compulsions when opting for a particular form of school. Both provisions have to be seen together and reconciled with each other through interpretation, since it is only concordance of the objects of legal protection under both articles that can do justice to the decision contained in the Basic Law (cf. BVerfGE 41, 29 [50 seq.]).

The Federal Constitutional Court has drawn the conclusion that the Land legislature is not utterly barred from introducing Christian references in designing the public elementary schools, even if those with parental power who cannot avoid these schools in their children's education may not desire any religious upbringing. There is a requirement, however, that this be associated with only the indispensable minimum of elements of compulsion. That means in particular that the school cannot treat its task in the religious and philosophical area in missionary fashion, nor claim any binding validity for contents of Christian beliefs. The affirmation of Christianity accordingly relates to acknowledgement of a decisive cultural and educational factor, not to particular truths of faith. But Christianity as a cultural factor includes the idea of tolerance for the other-minded. Their confrontation with a Christianity-marked image of the world will not involve discriminatory denigration of non-Christian philosophies of life, at least as long as the object is not the conveying of beliefs but the endeavour to realise autonomous personality in the religious and philosophical sphere, in accordance with the basic decisions of Article 4 of the Basic Law (cf. BVerfGE 41, 29 [51 seq.]; 41, 65 [85 seq.]). The Federal Constitutional Court has accordingly pronounced the provision for Christian non-denominational schools in Article 135 sentence 2 of the Bavarian Constitution compatible with the Basic Law only when given an interpretation conforming with the constitution (cf. BVerfGE 41, 65 [66 and 79 et seq.]), and has stressed in relation to the non-denominational school of Christian character in the traditional sense in Baden that this is not a bi-denominational school (cf. BVerfGE 41, 29 [62]).

The affixing of crosses in classrooms goes beyond the boundary thereby drawn to the religious and philosophical orientation of schools. As already established, the cross cannot be divested of its specific reference to the beliefs of Christianity and reduced to a general token of the Western cultural tradition. It symbolizes the essential core of the conviction of the Christian faith, which has undoubtedly shaped the Western world

in particular in many ways, but is certainly not shared by all members of society, and is indeed rejected by many in the exercise of their fundamental right under Article 4.1 of the Basic Law. Its affixation in State elementary schools is accordingly incompatible with Article 4.1 of the Basic Law insofar as these are not Christian non-denominational schools.

b) The affixation of the cross cannot be justified from the positive religious freedom of parents and pupils of the Christian faith either. Positive religious freedom is due to all parents and pupils equally, not just the Christian ones. The conflict arising cannot be resolved according to the majority principle, for the fundamental right to religious freedom specifically is aimed in a special degree at protecting minorities. Moreover, Article 4.1 of the Basic Law does not confer on the bearers of the fundamental right an unrestricted entitlement to activate their religious convictions in the context of State institutions. Insofar as the school, in harmony with the constitution, allows room for this, as with religious instruction, school prayers and other religious manifestations, these must be marked by the principle of being voluntary and allow the other-minded acceptable, non-discriminatory possibilities of avoiding them. With affixation of crosses in classrooms, the presence and demands of which the other-minded cannot escape, this is not the case. Finally, it would not be compatible with the principle of practical concordancy for the feelings of the other-minded to be completely suppressed in order that pupils of the Christian faith might be able, over and above religious instruction and voluntary devotions, to learn the profane subjects too under the symbol of their faith.

D.

Accordingly, the provision of s. 13.1 sentence 1 VSO that underlies the dispute is incompatible with the fundamental rights mentioned and is to be pronounced null and void. The decisions in the proceedings for provisional protection of rights challenged are to be set aside. Since the proceedings in the main case are now pending before the Bavarian Higher Administrative Court, the case is referred back to it (s. 95.2 of the Federal Constitutional Court Act - BVerfGG). The order for the reimbursement of costs is on the basis of s. 34a.2 of the Federal Constitutional Court Act.

Dissenting opinion of Judges Seidl, Söllner and Haas:

The Panel majority view that s. 13.1 sentence 3 of the School Regulations for Elementary Schools in Bavaria, according to which a cross is to be affixed in every classroom, infringes the Basic Law is not shared by us. The court's decisions challenged in the constitutional complaint do not infringe the complainant's fundamental rights under Article 4.1 and Article 4.1 in conjunction with Article 6.2 sentence 1 of the Basic Law.

I.

1. According to Article 7.1 of the Basic Law, the whole school system is under the supervision of the State. The setting up and operation of elementary schools is, as follows from Article 7.5 of the Basic Law which associates the licensing of private elementary schools with particularly

stringent requirements, in principle a matter for the State itself. To this extent, the State has an educational mandate of its own and therefore also the authority to lay down educational objectives (cf. BVerfGE 52, 223 [236]).

The Basic Law, however, allots educational law exclusively to the sovereign sphere of the *Länder*. Education law does not appear in the catalogue of competences in Art. 73 et seq. Basic Law. The Federal Government accordingly has - by contrast with the constitutional order of the Weimar Republic, which in the area of schooling assigned to the Reich the right of legislation in principle, by Article 10.2 of the Weimar Constitution (WRV) - no legislative authority (Article 70 seq. of the Basic Law) or administrative sovereignty (Article 30 of the Basic Law) for this area. The genesis of Article 7 of the Basic Law shows that far-reaching autonomy for the *Länder* as regards the philosophical and religious character of State schools was intended. Here the federalist principle prevailed. Proposals aimed at farther-reaching parental rights ("confessional parental right") and a secured position for confessional schools in the Basic Law were already rejected in the preliminary discussions on Article 7 of the Basic Law. It was repeatedly stressed that the *Länder* were not to be restricted in their power to regulate educational policy questions (cf. in detail BVerfGE 6, 309 [356] with further references; also BVerfGE 41, 29 [45]).

2. Constitutional assessment of the questions raised in the constitutional complaint must accordingly start from the circumstances existing in the Free State of Bavaria, and may not take conditions that may apply in other *Länder* of the Federal Republic as the starting point.

The Constitution of the Free State of Bavaria of 2 December 1946 (BV) contains, in its section on education and schools, the following provision on the educational objectives to be pursued in all schools: Article 131

(1) …

(2) The foremost objectives of education are reverence for God, respect for religious conviction and for the dignity of man, self-control, sense of responsibility and willingness to accept responsibility, helpfulness, openness to everything true, good and beautiful, and an awareness of responsibility for nature and the environment.

(3-4) …

While the educational objective "awareness of responsibility for nature and the environment" was added only with the Fifth Act amending the Constitution of the Free State of Bavaria of 20 June 1984 (GVBl p. 223), the other educational objectives have remained unaltered since the Bavarian State Constitution came into force.

For elementary schools, Article 135 of the Constitution of the Free State of Bavaria originally provided for denominational or nondenominational schools, with a preference for the denominational school. With developments in school policy (on which see BVerfGE 41, 65 [79 seq.]), this constitutional provision was amended by referendum, through the Act amending Article 135 of the Constitution of the Free State of Bavaria of 22 July 1968 (GVBl p. 238). It has since read as follows:

Article 135

The public elementary schools shall be joint schools for all children of elementary-school age. In them pupils shall be taught and brought up in accordance with the principles of the Christian confessions. Details shall be specified by the Elementary Schools Act.

In Article 135 sentence 2 of the Bavarian Constitution in its current version Christianity is not to be understood in a confessional sense. The principles of the Christian confessions within the meaning of this provision instead comprise the values common to the Christian confessions and the ethical norms derived from them (cf. BVerfGE 41, 65 [84]). These are values and norms which, decisively marked by Christianity, have largely become the common property of the Western cultural area. Applying these principles, pupils are to be guided towards the educational objectives described in Article 131.2 BV. An educational objective marked by specifically Christian beliefs is not, by contrast, embodied in the Bavarian constitution (cf. BVerfG, loc. cit. p. 84 seq.). The affirmation of Christianity relates not to the content of belief but to recognition of the decisive cultural and educational factor, and is therefore justified in relation to non-Christians too, by the history of the Western cultural area (cf. BVerfGE 41, 29 [64]).

In accordance with these considerations, there are no constitutional objections to the school type of the Christian non-denominational school based on Article 135 sentence 2 BV (cf. BVerfGE 41, 65 [79 et seq.]).

3. It is, pursuant to Article 7.1 and 5 of the Basic Law, incumbent on the federal *Länder* as the bodies responsible for the elementary school system to enact the requisite provisions on the organization of elementary schools. The various *Länder* legislators have broad discretion here. The provision of s. 13.1 sentence 3 of the School Regulations for Elementary Schools in Bavaria, according to which a cross is to be affixed in every classroom, does not exceed the limits of this discretion. Since the State legislature may in constitutionally unobjectionable fashion introduce the school type of the Christian non-denominational school, it cannot be barred from symbolizing the value conceptions characterizing those schools by the cross in classrooms.

a) The provision of s. 13.1 sentence 3 of the School Regulations is a part of the organizational design of the Christian non-denominational school. The cross in the classroom brings the supra-denominational Christian, Western values and ethical standards to be conveyed by this form of school symbolically before the eyes of teachers and pupils. In enacting this provision the State legislature was entitled to take account of the fact that the majority of the citizens living on its territory belong to a Christian church (cf. BVerfGE 41, 29 [50 seq., 60]). It could further take it that the affixation of a cross in the classroom would, because of its symbolic nature for the supra-confessional Christian, Western values and ethical standards, also be welcomed or at least respected by a large proportion of the persons not in a church. This notion is supported not least by the fact that the provisions of the Bavarian Constitution on the Christian non-denominational school received the assent of the majority of the population (cf. BVerfGE 41, 65 [67]).

b) The State, which through compulsory schooling is deeply involved in the upbringing of children by the parental household, is largely dependent on acceptance by parents of the school system it organizes. It is therefore not barred from upholding as far as possible the concurrence of school and parental household in views as to values

(cf. BVerfGE 41, 29 [60]; 41, 65 [87]). Affixing crosses in classrooms may also contribute to this; it is moreover in line with a long tradition in Bavaria that met with resistance only in the period of National Socialism.

4. Affixing crosses in classrooms does not infringe the State's duty of philosophical and religious neutrality. Within the validity of the Basic Law, the precept of philosophical and religious neutrality ought not to be understood as an obligation on the State to indifference or secularism. The reference to the church articles of the Weimar Constitution in Article 140 of the Basic Law has given the neutrality precept the sense of cooperation by the State with churches and religious communities, also including their promotion by the State.

In the decisions on the constitutional admissibility of Christian non-denominational schools, the Federal Constitutional Court stated in connection with the precept of neutrality that the school, insofar as it may influence children's decisions as to belief and conscience, may contain only the minimum of elements of compulsion. It may, further, not be a missionary school nor claim any binding valildity for Christian beliefs; it must also be open to other philosophical and religious contents and values (cf. BVerfGE 41, 29 [51]; 41, 65 [78]).

The provision of s. 13.1 sentence 3 of the Bavarian School Regulations for Elementary Schools, found unconstitutional by the Panel majority, meets all these requirements. The mere presence of a cross in the classroom does not compel the pupils to particular modes of conduct nor make the school into a missionary organization. Nor does the cross change the nature of the Christian non-denominational school; instead it is, as a symbol common to the Christian confessions, particularly suitable for acting as a symbol for the constitutionally admissible educational content of that form of school. The affixation of a cross in a classroom does not exclude consideration for other philosophical and religious contents and values in education. The form of teaching is, additionally, subject to the precept of Article 136.1 BV, according to which, at all schools, the religious feelings of others are to be respected.

II.

By contrast with the Panel majority view, the complainants' religious freedom (Article 4.1 of the Basic Law and Article 4.1 in conjunction with Article 6.2 sentence 1 of the Basic Law) is not infringed by the presence of crosses in classrooms.

1. Through compulsory schooling and the taking of responsibility itself for elementary schooling, the State has taken an area of life decisive for the upbringing of young people fully under its care. This has the consequence that there must be room here for the exercise of liberties. These may certainly be restricted in the light of the legitimate purpose of the institution - here the school - but not suspended. The public school, which the State has brought under its organizational and largely also substantive design, is an area of life in which State action and civil freedom intersect. In such an area the State may also, by making available visible value symbols in line with widespread practice in the Federal State concerned, create an organizational framework in which at the same time the religious convictions present among a large part of the pupils and their parents can develop (cf. Higher Administrative Court for the State of North Rhine Westphalia, NVwZ 1994, p. 597). By contrast, the equipping of courtrooms with crosses, which may infringe the fundamental right under Article 4.1 of the Basic Law of a party to

proceedings (cf. BVerfGE 35, 366), falls within the area of original sovereign functions of the State and is therefore subject to different constitutional constraints from the affixation of crosses in the classrooms of State schools (cf. in detail Böckenförde, Zeitschrift für evangelisches Kirchenrecht Vol. 20 [1975], p. 119 [127 seq., 134]).

The religious freedom of Article 4.1 of the Basic Law is, something not at all brought into view by the Panel majority, still further enhanced and emphasized by the guarantee of undisturbed exercise of religion in Article 4.2 of the Basic Law (cf. BVerfGE 24, 236 [245 f]). Article 4.1 and 2 of the Basic Law jointly guarantee the individual room for active practice of religious conviction. If, accordingly, a voluntary, supra-denominational school prayer is in principle constitutionally unobjectionable (cf. BVerfGE 52, 223), this is equally true of the cross in the classroom. The State is thereby giving positive religious freedom room in an area which it has taken entirely under its protection and in which religious and philosophical positions were always relevant (cf. BVerfGE 41, 29 [49]; 52, 223 [241]).

2. The religious freedom of the complainants is not infringed thereby.

   a) The complainants do not appeal to the freedom of exercise of religion under Article 4.2 of the Basic Law. Nor do they assert any infringement of their positive religious freedom that follows from Article 4.1 of the Basic Law, but object only to infringement of their negative religious freedom, similarly protected by Article 4.1 of the Basic Law. For they do not ask for affixation in the classroom of a symbol of their own philosophy of life alongside or in place of the cross, but only for the removal of crucifixes, which they regard as symbols they do not wish to tolerate of a religious conviction they do not share. In the order of 5 November 1991 (BVerfGE 85, 94) in which the complainants' application for issue of a temporary order was rejected, the Panel put the constitutional question as follows, more accurately than now in deciding the main case: "whether and in what circumstances the use of religious symbols in a school affects negative religious freedom and how far it is to be put up with by the minority because they have to take account of the majority's positive religious freedom" (BVerfG, loc. cit. p. 96).

   Admittedly, this is not a problem of the relation between majority and minority, but one of how in the area of State compulsory schools the positive and negative religious freedom of pupils and their parents can in general be brought into harmony. Resolving this tension, unavoidable in the area of schooling, between negative and positive religious freedom is a matter for the democratic State legislature, which must in the public decision-making process seek a compromise acceptable to all, taking account of the various views (cf. BVerfGE 41, 29 [50]; 52, 223 [247]). Here negative religious freedom is not some superior fundamental right that displaces the positive expressions of religious freedom where they come together. The right of religious freedom is not a right to prevent religion. The necessary adjustment between the two manifestations of religious freedom must be brought about through tolerance (cf. Schlaich, in Kirche und Staat in der neueren Entwicklung, 1980, p. 427 [439]; Starck, in: v. Mangoldt/ Klein, Das Bonner Grundgesetz, Article 4.1 Rdnr. 17, with further references).

b) These principles have been done justice to by the Bavarian State legislature in enacting s. 13.1 sentence 3 of the Elementary School Regulations. The requisite balancing of interests with those of non-believers and people with different beliefs shows no breach of the constitution.

aa) In assessing and evaluating these interests, one cannot as the Panel majority does take as a general basis the Christian theological view of the importance and meaning of the cross symbol. The decisive thing is rather what effect the sight of the cross develops with individual pupils, in particular what feelings the sight of the cross may induce in the other-minded (on this cf. also BVerfGE 35, 366 [375 seq.]). It may be that in a pupil of Christian faith the sight of the cross in the classroom may in part awaken those notions described by the Panel majority as the meaning of the cross (grounds, C II 2 b). For the non-believing pupil, by contrast, this cannot be assumed. From his viewpoint the cross in the classroom cannot have the meaning of a symbol for Christian beliefs, but only that of a symbol for the objectives set for the Christian nondenominational school, namely the conveying of the values of Christianity-marked Western culture, and alongside that, a symbol of a religious conviction he does not share, rejects and perhaps combats.

bb) In view of this meaning that the cross in the classroom has for non-Christian pupils, they and their parents have to put up with the presence of crosses. They are so obliged by the precept of tolerance. Unacceptable burdens on them do not arise thereby.

The psychic impairment and mental burden that non-Christian pupils have to endure from the enforced perception of the cross in class is of only relatively slight weight. The minimum of elements of compulsion which in this respect is to be accepted by pupils and their parents (cf. BVerfGE 41, 29 [51]) is not exceeded. The pupils are not obliged to particular modes of conduct or religious exercises before the cross. They are accordingly - by contrast with school prayer (cf. BVerfGE 52, 223 [245 et seq.]) - not forced to display their differing philosophical or religious conviction by non-participation. The danger of their being discriminated against accordingly does not exist from the outset.

Nor are the pupils constitutionally inadmissibly influenced in missionary fashion by the cross in the classroom (cf. BVerfGE 41, 29 [51]). Direct influence on the content of teaching or educational objectives in the sense of propaganda for Christian beliefs does not proceed from the cross in the classroom. Moreover, the particular conditions in Bavaria must be taken as a starting point. Pupils are there confronted, even outside the narrower church sphere, with the sight of crosses in many other areas of life. As examples, mention will be made only of the roadside crosses frequently to be met with in Bavaria, the many crosses in secular buildings (such as hospitals and old-age homes, but also hotels and restaurants), and finally also the crosses present in private dwellings. In such circumstances the cross in the classroom too remains within the framework of the ordinary; no missionary character attaches to it.

III.

Accordingly, the Bavarian State legislature has with the affixation of crosses in the classrooms of elementary schools admissibly made use of the discretion due it in the organization of elementary schooling, without exceeding the limits to its margin of discretion. The administrative court decisions challenged do not in this respect meet with any constitutional objections.

Dissenting opinion of Judge Haas

I further share neither the Panel majority's justification for the admissibility of the constitutional complaint nor its arguments on the ground for the order.

1. Insofar as doubt may exist as to the admissibility of the constitutional complaint because perhaps in the interim the complainant s cause of complaint has lapsed, say because of a change of school by complainants (3) - (5) or removal of the remaining crucifixes in the schoolrooms - which was all the complainants' petition referred to in the urgent proceedings for the protection of rights - that need not be gone into. The admissibility of the constitutional complaint cannot however here be affirmed on the same grounds as for lapse of the cause of complaint in the main proceedings (cf. BVerfGE 41, 29 [43]). For the assumption of a continued interest in a finding does not take adequate account of the special features of the procedure of the temporary protection of rights, the importance of which is not exhausted in the settlement of a merely temporary situation. However, this question need not, in the light of the legal view presented here that the constitutional complaint is unjustified, be further gone into.

2. The decision of the Bavarian Higher Administrative Court challenged is constitutionally unobjectionable also insofar as the existence of grounds for an order is denied; in particular, Article 19.4 of the Basic Law is not infringed. The Administrative Courts grant provisional protection of rights *inter alia* in accordance with s. 123 VwGO. Article 19.4 of the Basic Law calls for the granting of temporary protection of rights in proceedings concerning the carrying out of an act too, at any rate where otherwise severe, unacceptable and not otherwise avoidable detriment would arise which the decision in the main case would not longer be capable of subsequently removing (cf. BVerfGE 46, 166 [179]; 51, 268 [284]).

That was also the starting point for the Bavarian Higher Administrative Court. In testing the presence of the requirements for grounds for an order the Court rightly, taking account of the constitutional precept for the granting of effective legal protection, starts from whether unacceptable and irreparable detriment would arise for the complainants were a temporary order not issued.

In the context of testing this detriment it - constitutionally unobjectionably - tested the urgency and importance of the claim. It accordingly seems more than doubtful whether the Court's considerations on the advance of time, summarized in a single sentence, can be taken in isolation and assessed to the effect that the Court denied the urgency of the complainants' concern. Instead, the arguments as to the duration of the situation complained of must be seen and understood in their overall context. As part of the assessment of detriment by the Court, however, the duration of the situation has specifically also the significance of indicating the

severity of the detriment. The Court's consideration that tolerating a particular situation for a period of some five years may have an influence on the assessment of a detriment as acceptable is constitutionally unobjectionable. It is at any rate not unreasonable to assess the question of the acceptability of the detriment to those concerned by how the position took shape for them in the past and how they handled it. That the detriment arising for the complainants from the sight of a crucifix had become unacceptable only with the course of time cannot be derived from the statements of the Higher Administrative Court, which were not challenged by the complainants. Nor have the complainants brought forward anything to show that any such presentation was left out of account by the Higher Administrative Court. Moreover, the Court evaluated still other aspects legally in the context of assessing detriment. It considered that complainants 1) and 2) would if the desired provisional order were not made still have enough freedom for upbringing in accordance with parental responsibility, and that the sight of a crucifix in the schoolrooms would be only a comparatively slight burden on complainants 3) -5), since they were exposed to the sight elsewhere too. Where the Bavarian Higher Administrative Court accordingly arrived at the conviction that unacceptable, irreparable detriment does not arise for the complainants if a temporary arrangement is not made, there can be no constitutional objection to this. This assessment by the Bavarian Higher Administrative Court was, moreover, manifestly shared by the adjudicating Panel, in itself declining to issue the temporary order applied for by the complainants, because it could not be established in weighing the consequences that the detriment arising to the complainants was predominant (cf. BVerfGE 85, 94 [96 f]). The adjudicating Panel had to take account in this connection of the fact that the situation complained of by the constitutional complainants would have to be put up with by them for several more years, in view of the number of years that constitutional complaint proceedings take.

In view of its assessment of the detriment as of minor gravity, the Higher Administrative Court did not need either to test further whether the issuing of a temporary order might have been necessary because the complainants could not otherwise have been protected against the unacceptable, irreparable detriment arising for them (cf. BVerfGE 46, 166 [179 f]). The Court's assumption that against the background of the administration s willingness to compromise, extra-judicial compromise solutions like the existing ones would be reachable in the future too is constitutionally unobjectionable.

Nor did the principle of guaranteeing effective protection of rights require the Court to "sound out" possibilities of an interim solution by amicable settlement, in order to make a temporary order "superfluous". It is already doubtful whether the essence of the principle of guaranteeing effective protection of rights is met by a line of conduct aimed at making a decision made by the Court superfluous. However, in ordinary law alone there is no need to carry out mediation negotiations in proceedings for temporary protection of rights, because it is within the Court's discretion what arrangement to make in detail in the context of the legal protection applied for (frequent case law and literature; see references in Kopp, VwGO, 1994, s. 123 no. 17), where the requirements for issuing a temporary order are met. If however, as here, the requirements for issuing a temporary order are in the court's view not present, so that the matter is ripe for decision and the application is to be rejected, then it cannot, at any rate from the viewpoint of guaranteeing effective protection of rights, be required through traditional mediation negotiations to seek agreement by the parties, with an outcome that would not have been attainable through the remedy sought.

3. *The Headscarf and the Constitutional Court (Headscarf Ban I and II)*

Explanatory Annotation

The Islamic headscarf has been an issue in several high-profile court decisions in several jurisdictions.[47] The European Court of Human Rights (ECtHR) has had to decide several cases concerning Islamic dress beginning with its decision in a Turkish case in which it held that the prohibition to wear the headscarf in Turkish Universities does not violate the freedom of religion guarantee of the European Convention (Article 9 ECHR).[48]

The underlying issue in all these constellations is the question to what degree Islamic dress in general, or the Islamic headscarf in particular, is - only - a symbol and expression of religious belief and/or to what degree such dress is also a means to oppress and subordinate women. Whereas the former is generally unproblematic and raises issues only in the context of schools or other state institutions where the issue of religious - or even political - symbols has been the subject of many decisions. The latter is utterly unacceptable and raises the question of whether and how the state might even be obligated to step in to protect the equality of women and combat the rise of parallel societies where half of the population are treated as second class citizens. The problem is that the distinction is so difficult and perhaps even impossible. One could certainly not dispute that many Muslim women wear such dress completely voluntarily and as a proud expression of their faith. At the same time, it is also obvious that there is a strong element of discrimination against women and the expression of the "mobile prison" for more extreme versions of such dress amply illustrates the problem. To find fair and just solutions that respect religious feelings and beliefs and foster a climate of equality and non-discrimination is indeed a difficult task.

The difficulty of the issue also comes to the fore in the two decisions of the Constitutional Court concerning the headscarf issue reproduced below. In the first case,[49] the issue was a German citizen and Muslima of Afghan heritage who had sought a teaching position in the German public service but was refused because she had expressed her unwillingness to refrain from wearing the Islamic headscarf when exercising her duties in the public schools. This, it was argued, violated the obligatory neutrality of state schools in religious matters, especially in the light of the political meaning of the headscarf as a political symbol of "cultural disintegration".

47 For the European Court of Justice (ECJ) see Case C-157/15 [GC], 14.3.2017, EU:C:2017:203, Achbita; Case C-188/15, 14.3.2017, EU:C:2017:204, Bougnaoui; see also Cloots, Elke, Safe harbour or open sea for corporate headscarf bans? Achbita and Bougnaoui, 55-2 Common Market Law Review 2018, 589 et seq.

48 ECHR [GC], Appl. No. 44774/98, 10.11.2005, Leyla Sahin/Turkey, http://hudoc.echr.coe.int/eng?i=001-70956. For a brief but comprehensive overview over the jurisprudence of the ECtHR on religious symbols and clothing see ECtHR, Factsheet – Religious Symbols and Clothing, December 2018, https://www.echr.coe.int/Documents/FS_Religious_Symbols_ENG.pdf (last accessed on 4.9.2019). The ECtHR often follows the states in their restrictions of dress. However, in a recent decision the ECtHR held it to be incompatible with the religious freedom guarantee in Article 9 ECHR to demand from a woman to take off her hijab in order to attend a judicial hearing, ECtHR, Appl. No. 3413/09, 18.12.2018, Lachiri v. Belgium, http://hudoc.echr.coe.int/eng?i=001-186245 (last accessed 3.9.2019).

49 BVerfG, 24.9.2003, BvR 1436/02, http://www.bverfg.de/e/rs20030924_2bvr143602.html (in German only; last accessed on 4.9.2019).

The Constitutional Court, while deciding in favor of the applicant, in fact, handed the problem back to the legislature of *Baden-Württemberg*, the *Land* where the case had unfolded, and, by implication, to all state legislatures as the power to regulate school matter lies with the *Länder* and not the federal government. The Court held that the decision not to employ the applicant because of her refusal to discard the headscarf did not have a sufficient basis in statutory law. This requirement goes back to the principal constitutional requirement that all "significant" limitations of rights require a statutory legal foundation and limitations without such foundation are *per se* unjustified. The Court held that the prohibition of wearing the headscarf while teaching in a public school is such a "significant" limitation and hence requires statutory regulation.

However, the Court did not address the question of whether a statutory prohibition of wearing the Islamic headscarf in such circumstances would be constitutional or not. This notwithstanding, there is little in this decision to imply that it might not be. In a sense this decision could be counted as an example of judicial restraint or a cautionary approach to an issue, where the wisdom of the Court is not any greater than the wisdom of the legislature if that legislature attempts to reach a balanced decision by taking all sides of the issue and all rights concerned into account in an appropriate fashion.

In a strong dissenting opinion, three justices of the Court criticized the majority for considering the ban to be a "significant" violation of the applicant's religious freedom rights. In their view, the demand to abstain from the headscarf while on duty in school was only a modification of employment duties in an employment situation the applicant had chosen to pursue under her own free will. This raises another difficult question: To what extent can contractual relations, limit freedoms, here the religious freedom? Or, to formulate differently, to what extend can a person implicitly (or expressly) consent to such limitations by entering into a contract?

The second decision reached in 2015[50] dealt with legislation in the *Land* North-Rhine-Westphalia which contained a more or less blanket prohibition of any religious, political, or ideological displays (dress, symbols, etc.) at school that could be regarded as breaching the school's neutrality. In what can only be described as an ironic twist of reality, that same legislation also contained a sweeping counter-exception for "Christian and occidental educational and cultural values or traditions."[51]

50 BVerfG, 27.1.2015, 1 BvR 471/10, http://www.bverfg.de/e/rs20150127_1bvr047110en.html (last accessed on 4.9.2019).

51 Id. at para. 78.

The applicants challenged court decisions based on that legislation which upheld labor law consequences suffered by two Muslima for wearing a headscarf, respectively a woollen hat in its place. The Constitutional Court held that the legislation in question must be restrictively interpreted in such a way that it cannot be just assumed that wearing such dress will impinge on the school's neutrality. Rather some concrete evidence must be produced that there exists a "sufficiently specific risk of danger to or impairment of the peace at school or the neutrality of the state."[52] The Court, rather unsurprisingly, also found a violation of the prohibition of discrimination on religious grounds in the counter-exception contained in the legislation. One cannot help but wonder how and why legislators would pass such problematic legislation. This counter-exception had "unconstitutional' written all over it.

There was some discussion as to the compatibility of the two decisions. Some interpreted the first decision (by the second senate of the Constitutional Court) as giving the state legislators a free hand in either allowing such dress or banning it. Under such a reading the second decision (by the first Senate of the Constitutional Court) could be seen to deviate from that judgment by now imposing restrictions in the form of a necessity for a concrete risk to the school peace or neutrality of the school. Under § 16 of the Act on the Federal Constitutional Court,[53] such a deviation would necessitate a decision by the Plenary of the Constitutional Court. However, it is questionable whether the demand for a restrictive interpretation of the legislation can be regarded as a deviation from a judgment that requires that such legislation be passed as a legal basis for regulating religious dress.[54] The Constitutional Court itself saw no reason for a plenary decision.

a) Translation of BVerfG, 24.9.2003, BvR 1436/02, http://www.bverfg.de/e/rs20030924_2bvr143602.html, BVerfGE 108, 282 "Headscarf Ban I"

Headnotes:

1. There is no sufficiently definite statutory basis in the current law of the Land (state) Baden-Württemberg for a prohibition on teachers wearing a headscarf at school and in lessons.

2. Social change, which is associated with increasing religious plurality, may be the occasion for the legislature to redefine the admissible degree of religious references permitted at school.

52 Id. headnote 3 and para. 113.

53 https://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html#p0105 (last accessed on 4.9.2019).

54 For more details see Leiss, Johann Ruben, One Court, Two Voices: Case Note on the First Senate's Order on the Ban on Headscarves for Teachers from 27 January 2015: Case No. 1 BvR 471/10, 1 BvR 1181/10, 16/4 German Law Journal 2015, 901-915, https://doi.org/10.1017/S2071832200019945 (last accessed on 4.9.2019).

Facts:

The complainant was born in Kabul, Afghanistan in 1972; since 1987 she has lived without interruption in the Federal Republic of Germany, and in 1995 she acquired German nationality. She is of the Muslim religion. After passing the First State Examination and doing teaching practice, in 1998 the complainant passed the Second State Examination for the teaching profession at the primary school and the non-selective secondary school, with the main emphasis on the secondary school and the subjects German, English and social studies/economics.

The Stuttgart Higher School Authority refused the complainant's application to be appointed to the teaching profession at the English primary school and the non-selective secondary school in the Land Baden-Württemberg on the grounds of lack of personal aptitude. By way of a reason, it was stated that the complainant was not prepared to give up wearing a headscarf during lessons. The headscarf, it was stated, was an expression of cultural separation and thus not only a religious symbol, but also a political symbol. The objective effect of cultural disintegration associated with the headscarf, it was said, was not compatible with the requirement of state neutrality. The administrative courts confirmed the authority's decision.

…

B.

The constitutional complaint is admissible and is well-founded. The decisions challenged violate Article 33.2 of the Basic Law in conjunction with Article 4.1 and 4.2 of the Basic Law and with Article 33.3 of the Basic Law. In the context to be assessed here, wearing a headscarf makes it clear that the complainant belongs to the Islamic religion and identifies herself as a Muslim. Defining such conduct as a lack of aptitude for the office of a teacher at the primary school and non-selective secondary school encroaches upon the complainant's right to equal access to every public office under Article 33.2 of the Basic Law in conjunction with the fundamental right of freedom of faith guaranteed to her by Article 4.1 and 4.2 of the Basic Law, without the necessary, sufficiently definite statutory basis for this being satisfied at present. In this way, the complainant has in a constitutionally unacceptable manner been denied access to a public office.

I.

Constitutional review in connection with a constitutional complaint concerning a judgment is normally restricted to examining whether the decisions challenged, in their interpretation and application of law below the constitutional level, are based on a fundamentally erroneous view of the meaning and scope of the fundamental right relied on or are arbitrary (on this, cf. Decisions of the Federal Constitutional Court, Entscheidungen des Bundesverfassungsgerichts, BVerfGE 18, 85 [93]; established case law). However, to the extent that the court whose decision is challenged by the constitutional complaint directly interpreted and applied provisions of fundamental rights itself, the Federal Constitutional Court has a duty to determine the scope and limits of the fundamental rights and to establish whether fundamental rights were taken into account without

any error of constitutional law with regard to their extent and weight. This is the situation in the present case. The Federal Administrative Court and also the lower courts based their decisions on a particular interpretation of Article 33.2 of the Basic Law in conjunction with Article 4.1 and 4.2 of the Basic Law. In accordance with its duty of preserving, developing and extending constitutional law and in particular interpreting the various functions of a legal provision containing a fundamental right (cf. BVerfGE 6, 55 [72]; 7, 377 [410]), the Federal Constitutional Court in this regard, in its relation to the nonconstitutional courts, is not restricted to examining whether the non-constitutional courts applied constitutional law in a non-arbitrary manner, but must itself take final and unappealable decisions on the interpretation and application of constitutional law.

II.

1. Article 33.2 of the Basic Law grants every German, in accordance with his or her aptitude, qualifications and professional achievement, equal access to every public office.

The right in Article 33.2 of the Basic Law, which is equivalent to a fundamental right, guarantees the degree of free choice of one's occupation or profession (Article 12.1 of the Basic Law) that is possible in view of the number of positions in the civil service, which is, and is permitted to be, restricted by the public corporation responsible in each case (cf. BVerfGE 7, 377 [397, 398]); 39, 334 [369]). Article 33.2 of the Basic Law grants no right to be appointed to a public office (cf. BVerfGE 39, 334 [354]); Decisions of the Federal Administrative Court, Entscheidungen des Bundesverwaltungsgerichts, BVerwGE 68, 109 [110]). The access to activity in a public office (admission to an occupation, which also relates to free choice of occupation) may in particular not be restricted by subjective requirements for admission (cf. BVerfGE 39, 334 [370]). This is done in accordance with s. 7 of the Civil Service Law Framework Act (Beamtenrechtsrahmengesetz - BRRG) of 31 March 1999 (Federal Law Gazette, Bundesgesetzblatt, BGBl, I p. 654) in the Civil Service Acts of the *Länder* by provisions on the personal requirements necessary for those appointed to the status of civil servants. S. 11.1 of the Baden-Württemberg Land Civil Service Act as amended on 19 March 1996 (Baden-Württemberg Law Gazette, Gesetzblatt, GBl, p. 286) which applies in the present case, provides that appointments are to be made on the basis of aptitude, qualifications and professional achievement, without taking into account gender, descent, race, belief, religious or political convictions, origin or connections.

b) When laying down aptitude criteria for the relevant office and when defining official duties by reference to which the aptitude of applicants for the civil service is to be assessed, the legislature in general has a broad legislative discretion. Limits to this legislative discretion follow from the value decisions in other constitutional norms; the fundamental rights in particular impose limits on the legislature's legislative discretion. Even for those with the status of civil servants, the fundamental rights apply, although the civil servant's sphere of responsibilities under Article 33.5 of the Basic Law restricts the civil servant's legal possibility of relying on fundamental rights (cf. BVerfGE 39, 334 [366, 367]): Limits may be imposed on the civil servant's exercise of fundamental

rights in office; these limits follow from general standards imposed on the civil service or from particular requirements of the public office in question (cf. e.g. BVerwGE 56, 227 [228, 229]). However, if even access to a public office is refused by reason of future conduct on the part of the applicant that is protected as a fundamental right, then the assumption that there is a lack of aptitude for this reason must in turn be justifiable with regard to the fundamental right affected.

c) The evaluation by the employer of an applicant's aptitude for the public office applied for relates to the applicant's future occupation in office and at the same time contains a prediction, which requires a concrete assessment of the applicant's whole personality based on the individual case (cf. BVerfGE 39, 334 [353]; 92, 140 [155]). This also includes a statement with regard to the future as to whether the person in question will fulfil the duties under civil-service law that he or she is subject to in the office applied for. In this assessment with regard to the future, the employer has a wide scope of discretion; the review by the non-constitutional courts is essentially restricted to determining whether the employer proceeded on the basis of incorrect facts, misjudged the civil service law and constitutional law context, disregarded generally valid standards of value or took irrelevant matters into consideration (cf. BVerfGE 39, 334 [354]); BVerwGE 61, 176 [186]; 68, 109 [110]; 86, 244 [246]). The employer's prediction as to an applicant's aptitude for a particular office must be based on the civil servant's duties (ss. 35 et seq. of the Civil Service Law Framework Act; ss. 70 et seq. of the Baden-Württemberg Land Civil Service Act). Official duties that the applicant is expected to carry out must be sufficiently specified in law and must respect the limits imposed by the applicant's fundamental rights.

2. If a duty is imposed on the civil servant that, at school and in lessons, teachers may not outwardly show their affiliation to a religious group by observing dress rules with a religious basis, this duty encroaches upon the individual freedom of faith guaranteed by Article 4.1 and 4.2 of the Basic Law. It confronts those affected with the choice either to exercise the public office they are applying for or obeying the religious requirements as to dress, which they regard as binding.

Article 4.1 of the Basic Law guarantees freedom of faith, conscience and religious and ideological belief; Article 4.2 guarantees the right of undisturbed practice of religion. The two subsections of Article 4 of the Basic Law contain a uniform fundamental right which is to be understood comprehensively (cf. BVerfGE 24, 236 [245, 246]; 32, 98 [106]; 44, 37 [49]; 83, 341 [354]). It extends not only to the inner freedom to believe or not to believe, but also to the outer freedom to express and disseminate the belief (cf. BVerfGE 24, 236 [245]). This includes the individual's right to orientate his or her whole conduct to the teachings of his or her faith and to act in accordance with his or her inner religious convictions. This relates not only to imperative religious doctrines, but also to religious convictions according to which a way of behaviour is the correct one to deal with a situation in life (cf. BVerfGE 32, 98 [106, 107]; 33, 23 [28]; 41, 29 [49]).

The freedom of faith guaranteed in Article 4.1 and 4.2 of the Basic Law is guaranteed unconditionally. Restrictions must therefore be contained in the constitution itself. This includes the fundamental rights of third parties and community values of constitutional status (cf. BVerfGE 28, 243 [260, 261]; 41, 29 [50. 51]; 41, 88 [107]; 44, 37 [49, 50, 53]; 52, 223 [247]; 93, 1 [21]). Moreover, restricting the freedom of faith, which is unconditionally guaranteed, requires a sufficiently definite statutory basis (cf. BVerfGE 83, 130 [142]).

3. Article 33.3 of the Basic Law is also affected. It provides that admission to public offices is independent of religious belief (sentence 1); no one may suffer a disadvantage by reason of belonging or not belonging to a faith or to an ideology (sentence 2). Consequently, a connection between admission to public offices and religious belief is out of the question. Article 33.3 of the Basic Law is directed in the first instance against unequal treatment directly linked to the profession of a particular religion. In addition, the provision at all events also prohibits refusing admission to public offices for reasons that are incompatible with the freedom of faith protected by Article 4.1 and 4.2 of the Basic Law (cf. BVerfGE 79, 69 [75]). This does not exclude creating official duties that encroach upon the freedom of faith of office-holders and applicants for official offices, and that thus make it harder or impossible for religious applicants to enter the civil service, but it does subject these to the strict requirements of justification that apply to restrictions of freedom of faith, which is guaranteed unconditionally; in addition, the requirements of strictly equal treatment of the various religions must be observed, both in creating and in the practice of enforcing such official duties.

4. a) The wearing of a headscarf by the complainant at school as well as outside school is protected by the freedom of faith, which is guaranteed in Article 4.1 and 4.2 of the Basic Law. According to the findings of fact made by the non-constitutional courts and not disputed in the proceedings relating to the constitutional complaint, the complainant regards the wearing of a headscarf as bindingly imposed on her by the rules of her religion; observing this dress rule is, for her, the expression of her religious belief. The answer to the controversial question as to whether and how far covering the head is prescribed for women by rules of the Islamic faith is not relevant. It is true that not every form of conduct of a person can be regarded as an expression of freedom of faith, which enjoys special protection, purely according to its subjective intention; instead, when conduct by an individual that has been claimed to be an expression of the individual's freedom of faith is assessed, that his or her particular religious group's concept of itself may not be overlooked (cf. BVerfGE 24, 236 [247, 248]). A duty of women to wear a headscarf in public may, by its content and appearance, as a rule of faith founded in the Islamic religion, be attributed with sufficient plausibility to the area protected by Article 4.1 and 4.2 of the Basic Law (on this, see also BVerfGE 83, 341 [353]); this was done by the non-constitutional courts in a manner that cannot be constitutionally objected to.

b) The assumption that the complainant lacks the necessary aptitude to fulfil the duties of a teacher at the primary school und non-selective secondary school, because, contrary to an existing official duty, she wanted to wear a headscarf at school and in lessons,

and this headscarf showed clearly that she was a member of the Islamic religious group, and the refusal to admit her to a public office, which was based on this, would be compatible with Article 4.1 and 4.2 of the Basic Law if the intended exercise of freedom of faith conflicted with objects of legal protection of constitutional status and this restriction of the free exercise of religion could be based on a sufficiently definite statutory foundation. Interests that are protected by the constitution that conflict with freedom of faith here may be the state's duty to provide education (Article 7.1 of the Basic Law), which is to be carried out having regard to the duty of ideological and religious neutrality, the parents' right of education (Article 6.2 of the Basic Law) and the negative freedom of faith of school children (Article 4.1 of the Basic Law).

aa) In Article 4.1, Article 3.3 sentence 1 and Article 33.3 of the Basic Law, and in Article 136.1, Article 136.4 and Article 137.1 of the Weimar Constitution (Weimarer Reichsver-fassung) in conjunction with Article 140 of the Basic Law, the Basic Law lays down for the state as the home of all citizens the duty of religious and ideological neutrality. It bars the introduction of legal structures in the nature of a state church and forbids giving privileged treatment to particular faiths and excluding those of a different belief (cf. BVerfGE 19, 206 [216]; 24, 236 [246]; 33, 23 [28]; 93, 1 [17]). The state must be careful to treat the various religious and ideological communities with regard to the principle of equality (cf. BVerfGE 19, 1 [8]; 19, 206 [216]; 24, 236 [246]; 93, 1 [17]) and may not identify with a particular religious community (cf. BVerfGE 30, 415 [422]; 93, 1 [17]). The free state of the Basic Law is characterised by openness towards the variety of ideological and religious convictions and bases this on an image of humanity that is marked by the dignity of humans and the free development of personality in self-determination and personal responsibility (cf. BVerfGE 41, 29 [50]).

However, the religious and ideological neutrality required of the state is not to be understood as a distancing attitude in the sense of a strict separation of state and church, but as an open and comprehensive one, encouraging freedom of faith equally for all beliefs. Article 4.1 and 4.2 of the Basic Law also contain a positive requirement to safeguard the space for active exercise of religious conviction and the realisation of autonomous personality in the area of ideology and religion (cf. BVerfGE 41, 29 [49]; 93, 1 [16]). The state is prohibited only from exercising deliberate influence in the service of a particular political or ideological tendency or expressly or impliedly identifying itself by way of measures originated by it or attributable to it with a particular belief or a particular ideology and in this way itself endangering religious peace in a society (cf. BVerfGE 93, 1 [16, 17]) The principle of religious and ideological neutrality also bars the state from evaluating the faith and doctrine of a religious group as such (cf. BVerfGE 33, 23 [29]).

Until now, the understanding of the relationship between state and religion, as it is reflected in the case law of the Federal Constitutional Court, this applies above all to the area of the compulsory school, for which the state has taken responsibility, and for which, by its nature, religious and ideological ideas have always been

relevant (cf. BVerfGE 41, 29 [49]; 52, 223 [241]). In this view, Christian references are not absolutely forbidden in the organisation of state schools; however, school must also be open to other ideological and religious content and values (cf. BVerfGE 41, 29 [51]; 52, 223 [236, 237]). In this openness, the free state of the Basic Law preserves its religious and ideological neutrality (cf. BVerfGE 41, 29 [50]). For the tensions that are unavoidable when children of different ideological and religious beliefs are taught together, it is necessary, giving consideration to the requirement of tolerance as the expression of human dignity (Article 1.1 of the Basic Law) to seek a balance (cf. BVerfGE 41, 29 [63]; 52, 223 [247, 251]; 93, 1 [21 seq.]; for more detail, see dd) below).

bb) Article 6.2 sentence 1 of the Basic Law guarantees to parents the care and education of their children as a natural right, and together with Article 4.1 of the Basic Law it also includes the right to educate children in religious and ideological respects; it is therefore above all the responsibility of the parents to convey to their children the convictions in religious and ideological matters that they regard as right (cf. BVerfGE 41, 29 [44, 47, 48]; 52, 223 [236]; 93, 1 [17]). Corresponding to this is the right to keep the children away from religious convictions that appear to the parents to be wrong or harmful (cf. BVerfGE 93, 1 [17]). However, Article 6.2 of the Basic law does not contain an exclusive right of education for the parents. Separately and in its sphere given equal rights beside the parents, the state, to which under Article 7.1 of the Basic Law the supervision of all education is delegated, exercises its own duty to provide education (cf. BVerfGE 34, 165 [183]; 41, 29 [44]). How this duty is to be carried out in detail, and in particular to what extent religious references are to have their place at school, is subject within the limits laid down by the Basic Law, above all in Article 4.1 and 4.2 of the Basic Law, to the freedom of organisation of the *Länder* (cf. BVerfGE 41, 29 [44, 47, 48]; 52, 223 [242, 243]; for details, see dd) below).

cc) Finally the freedom to exercise religious conviction relied on by the complainant conflicts with the negative freedom of faith of the pupils in her wearing of a headscarf at school and in lessons. Article 4.1 and 4.2 of the Basic Law, which protects equally the negative and the position manifestations of freedom of faith, also guarantees the freedom to stay away from cultic acts of a religion that is not shared; this also applies to cults and symbols in which a belief or a religion represents itself. Article 4 of the Basic Law leaves it to the individual to decide what religious symbols he or she recognises and reveres and which he or she rejects. Admittedly, in a society that affords space to differing religious convictions, he or she has no right to be spared cultic acts, religious symbols and professions of other faiths. But this must be distinguished from a situation created by the state in which the individual is exposed without an alternative to the influence of a particular faith, to the actions in which this manifests itself and the symbols through which it presents itself (cf. BVerfGE 93, 1 [15, 16]). In this respect, Article 4.1 and 4.2 of the Basic Law have the effect of securing freedom precisely

in areas of life that are not left to be organised by society itself but that the state has taken responsibility for (cf. BVerfGE 41, 29 [49]); this is affirmed by Article 140 of the Basic Law in conjunction with Article 136.4 of the Weimar Constitution, which prohibits forcing anyone to take part in religious exercises.

dd) The Basic Law gives the *Länder* a broad freedom of organisation in education; in relation to the ideological and religious character of state schools too, Article 7 of the Basic Law takes account of the fact that the *Länder* are to a large extent independent and within the limits of their sovereignty in education matters may in principle organise compulsory schools freely (cf. BVerfGE 41, 29 [44, 45]; 52, 223 [242, 243]). The relationship between the positive freedom of faith of a teacher on the one hand and the state's duty of religious and ideological neutrality, the parents' right of education and the negative freedom of faith of the pupils on the other hand, taking into account the requirement of tolerance, is inevitably sometimes strained, and it is the duty of the democratic Land legislature to resolve this tension; in the public process of developing an informed opinion, the legislature must seek a compromise that is reasonably acceptable to everyone. When legislating, the legislature must orientate itself to the fact that on the one hand Article 7 of the Basic Law permits ideological and religious influences in the area of education, provided the parents' right of education is preserved, and on the other hand Article 4 of the Basic Law requires that ideological and religious constraints are excluded as far as at all possible when the decision is made in favour of a particular form of school. The provisions must be seen together, and their interpretation and their area of influence must be coordinated with each other. This includes the possibility that the individual *Länder* may make different provisions, because the middle course that needs to be found may also take into account school traditions, the composition of the population by religion, and whether it is more or less strongly rooted in religion (cf. BVerfGE 41, 29 [50, 51]; 93, 1 [22, 23]).

These principles also apply to the answer to the question as to the extent to which teachers may be subjected to duties as to their appearance and conduct at school, restricting their individual fundamental right of freedom of faith, in connection with the preservation of the ideological and religious neutrality of the state.

5. If teachers introduce religious or ideological references at school, this may adversely affect the state's duty to provide education, which is to be carried out in neutrality, the parents' right of education and the negative freedom of faith of the pupils. It at least opens up the possibility of influence on the pupils and of conflicts with parents that may lead to a disturbance of the peace of the school and may endanger the carrying out of the school's duty to provide education. The dress of teachers that is religiously motivated and that is to be interpreted as the profession of a religious conviction may also have these effects. But these are only abstract dangers. If even such mere possibilities of endangerment or of a conflict as a result of the appearance of the teacher, rather than concrete behaviour that presents itself as the attempt to influence or

even proselytise the school children for whom the teacher is responsible, are to be seen as an infringement of duties under civil service law or as a lack of aptitude which prevents appointment as a civil servant, then, because this entails the restriction of the unconditionally granted fundamental right under Article 4.1 and 4.2 of the Basic Law, it requires a sufficiently specific statutory basis permitting it. This is lacking in the present case.

a) In considering the question of whether a specific form of dress or other outward sign has a religious or ideological significance in the nature of a symbol, attention must be paid to the effect of the means of expression used and to all possibilities of interpretation that are possible. Unlike the Christian cross (on this, see BVerfGE 93, 1 [19, 20]), the headscarf is not in itself a religious symbol. Only in connection with the person who wears it and with the conduct of that person in other respects can it have such an effect. The headscarf worn by Muslim women is perceived as a reference to greatly differing statements and moral concepts:

> As well as showing the desire to observe dress rules that are felt to be binding and have a religious basis, it can also be interpreted as a symbol for upholding traditions of the society of the wearer's origin. In the most recent times, it is seen increasingly as a political symbol of Islamic fundamentalism that expresses the separation from values of western society, such as individual self-determination and in particular the emancipation of women. However, according to the findings of fact in the non-constitutional courts, which were also confirmed in the oral hearing, this is not the message that the complainant wishes to convey by wearing the headscarf.
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> The expert witness Dr. Karakasoglu, who was heard in the oral hearing, carried out a survey of about 25 Muslim students at colleges of education, twelve of whom wore a headscarf, and on the basis of this survey she showed that the headscarf is also worn by young women in order to preserve their own identity and at the same time to show consideration for the traditions of their parents in a diaspora situation; in addition, another reason for wearing the headscarf that had been named was the desire to obtain more independent protection by signalling that they were not sexually available and integrating themselves into society in a self-determined way. Admittedly, the wearing of the headscarf was intended to document in public the value one placed on religious orientation in one's own life, but it was understood as the expression of an individual decision and did not conflict with a modern lifestyle. As understood by the women questioned, preserving their difference is a precondition for their integration. It is not possible to make any statements that are representative of all Muslim women living in Germany on the basis of the interviews conducted and evaluated by the expert witness, but the results of the research show that in view of the variety of motive, the interpretation of the headscarf may not be reduced to a symbol of the social repression of women. Rather, the headscarf can for young Muslim women also be a freely chosen means to conduct a self-determined life without breaking with their culture of origin. Against this background, there is no evidence that the complainant, merely because she wears a headscarf, might for example make it more difficult for Muslim girls who are her pupils to develop an image of woman that corresponds to the values of the Basic Law or to put it into effect in their own lives.

> To assess whether the intention of a teacher to wear a headscarf at school and in lessons constitutes a lack of aptitude, the decisive question is what effect a headscarf can have on someone who sees it (the objective standpoint of the onlooker); therefore all conceivable possibilities as to how the wearing of a headscarf might be regarded, must be taken into account in the assessment. However, this has no effect on the fact that the complainant, who plausibly stated that she had religiously motivated reasons for her decision always to wear a headscarf in public, can rely for this conduct on the protection of Article 4.1 and 4.2 of the Basic Law, which is closely related to the paramount constitutional value of human dignity (Article 1.1 of the Basic Law; cf. BVerfGE 52, 223 [247]).

b) With regard to the effect of religious means of expression, it is necessary to distinguish whether the symbol in question is used at the instigation of the school authority or on the basis of one single teacher's personal decision; such a teacher may rely on the individual right of freedom in Article 4.1 and 4.2 of the Basic Law. If the state tolerates teachers wearing dress at school that they wear by reason of a personal decision and that can be interpreted as religious, this cannot be treated in the same way as a state order to attach religious symbols at school (on this, cf. BVerfGE 93, 1 [18]). The state that accepts the religious statement of an individual teacher associated with wearing a headscarf does not in so doing make this statement its own and is not obliged to have this statement attributed to it as intended by it. The effect of a headscarf worn by the teacher for religious reasons may, however, become particularly intense because the pupils are confronted with the teacher, who is the focal point of lessons, for the whole time when they are at school without a possibility of escape. On the other hand, the teacher may differentiate when explaining to the pupils the religious statement made by a garment, and in this way she may weaken its effect.

c) There is no confirmed empirical foundation for the assumption that the complainant would commit an infringement of her official duty because of the feared controlling influence of her headscarf on the religious orientation of the school children.

   In the oral hearing, the expert witness Professor Dr. Bliesener was heard on this point; he stated that from the point of view of developmental psychology there is at present no confirmed knowledge that proves that children are influenced solely because every day they meet a teacher who wears a headscarf at school and in lessons. Only if there were also conflicts between parents and teacher that might arise in connection with the teacher's headscarf were onerous effects to be expected, in particular on younger pupils. The two other expert witnesses heard by the Senate, Ms Leinenbach, Director of the Psychology Department, and Professor Dr. Riedesser, presented no information that contradicted this. Such an unconfirmed state of knowledge is not sufficient as the basis of an official application of the indeterminate legal concept of aptitude, which encroaches substantially upon the complainant's fundamental right under Article 4.1 and 4.2 of the Basic Law.

d) At all events, there was not a sufficiently definite statutory basis for rejecting the complainant for lack of aptitude as a result of her refusal to remove the headscarf at school and in lessons.

The school authority and the non-constitutional courts present the view that the complainant's intention to wear a headscarf as a teacher constitutes a lack of aptitude because pre-emptive action should be taken against possible influence on the pupils, and conflicts, which cannot be ruled out, between teachers and pupils or their parents should be avoided in advance; at present this view does not justify encroaching upon the complainant's right under Article 33.2 of the Basic Law, which is equivalent to a fundamental right, nor the accompanying restriction of her freedom of faith. No tangible evidence could be seen in the proceedings before the nonconstitutional courts that the complainant's appearance when wearing a headscarf created a concrete endangerment of the peace at school. The fear that conflicts might arise with parents who object to their children being taught by a teacher wearing a headscarf cannot be substantiated by experience of the complainant's previous teaching as a trainee. The current civil service and school legislation in the Land Baden-Württemberg is not adequate to permit a prohibition on teachers wearing a headscarf at school and in lessons on the grounds of abstract endangerment. The mere fact that conflicts cannot be ruled out in future does not, in the absence of a legal basis designed for this purpose, justify deriving from the general civil service law requirement of aptitude an official duty on the part of the complainant to give up exercising her religious conviction by wearing a headscarf.

Under civil service law, in view of the state's duty of religious and ideological neutrality at school described above under B. II 4. b) aa), neither the concept of aptitude contained in s. 11.1 of the Baden-Württemberg Civil Service Act nor the duties for civil servants laid down in ss. 70 et seq. of the Baden-Württemberg Civil Service Act, which are to be taken into consideration as orientation in assessing the aptitude of an applicant for a public office, can serve as the basis for a duty of teachers not to permit their affiliation to a particular religion or ideology to be outwardly discernible, in order in this way to pre-emptively counter potential dangers.

Under s. 70.1 sentence 1 of the Baden-Württemberg Civil Service Act, the civil servant serves all the people, and under s. 70.1 sentence 2 the civil servant must fulfil his or her duties impartially and fairly, and must take account of the welfare of the public in carrying out his or her duties. Under s. 70.2 of the Baden-Württemberg Civil Service Act, the civil servant must acknowledge the free democratic fundamental order of the Basic Law and stand up for its preservation in all his or her conduct. It is not apparent that the complainant would be prevented from doing this by wearing a headscarf. Nor does the requirement of moderation in s. 72 of the Baden-Württemberg Civil Service Act, which provides that a civil servant who is involved in politics shall observe the moderation and restraint that follow from his or her position *vis-à-vis* the whole of society and from the consideration for the duties of his or her office, cover the case of wearing a headscarf for religious reasons. The same applies to the duty of civil servants to devote themselves with full dedication to their office (s. 73.1 of the Baden-Württemberg Civil Service Act), to exercise their office unselfishly to the best of their belief (s. 73.2 of the Baden-Württemberg Civil Service Act) and to base their conduct

both on duty and off duty on doing justice to the respect and the confidence demanded by their profession (s. 73.3 of the Baden-Württemberg Civil Service Act). A prohibition preventing teachers at a state primary school and non-selective secondary school from wearing a headscarf for religious reasons and that restricts fundamental rights cannot be derived from these general duties under civil-service law. Finally, s. 94 of the Baden-Württemberg Civil Service Act contains no regulations on a particular form of working dress for teachers.

Nor do the provisions in Articles 11 to 22 of the Constitution of the Land Baden-Württemberg of 11 November 1953 (Baden-Württemberg Law Gazette p. 173) on education and teaching and the Baden-Württemberg Education Act (Schulgesetz für Baden-Württemberg - SchG) as amended on 1 August 1983 (Baden-Württemberg Law Gazette p. 397), in particular ss. 1 and 38 thereof, contain any provision under which the general civil service law duties of moderation and restraint for teachers could be interpreted in concrete terms to mean that they were not permitted at school to wear any dress or other symbols that show that they belong to a particular religious group. At present, therefore, the necessary sufficiently definite statutory basis does not exist to decide that teachers of the Islamic faith, by reason of their declared intention to wear a headscarf at school, lack aptitude for service at the primary school and non-selective secondary school and thus to restrict their fundamental right under Article 4.1 and 4.2 of the Basic Law.

6. However, the Land legislature responsible is at liberty to create the statutory basis that until now has been lacking, for example by newly laying down the permissible degree of religious references in schools within the limits of the constitutional requirements. In doing this, the legislature must take into reasonable account the freedom of faith of the teachers and of the pupils affected, the parents' right of education and the state's duty of ideological and religious neutrality.

a) The Federal Administrative Court, in the judgment challenged, emphasised *inter alia* that with growing cultural and religious variety, where an increasing proportion of schoolchildren were uncommitted to any religious denomination, the requirement of neutrality was becoming more and more important, and it should not, for example, be relaxed on the basis that the cultural, ethnic and religious variety in Germany now characterised life at school too. In the oral hearing, the representative of the Stuttgart Higher Education Authority, Professor Dr. F. Kirchhof, argued that the state's duty of ideological and religious neutrality in schools must now be treated more strictly, in view of the changed circumstances.

Social change, which is associated with increasing religious plurality, may be the occasion for redefining the admissible degree of religious references permitted at school. A provision to this effect in the Education Acts may then give rise to concrete definitions of teachers' general duties under civil service law, including duties with regard to their appearance, to the extent that the latter shows their affiliation to particular religious

convictions or ideologies. It is therefore conceivable that there could also be statutory restrictions of the freedom of faith, in compliance with the constitutional requirements. If it is apparent from the outset that an applicant will not comply with such rules of conduct, this can be stated to the applicant as a lack of aptitude.

A provision prohibiting teachers from continuously showing their membership in a particular religious group or belief by external signs is part of the law determining the relationship between state and religion in schools. The religious diversity in society, which has evolved gradually, is reflected here particularly clearly. School is the place where differing religious views inevitably collide and where this juxtaposition has particularly great effects. Tolerant coexistence with people of other beliefs could be practised here with most lasting effect through education. This need not mean denying one's own convictions; instead, it would give a chance for insight and to strengthen one's own point of view, and for mutual tolerance that does not see itself as reducing all beliefs to the same level (cf. BVerfGE 41, 29 [64]). Reasons could therefore be given for accepting the increasing variety of religions at school and using it as a means for practising mutual tolerance and in this way making a contribution to the attempt to achieve integration. On the other hand, the development described above is also associated with a greater potential for possible conflicts at school. There may therefore also be good reasons to accord the state duty of neutrality in schools a stricter importance that is more distanced than it has been previously, and thus, as a matter of principle, to keep religious references conveyed by a teacher's outward appearance away from the pupils in order to avoid conflicts with pupils, parents or other teachers.

b) It is not the duty of the executive to decide how to react to the changed circumstances, and in particular what rules of conduct with regard to dress and other aspects of behaviour towards schoolchildren should be imposed on teachers to define more specifically their general obligations under civil service law and to preserve religious peace at school, and what requirements therefore are part of aptitude for a teaching post. Rather, it is necessary for the democratically legitimated Land Legislature to make provisions in this respect. Only the legislature has a prerogative of evaluation to assess the actual developments; it depends on this assessment whether conflicting fundamental rights of pupils and parents or other values of constitutional status justify legislation that imposes on teachers of all religions extreme restraint in the use of symbols with religious reference; authorities and courts cannot exercise this prerogative of evaluation themselves (cf. BVerfGE 50, 290 [332, 333]; 99, 367 [389, 390]). The assumption that a prohibition of wearing headscarves in state schools may be a permissible restriction of freedom of faith as an element of a legislative decision about the relation between state and religion in the education system is also in harmony with Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (cf. European Court of Human Rights, decision of 15 February 2001, Neue Juristische Wochenschrift 2001, pp. 2871et seq.).

aa) The constitutional necessity of legislation follows from the principle of the requirement of parliamentary approval. The principle of a constitutional state and the requirement of democracy oblige the legislature to pass the provisions essential for the realisation of fundamental rights itself (cf. BVerfGE 49, 89 [126]; 61, 260 [275]; 83, 130 [142]). How far the legislature must itself determine the guidelines necessary for the area of life in question depends on its relation to fundamental rights. The legislature does have such an obligation if conflicting fundamental civil rights collide with each other and the limits of each are fluid and can be determined only with difficulty. This applies above all if the fundamental rights affected, like positive and negative freedom of faith in the present case and the parents' right of education are, by the wording of the constitution, guaranteed without a constitutional requirement of the specific enactment of a statute and a provision intended to organise this area of life is necessarily obliged to determine and specify their limits inherent in the Basic Law. Here, the legislature has a duty at all events to determine the limits of the conflicting guarantees of freedom at least to the extent that such a determination is essential to the exercise of these civil rights and liberties (cf. BVerfGE 83, 130 [142]).

When it is necessary for parliament to pass legislation can be decided only in view of the subject area and the nature of the object of constitutional definition involved. The constitutional criteria of evaluation here are to be derived from the fundamental principles of the Basic Law, in particular the fundamental rights guaranteed there (cf. BVerfGE 98, 218 [251]). Admittedly, the mere fact that a provision is politically controversial does not mean that it would have to be seen as essential (cf. BVerfGE 98, 218 [251]). Under the constitution, however, the restriction of fundamental freedoms and the balancing of conflicting fundamental rights are reserved to parliament, in order to ensure that decisions with such repercussions result from a procedure that gives the public the opportunity to develop and express its opinions, and that requires parliament to clarify the necessity and extent of encroachments upon fundamental rights in public debate (cf. BVerfGE 85, 386 [403, 404]).

In the education system in particular, the requirements of a constitutional state and the principle of democracy of the Basic Law oblige the legislature to make the essential decisions itself and not to leave them to the school board (cf. BVerfGE 40, 237 [249]; 58, 257 [268, 269]). This also applies, and applies in particular, if and to the extent that, in reaction to changed social circumstances and increasing ideological and religious variety at school it is intended to respond with a stricter restraining of all religious references and thus to newly define the state's duty of neutrality within the boundaries laid down by the constitution. Such a division is of considerable significance for the realisation of fundamental rights in the relationship between teachers, parents and children, and also the state.

bb) A provision that one of the duties of a teacher is to refrain in class from wearing a headscarf or any other indications of religious conviction is a material (wesentlich) provision in the meaning of the case law on the requirement of parliamentary approval. It encroaches substantially upon the freedom of faith of the person affected. It also affects people belonging to various religions with varying intensity, depending on whether they regard the observance of particular dress customs as part of the exercise of their religion or not. As a result, it has special effects of exclusion for particular groups. Because of this relation to groups, the creation of such an official duty for teachers is of material significance, over and above its significance for the exercise of the individual fundamental right, for the function of social organisation inherent in the freedom of faith.

Finally, the introduction of an official duty that prohibits teachers from allowing their outward appearance to show their religion must be expressly laid down by statute, for one reason because such an official duty can only be justified and enforced in a constitutional manner - *inter alia* compatible with Article 33.3 of the Basic Law - if members of different religious groups are treated equally by it. This is not guaranteed to the same extent if it is left to authorities and courts to decide from case to case whether such an official duty exists and what its scope is, depending on their predictions as to the potential for influence and conflict of identifying characteristics of religious affiliation in the appearance of the teacher in question.

III.

As long as there is no statutory basis that indicates specifically enough that teachers at the primary school and non-selective secondary school have an official duty to refrain from identifying characteristics of their religious affiliation at school and in lessons, then on the basis of prevailing law it is incompatible with Article 33.2 in conjunction with Article 4.1 and 4.2 of the Basic Law and Article 33.3 of the Basic Law to assume that the complainant lacks aptitude. The decisions challenged by the constitutional complaint therefore infringe the legal position of the complainant guaranteed in these provisions. The judgment of the Federal Administrative Court is overturned and the matter is referred back to the Federal Administrative Court (s. 95.2 of the Federal Constitutional Court Act, Bundesverfassungsgerichtsgesetz - BVerfGG). It is to be expected that the proceedings can be concluded there on the basis of s. 11.1 of the Baden-Württemberg Land Civil Service Act, which under s. 127 number 2 of the Civil Service Law Framework Act admits an appeal on a point of law; in these proceedings, the decisive concept of aptitude must be interpreted and applied in accordance with the provisions - amended if applicable - of the law of school education of the Land.

Extracts from the Dissenting Opinion of the judges Jentsch, Di Fabio and Mellinghoff

The majority of the Senate assumes that particular official duties of a civil servant, if they are connected to the civil servant's freedom of religion or ideology, may be created only by a law passed by parliament. Until now, this view has been stated neither in case law nor literature, nor by the complainant herself. If this point of view is adopted, not only does the fundamental constitutional question submitted to the court as to the state's neutrality in the school's sphere of training and education remain undecided; the view also results in an erroneous weighting, not based on the Basic Law, in the system of the separation of powers and in the understanding of the normative power of fundamental rights in connection with access to public offices. The decision disregards the expressly stated intention of the Baden-Württemberg Land parliament that it would not pass a formal statute by reason of the complainant's case; in addition, it leaves the parliament uncertain as to how a constitutional provision can be made. Finally, the majority of the Senate gives the Land legislature no possibility of preparing itself for the new situation under constitutional law that the Senate assumes will exist, and neglects to inform the judiciary and the administration how they are to proceed until a Land statute is passed.

I.

In order to justify the constitutional requirement that a statute must be specifically enacted, the majority of the Senate wrongly assumes that there was a serious encroachment upon the complainant's freedom of religion and ideology. In this they fail to appreciate the functional restriction, with regard to civil servants, of the protection of fundamental rights. In the case of access to a public office, there is no open situation where legal interests of equal value are weighed up; the legal relationship that is essential to the realisation of fundamental rights at school is shaped in the first instance by the protection of the fundamental rights of pupils and parents.

1. Those who become civil servants place themselves by a free act of will on the side of the state. A civil servant can therefore not rely on the effect of the fundamental rights to guarantee freedom in the same way as someone who is not part of the state organisation. In exercise of their public office, therefore, civil servants are protected by the promise of freedom as against the state guaranteed by fundamental rights only to the extent that no restrictions arise from the special reservation to civil servants of the exercise of sovereign powers. Teachers with the status of civil servants, even within the scope of their personal pedagogical responsibility, do not teach in exercise of their own freedom, but on the instructions of the general public and with responsibility to the state. Teachers who are civil servants therefore from the outset do not enjoy the same protection by fundamental rights as parents and pupils: instead, the teachers are bound by the fundamental rights because they share in the exercise of state authority.

In formulating official duties for the civil servants, the state administrative authority also fulfils the requirements of its obligation under Article 1.3 of the Basic Law; the civil servant's official duty is the reverse side of the freedom of the citizen who is confronted by state authority in the person of the official. If official duties are imposed on the teacher for the exercise of his or her office, therefore, this is not a matter of encroachments upon society outside the state-controlled sphere or an occasion for the ensuing call for law passed by parliament to protect the citizen. The state relies on official duties to ensure in its internal sphere uniform administration complying with statute and the constitution.

The majority of the Senate did not take this difference in structure adequately into account. As a result, the situation of the teacher on the one hand and of the pupils and parents on the other hand, which differ with regard to fundamental rights, are not correctly understood. In particular the legal position of the applicant, who has no legal claim to enter the sphere of state control as he or she desires, may not be seen under the aspect of a subject of fundamental rights defending himself or herself against the state. Voluntary entry into the status of a civil servant is a decision made by the applicant in freedom, choosing obligation to the public interest and loyalty to an employer that, in a democracy, acts for the people and is monitored by the people. A person who wishes to become a civil servant may therefore not reject the requirement of moderation and of occupational neutrality, neither in general nor with reference to specific official or private constellations that can be recognised in advance. At all events it cannot be reconciled with these duties if the civil servant plainly uses his or her employment, within the sphere of that civil service, as a space to profess beliefs, and thus effectively as a stage on which to develop the civil servant's own fundamental rights. The duty conferred on the civil servant consists in expertly, objectively, dispassionately and neutrally assisting in giving effect to democratic intention, that is, the intention of legislation and of the responsible government, and in taking second place as an individual where the civil servant's claims to realisation of his or her personality are likely to create conflicts in his or her employment and thus obstacles to the realisation of democratically formed will.

2. Civil servants are fundamentally different from those citizens who are subjected to a special status relationship by measures of public authority but do not in this connection enter the sphere of the state, merely a special legal relationship, such as pupils and their parents, who have the right to educate them, in the compulsory state school (BVerfGE 34, 165 [192, 193]; 41, 251 [259, 260]; 45, 400 [417, 418]; 47, 46 [78 seq.]) or prisoners in prison (BVerfGE 33, 1 [11]). It is therefore an error to believe that it is possible to fight another battle for the Basic Law's idea of freedom, following the struggle against the institution of the special relationship of subordination (besonderes Gewaltverhältnis), by emphasising fundamental rights positions in the internal sphere of the civil service. The opposite is the case. If one sees teachers, who are bound by fundamental rights, primarily as subjects of fundamental rights, and thus sees the teacher's personal liberty rights in opposition to those of pupils and parents, one reduces the freedom of those for whose sake the theory of materiality (Wesentlichkeitstheorie, the theory that material decisions must be laid down by the legislature rather than decided by the executive), broadened the constitutional requirement in school education law that matters should be specifically enacted in statutes.

The relationship of the civil servant to the state is a particular relationship of proximity with its own inherent rules, which are recognised by the constitution and regarded as worth preserving. Under the balanced concept of the Basic Law, civil servants are certainly intended to be freedom-conscious citizens - if not, loyalty to the free constitution would only be lip service - but at the same time they are to observe the fundamental priority of official duties and the intention of the democratic institutions embodied in it. As a personality, the civil servant is not a mere "instrument of execution", even if he or she decides to work for the public good. Those who wish to become civil servants, however, must loyally identify themselves with the constitutional state in important fundamental questions and when observing their official duties,

because the state, conversely, is represented by its civil service and is identified with the concrete civil servant. All the principles of the permanent civil service are dominated by this idea of reciprocity and proximity.

Fundamental personal liberty rights of a civil servant or of a person applying for a public office are therefore from the outset guaranteed only to the extent that they are compatible with these laws inherent to the civil service. They form part of these necessities of the civil service if there is no fear of obstructions to the working routine. Any other approach than such a priority of the exercise of sovereign powers with regard to fundamental rights of the civil servants in office would be incompatible with the constitutional requirement of practical concordance. Failing this, the interpretation of the constitution would give rise to a contradiction that is not contained in the Basic Law itself. The fundamental rights are intended to guarantee distance between political power and society outside state control, and they are not intended to take effect in the very context where the constitution intends there to be a particular proximity and therefore excludes mutual distancing.

The fundamental rights preserve distance between citizens and state authority precisely in order to place limits upon state rule (Loschelder, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, vol. V, 2nd ed., 2000, s. 123, marginal number 16; Di Fabio, Veröffentlichun-gen der Vereinigung der Deutschen Staatsrechtslehrer, VVDStRL, 56, p. 235 [253, 254]). This most elevated function of the fundamental rights may not, however, develop without restriction where the distance is specifically intended to be removed by incorporation into the state and therefore the constitution does not intend the distance to exist. In a relationship of proximity that is institutionally desired by the constitution, therefore, the most basic function of a fundamental right cannot assert itself without calling into question the relationship of proximity and the constitution's decision in favour of a democratically guided civil service.

3. The evaluation of aptitude in connection with the special right of equality under Article 33.2 of the Basic Law must not be mistaken for an encroachment upon the freedom under Article 4.1 of the Basic Law.

The requirement and, as it were, the normal case of classical civil rights and liberties is an intrusion by state authority into the sphere of the citizen. The constellations in which the citizen approaches the state, claims benefits from the general public or offers his or her services to the general public deviate from this normal case. Here, state authority does not intrude on society, but subjects of fundamental rights seek proximity to the state organisation, desire the state to act, seek a legal relationship.

The constitutional complaint challenges the violation of Article 33.2 in conjunction with Article 33.3 of the Basic Law and therefore relies on a special right of equality. If rights of equality are asserted in isolation or connection with a claim for performance, however, the constitutional requirement of the specific enactment of a statute cannot be relied on. The infringement of equality does not give rise to an encroachment upon a right of freedom that could trigger the requirement of the specific enactment of a statute. The constellation surrounding the encroachment is different: the appointment of a teacher whose person does not offer a

guarantee that he or she will carry out his or her duties neutrally in class indirectly affects fundamental rights of the pupils and their parents; as a result, at best there could be a discussion as to whether a statute is necessary with regard to protecting the freedom of the pupils and parents.

If the state forbids a person to wear a headscarf, which is at least in part motivated by religion, in a public place, it undoubtedly encroaches upon the fundamental right of freedom of religion. If the civil servant, on the other hand, wishes to display indications that are understood as religious in a space that the constitution has already defined as neutral - in this case when teaching in a compulsory state school - and as a representative of the general public, the civil servant is not exercising, in the social sphere, a freedom to which he or she is entitled as an individual. The civil servant's exercise of freedom at work is from the outset restricted by the necessities and above all the constitutional definition of the office; if this were not so, the realisation of the will of the people would fail for an excess of personal liberty rights on the part of the representatives of the state. When carrying out his or her official duties, the teacher must respect the fundamental rights of the pupils and their parents; the teacher is not merely on the state's side, but the state also acts through the teacher. Those who see the civil servant, except in questions of status, as having unrestricted fundamental rights *vis-à-vis* the civil servant's employer dissolve the boundary that has been drawn, in order to create liberty for children and parents, between the state and society. In this way they accept the risk that the democratic development of informed opinion will become more difficult, and in place of this they prepare the way for the courts to weigh the fundamental rights of teachers, parents and pupils, a process which is difficult to monitor.

4. Finally, another reason for which there is no need for a statute is that the evaluation of the aptitude of a civil servant has indirect effects in a legal relationship that is material for fundamental rights. Admittedly, in the past the application of the constitutional requirement in education law that a statute be specifically enacted was extended for the sake of the parents and pupils, but not to protect the teachers who were civil servants. The situation of civil servants, as a relationship of particular proximity between citizen and state, was, unlike education law with its character of a benefit directed outwards and affecting the rights of parents, specifically not understood as a legal relationship shaped by the civil servant's claim to fundamental rights (cf. Oppermann, Verhandlungen des 51. Deutschen Juristentages 1976, vol. I, part C, reports, Nach welchen rechtlichen Grundsätzen sind das öffentliche Schulwesen und die Stellung der an ihm Beteiligten zu ordnen?, C 46-47).

From the point of view of materiality, therefore, it could be of significance only if a Land permitted the headscarf, or other religious or ideological symbols likely to lead to conflict, in class. For then, even without the encroachment upon fundamental rights affecting the rights of pupils and parents, already specifically asserted, a dangerous situation from the point of view of fundamental rights would have arisen that needed to be legislated for. An extension of the constitutional requirement of the specific enactment of a statute, under the aspect of materiality, to include civil rights and liberties of the teacher in exercising his or her official duties, on the other hand, has not yet been advocated.

II.

The civil servant's duty of neutrality follows from the constitution itself; it does not need to be further supported by Land statutes. Civil servants who give no guarantee that in their conduct as a whole they will carry out their duties neutrally and in a way appropriate to the requirements of the particular employment lack aptitude in the meaning of Article 33.2 of the Basic Law (cf. BVerfGE 92, 140 [151]; 96, 189 [197]).

The grounds given by the majority of the Senate push the constitutional personal liberty rights a long way into civil-service law without giving appropriate weight to the structural decision made by the Basic Law in Article 33 of the Basic Law. These grounds can therefore not be brought into accord with fundamental statements of the constitution on the relationship between society and state. In particular, they misjudge the position of the civil service in realising democratic will.

1. Those who aspire to a public office seek in the status activus (rights to take part in a democratic state) proximity to public authority and, like the complainant, wish to create a particular relationship of service and loyalty to the state. This particular position of duty, which is constitutionally protected by Article 33.5 of the Basic Law, takes precedence over the protection of the fundamental rights (cf. BVerfGE 39, 334 [366, 367]), which in principle applies to civil servants too, to the extent that the duty and purpose of the public office so require. Accordingly, the citizen's right arising under Article 33.2 of the Basic Law grants equal access to public offices only if the applicant fulfils the factual requirements of the right, which is equivalent to a fundamental right, - aptitude, qualifications and professional achievement. The employer is authorised and constitutionally obliged to determine that an applicant is fit for a public office (Article 33.2 of the Basic Law).

In this discretionary decision, it is necessary to assess aptitude, qualifications and professional achievement; this is an act of evaluative decision-making, and it is to be reviewed by the court only to a restricted extent, to determine whether the administrative authority based the assessment on incorrect facts and whether it misjudged the civil service law and constitutional-law framework within which it can move without restriction. Apart from this, since there is no right to be accepted into the status of a civil servant, the review is restricted to checking for arbitrariness (cf. BVerfGE 39, 334 [354]). The interpretation of the indeterminate legal term "aptitude" necessitates a predictive decision in which the employer must comprehensively evaluate all the characteristics that the office in question requires of its holder (cf. BVerfGE 4, 294 [296, 297]; BVerwGE 11, 139 [141]).

Here, the employer must also give a prediction as to whether the applicant will fulfil his or her professional duties in future in the office sought. Aptitude includes not only a guarantee that the civil servant is equal to the professional tasks, but also that the civil servants person satisfies the fundamental requirements that are indispensable for the exercise of a public office that has been conferred. One of these requirements, which are protected by Article 33.5 of the Basic Law with constitutional status, is the guarantee that the civil servant will observe his or her official duties neutrally. What degree of restraint and neutrality can be required of the civil servant in the individual case is determined not only by general principles, but also by the concrete requirements of the office.

2. The state whose constitution is the Basic Law needs the civil service in order that the will of the people may take effect in practice. The civil service realises the decisions of parliament and of the responsible government; it puts the principle of democracy and the constitutional state into a concrete form (Article 20.1 of the Basic Law). The design of the constitution aims at democratic rule in a legally constituted form. Both the legislation passed by parliament and the political leadership given by the government therefore require the neutral civil service with its expert knowledge (cf. BVerfGE 7, 155 [163]). Statute and law are a promise for the citizen who is subject to state authority that the form in which a fact situation will be legislated on will be abstract and general and without respect of person. In conformity with this, the civil servant too, who is called to implement the law and to realise the political will of the government in a legal form, acts as a neutral fiduciary *vis-à-vis* the citizen.

The decision in favour of the constitutional state requires the civil servant to be bound by statute, as a counterweight to the political leadership of the government. He or she realises the democratic will. Under the design of the Basic Law, sovereign duties are normally assigned to civil servants (Article 33.4 of the Basic Law). The permanent civil service, founded on factual knowledge, expert performance and loyal fulfilment of its duties, is intended to secure a stable administration and thus to act as a balancing factor in face of the political forces that shape life in the polity (cf. BVerfGE 7, 155 [162]; 11, 203 [216, 217]). Civil servants must carry out their tasks impartially and justly; in exercising their office they must take account of the public welfare, be loyal to the state and behave, both inside and outside their office, in such a way that they do justice to the respect and the trust that their position requires (cf. s. 35.1 of the Civil Service Law Framework Act; s. 73 of the Baden-Württemberg Land Civil Service Act). Their conduct in office must be oriented solely towards factual correctness, faithfulness to the law, justice, objectivity and the public interest. These obligations form a fundamental basis for the trust of the citizens that the duties of the democratic constitutional state will be fulfilled.

3. The requirement of neutrality and moderation for civil servants that follows from this is one of the tradition fundamental principles of the permanent civil service (Article 33.5 of the Basic Law); it has been enacted in nonconstitutional law in s.s. 35.1, 35.2 and 36 of the Civil Service Law Framework Act and in the civil service Acts of the *Länder* (cf. s. 72 of the Baden-Württemberg Land Civil Service Act: cf. BVerfGE 7, 155 [162]; Battis in: Sachs, Grundgesetz 3rd ed., Article 33, marginal number 71; Lübbe-Wolff in: Dreier, Grundgesetz, vol. II, 1998, Article 33, marginal number 78). This corresponds to the basic duty of neutrality of the state, which also applies in the sphere of religion and ideology, which is derived precisely from the freedom of faith of Article 4 of the Basic Law in conjunction with Article 3.3, Article 33.3 of the Basic Law and from Article 140 of the Basic Law in conjunction with Article 136.1, 136.4 and Article 137.1 of the Weimar Constitution (cf. BVerfGE 19, 206 [216]; 93, 1 [16, 17]; 105, 279 [294]). To this extent, the principles of the permanent civil service under Article 33.5 of the Basic Law create a direct constitutional reservation that in advance restricts the scope for civil servants to exercise their fundamental rights: to protect the fundamental rights of those who are not integrated into the state organisation.

The previous case law of the Federal Constitutional Court derived rights and duties of the civil servant directly from Article 33.5 of the Basic Law. Non-constitutional provisions governing the civil servant's rights and duties are possible and to a certain extent desirable here, but they are not constitutionally required (BVerfGE 43, 154 [169, 170]). The duties of the civil servant created directly under Article 33.5 of the Basic Law include moderation and restraint, in particular when carrying out his or her official business. If the civil servant in office behaves in a way that is not neutral politically, ideologically or in religion, he or she violates his or her official duties if the behaviour is objectively likely to lead to conflicts or obstruction in observing public duties (cf. BVerfGE 39, 334 [347]). Especially in religious and ideological matters, the civil servant must be restrained, because this is required of the state for whom the civil servant acts, for the sake of the freedom of the citizens.

Under Article 4.1 of the Basic Law and under Article 3.3 sentence 1, Article 33.3 and Article 140 of the Basic Law in conjunction with Article 136.1, 136.4 and 137.1 of the Weimar Constitution, the state and its institutions are obliged to conduct themselves neutrally in questions of religious and ideological belief and not to endanger religious peace in society (BVerfGE 105, 279 [294]). For this reason too, when the civil servant first joins the civil service he or she must, constitutionally, already offer a personal guarantee of neutral conduct that neither provokes nor challenges in carrying out his or her future duties (Article 33.5 of the Basic Law).

4. What degree of restraint and neutrality can be required of the civil servant in the individual case is determined not only by these general principles, but also by the concrete and changing requirements of the office. These requirements too need not be separately laid down by statute as official duties, because it is a specific mark of the permanent civil service that official duties are not understood as restrictions on the civil servant's freedom, but are laid down by the employer in accordance with the relevant needs of a constitutional and factually effective administration. The standard for the assessment of aptitude is marked out for the authority in its essential lines in this respect too by Article 33.5 of the Basic Law with regard to the principle of neutrality and moderation. These principles, which constitutionally apply directly, need no further statutory definition, even in relation to school. The non-constitutional law requirements of the civil servant's duty of political neutrality are to this extent declaratory and not integral to the assessment of aptitude on entry into public offices in the meaning of Article 33.2, Article 33.5 of the Basic Law.

The general duty of neutrality applies to a particular degree for civil servants who exercise the office of a teacher at state schools. Teachers carry out the state's duty to provide education and training (Article 7.1 of the Basic Law). In this, they have direct pedagogical responsibility for teaching and the education of the pupils. By reason of their function, they are put in a position to exercise influence on the development of the pupils entrusted to them in a way comparable to the parents. Connected with this is a restriction of the parents' right of education, which is guaranteed as a fundamental right (Article 6.2 sentence 1 of the Basic Law); this restriction can be accepted only if schools endeavour to achieve objectivity and neutrality not only in the political sphere, but also in religious and ideological matters. One reason why this is the case is that under Article 6.2 sentence 1 of the Basic Law the parents also have the right to

bring up children in religious and ideological respects and they can in principle keep convictions that they feel are wrong away from their children (cf. BVerfGE 41, 29 [48]; 41,88 [107]).Observing these rights is one of the essential duties of school, required by the Basic Law itself; at the same time, they are a mirror image of the official duties to be observed by the teachers.

III.

A teacher at a primary school or non-selective secondary school violates official duties if, in lessons, she uses symbols as part of her dress that are objectively likely to result in obstacles at school or even constitutionally significant conflicts in relation to school. The uncompromising wearing of the headscarf in class that the complainant seeks is incompatible with the requirement for a civil servant to be moderate and neutral.

1. When civil servants exercise a public office, even if they are modern, open and courageous, fundamental rights are guaranteed by the constitution only if there is no suspicion that there will be a marked conflict with the employer's development of informed political opinion and no obstacle to the exercise of the public office conferred. When the majority of the Senate assume that only the existence of tangible evidence of a "concrete endangerment of the peace of the school" is sufficient to deny the aptitude of an applicant for a civil service post, they misjudge the standard for the assessment of aptitude.

The Senate majority themselves also admit that religiously motivated dress of teachers may influence schoolchildren, lead to conflicts with parents and in this way disrupt the peace of the school. In the case of conflict in particular, they state, it must also be expected that there will be onerous effects on younger pupils. This potential situation of danger, however, cannot be cited in response to a prospective teacher at the stage of "abstract danger", but only when tangible evidence of the endangerment of the peace of the school has materialised. In this view, if conflicts have not crystallised, the authority making the appointment can no longer find there is a lack of aptitude.

In this view, the majority of the Senate misjudge the standard of evaluation for the assessment of aptitude under Article 33.2 of the Basic Law. For because the removal from office of a person retaining civil service status for life on account of violation of his or her official duties is possible under the traditional principles of permanent civil service only to a restricted extent and by way of formal disciplinary proceedings, the employer must in advance see to it that no one becomes a civil servant who cannot be guaranteed to observe the official duties under Article 33.5 of the Basic Law. The constitutionally legitimate means for this is the consideration and decision of whether the applicant has the necessary aptitude for the office applied for. Doubts as to this that cannot be removed permit the appointing authority to make a negative prediction, since here it is not possible to establish aptitude positively (cf. BVerfGE 39, 334 [352, 353]). Preventive measures to protect children and the parents' right of education, moreover, do not in principle require that a situation of danger be scientifically and empirically proved (cf. BVerfGE 83, 130 [140]).

Reference to the concept of "abstract danger", which is taken from police law, cannot therefore appropriately solve the conflicts in the assessment of aptitude. On the contrary, the free constitutional state is prohibited from postponing denying that civil servants have the necessary aptitude until it becomes probable that their foreseeable conduct in office will cause damage to particular objects of legal protection, as the concept of danger implies. The distinction between concrete and abstract danger may therefore be used to describe the classical threshold of interference in the relationship between the citizen and the state, but not to describe the standard for the discretion in appointment incumbent on state administration. It cannot accord with the civil service law reservation to civil servants of the exercise of sovereign powers if the constitutional state would have to rely on the threshold of danger under police law against its own civil servants who represent the state and through whom the state acts in order to control their conduct in office. This applies all the more in that the complainant wishes to teach primary school and non-selective secondary school pupils in a state compulsory school, that is, in an area that is sensitive for pupils and parents from the point of view of fundamental rights. In this respect it is therefore not a question of potential dangers or modalities of danger under police law, but merely whether the school authority, in putting into specific terms not only provisions of Land law, but also the constitutionally valid principles of permanent civil servants in the meaning of Article 33.5 of the Basic Law assumed on a basis that can be followed that there was a risk of a violation of duty. This is clearly the case.

2. The school board, on the evidence of the record of the conversations relating to aptitude and according to the statements in the oral hearing before the Federal Constitutional Court, certainly showed understanding of the complainant's religious convictions; conversely, however, the complainant clearly showed no understanding for the employer's desire to show neutrality. Except in extreme cases such as the immediate threat of violence, she found she would not be capable of refraining from wearing a symbol of strong religious and ideological expressiveness while teaching. Apart from the fact that this rigidity gives rise to doubts as to the complainant's prior loyalty to the political aims of her employer and the order of values in the Basic Law, *inter alia* in a possible conflict with religious convictions of Islam, in this way, even at the early stage of evaluation of aptitude, circumstances became known that would make it substantially more difficult to use the applicant in every function at school and that would bring the Land authority of the state into conflicts with pupils and their parents, but possibly also with other teachers, that can be predicted even today.

The headscarf worn by the complainant is here not to be assessed abstractly or from the point of view of the complainant, but in her concrete relationship to school. The requirements of the office of a teacher at the primary school and non-selective secondary school include the duty to avoid for his or her person political, ideological or religious symbols that are objectively expressive. In the teaching profession, teachers must refrain from using such meaningful symbols, which are likely to awaken doubts as to their neutrality and professional distance in topics that are controversial politically or from the point of view of religion or culture. Here it cannot be relevant what subjective meaning the teacher who is a civil servant associates with the symbols he or she uses. What is decisive is the objective effect of the symbol.

Assessing such an effect in concretely changing situations is fundamentally the duty of the employer and can be reviewed for plausibility and conclusiveness by courts only to a limited extent. The professionally competent administration is best suited to carry out the assessment; putting official duties into specific terms is traditionally a domain of the employer. In doing this, the employer must react to changing situations. The use of symbols changes over the course of time, as does the violence of the resonance created by them: sometimes slogans on political badges (e.g. "Stop Strauß"; "Nuclear Power - No Thanks") are in the foreground, sometimes symbols derived from religion such as the orange-coloured dress of the followers of Bhagwan (Osho) (BVerwG, Neue Zeitschrift für Verwaltungsrecht, NVwZ 1988, p. 937). The employer, in the last instance the competent Land minister in his parliamentary and political responsibility, with his particular expertise with regard to the requirements for functions in the school situation, must assess in each case what use of symbols by the civil servant is compatible with the requirements of civil-service law in general and with the special requirements in the teaching profession, or is to be prohibited.

3. A distinction between abstract and concrete danger, such as the majority of the Senate regard as significant, is of no importance here, and as a result has to date not been relied on to determine official duties or in connection with decisions as to aptitude. All that is important if there are proceedings at a non-constitutional court challenging the decision as to aptitude is whether the assessment that particular symbols are incompatible with the requirement of neutrality in the civil service was based on a clearly erroneous factual foundation or on conclusions that cannot be understood.

The assumption on which the decisions challenged rest that if the complainant were employed in a general primary school or non-selective secondary school in Baden-Württemberg there would be apprehension of possible interference with the peace of the school is understandable. The majority of the Senate also assume that a teacher who permanently wears the headscarf in lessons as an Islamic symbol does at least give rise to "abstract danger". A symbol worn by the teacher that is - at present - expressive and has objective religious, political and cultural meaning is indeed likely to encroach upon the negative freedom of religion of pupils and parents and upon the parents' right of education (Article 6.2 of the Basic Law). Especially the wearing of a garment that unequivocally indicates a particular religious or ideological conviction of a teacher at state schools may encounter lack of understanding or rejection among pupils who are of a different opinion or the persons entitled to educate them and may affect this category of persons in their fundamental right of negative freedom of belief because the pupils cannot escape such a demonstration of religious conviction.

Teaching and education at state schools are benefits given by the state; accepting these benefits has been made a statutory duty for the children. For children and their parents, therefore, taking part in school lessons is for all intents and purposes unavoidable. In addition, the children's opportunities in life depend substantially on their level of achievement and on the competence of school institutions and their practice with regard to appropriate support and education. Consequently, neither the parents nor the state can reasonably be expected to wait and see how conflicts develop in the individual case when a future conflict situation becomes

evident during the job interview. In addition, it seems likely that some parents will fail to protest because they fear there might be disadvantages for their child if they did so. The possibility that peace at school might be disrupted has, apart from this, already taken on a concrete form in the case of the complainant, as is shown by experience in teaching practice and the negative reaction of other teachers.

4. The assumption of the majority of the Senate that the cross on a classroom door and the headscarf of a teacher in class are not comparable, a comparison decided in favour of the complainant, misjudges the fundamental rights position of the pupils and parents affected. The decisive factor here is the influence to which the individual pupil in a compulsory state school and under state responsibility is subjected. If, in surroundings with a Christian influence, a cross hangs above the school door - not a large crucifix behind the teacher (cf. BVerfGE 93, 1 [18]) - this can scarcely any longer be regarded as an encroachment upon the negative freedom of religion or the parents' right of education. Children have too few associations with a mere everyday object on the wall that has no immediate relation to a concrete person or real world fact situation. The cross, over and above its religious significance, is too much a general cultural symbol for a culture, fed by Jewish and Christian sources, bound by values but open, that has become tolerant as a result of wide historical experience, some of it painful.

In contrast, teachers, as persons and as personalities, have a material moulding effect on the children, especially at primary school and in the function of class teachers. If a teacher wears striking dress, this creates impressions, gives rise to questions and encourages imitation. In the oral hearing, the expert witness Professor Dr. Bliesener stated on this point that the conduct of the teacher encourages the pupils to imitate it: this happens because the pupils at a primary school often have a close emotional relationship, and the teacher is also expect to aim for this, for pedagogical reasons, and because the attention of children is clearly directed at the teacher and the teacher's authority is also perceived in the context of the school.

The complainant's statement that if there were questions about the headscarf she would answer these untruthfully and in contradiction to her religious conviction, saying it was only a fashion accessory, is not appropriate to avoid a conflict of fundamental rights. For children too are aware of the religious significance of wearing a headscarf permanently, that is, even indoors. In addition, school children interact not only with the teacher, but also with their parents and wider social surroundings. Parents who answer their children's questions truthfully within their own understanding of education will not be able to avoid explaining that the teacher wears the headscarf because only in this way can she preserve in public her dignity as a woman. But here there are the seeds of a conflict with the moral concepts of children with non-Islamic parents, and possibly even with Islamic parents who do not believe in a requirement that women cover themselves in public. The objective irritation effect of a symbol that is also political and cultural may easily reach the child, by way of reactions in its social surroundings, and lead the child to ask whether, in a conflict of values that it cannot judge, it should take the side of the teacher or the side of its social surroundings, which decidedly reject the headscarf, and which may include its parents. In the oral hearing, the expert witness Professor Dr. Bliesener in this connection referred to the possibility that children of primary school age might be emotionally overtaxed if a permanent conflict developed between the teacher on the one hand and the parents or individual parents on the other hand.

5. In order that an official duty, directed towards moderation in the civil servant's dress, can lawfully be put into concrete terms by the employer, no empirical proof of "dangerous situations" is needed, and still less is it necessary for the Land legislature to carry out scientific surveys in order to establish the "endangerment". A constitutional requirement of the specific enactment of a statute with a duty for the legislature to offer proof, for the mere purpose of putting official duties into concrete terms and ordering them to be applied, is not merely foreign to the system, but also takes the free constitutional state further into an immobility that obstructs its effectiveness. It is quite adequate for the assessment of aptitude that the use of meaningful symbols as part of dress a conflict appears reasonably possible or even likely.

This is the case, because the headscarf clearly, at least in part, carries a heavy symbolic meaning as a symbol of political Islamism - this is shown even by the public reactions to the court proceedings instigated by the complainant - and corresponding defensive reactions are to be expected. This objective content also includes the emphasis of a moral distinction between women and men that is likely to lead to conflicts with those who in turn support equality, equal value and equal treatment in society of women and men (Article 3.2 of the Basic Law) as a high ethical value.

The assessment that permanently wearing a headscarf in lessons is incompatible with the civil servant's duty of ideological and religious neutrality was convincingly described as free from errors in all three administrative court judgments. The headscarf as a religious and ideological symbol for the necessity that women cover themselves in public is at all events at present objectively likely to give rise to contradiction and polarisation.

6. The complainant stated that she felt her dignity was violated if she appeared in public with her hair uncovered. Even if the complainant did not expressly state it in so many words, this suggests the converse conclusion that a woman who does not cover her head gives up her dignity. Such a distinction is objectively qualified to give rise to values conflicts at school. This applies even in the relationship between the teachers, but particularly in relation to parents; their children, experience shows, develop a special relationship to their teacher in the primary school in particular.

Whether it is politically or pedagogically right or wrong to confront children as soon as possible with other standards of value or a lives based on a different understanding of the dignity of women than that of their parents is legally immaterial. The only significant factor is whether the appointing authority's assessment is understandable when it argues that there is a possibility of conflicts at school that could perfectly well have been avoided if the teacher had shown moderation in this respect. The responsible school board assumed without error that this was the case.

The headscarf, worn as the uncompromising compliance with an Islamic requirement that the complainant assumed existed for women to cover themselves, at present represents for many people inside and outside the Islamic religious group for a cultural and political statement with a religious foundation, relating in particular to the relationship of the sexes to each other (cf. e.g. Nilüfer Göle, Republik und Schleier, 1995, pp. 104 et seq.; Erdmute Heller/Hassouna Mosbahi, Hinter den Schleiern des Islam, 1993, pp. 108 et seq.; Rita Breuer, Familienleben im Islam 2nd

ed. 1998, pp. 81 et seq.; Tariq Ali, Fundamentalismus im Kampf um die Weltordnung, 2002, pp. 97 et seq.). The majority of the Senate did not attach enough significance to this circumstance. As a result, they also did not consider the question as to whether, among the adherents of the Islam faith in Germany, there was a not insignificant or even growing number of people who regard the headscarf and the veil as a cultural challenge made to a society whose value system they reject, and above all, whether defensive reactions are to be expected from among the majority of the citizens of different faiths, and if so, what form these reactions might take. At all events, important commentators on the Koran are also of the opinion that the requirement that women cover their heads is based on the necessity of keeping women in their role of serving men, independently of the question as to whether a strict requirement to this effect even exists. This distinction between men and women is far removed from the values of Article 3.2 of the Basic Law.

It is therefore not important whether such an opinion is the only valid opinion within Islamic society or merely the predominant opinion, or whether the opinion submitted by the complainant in the proceedings, that the headscarf is, instead, a sign of the growing self-confidence and emancipation of women of Islamic faith, is held by a large number of persons. It is sufficient that the opinion that if women cover their heads this guarantees that they are subordinated to men is clearly held by a not insignificant number of the adherents of the Islam religion and is therefore likely to lead to conflicts with the equal rights of men and women, which is strongly emphasised in the Basic Law too.

7. In the claim asserted by the complainant to the right to work as a school teacher wearing a headscarf, she enters a grey area that is culturally and legally problematic and full of tension. Even one further step to completely covering her face, which is also practised in the Islamic religious community, might be regarded under an understanding of the German constitution, as incompatible with the dignity of humanity: free human beings show their faces to others.

But the Basic Law, in the sphere of society, also respects religious and ideological views that document a relation between the sexes that is difficult to reconcile with the order of values in the Basic Law, as long as they do not overstep the limits of the state's order of peace and law. The value system of the Basic Law, including its understanding of the equality of men and women, does not close itself to all change; it confronts challenges, reacts and preserves its identity in change.

This openness and tolerance does not, however, go so far as to grant entry into the civil service to symbols that challenge the existing standards of value and are therefore likely to result in conflicts. The fundamental openness and tolerance in society may not be transferred to the state's internal relationships. On the contrary: there is a constitutional requirement to keep the internal organisation of state administration free from the obvious possibility of such severe conflicts, in order that - in the concrete case - school lessons and education at school can proceed without interruption, and in general, because the state must remain capable of acting and must be able to conduct itself with a minimum of uniformity.

IV.

The majority of the Senate extend the constitutional requirement of the specific enactment of a statute to an area which, because it is dependent on the individual case and because it is subject to existing constitutional obligations, is in practice not accessible to control by statute (cf. BVerfGE 105, 279 [304]).

1. The parliament of the Land Baden-Württemberg expressly and with good reasons refused to pass a formal statutory provision occasioned by the assessment of aptitude in the present case. In the period relevant for this litigation, the Land parliament twice dealt with the problem of teachers who wish to wear a headscarf in class (Minutes of plenary proceedings (PlenarProt.) 12/23 of 20 March 1997, pp. 1629 et seq.; Minutes of plenary proceedings 12/51 of 15 July 1998, pp. 3977 et seq.). The concrete case of the complainant was debated in detail in the plenary debate of 15 July 1998 (Minutes of plenary proceedings 12/51 of 15 July 1998) and a resolution was passed on a motion by the parliamentary Republikaner party; the motion was for legislation to be passed (Land parliament document, LTDrucks, 12/2931 of 9 June 1998). By a large majority, with only the votes of the Republikaner party opposing, the parliament voted not to pass legislation on the question of assessment of aptitude with regard to the wearing of religious symbols in class. The decision was stated to have been made because broader and more detailed legislation was not necessary; statutory provision would make it more difficult to make the appropriate assessment of aptitude based on the individual case and thus also to exercise the scope for interpretation in awarding public offices and at the same to do justice to personal liberties.

The call for a formal statute, based on the federal constitution, does not result in any advantage from the point of view of materiality for the democratic basis of an administrative decision. In complex questions of the individual assessment of applicants for a public office, a formal statute that in principle encourages freedom can have the reverse effect of reducing freedom, since in this way measures designed for the individual case are made more difficult. A general statutory provision, which in any case is foreign to the system for laying down official duties and assessing aptitude under civil service law, does not create more justice in the individual case, but less. Under the scheme of school policy of the Land government and the Land parliament, it would certainly be possible to appoint a teacher wearing a headscarf to a teaching post in the individual case if it could be seen that she was prepared to refrain from wearing the headscarf not only in extreme situations, as submitted by the complainant in the oral hearing, but also in everyday teaching situations in a primary school.

The school authority, the minister and the Land parliament, however, took offence specifically at the fact that the complainant categorically refused to take a step in the direction of a more flexible approach to her attitude to the headscarf. From this, the authority responsible for assessing her aptitude was entitled to conclude that in the case of conflicts with the negative freedom of religion of parents and children, solutions adapted to the individual case at mixed-religion schools would be very much more difficult (cf. Article 15.1, Article 16 of the Constitution of the Land Baden-Württemberg). It was also entitled to conclude that the persistence of the applicant's refusal was capable of arousing doubts as to her neutrality and moderation, although this did not appear beyond objective justification and arbitrary.

2. The majority of the Senate requires the Land legislature to put constitutional restrictions inherent in the Basic Law into concrete terms, although they can be determined concretely enough from the Basic Law. It is therefore doubtful whether the Land legislature is even authorised to put these inherent restrictions into concrete terms, beyond making a declaration confirming them or clarifying them.

The Federal Constitutional Court has to pass a final and unappealable decision on the extent and scope of inherent restrictions of fundamental rights. It is not the task of a Land legislature to repeat in a declaration the restrictions that arise directly from constitutional law. Nor is the appropriate respect accorded to the Land parliament if it is forced to pass statutory wording that on the one hand it expressly and in a well-considered way did not desire and that on the other hand - in the opinion of the majority of the Senate - put direct constitutional barriers in concrete form which will again be tested in later proceedings before the Federal Constitutional Court. A competent court that in such a controversial fundamental constitutional question refers to the legislature must at least inform the legislature how the latter is to carry out the task presented to it of putting direct constitutional limits into a concrete form.

In the present case, however, all questions remain open as to how the legislature is to draft legislation incorporating its political will, which it has already declared openly in the Land parliament. Is it sufficient if the legislature makes it an official duty for teachers to avoid religious and ideological dress symbols that are likely to result in negative effects on the peace of the school? Would it be admissible to prohibit the use of such religious, ideological or political symbols in the teaching profession that are likely to endanger the equality of men and women and its enforcement in practice (Article 3.2 of the Basic Law)? May civil service law for teachers be defined in such a way as the then Republikaner party group in the Land parliament demanded in its motion of 9 June 1998 (Land parliament document 12/2931), "that the wearing of the headscarf as the symbol of Islam in class represents an inadmissible, one-sided, ideological and political statement"? Must the Land legislature, because this is said by the majority of the Senate to be required by the Basic Law, carry out empirical research with regard to possible disruptions, and if so, to what extent? Or must it constitutionally and for reasons of equality prohibit without exception all religious symbols in the dress of the teachers, even if, like a small ornamental cross, they make no significant statement and therefore are from the outset unlikely to result in conflicts of values at school? Could such a prohibition of dress symbols without any objective provocative content whatsoever be justified at all?

3. The Senate did not do justice to the task of answering a fundamental constitutional question, although the case is ripe for a decision. As a result, the Land legislature must now pass a statute, which according to the dissenting opinion is not even necessary, and this without being granted a transitional period for this surprising necessity. In addition, it would scarcely be compatible with the principle of equality to incorporate a statutory basis for a general prohibition of significant religious or ideological symbols in office, as suggested by the majority of the Senate, only in the Education Act and not generally in the Land Civil Service Act; the relevant conflict situations may occur in other areas of the civil service too, for example in connection with the youth welfare service, social work, public safety or the administration of justice.

4. The majority of the Senate ought at least to have granted the legislature a transitional period. Taking into account earlier decisions of the Federal Constitutional Court on the constitutional requirement of the specific enactment of a statute, this would have been appropriate and would have reduced the effects of a surprise decision.

a) The Federal Constitutional Court derived the prohibition of surprise decision from the requirement of a fair hearing under Article 103.1 of the Basic Law. The parties to the proceedings may be surprised neither by a judicial decision in itself (BVerfGE 34, 1 [78]) nor by its factual (BVerfGE 84, 188 [190, 191]) or legal (BVerfGE 86, 133 [144, 145]) content. A judicial decision may be based only on facts and results of evidence to which the parties were able to respond. Merely informing the parties to the proceedings is not enough; they must also have a concrete opportunity to express a reaction to the facts (BVerfGE 59, 330 [333]). A statement relating to the circumstances and facts is regarded as satisfying the requirements of a fair hearing in the meaning of Article 103.1 of the Basic Law, and the possible to make a statement on the legal situation is deemed equivalent to this (BVerfGE 60, 175 [210]; 64, 125 [134]; 86, 133 [144]; 98, 218 [263]). The parties must be given the possibility of asserting their point of view by way of arguments on fact and law in the proceedings. In special cases, it may here be necessary to draw the attention of the parties to a legal opinion on which the court intends to base the decision. Granting a fair hearing in a way that satisfies the constitutional right requires that the party, using the care to be expected of him or her, is capable of recognising the aspects on which the decision may depend. If the court relies on a legal point of view without prior reference, and even a conscientious and informed party to the proceedings, even taking into account the variety of legal opinions that might be held, could not expect the court to rely on this legal point of view, the result may be the equivalent of prevention of submissions on the legal situation. This applies in particular if the court's interpretation of the law has to date not been argued either in case law or in literature, albeit in principle there is no right to a judicial dialogue or a reference to the court's legal viewpoint (BVerfGE 86, 133 [144, 145]; 96, 189 [204]; 98, 218 [263]).

   The majority of the Senate fail to adequately take into account the procedural right to a fair hearing that is also due to the state as a party to the proceedings when they introduce a requirement of the specific enactment of a parliamentary statute in order to create official duties in connection with the freedom of religion and ideology of the civil servant, where until now neither case law and literature nor the complainant herself have called for such a requirement, and this was not made a serious subject of the judicial dialogue in the oral hearing before the Senate. The Land Baden-Württemberg had neither occasion nor opportunity to express its opinion on this legal opinion, which was surprising for all parties and a major factor in the decision. The Land should have been given an opportunity to express an opinion on this aspect. The majority of the Senate accuse the Land of an omission. They state that it had not created a sufficiently definite statutory basis for the encroachment upon the complainant's right under Article 33.2 in conjunction with Article 4.1 and 4.2 of the Basic Law. The Land was unable to react to this charge, because it did not know of it nor was it obliged to know of it.

b) In view of this procedural omission, the majority of the Senate ought at least to have laid down a reasonable period of time for the Land legislature within which the legislature was able to take account of the requirement of the specific enactment of a statute by creating a provision that, in the opinion of the majority of the Senate, does

justice to the situation under constitutional law. In earlier decisions, the Federal Constitutional Court recognised this problem and when it made a new demand for the specific enactment of a statute it made it possible for the executive for a transitional period to make a decision encroaching upon fundamental rights without a corresponding statutory provision. In this way, for example, in the interest of the prison regime and schools, the monitoring of prisoners' letters was declared to be provisionally permissible because there was insufficient authorisation below the level of a statute (cf. BVerfGE 33, 1 [12, 13]; 40, 276 [283]) as was expulsion from school that was not governed by a parliamentary statute (cf. BVerfGE 58, 257 [280, 281]).

5. A reasonable transitional period would not only have been needed by reason of respect for the legislature, but would also have taken seriously the requirement of the specific enactment of a statute that was assumed by the majority of the Senate and given the Land legislature the possibility of creating an effective statutory basis for the present case. The Federal Administrative Court is also left by the reasoning of the majority of the Senate in a state of uncertainty, in a manner that is constitutionally questionable, as to how it is to proceed in future with regard to the proceedings that have been referred back. For if - as the majority of the Senate assume - the decision challenged by the complainant is unconstitutional, then at present the Federal Administrative Court should find in favour of the plaintiff. Since the dispute related only to the question of the religious symbol, therefore, the complainant would have to be appointed a civil servant by the Land Baden-Württemberg. In this way, under civil service law, a fait accompli would be created, which the legislature could scarcely correct. The alternative, not excluded even by individual elements of the grounds given by the majority of the Senate, of suspending the proceedings before the administrative courts until the Land parliament has created a statutory basis in the law relating to teachers who are civil servants, should have been clearly stated.

b) Translation of BVerfG, 27.1.2015, 1 BvR 471/10, http://www.bverfg.de/e/rs20150127_1bvr047110en.html "Headscarf Ban II"

Headnotes:

1. The protection afforded by the freedom of faith and the freedom to profess a belief (Art. 4 secs. 1 and 2 of the Basic Law) guarantees educational staff at interdenominational state schools the freedom to cover their head in compliance with a rule perceived as imperative for religious reasons. This can be the case for an Islamic headscarf.

2. A statutory prohibition on expressing religious beliefs at the *Land* level (in this case, pursuant to § 57 sec. 4 of the North Rhine-Westphalia Education Act) by outer appearance in an interdenominational comprehensive state school based on the mere abstract potential to endanger the peace at school or the neutrality of the state is disproportionate if this conduct can be plausibly attributed to a religious duty perceived as imperative. An adequate balance between the constitutional interests at issue - the educational staff's freedom of religion, the pupils' and parents' negative freedom of religion,

the fundamental right of parents and the educational mandate of the state - can only be struck via a restrictive interpretation of the prohibitive provision, i.e. that there must be at least a sufficiently specific danger to the protected interests.

3. Should there be a sufficiently specific risk of danger to or impairment of the peace at school or the neutrality of the state in certain schools or school districts in a substantial number of cases due to considerable situations of conflict in specific areas with respect to correct religious conduct, there might be a constitutionally recognised need to generally prohibit expressions of religious beliefs by outer appearance for certain schools or school districts for a certain time, and not only in a specific individual case.

4. If expressions of religious belief by outer appearance made by educators in interdenominational comprehensive state schools are prohibited by law for the purposes of protecting the peace at school and the neutrality of the state, in principle, this must apply to all religions and ideologies without distinction.

Facts:

A.

The constitutional complaints concern court decisions on sanctions under labour law (warning notice and dismissal) issued by the complainants' employer, the *Land* North Rhine-Westphalia, against the complainants because as employees at state schools, they refused to remove what is known as an "Islamic headscarf" or a woollen hat worn as a replacement for that scarf, while on duty. Both complainants are Muslims. Complainant I is employed as a social educator, and complainant II was employed as a teacher, both under employment contracts under private law. The constitutional complaints also indirectly challenge the legislative provision on the permissibility of and limitations on expressions of religious belief by persons employed in the school system, as adopted in North Rhine-Westphalia following the decision of the Second Senate of the Federal Constitutional Court of 24 September 2003 (Decisions of the Federal Constitutional Court *Entscheidungen des Bundesverfassungsgerichts* BVerfGE 108, 282). That provision is the basis for the labour-law measures reviewed by the regular courts in the initial proceedings. **[1]**

I.

[…] **[2-6]**

II.

[Excerpt from press release no. 14/2015 of 13 March 2015]

The constitutional complaints are directed against sanctions, as confirmed by the labour courts, imposed on the complainants after they refused to remove the headscarf worn at school for religious reasons, or the woollen hat worn as a replacement. Indirectly, they also challenge § 57 sec. 4 and § 58 sentence 2 of the *Schulgesetz für das Land Nor[]drhein-Westfalen* (North Rhine-Westphalia Education Act - SchulG NW) in the version of 13 June 2006.

Under § 57 sec. 4 sentence 1 SchulG NW, at school, teachers may not publicly express views of a political, religious, ideological or similar nature which are likely to endanger or interfere with the neutrality of the *Land* with regard to pupils and parents, or disturb the political, religious and ideological the peace at school. Under sentence 2, conduct that might create the impression among pupils or parents that a teacher advocates against human dignity, the principle of equal treatment, fundamental freedoms or the free democratic order is prohibited. Pursuant to sentence 3, carrying out the educational mandate in accordance with the Constitution of the *Land* and accordingly presenting (*Darstellung*) Christian and occidental educational and cultural values or traditions do not contradict the prohibition set out in sentence 1. Under § 58 sentence 2 SchulG NW, these provisions apply to other educational staff, including socio-educational staff, employed by the *Land*.

Both complainants are Muslims of German nationality. The complainant in proceedings 1 BvR 471/10 has been employed in a state comprehensive school in North Rhine-Westphalia as a social educator since 1997. She complied with the request by the school authority to remove the headscarf while on duty, but substituted it by an off-the-shelf pink-coloured beret with a knit band and a polo-neck pullover of the same colour to cover her neck. Following this, the school authority issued a warning. Her lawsuit brought in the labour courts was unsuccessful at all levels of jurisdiction. The complainant in proceedings 1 BvR 1181/10 entered into a private employment contract with the *Land* North Rhine-Westphalia in 2001 as a teacher. She taught the Turkish language for native speakers at several schools. After the complainant had refused to discard the headscarf while on duty, the *Land* first issued a warning and then dismissed her. Her lawsuits in the labour courts against these measures were unsuccessful.

[End of excerpt.]

[…] **[7-37]**

III.

The complainants direct their constitutional complaints at the labour courts' decisions against them, and indirectly against the underlying provision of the *Land* Education Act. **[38]**

1. Proceedings 1 BvR 471/10 (complainant I)

Complainant I claims that the indirectly challenged provisions violate Art. 3 secs. 1 and 3 and Art. 33 secs. 2 and 3 GG, also in conjunction with Art. 9 and Art. 14 of the European Convention on Human Rights (ECHR). In addition, she claims that the challenged court decisions violate Art. 4 secs. 1 and 2 in conjunction with Art. 12 sec. 1, Art. 33 secs. 2 and 3 GG and her general right of personality. She furthermore objects to the judgment of the Federal Labour Court, claiming a violation of her right to a lawful judge (Art. 101 sec. 1 sentence 2 GG) because it failed to request a preliminary ruling from the Court of Justice of the European Union. **[39]**

[…] **[40-48]**

2. Proceedings 1 BvR 1181/10 (complainant II)

Complainant II complains that the indirectly challenged provisions and the challenged court decisions violate Art. 2 sec. 1 in conjunction with Art. 1 sec. 1, Art. 3 secs. 1 and 3, Art. 4 secs. 1 and 2 in conjunction with Art. 12 sec. 1, as well as Art. 33 secs. 2 and 3 GG and Art. 9 and Art. 14 ECHR. Furthermore, she asserts that the judgment of the Federal Labour Court violates Art. 101 sec. 1 sentence 2 GG. **[49]**

[…] **[50-55]**

IV.

Statements on the constitutional complaints were submitted by the North RhineWestphalia Ministry of Schools and Continuing Education (*Ministerium für Schule und Weiterbildung des Landes Nordrhein-Westfalen*) on behalf of the *Land* government, the Lower Saxony State Chancellery (*Niedersächsische Staatskanzlei*) on behalf of the *Land* government, the Federal Administrative Court (*Bundesverwaltungsgericht*), and by the Umbrella Organisation of Independent Ideological Communities (*Dachverband Freier Weltanschauungsgemeinschaften e.V.* - DFW), the Coalition of Muslim Women (*Aktionsbündnis muslimischer Frauen e.V.* - amf), the Alevi Congregation of Germany (*Alevitische Gemeinde Deutschland e.V.*), the Training and Education Association (*Verband Bildung and Erziehung e.V.* - VBE), the International League of Non-Religious Persons and Atheists (*Internationaler Bund der Konfessionslosen and Atheisten e.V.* - IBKA), the Turkish-Islamic Union for Religious Affairs (*Türkisch- Islamische Union der Anstalt für Religion e.V.* - DITIB) and the Central Council of Jews in Germany (*Zentralrat der Juden in Deutschland K.d.ö.*R.). **[56]**

[…] **[57-76]**

B.

The constitutional complaints are admissible and for the most part well-founded. **[77]**

In cases of educational staff's expression of religious belief by outer appearance and conduct, the provisions under § 57 sec. 4 sentences 1 and 2 and § 58 sentence 2 SchulG NW are compatible with the Basic Law only when interpreted restrictively in a manner consistent with the [freedom of religion and belief, which includes both the] freedom of faith and freedom to profess a belief (*Glaubens-und Bekennntnisfreiheit*) (Art. 4 secs. 1 and 2 GG). The labour courts' decisions challenged by the complainants are not consistent with these requirements and therefore violate the complainants' fundamental freedom of faith and freedom to profess a belief. § 57 sec. 4 sentence 3 SchulG NW, which is designed to privilege Christian and occidental educational and cultural values or traditions, is not consistent with the prohibition on disadvantaging persons on religious grounds (Art. 3 sec. 3 sentence 1 and Art. 33 sec. 3 GG). However, this does not impair the validity of the remainder of the provision, or the possibility of interpreting sentences 1 and 2 of § 57 sec. 4 SchulG NW in conformity with the Constitution. **[78]**

I.

The constitutional review concerns the challenged decisions of the labour courts and the prohibition on which those decisions are based, under § 57 sec. 4 sentence 1 SchulG NW, insofar as the decisions relate to educational staff's expressions of religious beliefs through their outer appearance. The review must also extend to sentences 2 and 3 of § 57 sec. 4 SchulG NW, even though the labour courts expressly based their decisions only on the prohibition of expressions of belief in sentence 1. The provision is based on a single, unified concept. […] **[79]**

II.

The judgments of the labour courts issued in the initial proceedings are based on statutory provisions requiring a restrictive interpretation in conformity with the Constitution. These judgments do not meet the requirements of such an interpretation. A prohibition of the expression of religious belief by outer appearance, on the basis of a mere abstract danger to the peace at school or to the neutrality of the state, is in any case not appropriate and therefore disproportionate in light of the educational staff's freedom of faith and freedom to profess a belief, if the expression of that belief can plausibly be traced to a religious duty perceived as imperative. A sufficiently specific danger is required instead. Under constitutional law, such a prohibition extending over a region or possibly even over an entire *Land* is possible, with regard to interdenominational state schools, only if there is a sufficiently specific danger to the aforementioned legal interests throughout the area to which the prohibition applies. **[80]**

In both initial proceedings, the Federal Labour Court held - as the lower courts had previously done - that the complainants' conduct had the potential, within the meaning of § 57 sec. 4 sentence 1 SchulG NW, to endanger the neutrality of the state towards pupils and parents, as well as the religious peace at school. These courts held that the prohibition does not cover only those expressions that specifically endanger or even disturb the neutrality of the state or the religious peace at school; it is intended to avert even an abstract danger, so that specific dangers are not able to arise. **[81]**

In cases of the present kind, such a far-reaching understanding of the provision results in a serious interference with the educational staff's fundamental right to the freedom of faith and freedom to profess a belief. Such an interference cannot be justified constitutionally in this generalised form because it is disproportionate. **[82]**

1. The protection of the fundamental right to freedom of faith and freedom to profess a belief (Art. 4 secs. 1 and 2 GG) also guarantees educational staff in interdenominational state schools the freedom to comply with the rules of their faith that require them to cover themselves, as may for example be done by wearing an Islamic headscarf, if this is based on sufficiently plausible reasons. **[83]**

   a) As employees in the civil service, the complainants can also invoke their fundamental right under Art. 4 secs. 1 and 2 GG (as is also the case for civil servants, BVerfGE 108, 282 <297 and 298>). The complainants' status as holders of fundamental rights is not automatically or generally called into question by their becoming part of the state's carrying out of its educational mandate. Moreover, the state is still bound by

fundamental rights even if it makes use of the instruments of private law in carrying out a mandate, as was done here by entering into employment contracts under private law with the educational staff that it hired to carry out its educational mandate (Art. 1 sec. 3 GG; cf. BVerfGE 128, 226 <245>). **[84]**

b) In its section 1, Art. 4 GG guarantees the freedom of faith and of conscience, and freedom to profess a religious or ideological belief; in section 2 it guarantees the right to the undisturbed practice of religion. The two sections of Art. 4 GG contain a single fundamental right that is to be understood as all-encompassing (cf. BVerfGE 24, 236 <245 and 246>; 32, 98 <106>; 44, 37 <49>; 83, 341 <354>; 108, 282 <297>; 125, 39 <79>; German Federal Constitutional Court, *Bundesverfassungsgericht* - BVerfG, Order of the Second Senate of 22 October 2014 - 2 BvR 661/12 -, juris, para. 98). It extends not only to the inner freedom to believe or not to believe - i.e., to have a faith, to keep it secret, to renounce a former faith, and to turn to a new one - but also the outer freedom to profess and disseminate one's faith, to promote one's faith and to proselytise (cf. BVerfGE 12, 1 <4>; 24, 236 <245>; 105, 279 <294>; 123, 148 <177>). Therefore, it includes not only acts of worship and the practice and observance of religious customs, but also religious instruction and other forms of expression of religious and ideological life (cf. BVerfGE 24, 236 <245 and 246>; 93, 1 <17>). This also includes the right of individuals to align their entire conduct with the teachings of their faith, and to act in accordance with this conviction, and thus to live a life guided by faith; and this applies to more than just imperative religious doctrines (cf. BVerfGE 108, 282 <297> with further references; BVerfG, Order of the Second Senate of 22 October 2014 - 2 BvR 661/12 -, juris, para. 88). **[85]**

When assessing what qualifies as an act of practising a religion or an ideological belief in a given case, one must not disregard what conception the religious or ideological communities concerned, and the individual holder of the fundamental right, have of themselves (cf. BVerfGE 24, 236 <247 and 248>; 108, 282 <298 and 299>). However, this does not mean that all conduct by a person must be viewed as an expression of freedom of faith in the same way that the person views it subjectively. The authorities may analyse and decide whether it has been sufficiently substantiated, both in terms of its spiritual content and its outer appearance, that the conduct can in fact plausibly be attributed to the scope of application of Art. 4 GG; in other words, that it does in fact have a motivation that is to be viewed as religious. However, the state may not judge its citizens' religious convictions, let alone designate them as "right" or "wrong". This is especially the case when divergent views on such points are advanced within a religion (cf. BVerfGE 24, 236 <247 and 248>; 33, 23 <29 and 30>; 83, 341 <353>; 104, 337 <354 and 355>; 108, 282 <298 and 299>). **[86]**

c) The protection of the freedom of faith and the freedom to profess a belief under Art. 4 secs. 1 and 2 GG, can be invoked by Muslim women for the wearing of a headscarf tied in a manner typical of their faith, including when they exercise their profession in interdenominational state schools, but can also be invoked with regard to the wearing of other clothing that covers the hair and neck if this is done for plausibly religious reasons (cf. BVerfGE 108, 282 <298>). **[87]**

In their constitutional complaints, the two complainants claim a religious reason for wearing their head coverings. They refer to wearing them as an imperative religious duty, and as a fundamental component of an Islamically oriented lifestyle. **[88]**

This religious basis of the choice of clothing is sufficiently plausible both in terms of spiritual content and outer appearance even in light of the different interpretations of the requirement to cover oneself in public that are advanced in Islam. It does not matter that the exact content of the rules of female clothing is indeed in dispute among Islamic scholars. It is sufficient that this interpretation exist in different schools of Islam and can be traced back to two verses in the Quran in particular (Sura 24, verse 31; Sura 33, verse 59) (cf. Asad, Die Botschaft des Koran - Übersetzung und Kommentar, 2009, pp. 676 and 677, 810; cf. also Heine, Kleiderordnung, in: Handbuch Recht und Kultur des Islams in der deutschen Gesellschaft, 2000, pp. 184 <186 and187>). In some schools of Islam, the requirement to cover oneself is also categorised as an imperative duty (cf. Khoury, Das islamische Rechtssystem, in: Handbuch Recht und Kultur des Islams in der deutschen Gesellschaft, 2000, p. 37 <52>). Under these circumstances, it does not matter that other schools of Islam do not consider it imperative for women to cover themselves in public (cf. BVerfGE 108, 282 <298 and299>). **[89]**

2. In light of the religious requirement to cover themselves, which the complainants perceive as imperative, the prohibition of wearing the head coverings in question, based on § 57 sec. 4 (in conjunction with § 58 sentence 2, in the case of complainant I)SchulG NW and upheld by the challenged court decisions, proves to be a serious interference with their fundamental right of freedom of faith and freedom to profess a belief. **[90]**

a) The categorisation of the wearing of articles of clothing as an expression of religious beliefs by outer appearance or conduct within the meaning of § 57 sec. 4 sentence 1 SchulG NW is based on an interpretation of ordinary law incumbent, first, upon the regular courts that is *per se* unobjectionable under constitutional law. **[91]**

An "expression of belief by outer appearance or conduct" ("*äußere Bekundung*") within the meaning of the statutory basis for the interference in § 57 sec. 4 sentence 1 SchulG NW is not limited to verbal expressions. In this respect, the Federal Labour Court reasonably holds that any "deliberate profession of a religious conviction directed to the outer world" is sufficient, and in determining the declaratory value of an expression, relies on those possibilities of interpretation that immediately suggest themselves for a significant number of observers. This understanding of the norm that focuses on the communicative nature of an "expression of beliefs by outer appearance or conduct" within the meaning of § 57 sec. 4 sentence 1 SchulG NW and on the point of view of an objective observer is consistent with the chain of effects assumed in that provision between the outer expressions mentioned there, on the one hand, and on the other hand, the legally protected interests that they affect, meaning the neutrality of the state and the peace at school. **[92]**

However, head coverings and other articles of clothing do not automatically take on the meaning of a nonverbal means of communication within the meaning of § 57 sec. 4 sentence 1 SchulG NW. Rather, based on the point of view of an objective observer, this is the case only if, in virtue of its nature, the article of clothing *per se* is typically the expression of a political, ideological, religious or similar belief, or if after an overall assessment of the specific accompanying circumstances, an intrinsically neutral article of clothing can be understood, without a reasonable doubt, as such an outer expression. **[93]**

A headscarf, specifically, is not as such a religious symbol. It can exert a comparable effect only in combination with other factors (cf. BVerfGE 108, 282 <304>). To that extent, for example, it differs from the Christian cross (cf. on this point BVerfGE 93, 1 <19 and 20>). Even if an Islamic headscarf serves only to fulfil a religious requirement and the wearer does not attribute symbolic character to it, and merely views it as an article of clothing prescribed by her religion, this does not change the fact that, depending on social context, it is widely interpreted as a reference to the wearer's adherence to the Muslim faith. In that sense it is an article of clothing with religious connotations. If it is understood as an outer indication of religious identity, it has the effect of an expression of a religious conviction without any need for a specific intent to make this known or any additional conduct to reinforce such an effect. The wearer of a headscarf tied in a typical way will usually also be aware of this. Depending on the circumstances of the individual case, this effect may also occur for other forms of coverings for the head and neck. **[94]**

b) The interference that is inextricably linked with the ban on wearing an Islamic headscarf or some other covering for the head and neck in fulfilment of a religious requirement is serious. **[95]**

The complainants do not merely invoke a religious recommendation that individual adherents of the faith may dispense with or postpone obeying. Rather, they have plausibly demonstrated that in their case - and in accordance with the self-perception of some Islamic schools of thought (on this see the North Rhine-Westphalia Ministry for Employment, Integration and Social Affairs, *Ministerium für Arbeit, Integration und Soziales des Landes Nordrhein-Westfalen* <ed.>, Muslimisches Leben in Nordrhein-Westfalen, 2010, pp. 95 et seq.) - covering themselves in public constitutes an imperative religious duty, which, in addition, as has been plausibly shown, touches upon their personal identity (Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG). Therefore, a ban on covering the head when teaching or working as an educator at state schools may even block their access to that profession (Art. 12 sec. 1 GG). At the same time, there is a state of tension between the fact that at present this effectively means that mainly Muslim women are being kept away from qualified professions as teachers or other educational staff, and the requirement to achieve real equality of women in practice (Art. 3 sec. 2 GG), and the tension is in need of justification. Against this background, even though it is limited in time and space to the school environment, the statutory prohibition on expressing their faith constitutes a considerably more severe

interference with the complainants' fundamental right to freedom of faith and freedom to profess a belief than would be the case for a religious practice that had no plausible claim to being imperative. **[96]**

3. On the basis of the labour courts' interpretation of the legal norm, this interference with the complainants' freedom of faith and freedom to profess a belief proves to be disproportionate and is therefore unjustified. **[97]**

a) Restrictions to this fundamental right can only be derived from the Constitution itself, because Art. 4 secs. 1 and 2 GG does not contain a requirement of a specific enactment of a statute. Such limitations inherent in the Basic Law include the fundamental rights of third parties, along with those community values of constitutional status (cf. BVerfGE 28, 243 <260 and 261>; 41, 29 <50 and 51>; 41, 88 <107>; 44, 37 <49 and 50, 53>; 52, 223 <247>; 93, 1 <21>; 108, 282 <297>). Among the constitutionally protected interests that might come into conflict here with the freedom of faith are not only the state's educational mandate (Art. 7 sec. 1 GG), which must be fulfilled in observance of the duty of ideological and religious neutrality, but the parents' right to the upbringing of their children (Art. 6 sec. 2 GG), and the pupils' negative freedom of faith (Art. 4 sec. 1 GG) (cf. BVerfGE 108, 282 <299>). Resolving the normative tension among these constitutionally protected interests in consideration of the principle of tolerance is a task for the democratic legislature, which, within the public process of policy formulation, must seek a compromise that all can reasonably be expected to comply with. The above requirements of the Basic Law must be viewed together, and their interpretation and fields of application must be coordinated with one another (cf. BVerfGE 108, 282 <302-303>). **[98]**

b) In prohibiting religious expression through outer appearance or conduct by introducing § 57 sec. 4 sentence 1 SchulG NW, the legislature that enacted the North Rhine-Westphalian Education Act was pursuing legitimate aims. This also applies to the legislature's intention to include clothing that has religious connotations, and particularly the Islamic headscarf if worn in the typical manner. Its aims were to preserve the peace at school and the neutrality of the state, and thus to safeguard the educational mandate of the state, to protect conflicting fundamental rights of pupils and parents, and thereby to prevent conflicts from the outset in the sphere of the state schools under the legislature's responsibility (cf. *Landtag* document, *Landtagsdrucksache* - LTDrucks 14/569, pp. 7 et seq.). These aims are clearly not objectionable under constitutional law. They can easily be related to the educational mandate of the state, the principle of neutrality, the pupils' negative freedom of faith, and parents' rights to the upbringing of their children, and thus to restrictions on educational staff's freedom of faith and freedom to profess a belief that are inherent in the Constitution. **[99]**

c) It already seems doubtful whether the prohibition in § 57 sec. 4 sentence 1 SchulG NW is necessary, as, in its interpretation by the regular courts, the mere abstract capability of external religious expression, in the form of wearing a head covering with religious connotations, is sufficient to endanger legally protected interests. However, there is no need to decide here whether, in view of how widespread the Islamic headscarf

has now become in German society, and the common understanding of its meaning, and also in view of the very different possible interpretations of why women are moved to wear it, especially in such an extensive and heavily populated *Land* as North Rhine-Westphalia, the mere abstract danger to the legally protected interests of the school peace and the neutrality of the state must be prevented without exception in all interdenominational state schools and with regard to all pupil age groups, so as to keep specific dangers to these protected interests from arising in the first place. This is because, after all, the requirements that a provision of law be proportionate in the strict sense call for a restrictive understanding of the element of the "capability to endanger legally protected interests" required by the statute. **[100]**

d) In any case, the prohibition throughout an entire *Land* on religious expression through outer appearance, and particularly by wearing clothing that has a religious connotation, merely on the grounds that this has the abstract capability to endanger the peace at schools or the state's neutrality at an interdenominational school, proves to be disproportionate in the strict sense if such conduct can be plausibly attributed to a religious requirement that is understood as imperative. In the present instance, an appropriate balancing of conflicting interests protected under the Constitution, taking adequate account of the freedom of faith of educational staff who invoke a religious requirement to cover themselves in public, requires a restrictive reading of the ban that is intended to preserve the peace at schools and the state's neutrality, such that there must be at least a sufficiently specific danger to these protected interests. **[101]**

aa) The legislature possesses a prerogative of evaluation concerning facts and new developments, so as to decide whether conflicting fundamental rights of pupils and parents or other values of constitutional rank justify a provision that requires educational staff of all faiths to exercise extreme restraint in using symbols with a religious reference (cf. BVerfGE 108, 282 <310-311>). However, especially in the case of a largely preventive prohibition of external religious expressions, the legislature must strike a fair balance, taking into account the weight and importance of the educational staff's fundamental freedom of faith and freedom to profess a belief, and must respect the limit that reasonableness imposes in its overall balancing of the weight of the interference against the weight of the reasons that justify it (cf. BVerfGE 83, 1 <19>; 90, 145 <173>; 102, 197 <220>; 104, 337 <349>). **[102]**

bb) If educational staff bring religious or ideological references into the school and classes, this may interfere with the requisite neutrality of the state's educational mandate, parents' right to bring up their children, and the pupils' negative freedom of faith. It opens up at least the possibility of influencing children and of conflicts with parents, potentially disrupting the peace at school and endangering the school's fulfilment of its educational mandate. Religiously motivated clothing worn by educational staff, intended as an expression of a religious conviction, may also have these effects (cf. BVerfGE 108, 282 <303>). However, none of the opposing interests enshrined in the Constitution is of such weight that the mere abstract danger that they might be interfered with can justify a ban, if on the other side

the wearing of clothing or symbols with religious connotations is plausibly demonstrated to be attributable to a religious requirement that is perceived as imperative. **[103]**

(1) Pupils' negative freedom of faith (Art. 4 secs. 1 and 2 GG) guarantees the freedom to stay away from the acts of worship of a faith they do not share. This also refers to rites and symbols through which a belief or religion present themselves. However, in a society that holds space for different religious convictions, individuals have no right to be spared from ever being confronted with expressions of faith, rituals and religious symbols that are alien to them. But this must be distinguished from a situation created by the state in which the individual is subjected, with no possibility of avoidance, to the influence of a specific faith, the acts in which that faith is manifested, and the symbols through which it presents itself (cf. BVerfGE 93, 1 <15 and16>). It is true that pupils also find themselves in an unavoidable situation when, because of the general requirement of compulsory education, they are faced during a class, with no possibility of avoidance, with a state-employed teacher who wears an Islamic headscarf. However, in view of the effect of religious means of expression, one must distinguish here whether the symbol concerned is being used on the school authorities' initiative or due to a personal decision of individual educational staff. The latter may invoke the individual freedom under Art. 4 secs. 1 and 2 GG in this respect. If a state allows the religious expression associated with wearing a headscarf on the part of a single teacher or educational staff member, it does not adopt that expression as its own simply by so allowing, and also does not have to accept that the expression is attributed to it as having been intended by it. (cf. BVerfGE 108, 282 <305 and 306>). **[104]**

It is true that the teacher's freedom of faith invoked in order to wear an Islamic headscarf at school does impact the pupils' negative freedom of faith (cf. BVerfGE 108, 282 <301-302>). Yet wearing an Islamic headscarf, a comparable covering of the head and neck or other clothing with religious connotations is not *per se* apt to interfere with the pupils' negative freedom of faith and freedom to profess a belief. As long as members of the teaching and educational staff only display such an outer appearance and do not verbally promote their position or faith, or attempt to influence the pupils apart from their outer appearance, the pupils' negative freedom of faith as a rule remains unimpaired. The pupils are only confronted with the positive freedom of faith as exercised by educational staff in the form of wearing clothing in compliance with their beliefs, which, furthermore, is usually relativized and counterbalanced by the conduct of other members of staff who adhere to other faiths or ideologies. In this respect, religiously pluralistic society is mirrored in interdenominational schools. **[105]**

(2) Nor can anything else be derived from the fundamental right of parents. Art. 6 sec. 2 sentence 1 GG guarantees parents the care for and the raising of their children as a natural right and, in conjunction with Art. 4 secs. 1 and 2 GG, also includes religion- or belief-based education; for that reason, it is first and foremost a matter for parents to convey to their children those convictions in matters of faith and belief that they consider right (cf. BVerfGE 41, 29 <44, 47 and 48>; 52, 223 <236>; 93, 1 <17>). This corresponds with the right to keep children away from religious convictions that the parents consider wrong or harmful (cf. BVerfGE 93, 1 <17>). However, Art. 6 sec. 2 GG does not include an exclusive right for parents to bring up their children. The state, to which the responsibility for supervising the entire school system is assigned under Art. 7 sec. 1 GG, carries out its educational mandate in the schools independently and, within its sphere [of responsibility], with equal rank alongside parents (cf. BVerfGE 34, 165 <183>; 41, 29 <44>; 108, 282 <301>). **[106]**

Accordingly, the fundamental right of parents does not entail an entitlement to keep pupils away from the influence of educational staff who follow a widespread religious rule to cover the head, as long as this does not impair the pupils' negative freedom of faith and freedom to profess a belief. Nor does the parents' negative freedom of faith, which, in conjunction with the parents' rights to raise their children, can have an impact in this context, guarantee to be spared from being confronted with clothing with religious connotations worn by educational staff that merely permits a conclusion about those persons' adherence to another religion or belief, but otherwise exercises no deliberate influencing effect. In cases of the present type, this applies precisely because these situations do not concern faith-based conduct attributable to the state, but a recognisably individual exercise of a fundamental right. **[107]**

(3) Moreover, the state's educational mandate (Art. 7 sec. 1 GG), which has to be carried out in accordance with the state's duty to maintain religious and ideological neutrality, does not as such conflict with female educational staff members' exercising their positive freedom of faith by wearing an Islamic headscarf. If such outer conduct has plausibly been shown to be based on a religious duty perceived as imperative, the state's mandate can justify a prohibition only if there is a sufficiently specific danger to the peace at school that is necessary for the fulfilment of the educational mandate, or to the neutrality of the state. **[108]**

The Basic Law establishes an obligation for the state, as the home of all its citizens, to maintain religious and ideological neutrality in Art. 4 sec. 1, Art. 3 sec. 3 sentence 1, Art. 33 sec. 3 GG, as well as Art. 136 secs. 1 and 4 and Art. 137 sec. 1 of the Weimar Constitution (*Weimarer Reichsverfassung*) in conjunction with Art. 140 GG. It prohibits the introduction of any legal entity

of the nature of a state church and bars privileging any particular denomination, or excluding persons of other faiths (cf. BVerfGE 19, 206 <216>; 24, 236 <246>; 33, 23 <28>; 93, 1 <17>). The state must ensure that the treatment of the various religious and ideological communities is guided by the principle of equality (cf. BVerfGE 19, 1 <8>; 19, 206 <216>; 24, 236 <246>; 93, 1 <17>; 108, 282 <299-300>), and must not identify itself with a particular religious community (cf. BVerfGE 30, 415 <422>; 93, 1 <17>; 108, 282 <300>). The free state under the Basic Law is characterised by openness to the diversity of religious and ideological convictions, and bases that openness upon a concept of humanity characterised by human dignity and the free development of one's personality in selfdetermination under one's own responsibility (cf. BVerfGE 41, 29 <50>; 108, 282 <300-301>). **[109]**

The religious and ideological neutrality required of the state is not to be understood as a distancing attitude in the sense of a strict separation of state and church, but as an open and comprehensive one, encouraging freedom of faith equally for all beliefs. Art. 4 secs. 1 and 2 GG also requires the state, in the positive sense, to ensure that there is room for an active exercise of religious convictions and a realisation of one's autonomous personality in the religious and ideological sphere (cf. BVerfGE 41, 29 <49>; 93, 1 <16>). The state is only barred from exerting a targeted influence in the service of a specific political, ideological or philosophical direction, or, through measures originating from the state or being attributable to it, from identifying itself with a specific faith or a specific ideology and thus on its own initiative endangering religious peace in a society (cf. BVerfGE 93, 1 <16 and17>; 108, 282 <300>). The principle of religious and ideological neutrality also prohibits the state from judging the faith and doctrine of a religious community as such (cf. BVerfGE 33, 23 <29>; BVerfG, Order of the Second Senate of 22 October 2014 - 2 BvR 661/12 - juris, para. 88). **[110]**

This also applies in the sphere of schools, for which the state has taken responsibility, where religious and ideological concepts have always been relevant by virtue of schools' very nature (cf. BVerfGE 41, 29 <49>; 52, 223 <241>). Accordingly, for example, to allow for or permit Christian references in the state schools is not precluded; however, the school must also be open to other religious and ideological content and values (cf. BVerfGE 41, 29 <51>; 52, 223 <236 and 237>). As references to various religions and ideologies are possible in organising a state school, the mere visibility, apparent in their outer appearance, of the religious or ideological affiliation of individual members of educational staff - irrespective of what religion or ideology is concerned in the specific case - is not precluded as such by the neutrality required of the state in religious and ideological matters. It is through this openness that the free state under the Basic Law preserves its religious and ideological neutrality (cf. BVerfGE 41, 29 <50>). **[111]**

(4) (a) On that basis, a strict *Land*-wide prohibition of the expression of religious beliefs by outer appearance or conduct, for which - according to the interpretation by the labour courts in the challenged decisions - a mere abstract danger to the legally protected interests mentioned in § 57 sec. 4 sentence 1 SchulG NW is deemed sufficient, cannot reasonably be imposed on the holders of fundamental rights, at any rate in cases such as these. It suppresses their fundamental right to freedom of faith in a manner that is not appropriate. If individual members of educational staff wear a headscarf, this does not entail identification of the state with a particular faith - quite different from the case of a cross or crucifix in the classroom that has been installed by state authorities (cf. BVerfGE 93, 1 <15 et seq.>). Nor does the employer's toleration of the educational staff's faith-based conduct imply that the school endorses such conduct as exemplary, and that the peace at school or the neutrality of the state could be endangered or disturbed for that reason alone. In addition, the complainants follow a commandment of faith which they have plausibly shown to perceive as imperative. Thus, in the process of balancing the pupils' and parents' fundamental rights that the religiously and ideologically neutral state must also protect within the school environment with the complainants' freedom of faith, the latter attains much higher weight than would be the case if the matter related to a non-imperative rule. **[112]**

(b) The situation is different if the outer appearance of educational staff constitutes a sufficiently specific danger to, or impairment of, the peace at school or state neutrality, or contributes significantly to such a danger or impairment. This might be conceivable, for example, in a situation where very controversial positions on the question of correct religious conduct were promoted and introduced into the school - particularly by older pupils or parents - in a way that seriously interfered with school processes and the fulfilment of the state's educational mandate, if the visibility of religious convictions and clothing practices were to generate or fuel this conflict. If a sufficiently specific danger exists that is based on such facts, it would be reasonable to expect that the educational staff, as holders of fundamental rights, would refrain from following the rule to cover their heads that they plausibly perceive as imperative, in consideration of all the constitutionally protected interests that are involved and possibly in conflict, so as to ensure an orderly fulfilment of the state's educational mandate that in particular protects the pupils' and parents' fundamental rights as well as the neutrality required of the state. But even in such a case, in the interest of protecting the fundamental rights of those concerned, the employer will have to first consider whether it would be possible to employ the person concerned in other educational environments. **[113]**

(c) In addition, there might be a constitutionally relevant legal interest in prohibiting religious expression by outer appearance or conduct not merely in a specific individual case, but for a certain amount of time in a more general way at certain schools or in certain school districts if, due to considerable situations of conflict regarding correct religious conduct in those schools or districts, the threshold of a sufficiently specific danger to the school peace or to state neutrality has been reached in a substantial amount of cases in a specific area. In this respect, the legislature may also take due account of such a situation preventively (cf. BVerfGE 108, 282 <306 and 307>) with area-specific solutions. In so doing, especially in large *Laender*, it must provide for differentiated solutions, for example limited in place and time, possibly with the aid of a sufficiently specific authorisation to issue regulations (*Verordnungsermächtigung*). Also in the case of such a regulation, in the interest of the fundamental rights of those concerned, it would have to be considered at first whether it would be possible to employ the person concerned in other educational environments. **[114]**

As long as the legislature has not established a more differentiated regime, a restriction on the freedom of faith of educational staff can only be an appropriate result of the balancing of the relevant constitutionally protected legal interests if it can be shown that there is at least a sufficiently specific danger to the neutrality of the state or to the peace at school. This is particularly true when considering that it is precisely the task of "interdenominational" ("*bekenntnisoffen*") schools to convey to pupils the idea of tolerance also with regard to other religions and ideologies, because school must be open to Christian, Muslim and other religious and ideological content and values. It must also be possible, in the interest of a balancing and effective exercise of fundamental rights at an interdenominational school, to lead a life according to this ideal. By logical extension, this also pertains to wearing clothes with a religious connotation, such as - apart from the headscarf - the Jewish kipah, the nun's habit, or symbols such as a cross worn visibly. **[115]**

4. Because of the weight of educational staff's freedom of faith and freedom to profess a belief at interdenominational schools, a restrictive interpretation of § 57 sec. 4 sentence 1 SchulG NW in conformity with the Basic Law is needed, at least for the cases concerned here, insofar as that provision prohibits expressions of religious belief by outer appearance or conduct. For this purpose, the characterising feature of the ability to endanger or impair the peace at school or the state's neutrality must be restricted in that the expression of religious belief through outer appearance or conduct must represent not merely an abstract danger, but a sufficiently specific danger to the legally protected interests indicated in § 57 sec. 4 sentence 1 SchulG NW. The existence of that specific danger must be proven and substantiated. In general, wearing an Islamic headscarf does not substantiate a sufficiently specific danger. Wearing such a head covering as such does not have the effect of promoting a belief, still less proselytising for one. Even if a majority of Muslim women do not wear an Islamic headscarf, this is not uncommon in Germany

(cf. Federal Office for Migration and Refugees <ed.>, Muslimisches Leben in Deutschland - im Auftrag der Deutschen Islam Konferenz, 2009, pp. 194 and 195; North Rhine-Westphalia Ministry of Labour, Integration and Social Affairs <ed.>, Muslimisches Leben in Nordrhein-Westfalen, 2010, p. 93). It is often reflected in everyday social life and within student bodies. Its being merely visually perceptible, as a consequence of the individual exercise of fundamental rights, must be accepted in the schools just as there is also generally no constitutional right to be spared from being exposed to other religious or ideological convictions. **[116]**

A restrictive interpretation of § 57 sec. 4 sentence 1 SchulG NW is possible and mandated by the Constitution. It serves to prevent voiding the law, and is therefore required from the point of view of preserving the legislation so far as possible. It respects the fact that the norm has other applications that diverge from the case at hand. These may involve verbal expressions, for example, or openly promotional conduct. In such cases, the prohibition may also have significance in an interpretation that even includes an abstract danger. It does not stand to oppose this restrictive interpretation that in the legislative history, the legislature contemplated a prohibition of wearing a headscarf as a typical application of the provision. The norm is merely accorded a less far-reaching application. **[117]**

5. These interpretive standards apply accordingly with regard to § 57 sec. 4 sentence 2 SchulG NW. The presupposed ability of outer conduct to give pupils and parents the impression that an educator advocates against human dignity, the principle of equal treatment under Art. 3 GG, fundamental freedoms or the free democratic order, can be affirmed in the case of outer appearance alone only if the presence of sufficiently specific grounds can be affirmed from the point of view of an objective observer. However, with respect to the guarantees of fundamental rights under Art. 4 secs. 1 and 2 GG, it is wrong to assume that the mere wearing of an Islamic headscarf or another head covering indicating affiliation with a belief is in itself already conduct that would readily create the impression among pupils or parents, under § 57 sec. 4 sentence 2 SchulG NW, that the person wearing it advocates against human dignity, the principle of equal treatment under Art. 3 GG, fundamental freedoms or the free democratic basic order. This generalisation is impermissible. If wearing the headscarf, for example, appears as the expression of an individual clothing decision, tradition or identity (cf. BVerfGE 108, 282 <303 et seq.>), or identifies the wearer as a Muslim who complies strictly with the rules of her faith, particularly the requirement to cover herself which she perceives as imperative, this cannot be interpreted as a distancing from the constitutional principles mentioned in § 57 sec. 4 sentence 2 SchulG NW, unless further circumstances are present. Nor can it be assumed that those schools of Islam that require a headscarf to be worn to fulfil the requirement to cover oneself, but also consider this sufficient, are requiring, expecting or even merely hoping that believers will advocate against human dignity, the principle of equal treatment under Art. 3 GG, fundamental freedoms or the free and democratic basic order. **[118]**

6. The requirement of a restrictive reading of sentences 1 and 2 of § 57 sec. 4 SchulG NW also exists insofar as under § 58 sentence 2 SchulG NW they are to be applied accordingly to other educational staff, including socio-educational staff. Because other educational and socio-educational staff are comparable to teachers in everyday school life, and are comparably involved in the fulfilment of the state's educational mandate, no other interpretation can apply here. **[119]**

7. The challenged decisions of the regular courts, particularly of the Federal Labour Court, do not meet the requirements of the necessary restrictive interpretation in conformity with the Constitution; in their view, such an interpretation was not necessary. The legal assessment of the Federal Labour Court is based on the assumption that the ban on the expression of religious belief under § 57 sec. 4 sentence 1 SchulG NW already applies in the case of an abstract danger. The assumption that even parents' "justified concern" about an undesirable religious influence on their children endangers the peace at school does not take due account of the educational staff's freedom of faith and freedom to profess a belief at an interdenominational school. It neglects the weight of the educational staff's positive freedom of faith in connection with a plausibly explained imperative religious requirement to cover oneself. The findings to date, moreover, provide no indication that the complainants' appearance at their schools constitutes a sufficiently specific danger to the peace at school or the state's neutrality. **[120]**

In neither of the initial proceedings did the regular courts adopt a correct understanding of the legal provision, sufficiently taking into account the complainants' fundamental freedom of faith. Neither the findings of the labour courts in the proceedings on the facts nor the assessment in law by the Federal Labour Court reveal any circumstances that might illustrate a sufficiently specific danger to the legal interests protected by the norm. On the contrary, complainant II had even applied for her position with a photograph showing her in a headscarf. Her employment contract, initially for a fixed term, was later changed to a permanent position. By her account, which has not been contradicted, she always performed her work wearing a headscarf covering her hair, without this causing any objections. Under these circumstances, the warning notice upheld by the labour courts, and the dismissal of complainant II on the stated grounds, together with the underlying understanding of § 57 sec. 4 SchulG NW, are constitutionally untenable. In the initial proceedings for complainant I as well, there is not the slightest indication of how wearing a woollen hat and a polo-neck sweater could represent a sufficiently specific danger to the peace at school or the state's neutrality. **[121]**

Therefore, the challenged decisions infringe the complainants' fundamental right under Art. 4 secs. 1 and 2 GG. **[122]**

III.

The further constitutional objection that the complainants raise against sentence 3 of § 57 sec. 4 SchulG NW is well-founded. The partial requirement under section 3 of the provision, which is intended by the legislature to confer a privilege on presenting Christian and occidental educational and cultural values or traditions, constitutes a disadvantaging on the grounds of faith and religious beliefs that is contrary to equal treatment (Art. 3 sec. 3 sentence 1, Art. 33 sec. 3 GG). This violation of the Constitution is reflected in the challenged decisions. It is true that these decisions are not based on sentence 3 of § 57 sec. 4 SchulG NW, because sentence 3 does not apply to the two Muslim complainants. However, it is precisely the exclusion from the privilege provided in sentence 3 that leads to the unconstitutional disadvantaging of the complainants by the very two decisions to be reviewed here too. If the complainants enjoyed this privilege, they would not have been exposed to the labour-law sanctions under § 57 sec. 4

sentences 1 and 2 SchulG NW. However, the provision under § 57 sec. 4 sentences 1 and 2 SchulG NW and the challenged decisions are not affected by this; § 57 sec. 4 SchulG NW, in the interpretation in conformity with the Constitution adopted here, is not unconstitutional as a whole. **[123]**

1. § 57 sec. 4 sentence 3 SchulG NW results in the disadvantaging of followers of religions other than the Christian and Jewish faiths that cannot be justified under constitutional law. **[124]**

a) Art. 3 sec. 3 sentence 1 GG requires that no one may be placed at a disadvantage or favoured because of his or her faith or religious views. The norm reinforces the general principle of equality under Art. 3 sec. 1 GG and the freedom of faith protected by Art. 4 secs. 1 and 2 GG. **[125]**

Under Art. 33 sec. 3 sentence 2 GG, no public employee (*Träger eines öffentlichen Amtes*) may be placed at a disadvantage by reason of adherence or non-adherence to a particular religious denomination or ideological creed. The concept of public employment as used in Art. 33 sec. 3 GG must be understood in the same sense in which it is used in Art. 33 sec. 2 GG; it therefore also includes persons employed in the civil service who are not civil servants (cf. […]). The provision also includes a ban on disadvantaging in the civil service above and beyond the question of admission to public employment (cf. on this § 57 sec. 6 SchulG NW), which is addressed in sentence 1 of the provision. The provision forbids barring persons from admission to public employment on grounds that are incompatible with the freedom of faith protected in Art. 4 secs. 1 and 2 GG (cf. BVerfGE 79, 69 <75>). This does not exclude establishing official duties that interfere with the freedom of faith of employees and applicants for civil service, and that thus impede or even exclude applicants who are adherents of a certain faith from having access to civil service. Any such duties, however, are subject to the strict justification requirements that apply for restrictions on the freedom of faith, which is guaranteed without reservation; moreover, the requirement of strict equal treatment of different faiths must be observed in both the establishment and the practice of enforcing such official duties (cf. BVerfGE 108, 282 <298>) **[126]**

b) According to the ideas that became apparent in course of the legislative process (cf. LTDrucks 13/4564, p. 8; 14/569, p. 9), the overall design of § 57 sec. 4 SchulG NW was meant to provide for an exemption, in sentence 3, from the prohibition on the expression of religious beliefs by outer appearance or conduct under sentence 1, and thereby to bring about direct unequal treatment on religious grounds. The complainants plausibly argue that the provision of § 57 sec. 4 SchulG NW is aimed at treating the head-covering of a Muslim woman, worn for religious reasons, differently than clothing with religious connotations worn by adherents of Christian faiths and of Judaism. This assessment is supported by the aforementioned background materials from the legislative process (see d below). **[127]**

c) This unequal treatment cannot be justified under constitutional law. If expressions of religious belief by the outer appearance or conduct of educational staff at school are to be prohibited, this must, as a general rule, be done without distinctions. **[128]**

There are no apparent nor sound reasons to justify disadvantaging those expressions of religious belief by outer appearance or conduct that cannot be traced back to Christian-occidental cultural values and traditions. If a certain outer appearance or conduct can have a particularly indoctrinating suggestive power, the ban in sentence 1 of § 57 sec. 4 SchulG NW in its constitutionally required restrictive interpretation readily takes that into account. If some legal scholars argue that an objective observer would perceive women wearing an Islamic headscarf as proponents of a far-reaching unequal treatment of men and women, including in the legal sphere, and that therefore this conduct would cast doubts on such a person's suitability to practise educational professions (cf., for example, Bertrams, Deutsches Verwaltungsblatt - DVBl 2003, pp. 1225 <1232 et seq.>; Hufen, Neue Zeitschrift für Verwaltungsrecht - NVwZ 2004, p. 575 <576>; Kokott, Der Staat, 2005, pp. 343 <355 et seq.>; Rademacher, Das Kreuz mit dem Kopftuch, 2005, p. 24), such a general assumption is impermissible (see B. II. 5. above). In addition, such a purported justification must fail, as, under a generalising perspective, it can by no means provide a reason for treating all non-Christian-occidental cultural values and traditions differently. **[129]**

Likewise, there are no tenable justifications for favouring expressions relating to Christian or Jewish faith. The educational mandate of the state, as described in Art. 7 sec. 1 and Art. 12 sec. 3 of the North Rhine-Westphalian Constitution, cannot justify favouring office holders of a certain denomination when establishing official duties. Insofar as such provisions of the constitutions of the *Laender* may be interpreted to contain references to Christian values in the state school system, this should refer to secularised values of Christianity. Furthermore, under what is presumably the predominant interpretation, the educational objective stated in Art. 7 sec. 1 of the North Rhine-Westphalia Constitution ("respect for God") does not refer solely to the Christian faith; it must remain open to a personal understanding of God - and must therefore include not only a Christian one, but also the Islamic one, as well as polytheistic or impersonal concepts of God (cf. Ennuschat, in: Löwer/Tettinger, Kommentar zur Verfassung des Landes Nordrhein-Westfalen, 2002, Art. 7 para. 23 with further references, Art. 12 para. 22; Dästner, Die Verfassung des Landes Nordrhein-Westfalen, 2nd ed. 2002, Art. 7 para. 3; Söbbeke, in: Heusch/Schönenbroicher, Die Landesverfassung Nordrhein-Westfalen, 2010, Art. 12 para. 10; Häberle, in: Festschrift für Wolfgang Zeidler, vol. 1, 1987, p. 3 <14>). After all, the provisions of the *Land* Constitution referred to in § 57 sec. 4 sentence 3 SchulG NW pertain primarily to the organisation of instruction and its general framework, but do not constitute a viable basis for a differentiated regulation of educational staff's official duties. For that reason, in this case it is not relevant that Art. 31 GG likewise sets limits on *Land* constitutions' restricting of the rights of religious equality guaranteed by the Basic Law (see also Art. 142 GG; BVerfGE 96, 345 <364 and 365>). **[130]**

d) It is not possible to interpret § 57 sec. 4 sentence 3 SchulG NW restrictively in conformity with the Constitution in the way the Federal Labour Court has done in its decisions in order to avert an unconstitutional disadvantaging on religious grounds. This would overstep the limits of an interpretation of the law in conformity with the Constitution, and would be incompatible with the principle that the judiciary is bound by the law (Art. 20 sec. 3 GG). **[131]**

The limit to an interpretation in conformity with the Constitution is where contradiction with the wording and the clearly recognisable intent of the legislature arises. Respect for the democratically legitimated legislature forbids attributing an opposite sense to a law that is clear in its purpose and wording, or fundamentally redefining the normative content of a provision (cf. BVerfGE 90, 263 <274 and 275>; 119, 247 <274>; 128, 193 <209 et seq.>; 132, 99 <127 et seq.>). **[132]**

The Federal Labour Court has held that "presenting" ("*Darstellung*") Christian and occidental educational and cultural values in the sense of sentence 3 cannot be considered identical with "expressing" ("*Bekundung*") an individual faith in the sense of sentence 1. Furthermore, it held that the word "Christian" referred to a set of values dissociated from Christian beliefs stemming from the tradition of Christian-occidental culture and upon which the Basic Law was also evidently based and which laid claim to validity irrespective of its religious foundation. **[133]**

It is true that the difference in language between sentence 1 ("expressing") and sentence 3 ("presenting") offers a foothold for the interpretation reached by the Federal Labour Court. The *Land* legislature was also aware of a possible restrictive interpretation in this sense during the further course of the legislative project: even before the *Landtag* (state parliament) cast the final vote on the legislation, the Federal Administrative Court had already arrived at a similar interpretive result on a comparable *Land* legislative provision in Baden-Württemberg (§ 38 sec. 2 Baden-Württemberg Education Act, *Baden-Württembergische Schulgesetz* - SchulG BW) (cf. Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE 121, 140 <147, 150>). In a statement submitted to the *Landtag*, the North Rhine-Westphalian government argued at the time that the Federal Administrative Court's decision should not be understood to mean that there were doubts about the constitutionality of the draft act as a whole. The only question concerned the issue on how to interpret the provision in conformity with the Constitution (*Landtag* Bill - *LT-Vorlage* 14/463, p. 2). **[134]**

Nevertheless, just as in the drafting of the Act, the intention not to pass a law that would, for example, prohibit teachers from teaching in the habit of a religious order, or from wearing a Jewish kipah, was maintained in the further course of the legislative process (LTDrucks 14/569, p. 9). Consistent with that sense, the provision of § 57 sec. 4 sentence 3 SchulG NW expressly refers to the ban on "expression" in sentence 1 and is constructed, in terms of legislative technique, as an exception. This is further reinforced by the fact that while the wording of sentence 3 does indeed mention the educational mandate under the *Land* Constitution as a whole, it then exempts only the

corresponding "presentation" of Christian and occidental educational and cultural values or traditions from the ban on conduct under sentence 1. Meanwhile, the openness to other religious and ideological convictions that is in addition expressly mentioned in the wording of Art. 12 sec. 3 sentence 1 of the North Rhine-Westphalian Constitution is disregarded and omitted. All this makes it clear that the restrictive interpretation of the provision reached by the Federal Labour Court factually redefines its normative content and thus also no longer coincides with the legislative intent that became clearly evident in the legislative process. This intention was not changed by the discussion of a possible different interpretation before the conclusion of the legislative process; that discussion merely shows that the *Landtag* was aware of the risk of the Act's incompatibility with constitutional law. **[135]**

Under the interpretation chosen by the Federal Labour Court, the provision of § 57 sec. 4 sentence 3 SchulG NW takes on a clarifying function at the most. In this interpretation, the presentation of Christian and occidental cultural values is something that is already inherently different from the outer expression of an individual religious view as prohibited in sentence 1. But if that interpretation were correct, there would have been no need for the exception stated in sentence 3 that such a presentation does not contradict the ban on conduct under sentence 1. The statutory establishment of the permissibility of such a mere "presentation" of instructional content dissociated from belief-related content does not fit systematically into the regulatory context of sentence 1. In the interpretation given by the Federal Labour Court, sentence 3 no longer appears to have any meaningful regulatory content within the given normative context. Irrespective of that aspect, this interpretation allows a provision to remain in force which, under a possible broad reading of its wording, could be understood as leaving an opening for discriminatory administrative practices, and whose vagueness in this regard was deliberately retained in the legislative process. **[136]**

But if the approach by the Federal Labour Court thereby fails to adhere to the limits of interpretation in conformity with the Constitution, then § 57 sec. 4 sentence 3 SchulG NW appears to result in a disadvantaging on religious grounds that is contrary to the principle of equal treatment and therefore cannot be justified. **[137]**

2. Therefore, § 57 sec. 4 sentence 3 SchulG NW is to be declared void due to its incompatibility with Art. 3 sec. 3 sentence 1 and Art. 33 sec. 3 GG. The challenged decisions are based on that provision (see III., preceding 1.). **[138]**

IV.

Under the interpretation that is required here by constitutional law, the provision of § 57 sec. 4 SchulG NW (in conjunction with § 58 sentence 2 SchulG NW where applicable), insofar as it concerns expressions of religious belief by outer appearance or conduct on the part of educational staff, does not violate other fundamental rights or other federal law (Art. 31 GG); in particular, it is compatible with the relevant terms of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* - AGG) and the European Convention on Human Rights (ECHR). **[139]**

1. Provided the ban on expressing religious beliefs by outer appearance or conduct is interpreted as required in light of educational staff's freedom of faith and freedom to profess a belief, the provision indirectly under review (§ 57 sec. 4, § 58 sentence 2 SchulG NW) raises no further effective constitutional concerns. **[140]**

a) Other fundamental rights confer no further protection here than proceeds from Art. 4 secs. 1 and 2 GG and from Art. 3 sec. 3 sentence 1 and Art. 33 sec. 3 GG. Even assuming that the freedom to choose an occupation (Art. 12 sec. 1 GG) might be affected in a specific case if a religious requirement perceived as imperative were concerned, the objectives pursued by the *Land* legislature by a ban that is limited to a sufficiently specific danger to the peace at school or state neutrality would still constitute particularly weighty community interests that would justify the ban (cf. BVerfGE 119, 59 <83>). **[141]**

b) Under the requisite restrictive interpretation, § 57 sec. 4 sentence 1 SchulG NW does not violate the principle of equal treatment on grounds of gender. However, under the challenged interpretation of the Federal Labour Court, the provision would not have been compatible with the equal treatment requirement insofar as it would have affected the expression of religious beliefs by outer appearance or conduct as was the intention that determined the legislature's choice. **[142]**

Insofar as § 57 sec. 4 sentence 1 SchulG NW - in the challenged interpretation of the Federal Labour Court - already prohibits on duty educators in schools from expressing religious beliefs by outer appearance or conduct, irrespective of any specific danger, the provision disadvantages women, because it makes educational activity in the schools contingent on requirements that in fact quite predominantly cannot be met by women. Although it is true that the provision's wording is gender-neutral, the intended meaning of § 57 sec. 4 sentence 3 SchulG NW is to exempt the wearing of clothing that corresponds to Christian and occidental educational and cultural values or tradition from the ban on expression. But on that basis, at present, the ban on expression, if it applies irrespective of any specific danger, affects men only in vanishingly small numbers, such as in the case of Sikhs wearing turbans. On that basis, in Germany, at present, the challenged provision *de facto* quite predominantly affects Muslim women who wear a headscarf for religious reasons. **[143]**

The Basic Law also offers protection against *de facto* disadvantaging on the grounds of gender (cf. BVerfGE 97, 35 <43>; 104, 373 <393>; 113, 1 <15>; 121, 241 <254-255>; 126, 29 <53>; 132, 72 <97 and 98, para. 57>). It is true that, as a rule, *de facto* disadvantaging may be justified. But with regard to the challenged provision in the interpretation also intended by the legislature (cf. LTDrucks 13/4564, p. 8; 14/569, p. 9; see, already, C. III. above), no adequate justifying reason is apparent here. In light of both the protection against *de facto* disadvantaging and the educational staff members' religious freedom (B. II. 3. d above), the reasons given for a ban on expression (B. II. 3. a above) offer no justification for such a ban that applies irrespective of any specific danger. Nor does the argument hold up that a ban on

headscarves protects women against the discrimination that is already inherent in a religious requirement to cover oneself, because in fact this protection proves to place the persons concerned at a disadvantage (cf. BVerfGE 85, 191 <209>). Nor, again, can the disadvantaging be justified by the argument that the headscarf signals a rejection of the equal treatment of men and women, because this is neither automatically nor consistently the case (on this see B. II. 5. above). **[144]**

By contrast, insofar as under the required restrictive reading the norm does result in the *de facto* disadvantaging of women, this can be justified by the reasons that can also justify an interference with Art. 4 GG (B. II. 3. d bb 4 above). **[145]**

c) […] **[146]**

d) Under the interpretation constitutionally required here, § 57 sec. 4 SchulG NW (in conjunction with § 58 sentence 2, where applicable), as a provision of *Land* law, is compatible with other federal law, and is therefore also not constitutionally objectionable from that point of view (Art. 31 GG; cf. BVerfGE 80, 137 <153>). There is thus no further violation of the complainants' fundamental rights in that respect. Under this interpretation, the provision is consistent both with Art. 9 and Art. 14 ECHR and with § 7 sec. 1 and § 8 sec. 1 AGG. **[147]**

aa) There is no violation of the rights guaranteed under the European Convention on Human Rights. **[148]**

(1) Within the German legal system, the European Convention on Human Rights and its Protocols - insofar as they have entered into force for the Federal Republic of Germany - have the rank of federal law (cf. BVerfGE 74, 358 <370>; 120, 180 <200>; 128, 326 <367>). This attribution of rank means that German courts must observe and apply the Convention just as other federal statutory law if such an interpretation is methodologically tenable. Furthermore - so far as is methodologically tenable - the European Convention on Human Rights must also be consulted as a guide to interpretation in interpreting the fundamental rights and principles of the rule of law under the Basic Law (cf. BVerfGE 111, 307 <315 et seq.>; 128, 326 <366 et seq.>; 131, 268 <295 and 296>; BVerfG, Order of the Second Senate of 22 October 2014 - 2 BvR 661/12 - juris, paras. 128 and 129). Statutes as well must be interpreted and applied in accordance with the obligations of international law under the Human Rights Convention (cf. BVerfGE 74, 358 <370>; 127, 132 <164>). However, in the German legal system, the guarantees under the European Convention on Human Rights and its Protocols do not constitute a directly applicable standard for constitutional review (cf. Art. 93 sec. 1 no. 4a GG, § 90 sec. 1 Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz* - BVerfGG). Therefore, in a constitutional complaint to the Federal Constitutional Court, a complainant cannot directly assert a violation of human rights contained in the European

Convention on Human Rights (cf. BVerfGE 74, 102 <128>; 74, 358 <370>; 82, 106 <120>; 111, 307 <317>). However, the situation is different if a constitutional complaint indirectly also challenges *Land* law. The Convention, since it ranks as federal law, takes precedence over *Land* law. It is therefore included in the standard of review by way of Art. 31 GG (cf. Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* - BVerfGK 10, 234 <239>). **[149]**

(2) The freedom of religion guaranteed under the Convention (Art. 9 ECHR) and the prohibition of discrimination (Art. 14 ECHR), as interpreted in the relevant case-law of the European Court of Human Rights (ECtHR), are evidently not violated. The ECtHR has allowed the Contracting States a considerable margin of appreciation in connection with rules on clothing for educational staff, particularly with regard to the prohibition of wearing an Islamic headscarf, in view of the principle of ideological and religious neutrality applicable in the particular country and the protection of third parties' negative freedom of religion, which the Court has held are part of maintaining public security and public order (Art. 9 sec. 2 ECHR) (cf. ECtHR, Dahlab v. Switzerland, decision of 15 February 2001, no. 42393/98, Neue Juristische Wochenschrift - NJW 2001, p. 2871 <2873>; ECtHR <Grand Chamber>, Sahin v. Turkey, judgment of 10 November 2005, no. 44774/98, NVwZ 2006, pp. 1389 <1392 et seq.>, § 107 et seq.; ECtHR, Kurtulmus v. Turkey, decision of 24 January 2006, no. 65500/01; on the limits of this margin of appreciation, see ECtHR, Eweida *et al.* v. UK, judgment of 15 January 2013, no. 48420/10 et al., NJW 2014, p.1935 <1940 para. 95>). The Court has also emphasised the Contracting States' margin of appreciation in respect to allowing a possible ban on "headscarf substitutes" ("*Kopftuchsurrogate*") to encompass what it calls attempts to evade the ban (cf. ECtHR, Aktas v. France, decision of 30 June 2009, no. 43563/08). **[150]**

A prohibition of religious symbols that is not specifically directed against adherence to a particular religion is also unobjectionable in the light of the ban on discrimination under Art. 14 ECHR, at least on those grounds that could also justify interfering with Art. 9 ECHR (cf. ECtHR <Grand Chamber>, Sahin v. Turkey, judgment of 10 November 2005, no. 44774/98, NVwZ 2006, p. 1389 <1396>, § 165). That is the case here, because the prohibition applies to all religious expressions equally, and goes far beyond those expressed through outer appearance or conduct, and in particular also includes verbal expressions. **[151]**

On the basis of this case-law of the Court of Human Rights, which must form the starting point for the assessment here (cf. BVerfGE 111, 307 <319>; 128, 326 <368 et seq.>), it must be found that the provisions of the *Land* Education Act underlying the challenged decisions, in the

above-mentioned restrictive interpretation that is required by the Constitution, does not give rise to any further concerns proceeding from the European Convention on Human Rights. **[152]**

bb) […] **[153-155]**

2. The question of whether the Federal Labour Court, as the final regular court of appeal, deprived the complainants of their lawful judge (Art. 101 sec. 1 sentence 2 GG) by failing to request a preliminary ruling of the Court of Justice of the European Union under Art. 267 sec. 3 TFEU need not be addressed in any further detail. The decisions of the Federal Labour Court already prove to be incompatible with the Basic Law on other grounds. **[156]**

V.

Accordingly, § 57 sec. 4 sentence 3 SchulG NW is void because it is incompatible with Art. 3 sec. 3 and Art. 33 sec. 3 GG (§ 95 sec. 3 BVerfGG). The challenged decisions of the labour courts violate each of the complainants' fundamental right under Art. 4 secs. 1 and 2 GG. The decisions of the Higher Labour Courts and of the Federal Labour Court must be reversed. This Senate remands the matters to the relevant Higher Labour Courts (§ 95 sec. 2 BVerfGG). This allows the judges of fact to establish further facts which may then be newly assessed by the regular courts on the basis of an interpretation of § 57 sec. 4 SchulG NW in conformity with the Constitution. **[157]**

VI. Article 5 of the Basic Law
Freedom of Expression, the Media, Arts and Research

Some General Comments

Article 5 of the Basic Law protects free speech in a broad sense and does so by distinguishing several important aspects: The personal right to free speech and freedom of opinion, the freedom to inform oneself from any and all generally available sources (without, however, creating a freedom of information entitlement as in recent years has been enacted in many jurisdictions both in Germany and elsewhere under the administrative term "freedom of information"), the freedom and independence of the press as well as the freedom and institutional importance of broadcasting, including a special guarantee for public broadcasting to secure plurality of opinion and the freedom of the arts, and of research and teaching. The Constitutional Court has consistently emphasised that these communication freedoms are constituent elements for the liberal-democratic order laid down in the Basic Law[55].

1. Article 5.1, sentence 1 – Freedom of Expression ("Free Speech")

a) Lüth, BVerfGE 7, 198

Explanatory Annotation

The *Lüth* decision is one of the very fundamental decisions of the Constitutional Court, with great influence on the subsequent development of the freedom of communication in Germany. The decision has already been mentioned in the Introduction with an emphasis on the objective function of the fundamental rights in the Basic Law.[56]

Mr. Lüth had, in his capacity as a private citizen, publicly called for a boycott of a movie shown in German cinemas because of the movie director's past racist propaganda work for the Nazi regime. The production firm of the movie feared economic loss from this call to boycott the movie and sought and was granted an injunction on the basis of a norm in the Civil Code that prohibits the intentional and malicious infliction of economic loss on another individual. The term malicious, of course, requires interpretation and the Constitutional Court held that this interpretation would have to take into account the enormous significance of the free speech guarantee in Article 5.1 of the Basic Law. The Court regarded the dispute as a legitimate controversy and so long as this controversy was conducted by voicing opinions and the power

55 See for instance the decision of the Constitutional Court in the Lüth Case, BVerfGE 7, 198.

56 See Introduction, p. 86-87.

of persuasion, as opposed to, for example, the use of a dominant market position or other means of extortion[57], it was protected by the free speech guarantee and the respective private law provisions invoked in this case had to be interpreted restrictively to comply with the Basic Law.

The development of this 'objective function' i.e. the obligation of the courts to interpret all norms of law in the light of the significance of the fundamental rights guarantees of the Basic Law, is obviously of vast significance. It pulled the fundamental rights of the Basic Law into the realm of any and all courts and enlisted them in their enforcement and it put this enforcement under the supervision of the Constitutional Court. This was important because the German legal system had evolved as a more positivist system with a tendency to "compartmentalize" the various fields of law into independent subsystems. Hence it was not a self-evident - and subsequently harshly criticized - notion that fundamental rights of the Basic Law should play a role in the construction of norms of the Civil Code or similar 'technical fields' such as civil procedure or the law of conflicts (private international law).[58] The long-standing common law tradition that the common law should be interpreted in such a way that individual rights are interfered with as little as possible had never found its way into the German civil law tradition. The establishment of just the permeating nature of fundamental rights throughout the entire legal order is one fundamental consequence of the *Lüth* decision.

The other, no less important consequence of the decision is the emphasis of the Constitutional Court of the paramount importance of the freedom of communication as protected by Article 5.1 of the Basic Law. As the decision was rendered in 1958 the Court in effect put the new Republic on the only possible track for a democracy - the free flow of ideas even if these ideas are disturbing or even offensive to some or perhaps even to the majority. The Court did this by construing the principle of proportionality in such a way that any limitations of the freedom of communication by governmental authority, which could in principle be possible under Article 5.2 of the Basic Law, would themselves have to be scrutinized in the light of the fundamental importance of the freedom of speech for a democratic society. This construction of limiting the scope of the possible limitation of a right by the scope of the right itself has been a blessing for free speech in Germany, albeit one of dogmatic impurity.

57 See the contrasting decision of the Constitutional Court in the Blinkfuer Case, BVerfGE 25, 256, available in German at http://www.servat.unibe.ch/dfr/bv025256.html. In this case a large publishing house had threatened its wholesale organization with a removal of its complete line of newspaper and magazines, among them leading national titles, if they continued to sell a tiny magazine ("Blinkfuer") that published the East-German television schedule.

58 See, for example, the decision of the Court in BVerfGE 31, 58, available in German at http://www.servat.unibe.ch/dfr/bv031058.html, where the Constitutional Court held that the provisions of the German private international law, the law of conflicts, had to measure up to fundamental rights guarantees, and that this might necessitate modifications if the foreign law to which the German conflict norms point for the resolution of a dispute are not in line with fundamental rights of the Basic Law. See also the decision of the Court concerning contracts of guarantee, BVerfGE89, 214, available in German at http://www.servat.unibe.ch/dfr/bv089214.html, where the Court held that fundamental rights of the Basic Law require the regular courts to engage in a content review of private contracts to protect weaker contracting parties from unfair disadvantage.

Translation of the Lüth Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 7, 198*

Headnotes:

1. Basic rights are primarily to protect the citizen against the state, but as enacted in the Constitution (Grundgesetz - GG) they also incorporate an objective scale of values which applies, as a matter of constitutional law, throughout the entire legal system.

2. The substance of the basic rights is expressed indirectly in the rules of private law, most evidently in its mandatory provisions, and is best effectuated by the judges' use of the general clauses.

3. Basic rights may be infringed by a judicial decision, which ignores the effect of basic rights on private law (s. 90 of the Federal Constitutional Court Act - BVerfGG)). Judicial decisions on private law are subject to review by the Constitutional Court, only in respect of such infringements of basic rights, not for errors of law in general.

4. Rules of private law may count as 'general laws' which may restrict the basic right of freedom of expression under Article 5.2 of the Basic Law.

5. Such 'general laws' must be interpreted in the light of the special significance in a free democratic state of the basic right to freedom of expression.

6. The basic right in Article 5 of the Basic Law protects not only the utterance of an opinion as such, but also the effect it has on others.

7. The expression of an opinion favouring a boycott does not necessarily infringe proper conduct (boni mores) under s. 826 of the Civil Code (Bürgerliches Gesetz-buch - BGB); depending on all the circumstances such an expression may be justified as a matter of constitutional law.

Judgment of the First Senate of 15 January 1958 - 1 BvR 400/51 -

Facts:

At the opening of 'German Film Week' on 20 September 1950 the complainant, then a Senator of the Free and Hanseatic City of Hamburg and Head of the State Press Office, gave an address, in his capacity as President of the Hamburg Press Club, to an audience of film distributors and directors. He said, *inter alia*:

The person least likely to restore the claim to morality which the German film forfeited during the Third Reich is the man who directed 'Jud Süss' and wrote the script for it. If this very man is chosen to represent the German film industry, who can tell what harm we may

* Translation by J.A. Weir; © Basil Markesinis.

suffer throughout the world? True he was acquitted in a formal sense in Hamburg, but substantially the judgment was a condemnation. We must call on the distributors and cinema owners to show character-not cheap, but worth the price. And I want the German film to show character as well. If it shows character in its imagination, visual daring and sterling craftsmanship, it will merit every assistance and achieve what it needs in order to survive: success with the public here in Germany and abroad.

Domnick-Film-Produktion GmbH immediately challenged the complainant to justify these charges against Veit Harlan, under whose direction and with whose screen-play they were making 'Unsterbliche Geliebte'.

On 27 October 1950 the complainant released an 'open letter' to the Press by way of reply which contained the following:

> The court did not gainsay the fact that for much of the Hitler régime Veit Harlan was the 'Nazi film-director no. 1' or that his film 'Jud Süss' showed him to be a committed exponent of the Nazis' murderous purge of the Jews. Some businessmen here and abroad may not be opposed to Veit Harlan's re-emergence, but the moral integrity of Germany must not be destroyed by hard-faced money-makers. Harlan's return can only reopen wounds barely healed, and resuscitate diminishing distrust fatal to German reconstruction. For all these reasons it is not only the right but the duty of all decent Germans to protest against, and even to boycott, this ignominious representative of the German film industry.

Domnick-Film-Produktion GmbH and Herzog-Film GmbH (the distributor of 'Unsterbliche Geliebte' in the Federal Republic), obtained an interlocutory injunction from the Landgericht Hamburg ... and the Oberlandesgericht dismissed the complainant's appeal. At the complainant's request the two film companies were required to bring suit within a certain time. They did so, and on 22 November 1951 the Landgericht Hamburg issued the following judgment:

> The defendant is ordered, on pain of fine or imprisonment as determined by the court, to refrain (1) from calling on theatre managers and film distributors not to programme the film 'Unsterbliche Geliebte' and (2) from calling on the German public not to go to see the film.

…

B. I.

The complaint is admissible since the preconditions for the application of s. 90.2 sentence 2 of the Federal Constitutional Court Act are satisfied (decision before exhaustion of legal remedies).

II.

The complainant alleges that the Landgericht's judgment infringes his basic right to free expression of opinion as laid down in Article 5.1 sentence 1 Basic Law.

The judgment of the Landgericht, an act of the public power of judicature, could infringe the complainant's basic right by its content only if the court was bound to take account of the complainant's basic right.

By enjoining the complainant from making statements apt to lead others to endorse his views about Harlan's re-emergence and to follow him in discriminating against Harlan's films, the judgment clearly restricts the complainant's freedom of expression of opinion. The Landgericht granted the injunction as a matter of private law order on the basis that the complainant's statements were tortious under s. 826 of the Civil Code. Thus the public power has restricted the complainant's freedom of expression on the basis of the plaintiff's private law claim. This can constitute an infringement of the complainant's basic right under Article 5.1 sentence 1 of the Basic Law only if the applicable rules of private law are so substantially affected that they can no longer support the judgment.

The question whether basic rights affect private law, and if so in what manner, is much debated. The extreme positions are, on the one hand, that basic rights constrain only the state, and, on the other, that basic rights (or at any rate the most important of them) prevail against everyone in private legal relations. Previous decisions of this Court support neither of these extreme positions, the conclusions drawn by the Federal Labour court in its decision of 10 May 1957 (NJW 1957, 1688) from our decisions of 17 and 23 January 1957 (BVerfGE 6, 55 and 6, 84) being unwarranted. Nor is it necessary today to deal with all aspects of the debated question of the 'effect on third parties' (Drittwirkung) of basic rights. The matter can be properly resolved by the following considerations:

1. There is no doubt that the main purpose of basic rights is to protect the individual's sphere of freedom against encroachment by public power: they are the citizen's bulwark against the state. This emerges from both their development as a matter of intellectual history and their adoption into the constitutions of the various states as a matter of political history: it is true also of the basic rights in the Basic Law, which emphasizes the priority of human dignity against the power of the state by placing the section on basic rights at its head and by providing that the constitutional complaint (Verfassungsbeschwerde), the special legal device for vindicating these rights, lies only in respect of acts of the public power.

But far from being a value-free system the Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.

The legal content of basic rights as objective norms informs private law by means of the rules which directly control this area of law. Just as new rules must conform to the value-system of the basic rights so existing and older rules receive from it a definite constitutional content which thereafter determines their construction. From the point of view of substantive and procedural law a dispute between private citizens on the rights and duties that arise from rules of conduct thus influenced by the basic rights remains a dispute of private law. It is private law which is interpreted and applied even if its interpreters must follow the public law of the constitution.

The influence of the value-system of the basic rights is clearest in those rules of private law which are mandatory (zwingendes Recht) and form part of ordre public in the wide sense, i.e. those rules which in the public interest apply to private legal relations whether the parties so choose or not. Such provisions, being functionally related and complementary to public law, are especially exposed to the influence of constitutional law. 'General clauses', such as s. 826 of the Civil Code, by which human conduct is measured against extralegal standards such as 'proper conduct' (gute Sitten), allow the courts to respond to this influence since in deciding what is required in a particular case by such social commands, they must start from the value-system adopted by the society in its constitution at that stage of its cultural and spiritual development. The general clauses have thus been rightly described as 'points of entry' for basic rights into private law.

The judge is constitutionally bound to ascertain whether the applicable rules of substantive private law have been influenced by basic rights in the manner described; if so, he must construe and apply the rules as so modified. This is what is meant by saying that the civil judge is bound by the basic rights (Article 1.3 Basic Law). If he issues a judgment which ignores this constitutional influence on the rules of private law, he contravenes not only objective constitutional law by misconceiving the content of the objective norm underlying the basic law, but also, by his judgment, in his capacity as a public official, contravenes the Constitution itself, which the citizen is constitutionally entitled to have respected by the judiciary. Quite apart from any remedies he may have to correct this error in the courts of private law, the citizen can invoke the Federal Constitutional Court by means of a Verfas-sungsbeschwerde.

The Constitutional Court must determine whether the reach and effect of the basic rights in private law has been correctly ascertained by the regular courts. But this is also the limit of its investigation: it is not for the Constitutional Court to check judgments of civil courts for errors of law in general; the Constitutional Court simply judges of the 'radiant effect' of the basic rights on private law and implements the values inherent in the precept of constitutional law. The function of the Verfassungsbeschwerde is to test all acts, whether of the legislature, the executive or the judiciary, for 'compatibility with the Constitution' (s. 90 of the Federal Constitutional Court Act - BVerfGG). The Federal Constitutional Court is certainly not to act as a court of review, much less over-review, for the civil courts, but neither may it abjure consideration of such judgments entirely or leave uncorrected any instance which comes to its notice of the misapplication of the rules of basic rights.

2. The basic right to freedom of expression of opinion (Article 5 of the Basic Law) seems to pose special problems with regard to the relationship between basic rights and private law. As in the Weimar Constitution (Article 118), this right is constitutionally guaranteed only within the limits of 'general laws' (Article 5.2 of the Basic Law). Before inquiring what laws are 'general laws' in this sense, one might suppose that the constitution's reference to such laws must be to such laws as judicially construed, with the result that no judicial construction of such a law which limited the basic right could be regarded as a 'breach' of the basic right.

This is not, however, the sense of the reference to 'general laws'. The basic right to freedom of expression, the most immediate aspect of the human personality in society, is one of the most precious rights of man (Declaration of the Rights of Man and Citizen (1789) Article 11). It is absolutely essential to a free and democratic state, for it alone permits that

constant spiritual interaction, the conflict of opinion, which is its vital element (BVerfGE 5, 85 [205]). In a certain sense it is the basis of freedom itself, 'the matrix, the indispensable condition of nearly every other form of freedom' (Cardozo).

Given this fundamental importance for the free democratic state of freedom of expression of opinion, it would be illogical for a constitution to make its actual scope contingent on mere statute (and thus necessarily on the holdings of courts construing it). What was said earlier about the relationship between basic rights and private law applies here also: general laws which have the effect of limiting a basic right must be read in the light of its significance and always be construed so as to preserve the special value of this right, with, in a free democracy, a presumption in favour of freedom of speech in all areas, and especially in public life. We must not see the relationship between basic right and 'general laws' as one in which 'general laws' by their terms set limits to the basic right, but rather that relationship must be construed in the light of the special significance of this basic right in a free democratic state, so that the limiting effect of 'general laws' on the basic right is itself limited.

In its function as ultimate guardian of the basic rights through the medium of the Verfas-sungsbeschwerde, the Federal Constitutional Court must therefore have the power to supervise the decisions of courts whose application of a general law in this area may unduly restrict the scope of the basic right in the individual case. This Court must be competent to uphold as against all organs of public power, including the civil courts, the special value it represents for a free democracy, and thus to reconcile, as required by constitutional law, the conflicting restrictive tendencies of the basic right and the 'general laws'.

3. The concept of general law has always been controversial. Leaving on one side the question whether the concept may not be due to an error in the drafting of Article 118 of the 1919 Constitution, we may note that it was then construed to include all which 'do not forbid an opinion as such and do not envisage the expression of opinion as such', but rather 'serve to protect a legal interest which deserves protection without regard to any particular opinion', and protect 'a community value superior to the activity of freedom of opinion'. Exponents of the Grundgesetz agree with this ('laws which do not inhibit the purely intellectual effect of a mere expression of opinion').

If the term 'general laws' is so understood, we may state the protection of the basic right as follows:

> It is unacceptable to hold that the Constitution protects only the expression of opinion, and not its inherent or intended effect on others, for the whole point of an expression of opinion is to have 'an effect on the environment of ideas'. Thus value-judgments, which always have an intellectual aim, namely to persuade others, are protected by Article 5.1 sentence 1 of the Basic Law; indeed it is the stance of the speaker as expressed in the value-judgment by which he hopes to affect others which is principally protected by this basic right. To protect the expression and not to protect its effect would be a nonsense.

In this sense the expression of opinion is free in so far as its effect on the mind is concerned; but that does not mean that one is entitled, just because one is expressing an opinion, to prejudice interests of another which deserve protection against freedom of opinion. There has

to be a 'balance of interests'; the right to express an opinion must yield if its exercise infringes interests of another which have a superior claim to protection. Whether such an interest exists in a particular case depends on all the circumstances.

4. From this point of view the rules of private law may perfectly well be ranked as 'general laws' in the sense of Article 5.2 of the Basic Law. If this has not been done by commentators hitherto, that is simply because basic rights have been considered good only as against the state, so it was natural to consider as 'general laws' having limiting effect only those laws which regulated state activity *vis-à-vis* the individual, that is, laws of a public law nature. But if the basic right to free expression of opinion affects relations of private law as well and favours free expression of opinion against the fellow citizen also, then rules of private law which operate to protect superior legal interests must also be taken into account as possibly limiting the basic right. After all, if provisions of criminal law designed to protect honour or other essential aspects of human personality can set limits to the exercise of the fundamental right to freedom of expression, it is not obvious why similar provisions of private law should not equally do so.

b) Leipziger Volkszeitung (Leipzig People's Daily) - BVerfGE 27, 71

Explanatory Annotation

This decision is a reminder of the absurdities that happened during the "cold war" period, when the Soviet Union led communist block and the democratic western states were pitted against each other, among them former West-Germany and former communist East-Germany. At issue was the confiscation of East-German communist newspapers that some people had subscribed to by mail on the basis that this was qualified as abetting the activities of the prohibited Communist Party in West-Germany.[59] The Court, in one of its weaker moments, allowed these confiscations insofar as they could be qualified as abetting a prohibited political party, namely the Communist Party of Germany. However, it did so only because it went on to argue that the confiscation of the East-German newspaper in question violated another element of the freedom of communication clause of Article 5.1 of the Basic Law, the freedom of information.

59 The prohibition of political parties in Germany is possible under Article 21.2 of the Basic Law: "Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality." Only the Constitutional Court can declare a political party unconstitutional and it has only done so twice in the history of the Republic. The first decision in 1952 declared unconstitutional a successor party to the National-Socialist German Workers Party (so-called 'Nazis') of Adolf Hitler, the "Socialist Reich Party (SRP)", see BVerfGE 2, 1 and the second case pertained to one of the several communist parties in then West-Germany, the Communist Party of Germany (KPD). In order to be declared unconstitutional political parties must pursue the political goal of removing the democratic and rights based order in Germany and (sic!) they must be shown to be willing to pursue this goal with violence. It is not sufficient for a declaration of unconstitutionality to merely demand amendments of the Basic Law, as long as those amendments are legally possible, i.e. not prohibited by the eternity clause of Article 79.3. It is also not sufficient for such a declaration if the party calls for the abolition of the Basic Law but restricts itself to peaceful means. This approach to the legality and possible prohibition of political parties is shared by the European Court of Human Rights, see ECtHR (Grand Chamber), Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13/2/2003, Refah Partisi (The Welfare Party)/Turkey (available at http://hudoc.echr.coe.int/eng?i=001-60936 (last accessed on 21.10.2019)).

The Court held that the freedom of information guarantees the right to receive information from any source generally available. What is generally available cannot be determined by legislation regulating the legality of this or that lest the freedom of information were rendered ineffective. Even the fact that the information source in question might, in another context be qualified as a violation of criminal norms, i.e. abetting prohibited political parties, does not mean that the freedom of information must step back because just wanting to read a paper cannot be qualified as such a criminal act.

The broader significance of this decision lies in its construction of the freedom of information and this interpretation is still valid today. It should be noted that the freedom of information under Article 5.1 of the Basic Law cannot be understood in the same way as many freedom of information statutes in various countries. These "FOI-statutes" usually grant an entitlement to be granted access to certain information, e.g. documents etc. on request and subject to defined exceptions. The freedom of information of Article 5.1 of the Basic Law is limited to information that is publicly available and constitutes a defence right against government action restricting access to such generally available information. It is not a positive right for access to information that is not generally available and it does not entitle individuals to demand that such information to be made available to them.[60]

Translation of the 'Leipziger Volkszeitung' Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 27, 71*

Headnotes:

1. The right of citizens to inform themselves from generally accessible sources without hindrance that is guaranteed under Article 5.1 sentence 1 of the Basic Law (Grundge-setz - GG) (freedom of information) is an independent fundamental right that enjoys status equivalent to that of freedom of expression and freedom of the press.

2. A source of information is generally accessible if it is technically suitable for and intended to provide the general public with information. It does not lose this character through legal measures intended to prevent distribution.

3. Article 5.1 sentence 1 of the Basic Law protects not only the act of procurement of information, but just as much so the actual receipt of such information.

60 Whether this interpretation of the freedom of interpretation of Article 5.1 of the Basic Law needs to change is controversial. See Jürgen Bröhmer, Transparenz als Verfassungsprinzip - Grundgesetz und Europäische Union, 2004. Freedom of information legislation granting access to information and regulating this access and possible exceptions was passed on the federal level in 2005, see Gesetz zur Regelung des Zugangs zu Informationen des Bundes (Informationsfreiheitsgesetz) of 5/9/2005, Official Gazette (BGBl.), Part I, p. 2722, German version available at http://bundesrecht.juris.de/ifg/. This federal legislation had been preceded by legislation in some of the Länder. There are also statutes regulating access to environmental information. For the respective federal legislation see http://bundesrecht.juris.de/uig_2005/.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

4. Decision on the balance of interests between freedom of information and those provisions of criminal law constituting general laws which are intended to ward off threats to the constitutional order within the meaning of Article 5.2 of the Basic Law in the case of confiscation.

Order of the First Senate of 3 October 1969 - 1 BvR 46/65 -

Facts:

Pursuant to the Act to Monitor Criminal and Other Transportation Prohibitions (Gesetz zur Überwachung strafrechtlicher und anderer Verbringungsverbote - GÜV) of 24 May 1962 Federal Law Gazette (*Bundesgesetzblatt* - BGBl.) I, p. 607, the postal and customs authorities were charged with ensuring that materials - such as, among other things, newspapers and magazines - are not brought into the territorial sphere of operation of this Act if importation or distribution is prohibited for reasons of national security. In 1964, the complainant had daily newspapers, including a copy of the 8 May 1964 edition of the "Leipziger Volkszei-tung" in one parcel, mailed to him in Münster; Westphalia from the GDR (Deutsche Demokratische Republik - DDR) by acquaintances for information purposes. The complainant did not receive this newspaper since the Lüneburg Regional Court (Landgericht) had ordered that this edition of the "Leipziger Volkszeitung" be withdrawn from general circulation, due, among other things, to perpetration of various violations of national security (ss. 90a, 94 and 97 of the Criminal Code (Strafgesetzbuch - StGB), and it was then confiscated by the customs authorities. The Regional Court grounded its decision in the fact that the publication originated from the Socialist Unity Party of Germany (Sozialistische Einheitspartei Deutschlands - SED) - in the GDR. The Court reasoned that the parcel was sent for the purposes of supporting the efforts of the Communist Party of Germany (Kommunistische Partei Deutschlands - KPD), which was controlled by the Socialist Unity Party and whose activities were illegal, to introduce the rule of force and arbitrariness prevailing in the GDR to the Federal Republic.

The complainant's constitutional complaint directly challenging the order of the Lüneburg Regional Court issued in the objective proceedings was successful.

Extract from the Grounds:

C. I.

The constitutional complaint is founded.

1. The Regional Court did not explicitly take into account the freedom of expression and the freedom of the press of the publishers and distributors of the newspaper that was confiscated when it found that publication and distribution of that newspaper violated the provisions of law mentioned in the operative part of the order and when it ordered confiscation of the newspaper. There can be no objection to this on constitutional grounds. Although the order does not make it possible to discern which of the various commentaries in the newspaper article were considered to be in violation of the Basic Law, it can be inferred from the context of the grounds that the Regional Court assumed that the purpose of the publication and distribution of the newspaper

was to support the efforts of the Communist Party of Germany, which was controlled by the Socialist Unity Party and whose activities were illegal, in violation of ss. 42 and 47 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG) and ss. 128, 94 and 90a of the Criminal Code. In the presence of any such direct support for the organizational cohesion of the prohibited Communist Party of Germany, restriction of freedom of expression and freedom of the press is permissible due to the encouragement of the organization and there can in that regard be no objection on constitutional grounds to application of the provisions of criminal law (see BVerfGE 25, 44 [55 et seq]).

There could also be no objection if the Regional Court had at the same time based its order on s. 97 of the Criminal Code (defamation of governmental institutions) only in the grounds, but not in the operative part. Despite all permissible acerbity in the struggle for public opinion, the nature of an attack can, however, trigger effects that may no longer be tolerated (see also BVerfGE 4, 352 [355 et seq.] on the constitutionality of s. 187a of the Criminal Code [protection of politicians against defamation]).

2. However, when ordering confiscation the Regional Court did not take into account the influence exerted by the right of recipients or readers of the newspaper to inform themselves from generally accessible sources without hindrance that is guaranteed under Article 5.1 sentence 1 of the Basic Law (freedom of information). The decision to confiscate the newspaper under criminal law encroaches upon this fundamental right in that it hinders access to newspapers, which represent one of the most important sources of information.

When the Eighth Criminal Law Amendment Act (Strafrechtsänderungsgesetz) was being drafted, the various parties who took the position that making it difficult to obtain newspapers from the GDR did not interfere with the fundamental rights of citizens of the Federal Republic See the comments of the Member of the Bundestag Dr. Gradl, Stenographic Record of the 177th session of the Bundestag of 29 May 1968, p. 9527, and the Members of the Bundestag Dr. Güde and Dr. Schwarzhaupt at the 85th session of the Special Committee of the Bundestag for the Criminal Law Reform of 8 November 1967, Minutes pp. 1698 and 1701) (see the comments of the Member of the Bundestag Dr. Gradl, Stenographic Record of the 177th session of the Bundestag of 29 May 1968, p. 9527, and the Members of the Bundestag Dr. Güde and Dr. Schwarzhaupt at the 85th session of the Special Committee of the Bundestag for the Criminal Law Reform of 8 November 1967, Minutes pp. 1698 and 1701) failed to recognize that access to newspapers involves a two-way communication process that enjoys constitutional protection not only because of the freedom to express and disseminate opinions, also because of the freedom of information. For that reason, encroachment upon the process of communication affects both areas.

The provisions of criminal law (ss. 86 and 98.2 of the Criminal Code) cited as the basis for the decision of the Regional Court do not provide for compulsory confiscation, but leave this to the discretion of the court. As provisions of general laws that restrict the fundamental right within the meaning of Article 5.2 of the Basic Law, they must pursuant to the case law of the Federal Constitutional Court be viewed in the light of the importance of the fundamental right of freedom of information and construed in such a manner as to guarantee that the special

value embodied in that fundamental right is always preserved (see BVerfGE 7, 198 [208 et seq.]; 25, 44 [55]). In exercising its discretion, the Regional Court should have sought to achieve a balance between interests protected by the fundamental right of freedom of information and the interests protected by the provisions of criminal law. This requires that the content and reach of the fundamental right first be defined more precisely.

II.

1. Prior to the year 1945, there had been no independent fundamental right in German constitutional history that enabled citizens to inform themselves from generally accessible sources without hindrance. This freedom of information initially found its way into the constitutions of various *Länder* (see, for example, Article 11 of the Constitution of the former *Land* of Württemberg-Baden of 28 November 1946; Article 13 of the Hessian Constitution of 1 December 1946) Article 112.2 of the Bavarian Constitution of 2 December 1946 after World War II and thereafter into the Basic Law. The reason for the independent constitutional guarantee of freedom of information in the Basic Law lay in the experience with restrictions on information that were common practice under the National Socialist regime, which included governmental control of opinion, governmental prohibition of reception of foreign radio broadcasts and bans on literature and art.

2. a) The status of freedom of information in the constitutional order is equivalent to that of freedom of expression and freedom of the press. It is not merely an integral part of the right to express and disseminate opinions. This right does to be sure also encompass protection of the reception of opinions by others; this protection is, however, afforded exclusively the persons expressing opinions by virtue of their freedom of expression. The recipient plays only a passive role in that regard. Freedom of information, by contrast, is the actual right to inform oneself. On the other hand, this freedom is a prerequisite to the formation of opinion, which precedes expression of opinion. Because only through comprehensive information, which is made possible by the availability of adequate sources of information, can individuals and society freely form and express opinions. Finally, a free press makes it easier for citizens to form opinions and make political decision by providing comprehensive information (BVerfGE 20, 162 [174]).

Accordingly, the nature of the freedom of information guaranteed under Article 5.1 sentence 1 of the Basic Law is defined by two elements. The one is the reference to the principle of democracy contained in Article 20.1 of the Basic Law: A democratic state cannot exist without free public opinion and a public that is as well-formed as possible. In addition, freedom of information involves a personal element that derives from Article 1 and Article 2.1 of the Basic Law. The ability to inform themselves from as many sources as possible, to widen their knowledge and to thereby develop their personalities is one of the most basic needs of human beings. Additionally, the possession of information is of significant importance for the social standing of the individual in modern industrial society. The fundamental right of freedom of information is, like the fundamental right of free expression of opinion, one of the most important prerequisites for a free democracy (see BVerfGE 7, 198 [208]). It is only by virtue of this right that citizens are able to acquire on their own the necessary prerequisites for the

exercise of their personal and political duties in order to be able to act responsibly in a manner conducive to democracy. As they become better informed, citizens recognize interactions in politics and their importance for their existence and can draw consequences; their freedom to share responsibility and voice criticism grows. Not of least importance is the fact that information can enable the individual to become familiar with the opinions of others, weigh them against one another, and thereby eliminate prejudices and develop an understanding for those with other views.

Special importance is also assigned to freedom of information at the international level, which is reflected in international efforts made since 1945 to secure this freedom as an independent right. Following the Resolution of the General Assembly of the United Nations of 14 December 1946, which embodied an understanding of freedom of information in a broad sense that even included freedom of expression, the General Assembly of the UN enshrined the principle in Article 19 of the General Declaration of Human Rights of 10 December 1948:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 10.1 sentences 1 and 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 is similarly worded:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

b) Article 5.1 sentence 1 of the Basic Law protects not only the act of procuring information, but just as much so the actual receipt of information. The Basic Law is intended to ensure that the individual is able to inform himself to the greatest extent possible. It is also possible for individuals to be "informed" by sources that find their way into their sphere of cognizance without any active intervention on their part. For only through possession of information is it possible to make an independent choice. This aspect of being able to make such a choice is a fundamental element of any act of acquiring information. If freedom of information did not guarantee that sources of information are made available to individuals in the first place, that would also prevent them from actively making a choice. The act of "informing oneself" therefore also includes the purely intellectual process of acquiring information. An individual is already "informing himself" in this manner when information is being brought to him by mail. If such access is interrupted, subsequent reliance on freedom of information cannot be refuted by arguing that the printed matter was never received and that there was for that reason no interference with the freedom "to inform oneself." That the desire to inform one-self may not manifest itself until after receipt of the matter sent by mail lies in the nature of this right.

c) Freedom of information is constitutionally guaranteed only if the source of information is generally accessible.

This will regularly be the case if the source of information is technically suitable for and intended to provide the general public, i.e., a class of persons that is not specifically defined, with information. Newspapers and other means of mass communication are therefore by their very nature generally accessible sources of information. They also do not lose that characteristic of being generally accessible sources even if the possibility of general access is impaired by governmental measures such as confiscation and prohibition or regulation of importation. Such restriction of unhindered access to a source of information does not negate its general accessibility (see also Herzog in MaunzDürigHerzog, Kommentar zum Grundgesetz, Article 5 marginal notes 89 et seq.; Lerche, entry under *"Informationsfreiheit"* ["Freedom of information"] in Evangelisches Staatslexikon, 1966, column 785 [786]).

The actual nature of dissemination is the sole criterion, not any governmental provision or order.

The view to the effect that general accessibility may be significantly influenced by acts of government (Hamann, Das Grundgesetz, 2nd ed., 1961, note B 5 on Article 5; Dürig, AöR, vol. 81, p. 117 [139]; see also Bundestag document [*Drucksache des Deutschen Bundestages* - BTDrucks] IV/2476 p. 34 and Bundestag document V/1319 p. 75) runs counter to the purpose of the constitutional guarantee of freedom of information. It must be possible for individuals to form opinions on the basis of a broad spectrum of informational materials. The choice of such materials may not be subject to governmental influence. Since freedom of information is by virtue of its association with the principle of democracy also specifically intended to permit preparation for the formation of judgments as regards the policies of one's own governmental institutions, the fundamental right must enjoy extensive protection against restriction by those institutions.

The historical development, which is particularly important due to the recent nature of the fundamental right to freedom of information, also shows that general accessibility must be gauged exclusively against objective criteria. Freedom of information was specifically guaranteed under the Basic Law in reaction to the National Socialist bans and restrictions on information in order to ensure that individuals are also able to inform themselves from sources lying outside the territorial jurisdiction of the governmental powers of the Federal Republic. If a source of information is generally accessible at some place, be it even outside the Federal Republic, then even a legally enforceable confiscation order cannot deprive this source of information of its characteristic of general accessibility.

The structure of Article 5 of the Basic Law leads to the same conclusion. The "general laws" restriction in Article 5.2 of the Basic Law refers to all fundamental rights set forth in s. 1. The restriction contained in s. 2 would, however, be largely devoid of meaning in respect of freedom of information if the government could define general accessibility and thereby arbitrarily limit the scope of the fundamental right.

A generally accessible source also does not lose this characteristic if it constitutes the content of a postal item. In addressing the question as to general accessibility, not a single copy, but the entire circulation of a publication is what counts. That is what constitutes the source within the meaning of Article 5.1 sentence 1 of the Basic Law. Procurement of a single copy is only a concrete manifestation of the freedom to inform oneself.

III.

1. Accordingly, no. 126 of the "Leipziger Volkszeitung" of 8 May 1964, which was the issue affected by the confiscation order of the Regional Court, must be considered a generally accessible source within the meaning of Article 5.1 sentence 1 of the Basic Law. Confiscation therefore restricted the freedom of information of the complainant. The confiscation order must be lifted since the Regional Court did not take into account the influence exerted by the freedom of information.

2. The Regional Court must seek a balance on the basis of the meaning of freedom of information set forth here and in so doing take into account in particular the following:

a) Although there can be no objection on constitutional grounds to the assumption that a publication to be confiscated violates provisions of criminal law, this does not in itself mean that the right to information must be subordinated. The balance of interests between freedom of expression and freedom of the press of the publisher and distributor of a publication and the legal interests protected by the provisions of criminal law involves an active undertaking that engenders dangers. On the other hand, freedom of information does not become operative in the case of such publications until general access to information has already been provided. The fundamental right of citizens desirous of informing themselves requires a special balance of interests. Only dangers resulting from the information process can justify restriction of the individual, who, seen from the perspective of the Basic Law, has the right to his opinion and is called upon to take part in the public decision-making process.

…

3. The very complaint of a violation of Article 5.1 sentence 1 of the Basic Law requires reversal of the challenged decision due to deficiencies in the application of substantive law governing confiscation. In addition, Article 2.1 of the Basic Law does not come into question as a standard of review (see BVerfGE 11, 234 [238]).

It need not be decided here whether the fundamental right to freedom of information requires a specific procedural form, for example, provision of further legal remedies against decisions to make confiscation orders, the possibility of new proceedings or more extensive consultation of the affected party in the confiscation proceedings than is to be inferred from the relevant provisions of law (s. 431.2 of the Criminal Procedure Code old version - now ss. 440 and 431 of the Criminal Procedure Code in the version of Article 2 no. 16 of the Introductory Act to the Regulatory Offences Act (Einführungsgesetz zum Gesetz über Ordnungswidrigkeiten - EGOWiG) according to prevailing opinion.

c) Soldiers - Murderers, BVerfGE 93, 266

Explanatory Annotation

This decision of the Constitutional Court is certainly one of the more controversial ones and was subject to heated debates. At issue were a number of cases, joined together in this decision, were the various applicants in expression of their pacifist conviction in various public settings had referred to soldiers in general and German soldiers in particular as "murderers" or "potential murderers". The German translation for "murderer" ("Mörder") is also used to describe the person who commits one of the most serious crimes of the German Criminal Code.[61] Active soldiers confronted with this label had brought criminal action against the perpetrators under s. 185 of the German Criminal Code under which insulting another person is punishable. The regular criminal courts had held that the description of another person as a "murderer" and hence a heinous criminal constitutes such an insult and fines had been ordered.

The Court argued very carefully and acknowledged that a person could well feel insulted if referred to as a murderer. However, the Court also emphasized the quintessential importance of Article 5.1 of the Basic Law and therefore deemed it necessary in the light of the significance of free speech to scrutinize what was said to see if it could not be understood in a different manner. The fact that in all incidents soldiers in general were dealt with under the epithet and German soldiers were only included in this amorphous larger group would also have to lessen the potential for insult in one individual soldier. As a result the Court quashed all regular court decisions as unconstitutional in the light of the freedom of speech protected in Article 5.1 of the Basic Law.

The decision was met with harsh criticism, even alleging that, insofar as foreign soldiers were referred to as murderers the decision violated public international law. The balance between free speech and the protection of personality rights such as personal honour and integrity is of course a problem, which has kept many constitutional and other courts busy and has given rise to many controversies. That the Constitutional Court decided correctly can be illustrated by a simple test. Pacifist convictions have been around for centuries and are based on the belief that killing other human beings is morally wrong and not justifiable even in case of war and even if the war is one fought in self-defence. A non-justifiable killing is always tantamount to a serious crime. If that assumption is correct, a pacifist could never voice his opinion without being in danger of accusing someone of being a criminal. Free speech must prevail under such circumstances because curtailing such a fundamental debate is not acceptable under a liberal free speech clause.

61 See s. 211 of the German Criminal Code: "(1) Whosoever commits murder under the conditions of this provision shall be liable to imprisonment for life. (2) A murderer under this provision is any person who kills a person for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence", see http://www.gesetze-im-internet.de/englisch_stgb/index.html (in this translation 's.' are referred to as 'sections').

Translation of the Soldiers - Murderers Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 93, 266*

Judgment of 10 October 1995 -1 BvR 1476, 1980/91 and 102,221/92 -

Facts:

These constitutional complaints are about criminal court convictions for "insult" in the sense of the Criminal Code of the Federal Army and individual soldiers by statements like "Soldiers are murderers" or "Soldiers are potential murderers". The first complainant (1 BvR 1476/91) displayed a blanket with the words (in English) "A SOLDIER IS A MURDERER" written on it in red at a cross roads where NATO manoeuvres were taking place.

The second complainant (Case 1 BvR 1980/91) distributed a leaflet written by him at an exhibition by the Federal Army at a college in his hometown. It stated as follows: "Are soldiers potential murderers? One thing is clear: Soldiers are trained to be murderers. "Thou shall not kill" is changed to "Thou shall kill". World wide. And in the Federal Army too. Mass extermination, murder, destruction, brutality, torture, mercilessness, terror, threats, inhumanity, revenge, retaliation practiced in peace, perfected in war.

That is the trade of soldiers. World wide. And in the Federal Army too. If soldiers carry out "their duty", give commands and obey commands, then civilians are in for it. Militarism kills, even without weapons and even without war. There is only one answer to this: For peace, disarmament and humanity - refuse military service! Resistance against militarism!" A soldier R, and the Federal Defence Minister, started criminal proceedings in respect of this.

The Amtsgericht fined the complainant for insult of soldiers and the Federal Army. An appeal and a further appeal in law against this were unsuccessful. The third complainant (Case 1 BvR 102/92) wrote a letter, which was published in a newspaper after Dr. A was acquitted in the "Frankfurt soldiers trial". The letter repeated the "soldiers-are-murderers" quote from Kurt Tucholsky in 1931. The third complainant then argued that a decision in favour of military defence and an army always includes readiness for war and for mass murder legitimated by the state. He concluded with a declaration of complete solidarity with Dr. A and stated "All soldiers are potential murderers!". The Amtsgericht and the Landgericht fined the third complainant in several criminal prosecutions by members of the Federal Army, for insult of every member of the Federal Army (and therefore of the prosecutors). The Oberlandesgericht rejected his appeal in law. The fourth complainant (Case 1 BvR 221/92) appeared with five other people at a Federal Army information stand at a motorbike show. Some of them distributed leaflets; the fourth complainant and another person held up a banner on which were the words: "Soldiers are potential MURDERERS". The lower third of the word murderers had "conscientious objectors" written across it. The leaflet lamented the fact that the Federal Army only presented the fascination of technology but was silent about the reality of war. The other side of the leaflet consisted of pictures of weapons and the victims of war.

The Federal Constitutional Court quashed the criminal convictions and referred the cases back to the criminal courts. The grounds for the decision are given only insofar as they relate to the second and third complainants. Part of the dissenting judgment by Judge Haas is also given.

Extract from the Grounds:

The constitutional complaints are, insofar as they are permissible, well founded. The decisions challenged did not have sufficient regard to the basic right of the complainants under Article 5.1 sentence 1 of the Basic Law (Constitution of 1949 - GG).

I.

1. The statements for which the complainants have been punished for insult enjoy the protection of Article 5.1 sentence 1 of the Basic Law.

This constitutional norm gives everyone the right to express and disseminate his opinion freely in word, writing, and picture. In contrast to assertions of fact, opinions are characterised by the subjective attitude of the person expressing himself to the object of the statement (see BverfGE 90, 241 [247 seq.]). They contain his judgment about facts, ideas or persons. The protection of the basic right relates to this personal attitude. It therefore exists independently of whether the statement is rational or emotional, well founded or groundless, or regarded by others as useful or harmful, valuable or valueless (see BVerfGE 30, 336 [347 seq.]. The protection does not only relate to the content of the statement, but also to its form. The fact that a statement is formulated in a polemical or hurtful way does not remove it from the area of protection of the basic right (see BverfGE 54, 129 [138 seq.]; 61, 1 [7 f.]. Further, the choice of the place and time of a statement is protected. The person making the statement does not only have the right in general to make his opinion known. He may also choose for it those circumstances from which he expects the widest dissemination or the strongest effect of making it known.

The statements for which the complainants have been punished for insult are opinions in this sense, which are always covered by the protection of the basic right. The complainants in their statements that soldiers are murderers or potential murderers did not claim that particular soldiers had committed a murder in the past. They were instead expressing a judgment about soldiers and about the profession of soldier which under certain circumstances compels the killing of other human beings. The criminal courts also proceeded on the basis that it was a value judgment, not an assertion about facts.

2. Punishment for these statements is an intrusion into the protected area of the basic right to freedom of opinion.

3. The basic right to freedom of opinion is certainly not guaranteed without reservation. According to Article 5.2 of the Basic Law it is limited by the provisions of general statutes, the statutory provisions for the protection of young people, and the right to personal honour. S. 185 of the Criminal Code, which forms the basis of the decisions that are being challenged belongs to this category. In order to be able to support the conviction, the provision must agree with the Basic Law and besides this be interpreted and applied in a constitutional manner (see BVerfGE 7, 198 [208 seq.]; constant case law).

II.

No effective constitutional law objections exist against s. 185 of the Criminal Code.

1. The criminal provision is reconcilable with Article 5.1 sentence 1 of the Basic Law.

   a) The provision primarily protects personal honour. Within the framework of the general right of personality derived from Article 2.1 in combination with Article 1.1 of the Basic Law honour, itself, enjoys basic right protection. It can primarily be harmed by expressions of opinion. Therefore it is expressly recognised in Article 5.2 of the Basic Law as a ground justifying limitations on the freedom of opinion. It certainly does not follow from this that the legislature could limit freedom of opinion in the interest of personal honour as it pleases (see BVerfGE 7, 198 [208]). It should instead, when making use of the authorisation in Article 5.2 of the Basic Law, keep in mind the restricted basic right, and avoid excessive limitations of freedom of opinion. However, s. 193 of the Criminal Code takes account of this requirement in that it excludes punishment for a statement that has been made for the protection of justified interests. This provision, which is to be taken into consideration before any conviction under s. 185 of the Criminal Code, is widely formulated. It is therefore open to the influence of freedom of opinion in a special way, and permits a careful adjustment of the conflicting legal interests (see BverfGE 12, 113 [125 seq.]).

   b) As may be deduced from s. 194.3 sentence 2 of the Criminal Code, the protection of s. 185 of the Criminal Code does not only apply to persons. It also applies to authorities or other offices, which look after tasks of public administration. The norm cannot be justified here from the point of view of personal honour, because state institutions have no personal honour, nor can they have the general right of personality. s. 185 of the Criminal Code as a protective norm in favour of state institutions ranks however with the general laws in the sense of Article 5.2 of the Basic Law. This is to be understood as including all laws which do not forbid an opinion as such and are not directed against the expression of the opinion as such, but serve to protect a legal interest which is simply to be protected, without regard to any particular opinion. (See BVerfGE 7, 198 [209]; constant case law). That is the case with s. 185 of the Criminal Code. State institutions cannot fulfil their function without a minimum degree of social acceptance. They ought, therefore, in principle to be protected from verbal onslaughts which threaten to undermine this prerequisite (see BverfGE 81, 278 [292 seq.]). The criminal law protection ought not however to lead to state institutions being shielded from public criticism, even if it takes a harsh form. This should be guaranteed in a special way by the basic right of freedom of opinion. But s. 193 of the Criminal Code again takes sufficient account of this requirement, as it gives room for the influence of Article 5.1 sentence 1 of the Basic Law. It acquires increased significance if s. 185 of the Criminal Code is used for the protection of public institutions and not for the protection of personal honour.

2. S. 185 of the Criminal Code is also not too uncertain and therefore does not violate Article 103.2 of the Basic Law.

III.

The interpretation and application of criminal statutes are matters for the criminal courts. But for statutes which limit the freedom of opinion, according to a constant case law of the Federal Constitutional Court, the restricted basic right is at the same time to be taken into account so that its significance in setting values remains intact even at the level of application of the law (see BVerfGE 7, 198 [208 seq.]).

1. At the level of interpretation of the norm, Article 5.1 sentence 1 of the Basic Law requires a balancing operation, between the importance on the one hand of freedom of opinion and on the other hand of the legal interest for the benefit of which it has been limited. This is to be undertaken within the framework of the features of the definition of the statutes concerned. An interpretation of s. 185 of the Criminal Code would therefore be incompatible if it extends the concept of insult so widely that it exceeds the requirements of the protection of honour or protection of institutions (see BVerfGE 71, 162 [181]) or leaves no more room for taking freedom of opinion into consideration. Likewise Article 5.1 sentence 1 of the Criminal Code forbids an interpretation of ss. 185 seq. of the Criminal Code by which people would be deterred from the use of the basic right, which would lead to even permissible criticism remaining unspoken through fear of sanctions.

Especially in relation to the interpretation of s. 193 of the Criminal Code, weight must be given to the fact that freedom of opinion is simply constitutive for the free democratic order (see BVerfGE 7, 198 [208]). A justified interest can therefore exist not only when the person affected has himself given cause for the statement or when someone defends himself against personal attacks, but also if he participates in a public debate about questions which are socially or politically relevant. Special account must be taken of this if the provisions for the protection of honour in ss. 185 seq. of the Criminal Code are applied not to persons but to state institutions. They do not then serve the protection of personal honour, but seek to guarantee the public recognition needed by state institutions to fulfil their function. If this protective aim comes into conflict with the freedom of opinion, the importance of that freedom is to be rated particularly highly because the basic right has grown from the special need for protecting the criticism of authority and invariably is of importance here.

2. At the level of application of ss. 185 seq. of the Criminal Code in the individual case, Article 5.1 sentence 1 of the Basic Law requires weighing of the injury threatened to personal honour on the one hand and to freedom of opinion on the other. In this connection all the material circumstances are to be considered (see BVerfGE 7, 198 [212]; constant case law). The result of this balancing operation cannot be determined in advance in a general and abstract manner, because of its relationship to the facts of the individual case. But in the case law a series of approaches have been developed which provide criteria for the actual balancing operation.

Freedom of opinion must always take second place if the statement violates the human dignity of another. This principle, stated in relation to artistic freedom, is valid for freedom of opinion as well, because human dignity, as the root of all the basic rights, is not capable of being weighed against any individual basic right. But as not merely the individual basic rights but

also the basic rights as a whole are concrete manifestations of the principle of human dignity, it always needs careful reasoning if it is to be assumed that the use of a basic right affects inviolable human dignity.

Likewise, where disparaging statements are concerned which appear to be insult in the formal sense or abuse, freedom of opinion as a rule takes second place to protection of honour (see BVerfGE 61, 1 [12]). But because of its effect in suppressing freedom of opinion, the Federal Constitutional Court has defined narrowly the concept of abusive criticism developed in the specialist courts. According to this, an exaggerated or even rude criticism does not of itself turn a statement into abuse. Instead, the prominent feature about the statement should be defamation of the person rather than debate about the issue. It must be personal disparagement beyond even polemical and overstated criticism. On this basis abusive criticism will only exceptionally be present in statements about a question materially affecting the public and incidentally will more be limited to the so-called private feud. If a court incorrectly holds a statement to be insult in the formal sense or abuse the result will be to dispense with an actual balancing exercise taking into account all the circumstances of the individual case. There will then be a material error in constitutional law here, which will lead to the quashing of the decision if this is based on it (see BVerfGE 82, 272 [281]).

If the statement can be classified neither as an attack on human dignity nor as insult in the formal sense nor abuse then, for the purposes of the balancing exercise, it is a question of the seriousness of the interference with the legal interests affected. But here, in contrast to the case of assertions of facts, whether the criticism is justified or the value judgment is "right" plays in principle no role (see BVerfGE 66, 116 [151]). On the other hand, weight must be given to the question of whether use is being made of the basic right of freedom of opinion, within the framework of a private dispute, for the pursuit of personal interests or in connection with a question materially affecting the public. If the statement in question represents a contribution to formation of public opinion, according to constant case law of the Federal Constitutional Court, there is a presumption in favour of the freedom of speech (see BVerfGE 7, 198 [208, 212]). Deviations from this consequently need a basis that takes account of the constitutive importance of freedom of opinion for democracy, in which the presumption is rooted.

3. A prerequisite of every legal assessment of a statement is that its sense has been understood accurately. If this is absent in a conviction for a crime relating to a statement, this can lead to suppression of a permissible statement. Besides this, the danger exists that such a conviction would operate disadvantageously for the exercise of the basic right of freedom of opinion in general, because those wishing to make statements would risk punishment because of remote or untenable meanings of their statements (see BVerfGE 43, 130 [136]). Under these circumstances preliminary decisions are made at the level of meaning about the permissibility or impermissibility of statements. Article 5.1 sentence 1 of the Basic Law therefore generates requirements not only about the interpretation and application of statutes restricting the basic right, but also requirements about the meaning of the statements in question.

The purpose of the meaning is the communication of the objective sense of a statement. Neither the subjective intention of the person making the statement nor the subjective understanding of the person affected by the statement is therefore decisive. It is instead the sense

that the statement has according to the understanding of an unprejudiced and sensible public. In this connection, the starting point is always the literal meaning of the statement. But this does not establish its sense conclusively. It is also determined from the linguistic context of the statement in question and the accompanying circumstances in which it is made, insofar as these can be known to the recipient. The isolated study of a disputed part of a statement does not therefore as a rule fulfil the requirement for reliably deducing its sense (see BVerfGE 82, 43 [52]).

Judgments that clearly overlook the sense of the statement in dispute and base their legal assessment upon this violate the basic right of freedom of opinion. The same applies if a court faced with statements with more than one meaning takes as a basis the meaning leading to the conviction without having previously excluded the other possible meanings on conclusive grounds. In this connection the court does not of course need to go into remote alternatives supported neither by the literal meaning nor by the circumstances of the statement. Nor does it have to develop abstractly possible meanings for which there are no grounds of any kind in the actual circumstances. If, however, the wording or the circumstances permit a meaning that is not defamatory, a criminal conviction which ignores this violates Article 5.1 sentence 1 of the Basic Law. It must also be taken into consideration here that many words or concepts can have different meanings in different communication contexts. This is amongst other situations the case with concepts that are used in legal specialist terminology in a different sense than in colloquial speech. It is therefore also an error of substance in constitutional law if the sense specific to a specialism is taken as the basis of the conviction even though the statement was made in a colloquial context (see BVerfGE 7, 198 [227]).

The requirements which Article 5.1 sentence 1 of the Basic Law makes for deducing the sense of statements are subject to examination by the Federal Constitutional Court and especially when, as with criminal decisions, it is a matter of an intensive invasion of a basic right. The Federal Constitutional Court has always emphasised this (see BVerfGE 43, 130 [136 seq.]; 54, 129 [136 seq.]; 61, 1 [6, 9 seq.]; 82, 43 [50]; 82, 272 [280]; 85, 1 [13 f.]). There is no deviation in this from the constant case law on the extent of the authority of the Federal Constitutional Court to carry out an examination. This is because even in the case of conviction for crimes relating to statements, the Federal Constitutional Court only examines whether the courts have misunderstood the meaning and scope of the basic right of freedom of opinion. Otherwise it remains a matter for the sole competence of the specialist courts. In connection with crimes relating to statements, the enquiry focuses on whether the statement was in fact made. It also looks at what literal meaning it had, from whom the statement originated, and under what circumstances was it made - especially if the findings are based on the totality of the impression given at the oral hearing (see BVerfGE 43, 130 [137]). The contents of the minority judgment which deviate from this constant case law provide no cause for the giving up what has been the practice so far and for the restriction of the basic right protection for statements of opinion.

IV.

The decisions under challenge do not completely fulfil these requirements.

1. It certainly meets with no objection that the courts saw in the description of a soldier as a murderer a grave attack on his honour. Even if this description is not accompanied by an accusation that the person concerned actually committed murders, rating him on a level with a murderer still remains a deep insult. This weighs particularly heavily if the expression is used in the criminal law sense by incorporating the subjective characteristics of murder of s. 211 of the Criminal Code. But it is also so if it is used in the colloquial sense, because in this case, also, it describes a person who contributes (or is ready to do so) to the destruction of human life in a morally unjustifiable manner. In this there is likewise a condemnation of such a nature as appreciably to disparage the person affected in the eyes of those around him. That applies especially if the accusation refers not to occasional behaviour but to the totality of vocational activity.

But the courts have not sufficiently ensured that the statements for which punishment was imposed also really did have this sense. They ought to have investigated alternative meanings insofar as these would have been assessed more leniently in criminal law. Otherwise the danger exists that the person making the statement will be punished for a statement which does not contain the assumed insult. The courts ought not to have closed their eyes to such alternatives by an isolated consideration of the criminalised part of the statement. Consideration must, instead, be given to the context insofar as this was perceivable by the addressees of the statement. That applies first to the linguistic context of the statement in dispute, but can also include circumstances external to the statement.

In the present cases, there were alternatives to the meaning assumed by the courts that the soldiers in the Federal Army were equated to murderers in the criminal law or in the colloquial sense (implying that they were capable of committing especially despicable behaviour against other human beings). That arises principally from two circumstances.

Firstly the statements of the complainants according to their literal meaning refer to soldiers in general, without exception, but not to individual soldiers or specially to those of the Federal Army. If the Federal Army is also occasionally mentioned, that only occurs in order to confirm that the statement about all soldiers also applies to the soldiers of the Federal Army. This circumstance had to give cause to reflect whether the statement might not simply be directed against soldiery and soldiering; and that this was condemned because it was connected with the killing of other human beings which may take place in a cruel way and also affects the civil population. The fact that the complainants predominantly did not speak impersonally of "murder" but personally of "murderer" is, taken on its own, not sufficient to exclude this meaning. This is because an accusation against the individual soldier of seriously criminal conduct or a seriously criminal attitude need not necessarily be contained even in the use of the word "murderer". The person making the statement may instead be drawing attention in an especially challenging form to the fact that killing in war is not an impersonal event but is effected by a human hand. It should not therefore be excluded from the outset that the phraseology was to awaken

consciousness of personal responsibility with those carrying out military service and those in a soldier's vocation for the totality of the events condemned and thus foster preparedness to become conscientious objectors.

Secondly, the statements that soldiers are murderers or potential murderers are, as to the second, third, and fourth complainants, in a wider linguistic context. This was as to the second complainant in the form of a leaflet, as to the third complainant in the form of a reader's letter, and as to the fourth complainant in the form of leaflet used together with the banner and distributed simultaneously at the Federal Army stand. It was predominantly concerned with the destruction of human life, amongst soldiers as well as in the civil population, as an accepted consequence of the maintenance of armies and the associated readiness to carry on war, whether for the purposes of attack or defence. On the other hand, it was not a question of criticism of especially reprehensible individual behaviour or even of character defects of soldiers. From the context of the criminalised statements, there are no grounds at all for equating soldiers with murderers in the sense of fulfilling the subjective characteristics of murder of s. 211 of the Criminal Code.

2. Further, it is not open to objection constitutionally that the courts in certain circumstances see an attack on the personal honour of the members of a collective in a disparaging statement which neither names nor recognisably refers to certain persons, but covers the collective without any individual classification of it.

The personal honour of a human being, which should be protected from attacks by the threat of punishment under s. 185 of the Criminal Code, cannot be regarded in a purely individual way, removed from the collective relationships in which he stands. The individual moves in numerous interrelations, which transcend his individuality, some of which he chooses freely and some of which he must accept without any involvement by him. On the basis of these he is subject to expectations about roles and behaviour. He is also more or less identified by those around him with the collectives to which he belongs and the social roles that he plays. His reputation in society depends in these circumstances not only on his individual qualities and behaviour but also on the characteristics and activities of the groups to which he belongs, or of the institutions in which he is active. In this respect disparaging statements about collectives can also adversely affect the honour of their members.

In the case of disparaging statements based on a collective term, the boundary certainly cannot be precisely drawn between two things. One is an attack on personal honour, which is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law and which according to Article 5.2 of the Basic Law justifies restrictions on freedom of opinion. The other is criticism of social phenomena, institutions of state or society or social roles and role expectations for which Article 5.1 sentence 1 of the Basic Law guarantees free scope. The danger of excessive limitations on freedom of opinion is therefore always inherent in punishment for statements of this kind. Certain foreign legal systems, in particular those of the Anglo-Saxon legal family, do not therefore recognise collective insult at all and only punish injury to honour which expressly or recognisably refers to individuals. (See, for instance, Robertson / Nicol, Media Law, 3rd edition (1992), 57.)

Whether s. 185 of the Criminal Code could also be interpreted in this way is not for decision here. The Basic Law does not in any case demand such a restrictive interpretation of the provisions for the protection of honour. But when s. 185 of the Criminal Code is applied to disparaging statements related to a collective name, it is always necessary to examine whether they really impugn the "personal" honour of the individual members of the group. Above all it must be taken into account that it ought not to extend to the suppression of critical statements about political and social phenomena or institutions for which the protection of freedom of opinion applies in a special way. Criminal jurisprudence also emphasises this.

The courts have in this connection relied on a decision of the Bundesgerichtshof which was in fact made because of disparaging statements about soldiers (see BGHSt 36, 83). The Bundesgerichtshof proceeds in this decision on the basis that the requirements which the Reichsgericht had placed on the criminality of collective insults, namely that the group must be delimitable and easily comprehensible, did not satisfy the demands of the rule of law as to the limiting of definitions of criminal acts. The Bundesgerichtshof, therefore, requires additionally that the disparaging statement should be linked to a characteristic, which is present with all members of the collective. A link to characteristics, which certainly apply to some but obviously not to all members, does not, according to this case law, diminish the personal honour of each individual member. As it would be clear to every addressee of such a statement that every individual cannot be intended, and particular persons are not named no one is insulted by such a statement.

The Bundesgerichtshof obviously proceeds on the basis that even after this delimitation, very large collectives still remain whose members would have to be treated as personally insulted by disparaging statements related to a collective description. In order to avoid this, it adheres to the view that disparaging statements about groups so large as not to be easily comprehensible (like all Catholics or Protestants, all trade union members, or all women) do not affect the personal honour of every individual member of the group. Criminal jurisprudence also accepts that otherwise the limiting of the definition of the criminal act that is held to be necessary would again be sacrificed.

This interpretation takes account of the point of view of freedom of opinion. Article 2.1 in conjunction with Article 1.1 of the Basic Law as well as Article 5.2 of the Basic Law serve to protect personal honour. The larger the collective to which a disparaging statement refers, the weaker the extent to which an individual member can be personally affected. This is because with accusations against large groups, it is mostly not a question of individual inappropriate behaviour or individual characteristics of the members, but of the demerits, as they exist in the view of the speaker, of the group and of its social function, as well as the requirements for the behaviour of the members connected with this. Thus, on the one end of the scale we find the insult of a single person described by name or otherwise rendered identifiable, and on the other pejorative statements about human qualities or the criticism of social institutions or phenomena that are not, as such, able to affect the personal honour of an individual.

These considerations also apply to disparaging statements about soldiers, so far as they refer to all soldiers in the world. On the other hand, the criminal courts are not prevented on constitutional grounds from seeing in the (active) soldiers of the Federal Army a group that is

sufficiently easily comprehensible. Therefore, a statement which refers to them can also insult every individual member of the Federal Army if it is linked to a characteristic which obviously or at least typically applies to all members of the collective.

It is inconsistent to apply specifically to soldiers of the Federal Army a disparaging statement, which without closer delimitation has all soldiers as its object, just because these soldiers are part of soldiers as a whole. As all large collectives divide into smaller sub-groups, even an entirely non-specific and therefore innocent statement changes by the application of it to any of them into a personal and therefore criminal insult. The limiting of the definition of the criminal act undertaken by the Bundesgerichtshof on the grounds of the rule of law is thereby in effect removed again.

This inconsistency is also pertinent in constitutional law. Freedom of opinion may only be limited to the extent that is necessary for the protection of personal honour, and this is not affected by disparaging statements about large collectives which are not easily comprehensible. Therefore according to the view of the criminal courts which is not open to objection on constitutional law grounds, punishment for statements of this kind represents an impermissible restriction of Article 5.1 sentence 1 of the Basic Law. If someone who has made a disparaging statement about soldiers in general is punished for insult of soldiers of the Federal Army, it does not therefore suffice to show that the soldiers of the Federal Army form a sub-group of all soldiers. It must, instead, be demonstrated that it is the soldiers of the Federal Army that are meant, even though the statement refers simply to soldiers. Such a divergence of linguistic form and objective sense is not by any means impossible. But the courts must then identify the circumstances from which the understanding arises, even though it is not discernible from the literal meaning of the statement alone. If there are none, a violation of Article 5.1 sentence 1 of the Basic Law is present.

3. Finally there is no constitutional law objection to the courts balancing freedom of opinion and protection of honour and giving preference to the latter when there is no wider contribution to discussion about the issue in the statement in dispute, defamation of the person being the dominant feature. That corresponds to the case law of the Federal Constitutional Court on abusive criticism.

But it is a prerequisite that the statement in question really amounts to abusive criticism. The courts have assumed this predominantly with reference to the decision of the Bavarian Obersten Landesgericht (NJW 1991, p. 1493) referred to, which concerned a very similar statement about soldiers. It is true that this decision reproduces accurately the principles on abusive criticism developed in the constitutional case law; but it does not orientate the application of the law to this sufficiently. The narrow concept of abuse developed in the constitutional case law taking freedom of opinion into consideration does not form the basis of the minority judgment either.

The characteristic of abuse is personal insult forcing the objective issue completely into the background. For the complainants, however, it was obviously a question of a debate about the issue, in fact about the question of whether war and military service and the killing of human beings connected with it are morally justified or not. That arises for the second, third and fourth complainants from the context of the criminalised statement which the courts had to consider under the label of abusive criticism. As to the first complainant, the choice of the word "murder" instead of "murderer" as well as the situational context at least point in this direction. The conflict between preparedness for defence and pacifism is a question substantially affecting the public as to which there is a presumption in favour of freedom of speech. In the face of this the courts would have had to demonstrate that in the actual statements, even taking into consideration their context, debate about the issue had been forced into the background by defamation of people.

But there are no doubts about this, for the very reason that the statements according to their literal meaning did not refer to particular persons but covered all soldiers without distinction. It is certainly not impossible that even with disparaging statements about large collectives, defamation of the persons belonging to them is the dominant feature. That applies especially if the statements are connected to ethnic, racial, physical or intellectual characteristics from which the inferiority of a whole group of persons and therefore at the same time every individual member is deduced. But as a rule only statements about definite persons or associations of persons will come to be considered as abusive criticism. The concept has only been used in this sense so far in the case law of the Federal Constitutional Court and the Bundesgerichtshof. If, on the other hand, it is a question of groups of persons that are united by a definite social function, it is rather to be presumed that the statement is not characterised by defamation of persons but is linked to the activity undertaken by them. The statement can then nevertheless be injurious to honour. But it no longer falls within the concept of abusive criticism, which makes superfluous an actual balancing exercise with the interests of freedom of opinion, taking into consideration all the circumstances of the case.

Contrary to the minority judgment, no different assessment is required just because the statement affects soldiers. In particular, the circumstance that soldiers carry out armed service, are called up for this purpose by the state as conscripts and in this connection must show obedience does not make their personal honour more worthy of protection than that of members of groups of the civil population. A constitutional law principle according to which certain duties of obedience are to be compensated by increased protection of honour does not exist. The fact that someone who is abused has a claim to state protection of his honour is rather the product of the constitutional law protection of the personality, which is the right of all human beings in the same way. The protection does not of course make the proof that the statement in dispute is injurious to honour or even abusive unnecessary, but makes it a prerequisite.

V.

For the individual decisions which have been the subject of a permissible challenge, the following applies:

…

2. Case 1 BvR 1980/91

a) According to the opinion of the Amtsgericht, the statement of the complainant gives expression to the view "that every soldier at the end of his training is a murderer, someone who kills out of a reprehensible state of mind". The court has no more explained what this interpretation is based on than it has considered alternative possible interpretations of the leaflet. It has instead described the interpretation presented by the complainant as "insignificant", because the statement could have no other sense than the one assumed. However the leaflet itself as composed by the complainant would have offered clues for other interpretations. It is true that it uses the noun "murderer" in connection with the training goal of the military, but in characterising a soldier's activity reverts immediately to the verb "killing" for which in the German language there is no corresponding noun. For this reason the concept of the murderer is common in colloquial speech even for persons who have killed without fulfilling the characteristics of murder in s. 211 of the Criminal Code. The text which follows, with its allusion to "soldier's trade" and "militarism", also makes it appear possible that the complainant did not make the accusation against soldiers of killing out of a reprehensible state of mind, but indicated the possible consequences of soldiers' training and the conduct of war.

The court has not explained to what extent the statement referred to the soldier R (who laid the criminal charge) as a member of the Federal Army (rather than as a statement about all soldiers -a group not easily comprehensible- leaving his personal honour unaffected).

The protection of justified interests has been denied to the complainant by the assertion that his text debased human dignity, and overstepped the boundary between sharp criticism and polemical defamation. A reason is lacking for both these claims. The court has thereby evaded the necessity for a balancing between freedom of opinion and protection of honour.

For the further assumption that the statement insulted not only individual soldiers but also the Federal Army as a whole, the court limited itself to the comment that the capacity of the Federal Army to be insulted was recognised. But it neither explained how far the Federal Army had in fact been insulted, nor set out why the disparagement of its reputation is of greater weight than the interference with freedom of opinion.

b) The Landgericht also did not concern itself with an interpretation of the statement, but contented itself with the finding that the complainant had answered the question put by himself as to whether soldiers were potential murderers in the affirmative. It certainly reproduced in detail the complainant's understanding associated with his statement, but did not investigate it.

In contrast to the Amtsgericht, the Landgericht did explain how the disparaging statement referred to soldiers of the Federal Army and thereby also to the soldier R who laid the criminal charge. That is inferred from the fact that in the text of the leaflet the Federal Army had been "twice mentioned expressly by the phrase 'in the Federal Army'". But the text of the leaflet does not support this meaning. The Landgericht ignored the fact that in both cases general statements were made about soldiers as well as about soldiers' trade. The universal validity of these statements was expressed by the complainant by the word "world wide" immediately preceding the words "in the Federal Army as well" on two occasions. Grounds were therefore needed for saying why the statement nevertheless referred not to all the soldiers in the world but to those of the Federal Army.

The Landgericht denied that justified interests were being protected because it regarded the statement as abuse for which freedom of opinion always takes second place to protection of the personality. It gave as its reasoning that the disparagement of the reputation of soldiers played a dominant role because murder was to be regarded as killing due to a reprehensible state of mind. In its view, equating soldiers with murderers was not substantially mitigated by the "supposed" extension of the statement to cover all soldiers of the world and by the addition of the word "potential". However, the whole content of the leaflet, as well as the cause for its distribution, should have given grounds for considering whether it contained in substance a defamation of persons or whether it was merely a contribution to a wider public debate which, as a rule, excludes the assumption of abusive criticism.

The judgment lacks a basis for saying that the Federal Army has been insulted as a whole.

c) The decision of the court hearing the appeal in law suffers from the same defects as the judgment of the appeal court.

3. Case 1 BvR 102/92

a) The judgment of the Landgericht contains no explanations about the meaning of the statement in dispute. The Landgericht proceeded instead simply on the basis that it was a question of an insult to honour.

On the other hand, it obviously gave legal significance to and investigated the objection of the complainant that his statement referred to all soldiers of the world and thereby to a group which was not capable of being insulted because it was not easily

comprehensible. It sought, however, to refute this with the argument that the complainant had in his reader's letter declared solidarity with Dr A, the accused in the so-called Frankfurt soldiers trial, whose statement that every soldier was a potential murderer also referred to Captain W (who was present) because he was likewise a soldier. Apart from the fact that the conclusion that the complainant had thereby directed his statement at the soldiers of the Federal Army does not follow from this, the reasoning in other respects also does not stand up to examination. If a disparaging statement refers to all soldiers in the world and thereby to individual soldiers only insofar as these form a part of the totality of all soldiers, then those soldiers are not more precisely identified. The assumption that, contrary to the text of the reader's letter, the statement does not cover all the soldiers of the world but specially the soldiers of the Federal Army, would therefore have required further findings.

The Landgericht omitted to carry out a balancing between freedom of opinion and the protection of honour, indicating that it was a question of abusive criticism. The judgment does not contain a separate reason for this. Instead it reproduces the considerations of the Bavarian Obersten Landegericht in the decision mentioned and explains that nothing is to be added to this. No subsuming under the principles developed there is undertaken. But the assumption that it is a question of abusive criticism is prevented in the present case because of the context in which the statement in dispute stood. This made clear that for the author it was a question of the problematic issue of the support of the military and the readiness to kill in war connected with this. Whether he had expressed that in a way which takes account of the requirements of the protection of honour must therefore be elucidated by a balancing exercise based on the actual case.

The decision of the Oberlandesgericht shows the same defects as the appeal judgment.

VI.

It is possible that in any of the four cases the courts would have come to other conclusions if they had considered the other possible and natural interpretations of the statements; taken account of the difference between a disparaging statement about all soldiers of the world and the soldiers of the Federal Army; and applied the concept of abusive criticism in a constitutional manner. The decisions under challenge must therefore be quashed and the cases referred back. But this does amount to an acquittal of the complainants nor to a declaration that insults of individual soldiers or of the members of specific armed forces by statements like "soldiers are murderers" are permissible. Rather the actual statements must be assessed afresh taking into consideration the requirements of Article 5.1 sentence 1 of the Basic Law which have been explained.

This decision is made in respect of the first, third and fourth constitutional complaints by a majority of five votes to three, and in respect of the outcome of the second constitutional complaint unanimously.

Dissenting opinion of Judge Haas:

> I do not share the opinion of the majority of the Senate that the decisions of the Bavarian Obersten Landesgericht and the Oberlandesgericht of Koblenz as well as the Landgericht judgments (as the courts of last instance for the finding of facts) are unconstitutional. The basic right of the complainant under Article 5.1 of the Basic Law is not violated. The freedom of expression of opinion is limited by the right to personal honour.

1. The courts in the initial proceedings have made a correct legal assessment of the facts, on the basis of the findings made by them. This is to the effect that the statement "soldiers are murderers" or "soldiers are potential murderers" contains a negative value judgment about soldiers of the Federal Army, which is not open to another interpretation, taking into consideration the content of the expression in colloquial speech, than that which they gave it. This is not open to objection in constitutional law.

In principle, the position is as follows: the elucidation and assessment of the facts of a case are a matter for the specialist courts. The Federal Constitutional Court in constant case law proceeds on the basis that court decisions can only be examined within narrow boundaries under the constitutional complaints procedure. In particular, it considers that the establishment and assessment of the facts of a case and the interpretation of ordinary law and its application to the individual case are matters for the courts which have general jurisdiction for this and are removed from the scope of examination undertaken by the Federal Constitutional Court (see BVerfGE 18, 85 [92 seq.]; 22, 93 [99 seq.]; 30, 173 [196 seq.]; 42, 143 [148]; 76, 143 [161]; 82, 6 [11]; 89, 276 [285]). The Federal Constitutional Court has stressed its special function and position in relation to other holders of judicial power. It has therefore always emphasised that it could not put its own assessment of the circumstances of the individual case in the manner of a court of appeal in place of that of the competent judge where the assessment of the established circumstances is decisive for the constitutional law judgment.

I cannot subscribe to the laying down by the Senate of another yardstick for testing the interpretation of statements, nor its application sometimes of the "full" constitutional law examination. Nor can I accept it requiring that the judge of fact must, from several possible interpretations, choose one which has a "convicting" or "conclusive" basis. "Conviction" (whose?) is not a constitutional law yardstick; "conclusiveness" cannot be required in the assessment of statements, because understanding follows its own laws, not simply those of logic. Finally, the wider yardstick for examination has led to the Federal Constitutional Court claiming for itself extensively the interpretation competence of a judge of fact. It has also resulted in it interfering in areas of decision-making which are reserved to the specialist jurisdiction which is closer to the case with its specific opportunities for elucidation and especially investigation in the oral hearing. This is meeting with increasing criticism (see Bertrams, DVBl. 1991, p. 1226; Herdegen, NJW 1994, p. 2934; OLG Mamberg, NStZ 1994, p. 406). It is not clear which special features could justify or even require a more thorough examination here. The fact that the constitutional law assessment under Article 5.1 of the Basic Law depends upon the outcome of the assessment of the facts of the case does not suffice for this purpose; it applies to other basic rights in the same manner. Here, as there, the constitutional court control must limit itself to violations of

specific constitutional law. It is true that the constitutional complaint opens up to examination by the Federal Constitutional Court the question of whether the circumstances which are important for interpretation purposes have been taken note of by the court, and considered and weighed bearing constitutional law guidelines in mind. Whether the specialist judge has interpreted the sense of an ambiguous statement with accuracy in every respect is however not a question of constitutional law. I cannot therefore share the opinion of the majority of the Senate that the Federal Constitutional Court can nevertheless examine whether all possible interpretations which it recognises as conceivable have been considered by the specialist court.

2. It is quite understandable that the specialist courts, taking into consideration the findings of fact that they have made, should attribute to the concept "murderer" the sense of a negative value judgment of substantial weight. Even on the basis of the view of the majority of the Senate, this interpretation is not open to objection. In colloquial speech, the word "murderer" is associated with a type of criminal who stands out as having a particularly negative profile. Murderers form the most abhorrent category of criminals. There is no evident alternative interpretation that could take away the deep injury to honour from the accusation of being a murderer. Even the majority of the Senate did not produce such an alternative interpretation that could impress the mind of the objective unprejudiced observer. That the word "murder" in case 1 BvR 1476/91 conveys the message that the soldier is at the same time the perpetrator and the victim seems scarcely probable; it would however be unimportant anyway because this interpretation still equates soldiers with murderers. Finally, the total context of the statement on each occasion also allows no other interpretation. Thus in the case of the complainant in case 1 BvR 221/92 the discriminatory message of the banner which was widely visible was not toned down for individual readers of the leaflet. Regardless of this, an interpretation, which takes into account the text of the leaflet, should not be considered here anyway. This is simply because the specialist court did not establish (and according to all experience of life cannot establish) that all readers of the banner would also have become aware of the content of the leaflet. The specialist court cannot avail itself of an alternative interpretation based on facts not established by it.

What the maker of the statement intended to say is in the end unimportant for interpreting the concept "murderer", if it found no expression in the statement. At first, only what he actually said is in question; the decisive thing is then the objective sense: how the statement was to be understood by the average observer in the position of the recipient of the statement at the point in time when it was communicated. Therefore a possible intention by the complainant to awaken, by the choice of words, consciousness of personal responsibility with those concerned cannot, contrary to the view of the majority of the Senate, influence the truth content of the statement. This is because such an intention changes nothing in the content and sense of the words chosen. Besides this, consideration of such an intention would depend on the specialist court having made appropriate findings; this is lacking, for instance, in case 1 BvR 102/92.

3. The courts established as a fact that the statement which was injurious to honour referred expressly (or obviously, from the total context) to soldiers of the Federal Army. On this basis, the courts could also affirm that the soldiers of the Federal Army (and therefore every single

member of the armed forces) were an addressee of the statement. To what extent the arguments of the majority of the Senate on defamation of collectives can be followed can be left undecided here. There are doubts anyway about the majority of the Senate understanding the decision of the Bundesgerichtshof (which was quoted with approval) (BGHSt 36, 83 [87]) as meaning that a characteristic present with all members of the group must be added, besides the criterion of the group being easily comprehensible.

4. The statements of opinion by the complainants are not covered by the right to free expression of opinion (Article 5.1 of the Basic Law) which is subject to the reservation of the right to personal honour. It is not evident that the decisions which are under challenge had in this respect misjudged the meaning and scope of the basic right.

The specialist courts have assessed the disparaging comparison of soldiers with murderers as violation of the general right of personality (Article 1.1 in conjunction with Article 2.1 of the Basic Law) but not as violation of human dignity (Article 1.1 of the Basic Law). It might need to be considered whether the accusation of being a murderer does not put in question the moral value of the individual and therefore really affects the essence of the person thus addressed. In any case, the specialist courts have resolved the tension between freedom of opinion and protection of honour in a manner not open to objection in constitutional law. According to the case law of the Federal Constitutional Court, in cases of abusive criticism freedom of opinion regularly takes second place to protection of honour (BVerfGE 82, 43 [51] with further references). Abusive criticism is always to be assumed if the disparaging statement predominates. Accordingly, the mere presence of a reference to an issue insofar as it is discernible as such by persons to whom the statement is communicated does not get rid of the charge of abusive criticism. The specialist courts, in balancing all the factual circumstances of the individual case, which is a matter for them, came to the conclusion that abusing soldiers dominated the rest of what happened in such a way that the possible expression at the same time of concern about an objective issue takes second place. If - as in the case of the complainant in case 1 BvR 1476/ 91 - in default of any additional factor going beyond the literal defamatory meaning of the banner an ascertained or even only ascertainable concern with an objective issue is not discernible by the passing observer, this is obvious and needs no special reasoning to support it. In the two other cases as well, the balancing exercise undertaken by the specialist courts is not open to objection from this point of view.

It is not by chance that the Basic Law has expressly named the right to personal honour as a limitation of freedom of opinion. Even without this special emphasis, the right to personal honour as an expression of the personality and as a result of human dignity (which it is the responsibility of all state power to protect and to respect: Article 1.1 of the Basic Law) would acquire importance of such a nature as to set limits, especially with public statements. This was not sufficient for the author of the Constitution. He wanted, by the limiting of freedom of opinion which is anchored in the Basic Law, emphatically to counteract any spilling over of the conflict of political opinions into the personal realm. Because the protection of honour until then was, against the background of experiences principally in the time of the Weimar Republic, seen

on all sides as insufficient, the right to personal honour was taken into the Basic Law in 1949 as an express limitation of freedom of opinion. A basis for the protection of honour which deserves the name was thereby laid. This protection of honour was not contested in the deliberations of the Parliamentary Council from beginning to end. What was self-evident at the time still deserves attention even today. Renunciation of personal defamation in the process of formation of political opinion can only promote this, in that it elevates the culture of political argument.

For public statements with reference to members of the German armed forces this must apply so much the more since these soldiers are under a duty to fulfil the task of defence provided for in constitutional law to the best of their powers. They risk their lives in order to keep the horror of war from the civil population and to protect the lives of that population - and not least the lives of those who disparage their activities and make them contemptible in the eyes of the public. A legal order which obliges young men to carry out armed service and requires obedience from them must guarantee protection to those who fulfil these duties when they are abused because of this service as soldiers and publicly described as murderers. It is not a question here of the construction of a special "soldier's honour". It is a question of the simple self-evident fact that the Constitution, if it does not want to lose its credibility, ought not to leave without protection those who follow its commands and (exclusively) for that very reason are attacked. The correlation between protection and obedience belongs to the elementary principles of a legal order. This cannot be and ought not to be left out of consideration.

2. *Article 5.1 of the Basic Law in the Context of the Holocaust*

Explanatory Annotation

The traumatic historical experience of the total breakdown of civilization that was the Holocaust (Shoa), i.e. the attempted annihilation of the Jewish population, and the attempted annihilation also of other minorities, ethnic or otherwise, such as the Roma, homosexuals, persons with disabilities, communists and other opponents at the hands of Germany continues to create conflict in the area of free speech. The Basic Law is a constitution created in the dark shadow of the totalitarian Nazi terror regime and it is not surprising that the "free speech" guarantee is a prime area of controversy. The four decisions presented below deal with various facets of the same problem. How can one adequately reconcile the guarantee of free speech with the gruesome historical facts that bestow a special responsibility of the Germany of the Basic Law?

In the Auschwitz-Lie decision, the German Constitutional Court addresses the scope of the freedom of speech in the context of persons denying that the Holocaust even happened and in particular that the concentration camp associated with the innocent Polish town of Auschwitz did not engage in the industrial killing of the mostly Jewish prisoners. A few revisionist "historians" have supported such claims, perhaps most notably and notoriously by the British historian David

Irving. German criminal law prohibits the so-called "Auschwitz lie" and threatens criminal sanctions of up to five years in prison or fines to those who deny the Holocaust.[62]

At issue in this case where violates requirements placed on the - extreme right-wing - organizers of an indoor appearance of the British historian Irving. The organizers were required by the city of Munich to see to it that no criminal activity under the relevant sections of the German Criminal Code, especially § 130 Criminal Code, would take place and to take active steps if that were to happen. The organizers were also informed that, among other things, the denial of the Holocaust is prohibited by criminal law.

The Constitutional Court saw this as a justifiable restriction on free speech. The Court noted that the scope of the freedom of speech clause predominantly covers opinions and not statements of fact. The difficulty lies in the distinction between opinion and fact because opinions are often based on factual assertions. As far as the denial of the Holocaust itself was concerned, the Court regarded that as a denial of facts and factual assertions do not join in the protection of Article 5.1 of the Basic Law. This protection could only become relevant if the denial took place in some broader concept of voicing an opinion. The Court also held that such denial violates the personality rights of the victims of the Holocaust and the protection of personality rights is specifically mentioned as a possible restriction for the freedom of communication in Article 5.2.

Whether and how the various forms of "hate speech" are or should be compatible with the guarantee of free speech has caused much controversy not only in Germany[63] but also in other European countries, with the seemingly more libertarian approach in the United States serving as a point of contrast. The European Court of Human Rights in Strasbourg (ECtHR), whose jurisprudence is a very significant cornerstone of the legal freedom of communication framework in Europe, has consistently held that member states are not obligated to accept such forms of speech under the Article 10 of the European Convention of Human Rights (ECHR).[64]

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62 § 130 Criminal Code (Incitement to hatred") generally prohibits various forms of "hate-speech", including in § 130.3, by reference to (German) Code of International Criminal Law (unofficial English translation available at http://www.iuscomp.org/gla/statutes/VoeStGB.pdf) and specifically to § 6 thereof which deals with the crime of genocide, the denial or downplaying of genocidal acts under the "rule of National Socialism", see § 130, http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1246 (last accessed on 27.8.2019).

63 See the instructive articles of Brugger, Winfried, The Treatment of Hate Speech in German Constitutional Law (Part I), 3(12) German Law Journal 2002, E10, doi:10.1017/S2071832200015698 and Part II, The Treatment of Hate Speech in German Constitutional Law (Part II), 4(1) German Law Journal 2003, 23-44, doi:10.1017/S2071832200015728.

64 See for example ECtHR [GC], Appl. No. 64569/09, 16.6.2015, Delfi AS v. Estonia, http://hudoc.echr.coe.int/eng?i=001-155105, para 136: "Moreover, the Court has held that speech that is incompatible with the values proclaimed and guaranteed by the Convention is not protected by Article 10 by virtue of Article 17 of the Convention. The examples of such speech examined by the Court have included statements denying the Holocaust, justifying a pro-Nazi policy, linking all Muslims with a grave act of terrorism, or portraying the Jews as the source of evil in Russia. [...].

The difficulty of the distinction between what is inciteful non-protected "hate speech" and what is still protected speech can be difficult and the other three decisions illustrate the difficulties. In essence, the Constitutional Court wants to ensure that there cannot be a blanket prohibition of all right-wing extremist speech as that would outlaw whole belief structures. In its recent jurisprudence, the Court emphasizes the criterion in § 130.3 Criminal Code according to which the speech must be "capable of disturbing the public peace". This picks up on the Constitutional Courts Wunsiedel/Hess decision where the Court analyzed in much detail the nature of § 130 Criminal Code and how it fits into the nomenclature of laws that could justifiably limit free speech.[65] The lower courts, when applying these criminal sanctions, must ensure and demonstrate that not the speech as such is being sanctioned but its negative impact on the public peace.[66] In the Netzradio-Germania decision the Constitutional Court could not find this link to the disturbance of the public peace; hence, the constitutional complaint was successful. In the Holocaust-denial decision issued on the same day, the Constitutional Court confirmed the potential for the disturbing of the public peace, for example, because the denial was combined directly and deliberately with calls to Jewish persons and institutions to rectify the "falsified" history thus indirectly blaming and accusing the victims in typical fashion.[67]

The approach of the German Constitutional Court and the ECtHR are correct. Free speech was never absolute. Libel, slander, defamation, etc. have always been accepted as limitations and the only question is the balancing of these exceptions with the free speech guarantee, which is of such central importance for any democratic system. It is hard to fathom a more fundamental insult and attack on the public peace than to tell those who have lost family, relatives, and friends, and indeed those who have suffered in the concentration camps and survived (though not many are now left to tell the story first hand), that their suffering is only imagined and never took place.

65 Especially whether § 130 Criminal Code is a "general law"in the sense of Article 5.2 of the Basic Law, see Wunsiedel Assembly/Hess Memorial - BVerfG, 4.11.2009, 1 BvR 2150/08, http://www.bverfg.de/e/rs20091104_1bvr215008en.html, paras. 30 et seq.

66 Netzradio Germania - BVerfG, 22.6.2018, 1 BvR 2083/15, http://www.bverfg.de/e/rk20180622_1bvr208315en.html, paras. 17, 23.

67 Holocaust Denial - BVerfG, 22.6.2018, 1 BvR 673/18, http://www.bverfg.de/e/rk20180622_1bvr067318en.html, para. 35.

a) Auschwitz Lie - BVerfG, 13.4.1994, 1 BvR 23/94, http://www.bverfg.de/e/rs19940413_1bvr002394.html ((in German) (BVerfGE 90, 241)

Translation of the Auschwitz Lie Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE), 90, 241*

Headnote:

Judgment on the question as to whether application of s. 5 no. 4 of the Assembly Act (Versammlungsgesetz - VersG) to assemblies at which denial of the persecution of Jews is to be expected is in violation of Article 5.1 sentence 1 of the Basic Law (Grundgesetz - GG).

Order of the First Senate of 13 April 1994 pursuant to s. 24 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG) - BvR 1 23/94

Facts:

When the complainant, a regional organization of the NPD, invited David Irving, a historian who is widely considered to be a revisionist on the extreme right, to a symposium, the local authority with jurisdiction for the complainant invoked s. 5 no. 4 of the Assembly Act, making permission to hold the event contingent on the condition that appropriate measures be taken to ensure that the persecution of Jews during the Third Reich not be the subject of any discussion that involved denial of such persecution or doubt as to whether it took place. The authority required that it be announced at the beginning of the event that such talks were punishable by law and that any such talks be immediately prohibited; if necessary, the meeting was to be interrupted or householders' rights invoked to end the event. The authority found it necessary to take these measures because there was reason to assume that criminal acts under ss. 130, 185, 189 and 194 of the Criminal Code (Strafgesetzbuch - StGB) would be committed at the planned event. The administrative appeal against these conditions was unsuccessful.

The Federal Constitutional Court dismissed the constitutional complaint as obviously unfounded.

Extract from the Grounds:

B. II.

The challenged decisions are not in violation of Article 5.3 sentence 1 of the Basic Law.

1. Article 5.1 sentence 1 of the Basic Law guarantees every person the right to freely express and disseminate his or her opinion.

a) The decisions must be measured primarily against this fundamental right. The condition that the complainant contests does to be sure relate to a public assembly. At issue, however, are specific statements that the complainant, as the sponsor of the event, may

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

neither make nor tolerate. Assessment of the condition under constitutional law hinges primarily upon whether such statements are allowed or not. A statement that may not be prohibited on constitutional grounds may pursuant to s. 5 no. 4 of the Assembly Act also not constitute a reason for a measure that restricts assembly. However, the standards for resolving this issue do not derive from the fundamental right to freedom of assembly (Article 8 of the Basic Law), but rather from freedom of expression.

b) The fundamental right protected under Article 5.1 sentence 1 of the Basic Law pertains to opinions. Freedom of expression and dissemination relates to opinions. Opinions reflect a subjective relationship between a person and the content of his or her statements (see BVerfGE 33, 1 [14]). A characteristic element of opinions is that they involve taking and holding a position (see BVerfGE 7, 198 [210]; 61, 1 [8]). In that regard, opinions also cannot be proven true or false. They enjoy the protection of the fundamental right regardless of whether the statements are considered founded or unfounded, emotional or rational, valuable or worthless, dangerous or harmless (see BVerfGE 33, 1 [14-15]). The protection of the fundamental right also extends to the form of statements. An expression of opinion does not lose the protection afforded fundamental rights because its formulation is cutting or injurious (see BVerfGE 54, 129 [136 et seq.]; 61, 1 [7]). In that regard, the only question can be whether and to what extent the freedom of expression may be limited under Article 5.2 of the Basic Law.

Representations of fact, on the other hand, are not in the strictest sense expressions of opinion. Unlike opinions, representations of fact are such that the objective relationship between the statement and reality is in the foreground. To that extent, they are also amenable to verification of the truthfulness of their content. This does not mean, however, that representations of fact are automatically excluded from the scope of protection offered by Article 5.1 sentence 1 of the Basic Law. Since opinions are generally based on factual assumptions or involve taking a position as regards actual situations, representations of fact also enjoy the protection of the fundamental right - in any case insofar as they represent a prerequisite for the formation of opinion - that is guaranteed by Article 5.1 of the Basic Law taken as a whole (see BVerfGE 61, 1 [8]).

As a result, representations of fact are protected only until such time as they can no longer make the contribution to the formation of opinion required under constitutional law. Under this aspect, incorrect information does not constitute an interest that merits protection. The Federal Constitutional Court has in its established case law consistently held that representations of facts that are deliberate misrepresentations which have been demonstrated to be untrue are not covered by the protection of freedom of expression (see BVerfGE 54, 208 [219]; 61, 1 [8]). However, the standards to be met in terms of truthfulness may not be chosen such that the function of freedom of expression suffers and permissible statements are also suppressed for fear of sanctions (see BVerfGE 54, 208 [219-220]; 61, 1 [8]; 85, 1 [22]).

It can of course be difficult to distinguish between expressions of opinion and representations of fact since the two are frequently associated with one another and only together yield a meaningful statement. In such cases, separation of factual and subjective elements is permissible only if the meaning of the statement is not distorted. When this is not possible, the statement must be considered in its entirety to represent an expression of opinion and included within the scope of protection of freedom of expression in the interest of effective protection of the fundamental right since there would otherwise be a danger of significant curtailment of the protection of the fundamental right (see BVerfGE 61, 1 [9]; 85, 1 [15-16]).

c) Freedom of expression is not, however, guaranteed without reservation. According to Article 5.2 of the Basic Law, it is subject to the restriction imposed by the provisions of general laws and statutory provisions governing the protection of youth and personal honour. However, it is necessary to take into account the importance of freedom of expression when interpreting and applying laws that have a restrictive effect on the freedom of expression (see BVerfGE 7, 198 [208-209]). As a rule, this makes it necessary to find a balance between the restriction of the fundamental right and the legally protected interest that the statute restricting the fundamental right is intended to protect as a function of the constitutive elements of the relevant statutes.

The Federal Constitutional Court has developed various rules for balancing such interests. According to these rules, freedom of expression by no means always takes precedence over the protection of personality, as the complainant would argue. In fact, protection of personality regularly takes precedence over freedom of expression in the case of statements of opinion that can be considered to constitute formal insults or invective (see BVerfGE 66, 116 [151]; 82, 272 [281, 283 et seq.]). In the case of statements of opinion accompanied by representations of fact, the degree of protection may depend upon the truthfulness of the underlying assumptions of fact. If these facts are shown to be untrue, freedom of expression is regularly subordinated to protection of personality (see BVerfGE 61, 1 [8-9]; 1 [17]).

In addition, it is necessary to determine which legally protected interest merits precedence in the individual case. However, it is to be noted that freedom of speech will be afforded precedence in the case of issues of significant public interest (see BVerfGE 7, 198 [212]).

This must therefore also always be taken into account when weighing the legal interests of the parties involved against one another.

2. In this respect, no apparent violation of Article 5.3 sentence 1 of the Basic Law can be discerned. The condition imposed upon the complainant as the organizer of the assembly to ensure that the persecution of Jews during the Third Reich not be denied or doubted is compatible with this fundamental right.

a) The complainant did not contest the assumption made by the authority responsible for approving the meeting and confirmed by the administrative courts to the effect that there was a danger that such statements would be made in the course of the meeting. In fact, it is argued that the complainant has a right to make such statements.

b) The prohibited statement to the effect that there was no persecution of Jews during the Third Reich is a representation of fact that has been demonstrated to be untrue by countless eyewitness accounts and records, the findings of the courts in numerous criminal proceedings and the results of historical research. Taken on its own, a statement with this content does not therefore enjoy the protection of freedom of expression. This represents a significant difference between denial of the persecution of Jews during the Third Reich and denial of German culpability for the outbreak of World War II, which was dealt with in the decision of the Federal Constitutional Court of 11 January 1994 (BVerfGE 90, 1 et seq.).

In the case of statements regarding the assignment of guilt and responsibility for historic events, complex assessment is always involved that cannot be reduced to a representation of fact, whereas the denial of an occurrence itself will regularly be of the nature of a representation of fact.

c) However, the decisions under challenge withstand constitutional review even if one does not take the statement responsible for the condition imposed by the authority on its own, but instead views it in the context of the subject of the meeting and considers it a prerequisite to formation of an opinion on the susceptibility of German politics to "extortion." The prohibited statement does then to be sure enjoy the protection of Article 5.1 sentence 1 of the Basic Law. However, the restriction of that right cannot be objected to on constitutional grounds.

aa) A legal basis for such restriction exists that is consistent with the Basic Law.

The public authorities and administrative courts based the condition restricting expression of opinion on s. 5 no. 4 of the Assembly Act. According to this provision, an assembly in closed rooms may be prohibited if facts are established that show that the organizer or the organizer's followers will advocate views or tolerate statements that constitute an indictable offence or a summary offence subject to prosecution *ex officio*. This provision is compatible with the Basic Law.

In particular, it is not in violation of Article 8.1 of the Basic Law. Freedom of assembly in closed rooms is to be sure guaranteed without reservation. That does not, however, mean that statements of opinion at meetings enjoy protection beyond that afforded by Articles 5.1 and 5.2 of the Basic Law. Statements of opinion that are punishable under a provision of law that is compatible with Article 5.2 of the Basic Law are also forbidden at meetings. In view of Article 8.1 of the Basic Law, it is also in principle not possible to object to the fact that the legislature would seek to prevent criminal acts that can with a high degree of probability be expected to occur at a meeting before they are actually committed. Limitation of the reasons for prohibition to indictable offences and summary offences to be prosecuted *ex officio* and the principle of proportionality, which is to be respected in the case of all measures taken to limit freedom of assembly, provide protection against excessive restriction of freedom of assembly.

There is also no evidence of a violation of Article 5.1 sentence 1 of the Basic Law. s. 5 no. 4 of the Assembly Act does not itself provide for restriction of freedom of expression, but relies on restrictions contained in the Criminal Code. Measures that restrict freedom of assembly under s. 5 no. 4 of the Assembly Act may therefore only be taken if there is a threat that statements will be made at an assembly that are otherwise punishable and are prosecuted *ex officio*. However, the provision does not involve subsequent sanctions by the courts, but rather preventive prohibition by the authorities. The concomitant dangers for freedom of expression are, however, countervailed since stringent requirements are imposed as regards the likelihood of danger and there must be no doubt as to the criminal nature of the statements under existing case law.

There is no doubt as to the constitutionality of the penal provisions underlying the condition imposed on the organizer of the meeting. The existence of the offence of defamation protects personal honour, which Article 5.2 of the Basic Law explicitly identifies as a legally protected interest that justifies the restriction of freedom of expression. s. 130 of the Criminal Code is a general law within the meaning of Article 5.2 of the Basic Law that is intended to protect humanity (see Bundestag document [*Drucksache des Deutschen Bundestages* - BTDrucks.] III/ 1746, p. 3) and finds its ultimate constitutional justification in Article 1.1 of the Basic Law.

bb) The interpretation and application of s. 5 no. 4 of the Assembly Act in conjunction with s. 185 of the Criminal Code in the decisions under challenge are also compatible with Article 5.1 sentence 1 of the Basic Law.

(1) The administrative authorities and administrative courts based their decisions on the interpretation of criminal law that they were provided with by the ordinary courts. According to this interpretation, the Jews living in Germany constitute a class that it is possible to insult because of the fate to which the Jewish population was exposed under the rule of National Socialism; denial of the persecution of the Jews is considered to constitute an insult to this class of persons. The Federal Court of Justice commented as follows on this issue:

> The very historical fact that human beings were ostracized on the basis of the criteria of descent in what are referred to as the Nuremberg Laws and robbed of their individuality for the purposes of extermination gives Jews living in the Federal Republic a special personal relationship with their fellow citizens; what took place in the past is still with us today. It is part of their personal self-perception to consider themselves members of a class of persons that has been singled out by fate toward which all others have a special moral responsibility, and this constitutes part of their dignity. Respect for this self-perception is for each of them indeed one of the guarantees against the repetition of such discrimination and a fundamental prerequisite for life in the Federal Republic. Anyone who would attempt to deny those events deprives each and every one of them of this personal esteem to which they are entitled. For those affected, this represents a continuation of the discrimination against the class of persons to which they belong and at the same time against them personally (Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 75, 160 [162-163])."

The legislature has relied on this case law and included an exception to the requirement for a request by the victim in the case of such insults in s. 194.1 sentence 2 of the Criminal Code (see Bundestag document 10/3242, p. 9).

The opinion of the Federal Court of Justice has to be sure been contested in the literature on criminal law. Some authors feel that the definition of the elements of the offence of defamation is too broad (Schönke/Schröder-Lenckner, StGB, 24th ed., s. 185 marginal note 3; Dre-her/Tröndle, StGB, 46th ed., s. 194 marginal note 1; Köhler, NJW 1985, p. 2390 fn. 11). However, it is not the task of the Federal Constitutional Court to determine whether an interpretation of the Criminal Code under ordinary law is correct or whether other opinions would also be tenable. For the purposes of assessment under constitutional law, the sole consideration is whether the interpretation is based on a failure to recognize fundamental rights. This is not the case here.

The fact that denial of the persecution of Jews is viewed as a serious violation of the right of personality in the decisions under challenge based on this case law provides no reason for misgivings. There can be no objection on constitutional grounds to the logical connection established by the Federal Court of Justice between the denial of the racially motivated annihilation of the Jewish population during the Third Reich and attacks on the right to respect and human dignity of the Jews alive today. Here too, there is a difference between the denial of the persecution of the Jews and the denial of German responsibility for the war (see Federal Constitutional Court, Order of 11 January 1994 - BVerfGE 90, 1 et seq.). The latter opinion, regardless of its questionable historical accuracy, does not in any case impair any legal interests of others.

The objection of the complainant to the effect that the conditions for assembly were based on an understanding of s. 185 of the Criminal Code underlying the draft of s. 140 of the Criminal Code in the 21st Criminal Law Amendment Act (Strafrechtsänderungsgesetz, Bundestag document 10/1286, p. 4), which was not enacted by the German Bundestag, also does not make this interpretation unconstitutional. Although the legislature did refrain from introducing a specific offence subject to more severe punishment to cover denial of the persecution of the Jews, this does not make it possible to conclude that the act is not punishable under the more general provision contained in s. 185 of the Criminal Code, especially since - as has been shown - the legislature relied on the case law under which denial of fateful persecution is construed as an insult.

(2) It is also not possible to detect a flaw of constitutional significance in the balance between injury to reputation on the one hand and restriction of freedom of expression on the other hand. The severity of the respective impairment plays a decisive role in such a balance. In the case of derogatory statements that include a representation of fact, whether the representation of fact is true or not is important. Representations of fact that have been proven to be incorrect are not interests that merit protection. When such representations are inextricably associated with opinions, they do benefit from

protection under Article 5.1 sentence 1 of the Basic Law, but any encroachment upon the freedom of expression is from the outset less serious than in the case of statements of fact that have not been proven to be untrue.

That is the case here. Even if the statement that the complainant was prohibited from making at the meeting is considered to be an expression of opinion in the context of the subject of the meeting, this does not in any way change the fact that the actual content has been proven to be incorrect. The encroachment upon the freedom of expression as regards this statement is therefore not particularly serious. In view of the importance attributed to injury to reputation, there can be no objection to the fact that protection of personality is given precedence over freedom of expression in the decisions under challenge.

This is also not changed by the fact that the attitude of Germany towards its National Socialist past and the political implications thereof, which is what the meeting was about, represents an issue of significant public interest. In this case, there is to be sure a presumption in favour of free speech. However, this does not apply in the case of statements that constitute formal insults or invective or offensive statements based on representations of fact that have been proven to be untrue.

There is also no reason to fear overextension of the standard of truthfulness required of the factual core of the statements from this balance of interests that is incompatible with Article 5.1 sentence 1 of the Basic Law. The limitation of the duty of care required by the Federal Constitutional Court in the interest of free communication and the critical and control function of the media applies to representations of fact when the accuracy of the facts is at the time the statement is made still uncertain and cannot be immediately verified. It does not, however, apply when it has already been established that a statement is not true, as is the case here.

(3) Since the condition imposed by the authority under challenge cannot be objected to on the basis of s. 185 in conjunction with s. 194.1 sentence 2 of the Criminal Code as it is, whether this also applies for the purposes of establishing culpability under ss. 130 and 189 of the Criminal Code is no longer of any importance.

III.

The same considerations apply as regards review of the decisions under challenge against the standard of Article 8.1 of the Basic Law. No other conclusion can therefore be inferred from this fundamental right.

b) Wunsiedel Assembly; Hess Memorial - BVerfG, 4.11.2009, 1 BvR 2150/08, http://www.bverfg.de/e/rs20091104_1bvr215008en.html (BVerfGE 124, 300)

Headnotes:

1. Even though it is not a general law, § 130.4 of the Criminal Code (Strafgesetzbuch – StGB) is compatible with Article 5.1 and 5.2 of the Basic Law. In view of the injustice and the horror which National Socialist rule inflicted on Europe and large parts of the world, defying general categories, and of the establishment of the Federal Republic of Germany which was understood as an antithesis of this, an exception to the ban on special legislation for opinion-related laws is inherent in Article 5.1 and 5.2 of the Basic Law for provisions which impose boundaries on the propagandistic condonation of the National Socialist rule of arbitrary force.
2. The amenability of Article 5.1 and 5.2 of the Basic Law to such special provisions does not rescind the substantive content of freedom of opinion. The Basic Law does not justify a general ban on the dissemination of right-wing radical or indeed National Socialist ideas already with regard to the intellectual impact of its content.

Ruling:

The constitutional complaint is rejected as unfounded.

Facts:

With his constitutional complaint, the complainant opposes a judgment on an appeal on points of law of the Federal Administrative Court which has as its subject-matter the banning under the law on assemblies of a commemorative demonstration for Rudolf Heß in Wunsiedel that had been announced for 20 August 2005. The ruling is based on § 15.1 of the Act on Meetings and Processions (*Gesetz über Versammlungen und Aufzüge*) (in the new version of 15 November 1978, Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I p. 1789 <1791> - Assemblies Act (*Versammlungsgesetz* – VersG)) in conjunction with § 130.4 of the Criminal Code. The complainant opposes both § 130.4 of the Criminal Code itself and its interpretation in the concrete case. **[1]**

I.

The provision contained in § 130.4 of the Criminal Code was inserted into the Criminal Code with the Act Amending the Assemblies Act and the Criminal Code (*Gesetz zur Änderung des Versammlungsgesetzes und des Strafgesetzbuchs*) of 24 March 2005 and came into effect as per 1 April 2005 (Federal Law Gazette I p. 969 <970>). It reads as follows: **[2]**

> (4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying the National Socialist rule of arbitrary force shall be liable to imprisonment of not more than three years or a fine. **[3]**
>
> In terms of the law on assemblies, § 130.4 of the Criminal Code becomes significant because of § 15.1 of the Assemblies Act. This reads as follows: **[4]**

(1) The competent authority may ban the meeting or the procession or make it subject to specific conditions if according to the circumstances which are recognisable at the time of the issuance of the order, public security or order would be directly placed at risk if the meeting or the procession were to take place. **[5]**

A danger to public security is to be presumed according to this provision *inter alia* if the violation of criminal provisions is threatened (Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 69, 315 <352>). **[6]**

[...]

C.

The constitutional complaint is unfounded. § 130.4 of the Criminal Code is compatible with the Basic Law (C I-V), and was applied by the Federal Administrative Court in a manner which is constitutionally unobjectionable (D). **[24]**

I.

§ 130.4 of the Criminal Code encroaches on the area protected by Article 5.1 sentence 1 of the Basic Law. **[25]**

Article 5.1 sentence 1 of the Basic Law guarantees to every person the right to express and disseminate his or her opinion freely. Opinions are characterised by the subjective relationship between the individual and the content of his or her statement (see BVerfGE 7, 198 <210>). The element of taking a position and of appraising/having one's way of thinking is characteristic of them (see BVerfGE 7, 198 <210>; 61, 1 <8>; 90, 241 <247>). In this respect, they also cannot be proven to be true or untrue. They enjoy the protection of the fundamental right without it being a matter of whether the statement is well-founded or groundless, emotional or rational, is evaluated as valuable or valueless, dangerous or harmless (see BVerfGE 90, 241 <247>). Nor are citizens legally obliged to personally share the values on which the Constitution is based. The Basic Law is built on the expectation that citizens accept and realise the general values of the Constitution, but does not bring about loyalty to values by force (see Federal Constitutional Court, Orders of the First Chamber of the First Senate of 24 March 2001 - 1 BvQ 13/01 -, *Neue Juristische Wochenschrift* – NJW 2001, p. 2069 <2070> and of 15 September 2008 - 1 BvR 1565/05 -, NJW 2009, p. 908 <909>). **[26]**

Opinions aiming to fundamentally change the political system regardless of whether and how far they are implementable in the context of the system of the Basic Law are hence also protected by Article 5.1 of the Basic Law. The Basic Law trusts in the power of the free debate as the most effective weapon against the dissemination of totalitarian, inhumane ideologies. Accordingly, even the dissemination of National Socialist ideas as a radical questioning of the valid system does not from the outset fall outside the area protected by Article 5.1 of the Basic Law. Within the free system of the Basic Law, it is primarily civil commitment in the free political debate, as well as state education and upbringing in schools according to Article 7 of the Basic Law which are entrusted with countering the dangers lying therein. **[27]**

By virtue of the fact that § 130.4 of the Criminal Code links to the approval, glorification and justification of the National Socialist rule of arbitrary force and penalises this subject to further preconditions, the provision encroaches on the area protected by freedom of opinion. **[28]**

II.

The encroachment on freedom of opinion is justified. § 130.4 of the Criminal Code constitutes a statutory basis which in a constitutionally permissible manner can justify an encroachment on freedom of opinion. The criminal provision is not a general law within the meaning of Article 5.2 alternative 1 of the Basic Law (1). As a special legislation, it can also not be based on the right to personal honour according to Article 5.2 alternative 3 of the Basic Law (2). In relation to the National Socialist Regime in the years between 1933 and 1945, Article 5.1 and 5.2 of the Basic Law however also permits encroachments to be made through provisions which do not comply with the requirements as to a general law. In view of the unique injustice and of the horror which this rule under German responsibility inflicted on Europe and large parts of the world, and of the significance of this past, which characterises the identity of the Federal Republic of Germany, statements approving of this can have impacts which cannot be suitably done justice to solely in categories that are amenable to generalisation (3). **[29]**

1. § 130.4 of the Criminal Code is not a general law within the meaning of Article 5.2 alternative 1 of the Basic Law. **[30]**

a) According to Article 5.2 alternative 1 of the Basic Law, freedom of opinion finds its limits in the provisions of the general laws. These are to be understood as including laws which do not prohibit an opinion as such, which are not directed against the utterance of the opinion as such, but which serve to protect a legal interest which is to be protected per se without regard to a specific opinion (see BVerfGE 7, 198 <209-210>; 28, 282 <292>; 71, 162 <175-176>; 93, 266 <291>; established caselaw). **[31]**

This legal interest must be protected in the legal system generally, and hence regardless of whether it can be violated by expressions of opinion or by other means (see BVerfGE 111, 147 <155>; 117, 244 <260>). **[32]**

aa) A starting point for examining whether a law is a general one is first and foremost the question of whether a provision is linked to the content of opinions. If it covers the conduct in question quite independently from the content of an expression of opinion, there are no doubts with regard to the general nature of the law. If, by contrast, it links to the content of an expression of opinion, one must ask whether the provision serves to protect a legal interest otherwise protected in the legal system. If this is the case, it can be presumed as a rule that the law does not target a specific opinion, but generally aims in an opinion-neutral manner to avert violations of legal interests. In this respect, it is not the case that any linking to the content of opinions as such lends to a law the character of a general law. Instead, content-linking provisions are also to be evaluated as general laws if they recognisably target the protection of specific legal interests and not a

specific opinion. On the basis of this presumption, the Federal Constitutional Court (*Bundesverfassungsgericht*), in relation to Article 5.2 of the Basic Law, for instance evaluated as general laws the provisions on the duties of soldiers and civil servants to exercise political moderation (see BVerfGE 28, 282 <292>; 39, 334 <367>), on the punishability of defamation of the state and its symbols according to § 90a of the Criminal Code (see BVerfGE 47, 198 <232>; 69, 257 <268-269>), on insult according to § 185 of the Criminal Code (see BVerfGE 93, 266 <291>; Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 8, 89 <96>; Federal Constitutional Court, order of the First Chamber of the First Senate of 12 May 2009 - 1 BvR 2272/ 04 -, NJW 2009, p. 3016 <3017>) or on the predecessor version of the offence of incitement to hatred according to § 130 old of the Criminal Code (see BVerfGE 90, 241 <251>; 111, 147 <155>). **[32]**

Having said that, it cannot be concluded from this case-law, conversely, that any time when a provision protects a recognised legal interest, its generality is *per se* solely secured by this (see Enders, *Juristenzeitung* – JZ 2008, p. 1092 <1094>). The fact that a law restricting opinions protects a recognised legal interest does not guarantee its generality for each case, but merely constitutes an indication of safeguarding of distance in terms of the rule of law and compliance with the principle of neutrality of opinions. The Federal Constitutional Court has always stressed that the legal interest in question must be protected *per se*, without regard for a specific opinion (see BVerfGE 111, 147 <155>; 117, 244 <260>), and that links to content must therefore be neutral with regard to the various political currents and ideologies. Accordingly, it was material to the qualification of § 90a of the Criminal Code as a general law that this provision makes punishable the disparagement of the Federal Republic of Germany "regardless of a political conviction" (see BVerfGE 47, 198 <232>). Nothing else applies to §§ 86 and 86a of the Criminal Code, which the Federal Constitutional Court has also judged to be general laws (see BVerfGE 111, 147 <155>). § 86.1 no. 4 in conjunction with § 86a.1 no. 1 of the Criminal Code contains an explicit link to National Socialist organisations. In the context of the overall provision contained in § 86.1 of the Criminal Code, this is however nonetheless not special legislation. The provision does not target the dissemination of National Socialist ideas, but establishes a factually restricted right to punish against the organisation-related continuation of formally banned associations and parties, and extends it to equally cover all organisations affected by it. **[33]**

bb) A law is not general if a content-related restriction of opinion is not sufficiently openly worded and from the outset only targets specific convictions, stances or ideologies. **[34]**

Laws to protect legal interests are only general if, taking the required overall view, they prove to be consistent and abstractly thought in terms of the legal interest and are designed regardless of views which are found to be held in specific instances. This includes a sufficiently generally worded formulation of the act of

violation, as well as of the protected legal interests, which ensures that in the political field of powers, the provision appears to be open *vis-à-vis* various groups and, fundamentally, the expression of opinion that is penalised or banned can emerge from various fundamental political, religious or ideological positions. What is needed is a version of the provision which, distant from concrete exchanges in the political or other type of debate as required by the rule of law, guarantees strict "blindness" *vis-à-vis* those to whom it is to be ultimately applied. It may be orientated solely towards the legal interest that is to be protected, but not towards a value judgment or condemnation as to the concrete attitudes or positions taken up. **[35]**

Corresponding to the ban on placing at a disadvantage or allotting preference because of political views (Article 3.3 sentence 1 alternative 9 of the Basic Law), the general nature of the law hence guarantees for encroachments on freedom of opinion a specific and strict ban on discrimination *vis-à-vis* specific opinions. Laws which link to the content of expressions of opinion, and which ban or sanction violations of legal interests caused by such means, are only permissible on proviso of strict neutrality and equal treatment. **[36]**

The question of whether, according to these principles, a provision is still to be assessed as a general law or as special legislation cannot be schematically answered here. It is rather more a matter of taking an overall view. This should be based in particular on the degree to which a provision is restricted to abstract content-related criteria which are open to various positions or takes as a basis differentiations which are related to a concrete standpoint, and in particular for instance ideology-related differences (see similar discussion in BVerfGE 47, 198 <232>). An indication of special legislation is for instance if it is understood as a response to an existing conflict within the current debate that is going on within public opinion or, linking to content-related positions of individual available groups, is formulated such that it can in the main only be applied *vis-à-vis* these. The same applies to sanctions of conduct which typically derives from a concrete attitude of mind or from a specific ideological, political, or historical interpretation, or also for provisions which aim exclusively at affiliation to groups which are defined by such attitudes. The more a provision is interpreted in such a way that it is likely to affect solely proponents of specific political, religious or ideological views, and hence has an impact on the debate within public opinion, the more it is suggested that the threshold to special legislation has been overstepped. An indication of special legislation is equally if a law which serves to restrict opinions is linked to certain historical interpretations of events or is restricted to the protection of the legal interests of a group of individuals which is no longer open, but already established. All in all, it is a matter of whether the opinion-restricting provision keeps a fundamental distance in terms of its content from the various concrete positions in the political and ideological debate on opinions. **[37]**

b) On this basis, § 130.4 of the Criminal Code is not a general law. The provision serves the purpose of public peace, and hence the protection of a legal interest which is also protected elsewhere in the legal system in many ways. However, § 130.4 of the Criminal Code does not design this protection in a general manner with open content, but related solely to expressions of opinion where a specific position is taken up towards National Socialism. The provision serves not to protect victims of violence in general terms, and deliberately does not aim at the approval, glorification and justification of the rule of arbitrary force of totalitarian regimes as a whole, but is restricted to statements solely in relation to National Socialism. Also in terms of the manner in which it came about, the provision was materially understood as a response to public meetings and marches held by right-wing radicals whose demonstrations establish a connection to the time of National Socialism - not lastly in particular also targeting the annual commemorative events for Rudolf Heß (see minutes of the session (*Sitzungsprotokoll*) of the German Bundestag 15/158 of 18 February 2005, pp. 14818 and 14820; minutes of the Committee on Internal Affairs 15/56 of 7 March 2005, pp. 11 and 22 et seq., 44, 45, 53-54 and 57; *Bundestag* printed paper (*Bundestagsdrucksache* – BTDrucks) 15/5051, p. 6; minutes of the session of the German *Bundestag* 15/164 of 11 March 2005, p. 15352). In this respect, it is a reaction of the legislature to concrete political views judged as particularly dangerous in the debate within public opinion. The provision penalises expressions of opinion which may result solely from a specific interpretation of history and from a corresponding position. It is hence not blind towards existing fundamental positions but, in its element of the offence, already provides criteria which are related to specific standpoints. Hence, it is not a general law, but special legislation to specifically avert those violations of legal interests which emerge from the expression of a specific opinion, namely the condonation of the National Socialist rule of arbitrary force. **[38]**

2. As special legislation, § 130.4 of the Criminal Code also cannot be based on the right to personal honour according to Article 5.2 alternative 3 of the Basic Law - here related to the dignity of the victims. The requirement of the general nature of opinionrestricting laws according to Article 5.2 alternative 1 of the Basic Law also covers provisions to protect honour. **[39]**

Article 5.2 of the Basic Law is based on a term of the general law, according to which the threshold to special legislation has not yet been reached if an opinionrestricting law links to opinion contents in general terms, but only when the offence already contains items related to a specific viewpoint and the provision is therefore not designed in a manner which is neutral in terms of opinions. According to this view, the ban of special legislation guaranteed in the requirement of a general law guarantees protection against discrimination linking to specific opinions and political views, as is similarly also contained in Article 3.3 sentence 1 alternative 9 of the Basic Law ("political views"), and hence ensures distance to protection of freedom of opinion as required by the rule of law. In this understanding, the ban on special legislation must however apply across-the-board, and must cover all laws which serve to restrict opinions. Statutory provisions on protection of youth or personal honour are subject to it, as are those to protect other legal interests. Accordingly, the Federal Constitutional Court has for instance also

previously regarded the crime of insult as constituting a general law (see BVerfGE 69, 257 <268-269>; 93, 266 <291>; see also BVerfGK 1, 289 <291>). This understanding has also found support in the history of freedom of opinion. Freedom of opinion already found its limits in the general laws according to Article 118 of the Constitution of the German Reich (Weimar Reich Constitution). An additional exception going beyond individual provisions on the prohibition of censorship for protection of youth and honour was not contained in the provision. Rather, such provisions were regarded as being covered by the general laws as a matter of principle, regardless of the various positions regarding the content interpretation of the criterion for a general law between the special-legislation doctrine (see *Häntzschel, Archiv des öffentlichen Rechts* – AöR, Vol. 10, 1926, p. 228 <232>; Häntzschel, in: Handbuch des Deutschen Staatsrechts, Vol. 29, 1932, p. 651 <657 et seq.>; Rothenbücher, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* – VVDStRL Vol. 4 1928, p. 6 <20>) and the teaching of Smend (see VVDStRL Vol. 4 1928, p. 44 <52>). It is not evident that the legislature handing down the Basic Law wished to make any other fundamental decision in this regard with Article 5.1 and 5.2 of the Basic Law. The explicit inclusion of youth and honour protection in Article 5.2 of the Basic Law was merely intended to ensure that such provisions continue to be permissible. It was however not intended to rescind the requirements to be made of all laws with regard to the distance required by the rule of law through neutrality in terms of opinions. **[40]**

3. Even though it is not a general law, § 130.4 of the Criminal Code is compatible with Article 5.1 and 5.2 of the Basic Law. In view of the injustice and the horror which National Socialist rule inflicted on Europe and large parts of the world, defying general categories, and of the establishment of the Federal Republic of Germany which was understood as an antithesis of this, an exception to the ban on the special legislation for opinion-related laws is inherent in Article 5.1 and 5.2 of the Basic Law for provisions which impose boundaries on the propagandistic condonation of the National Socialist Regime between the years 1933 and 1945. **[41]**

a) Concerning the requirement of the general nature of laws which impose restrictions on opinions according to Article 5.2 of the Basic Law, an exception is to be recognised for provisions which aim to prevent a propagandistic affirmation of the National Socialist rule of arbitrary force between the years 1933 and 1945. The inhuman regime of this period, which brought immeasurable suffering, death and suppression to Europe and the world, has an antithetical significance characterising the identity of the constitutional system of the Federal Republic of Germany which is unique and cannot be captured solely on the basis of general statutory provisions. The deliberate discarding of the tyrannical regime of National Socialism was historically a central concern of all the powers participating in the establishment and passing of the Basic Law (see Constitutional Committee of the Conference of Minister-Presidents of the Western Occupation Zones (*Verfassungsausschuss der Ministerpräsidenten-Konferenz der Westlichen Besatzungszonen*), Report on the Constitutional Convention at Herrenchiemsee (*Bericht über den Verfassungskonvent auf Herrenchiemsee*), from 10 to 23 August 1948, pp. 18, 20, 22 and 56), in particular also of the Parliamentary Council (see Parliamentary Council (*Parlamentarischer Rat*), Written Report on the Draft of the Basic Law for the Federal Republic of Germany, Annex to the Stenographic Record of the 9th Session of the Parliamentary Council on 6 May 1949, pp. 5, 6 and 9) and forms an internal structure

of the order of the Basic Law (see only Article 1, Article 20 and Article 79.3 of the Basic Law). The Basic Law can be largely particularly interpreted as an antithesis to the totalitarianism of the National Socialist regime, and from its structure through to its many details seeks to learn from historical experience and to rule out a repeat of such injustice once and for all. The final overcoming of the National Socialist structures and the prevention of the resurgence of a totalitarian nationalist Germany was a major motive for the re-establishment of the German state by the Allies and – as shown for instance by the Atlantic Charter of 14 August 1941, the Potsdam Agreement of 2 August 1945 and Act no. 2 of the Allied Control Council for the Disbandment and Liquidation of the Nazi Organizations (*Kontrollratsgesetz Nr. 2 zur Auflösung und Liquidierung der Naziorganisationen*) of 10 October 1945 – constituted a major conceptual basis for the Frankfurt Documents of 1 July 1948, in which the military governors commissioned the Minister-Presidents from their occupation zones with the creation of a new constitution. The experience of the destruction of all civilising achievements by National Socialism provided a strong impetus for the creation of the European Communities, as well as of many international agreements, particularly including the European Convention for the Protection of Human Rights and Fundamental Freedoms. It makes a major contribution towards characterising the entire post-War system and the inclusion of the Federal Republic of Germany in the international community to the present day. **[42]**

Against this background, the propagandistic condonation of the historical National Socialist rule of arbitrary force, with all the terrible factual events for which it is responsible, exerts an impact far beyond the general tensions of the debate within public opinion and cannot be covered solely on the basis of the general rules regarding the boundaries imposed on freedom of opinion. In Germany, favouring this rule constitutes an attack on the internal identity of the community and has a potential to pose a threat to peace. In this regard, it is not comparable with other expressions of opinion, and ultimately it can also trigger profound disquiet abroad. Doing justice to this historically rooted special situation by special provisions is not intended to be ruled out by Article 5.2 of the Basic Law. The need for the general nature of laws imposing restrictions on opinions, with which Article 5.2 of the Basic Law obliges the legislature, linking to long lines of tradition, to guarantee the protection of legal interest over expressions of opinion regardless of specific convictions, stances and ideologies, cannot demand application for this unique constellation which concerns the historically affected identity of the Federal Republic of Germany, which cannot be transferred to other conflicts. § 130.4 of the Criminal Code is accordingly not unconstitutional because it is a special provision which has as its sole subject-matter the evaluation of the National Socialist rule of arbitrary force. **[43]**

b) The amenability of Article 5.1 and 5.2 of the Basic Law to such special provisions which relate to statements on the National Socialism of the years between 1933 and 1945 does not rescind the substantive content of freedom of opinion. In particular, the Basic Law does not have a general anti-National Socialist fundamental principle (see however in rem: Battis/Grigoleit, *Neue Zeitschrift für Verwaltungsrecht* – NVwZ 2001,

p. 121 <123 et seq.>; Münster Higher Administrative Court, order of 23 March 2001 - 5 B 395/01 -, NJW 2001, p. 2111), which permitted a ban of the dissemination of right-wing radical or even National Socialist ideas already with regard to the intellectual impact of its content. Such a fundamental principle emerges in particular neither from Article 79.3 of the Basic Law nor from Article 139 of the Basic Law, in which on the basis of a deliberate decision, only the provisions designated there are removed from the application of the constitution. The Basic Law goes as far as granting as a matter of principle freedom of opinion to the enemies of freedom, trusting in the power of the public debate carried on in freedom. The Parliamentary Council also acknowledged this towards National Socialism, which had only recently been overcome. In Article 9.2, Article 18 and Article 21.2 of the Basic Law, it determined that the mere dissemination of anti-constitutional ideas as such does not constitute the boundary of the political debate carried on in freedom, but only an actively belligerent, aggressive stance *vis-à-vis* the freedom-based democratic fundamental system (see BVerfGE 5, 85 <141>). Accordingly, Article 5.1 and 5.2 of the Basic Law guarantee freedom of opinion as intellectual freedom, regardless of the evaluation of their content with regard to correctness, legal enforceability or dangerousness (see BVerfGE 90, 241 <247>). Article 5.1 and 5.2 of the Basic Law does not permit the state to encroach on the way of thinking, but only empowers an intervention to be carried out when expressions of opinion leave the purely intellectual domain of opinion and become reflected in violations of legal interests or recognisably turn into danger situations. **[44]**

Also the exception, which is to be recognised according to Article 5.1 and 5.2 of the Basic Law, to the requirement of the general nature of opinion-restricting laws because of the unique nature of the crimes committed under the historical National Socialist rule of arbitrary force and the resultant responsibility for the Federal Republic of Germany does not open any doors to this, but entrusts the responsibility for the necessary repression of such dangerous ideas to free critical debate. It merely permits the legislature to issue separate provisions for expressions of opinion which have as their subject-matter a positive evaluation of the National Socialist regime in its historical reality, such provisions being connected with the specific impact of such statements in particular and taking these into account. Even such provisions must however comply with the principle of proportionality and in doing so be orientated strictly towards externalised protection of legal interests, but not towards an evaluation of the content of the opinion in question. **[45]**

III.

§ 130.4 of the Criminal Code satisfies the requirements of the principle of proportionality. The provision pursues a legitimate purpose with the protection of the public peace, to achieve which it is suitable, necessary and appropriate. **[46]**

1. § 130.4 of the Criminal Code serves to protect the public peace. This constitutes a legitimate protection purpose which with a proper understanding which is restricted in the light of Article 5.1 of the Basic Law is able to justify the encroachment on freedom of opinion. **[47]**

a) The determination of a legitimate purpose is a prerequisite for an encroachment on Article 5.1 of the Basic Law and is material for its proportionality (see BVerfGE 80, 137 <159>; 104, 337 <347>; 107, 299 <316>). As a matter of principle, any public interest which is not constitutionally ruled out is legitimate. What purposes are legitimate also depends here on the respective fundamental right which is being encroached upon. In particular, the rescission of the freedom principle contained in the respective fundamental right as such is not legitimate. For freedom of opinion this finds its specific expression in the theory of interaction: An interaction takes place between protection of fundamental rights and boundaries on fundamental rights in the sense that the general laws do impose boundaries, but that these in turn must be determined once more in the light of these fundamental rights guarantees (see BVerfGE 7, 198 <208-209.>; 94, 1 <8>; 107, 299 <331>). The boundaries on freedom of opinion may not call into question their substantial content. This applies to the interpretation just as to the restricting law, and to the purposes themselves pursued with it (see BVerfGE 77, 65 <75>). **[48]**

For encroachments on Article 5.1 of the Basic Law, it ensues that their purpose may not aim to ensure that protective measures are taken towards impacts of specific expressions of opinion that remain purely intellectual. The intention of preventing statements with content that is damaging or dangerous in their conceptual consequence rescinds the principle of freedom of opinion itself and is illegitimate (see already Häntzschel, in: *Handbuch des Deutschen Staatsrechts*, Vol. 29, 1932, pp. 651 et seq.; Rothenbücher, in: VVDStRL Vol. 4 1928, pp. 6 et seq.). The same applies – regardless of Article 9.2, Article 18 and Article 21.2 of the Basic Law – to the concern of preventing the dissemination of anti-constitutional views. Solely the lack of value or indeed dangerousness of opinions as such is not a reason to restrict them (see BVerfGE 90, 241 <247>). Article 5.1 of the Basic Law does not permit subjecting freedom of opinion to a general reserve of weighing up. **[49]**

By contrast, it is legitimate to prevent violations of legal interests. Where the legislature aims to restrict expressions of opinion to the degree that they overstep the threshold to an individually identifiable, concrete, definable danger of a rights violation, it pursues a legitimate purpose. The legislature can in this regard link in particular to expressions of opinion which, beyond the formation of convictions, are indirectly intended to provoke real impacts and can for instance directly trigger consequences placing legal interests at risk in the shape of appeals to violate laws, aggressive emotionalisation or the lowering of inhibitions. **[50]**

For the protection of substantive legal interests, there emerges from this a kind of threshold for interference for warding off danger: dangers which derive solely from the opinions as such are too abstract to justify the state banning them. As long as a risk lies solely in the abstraction of an opinion and the exchange on this, warding off danger is entrusted to the intellectual debate carried on in freedom between the various currents within society. Opinion-restricting measures with regard to the content of statements can, however, be permissible if the opinions recognisably endanger the legal

interests of individuals or interests of the general public which are to be protected. Warding off dangers to legal interests is then a legitimate goal of the legislature. The state is hence limited in terms of the rule of law to encroachments serving to protect legal interests in the domain of that which is external. By contrast, it is not entitled to encroach on the subjective, inner individual conviction or on the positions taken up, and in this respect, according to Article 5.1 of the Basic Law, also on the right to impart and disseminate these. **[51]**

Purely intellectual impacts and right-violating impacts of expressions of opinion are not in strict opposition to one another here. They are not definable in purely formal terms, and may overlap. The legislature has some latitude here in the design of opinion-restricting laws in this respect. It must however from the outset restrict itself to pursuing protection purposes which are orientated towards this boundary and do not themselves rescind the principle of the free intellectual debate itself. This setting of boundaries must also be followed by a review of proportionality. The more concretely and directly a legal interest is placed in danger by an expression of opinion, the less stringent are the requirements when it comes to an encroachment; the more indirect and distant the threatening violations of legal interests remain, the greater are the requirements to be made. Accordingly, encroachments on freedom of opinion are more to be accepted when they are restricted to the forms and circumstances of an expression of opinion in the outside world. The more, by contrast, they ultimately result in a content-related suppression of the opinion itself, the higher are the requirements as to the concrete threat of a danger to legal interests. **[52]**

b) The legislature has based § 130.4 of the Criminal Code on the protection of public peace (see *Bundestag* printed paper 15/4832, p. 3; printed paper of the Committee on Internal Affairs 15(4)191, p. 5; *Bundestag* printed paper 15/5051, p. 5). This is constitutionally tenable. Having said that, according to the above standards the term of public peace is to be based on a restrictive understanding. **[53]**

aa) An understanding of public peace which aims to protect against subjective disquiet being caused to citizens through the confrontation with provocative opinions and ideologies or to conserve social or ethical views which are seen as fundamental is not tenable for the justification of encroachments on freedom of opinion. Disquiet which is brought about by intellectual debate in the struggle to form opinions and which follows solely from the content of the ideas and their conceptual consequences is the other side of the coin and unavoidable if one is to have freedom of opinion; it cannot constitute a legitimate goal for the restriction of this freedom. The possible confrontation with disquieting opinions, even if in their conceptual consequence they are dangerous, and even if they aim at a fundamental transformation of the valid order, is part of the state based on freedom. Protection against an impairment of the "general feeling of peace" or the "poisoning of the intellectual atmosphere" constitute no more reason for an encroachment than does the protection of the population against an insult to their sense of right and wrong by totalitarian ideologies or an evidently false interpretation of history. Neither does the goal of establishing human rights in the legal awareness of the population permit the suppression of contrary views. Instead, the constitution trusts that

society can cope with criticism, and even polemics, in this regard, and that they will be countered in a spirit of civil commitment, and that finally citizens will exercise their freedom by refusing to follow such views. By contrast, the recognition of public peace as a limit of what is acceptable as against unacceptable ideas solely because of the opinion as such would disable the principle of freedom, which itself is guaranteed in Article 5.1 of the Basic Law. **[54]**

bb) However, public peace, understood as guaranteeing peacefulness, is a legitimate purpose for adhering to which the legislature may limit expressions of opinion which have a public impact. The goal here is to provide protection against statements which, in terms of their content, are recognisably aimed towards acts which place legal interests in peril, that is, they mark the transition to aggression or to law-breaking. The maintenance of public peace relates in this regard to the external impact of expressions of opinion, for instance through appeals or emotionalisation which trigger among those approached a willingness to act or reduce inhibitions or directly intimidate third parties. Here too, the encroachment on freedom of opinion may be connected to the content of the expression of opinion. However, the protection of public peace aims to maintain a peaceful co-existence. It is a matter of upstream legal protection of interests, targeting imminent dangers which assume concrete form in reality. In this sense, public peace is an interest to be protected on which various provisions of criminal law have been based for many years, such as the bans on public incitement to crime (§ 111 of the Criminal Code), threatening to commit offences (§ 126 of the Criminal Code), rewarding and approving of offences (§ 140 of the Criminal Code) or indeed the other offences of the section on incitement to hatred (§ 130.1 to 130.3 of the Criminal Code). **[55]**

c) As is shown by the reasoning of the law, the legislature has based § 130.4 of the Criminal Code solely and tenably on the protection of public peace. The question of whether and in what understanding the provision could also be based on the protection of the dignity of victims of the National Socialist rule of arbitrary force is hence immaterial. **[56]**

2. The design of § 130.4 of the Criminal Code is suitable to protect public peace in its understanding as the peaceful nature of the public debate. **[57]**

§ 130.4 of the Criminal Code defines as punishable acts the approval, glorification and justification of the National Socialist rule of arbitrary force. Hence it is not the condonation of ideas which is punished, but that of real crimes which are unique in history and cannot be overstated in terms of their inhumanity. The law opposes the awakening and approval of the wrongdoings of a regime which strove to eliminate whole population groups and has burned itself into the awareness of the present time as a nightmare of immeasurable brutality. That condonation of the rule of arbitrary force of this time appears to today's population as a rule as aggression and as an assault on those who regard their value and their rights as being called into question once again, and in view of historical reality has a greater impact than a mere confrontation with an ideology which is inimical to democracy and freedom, is a constitutionally tenable evaluation on the part of the legislature. This is more than merely an offensive

intellectual relativisation of the prohibition of violence. Rather, the announcement of a positive evaluation of this tyrannical regime as a rule, firstly, leads to resistance or causes intimidation and, secondly, has an effect on the proponents of such views who are targeted in that it lowers their inhibitions. **[58]**

Related to the historical National Socialist rule of arbitrary force, the offences of approval, glorification and justification are also typically sufficiently intense to endanger the peacefulness of the political debate. The provision does not already penalise a playing down of National Socialism as an ideology or an offensive interpretation of the history of this time, but it does penalise the externally manifested condonation of the real historical rule of arbitrary force as was applied under National Socialism. Regardless of the characteristic additionally inserted by the legislature of the violation of the dignity of the victims, this already constitutes a suitable link to the protection of the public peace within the meaning of peacefulness. In terms of the legislative evaluation, the provision is similarly shaped in this respect as was previously § 140 of the Criminal Code, which penalises the rewarding and approval of specific, particularly serious criminal offences which were actually committed. **[59]**

The design of § 130.4 of the Criminal Code is also not unsuitable to the degree that the punishment covers not only statements made in public, but also those made in closed meetings. The legislature was able to presume that the condonation of this rule of arbitrary force as a rule also causes external reactions from closed meetings. Where this does not apply in individual cases, this can be correctively dealt with via the further element of the offence of disturbing the public peace (see C V 2 b below). **[60]**

3. § 130.4 of the Criminal Code is also necessary for the protection of the public peace that the legislature seeks to achieve. A less incisive means which with regard to the violations of rights in question here can guarantee the protection of the public peace in an equally effective manner is not evident. **[61]**

§ 130.4 of the Criminal Code is also proportionate in the narrower sense in terms of its design. With an interpretation which does justice to Article 5.1 of the Basic Law, the provision gives rise to suitable compensation between freedom of opinion and the protection of the public peace. It is in particular not excessively broad in the sense that it would penalise even the dissemination of right-wing radical views and also those connected to the ideology of National Socialism with regard to their content. It neither bans in general terms an affirming evaluation of measures of the National Socialist regime nor a positive link to dates, places or forms taking on a semantic content reminiscent of this time with considerable symbolic power. The threat of punishment is restricted solely to the condonation of the historically real rule of arbitrary force under National Socialism for which Germany has shouldered a long-term responsibility which has a special historical foundation. Additionally, the definition of the crime demands that this banned confirmation also in fact – as to be anticipated as a rule – takes place in a manner which violates the dignity of the victims and leads to a disturbance of public peace. Atypical situations in which the restriction of freedom of opinion caused by a ban may be unsuitable in individual cases can be taken up by this offence (see C V 2 b below). All in all, § 130.4 of the Criminal Code is designed in a manner that is also proportionate in the narrow sense of the word. **[62]**

IV.

§ 130.4 of the Criminal Code also does not breach Article 3.3 sentence 1 of the Basic Law (ban on placing at a disadvantage because of political views) which protects against encroachments which link solely to merely "holding" a political view. By contrast, the proportionality of encroachments which link to the statement and action of such views in principle depends on the respective fundamental freedom rights (see BVerfGE 39, 334 <368>). This at least applies if special equality guarantees are inherent in the corresponding fundamental freedom rights, as in this case Article 5.1 and 5.2 of the Basic Law. A violation of Article 3.3 of the Basic Law cannot be considered with this. In particular, no further requirements can emerge from Article 3.1 of the Basic Law than those from Article 5.1 and 5.2 of the Basic Law. **[63]**

V.

§ 130.4 of the Criminal Code is also compatible with Article 103.2 of the Basic Law. **[64]**

1. Article 103.2 of the Basic Law obliges the legislature to describe the prerequisites of punishability in such concrete terms that the scope and area of application of the offences can be recognised and can be ascertained through interpretation. This obligation serves a two-fold purpose. On the one hand, it serves the protection of the addressee of the provision in line with the rule of law: Everyone should be able to predict what conduct is banned and punishable. On the other hand, it should be ensured that only the legislature decides on punishability. In this regard, Article 103.2 of the Basic Law contains a strict legal reserve which prevents the executive and legislative powers deciding themselves on the prerequisites for punishment (see BVerfGE 71, 108 <114>). **[65]**

This does not rule out terms being used which particularly require interpretation by the judge. Even in criminal law, the legislature is faced by the need to do justice to the multifarious nature of life. Because of the general and abstract nature of criminal provisions, it is furthermore unavoidable that it can be doubtful in borderline cases whether or not conduct already, or still, falls under the statutory offence. Then it is sufficient if their meaning can be ascertained in a standard case with the aid of the customary interpretation methods, and in borderline cases at any rate the risk of punishment becomes recognisable to the addressee (see BVerfGE 41, 314 <320>; 71, 108 <114-115>; 73, 206 <235>; 85, 69 <73>; 87, 209 <223-224>; 92, 1 <12>). **[66]**

2. The design of § 130.4 of the Criminal Code does justice to these requirements. **[67]**

   a) No doubts as to the adequate determinateness according to Article 103.2 of the Basic Law accrue to the terms "approval", "glorification" or "justification" of the National Socialist rule of arbitrary force, as well as to the offence-related modalities "publicly or in a meeting" and "in a manner that violates the dignity of the victims". Each of these elements of the offence is already adequately clear and limited in terms of its linguistic wording in order to be amenable to interpretation within the meaning of the requirements of the case-law. The question as to how narrowly or broadly these terms are to be interpreted in the context of the provision is a question of their application.

With regard to these characteristics, the provision itself is not open in such a manner that it would place the punishability in the hands of the criminal justice system in this respect without prescribing the degree to which this is possible. **[68]**

b) The offence of disturbing the public peace is also compatible with the principle of legal certainty in the context of § 130.4 of the Criminal Code. **[69]**

aa) Having said that, recourse by the legislature passing criminal law to "public peace" as an element of the offence is not constitutionally unobjectionable *per se*. The fact that, with a sufficiently restricted understanding, public peace may constitute a suitable protected interest of criminal law, does not yet state that it is easily possible to also have recourse to this term as an element of the offence. Instead, understood as an element of the offence which has the effect of giving rise to punishment separately, the term of public peace casts doubt on its compatibility with the principle of legal certainty. It is open in many respects to different interpretations which are based on an intangible, subjective and collective feeling of insecurity and which are amenable here to an understanding which does not do adequate justice to the fundamental significance of the freedom rights in the system of the Basic Law. In this respect, it is also no longer possible today to link without a caesura to corresponding regulatory traditions prior to the time of the Basic Law. Correspondingly, the legal literature remains critical of the recourse to public peace under criminal law (see Fischer, *Öffentlicher Friede und Gedankenäußerung*, 1986, pp. 630 et seq.; Enders/Lange, JZ 2006, pp. 105 <108>; Hörnle, Grob *anstößiges Verhalten*, 2005, pp. 90 et seq., 282 et seq.; Junge, *Das Schutzgut des § 130 StGB*, pp. 26 et seq.). As an element of the offence giving rise to punishment by itself, or as a supplementary element of the offence in offences which do not already take on sufficiently limited contours as a result of other elements of the offence which are fundamentally tenable, its compatibility with Article 103.2 of the Basic Law can be subject to reservations. **[70]**

By contrast, there are no reservations against the element of the offence of public peace if the disturbance of public peace by other offences evaluated as punishable by the legislature is described in concrete terms by other offences which in turn are adequately determined and which already per se can uphold the threat of punishment at least fundamentally. If in such a case public peace is consulted as an additional element of the offence, its content can be more closely determined from such a context in terms of content. Public peace is to be understood then as an element of an offence the content of which is determined separately from the respective context of the provision. It has only a corrective function here. Fundamentally, the realisation of the other elements of the offence already gives rise to punishability which when it is complied with can also suggest the disturbance of public peace (or of suitability thereto) which can then be presumed. It only takes on separate significance in atypical situations if this presumption does not hold water because of special circumstances (see D I 1 b below). In this regard, public peace is not an element of the offence giving rise to punishment, but an

"evaluation formula to eliminate cases not appearing to be in need of punishment" (see Fischer, *StGB*, 56th ed. 2009, *§ 130*, marginal no. 14b). It is hence a corrective permitting in particular to also create validity in individual cases for fundamental rights evaluations. **[71]**

bb) According to these standards, there are no constitutional reservations against the determinedness of § 130.4 of the Criminal Code. The legislature was permitted to regard the approval, glorification or justification of the historical National Socialist rule of arbitrary force expressed publicly or in a meeting, at least fundamentally, as a punishable and sufficiently determined disturbance of the public peace. From this context, the disturbance of the public peace can also be determined as an element of the offence: It consists as a rule of reducing the threshold of willingness to engage in violence and in the threatening impact accruing to such statements against the specific background of German history. Such an impact can be fundamentally presumed on realisation of the further elements of the offence. The element of the offence of the public peace according to § 130.4 of the Criminal Code however makes it possible here to do justice to atypical situations within the meaning of freedom of opinion. **[72]**

D.

The impugned ruling is also constitutionally unobjectionable at the level of the application of the law. The interpretation of § 15.1 of the Assemblies Act in conjunction with § 130.4 of the Criminal Code by the Federal Administrative Court is compatible with Article 8.1 in conjunction with Article 5.1 of the Basic Law. **[73]**

I.

1. a) Fundamentally, the interpretation and application of the criminal law is a matter for the non-constitutional courts. Laws encroaching on freedom of opinion must however be interpreted in such a manner that the fundamental content of this right, which in a freedom-based democracy must lead to a fundamental presumption in favour of freedom of expression in all areas, namely in public life, is retained under all circumstances. An interaction takes place in that the barriers do set boundaries in terms of the wording according to the fundamental right, but in turn must be interpreted from the knowledge of the fundamental significance of this fundamental right in the free democratic state, and hence themselves restricted in terms of their impact of limiting fundamental rights (see BVerfGE 7, 198 <208-209>; established case-law). **[74]**

The constitutional standards regarding the compatibility of § 130.4 of the Criminal Code with Article 5.1 of the Basic Law must, accordingly, also guide the interpretation of the provision. Therefore, the elements of the offence are to be interpreted such that the claim of protection only applies to impairments of public peace in the demonstrated understanding of peacefulness (see C III 1 b bb above). **[75]**

For the question which is material in this regard as to whether the expression of an opinion remains solely at the intellectual level or crosses the threshold to constituting a risk to legal interests, it is a matter in particular of whether the risks which may arise as a consequence of this expression of opinion only pose a threat in terms of a distant effect with the further free formation of conviction, or whether their realisation is already set in motion with the statement. The more the ideas intended with the propagation of an ideology reveal their impact only as an abstract consequence of an ideal construct, the more unambiguously they remain in the intellectual domain, which is protected as a matter of principle. The more, however, they become tangible through the nature of the statement in concrete, direct terms, the more they pose an immanent threat to specific persons, groups of individuals or real situations, the sooner they can be attributed to the real domain. A merely symbolic presentation of convictions, teachings or ways of attaining a sort of salvation will be more likely to be attributed to the intellectual domain than if violations of rights are for instance imagined in the shape of historic events in concrete, direct terms and are depicted as desirable. **[76]**

b) According to these principles, it is necessary in order to give rise to the application of § 130.4 of the Criminal Code that the condonation covered with this provision is recognisably related to National Socialism in particular as a historically real rule of arbitrary force. Understood as an integral term of the human rights violations that were typical of the National Socialist regime (see Federal Court of Justice (*Bundesgerichtshof* – BGH), judgment of 28 July 2005 - 3 StR 60/05 -, NStZ 2006, p. 335 <337>), and which hence describes historically real arbitrary acts of criminal quality, it designates rights violations the affirmative evocation of which in public or at a meeting create the potential for a repeat to become real and can endanger the peacefulness of the political debate. By contrast, merely concurring with events of this period or condonation of generally National Socialist ideas cannot suffice to give rise to the commission of this offence. For instance, an incorrect historical interpretation or affirmation of National Socialist ideology cannot be adequate for punishment according to § 130.4 of the Criminal Code. **[77]**

The elements of the offence of approval, glorification and justification are also to be interpreted in the light of Article 5.1 of the Basic Law. It is constitutionally unobjectionable here if this is also understood as approval by implication, that is not explicit but emerging from the circumstances. Having said that, this must manifest itself externally. There is a need in this respect for a recognisably active approval which carries its meaning in itself (see also Decisions of the Federal Court of Justice in Criminal Cases (*Entscheidungen des Bundesgerichtshofes in Strafsachen* – BGHSt) 22, 282 <286>). On the other hand, approval in the shape of the mere omission – also in a one-sided manner that falsifies history – to mention historical acts of violence in connection with positive references to events of the National Socialist period does not in principle cross the threshold towards lessening the inhibitions towards the glorification of violence. By contrast, approval may also be constituted in glorifying and paying tribute to a historical figure if it emerges from the concrete circumstances that this individual stands as a symbolic figure for the National Socialist rule of arbitrary force as such. **[78]**

If according to the above standards, approval, glorification or justification of the National Socialist rule of arbitrary force applies, it is constitutionally unobjectionable if the presumption is derived from this that the dignity of the victims is also violated through such statements. The legislature has primarily, and per se tenably, based § 130.4 of the Criminal Code on the protection of public peace, and in doing so has restrictingly added the further element of the offence "in a manner that violates the dignity of the victims" as a modal supplement. There are no constitutional objections to this, regardless of whether or to what degree the protection of the dignity of the victims always falls together with the protection of human dignity according to Article 1.1 of the Basic Law. It is consequently not a matter of the application of the particularly strict prerequisites for the presumption of a violation of human dignity when it comes to the interpretation of § 130.4 of the Criminal Code. **[79]**

Accordingly, with the element of the offence "condonation of the National Socialist rule of arbitrary force" one may fundamentally presume the existence of a disturbance of public peace. The element of the offence of disturbing the public peace serves primarily to cover non-typical situations in which the presumption of the disturbance of the peace is not tenable because of specific circumstances, and hence freedom of opinion must prevail (see C V 2 b above). This should be considered if impacts causing incitement to violence and intimidation or threat can be ruled out in the concrete case, for instance because statements made in small closed meetings do not achieve any profound or broad impact, if they remain incidental or if they cannot be taken seriously under the specific circumstances. **[80]**

2. For the interpretation of § 130.4 of the Criminal Code, furthermore, the interpretation rules apply which were developed by the case-law of the Federal Constitutional Court in general re Article 5.1 sentence 1 of the Basic Law. Hence, it is a prerequisite of any legal evaluation of expressions of opinion that their meaning has been correctly understood. Material for this is the meaning which the statement has according to the understanding of an objective, discerning public. Here, one should always take the wording of the statement as a basis. This however does not finally determine its meaning. The latter is, rather, also determined by the linguistic context in which the contested statement is embedded and the ancillary circumstances in which it is made, in so far as these were recognisable for the recipients. Judgments which recognisably disregard the meaning of the contested statement and base their legal assessment on this are in breach of the fundamental right of freedom of opinion. The same applies if in the case of ambiguous statements a court takes as a basis the meaning leading to a conviction without having previously ruled out the other possible interpretations with sound reasons (see BVerfGE 93, 266 <295-296>; established case-law). **[81]**

II.

The impugned ruling is not constitutionally objectionable according to these standards. **[82]**

The Federal Administrative Court bases its interpretation of § 130.4 of the Criminal Code on an understanding which is in compliance with Article 5.1 sentence 1 of the Basic Law. It correctly understands § 130.4 of the Criminal Code in the light of Article 5.1 of the Basic Law

in that not simply the condonation of measures under the rule of National Socialism as such gives rise to the fulfilment of the element of the offence, but only one which refers particularly to National Socialism as a rule of arbitrary force, this being understood as the systematically committed serious human rights violations as they became historic reality. The Federal Administrative Court explicitly states in view of freedom of opinion that the positive evaluation only of individual aspects of the state and societal order of that time, in which no connection with the National Socialist rule of arbitrary force and the human rights violations typifying it can be created, does not fulfil the element of the offence of § 130.4 of the Criminal Code. **[83]**

It is also not objectionable if the Federal Administrative Court considers approval of the National Socialist rule of arbitrary force by implication to be possible through overtly paying tribute to responsible and symbolic figures of this regime. The ruling is based in this respect on a nuanced view, taking freedom of opinion into account, according to which such approval can only be presumed if the person to whom tribute was paid under the extant circumstances stands as a symbolic figure for the rule of National Socialism as such, but not already if positive statements, or even statements minimising the effects of that rule, refer to – even leading – proponents of National Socialism which only apply to the person as an individual. The evaluation that the unrestricted glorification of a symbolic figure who stands for the National Socialist rule as a whole constitutes at the same time approval of the rule of arbitrary force is not subject to constitutional objections in this instance. Approval which unreservedly relates to the rule of National Socialism in the years between 1933 and 1945 as a whole will undeniably also and above all be understood by an unbiased observer as approval of the human rights violations which characterised this period. **[84]**

The non-constitutional courts' assessment of the concrete case related to this, according to which the meeting planned by the complainant to "commemorate Rudolf Heß" would have signified approval of the National Socialist rule of arbitrary force, does not give rise to any constitutional objections. The Federal Administrative Court correctly takes as a basis the rules for the interpretation of expressions of opinion following from Article 5.1 of the Basic Law, and justifiably reaches the judgment that the unreserved glorification of Rudolf Heß could have been understood from the point of view of an unbiased, discerning public under the concrete circumstances as none other than unreserved approval of National Socialist rule as a whole – and hence in particular also of the human rights violations committed at that time. It materially bases its finding on the fact that, on an overall evaluation of the planned meeting – regardless of individual statements which taken in isolation would also be open to other interpretations – tribute was to be paid to Rudolf Heß as the "Deputy of the Führer" with considerable shared responsibility for the events and hence for the National Socialist Regime as such. In view of the longstanding and for a time particularly close relationship between Adolf Hitler and Rudolf Heß, which had also been reflected in the extremely prominent function of Rudolf Heß as "Deputy of the Führer" in all party matters, as well as of his personal responsibility for massive human rights violations, the assessment that such an interpretation would have forced itself to the fore at the meeting is within the framework of the evaluation of the specialist courts. **[85]**

Linking to this, it is also constitutionally not objectionable that the Federal Administrative Court – in interpreting § 130.4 of the Criminal Code as non-constitutional law – has derived from the unrestricted approval of the National Socialist rule system as a rule a violation of the

dignity of the victims. It is immaterial here whether, as the Federal Administrative Court presumes, a violation of human dignity is always also linked herewith within the meaning of Article 1.1 of the Basic Law. **[86]**

There are also no constitutional objections against the presumption of a disturbance of public peace by the planned meeting. No indications are evident which should have led to a review of whether, in the case at hand, the disturbance of public peace fundamentally constituted by the approval of the National Socialist rule of arbitrary force was to be ruled out through special circumstances. **[87]**

c) Netzradio Germania - BVerfG, 22.6.2018, 1 BvR 2083/15, http://www.bverfg.de/e/rk20180622_1bvr208315en.html

Facts:

The constitutional complaint lodged by the complainant is directed against criminal court decisions. He was convicted for inciting hatred and violence against segments of the population (*Volksverhetzung*) pursuant to § 130(3) alternative 3, (5) of the Criminal Code (*Strafgesetzbuch* - StGB) in connection with a spoken text published on his YouTube channel and his website. **[1]**

I.

[Excerpt from Press Release no. 66/2018 of 3 August 2018

The complainant published an audio file on his website and on his YouTube account; on the file another person can be heard criticising the first "*Wehrmacht* exhibition" (on the armed forces of Nazi Germany) which was touring Germany a few years ago, on the grounds that photographs of *Wehrmacht* soldiers were, in part, presented in an inaccurate manner. In the audio file, the persons responsible for the exhibition are accused of falsifying and manipulating the material and inciting hatred and violence against segments of the population, and the allied forces are accused of "mendacious propaganda". It is alleged that the dissemination of historical truths were prosecuted and punished and that persons had voluntarily followed the Nazi-*Schutzstaffel* (SS) into the concentration camps. Survivors of the Holocaust are accused of making profits from giving lectures on the mass killings; furthermore, the view is promoted that persons who fought the Nazi regime in the resistance and witnesses who testified in the court proceedings on Nazi-era crimes had given false accounts.

The local court convicted the complainant for incitement to hatred and violence against certain segments of the population to a fine of 70 daily rates in the amount of EUR 30.00 each. The Regional Court rejected the complainant's appeal on points of law and fact and convicted him for incitement to hatred and violence against certain segments of the population to a fine of 100 daily rates in the amount of EUR 30.00 each. The appeal on points of law before the Higher Regional Court was unsuccessful.

[End of excerpt]

1.-4. […] **[2-7]**

5. In his constitutional complaint the complainant challenges the decisions of the Regional Court and the Higher Regional Court; accordingly, he claims - among other things - a violation of his right to freedom of expression under Art. 5(1) of the Basic Law (*Grundgesetz* - GG). **[8]**

6. [...] **[9]**

II.

1. To the extent that the complainant claims a violation of his rights under Art. 5(1) first sentence GG by the challenged judgment of the Regional Court and the challenged order of the Higher Regional Court, the Chamber admits the constitutional complaint for decision, because it is appropriate in order to enforce the rights of the complainant referred to in § 90(1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG) (§ 93a(2) letter b BVerfGG). **[10]**

The judgment of the Regional Court and the order of the Higher Regional Court violate the complainant's fundamental right under Art. 5(1) GG. **[11]**

a) The standard to be applied is the freedom of expression under Art. 5(1) first sentence GG. **[12]**

aa) Subject of the scope of protection of Art. 5(1) first sentence GG are opinions, i.e. statements characterised by the element of taking a position and making one's own assessment (cf. BVerfGE 7, 198 <210>; 61, 1 <8>; 90, 241 <247>). They are always within the scope of protection of Art. 5(1) first sentence GG, regardless of whether they turn out to be true or false, whether they are reasonable or without any reason, emotional or rational, or whether they are considered valuable, useless, dangerous or harmless (cf. BVerfGE 90, 241 <247>; 124, 300 <320>). **[13]**

Besides opinions, the scope of Art. 5(1) first sentence GG also includes factual statements because and to the extent that they are or can be the prerequisites for the formation of opinions (cf. BVerfGE 61, 1 <8>; 90, 241 <247>). Whereas deliberately untrue factual claims or such statements that are proven to be untrue are excluded from the scope of protection of Art. 5(1) first sentence GG because they do not contribute to the constitutionally guaranteed opinion-forming process (cf. BVerfGE 61, 1 <8>; 90, 241 <247>).

bb) However, the fundamental right to freedom of expression is not guaranteed without reservation. Pursuant to Art. 5(2) GG it is explicitly subject to the limitations that are imposed by the general laws. Formally, interferences with the right to freedom of expression must be based on a general law that is not directed against a particular opinion; substantively, interferences must meet the requirements of proportionality since the right to freedom of expression is a basic right of communication that is fundamental for the democratic order. **[15]**

However, with regard to the formal requirement that limitations of the right to freedom of expression be based on general laws, the Federal Constitutional Court recognises one exception for laws that seek to prevent a propagandistic affirmation of the Nazi reign of violence and tyranny in the years 1933 to 1945. The Court thereby takes account of the crucial impact of German history on the national identity and considers it for the interpretation of the Basic Law (cf. BVerfGE 124, 300 <328 et seq.>). **[16]**

The substantive content of the freedom of expression, however, remains unaffected by this exception. In particular, the Basic Law does not contain a general principle that would allow prohibiting the dissemination of extreme right-wing or national-socialist ideas merely with regard to the effect their content has on peoples' minds. Rather, Art. 5(1) and (2) GG guarantees freedom of expression as an intellectual freedom independent of the assessment of its content, correctness, legal enforceability or dangerousness. Art. 5(1) and (2) GG does not permit the state to interfere with what a person believes but only authorises an interference once an expression of opinion leaves the purely intellectual sphere of what a person thinks is right and becomes a violation of legal interests or an apparent threat (BVerfGE 124, 300 <330>). This is the case if the statements of opinion endanger public peace in terms of the peaceful public discourse, thereby marking the transition to aggression or a violation of law (cf. BVerfGE 124, 300 <335>). **[17]**

cc) The regular courts too must take account of these requirements in the interpretation and application of the laws restricting the freedom of expression so that its role in defining values is also guaranteed at the level of application of the law. An interaction takes place between protection of fundamental rights and restrictions on fundamental rights in the sense that these restrictions impose boundaries on fundamental rights; in turn, however, these restrictions must be interpreted in the light of the principal significance of a fundamental right for a free democratic state and hence be restricted in their limiting effect on the fundamental right (cf. BVerfGE 7, 198 <208 and 209>; 124, 300 <332, 342>). **[18]**

b) The decision of the Regional Court as the last trial court does not meet these standards. In applying § 130(3) StGB, the Regional Court did not demonstrate in a tenable manner that the statements of the complainant were capable of endangering public peace with regard to its constitutionally required understanding as peacefulness of the public discourse. **[19]**

aa) The statements that gave rise to the criminal conviction fall within the scope of protection of the fundamental right of freedom of expression as they constitute hazy factual claims that are inherently linked to value judgments. It is not objectionable under constitutional law that the Regional Court held the complainant responsible for statements made by a third party and published on the complainant's website. **[20]**

bb) The criminal punishment for the dissemination of the read text in dispute constitutes an interference with this fundamental right. The Regional Court based the conviction on § 130(3) and (5) StGB, which provides the legal basis for the interference. The fact that § 130(3) StGB is not a general law but instead specifically criminalises statements in relation to the Nazi regime does not rule out a conviction based on the aforementioned standards. The legal provision is exempted from the formal requirement of a general law - which is applicable in other cases of interferences pursuant to Art. 5(2) GG - as it seeks to prevent a propagandistic affirmation of the Nazi reign of violence and tyranny during the years 1933 to 1945. **[21]**

cc) The interference with the freedom of expression does not meet its substantive requirements. The criminal courts did not sufficiently take into account the requirements of Art. 5(1) GG. **[22]**

(1) § 130(3) StGB focuses on the preservation of public peace. It follows from the wording of the provision that a statement only fulfils the constituent elements of the provision if it is capable of disturbing the public peace. With regard to the requirement of specificity in Art. 103(2) GG, the constituent element that a statement is capable of disturbing public peace requires further specification based on the other constituent elements; where the other constituent elements are fulfilled, disturbance of public peace can generally be assumed (cf. BVerfGE 124, 300 <339 et seq.>). This requires, however, that the other constituent elements be interpreted in the light of the notion "disturbance of the peace". A criminal conviction pursuant to § 130(3) StGB with all its variations - i.e. including the act of trivialisation - can therefore only be based on such statements that are capable of endangering public peace in the sense of the requirements of Art. 5(1) GG. Where this is not clearly ascertainable on the basis of the other constituent elements, the element that a statement is capable of endangering public peace must be established independently. In contrast to the acts of denial and approval, which generally evince a disturbance of the public peace, it appears that such an independent assessment is necessary with regard to the act of trivialisation. **[23]**

(2) In light of Art. 5(1) GG further constitutional requirements arise regarding the as sessment of whether a statement is capable of endangering public peace. **[24]**

First of all, consideration must be given to freedom of expression in its formation as freedom of mind. Interferences with Art. 5(1) GG must not be aimed at taking measures against the purely intellectual consequences of certain statements of opinion. Neither the aim to prevent the dissemination of anti-constitutional views nor the qualification of certain opinions as worthless or even dangerous constitute sufficient reasons for imposing restrictions on these opinions. It is, however, legitimate to prevent the violation of legal interests (cf. BVerfGE 124, 300 <332 and 333>). **[25]**

Based on these standards, the concept of public peace must be interpreted in a strict manner. It is not tenable to apply an understanding of public peace that seeks to protect citizens against subjective worries caused by being confronted with provocative opinions and ideologies. The possibility of being confronted with disconcerting opinions is part of living in a free state; this may also include opinions with dangerous intellectual consequences and even opinions that aim to fundamentally transform the existing state order. Neither the aim to prevent a "poisoning of the public mind" nor the aim to protect the public against affronts to shared legal values arising from totalitarian ideologies or a manifestly wrong interpretation of history provide a reason for interference (BVerfGE 124, 300 <334>). The trivialisation of the Nazi ideology or an offensive historic interpretation of this time period as such are not sufficient to establish criminal liability (cf. BVerfGE 124, 300 <336>). **[26]**

However, public peace in terms of its understanding as peacefulness constitutes a legitimate legal interest. In this case, the objective pursued is to protect against statements which, in substantive terms, are clearly geared towards acts that threaten protected legal interests. In this context, the protection of public peace refers to the external effects brought about by certain statements of opinion, for instance by means of calls for action or emotionalised statements that incite willingness to take action among its addressees, lower inhibitions, or directly intimidate third parties (cf. BVerfGE 124, 300 <335>). A statement of opinion may provide a sufficient basis for a criminal conviction where it, beyond the mere influencing of opinions, indirectly aims to bring about real life consequences that directly threaten recognised legal interests, e.g. by way of calling for unlawful action, resorting to aggressively emotionalised statements or lowering inhibitions (cf. BVerfGE 124, 300 <333>). **[27]**

(3) The challenged decisions do not meet these requirements. The Regional Court held that the statements in question were capable of endangering public peace; this finding was primarily based on the consideration that the statements undermined public trust in legal certainty and they were effectively expressing an unacceptable level of contempt. Factually, this finding only suggests a poisoning of the public mind and an affront to the shared legal values of the general public and does not cross the threshold of endangering peacefulness. The same holds true for the unsubstantiated claim that the statement was capable of impairing the peaceful coexistence of different ethnic groups - a claim which was obviously solely based on the right-wing content of the statement. The fact that the website's target audience is the extreme right of the political spectrum does not, by itself, support a finding that there was a danger to public peace in terms of the peacefulness of public discourse. **[28]**

Nor do the assessments of the statements as such by the regular courts indirectly show that the statements amount to a disturbance of public peace. In this regard, the Regional Court finds that the statements glossed over and downplayed the acts of violence committed by the Nazi regime. Yet, the court does not accuse the complainant of stirring aggression nor does it find that the statements amount to a denial or approval of the crimes against humanity committed by the Nazis. Rather, the court concludes that the statements provide a one-sided, euphemistic account of the Nazi era. It holds that by accusing contemporary records of history of collectively blaming the Germans for the Nazi crimes and of telling lies, the statements, which neither mention nor recognise the victims of the Nazi era, insinuated that the mass murder that took place in Auschwitz and in other places had not been committed in the scope recognised by history. This is not sufficient to establish that the threshold at which a statement is capable of disturbing public peace in terms of jeopardising a peaceful discourse has been reached as is the case for the glorification of violence, incitement to hatred and violence against certain segments of the population or also for an emotionalised presentation. A statement does not fall outside freedom of expression, however, solely because it fails to give adequate consideration to the commonly accepted records of history or to the victims. Freedom of expression also covers manifestly offensive, repugnant and intentionally provocative statements that are scientifically unfounded and seek to discredit the fundamental values of our society. **[29]**

However, the fact that such statements are protected by the freedom of expression does not entail that their contents should be regarded as acceptable and treated with indifference in the public discourse. Instead, the free order of the Basic Law provides that such statements - which a democratic public may find difficult to tolerate - be countered, in principle, not by imposing prohibitions but by engaging in public debate. Criminal sanctions as a limit to the freedom of expression may only be imposed where the statements can no longer be considered non-violent in nature. The challenged court decisions do not contain sufficient findings in this regard. **[30]**

c) […] **[31]**

d) The judgment of the Regional Court and its upholding by the order of the Higher Regional Court denying the appeal are based on a failure to recognise the importance and scope of the fundamental right to freedom of expression under Art. 5(1) first sentence GG. It is possible that the courts would have come to a different conclusion if they had taken the fundamental rights requirements into account. **[32]**

2. Accordingly, the judgment of the Regional Court and the order of the Higher Regional Court are reversed pursuant to § 93c(2) in conjunction with § 95(2) BVerfGG and the matter is remanded to the Regional Court for a new decision. **[33]**

d) Holocaust Denial – BVerfG, 22.6.2018, 1 BvR 673/18

Facts:

The complainant, who was convicted several times for inciting hatred and violence against segments of the population (*Volksverhetzung*), challenges her repeated criminal conviction for denial of the persecution of Jews by the Nazis pursuant to § 130(3) of the Criminal Code (*Strafgesetzbuch* - StGB). **[1]**

I.

[Excerpt from Press Release no. 67/2018 of 3 August 2018]

The 89-year-old complainant has published various articles in which she contends that the mass murder of people of Jewish faith under Nazi rule did not actually take place and that it was impossible, in particular, for mass gassing to have been used in the Auschwitz-Birkenau extermination camp. Several of the articles present this contention as an established fact based on new evidence; as proof, the texts repeatedly refer, *inter alia*, to published written commands, which supposedly show that the exclusive purpose of the Auschwitz-Birkenau camp had been to ensure that the persons detained remained fit for labour in the arms industry. In addition, the articles cite several statements allegedly made by the management board of the Auschwitz-Birkenau Memorial and Museum, various historians, newspaper interviews and statements made by witnesses and eyewitnesses, identified by name, who were purportedly exposed as liars.

On the basis of these statements in the articles, the Local Court convicted the complainant of seven counts of *Volksverhetzung* and one count of attempted *Volksverhetzung*, and imposed an aggregate prison sentence (*Gesamtfreiheitsstrafe*) of two years and six months. On the complainant's appeal on points of fact and law, the Verden Regional Court reduced the aggregate prison sentence to two years without parole, and rejected the appeal for the rest. The subsequent appeal on points of law was unsuccessful.

[End of excerpt]

5. The complainant challenges these decisions in her constitutional complaint of 12 March 2018. She claims that the decisions violate her fundamental rights to freedom of expression and freedom of research and teaching under Art. 5(1) first sentence and (3) of the Basic Law (*Grundgesetz* - GG) and her right to a fair trial. In addition, she holds that the constituent elements of the offence underlying her conviction violated the principle of specificity under criminal law pursuant to Art. 103(2) GG. Imposing a prison sentence of two years without parole for statements made by the complainant who is over 80 years old violated the principle of culpability rooted in the principle of rule of law. The complainant further claims that in view of the Wunsiedel decision of the Federal Constitutional Court, § 130(3) StGB could not be considered a general law. The exception from the requirement of general applicability of a law acknowledged in that decision only referred to § 130(4) StGB and could not be applied to paragraph 3. According to the complainant, it also followed from the decision that interpretations of historical facts contrary to the majority view are protected under the right to freedom of expression and cannot be excluded from its scope of protection as untrue factual claims. At least,

this approach ought to be applied to a research activity of the type undertaken by the complainant. In addition, impunity of the denial of the Holocaust followed directly from applying the principles of the Wunsiedel decision. Pursuant to that decision, interferences to maintain a general feeling of peace, to protect the majority population from an insult to its sense of right and wrong or for the protection from evidently false interpretations of history are impermissible. **[16]**

II.

The constitutional complaint is not admitted for decision because the prerequisites for admission pursuant to § 93a(2) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG) have not been met. The constitutional complaint does not have general constitutional significance. Nor is admission for decision appropriate to enforce the rights referred to in § 90(1) BVerfGG (cf. BVerfGE 90, 22 <24 et seq.>; 96, 245 <248 et seq.>). The constitutional complainant is unfounded because the challenged decisions do not violate the complainant's fundamental rights. **[17]**

1. The Federal Constitutional Court has already decided the issues with regard to the scope of protection of Art. 5(1) first sentence GG in general and the punishability of the denial of the persecution of Jews on the basis of § 130 StGB in particular that are relevant in the present case. **[18]**

a) Subject of the scope of protection of Art. 5(1) first sentence GG are opinions, i.e. statements characterised by the element of taking a position and making one's own assessment (cf. BVerfGE 7, 198 <210>; 61, 1 <8>; 90, 241 <247>). They are always within the scope of protection of Art. 5(1) first sentence GG, regardless of whether they turn out to be true or false, whether they are reasonable or without any reason, emotional or rational, or whether they are considered valuable, useless, dangerous or harmless (cf. BVerfGE 90, 241 <247>; 124, 300 <320>). **[19]**

Besides opinions, the scope of Art. 5(1) first sentence GG also includes factual statements because and to the extent that they are or can be the prerequisites for the formation of opinions (cf. BVerfGE 61, 1 <8>; 90, 241 <247>). Whereas deliberately untrue factual claims or such statements that are proven to be untrue are excluded from the scope of protection of Art. 5(1) first sentence GG because they do not contribute to the constitutionally guaranteed opinion-forming process (cf. BVerfGE 54, 208 <219>; 61, 1 <8>; 90, 241 <247>). **[20]**

Whether a statement is mainly of a factual nature or whether it is predominantly a value judgment must be established by interpretation of the respective statement in its overall context (cf. BVerfGE 93, 266 <295>; BVerfG, Order of the Third Chamber of the First Senate of 16 March 2017 - 1 BvR 3085/15 -, www.bverfg.de, para. 13). In this context, it must be ensured that a separation of factual and judgmental parts of a statement does not lead to an alteration of its meaning (cf. BVerfGE 90, 241 <248>). In cases in which this is not possible, the statement must be regarded - in its

entirety - as an expression of opinion and included in the scope of protection of the freedom of expression in the interest of effective protection of fundamental rights (cf. BVerfGE 90, 241 <248>). **[21]**

b) If, according to these requirements, the statement at issue is protected under Art. 5(1) first sentence GG, the fundamental right to freedom of expression is not guaranteed without reservations. Pursuant to Art. 5(2) GG it is explicitly subject to the limitations that are imposed by the general laws. Formally, interferences with the right to freedom of expression must be based on a general law that is not directed against a particular opinion; substantively, interferences must meet the requirements of proportionality since the right to freedom of expression is a basic right of communication that is fundamental for the democratic order. **[22]**

However, with regard to the formal requirement of [a general law], the Federal Constitutional Court recognises one exception for laws that seek to prevent a propagandistic affirmation of the Nazi reign of violence and tyranny in the years 1933 to 1945. The Court thereby takes account of the crucial impact of German history on the national identity and considers it for the interpretation of the Basic Law (cf. BVerfGE 124, 300 <328 et seq.>). **[23]**

The substantive content of the freedom of expression, however, remains unaffected by this exception. In particular, the Basic Law does not contain a general anti-national-socialist principle that would allow prohibiting the dissemination of extreme rightwing or national-socialist ideas merely with regard to the effect their content has on people's minds. Rather, Art. 5(1) and (2) GG guarantees the freedom of expression as an intellectual freedom independent of the assessment of its content, correctness, legal enforceability or dangerousness. Art. 5(1) and (2) GG does not permit the state to interfere with what a person believes but only authorises an interference once an expression of opinion leaves the purely intellectual sphere of what a person thinks is right and becomes a violation of legal interests or an apparent threat (BVerfGE 124, 300 <330>). This is the case if the statements of opinion endanger public peace in terms of the peaceful public discourse thereby marking the transition to aggression or a violation of law (cf. BVerfGE 124, 300 <335>). **[24]**

The regular courts too must take account of these requirements in the interpretation and application of the laws restricting the freedom of expression, so that its role in defining values is guaranteed at the level of application of the law. An interaction takes place between protection of fundamental rights and restrictions on fundamental rights in the sense that these restrictions impose boundaries on fundamental rights; in turn, however, these restrictions must be interpreted in the light of the principal significance of a fundamental right for a free democratic state and hence be restricted in their limiting effect on the fundamental right (cf. BVerfGE 7, 198 <208 and 209>; 124, 300 <332, 342>). **[25]**

c) § 130(3) StGB focuses on the preservation of public peace. It follows from the wording of the provision that a statement only fulfils the constituent elements of the provision if it is capable of disturbing the public peace. With regard to the requirement of

specificity in Art. 103(2) GG the constituent element that a statement is capable of disturbing public peace requires further specification based on the other constituent elements; where the other constituent elements are fulfilled, disturbance of public peace can generally be assumed (cf. BVerfGE 124, 300 <339 et seq.>). This requires, however, that the other constituent elements be interpreted in the light of the notion "disturbance of the peace". **[26]**

2. Measured against these principles, the statements made by the complainant do for the most part not fall within the scope of protection of Art. 5(1) first sentence GG. For the rest, the challenged decisions are also not objectionable under constitutional law. **[27]**

a) The statements made by the complainant are in essence based on factual claims, which by themselves do not fall within the scope of protection of Art. 5(1) first sentence GG. These factual claims that are demonstrably untrue and - according to the regular courts' findings - also deliberately false do not contribute to the constitutionally guaranteed opinion-forming process and their dissemination does not fall within the freedom of expression. The fact that factual claims were made in connection with statements of opinion also does not merit a different conclusion. Also in such cases, untrue factual claims as such - unlike value judgments relying on factual claims - are excluded from the protection of Art. 5(1) first sentence GG. **[28]**

With her statements the complainant contests that the Auschwitz-Birkenau camp was a place used for systematic mass killings, she denies the systematic killing of Jewish persons by Nazi Germany in general and in the concentration camp Auschwitz-Birkenau in particular and claims that there is new evidence that there were no mass gassings with zyklon b in Auschwitz. As shown by innumerable eye- witness reports and documents, by historical findings and findings of courts in numerous criminal trials, these statements have proven to be untrue (cf. BVerfGE 90, 241 <249>; for the Auschwitz-Birkenau extermination camp cf. also the findings of the judgment rendered by the Frankfurt am Main Regional Court in the Auschwitz trial of 19 and 20 August 1965, 4 Ks 2/63, p. 37 to 44; […]). **[29]**

b) To the extent that, beyond disseminating untrue factual claims, the complainant bases her denial of the crimes pursuant to § 6 of the International Criminal Code (*Völkerstrafgesetzbuch* - VStGB) on subjective conclusions and appraisals invoking her freedom of expression under Art. 5(1) first sentence GG, the criminal conviction of the complainant does not violate her fundamental rights. The way the criminal courts have interpreted and applied § 130(3) StGB fulfils the requirements under Art. 5(1) first sentence GG with regard an application of this constituent element of the offence in a manner that is compatible with fundamental rights. In particular, the conviction by the criminal court took into account the requirement following from Art. 5(1) first sentence GG that interferences with the freedom of expression must not be directed against the purely intellectual consequences of certain statements of opinion but must serve the protection of recognised legal interests instead. Based on the findings in the challenged decisions, the Regional Court could reasonably assume that in case of the variant of "denial" relevant in the present case, the statements made by the complainant were capable of endangering the public peace. **[30]**

aa) Based on the aforementioned principles it can be assumed that the constituent elements of the offence of approval and denial generally evince disturbance of the public peace. **[31]**

In case of "approval" this already follows from the identity of this constituent element with the relevant element stated in § 130(4) StGB. Public approval of Nazi crimes pursuant to § 6 VStGB constitutes a form of approval of the Nazi reign of violence and tyranny that crosses the boundaries of peaceful public discourse and evinces a disturbance of the public peace (cf. BVerfGE 124, 300 <344>). **[32]**

The same holds true for the constituent element of "denial" of these crimes. Such an act crosses the boundaries of peacefulness given that, against the background of German history, the denial of the Nazi genocide - in terms of contesting that these commonly known events took place - can only be understood as the trivialisation of these crimes, which leads to the legitimation and approval thereof. Thus, the effect of denying these crimes is similar to that of their approval, which is generally sanctioned under criminal law pursuant to § 140 StGB (cf. BVerfGE 124, 300 <335>); it is furthermore equivalent to the glorification of the Nazi reign of violence and tyranny pursuant to § 130(4) StGB. Against the background of German history, denying the Nazi crimes of genocide is capable of provoking aggression on the part of an audience that thinks favourably of the speaker, and of inciting that audience to take action against those perceived as being the authors of, or responsible for, the purported distortion of an alleged historical truth implicit in such denial. It thus inherently carries the danger that the political discourse will turn hostile and violent. The denial of the Nazi crimes of genocide particularly endangers the peaceful political discourse not least because these crimes particularly targeted certain groups of persons or groups within society, and the denial of these events can and has been used, openly or insidiously, as a code to instigate hostile actions targeting these very groups. Against that background, it is consistent that the explanatory memorandum to the legislative draft qualifies § 130(3) StGB as a specific manifestation of the offence of *Volksverhetzung* traditionally recognised under criminal law. Thus, the regular courts can also assume in this case that denial of Nazi crimes evinces a disturbance of public peace. Special cases in which such effects appear to be unlikely from the outset and in which a disturbance of public peace can thus be ruled out can be dealt with by an adequate interpretation of this constituent element of the offence (cf. BVerfGE 124, 300 <339 et seq.>). **[33]**

bb) Measured by these standards, the findings of the Regional Court provide a sufficient basis for the criminal conviction of the complainant. According to these findings, the complainant has repeatedly and publicly contested the systematic mass killings committed by Nazi Germany, and especially the genocide of Jewish persons. Neither from these findings nor from the complainant's submission is it discernible why, in these cases exceptionally, the denial of these crimes, which constitutes a constituent element of the offence, should not be capable of disturbing the public

peace - in terms of peacefulness of the public discourse and of public life - despite the fact that fulfilling the constituent element of the criminal offence evince the contrary. **[34]**

Indeed, in the complainant's articles, the denial of the genocide is embedded in repeated requests directed at members of the Central Council of Jews in Germany (*Zentralrat der Juden*), demanding a rectification of the commonly accepted account of events that took place at Auschwitz; the articles thus exemplify the danger that was recognised by the legislature, namely that denying the genocide could intentionally serve to instigate hostile actions against the very groups of society that had been victims of that genocide. The complainant repeatedly urges only Jewish members of the population and their representatives in Germany to rectify the error that has allegedly been disseminated in their interest. She states that failure to rectify the account of events could lead to "the doom of the Jewry". The denial of the genocide committed against the Jews is used as a means to intentionally and deliberately stir opinion against Jewish members of the population and their representatives. This is punishable because it fulfils the constituent elements of inciting hatred and violence against segments of the population. **[35]**

cc) Sentencing the complainant to an aggregate prison term of two years without parole satisfies the requirement of proportionality, also in this individual case. […] **[36]**

3. Article 5.1, sentence 2 - Freedom of the Media

a) Spiegel, BVerfGE 20, 162

Explanatory Annotation

The magazine 'Der Spiegel' is Germany's leading news magazine, as such an integral part of the political process in Germany, and perhaps even the leading representative of the fourth power, the media in general and the press in particular. The 1966 decision of the German Constitutional Court in this case is Germany's equivalent to the later decision of the US Supreme Court in *New York Times v. United States of America*, where the Supreme Court defended the right of the New York Times to report classified information.[68]

In the German Court's decision, the issue was a search of the editorial rooms of Der Spiegel' magazine to find out how the classified information published in the magazine on the alleged inadequacy of the defense readiness of the West-German defense forces had come to the magazine. Releasing this qualified information constituted an act of treason under German

68 New York Times Co. v. United States, 403 US 713 (1971), available at: https://cdn.loc.gov/service/ll/usrep/usrep403/usrep403713/usrep403713.pdf (last accessed on 21.10.2019). President Nixon wanted to suspend the publication of classified material in the New York Times claiming executive authority but the Supreme Court held in favour of the freedom of press.

criminal law. Despite the fact that the magazine lost the case on a controversial 4:4 decision[69], the decision actually contained important dicta in favour of freedom of the press. The Court held the search to be constitutional to investigate the treason but stated at the same time that the mere publishing of what the government has classified cannot be considered as treason because it is the task of the press to collect information and publish it. Whereas it is not entirely impossible even for a media outlet to commit treason, to so qualify acts of publication would have to be measured against the importance of the freedom of communication as protected by Article 5.1. The decision set in motion a number of statutes protecting the work of the media, especially granting journalists a statutory right to remain silent when questioned about the source of their information even if it is clear that the source itself had acted illegally.

Translation of the Spiegel Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 20, 162*

Headnote:

Judgment concerning the issue of compliance of searches of press offices with the Basic Law (Grundgesetz).

Partial Judgment of the First Senate of 5 August 1996 based on the oral hearing of 25, 26 and 27 January 1966 - 1 BvR 586/62 and 512/64 -

Facts:

The constitutional complaint brought by Spiegel-Verlag Rudolf Augstein GmbH und Co. KG was directed, among other things, against the search warrants issued by the investigating judge and confirmation thereof by the Federal Court of Justice (Bundesgerichtshof) that provided the basis for searches of the offices of Spiegel-Verlag in Hamburg and its editorial offices in Bonn in October and November 1962. The searches and subsequent seizure of extensive materials were occasioned by an article in the 10 October 1962 issue of the news magazine "Spiegel" entitled "Conditionally Prepared for Defense" ("Bedingt abwehrbereit"), which discussed the military situation of the Federal Republic of Germany and NATO as well as military and strategic problems and plans for the future. The search and arrest warrant issued against the publisher Rudolf Augstein and the responsible editor was based on suspicion of treason pursuant to s. 100.1 of the Criminal Code (Strafgesetzbuch - StGB) (The provisions of the Criminal Code cited in this decision refer to the promulgation of the notice of the Reform of 25 August 1953 [Federal Law Gazette (*Bundesgesetzblatt* - BGBl.) I p. 1083)] with subsequent changes, those of the Criminal Procedure Code in the Act of 1 February 1877 [Reich Law Gazette (*Reichsgesetzblatt* - RGBl. p. 253)] at the time of the search as most recently amended by the Act of 26 July 1957 [Federal Law Gazette I p. 861]).

69 A finding of unconstitutionality always requires a majority finding. A tie among the eight justices of one of the senates of the Constitutional Court therefore means that the relevant conduct was constitutional.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

The Senate being equally divided, the constitutional complaint brought in particular against the search warrant, the seizure orders issued by the investigating judge and against the orders of the Federal Court of Justice confirming the measures carried out in connection with the investigation was not successful.

Extract from the Grounds:

…

C.

I.

1. A free press that is subject neither to control by the public powers nor to censorship is a characteristic element of free government; in particular, a free political press that publishes at regular intervals is indispensable to a modern democracy. If citizens are to be able to make political decisions, they must be not only thoroughly informed, but also be familiar with the opinions of others and be able to weigh them against one another. The press keeps this ongoing debate alive; it provides the information, takes its own positions and functions thereby as a frame of reference for public debate. It is a vehicle for public opinion; positions are elucidated in a process of argument and rebuttal, take on clear contours and in that way make it easier for the public to form judgments and make decisions. In a representative democracy, the press functions at the same time as a permanent communication and control channel between the people and their elected representatives in parliament and government. It provides critical recapitulation of the opinions and exigencies that are in an incessant state of flux within society and its constituent groupings, submits them for discussion and brings them to the attention of the political actors involved in the various bodies of government, which can in this way constantly measure their decisions, including those pertaining to everyday political issues, against the opinions that are actually held by the public.

The importance of this "public responsibility" assigned to the press makes this responsibility all the less amenable to fulfilment by the organized powers of government. Publishing enterprises must be able to form freely within the framework of society. They operate on the basis of principles of private enterprise and are organized under private law. They engage in intellectual and economic competition with one another, and the public powers may in principle not intervene in this process.

2. The function of a free press in a democratic state reflects its legal status under the Basic Law. Article 5 of the Basic Law guarantees freedom of the press. Although this first of all - by virtue of the standing of the provision within the legal system and the way it has been traditionally understood - represents a personal fundamental right that guarantees individuals and enterprises involved in the area of the press freedom from governmental coercion and under certain circumstances accords them a privileged legal status, the provision at the same time has an objectively legal aspect. It guarantees the existence of the "Free Press" as an institution. The state has - apart from the personal rights of individuals - a duty to respect the principle of freedom of the press in its legal system whenever the sphere of operation of a provision of law

affects the press. The freedom to establish publications, free access to journalistic professions and the duty of public authorities to divulge information are principles that follow from this; on the other hand, it is also possible to conceive, for example, of a duty on the part of the state to avert the threat to a free press that could arise from the formation of monopolies on opinion.

The independence of the press guaranteed under Article 5 of the Basic Law extends from the procurement of information to dissemination of news and opinion (BVerfGE 10, 118 [121]; 12, 205 [260]). As a result, freedom of the press also includes a certain protection for the confidential relationship between the press and private informants. This is indispensable since the press cannot function without information from private sources, but this information will continue to flow freely only if informants can in principle be certain that "editorial privilege" will remain intact.

3. Freedom of the press entails the possibility of conflict with other values that are protected by the Basic Law; this may involve rights and interests of individuals, associations or even society itself. The Basic Law makes reference to the general laws, to which the press is also subject, for the purposes of regulating such conflict situations. Legal interests of others and the general public that enjoy at least equal rank with freedom of the press must also be respected by the press. The members of the press are afforded their status, which is in certain respects privileged, because of their responsibility and only in connection with this responsibility. This is not a matter of personal privilege; exemptions from generally applicable laws must be consistently justifiable on the basis of the nature and reach of the matter at hand.

The reference to the general legal order is found in Article 5.2 of the Basic Law, according to which freedom of the press finds its limits in the provisions of general laws. The Federal Constitutional Court addressed the relationship between freedom of expression and general laws in its decision of 15 January 1958 (BVerfGE 7, 198 [208 et seq.]). According to that decision, freedom of expression is to be sure limited by general laws; these laws must, however, be consistently construed with a view to freedom of expression and their restrictive effect upon freedom of expression therefore in turn restricted if appropriate. These principles also apply accordingly to freedom of the press; they in fact take on especial importance here since statements in the press are as a rule intended to form public opinion, which means they are initially presumed to be permissible even when they affect the legal sphere of others (op. cit. page 212). As applied to freedom of the press, the purpose of this judgment is therefore to prevent dilution of this freedom by general laws - and the courts applying them - and, by compelling consistent construction of general laws in alignment with the basic value of freedom of the press, to ensure appropriate latitude and prevent any restriction of freedom of the press that is not absolutely necessary in order to respect legal interests of at least equivalent standing. The objectively legal, institutional aspect of freedom of the press and its effect as a standard and principle of construction for the general legal system are especially pronounced here.

4. The provisions pertaining to treason (ss. 99 and 100 of the Criminal Code) are "general laws" within the meaning of Article 5.2 of the Basic Law. There are no grounds for doubting their compatibility with the Basic Law. In particular, the occasional reservations expressed as regards the lack of a sufficiently specific description of the elements of a criminal offence

(Article 103.2 of the Basic Law) are not compelling. Construction of the provisions to determine conformity with the Basic Law also does not reveal any violation of such Law insofar as the provisions include disclosure of state secrets through publication in the press, i.e., "treasonable publication."

Protection of the continued existence of the Federal Republic of Germany against external enemies, which the provisions of criminal law governing treason are intended to achieve, conflicts with freedom of the press when the press publishes facts, subject matter or knowledge whose secrecy would be in the interest of national defense. This conflict cannot be resolved summarily and in general by arguing against freedom of the press that the existence of the Federal Republic of Germany is a necessary prerequisite for freedom of the press and that freedom of the press itself would be lost with the destruction of the Federal Republic of Germany. For the existence of the Federal Republic of Germany, which must be protected and preserved, is to be understood to mean not only its organizational structure, but also its basic free democratic order. It is endemic to this order that the affairs of state, including military affairs, albeit conducted by the responsible bodies of government, are subject to constant criticism or approval by the people.

In this regard, the necessity of military secrecy in the interest of national security and freedom of the press are not mutually exclusive. Rather, the two are complementary because of the superior goal of preservation of the existence of the Federal Republic of Germany - understood in the proper sense. In view of this goal, conflicts between the two necessities of state must therefore be resolved. In this context, it is necessary to take into account the importance of the disclosed information, etc., not only for potential enemies, but also for the purposes of formation of public opinion on political issues, in the individual case; the threat to the security of the country that may arise from publication must be weighed against the need to be informed of important developments, including such as pertaining to the area of defense policy. In this sense, Article 5.1 of the Basic Law has in principle a restrictive effect on the construction of the above provisions of criminal law.

D.

It follows from the review of the search warrant on the basis of the above constitutional standards that pursuant to s. 15.2 sentence 4 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerGG) it is not possible to establish a violation of Article 5.1 sentence 2 of the Basic Law through application of substantive criminal law.

E.

The necessity of taking into account freedom of the press and its importance for the basic free democratic order in the context of the construction and application of general laws also applies as regards the Criminal Procedure Code (Strafprozessordnung - StPO), especially as regards coercive measures in connection with criminal proceedings such as searches and seizures carried out against a publishing company or a member of the press due to or in connection with publication in the press.

These coercive measures, which are ordered at the discretion of a judge or otherwise responsible authorities, will by their very nature regularly constitute significant encroachment upon the sphere of life protected by fundamental rights and in particular upon the fundamental rights under Articles 2 and 13 of the Basic Law. The use of such measures is therefore from the outset subject to the general legal principle of proportionality (BVerfGE 19, 342 [348-349]; 17, 108 [117]; 16, 194 [202]). The coercive measure must be commensurate with the severity of the criminal offence and the strength of the existing suspicion; in addition, this specific measure must be necessary for the investigation and prosecution of the criminal offence, which is not the case if other, less severe, means are available. Finally, the search must be likely to yield appropriate evidence.

In the case of searches and seizures involving a publishing enterprise, possible or probable encroachment upon freedom of the press must also be taken into account. This pertains first of all to the obstruction of the exercise of the fundamental right that may occur - for example, as a result of the sealing of necessary working areas or deprivation of materials required for current work - but even more so intrusion upon editorial privilege, which is regularly associated with such coercive measures. Since the confidential relationship between the press and its employees and informants constitutes an essential prerequisite for the functional viability of an organ of the press and jeopardization of this confidential relationship may entail negative effects upon other organs of the press and freedom of the press that go beyond the respective individual case, this necessarily entails a conflict between the interest in prosecution of criminal offences and the protection of the freedom of the press that must be resolved with the help of the balance of interests elaborated in the case law of the Federal Constitutional Court cited above.

It is in principle the affair of the legislature to undertake this balance of interests. The Criminal Procedure Code takes this requirement into account only to a limited extent: the relevant provisions (ss. 53.1 no. 5 and 97.5 of the Criminal Procedure Code) cover only the case of publication of illegal content that constitutes grounds for prosecution of the author, contributor or informant. They operate on the assumption of what is referred to as guarantor liability, according to which the greater difficulty in the prosecution of criminal offences is accepted in the interest of the confidential relationship between informants and members of the press if at least one editor of the printed publication involved is or may be punished. In this context, it is necessary to take into account the provisions of law governing the press, according to which the "responsible editor" and under certain circumstances also other members of the press involved in the production and distribution of the respective publications are held to higher standards of responsibility under criminal law for the appearance of illegal content in periodical publications. If these conditions for guarantor liability are satisfied, then the responsible editor or other members of the press involved benefit from the right to refuse to give testimony under s. 53.1 no. 5 of the Criminal Procedure Code and - to preclude circumvention of this right to refuse to give testimony - prohibition of any seizure in respect of the above members of the press pursuant to s. 97.5 of the Criminal Procedure Code as well immunity from searches as inferred therefrom in the case law. According to the revision of the above provisions by the Third Criminal Law Reform Act (Drittes Strafrechtsreformgesetz) of 4 August 1953 (Federal Law Gazette I p. 735), the prohibition of seizure applies only to investigations of authors, contributors

or informants of illegal publications, but not to all written correspondence between members of the press with the right to refuse to give testimony and not to all informants or records made by members of the press of information entrusted to them.

No provision is made for editorial privilege when an investigation is directed against a source of information that is not illegal or in the case of investigatory proceedings involving the responsible editor or another member of the press as a suspect. Such members of the press may to be sure refuse to testify in this capacity; however, they are then not immune from searches and seizures even if such measures relate to documents that could yield the name of an informant.

All *Länder* have since enacted new provisions in their press laws that despite significant differences in detail all reinforce the protection of editorial privilege, but at the same time depart from guarantor liability and to a certain extent separate the prohibition of searches and seizures from the right to refuse to give testimony. The question as to whether these provisions remain within the area of authority of the Land legislature need not be decided in the present case since the Criminal Procedure Code provided the only legal basis for issuance of the search warrant at the relevant time.

Since the above provisions of the Criminal Procedure Code in any case partially serve to protect editorial privilege, they are compatible with Article 5.1 sentence 2 of the Basic Law. These provisions contain no exhaustive regulation of the matter. They do not exclude the possibility that the protection of editorial privilege may be taken into account to a greater extent in the context of the exercise of discretion by the courts as to whether and to what extent a search or seizure is to be ordered. In the absence of legal reform, it was therefore at the time that is at issue here the responsibility of the judge to strike the required balance, taking into account the importance of the fundamental right of freedom of the press as a standard.

…

G.

It follows from further review of the search warrant on the basis of the constitutional standards mentioned under E. that pursuant to s. 15.2 sentence 4 of the Federal Constitutional Court Act it is not possible to establish a violation of Article 5.1 sentence 2 of the Basic Law through application of the Criminal Procedure Code.

(The opinion of the four dissenting justices, who held that the search warrant constituted a violation of the fundamental right of freedom of the press, is summarized below:)

3. In summary, it must be concluded that the balance of interests required by the principle of proportionality and the value judgment of Article 5.1 sentence 2 of the Basic Law were ignored when the search warrant was issued. If these requirements had been taken into account when the law was applied in the present case, it would have been obvious that such an extensive search represented disproportionate encroachment.

The severity of the offence of treason and the potential threat to national security through the betrayal of military secrets do not in and of themselves suffice to suppress the protection of freedom of the press in principle and justify every sort of coercion by legal process. This would ignore the importance of the press for the free system of government and place editorial treason on the same level as high treason. Furthermore, this would constitute failure to acknowledge that what is at issue here is not whether to let the publication of illegal content go unpunished or to privilege such publication in general as regards prosecution, but solely whether the use of a specific instrument of criminal procedure was appropriate under the circumstances of a given case. In accordance with the opinion advanced here, freedom of the press may also not be used as a subterfuge for serious criminal offences against the security of the state. However, an already proven violation of the supreme legal interest that is protected by the provisions of *Land* law governing treason is not involved in the present case; rather what was to be determined was whether and, if so, to what extent such a violation took place. If the very fact that treason is made the subject of the investigation at this stage in the proceedings, at which the presumption of innocence applies pursuant to Article 6.2 of the European Convention on Human Rights, were to suffice to dispense with the process of balancing of interests that would actually be required or to impose less stringent standards for the purposes of such balancing of interests, free public debate would be unjustifiably restricted in a significant area of public life.

For this reason alone, reference to the duty to report a crime under s. 138 of the Criminal Code fails to convince, apart from the fact that distinctions depending on the nature of the offence are not even recognized for the purposes of the limited protection of editorial privilege afforded under the Criminal Procedure Code. Moreover, the purpose of this provision of criminal law is to prevent the occurrence of a capital offence that has not been committed; that it is applicable to offences involving the content of a publication is not evident.

With the sole exception of the Baden-Württemberg Press Act (Pressegesetz), the press laws of all other German *Länder* afford journalists and other members of the press a right to refuse to give testimony that is independent of the nature and punishability of the prosecuted offence. Such a provision has already been in place in Bavaria for 17 years without providing any occasion for disagreement. Comparison with the legal systems of other democratic countries also provides no convincing arguments against the opinion advanced here if such comparison is limited exclusively to the existence or non-existence of a specific independent provision of law, and neither the respective legal system - which as in the case of England or the federal law of the USA affords no profession the legal right to refuse to give testimony - is examined in its entirety nor are legal practice and democratic awareness of the respective society taken into account.

The importance of freedom of the press requires that the use of coercive measures for the purposes of prosecution of criminal offences be subject to stringent conditions and at the same time justifies extensive review of procedural operation in the concrete case by the Federal Constitutional Court. To the extent required for the purposes of protection of the fundamental right, aspects of effective procedural conduct that are themselves important must also be sacrificed and procedural inconvenience accepted (see BVerfGE 17, 108 [118]).The extent to which a different situation would have to apply in the case of a state of defense or similar crises due to emergency legislation is not under discussion here. ...

(The opinion to the effect that the search warrant was in compliance with the Basic Law, which provided the basis for the judgment pursuant to s. 15.2 sentence 4 of the Federal Constitutional Court Act, is supported, *inter alia*, by the following arguments:)

> By continuing to characterize these proceedings as "frivolous," the complainant exaggerates the legitimate demands of the state. The point at issue was to determine whether to pursue a suspicion. It cannot be expected that such a decision will be made with the degree of "certainty" required for conviction or acquittal. If searches of press offices are not to be prohibited from the outset, it is not possible to make that which is to be established through a search a condition for ordering such a search in the first place.

The press enjoys no privileges in criminal proceedings; like any citizen who through his conduct awakens serious suspicion of a criminal act, the press must tolerate the investigative measures of the prosecution authorities. The correlate to freedom of the press is a press that carries out its work responsibly (BVerfGE 12, 113 [130]). In particular, freedom of the press is reciprocated by co-responsibility for national security on the part of the press in a free democratic state. The various organs of the press may set themselves different goals and pursue them with different means and journalistic methods. In any case, it is not possible to accept a "presumption" to the effect that an organ of the press will in the case of doubt have carried out its work responsibly and be therefore from the outset above suspicion of criminal conduct.

2. The task of the Federal Prosecutor's Office and the investigating judge was to decide whether it was permissible to consider a search of the business premises of the complainant for the purposes of discovering evidence as a possible course of action in view of the nature of the matter in order to achieve elucidation of the facts.

Measures to obtain evidence such as searches and seizures constitute by their very nature serious encroachment upon a citizen's fundamental rights. Since they are, however, indispensable for effective prosecution of criminal offences under certain circumstances, innocent persons who come under suspicion must also tolerate such measures to a certain extent. When such measures are taken against an organ of the press, the conflict with the fundamental right of freedom of the press that inevitably results compels special caution and careful balancing of the aspects that speak in favour of and against the permissibility of the procedural measure. The upshot of this is the postulate of proportionality of the measure in the individual case under the rule of law. What in such cases must be balanced against the requirements of freedom of the press has already been set out in detail above: the general standing of the legal interest that is to be protected by the coercive measures; the threat to that interest posed by the concrete act that is the subject of investigation; the degree of suspicion; the suitability and necessity of the procedural measure envisaged.

It has already been said - and the complainant also concurs in this - that the press is not completely exempted from application of the provisions of criminal procedure governing searches and seizures. An objective balancing of values is required in the individual case, not respect for a privilege "of the press" that exists once and forever because of "public responsibility" and so forth.

The suitability of the means requires no further justification in the present case. It was to be assumed with a high degree of probability that the search of the premises of the "Spiegel" would lead to the discovery of evidence (s. 102 of the Criminal Procedure Code). Records pertaining to news items that had been (and under circumstances were to be) published such as could be expected with certainty in the editorial offices made it possible to elucidate not only the secret nature of various facts as well as the nature of collaboration with informants from the Ministry of Defense (Verteidigungsministerium), but also the aspect of suspicion of treason by the members of the "Spiegel" editorial staff. The federal prosecutors who were primarily involved, Dr. Wa. and Dr. K., were motivated by the idea that there must be a "record," "dossier" or "exposé" in the editorial offices that would significantly help to clear up the entire case and its ramifications quickly and completely if obtained.

In reviewing the necessity of the measure, it was to be assumed that the work of the press is to remain free from any interference by the public powers that is not absolutely essential (this was in particular the opinion of the Federal Prosecutor's Office, which it explicitly emphasized before the investigating judge and communicated to its enforcement officers as a general guideline at the meeting of 22 October 1962); on the other hand, it was also necessary to take into consideration that a serious suspicion of a criminal act directed against the security of the state was involved, which meant that there was a possibility of a threat to a legal interest that is in any case not subordinate to freedom of the press. It was necessary to assess whether the suspicion was so serious, the criminal offence at issue so dangerous and the public interest in complete clarification of the case so great that restriction of freedom of the press in a manner that did not in any way threaten the existence and further appearance of the magazine could be accepted. The Federal Prosecutor's Office and the investigating judge decided that this was the case; their decision does not indicate that they failed to assess the situation as required or that they in principle misconstrued the standards of the Basic Law. When the press enters the realm of individual issues involving military technology, the balance shifts; the public's need for information becomes relatively less important, first of all because readers cannot in any case form an independent opinion due to a lack of adequate technical expertise and secondly because they do not need this knowledge to form a political opinion. On the other hand, however, published details that are relatively unimportant for the domestic public may be of value to a foreign intelligence service with the requisite expertise. The press must therefore also weigh the need for information against governmental interests in the case of such publications. This cannot be avoided through reliance on "freedom of the press."

Treason potentially threatens the existence of the state and justifies in principle a sharp reaction by the forces of government. Article 21.2 and Article 91 of the Basic Law make it possible to recognize that uncompromising intervention is also required by the Basic Law in the face of a threat to the continued existence of the Federal Republic of Germany. In concreto, the danger was especially pronounced in view of the political situation at the time ("Cuban Missile Crisis"); there seemed to be some question as to the reliability of the Federal Republic of Germany within the Atlantic alliance. If one also takes into account the high degree of probability to be inferred from the article that illegal cooperation with senior members of the Federal Armed

Forces (Bundeswehr) was to be suspected, there can be no denying an urgent public interest in speedy and complete clarification of the entire affair. The Federal Prosecutor's Office and the investigating judge were able to assume that complete clarification would be possible only through discovery of concrete documentary evidence, which they expected from the search of the editorial offices. Such evidence was vastly more valuable than witness testimony. This was the only possible way to obtain precise information on the documents that were used in the article, on their nature as state secrets (an important indication of which could be, for example, formal classification as secret), on the existence of any further secret materials slated for publication, but especially on how the documents came into the possession of the "Spiegel" and on the presence of the element of the offence of treason by the responsible individuals from the "Spiegel" and on the extent of any involvement in criminal acts on the part of informants from the Federal Ministry of Defense (Bundesverteidigungsministerium). None of this could have been expected to be forthcoming from interrogations, which would initially have necessarily been random. The first interrogation would have warned all parties involved; a subsequent search would no longer have resulted in the discovery of incriminating material.

3. The complainant's objection to the effect that the search of the editorial offices was illegal and in violation of the Basic Law in view of the protection of informants of the press that derives from freedom of the press is unfounded.

There can be no doubt that a certain protection of editorial privilege and informants of the press does follow from the fundamental right of freedom. However, the legislature enjoys broad operational latitude as regards such protection. There is no constitutional requirement of protection of informants with a specific content.

(According to the prevailing opinion that follows, the provisions of criminal procedure in effect at the time were compatible with the Basic Law as measured by this standard. Finally, the Court can - also because of s. 15.2 sentence 4 of the Federal Constitutional Court Act - also find no violation of the requirements of the rule of law by the search warrant (on the constitutional requirements for search warrants see BVerfGE 42, 212).

…

b) The Decisions Caroline of Monaco II, BVerfGE 101, 361 and Soraya, BVerfGE 34, 269

Explanatory Annotation

This Soraya-case is the nucleus of a development that many years later was aggressively moved forward by a number of cases brought by Princess Caroline of Monaco with an emphasis on photos often obtained by the so-called paparazzi.[70]

At issue in the Soraya case was the question whether the rainbow press is subject to limitations when reporting about celebrities and their private lives. The celebrity in this decision of 1973, Soraya, was the wife of the former Shah of Iran and an icon of society journalism at the time. A rainbow magazine of a large German publishing house had published a completely fictitious 'interview' with Soraya concerning her divorce from the Shah. The interview had never taken place and its content had not been authorized. Soraya successfully sued for a modest amount as compensation for immaterial damages sustained because of the violation of her personality rights. The publisher unsuccessfully argued before the Constitutional Court that the decision of the Federal Supreme Court violated the freedom of the press as guaranteed by Article 5.1 of the Basic Law. The Constitutional Court saw no fault with the Federal Supreme Court's interpretation of the relevant clauses of the Civil Code as providing for immaterial damages. The Court, however, emphasized the point that the protection of the personality rights of Soraya only prevailed because the damages sought and won were only modest in nature and because the publication was driven exclusively by business interests. A larger sum, the Court implied, would tilt the balancing act in favour of the freedom of the press.

The Caroline decisions of the Federal Supreme Court (*Bundesgerichtshof*, BGH) and the Constitutional Court not only pushed the boundaries for monetary compensation for immaterial damages considerably, the Constitutional Court also clarified other important matters. The Court undertook to delineate the private sphere of celebrities, regardless of whether they are entertainment stars or politicians, from the public sphere, the latter being open for reporting, the former being protected as part of the privacy and personality rights of the affected individual. The Court made it clear that there are no general delineation criteria for all cases and that each case must be looked at separately. The privacy of the home is one such area where persons are protected regardless of their status. However, the Court held that the private sphere extends beyond the walls and fence of one's private dwellings. The determination of this protected sphere depends on the concrete situation. Excluded are public areas where the affected person is among many others. Excluded from the protection are areas where the affected person consented to private affairs becoming available to the public. The Court specifically stated that privacy protection is not afforded to protect a commercial interest. Hence the constitutional protection of the private sphere is not available to protect against the interference of third persons with an exclusive contract to publish certain otherwise private events. The Court also held that children require special protection. Parental interaction with their children is therefore in principle privacy protected unless the celebrity seeks publicity.

70 See, for example, BGH 160, 298 where the first instance District Court had awarded 150.000 German Marks in 2001. The Federal Supreme Court held that monetary damages are the only means of legal redress against privacy and personality rights' violations by printing photos.

The Constitutional Court also largely upheld the Federal Supreme Court in its interpretation of the right to one's own picture, which is governed by a special statute. Under this statute the publication of photographs requires the consent of the persons depicted. There is, however, an exception for images of "contemporary history" and a counter-exception for legitimate interests of the depicted person. The Constitutional Court balanced the freedom of the press against the privacy interests of Caroline regarding the published images in favour of the freedom of the press. The European Court of Human Rights, to whom the case was consequently brought, came to a different conclusion because Caroline had no official or political function in Monaco and hence her privacy rights with regard to the images in question prevailed.[71]

aa) Translation of the Caroline of Monaco II Judgment, Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 101, 361*

1. Privacy, which is protected by the general right of personality under Article 2.1 in conjunction with Article 1.1 of the Grundgesetz (Basic Law), is not restricted to the domestic sphere. It must, in principle, be possible for an individual to move in other places that are recognisably secluded without being disturbed by the activities of photo journalists.

2. The general right of personality is not meant to serve the interest of the commercialisation of the person of an individual. The protection of privacy from being portrayed comes second to the extent that someone declares his or her consent that specified matters that are usually regarded as private are made public.

3. The scope of protection provided by the general right of personality of parents is enhanced by Articles 6.1 and 6.2 of the Basic Law to the extent that the publication of images is concerned the subject of which is the specifically parental care of their children.

4. The guarantee of the freedom of the press provided by Article 5.1(2) of the Basic Law also covers entertaining publications and articles as well as the images that they contain. In principle, this applies as well to the publication of images that show persons with roles in public life in everyday or private contexts.

Judgment of the First Senate of 15 December 1999 on the basis of the oral hearing on 9 November 1999 - 1 BvR 653/96 -

71 See BVerfG, 1 BvR 653/96 of 15.12.1999, http://www.bverfg.de/entscheidungen/rs19991215_1bvr065396en.html and ECtHR, Appl. No. 59320/00, 24.6.2004, http://hudoc.echr.coe.int/eng?i=001-61853 (last accessed on 21.10.2019).

*

Facts:

The constitutional complaint concerns the publication of photographs from the daily and private life of prominent persons. The defendant in the original proceedings, the company Burda GmbH, publishes the magazines "Freizeit Revue" and "Bunte". Photographs of the complainant, Princess Caroline of Monaco, were published in these magazines to illustrate various articles. The photographs gave rise to the original proceedings, seeking to block their publication.

For the assessment of these photos the civil courts have mainly been guided by s. 22 and s. 23 of the Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie (Act concerning the copyright of works of visual art and photographic works), of 9 January 1907 (Reichsgesetzblatt [RGBl, Reich Law Gazette] p. 7, hereinafter referred to as Kunsturhebergesetz [KUG, Art Copyright Act]). These regulations have the following wording:

Images may be distributed or presented for public display only with the consent of the subject. In case of doubt, the consent is deemed to have been granted when the subject receives a payment for allowing the images to be made. After the death of the subject and until the expiration of 10 years, the consent of the subject's relatives is required.

…

S. 23 states:

(1) The following images may be distributed and presented for display without the consent required by s. 22:

1. Images from the sphere of contemporary history;
2. Pictures in which the subjects appear only as part of the backdrop in a landscape or other locality;
3. Pictures of assemblies, demonstrations and similar events in which the depicted individuals have taken part;
4. Images, though not produced by request, in so far as the distribution or display serves a higher interest of art.

(2) The authority does not, however, extend to a distribution and display by which the subject, or in the case the subject is dead, his relatives, suffers an injury to a legitimate interest.

Extract from the Grounds:

B.

The constitutional complaint is partly founded.

I.

The challenged judgments affect the complainant's general right of personality that follows from Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law.

1. The constitutional safeguard of the protection of the general right of personality also extends to images of an individual made by third parties.

a) The fundamental right that safeguards the legal protection of the general right of personality has the objective of safeguarding elements of an individual's personality that are not the subject of the freedoms that are especially guaranteed by the Basic Law but do not come second to these freedoms as concerns their importance for the formation of the personality (cf. BVerfGE 54, 148 [153]; BVerfGE 99, 185 [193]). The necessity of such a safeguard for filling gaps in the legislation exists in particular as regards new threats to the free development of one's personality that mostly occur in the wake of scientific and technical progress (cf. BVerfGE 54, 148 [153]; BVerfGE 65, 1 [41]). The standard for ascertaining whether, in the framework of a specific legal action, the general right of personality is affected and if so, which manifestation thereof, is, first and foremost, a question of the threat to one's personality. This must be inferred from the concrete situation.

b) The authority to publish photographs that show individuals in private or everyday contexts depends on the right to one's own image and on the guarantee of privacy that characterise the right to develop one's personality.

aa) Contrary to the complainant's opinion, Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law does not establish a general and comprehensive individual right to determine the manner in which one is portrayed. To the extent that the complainant would like to infer such a right from former decisions of the Federal Constitutional Court (cf. BVerfGE 35, 202 [220]; BVerfGE 54, 148 [155-156]; BVerfGE 63, 131 [142]), this is an incorrect generalisation of the scope of protection of the guarantee provided by the fundamental right, which was formulated in the Court's consideration of the concrete cases. As the Federal Constitutional Court has emphasised on several occasions already, the general right of personality does not confer to the individual the right to be portrayed by others only as he or she views him- or herself or only as he or she wants to be perceived (cf. BVerfGE 82, 236 [269]; BVerfGE 97, 125 [149]; BVerfGE 97, 391 [403]; BVerfGE 99, 185 [194]). Such a broad protection would not only exceed the aim of protection, i.e. to avoid risks to the development of an individual's personality, but would also extend far into third parties' sphere of freedom.

The complainant does not criticise the way in which she is portrayed in the photographs at issue, which had been regarded as altogether positive by the civil courts that dealt with the case. Rather, the question with which she is concerned is whether images of her may be made and published at all if she does not move in public in an official function but as a private individual or in everyday contexts. The answer to this question can be ascertained from those aspects of the general right of personality that protect the right to control over one's own image as well as privacy.

bb) The right to control over one's own image (cf. BVerfGE 34, 238 [246]; BVerfGE 35, 202 [220]; BVerfGE 87, 334 [340]; BVerfGE 97, 228 [268-269]) ensures that the individual has the opportunity to influence and decide the taking and the use of photographs or recordings of his or her own person. In principle, it is of no importance whether the photographs or recordings show the individual in private or public contexts. The protection required for the right to control over one's own image is similar to, and developed after, the protection required for the right to control over one's own words. Both find support in constitutional jurisprudence (cf. BVerfGE 34, 238 [246]). The need for protection, in the case of the right to control over one's own image, results from the fact that it is possible to detach the image of an individual in a specific situation from this individual, to record the image in a data format and to reproduce it at any time for an immeasurable audience. The progress in recording technology, which permits the taking of images from a great distance, most recently even by satellite and under bad lighting conditions, has considerably expanded this possibility.

The existing technology of image and sound reproduction make it possible to change (1) the public setting in which one appears, and (2) the breadth of the public by which one may be observed. In particular, the limited public, in which an individual moves under normal circumstances, can be substituted by a public that is created by the media. The audience that is present in a courtroom, for instance, is the feature that distinguishes the public in court proceedings from the public created by television, because the public in the courtroom witnesses the events itself and can, in turn, be perceived and assessed by the parties to the legal action (cf. BVerfGE, 3rd Chamber of the First Senate, NJW [Neue Juristische Wochenschrift] 1996, 581 [583]). Apart from that, the change of the context in which an image is reproduced can also change, unintentionally or intentionally, the sense of the message that the image conveys.

Among the different aspects of the protection of the right to control over one's own image, only the aspect that concerns the production of specified photographs and their transfer to a broader public is of importance in this context. The proceedings do not deal with manipulated photographs or distortions by a change of context, with which the protection is particularly concerned. The complainant, on the contrary, assumes that the photographs that are at issue in the proceedings and the accompanying text, which is also relevant for the message conveyed by the photographs, correctly depict situations from her life in a way in which observers, had they been present at the occasion when the pictures were taken, could have perceived them. The complainant simply does not want these situations to be captured in photographs and presented to a broader public as these situations, in her opinion, are part of her privacy.

cc) As distinguished from the right to control over one's own image, the protection of privacy, which also flows from the general right of personality, does not refer to images in particular but is determined by the subjects of the images and the places

in which they are taken. On the one hand, the protection of privacy comprises matters that, due to the information conveyed, are typically regarded as "private", because their public discussion or display is regarded as unseemly, because they are regarded as embarrassing if they become known, or if they provoke adverse reactions from the environment. This applies e.g. to reflections about oneself in diaries (BVerfGE 80, 367); to confidential communication between husband and wife (BVerfGE 27, 344); to the sphere of sexuality (BVerfGE 47, 46); in the case of socially deviant behaviour (BVerfGE 44, 353) and in the case of diseases (BVerfGE 32, 373). If such matters were not protected from others taking note of them, the reflection about oneself, the uninhibited communication among individuals who are close to each other, the development of one's sexuality and the resort to medical aid could be impaired or made impossible even though these types of behaviour are protected by fundamental rights.

On the other hand, protection extends to a physical space in which the individual can recover, relax and also let him- or herself go (cf. BVerfGE 27, 1 [6]). It is true that such a space also provides the possibility to behave in a way that is not meant for the public and the observation and display of which by outside observers would be embarrassing or detrimental for the individual affected. In essence, this is a space in which it is possible for the individual to be free from public observation, and thus free from the self-control imposed by the public even if the individual affected does not necessarily behave differently in this space than he or she would in public. If such a possibility of retreating no longer existed, this could overstrain the individual psychically because he or she would always have to be aware of the effect he or she has on others and would always have to consider whether he or she is behaving correctly. This would deprive the individual of phases in which he or she can be alone and recover; such phases are necessary for the development of one's personality, and without them the development of one's personality would be seriously impaired. Such need for protection also exists in the case of individuals who, on account of their rank or reputation, of their position or influence or of their abilities or actions are the subject of particular public attention. The fact that someone, whether wanted or unwanted, has become a person, upon whom the public focuses, does not mean that this person has lost his or her right to a sphere of privacy that is withdrawn from the observation of the public. This also applies to democratically elected office holders. They are certainly accountable to the public for the way in which they administer their office, and they have to tolerate public attention in this context. They do not, however, have to tolerate the same extent of public attention regarding their private life in so far as their private life does not affect the administration of their office.

By common consent, the domestic sphere constitutes such a protected area. Due to its connection with the free development of one's personality, the area of withdrawal must not, from the outset, be restricted exclusively to the domestic sphere. This holds true if only for the reason that the functions that the area of

withdrawal serve do not end at the walls of one's house or at the boundaries of one's property. The free development of an individual's personality would be seriously impaired if the individual could only evade public curiosity in his or her own home. In many cases, it is only possible in the seclusion of a natural environment, e.g. in a holiday resort, for an individual to recover from being a part of the public, which is characterised by compulsions to function in a certain way and by the presence of the media. This is why the individual must also have, in principle, the possibility to move in the open country, although it is secluded, and in places that are recognisably secluded from the broad public in a manner that is free from public observation. This especially applies with regard to technologies of imaging that overcome physical seclusion without the person affected being able to recognise this.

The physical boundaries of privacy outside the home cannot be determined in a general and abstract manner. Rather, they can be determined only from the particular characteristics of the place visited by the concerned person. The decisive standard is whether the individual finds or creates a situation in which he or she can reasonably, i.e. in a way that is also recognisable for others, assume that he or she is not exposed to the observation of the public.

Whether the prerequisites of seclusion are fulfilled can only be ascertained for each particular situation. In one and the same place, there may be a time in which an individual can, with good reasons, feel unobserved, whereas this is not the case at other points in time. Nor does the fact that an individual stays in a closed room always mean that this place is secluded. The decisive question is whether the individual has good reasons to expect that he or she is unobserved or whether the individual visits places in which he or she moves under the eyes of the public. Therefore, seclusion, which is the prerequisite for the protection of privacy outside the domestic sphere, can be lacking in closed rooms as well.

Places in which the individual is among many people, lack, from the outset, the prerequisites of the protection of privacy within the meaning of Article 2.1 in conjunction with Article 1.1 of the Basic Law. Such places cannot cater to an individual's need of withdrawal, and they therefore do not justify the protection of fundamental rights that this need deserves for reasons of the free development of one's personality. Neither can the individual, by showing a behaviour that would not usually be displayed in public, redefine these places in such a way that they become part of his or her sphere of privacy. It is not the individual's behaviour, whether alone or with others, that constitutes the sphere of privacy but the objective characteristics of the place at the time in question. Thus, if an individual behaves, in places that do not show the characteristics of seclusion, in the manner he or she would behave if he or she were not under observation, this individual eliminates the need for protection of behaviour that is of no concern to the public.

The protection of privacy, over and against the public's observation, is also eliminated if someone declares his or her agreement with the fact that certain matters that are usually regarded as private are made public, e.g. if someone enters into exclusive contracts concerning media coverage of his or her private sphere. The constitutional protection of privacy provided by Article 2.1 in conjunction with Article 1.1 of the Basic Law is not meant to serve the interest of the commercialisation of the person of an individual. Certainly no one is prohibited from opening his or her private sphere in such a manner. When doing so, however, one cannot claim protection of privacy, because privacy is the status of being removed from the observation of the public. Therefore, someone who expects that others may only to a limited extent or not at all observe matters or behaviour that take place in an area that normally serves for the withdrawal from the observation of the public, must express this expectation in a consistent manner that is not bound to a particular situation. This also applies if someone revokes his or her decision to permit or tolerate reporting about certain issues in his or her private sphere.

dd) There is no previous Federal Constitutional Court case law about the meaning of the protection of privacy with respect to the family relationship, especially between parents and children. It has been acknowledged, however, that children need special protection because they still have to develop into responsible persons (cf. BVerfGE 24, 119 [144]; BVerfGE 57, 361 [383]). This need for protection extends as well to the protection of children from threats posed by the interest of the media and the consumers of media images of children. This interest can constitute a more severe interference with the development of a child's personality than it does for the development of an adult's personality. The sphere in which children can feel free from observation by the public and develop free from such observation must therefore be protected in a more comprehensive way than in the case of adults.

It is the parents who are first of all responsible for the development of a child's personality. To the extent that education depends on an undisturbed relationship between parents and their children, the special protection of the children's fundamental rights does not have a merely automatic impact in favour of the father or the mother (also cf. BVerfGE 76, 1 [44 et seq.]; BVerfGE 80, 81 [91- 92]). Rather, the specifically parental care of their children, in principle, also falls into the sphere of protection provided by Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law. In this case, the scope of protection provided by the general right of personality is enhanced by Articles 6.1 and 6.2 of the Basic Law, which oblige the State to secure the living conditions that are necessary for a child to grow up in a healthy way. Of these conditions, parental care is particularly important (cf. BVerfGE 56, 363 [384]; BVerfGE 57, 361 [382-383]; BVerfGE 80, 81 [90 et seq.]).

> Article 6 of the Basic Law, thus, enhances the protection to which children are entitled in order to enjoy the general right of personality. The impact that this enhancement has in particular cases cannot be determined in a general and abstract way. As a general rule, there will certainly be no need for protection in cases in which parents deliberately turn towards the public with their children, e.g. if they participate in public functions together or even are the centre of such functions. In such cases, they assent to the conditions of public appearances. As regards all other cases, the protection of the general right of personality as enhanced by the specific relationship between parents and children can, in principle, arise in contexts in which the prerequisite of seclusion is not otherwise fulfilled.

3. The challenged decisions impair the complainant's general right of personality. As the contexts in which the images were made enjoy the protection provided by this fundamental right; the courts' finding that they may be published against the complainant's will diminish the required protection, which the courts in private law litigation are also obligated to extend to the complainant (cf. BVerfGE 7, 198).

II.

The challenged judgments do not fully meet the requirements stipulated by Article 2.1 in conjunction with Article 1.1. of the Basic Law.

1. However, the provisions of s. 22 and s. 23 of the Art Copyright Act, on which the civil courts based their decisions, are consistent with the Basic Law.

Pursuant to Article 2.1 of the Basic Law, the general right of personality is only guaranteed in the framework of the constitutional order. This also includes the provisions about the publication of photographic images of persons in s. 22 and s. 23 of the Art Copyright Act. The provision can be traced back to an offensive incident (images of Bismarck on his deathbed, cf. Entscheidungen des Reichsgerichts in Zivilsachen [RGZ, Decisions of the Supreme Court of the German Reich in Civil Cases] 45, 170) and the subsequent discussion on legal policy (cf. Verhandlungen des 27. DJT, 1904, 4th volume, pp. 27 et seq.). The provision seeks to achieve an equitable balance between the respect of an individual's personality and the interest of the general public in being informed (cf. Verhandlungen des Reichstages, 11. Legislaturperiode, II. Session, 1. Sessionsabschnitt 1905/1906, No. 30 p. 1526 [at pp. 1540-1541]).

Pursuant to s. 22.1 of the Art Copyright Act, images may be distributed or presented for public display only with the consent of the subject. S. 23.1 of the Art Copyright Act exempts, *inter alia*, images from the sphere of contemporary history (no. 1) from this principle. Pursuant to s. 23.1 of the Art Copyright Act, this exemption does not, however, extend to a distribution by which the subject suffers an injury to a legitimate interest. As this concept of protection consists of several stages, the provision sufficiently takes into account the depicted person's need for protection as well as the public's wish of being informed and the interests of the media that satisfy these wishes. This has already been established by the Federal Constitutional Court on earlier occasions (cf. BVerfGE 35, 202 [224-225]).

The respondents' opinion that the regulation violates the freedom of the press as it, in their opinion, amounts to a Verbot mit Erlaubnisvorbehalt, i.e. a prohibition of publication, with each publication requiring permission in advance, does not lead to a different assessment. That there is no such prohibition can already be discerned from the fact that the provisions only conciliate different, legally protected interests of individuals. Neither does the regulation favour the protection of an individual's rights to protection of his or her general right of personality in a one-sided manner. It is true that on the first and third stages (s. 22.1 and s. 23.2 of the Art Copyright Act), the regulation is primarily concerned with the depicted person's need for protection. In the second stage (s. 23.1 of the Art Copyright Act), however, the interests of the freedom of the press and of the freedom to form one's own opinion, which is at the background of this fundamental right, are sufficiently taken into account. At the same time, the open wording of the regulation provides enough room for an interpretation and application that is in conformity with the fundamental rights.

2. The interpretation and application of the provisions, however, do not in all respects comply with the requirements established by the fundamental rights.

a) The interpretation and application of constitutional civil law provisions is the task of the civil courts. In doing so, the civil courts must observe the meaning and the scope of the fundamental rights that are affected by their decisions to assure that their normative content be preserved at the level of judicial application of the law as well (cf. BVerfGE 7, 198 [205 et seq.]; established case law). This requires a balancing between the conflicting interests that are protected by fundamental rights. This balancing is to take place in the framework of the elements of civil law provisions that may be interpreted, and it must take the special circumstances of the case into account (cf. BVerfGE 99, 185 [196]; established case law). Irrespective of the influence of the fundamental rights, the litigation remains a private law action that finds its solution in private law, the interpretation of which is guided by the fundamental rights. The mission of the Federal Constitutional Court is therefore restricted to reviewing whether the civil courts have sufficiently taken into account the influence of the fundamental rights (cf. BVerfGE 18, 85 [92-93]). It is, however, not the task of the Federal Constitutional Court to prescribe to the civil courts the outcome of their decision in the litigation (cf. BVerfGE 94, 1 [9-10]).

   A violation of fundamental rights that leads to an objection to the challenged decisions only exists (1) if, in the interpretation and application of constitutional provisions of private law, the fact has been overlooked that fundamental rights were to be respected; or (2) if the scope of protection provided by the fundamental rights that are to be respected has not been determined correctly or completely, or (3) if the weight of the fundamental rights that are to be respected has been misjudged in such a way that the balancing of the legal positions of the parties in the framework of the private law settlement suffers (cf. BVerfGE 95, 28 [37]; BVerfGE 97, 391 [401]), and the decision is based on this mistake.

b) In the present case, the interpretation and application of ss. 22 and 23 of the Art Copyright Act does not only have to consider the general right of personality but also the freedom of the press, which is affected by these provisions as well.

The right to freely determine the nature and tendency, contents and form of an organ of the press is in the centre of the guarantee of the fundamental right of the freedom of the press (cf. BVerfGE 20, 162 [174 et seq.]; BVerfGE 52, 283 [296]; BVerfGE 66, 116 [133]; BVerfGE 80, 124 [133-134]; BVerfGE 95, 28 [35]). This includes, *inter alia*, the decision whether and how to illustrate an organ of the press. The protection is not restricted to specified subjects of illustrations. It also comprises the depiction of persons. The protection does not depend on the nature or the level of the organ of the press (cf. BVerfGE 34, 269 [283]; BVerfGE 50, 234 [240]). Any distinction of this kind would ultimately amount to public authorities assessing and controlling the press, a fact that would plainly contradict this fundamental right (BVerfGE 35, 202 [222]).

The freedom of the press serves to facilitate, for individuals and the public, the free formation of opinions (cf. BVerfGE 57, 295 [319]). Such formation of opinions can only be successful under the condition that free reporting, i.e. reporting without any prescribed or precluded subjects or manners of presentation, is possible. In particular, the formation of opinions is not restricted to the political sphere. In the interest of a functioning democracy, the formation of opinions with regard to the political sphere is certainly of special importance. The formation of opinions in the political sphere, however, is embedded in a comprehensive, highly interconnected communication process that can neither under the aspect of the development of one's personality nor from the point of view of democratic governance, be split up into relevant and irrelevant areas (cf. BVerfGE 97, 228 [257]). The press must be allowed to decide according to its own publishing standards what it regards as being worthy of the public interest and what it does not deem to be worthy of such interest.

The fact that the press has to fulfil an opinion-forming mission does not exclude entertainment from the constitutional free press guarantee. The formation of opinions does not stand in opposition to entertainment. Entertaining articles can also contribute to the formation of opinions. Such articles can, under certain circumstances, stimulate or influence the formation of opinions in a more sustainable way than information that is exclusively fact-related. Moreover, in the media, an increasing tendency toward the elimination of the distinction between information and entertainment can be observed both with respect to specific organs of the press as a whole as well as with regard to individual articles, i.e., to disseminate information in an entertaining manner or to mix information and entertainment ("infotainment"). This means that many readers obtain the information that they regard as important or interesting exactly from entertaining articles (cf. Berg/Kiefer [eds.], Massenkommunikation, volume V, 1996).

Nor can it be denied from the outset that mere entertainment has an influence on the formation of opinions. It would be a narrow view to assume that entertainment only satisfies wishes for amusement, relaxation, distraction and escape from reality. Entertainment can also convey images of reality and provides topics for conversation that can be followed by processes of discussion and integration that refer to views on life, to standpoints concerning values and patterns of behaviour, and in this respect, it

fulfils important functions in society (cf. BVerfGE 97, 228 [257]; furthermore: Pürer/ Raabe, Medien in Deutschland, volume 1, 2nd edition 1996, pp. 309-310). For this reason, entertainment in the press cannot be neglected or even be regarded as worthless in the context of the freedom of the press, for which constitutional protection is intended; entertainment is, therefore, also covered by the protection that this fundamental right provides (cf. BVerfGE 35, 202, [222]).

This also applies to reporting about individuals. Personalising a theme is an important journalistic means for attracting attention. Personalising a theme often awakens the interest in certain problems in the first place and is the basis of the wish for factual information. Sympathy for events and situations is often conveyed by personalising the theme. Moreover, prominent persons also stand for certain ethical positions and views of life. Therefore, prominent persons provide orientation for their own concepts of life to many people. Prominent persons become focuses for approval or rejection and thus fulfil the function of role-models or of examples of life-styles from which people want to detach themselves. This is the reason for the public interest in the most varied aspects of the lives of prominent persons.

As regards persons from political life, the public's interest has always been recognised as legitimate from the point of view of democratic transparency and control. In principle, however, it cannot be denied that such interest also exists concerning other persons with roles in public life. In this respect, the depiction of individuals that is not restricted to specified functions or events complies with the tasks of the press and therefore also falls under the scope of protection provided by the freedom of the press. Only when a balance is established between the freedom of the press and colliding rights of personality, can it be of importance whether questions that essentially concern the public are discussed in a serious, fact related manner or whether merely private matters that only satisfy curiosity are divulged (cf. BVerfGE 34, 269 [283]).

c) The judgment of the Federal Court of Justice mainly stands up to the review of constitutionality.

aa) It is not objectionable from the constitutional point of view that, in order to determine the elements of s. 23.1(1) of the Art Copyright Act, the Federal Court of Justice has taken as its controlling standard the general public's interest in being informed, and that the Federal Court of Justice, for this reason, has regarded the publication of images of the complainant that show her outside her representative function in the principality of Monaco as permissible.

S. 23.1 (1) of the Art Copyright Act establishes that the publication of images from the sphere of contemporary history does not require the subject's consent, as otherwise required by s. 22 of the Art Copyright Act. As concerns the parliament's intention when establishing this provision (cf. Verhandlungen des Reichstages, loc. cit., pp. 1540-1541) and as regards the purpose of the regulation, it shows consideration for the general public's interest in being informed as well as for the freedom of the press. Therefore, the interest of the public is to be taken into

account especially when interpreting the element "images from the sphere of contemporary history", as the public must not be granted free access to images of persons who are not deemed important in the context of contemporary history; such images instead require the subject's consent for publication. The other element of the Art Copyright Act that is open to the influence of fundamental rights, i.e. the "legitimate interest" in s. 23.2, refers from the outset only to persons who are of importance in the context of contemporary history and therefore cannot sufficiently take the interests of the freedom of the press into consideration if such interests have before been disregarded when delimiting the group of persons who are considered to be persons of importance in the context of contemporary history.

The concept of contemporary history in s. 23.3 (1) of the Art Copyright Act is not linked to the proviso of a judicial definition of its contents, by which its coverage might, for instance, be limited to events of historical or political importance; rather, it is determined by the public's interest in being informed (cf. RGZ 125, p. 80 [at p. 82] already). This takes the importance and the scope of the freedom of the press into account without disproportionately restricting the protection of the general right of personality. The core of the freedom of the press and the freedom of opinion includes that the press has sufficient room to manoeuvre, within the boundaries of the law, so that it may decide, according to its publishing standards, which facts claim public interest, and that it becomes apparent in the process of formation of public opinion which matters are matters of public interest. As has been stated, entertaining articles are not exempt from this. Moreover, it is not objectionable that the Federal Court of Justice has also assigned to the "sphere of contemporary history" pursuant to s. 23.1(1) of the Art Copyright Act images of persons who have not attracted public attention at a certain point through their involvement with a specific event of contemporary history but instead encounter general public attention, independently of single events, on account of their status and their importance. In this context, the increased importance that photo journalism has acquired today in comparison with the time in which the Art Copyright Act was enacted carries weight as well. Certainly, the concept of an "absolute person of contemporary history", to which reference is frequently made in scholarly literature and jurisprudence, in this context, imperatively follows neither from the law nor from the Constitution. If this concept is understood, as the Higher Regional Court and the Federal Court of Justice present it, as describing, in an abridged manner, persons whose images the public deems worthy of notice for the depicted person's sake, it is unobjectionable from the constitutional point of view. It is important, however, that a balancing take place, in each individual case, between the public's interest in being informed and the legitimate interest of the depicted person. The general right of personality does not require that the publication of images of persons who are of importance in contemporary history without the consent of the depicted person, must be limited to images that show them when exercising the function that they discharge

in society. Frequently, the public interest that such persons claim is characterised exactly by the fact that it is not restricted to the exercise of this person's public function in the narrower sense. Due to the person's exposed function and to the effect of the function, the interest can also extend to information about how the persons generally move in public, i.e. when they are not exercising their respective public function. The public has a legitimate interest in learning whether such persons, who are often regarded as a role-model or as an example, convincingly bring into agreement the behaviour that they show in their public function and their personal behaviour.

If the publishing of images was limited to the function of a person who is of importance to contemporary history, this would, however, fail to adequately take into account the interest that such persons legitimately arouse in the public. Moreover, this would encourage a selective manner of representation which would deny the public the required opportunity to assess persons from social and political life on account of their functions as role-models and on account of their influence. This does not open the press unlimited access to images of persons of contemporary history. Rather, s. 23.2 of the Art Copyright Act provides the courts with sufficient possibilities to bring the requirements of protection to bear that are stipulated by Article 2.1 in conjunction with Article 1.1 of the Basic Law (cf. BVerfGE 35, 202 [225]).

bb) In principle, the standards that the Federal Court of Justice has developed when interpreting the element of a "legitimate interest" in s. 23.2 of the Art Copyright Act are not objectionable from the constitutional point of view.

Pursuant to the challenged judgment, the privacy that is worthy of protection, to which the so-called absolute persons of contemporary history are also entitled, requires (1) a local seclusion to which someone has withdrawn to be alone; (2) that this wish to be alone is recognisable by an objective person; and (3) that the person, confiding in the seclusion, behaves in a manner in which he or she would not behave in the broad public. The Federal Court of Justice assumes that a violation of ss. 22 and 23 of the Art Copyright Act exists if images of the person affected are published that, in such a situation, were taken secretly or by catching the person unawares.

The standard of physical seclusion, on the one hand, takes the sense of the general right to privacy into account, i.e. to secure to individuals a sphere outside their home in which they are aware that they are not under constant public observation and therefore do not have to control their behaviour in view of such observation but find it possible to relax and to recover. On the other hand, the standard of physical seclusion does not excessively restrict the freedom of the press, as it does not completely withdraw the daily and private life of persons of contemporary history from photojournalism but makes it accessible to pictorial representation to

the extent that it takes place in public. In the case of an outstanding public interest in being informed, the freedom of the press can, pursuant to these rulings, also prevail over the protection of privacy (cf. BGH, JZ [Juristenzeitung] 1965, 411 [413]; Oberlandesgericht [OLG, Higher Regional Court] Hamburg, Archiv für Urheber-, Film-, Funk- und Theaterrecht [UFITA, Archive of Copyright, Film, Broadcasting and Theatre Law] 1977, p. 252 [at p. 257]; OLG Munich, UFITA 1964, p. 322 [at p. 324]).

It is also not objectionable that in its ruling, the Federal Court of Justice took the individual's behaviour in a specific situation as an indicator that he or she is recognisably in a situation of seclusion. The protection against pictorial representations in this sphere, however, is not triggered only if the person affected shows a behaviour in this sphere that he or she would avoid under the eyes of the public. Rather, physical seclusion can fulfil its protective function with respect to its role in the development of someone's personality only if the seclusion ensures the individual, irrespective of the behaviour in which he or she engages in a given moment, a space for relaxation in which he or she need not constantly expect the presence of photographers or camera teams. This, however, is not the decisive question in this case, as pursuant to the findings of the Federal Court of Justice, the first prerequisite for the protection of privacy was lacking in the first place.

Finally, it is not objectionable from the constitutional point of view that the method of obtaining information is regarded as important when balancing the public interest in information and the protection of privacy (cf. BVerfGE 66, 116 [136]). There are, however, doubts about whether images that are taken secretly or by catching the subject unawares, without more, violate the privacy that exists outside the depicted individual's home. With regard to the function that the Constitution assigns to this sphere, and in view of the circumstance that one often cannot tell whether an image was taken secretly or by catching the subject unawares, an impermissible encroachment upon privacy can, in any case, not only be assumed if these characteristics exist. As the Federal Court of Justice, as concerns the photographs in dispute in these proceedings, denied in the first instance that the context in which the photos were made constituted a sphere of seclusion, the doubts about the manner in which the photographs were taken do not affect the result of its decision.

cc) The constitutional requirements, however, are not met to the extent that the challenged decisions disregarded the circumstance that the complainant's legal position concerning the protection of her right to personality is enhanced by Article 6 of the Basic Law in situations in which she cares for her children.

dd) As regards the different images, this leads to the following conclusions:

> The decision of the Federal Court of Justice gives no reason for objection from the constitutional point of view as regards the images that show the complainant on her way to the market, accompanied by a bodyguard at the market and with a companion in a frequented restaurant. In the first two cases, the locations that are shown are not secluded, but are visited by the broad public. Certainly, the location of the third image is a bounded location, the complainant, however, finds herself in this location under the eyes of the public that is present. For this reason, the Federal Court of Justice does not, with its judgment to permit the publication of these photos, act in contradiction to the ban on the photos made at the garden restaurant. This ban is the subject of the challenged decisions but was not raised as part of the constitutional complaint. The seat that the complainant took at the garden restaurant with her companion showed all characteristics of seclusion. The circumstance that the photographs at the garden restaurant were obviously taken from a great distance additionally indicates that the complainant could assume that she was not exposed to the observation of the public.

Neither are there objections to the decision to the extent that it deals with the photos in which the complainant is shown alone on horseback or riding her bicycle. On the basis of its views, the Federal Court of Justice also did not assign these photographs to the sphere of physical seclusion but to the public sphere. This is not objectionable from the constitutional point of view. The complainant herself also assigns the images to the secluded sphere of privacy only because, in her opinion, they indicate her wish to be left alone. However, according to the criteria that have been explained, the mere subjective wish is not decisive in this context.

Contrary to this, the three photos that show the complainant together with her children require a new examination under the constitutional standards that were described above. It cannot be excluded that the examination according to these standards leads to a different result as concerns some of the images or all of them. To this extent, the judgment of the Federal Constitutional Court is therefore to be reversed and remanded.

d) As concerns the challenged judgments of the Regional Court and the Higher Regional Court, the violation of a fundamental right already follows from the fact that they--in conformity, however, with case law at that time--restricted the privacy that is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law to the domestic sphere. However, it is not required to reverse the decisions because the violation concerning this point was remedied by the Federal Court of Justice and because, with regard to the other points, the case was remanded.

III.

…

bb) Translation of the Soraya Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 34, 269*

Headnote:

The case law of the civil courts that also allows claims for pecuniary compensation for non-material damage is in the case of serious violations of the general right to personality compatible with the Basic Law.

Order of the First Senate of 14 February 1973 - 1 BvR 112/65 -

Facts:

A German illustrated weekly published an interview with the divorced wife of the Shah of Iran, Princess Soraya, in April 1962. The interview, which contained statements made by the Princess on her private life, was freely invented. As a result of her action, the civil courts awarded Princess Soraya damages in the amount of DM 15,000 against the publishing house and the editor in chief of the magazine for violation of her right to personality. Proceeding on the basis of its previous case law, the Federal Court of Justice (Bundesgerichtshof - BGH) found the false interview to be a serious violation of the right to personality of the Princess. The Court ruled that she could claim pecuniary compensation for the non-material damage suffered.

The constitutional complaint brought against the decision of the civil courts was unsuccessful.

Extract from the Grounds:

C. I.

1. The judicial proceedings that resulted in the decisions under challenge constituted a civil dispute that was to be decided on the basis of the private legal order. The Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) must not review the interpretation and application of civil law as such. The objective system of values contained in the fundamental rights provisions of the Basic Law does, however, also affect private law; it constitutes a fundamental decision under constitutional law for all areas of the law. The Federal Constitutional Court is responsible for ensuring that the Basic Law exerts this influence. It therefore determines whether decisions of the civil courts are based on a fundamentally erroneous understanding of the scope and impact of a fundamental right or whether the results of decisions themselves violate the fundamental rights of a party (See on this in general BVerfGE 7, 198 [205 et seq.]; 18, 85 [92, 93]; 30, 173 [187, 188, 196, 197]; 32, 311 [316].

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

In the case at hand, the complainants challenge not only the results of decisions of the civil courts; they contest in particular the way the courts arrived at these results. The complainants dispute that judges have the right to award pecuniary damages in cases of this nature since they are bound by law. This compels contemplation of the nature and limits of judicial activity as prescribed in the Basic Law. The issue under review here is whether the courts may be used to make decisions involving such substantive content. Judges may not arbitrarily assert the value system of the Basic Law in their decisions. They would also be in violation of the constitution if they arrived at results that are compatible with the value system contained in the Basic Law by using methodological means that fail to respect the constraints imposed on judges in the context of adjudication. The Federal Constitutional Court would also have to object to any decision made in such a manner.

2. The claim in the civil dispute at issue is based on s. 823.1 of the Civil Code (Bürgerliches Gesetzbuch - BGB). Referring to existing case law that is established in detail in the decision of 25 May 1954 (Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 13, 334), the Federal Court of Justice also includes a "general right to personality" among the rights mentioned therein; the Court sees a violation of this right in the actions of the complainants. It is not the task of the Federal Constitutional Court to judge the "correctness" of this decision insofar as its grounds and further development lie in the area of civil law dogma. It suffices to ascertain that the general right to personality - which was still rejected by the legislature that adopted the German Civil Code - has in the course of decades of discussion become an established fact in legal theory and following its recognition in the above decision of the Federal Court of Justice has since been an integral part of our system of private law (See on this, *inter alia*, the abovementioned draft of the law Bundestag document [*Drucksache des Deutschen Bundestages* - BTDrucks.] III/1237, grounds pp. 67; Nipperdey in "*Die Grundrechte*" handbook, vol. IV, book 2, 1962, p. 830; Hubmann, *Die Persönlichkeitsrecht*, 2nd ed., 1967, pp. 5 et seq.; MaunzDürigHerzog, *Grundgesetz*, Article1.I marginal no. 38).

The Federal Constitutional Court has no occasion to oppose this decision of the Federal Court of Justice on constitutional grounds. The system of values embodied in the fundamental rights lies at the core of free development of human personality and human dignity within the social community (BVerfGE 6, 32 [41]; 7, 198 [205]. It is deserving of the respect and protection of all state authority (Articles 1 and 2.1 of the Basic Law). Such protection may be claimed in particular in the private sphere of human beings, which is the area in which they desire to be alone, to make decisions under their own responsibility and to be undisturbed by intrusions of any kind (BVerfGE 27, 1 [6]). The legal concept of a general right to personality also serves this protective purpose in the area of private law; it fills gaps in the protection of personality that have remained despite recognition of the rights to personality of individuals and in the course of time for various reasons become increasingly tangible. The Federal Constitutional Court has therefore never objected to recognition of a general right to personality in the case law of the civil courts (See in particular BVerfGE 30, 173 [194 et seq.]; 34, 118 [135, 136] and order of 31 January 1973 - 2 BvR 454/71 - B II 2).

3. S. 823.1 of the Civil Code is a "general law" within the meaning of Article 5.2 of the Basic Law (BVerfGE 7, 198 [211]; 25, 256 [263 et seq.]). Since the general right to personality belongs to the rights enumerated therein according to the interpretation of this provision, which

cannot be objected to on constitutional grounds, it does in view of the intent of the Basic Law have the capacity to restrict the fundamental right of freedom of the press that the complainants invoke.

This potential impact of the general law is reinforced, as has been mentioned, under constitutional law by the protective mandate contained in Articles 1 and 2.1 of the Basic Law. On the other hand, the fundamental importance of freedom of the press for the free democratic order cannot be ignored. It retains its importance in the process of weighing issues against one another that must take place when it is necessary to resolve a conflict between parties under civil law that involves areas of interest that enjoy protection under constitutional law (BVerfGE 25, 256 [263]; 30, 173 [196, 197]). In the case of such a weighing process, the general right to personality may not simply be afforded precedence; freedom of the press may, depending upon the situation in the concrete case, have a restrictive effect on claims deriving from the right to personality (BVerfGE 7, 198 [208, 209]).

4. The decisions under challenge afforded protection of the personal sphere of the plaintiff in the initial proceedings precedence over freedom of the press. On the basis of the facts of the case, there is no reason for any reservations under constitutional law in respect of these decisions. According to these facts, the complainants published an invented interview with the plaintiff in an organ of the entertainment press in which events in her private life were presented as though the plaintiff had portrayed them herself. The courts view this as an unauthorized intrusion into the private sphere of the plaintiff, who may alone decide whether and in what form she wants to make events from her private life accessible to the public.

Indeed, given the facts of this situation, the complainants cannot invoke freedom of the press in defense of their actions. It would be excessive to completely deny the entertainment and sensation-press the protection of this fundamental right, as the Regional Court (Landgericht) did in reliance on various opinions voiced in the literature. The term "press" must be interpreted broadly and formally; it may not be made dependent upon evaluation - no matter what standards serve as the basis - of a single publication. Freedom of the press is not limited to the "serious" press (MaunzDürigHerzog, *Grundgesetz*, Article 5 marginal no. 128129; see also BVerfGE 25, 296 [397] and for radio - BVerfGE 12, 205 [260]). It does not, however, follow from this that protection of the fundamental right would have to be afforded in the same manner to every organ of the press in every legal context and for all of the content of its statements. When weighing freedom of the press against other legal interests protected under constitutional law, it is possible in concrete cases to take into account whether the press treats a matter of public interest seriously and objectively to satisfy the desire of its readership for information and contributes thus to the formation of public opinion or whether it satisfies only the need of a more or less broad class of readers for superficial entertainment.

In this case, the need for protection of the private sphere of the plaintiff was not offset by an overriding general interest in public discussion of the matters dealt with in the interview. Readers have no right to be "informed" of the private life of a personality standing for the time being in the public eye through invented disclosures. An invented interview can - even if one chooses to recognize an interest in it as legitimate in this area - make no contribution to genuine formation of public opinion. Protection of the private sphere enjoys absolute precedence over press statements of this kind.

II.

If a "general law" potentially restricts freedom of the press, the manner in which such restriction may be effected is determined exclusively by the substantive content of that law. That means in particular that only those sanctions that are authorized by law may be imposed on the organ of the press and effectively restrict its freedom. This provides the basis for the challenge of the complainants; they argue that there is no "general law" that makes provision for pecuniary compensation for non-material damage in the case of violation of the general right to personality and that such claims are in fact explicitly precluded by s. 253 of the Civil Code. The courts have therefore, it is claimed, by awarding such compensation for damages exceeded the bounds within which the constitution allows them to restrict the freedom of the press; moreover, it is argued further, they have imposed a sanction that constitutes substantive infringement of freedom of the press since it is directed exclusively against the press and burdens the press with an incalculable risk that must eventually threaten its existence. As a result, it is claimed, this constitutes a fundamental failure to recognize the essence and importance of freedom of the press in a free democratic system of government.

It is also necessary in respect of this argumentation to emphasize from the beginning that it does not lie within the decision-making powers of the Federal Constitutional Court to judge whether the legal conclusion derived from the assumed violation of the general right to personality by the Federal Court of Justice can be justified on the basis of civil law dogma or, in other words, whether civil law permits and requires pursuit of the avenue embarked upon through recognition of a general right to personality and extension of the protection provided in related cases under s. 847 of the Civil Code to include this right by awarding compensation for damages.

The Federal Constitutional Court must also limit itself to a review of those aspects of this case law that fall under constitutional law in this case. This gives rise to the questions, on the one hand, as to whether the substantive result of the decisions as such is in violation of the fundamental right of freedom of the press in the first place and, further, whether to come to this result through adjudication despite the absence of an unambiguous basis in written law is compatible with the Basic Law.

Examination of both questions shows that there are no objections under constitutional law to the case law of the Federal Court of Justice underlying the decisions challenged in this case.

III.

It lies in the nature of things that violations of the general right to personality may be committed in particular by organs of the press since they have at their disposal the technical means required for the acquisition and dissemination of information and it is therefore also made relatively easy for them to intrude upon the private sphere of citizens. Examples from the case law show, however, that the civil courts also apply the rules they have established for the protection of the general right to personality outside the area of the press (See, for example, Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* BGHZ] 26, 349; 30, 7; 35, 363). For this reason alone, there exists no "special right against the press."

The imposition of excessively onerous sanctions, which under certain circumstances could also include unpredictably high claims for damages, would, however, restrict the freedom of the press in violation of constitutional law, especially if the legal prerequisites for such claims were not clearly established. Such a case is not, however, at issue here. Pecuniary compensation for non-material damage constitutes a sanction that is not inherently foreign to our legal order, as may be recognized from s. 253 of the Civil Code itself. In s. 847 of the Civil Code, it is provided for in the case of violation of other legal interests identified in s. 823 of the Civil Code as well as in a few specific statutes. In the course of the development of the case law, the classes of cases in which compensation must be made for non-material damage have taken on clear contours. Claims for damages have subordinate character; the courts award pecuniary damages only if natural restitution, for example, through the grant of a right to an injunction or rescission, is impossible or because of the nature of the case inadequate; there can be no serious discussion of "commercialization of honour." Since a significant encroachment upon the personal sphere and serious fault are required, this ensures that the standards of care are not exaggerated for a press that works responsibly and that not every instance of inaccuracy or objectively false information will entail liability. Finally, a look at the case law shows that - as also in the present case - the amounts of damages awarded are within reasonable limits, especially if one takes into account that the actions of the press organ that give rise to the claim for damages are as a rule themselves motivated by economic interests. The risk to which the press is exposed by this case law does not therefore exceed a reasonable measure. In the case to be judged here, this is especially obvious; the degree of care that must be exercised to prevent dissemination of an invented interview is never unreasonable.

IV.

1. The traditional accountability of judges to the law, which is a mainstay element of the principle of the separation of powers and therefore of the rule of law, is in any case as regards its formulation modified in the Basic Law such that the judiciary is bound by "law and justice" (Article 20.3). This constitutes according to prevailing opinion rejection of narrow legal positivism. This formulation supports awareness of the fact that the law and justice are to be sure in fact generally identical, but not necessarily so and not always. Justice is not identical with the entire body of written law. There may exist under certain circumstances law that surpasses that embodied in the positive statutes of the state and has its origins in the legal order under constitutional law as a conceptual whole and can function as a corrective to written law; to find and implement this law in its decisions is the task of the judiciary. Judges are not bound by the Basic Law to apply the mandates of the legislature within the limits imposed by their possible literal meaning in individual cases. Such an understanding would have to predicate the complete absence of any gaps in the positive legal order of the state, which whilst justifiable as a fundamental postulate of legal certainty is in practice unattainable. Judicial activity consists not only in recognition and pronouncement of decisions of the legislature. The task of the judiciary may in particular require bringing to light and rendering in the form of decisions values that are inherent to the constitutional legal order, but have not or have only incompletely found expression in the texts of written laws, through a process of evaluative judgment, which is also not devoid of elements of volition. In so doing, judges must avoid arbitrariness; their decisions must be grounded in rational argumentation. It must be made obvious that the written law has not fulfilled its function of providing an equitable solution to a legal problem. A judicial decision

then closes this gap on the basis of standards of practical reason and the "established general notions of justice of the community" (BVerfGE 9, 338 [349]).

The duty and authority of judges with regard to "creative adjudication" have never in principle - in any case not under the Basic Law - been the subject of dispute (See, for example, R. Fischer, *Die Weiterbildung des Rechts durch die Rechtsprechung, Schriftenreihe der Juristischen Studiengesellschaft Karlsruhe*, vol. 100 (1971), and on that Redeker, NJW 1972, pp. 409 et seq., each with further references).

The highest courts have from the very beginning claimed this right (See, for example, Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 3, 308 [315], 4; 153 [158]; Federal Labour Court [*Bundesarbeitsgericht* - BAG] 1, 279 [280, 281]).

The Federal Constitutional Court has always recognized it (See, for example, BVerfGE 3, 225 [243, 244]; 13, 153 [164]; 18, 224 [237 et seq.]; 25, 167 [183]). The legislature itself explicitly charges the Great Senates of the highest federal courts with responsibility for "further development of the law" (see, for example, s. 137 of the Judicature Act (Gerichtsverfassungsgesetz - GVG)). In some areas of law, labour law, for example, this has taken on special importance because legislation has lagged behind the flow of social progress.

The sole question that remains concerns the limits that must be imposed upon creative adjudication, taking into account the principle that binds the judiciary to the law, which is an essential prerequisite for upholding the rule of law. Such limits cannot be expressed in a formula that would be equally valid for all areas of law and for all legal situations they give rise to or to which they apply.

2. For the purposes of the present decision, this question can be restricted to the area of private law. In this case, judges are confronted with the large body of codified law that constitutes the German Civil Code, which has been in effect for more than 70 years. This is of twofold importance: firstly, the freedom of judges for creative development of the law necessarily increases with the "aging of the codifications" (Kübler, *JZ* 1969, p. 645), i.e., in proportion to the length of time between the original legal mandate and the judicial decision in the individual case at issue. The interpretation of a provision of law cannot always indefinitely retain the meaning attached to it when it originated. It is necessary to take into account the reasonable purpose it may serve when it is applied. Laws consistently exist in a context of social conditions and socio-political attitudes; their substantive content can and must evolve commensurately when necessary. This is especially the case when conditions of life and legal attitudes have undergone such far-reaching change during the time that has elapsed between the enactment of laws and the application thereof as has been the case in this century. Judges cannot evade the possibility of a conflict arising between a law and the substantive notions of justice of a changed society by relying on the unchanged wording of the law; they are compelled to deal freely with legal norms in order to avoid abdication of their responsibility for the administration of "justice." On the other hand, as experience shows, legislative reforms encounter special difficulties and obstacles precisely when they are intended to lead to revision of major bodies of legislation that characterize the entire legal order to such an extent as the codification of private law in the form of the German Civil Code.

…

However, results that are obtained in a manner that can at least be discussed in terms of civil law and are in any case not obviously in conflict with the hermeneutic rules of civil law cannot be objected to on constitutional grounds if they serve to assert and effectively protect a legal interest that is viewed under the Basic Law itself as being at the core of its system of values. Such results constitute "justice" within the meaning of Article 20.3 of the Basic Law - not as opposed to, but as a complement to and extension of written law.

It is also not possible to object to the method of adjudication of the Federal Court of Justice on constitutional grounds since it deviates from written law only to the extent required to render justice in a concrete case. The Federal Court of Justice neither considers s. 253 of the Civil Code to be no longer valid in its entirety, nor did it by any means want to characterize it as being unconstitutional (a possibility that would have been available to the Court since the issue involves a law that predates the Basic Law). The Court left the principle of enumeration expressed in the provision untouched and merely added to those cases in which the legislature had already made provision for compensation for non-material damage a further instance in which not only change in conditions of life, but also a jus superveniens of higher rank, namely, Articles 1 and 2.1 of the Basic Law, made this decision seem compellingly required. The Federal Court of Justice and courts that follow its reasoning have therefore not departed from the system of the legal order and have not asserted their own will in terms of legal dogma, but have only elaborated on basic ideas behind the legal order stamped by the Basic Law using systemic means.

…

c) The First and the Sixth Broadcasting Decision, BVerfGE 12, 205 and BVerfGE 83, 238

Explanatory Annotation

The German Broadcasting system, radio and television, has always been the subject of separate and more intensive regulation. Whereas, for example, there has never been a requirement for newspapers to be licensed by the government, broadcasters have always been subjected to such licensing. Whereas there are very few access and content rules regarding newspapers[72] other than those of general application such as obscenity or advertising restrictions for alcohol or tobacco there has always been access regulation and rules safeguarding plurality and thus indirectly content in the case of broadcasting. The reason is the structural difference between the press and broadcasting. The press, both in terms of quantity of publications and in terms of the range of opinions and philosophies represented was traditionally more pluralistic than broadcasting with its limited frequencies and the required high capital investment. At the same time the effectiveness of broadcasting as a mass medium can be far greater than that of a newspaper.[73]

72 The Court has held that it would in principle be unconstitutional for the government to regulate the press as this would interfere with its institutional independence, see BVerfGE 12, 205 (260).

73 See BVerfGE 12, 205 (261).

The Constitutional Court has played a major, if not the main role, in defining the structure of the German broadcasting media landscape.[74] The result of the Court's jurisprudence is the specific German 'dualistic' broadcasting system with a large and extensively funded public (but not government controlled)[75] broadcasting pillar and private, commercially funded broadcasting existing side by side. This result largely came about on the basis of a few words in Article 5.1 of the Basic Law, which stipulate that "freedom of reporting by means of broadcasts and films shall be guaranteed". The perhaps astonishing effect of these few words in the Basic Law on the shape of an entire industry are not only ample evidence of the Court's power but also illustrate that the distinction between the interpretation of law and the making of law is difficult at best, particularly in the area of constitutional law.

The first of these decisions translated here (BVerfGE 12, 205) is important for two very different reasons. The first has to do with the federal structure of Germany. The federal government had attempted to set up a federally controlled television network. The Court denied the federal government this power on the basis that no legal basis for the exercise of such a power could be inferred from the Basic Law and that therefore, under the general safeguarding clause of Article 30 of the Basic Law, any such powers must lie with the *Länder* and not with the federal government. The only powers left on the federal level are the powers concerning the technical side of broadcasting, i.e. powers necessary to regulate the technical infrastructure for the transmission of broadcasting, which at the time was monopolized in the German Postal Service but has since been privatized.[76] Broadcasting as such, however, i.e. the organization of broadcasting and anything to do with the programming was regarded as part of cultural policy and hence as part of the powers of the *Länder*. As a result the federal government had to stay completely out of broadcasting and this has had an effect even beyond the Federal Republic. The Constitutional Court[77] and, subsequently, the amended Article 23 of the Basic Law made it clear that as far as the regulation of broadcasting on the European Union level is concerned, Germany will not be represented in the European Union's Council of Ministers by a representative of the federal government but by a representative of the *Länder* to be determined by the federal chamber, the *Bundesrat*.

The second principle developed by the Court in this first broadcasting decision is the principle of broadcasting independence. Broadcasting must be organized in such a way that neither the state (government) nor particular groups of society can exercise undue influence. Rather, broadcasting must be structured and organized to guarantee 'intra-plurality' by putting the management into the cooperative hands of all relevant groups of society to be exercised through

74 Depending on the count there are about twelve decisions of the Constitutional Court dealing with various broadcasting matters. For a recent overview in English see Witteman, Chris, Constitutionalizing Communications: The German Constitutional Court's Jurisprudence of Communications Freedom (January 22, 2010). Available at SSRN: http://ssrn.com/abstract=1540906 (last accessed on 21.10.2019).

75 The broadcasting and the public welfare sector are the two most noticeable areas operating in this fashion as agencies under public law (Anstalten des öffentlichen Rechts), with their own pluralistically composed governance bodies operating under broad statutory authority.

76 Another example for the indirect influence of federal powers of broadcasting is the area of copyright law.

77 BVerfGE 92, 203 - http://www.servat.unibe.ch/dfr/bv092203.html.

governing boards ("broadcasting councils") which control the management and which are composed of members from many diverse groups ranging from the political parties, to trade unions, the various churches and many others. The system has recently come under pressure as critics argue that despite the *prima facie* diversity on the governing bodies in fact the political parties and state representatives have too much influence.

In the second decision presented here, known as the fourth broadcasting decision[78], the Constitutional Court developed a concept that is now fundamental to the broadcasting order of Germany, the "*Grundversorgung*", i.e. the provision of basic or primary broadcasting services as a constitutionally protected task of the public broadcasting pillar, whose institutional and financial guarantee is protected by the broadcasting freedom of Article 5.1 of the Basic Law and which is a prerequisite for allowing private broadcasting to take place. This *Grundversorgung* goes beyond just providing information relevant in the broadest sense for the democratic process and encompasses all aspects of cultural life as well, including entertainment and sports. Financially this means that public broadcasting must be financed such that the basic provision of broadcasting services in this public pillar is comprehensively secured. This is largely achieved by levying a broadcasting fee of roughly 18 Euros per month on every owner of a television or radio, regardless of whether the owner chooses to watch public television or not. This fee is set independently by a Commission based on the needs of the public broadcasting pillar to effectively provide the basic services and the decision of this Commission on the relevant fee is only subject to very limited scrutiny by the governments of the *Länder*, whose Parliaments have to legislate on this fee.[79]

aa) Translation of the 'First Broadcasting Decision' Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 12, 205*

Headnotes:

1. Constitutional review pursuant to abstract norm control proceedings (Abstract Judicial Review) also covers "treaty laws" for treaties between Germany's states.

2. A federal organ is also deemed to have "not applied" state law within the meaning of s. 76 no. 2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG) when it "disregarded" this law.

3. a) The postal and telecommunications system within the meaning of Article 73 no. 7 of the Basic Law only covers - apart from the reception of broadcasts - the transmission related area of broadcasting, excluding so-called studio technology.

78 BVerfGE 73, 118.

79 See the 2007 decision of the Court, BVerfGE 119, 181, available in German at http://www.servat.unibe.ch/dfr/bv119181.html.

b) Article 73 no. 7 of the Basic Law does not empower the Federation to regulate the organization of broadcasting and that of broadcasters.

4. The Federation's legislative competence with regard to telecommunications system (Article 73 no. 7 of the Basic Law) also extends to regulations that reserve for the Federation the exclusive right to establish and operate transmission facilities for the purpose of broadcasting.

5. In accordance with the system of the Basic Law, the Federation's legislative competence describes the outermost boundary of its administrative powers. The "Federal postal service" (Bundespost) in Article 87.1 of the Basic Law therefore cannot comprise more than the "postal and telecommunications system" in Article 73 no. 7 of the Basic Law.

6. In awarding the right to establish or operate broadcasting facilities (s. 2 of the Telecommunications Facilities Act) and in concluding contracts dealing with the use of such facilities, the Bundespost may only regulate transmission aspects. Any "terms" going beyond this area are impermissible.

7. a) In accordance with the development of German law, broadcasting is a public function. When the State exercises this function in some form (including in those cases in which it makes use of forms of private law), it becomes a "State function" within the meaning of Article 30 Basic Law.

   b) Broadcasting by the Federation cannot be justified under Article 30 in conjunction with Articles 83 seq. Basic Law with the argument that broadcasting is a "supra-regional function" or that the Basic Law permits the broadcasting by the Federation of such programs that are to serve national representation within the country and to assist in safeguarding "continuity of tradition". By the very nature of the matter, the Federation does not have any competence over this.

8. a) Article 30 Basic Law applies to the discharge of public functions both pursuant to law and outside the law.

   b) Section VIII of the Basic Law "provides otherwise" within the meaning of Article 30 of the Basic Law both for administration pursuant to law and that outside the law.

9. The procedure and style of the negotiations that become necessary under the Constitution between the Federation and its component parts and between the states are also subject to the mandate that the parties act for the benefit of the Federation.

10. Article 5 Basic Law calls for laws providing that broadcasters be organized in such a way that all pertinent forces are able to have an influence in their organs and to have their say in overall programming; such laws are also to establish binding guidelines for the content of overall programming that guarantee a minimum of substantive balance, objectivity and mutual respect.

Judgment of the Second Panel of 28 February 1961 on the basis of the oral hearing of 28, 29 and 30 November 1960 - 2 BvG 1, 2/60 - in the proceedings relating to the constitutional review of s. 3 of the Interstate Treaty on the Norddeutschen Rundfunk of

16 February 1955, Applicant: the Senate of the Free and Hanseatic City of Hamburg, represented by the President, agent, and in the constitutional dispute on the question of whether by the establishment of Deutschland-Fernsehen-GmbH and by other actions in the area of television, the Federal Government violated Article 5 of the Basic Law and Article 30 in conjunction with Article 87(3) Basic Law as well as the duty to act for the benefit of the Federation. Applicant: for the Free and Hanseatic City of Hamburg, the Senate, represented by the President, agent ...; for the State of Hesse, the State Government, represented by the Minister-President, agents ...; Opponent: for the Federal Republic of Germany, the Federal Government, represented by the Federal Minister of the Interior, agents ...; Other Participants: for the State of Lower Saxony, the State Government, represented by the Minister-President, agents ...; for the Free and Hanseatic City of Bremen, the Senate, represented by the President, agent.

Judgment of the Second Senate of 28 February 1961 - 2 BvG 1,2/60 -

Facts:

Following the end of World War II, the operation of broadcasting facilities by German authorities was initially prohibited. The confiscated radio stations were operated by the Occupying Powers, which gradually returned broadcasting to German control. The Western Occupying Powers pursued the objective of eliminating all forms of State influence over broadcasting. By way of ordinances issued by the military governments or through laws of the states, whose contents were fundamentally influenced by the Occupying Powers, public broadcasting companies were created in the three Western zones of occupation. These received the right of selfadministration and in some areas were subject to precisely described legal supervision.

The public broadcasting companies have united to form the "Working Group of Public Broadcasting Companies in the Federal Republic of Germany" (Arbeitsgemeinschaft der öf-fentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland; ARD). Their cooperative efforts in the area of television are based on the "Interstate Television Treaty" concluded on 27 March 1953, which is currently in force in the version of 24 May 1956. The "Agreement regarding the Coordination of the First Television Channel", which was concluded by the states on 17 April 1959, is intended to provide the companies' joint programming activities with a legal foundation.

Following the entry into force of the Basic Law, a number of efforts were made to reorganize the broadcasting system, some by way of federal legislation, others by way of agreements between the states or between the states and the Federation.

On 25 July 1960, the Deutschland-Fernsehen-GmbH (Germany Television Corporation) was founded. The Corporation's function is "the transmission of broadcast television programs that are to provide viewers in all of Germany and abroad with a comprehensive picture of Germany" (s. 2 of the Charter). The Corporation bears sole responsibility for all programming; it is either to produce this itself or have it produced by third parties at its request and under its responsibility (s. 4 of the Charter).

The Free and Hanseatic City of Hamburg and the State of Hesse are of the view that, by founding the Corporation, the Federation has violated their constitutional rights.

Extracts from the Grounds:

…

C.

I.

The applications fall within the jurisdiction of the Second Senate; they are admissible.

D.

S. 3.1 of the Interstate Treaty reserves for the Norddeutschen Rundfunk the exclusive right to disseminate for the general public news and presentations in word, sound and image in the States of Lower Saxony, Schleswig-Holstein and the Free and Hanseatic City of Hamburg (Transmission Territory), i.e., to broadcast programs (monopoly on the broadcasting of programs). The provision further provides the Norddeutschen Rundfunk the exclusive right to establish and operate in its Transmission Territory the radio broadcasting and television broadcasting facilities required for broadcasting programs (monopoly on the establishment and operation of transmission facilities).

The Hamburg Act relating to the Interstate Treaty on the Norddeutschen Rundfunk is, insofar as it refers to s. 3.1 of the Interstate Treaty, incompatible with the Basic Law and therefore null and void to the extent that the provision provides the Norddeutschen Rundfunk with a monopoly on the establishment and operation of transmission facilities. In all other respects, the provision is compatible with the Basic Law.

I.

1. In the view of the Federal Government, s. 3.1 of the Interstate Treaty is null and void in its entirety. The provision is alleged to be incompatible with the exclusive legislative competence of the Federation with regard to regulation of the telecommunications system (Article 73 no. 7 of the Basic Law).

The Federal Government asserts that the term "postal and telecommunications system" is the result of historical developments. It is said to correspond to that of the "postal and telegraph system" in Article 6 no. 7 and Article 88.1 of the Weimar Constitution, covering radio and - since its origins - also broadcasting. During the period of the Reich postal services, it attached to the "licenses" issued to programming companies for the use of its radio transmission facilities for the purposes of entertainment broadcasting "extensive terms designed to ensure political impartiality in the transmission program and organizational neutrality of the transmission companies". It is alleged that the wording of the licenses unambiguously reveals "that the Reich postal services controlled both the technical and the organizational side" and "laid claim to all issues concerning the broadcasting area by virtue of its sovereignty in the field of telegraphy (radio sovereignty)" (Scheuner, Expert Opinion, pp. 45 seq.). The Act on Telecommunications Facilities of 1928 is said to have confirmed this legal situation and included in the statutory regulation the Reich's ability to exercise influence over broadcasting (Scheuner, Expert Opinion, p. 46).

The Federal Government further asserts that the term "telecommunications system" is also unable, insofar as it covers broadcasting, to be divided into a technical, an organization and a programming category, since, from the standpoint of the legislature, broadcasting constitutes an unified whole. It is alleged that sensible regulation of licensing cannot be implemented without imposing terms regarding the organization and programming of broadcasting.

Thus, in the view of the Federal Government, the legislative powers under Article 73 no. 7 of the Basic Law cover broadcasting as a whole. For this reason, the Federation is said also to be empowered to issue statutory rules pursuant to the guiding principles contained in Article 5 of the Basic Law for ensuring freedom of broadcasting. The granting of a monopoly to the Norddeutschen Rundfunk for the broadcasting of programs is therefore alleged to conflict with Article 5 of the Basic Law.

2. The regulation made by s. 3.1 of the Interstate Treaty for the benefit of the Norddeutschen Rundfunk would be incompatible in its entirety with Article 73 no. 7 of the Basic Law if the term "telecommunications system" were to be understood in such a comprehensive manner as asserted by the Federal Government. Not only the exclusive right reserved for the Norddeutschen Rundfunk by s. 3.1 of the Interstate Treaty to establish and operate transmission facilities but also its monopoly on the broadcasting of programs falls in that area that, in the view of the Federal Government, is subject to exclusive statutory regulation by the Federation pursuant to Article 73 no. 7 of the Basic Law.

II.

1. The interpretation given by the Federal Government to Article 73 no. 7 of the Basic Law is incorrect. The "postal and telecommunications system" covers only the transmission related area of broadcasting, excluding so-called studio technology, but not broadcasting as a whole. Article 73 no. 7 of the Basic Law in particular does not empower the Federation to regulate the organization of broadcasting and the internal organization of the broadcasters or to enact rules relating to programs. The enacting of statutes called for by Article 5 of the Basic Law in order to give shape to the guiding principles it contains to ensure freedom of broadcasting falls, from both the standpoint of substantive law and from an organizational perspective (see infra E III), within the legislative competence of the states and only within that of the Federation to the extent that it might in exceptional cases have the authority to broadcast programs of a special nature (see infra III 2 and E I 5).

2. a) Under Article 73 no. 7 of the Basic Law, the Federation has exclusive legislative competence for the "postal and telecommunications system". Broadcasting could only be attributed to the telecommunications system within the meaning of this provision. The wording of Article 73 no. 7 of the Basic Law can be traced back to older formulations, which assigned to the postal services, in addition to their traditional functions, the telegraph system (cf. ss. 41 fet seq. of the Reich Constitution of 1849; Article 4 no. 10 of the Constitution of the North German Alliance of 1867 and the Reich Constitution of 1871; Article 6 no. 7 of the Weimar Constitution). In other words, by "postal system" in Article 73 no. 7 of the Basic Law is meant the "traditional" service branches of the postal services in contrast to the "new" field of the "telecommunications system". Both of these are a part of the "Bundespost" within the meaning of Article 87.1 of the Basic Law.

b) Broadcasting (here and in the following, radio broadcasting and television broadcasting) makes use, for the wireless dissemination of programming, of electric waves that are sent out by transmitters. These broadcasting transmitters are radio facilities and thus telecommunications facilities (s. 1 of the Telecommunications Facilities Act [Fernmeldeanlagengesetz; FAG]); they are a part of the telecommunications system within the meaning of Article 73 no. 7 of the Basic Law.

Under an interpretation following the ordinary meaning of the words and common usage of language, the telecommunications system only comprises the technical steps in the transmission of broadcast presentations. Telecommunications system is a technical term oriented according to the process of disseminating signals. The telecommunications system employs telecommunications facilities, i.e., technical equipment, with the aid of which signals are sent or conveyed "into the distance". This is confirmed by the Act on Telecommunications Facilities of 1928, whose provisions are limited, to the extent applicable here, by their meaning and their wording to regulations regarding the establishment and operation of radio facilities, i.e., to the regulation of technical processes. The medium of mass communications "broadcasting", whose political and cultural significance can hardly be overestimated, is not a part but rather a "user" of the equipment of the telecommunications system (cf. Moser, DÖV 1954, 389 [390]; Lademann, JIR 8 [1957/1958] p. 307 [310]; cf. also Haenel, Deutsches Staatsrecht, 1892, vol. 1, p. 415). The technical aspects of telecommunications may very well have been of predominant significance in the early days of broadcasting and have marked its development. However, viewing broadcasting as a whole, technical telecommunications equipment has for decades only exercised minor, support functions.

c) If, in accordance with the general usage of language, the telecommunications system only covers the technical processes serving to disseminate signals, then it follows that so-called studio technology does not belong to the telecommunications system. The telecommunications system first begins with the conveyance of transmittable sound and image signals by the broadcasting studio to one or several transmitters (conveyance by cables or by radio waves); it then also covers the sending out of the program and the conceivable, related technical processes up to reception of the program.

Within the meaning of Article 73 no. 7 of the Basic Law, the telecommunications system comprises the technical requirements whose regulation is indispensible for an orderly running of the operations of the broadcasters and the reception of their programs. The transmitters must be assigned specific frequencies that are coordinated with those of other transmitters. In order to avoid overlapping and disturbances, the location and transmission power of the transmitters must be fixed according to radio-technical aspects. The adherence to frequencies and transmission power must be supervised. Care must be taken that the sending out and reception of programs are not disturbed by other telecommunications facilities and electrical equipment, and that they in turn do not disturb general radio traffic. The same applies to the cables and radio traffic through which the sound and image signals are conveyed from the studio to the transmitter.

These things are a part of the telecommunications system. Insofar as they can be made subject to statutory rules, then only the Federation may enact the regulations.

3. It also follows from the relationship of Article 73 no. 7 of the Basic Law to other provisions of the Basic Law that the telecommunications system only comprises the transmission technology of broadcasting.

a) Article 5.1 sentence 2 of the Basic Law uses the term "broadcasting", and by this it means broadcasting as an institution. Although this does not rule out that other provisions of the Basic Law regulate sub-areas of broadcasting under other, more specific designations, the mention of "broadcasting" in Article 5.1 sentence 2 of the Basic Law does not permit the assumption that the term "telecommunications system" covers broadcasting as a whole. If only sub-areas of broadcasting can be meant by the "telecommunications system", then this can only involve those areas that serve the conveyance of presentations, i.e., transmission technology.

   As a medium of mass communications, broadcasting belongs in the neighbourhood of press and film. Article 5.1 sentence 2 of the Basic Law refers to all three media in one sentence. The Federation's legislative competence is expressly provided only for the general legal affairs of press and film (Article 75 no. 2 of the Basic Law). Broadcasting is not mentioned in Article 75 no. 2 of the Basic Law. An interpretation paying regard to the interrelationship of the provisions of the Basic Law may therefore not assume that the Federation in entitled to exclusive legislative competence for broadcasting as a whole while it may enact only framework provisions dealing with the general legal affairs of the press and film.

b) With regard to the structure of legislative competence of the Federation and the states, the Basic Law operates on the principle that the states first have competence (BVerfGE 10, 89 [101]). The Federation only has legislative competence to the extent that the Basic Law endows it with such (Article 70.1 of the Basic Law). The Federation's legislative powers may therefore normally only be supported by an express authorization by the Basic Law. In cases of doubt regarding the Federation's jurisdiction, there is no assumption that argues in favour of federal competence. Rather, the systematic of the Basic Law calls for a strict interpretation of Articles 73 seq. of the Basic Law.

   In addition, broadcasting is in any event also a cultural phenomenon. To the extent that cultural matters can be administered and regulated whatsoever by the State (cf. BVerfGE 10, 20 [36 seq.]), they nevertheless fall, in accordance with the Basic Law's fundamental decision (arts. 30, 70 et seq. and 83 et seq. Basic Law), in the area of the states (cf. BVerfGE 6, 309 [354]) when special provisions of the Basic Law do not provide restrictions or exceptions in favour of the Federation. This fundamental decision by the Constitution, which is not least a decision in favour of the federalist structure of the State in the interest of effective separation of powers, forbids especially in the area of cultural matters the assumption that the Federation has jurisdiction without a sufficiently clear, contrary rule of exception. The latter is lacking here.

c) Article 87.1 of the Basic Law stipulates that the Bundespost is to be managed as direct federal administration. This does not permit any inferences as to the extent of the Federation's legislative competence. It conforms to a principle of German constitutional law that federal competence to legislate extends farther than that to administer

(cf. Scheuner, Expert Opinion, p. 48). In accordance with the systematic of the Basic Law, the Federation's legislative competence traces the outermost boundary of its administrative powers (cf. Krüger, Der Rundfunk im Verfassungsgefüge und in der Verwaltungsordnung von Bund und Ländern, 1960, p. 78; Zeidler, DVBl. 1960, 573 [579 seq.]). But this means that the Federation's administrative competences follow its legislative competences and not the reverse. No conclusions may therefore be drawn from the alleged powers of the Bundespost under Article 87.1 of the Basic Law as to the extent of the Federation's legislative competence. Moreover, the "postal and telecommunications system" in Article 73 no. 7 of the Basic Law and the "Bundespost" in Article 87.1 of the Basic Law mean the same area. The extent of the area "Bundespost" results from what is to be understood by "postal and telecommunications system". It is also incorrect that broadcasting is considered a matter of the Bundespost. The Federal Government has dictated that broadcasting matters are, apart from technical issues, not to be dealt with offically by the Federal Ministry for the Postal and Telecommunications System but rather by the Federal Ministry of the Interior. It therefore acknowledges that in its view as well, this does not involve matters of the telecommunications system (cf. s. 1 of the Postal Administration Act of 24 July 1953, BGBl. I, p. 676).

4. The interests of the general public call for an ordering of radio traffic, which can only be effectively accomplished by the Federation. This also applies to broadcasting. The allocation and delineation of transmitter frequencies, the determination of their location and transmission power according to radio-technical aspects, so-called cable technology, supervision of radio traffic, its protection against large-scale and local disturbances, as well as the implementation of international agreements all must be uniformly regulated by virtue of the nature of the matter if chaos in radio traffic is to be avoided.

Article 73 no. 7 of the Basic Law serves the purpose of making possible the indispensible uniform regulation of these and similar matters. This purpose does not, however, require that in addition to radio and, in particular, transmission related issues, the broadcasting of programs must also be submitted to statutory regulation by the Federation. In other words, also following from the purpose of Article 73 no. 7 of the Basic Law is the restriction to transmission related matters of broadcasting.

5. A historical interpretation of the term "telecommunications system" does not lead to different results. Although it is correct that by means of the administrative practice of the Reich postal services, authorities of the Reich exercised a not insubstantial influence in the period from 1926 to the beginning of 1933 on the organization of broadcasters and the structuring of their programs (cf. the depiction in Bausch, Der Rundfunk im politischen Kräftespiel der Weimar Republik, 1956, pp. 11 et seq.; Pohle, Der Rundfunk als Instrument der Politik, 1955, pp. 27 et seq.), it is not possible to draw from this that the telecommunications system within the meaning of Article 73 no. 7 of the Basic Law covers broadcasting as a whole.

a) In the period before 1933, statutory rules for broadcasting were not enacted. Neither the Ordinance for the Protection of Radio Traffic of 8 March 1924 (RGBl. I, p. 273) - Radio Ordinance - nor the Act to Amend the Telegraph Act of 3 December 1927 (RGBl. I, p. 331), which provided for the promulgation of the revised Telegraph Act

under the title "Act on Telecommunications Facilities", employs the word "broadcasting". The reasoning accompanying this Amending Act (RT III/1924 Drucks. No. 3682) merely mentions broadcasting in the context of imposing fees for the establishment and operation of broadcasting reception facilities. According to the reasoning, the purpose of the amendment of the Telegraph Act was the solidification of the State's radio sovereignty in view of the progress made in radio technology (id. at p. 5). The Act was accepted in the Reichstag in all three readings without discussion (RT III/1924, Negotiations vol 394, p. 11719 and 11732; Stenographic Report of the 346th Session on 24 November 1927).

Under an unbiased reading, the wording of the Act on Telecommunications Facilities is restricted to the regulation of radio-technical issues; it does not give rise to any references to the fact that broadcasting as a whole was assigned to the postal and telegraph system within the meaning of Article 6 no. 7 and Article 88.1 of the Weimar Constitution. The same applies to the reasoning behind the draft Act. In the commentaries to the Reich Constitution of 1919, broadcasting is mentioned neither in Article 6 no. 7 nor in Article 88.1, let alone included in the postal and telegraph system.

b) Thus, for the "historical development" of the term "telecommunications system", the Federal Government cannot rely on the legislation but rather only on the administrative practice of the Reich postal services and the Reich Minister of the Interior in the period up to 1933. It particularly relies on this for its position that the competence to regulate the telecommunications system also covers to power to give statutory form to the guiding principles of Article 5 Basic Law.

The tool used not only by the Reich but also by the states to gain influence on the broadcasting of programs was primarily the "licenses" - common since 1926 and tied to conditions - for the use of radio transmission facilities of the Reich postal services for the purpose of entertainment broadcasting ("Conditions"), to which were appended guidelines for the news and information service ("Guidelines") as well as provisions for the Supervisory Committees and the Councils ("Provisions").

It is only conditionally correct that the influence had by the Reich and the states on the broadcasting of programs served the "political impartiality", the "organizational neutrality of the transmission companies" and the safeguarding of the right to freedom of expression (Article 118 of the Weimar Constitution) in broadcasting. For this assertion, only no. 1 of the Guidelines can be resorted to, which stated: "Broadcasting shall serve no one party. Its overall news and information service shall therefore be strictly structured in a supra-party fashion" (see also No. 10 of the Provisions for the Council of 1926 and no. 1(c) of the Guidelines on the Revised Regulation of Broadcasting of 1932, reproduced in Pohle, supra at pp., 124 et seq.). In all other respects, however, a system of State influence and supervision was established with the aid of the Conditions, which approached censorship.

The programming companies were only allowed to disseminate such political news that they had received from a "News Agency" of the "Wireless Services Corporation for Books and Press" (Drahtloser Dienst AG für Buch und Presse), 51 % of whose shares were held by the Reich (no. 2 of the Guidelines). Only nonpolitical and local news was

permitted to be obtained from other agencies. News designated by the News Agency or by the responsible state governments as "priority news" (Auflagenachrichten) had to be disseminated promptly, unabridged and unchanged, as was the case for "priority information" (AuflageVorträge) (nos. 3, 5 and 7 of the Guidelines). The Corporation was required to be constantly informed of the "handling" of the news and information provided by the News Agency (no. 8 of the Guidelines). The Supervisory Committee for the news and information services, which was normally composed of a representative from the Reich and two representatives from the responsible state government, was charged with "deciding on all political issues related to programming" (Article 3.1 of the Conditions). The programming company was obligated "to seek contact with the Supervisory Committee in all political issues of programming and to await its decision" (no. 3 of the Provisions for the Committee). Programs always had to be submitted to its members, and they had to be informed of important program changes. Finally, the Committee had a veto right with regard to all aspects of programming, insofar as not merely issues of art, science or public education were involved (Nos. 5 and 6 of the Provisions). Similar powers were possessed by the Council, whose members were appointed, following discussions with the programming company, by the responsible state government in consultation with the Reich Minister of the Interior. The Council was charged with "participating in the structuring of programming with respect to presentations in the area of art, science and public education" (Article 3.2 of the Conditions). The Council also had the right to lodge objections to programming (no. 7 of the Provisions for the Council).

The Supervisory Committees and the Councils were characterized as early as 1927 as "censorship authorities" (Dencker, Handwörterbuch der Rechtswissenschaft, vol. 2, 1927, p. 547 [550 seq.]). Doubts were expressed whether this administrative practice was compatible the right to freedom of expression safeguarded by Article 118 of the Weimar Constitution. Häntzschel (HdbDStR II, 651 [668]) only considered the censoring activities of the Supervisory Committees to be compatible with Article 118 of the Weimar Constitution because in his view the operation of broadcasting facilities was not a sovereign but rather a fiscal branch of the postal administration aimed at revenues. He stated that broadcasting censorship would be "undoubtedly unconstitutional" if the operation of broadcasting were to be deemed an emanation of a State sovereign right (id. at p. 668 n. 38). At the same time, however, there was just as little doubt then as there is today that as of 1926 the legal relations between the Reich postal services and the programming companies were in the nature of public law

(cf. the written response of the Reich Minister of the Interior of 2 December 1926 to a resolution of the Reichstag, RT III/1924 Drucks. no. 2776; Neugebauer, Archiv für Post und Telegraphie 53 (1925) p. 46 [47]; id., Fernmelderecht mit Rundfunkrecht, 3 d ed. 1929, pp. 699 seq.; id., Archiv für Funkrecht 3 (1930) pp. 155 [166, 203], 627 [628]; Bredow, Vier Jahre deutscher Rundfunk, 1927, p. 20; Freund, Der deutsche Rundfunk, 1933, p. 54; Schuster, Archiv für das Post- und Fernmeldewesen 1 (1949) p. 309 [314]; Lüders, Die Zuständigkeit zur Rundfunkgesetzgebung, 1953, pp. 12 seq.; Peters, Die Zuständigkeit des Bundes im Rundfunkwesen, 1954, pp. 6 seq.; Steinmetz, Bundespost und Rundfunk, 1959, pp. 11 et seq.).

In this regard, it is irrelevant whether the basis of these public law relations were seen in a "license" or "award" (s. 1 of the Radio Ordinance of 1924; s. 2 FAG) subject to terms (Conditions) permitting the joint operation of transmission facilities (e.g., the Reich Minister of the Interior; Neugebauer, Bredow, Freund and Schuster, supra; cf. also Article 4.3 of the Conditions) or in public law relations of another kind regulating the practical usage of these facilities, (e.g., Dencker, supra; Peters and Steinmetz, supra).

Regardless of whether the administrative practice of the Reich postal services and the Reich Minister of the Interior was compatible with Article 118 of the Weimar Constitution, it cannot be ascertained - at least in paying broad regard to the "safeguarding of the official influence on the presentations of broadcasting" (Bredow, id. at p. 20) realized with the aid of the Conditions - that this influence served the objective of ensuring the basic right of freedom of expression, including the prohibition of censorship, in the area of broadcasting. The same applies to the possibilities for interference with the various programming companies secured by the Reich via the Reich Broadcasting Corporation (cf. Bredow, supra, pp. 41 seq.). This cannot be countered with the argument that party-political neutrality in broadcasting may have been achieved to a certain extent.

Thus, the Federal Government improperly relies on administrative practice in the period to 1933 when it asserts that the competence to regulate the telecommunications system enables the Federation to give statutory form to the guiding principles in Article 5 of the Basic Law with regard to broadcasting.

The constitutionality of the administrative practice of the Reich postal services and the Reich Minister of the Interior with regard to broadcasting was furthermore disputed in still other respects as well. The reorganization of broadcasting in 1925-1926 as well as the reform in the summer of 1932 was the result of protracted negotiations between the Reich and the states in the Reich Council and its committees (cf. Bausch, supra, at pp. 40 et seq., 91 et seq.). In these negotiations, the states took issue with the Reich regarding the latter's competence to regulate the broadcasting system; they particularly objected to the efforts to gain political influence over programming, which were initiated not by the Reich postal services but rather by the Reich Minister of the Interior. The differences of opinion between the Reich and the states were not carried out. Instead, agreement was reached on compromises that provided the states with a not insignificant amount of influence on the broadcasting of programs. Nevertheless, in 1926 and in 1932 the states contested the comprehensive powers claimed by the Reich and emphasized that on the basis of their police and cultural sovereignty, they had the right to regulate broadcasting on their own (cf. Bausch, supra, pp. 55, 102 seq., 199 seq.). In view of these fundamental differences of opinion between the Reich and the states, it is not possible to refer to a "supplement to the Constitution arising by way of custom" in the sense of a Reich competence (e.g., Scheuner, Expert Opinion, p. 47).

It must finally be added that the "official influence on the presentations of broadcasting" (Bredow, supra) did not emanate from the Reich Postal Minister and the Reich postal services but rather from the Reich Minister of the Interior and the state governments. Schuster (supra, p. 320) correctly emphasized that before and after 1933,

"the Reich postal services never had anything to do with the programming side but rather . . . limited itself to the technical side of broadcasting". This is confirmed by the fact that "broadcasting law" was only assigned to the area of telecommunications law insofar as it regulated the technical side of broadcasting (cf. Krause, Die Zuständigkeit zur Ordnung des Rundfunkwesens in der Bundesrepublik Deutschland, 1960, pp. 80 et seq., in particular, the statements cited there by Ministerial Advisor Dr. Neugebauer in the Reich Postal Ministry).

In all, it therefore cannot be assumed that the administrative practice of the Reich postal services, the Reich Minister of the Interior and the state governments up to 1933 gave rise to a legal term "telecommunications system" covering broadcasting as a whole, which the drafters of the Basic Law could then have adopted.

c) The period from 1933 to 1945 must be left out of consideration. The development of broadcasting in the years 1945 to 1949 is unable to contribute to the establishment of a term "telecommunications system" covering broadcasting as a whole.

d) The historical background of Article 73 no. 7 of the Basic Law confirms that the telecommunications system does not cover broadcasting as a whole. It can only be unambiguously drawn from the negotiations in the Parliamentary Council that, on the one hand, in contrast to the proposal of the Constitutional Convention at Herrenchiemsee (Report, Descriptive Part, p. 32), the technical side of broadcasting was assigned to the telecommunications system and that, on the other hand, the "cultural side", i.e., the contents of the programs, was to be a matter for the states. The question of whether the organization of the broadcasting system was also to belong to the telecommunications system remained open, without any distinctions having been made between the organization of transmission related processes and the organization of the broadcasting of programs. The materials do not evidence an even remotely clear response to this question

(for the historical background, cf. JÖR 1 (1951), pp. 476 seq.; ParlRat, Ausschuß für Zuständigkeitsabgrenzung, Wortprotokoll über die 2. Sitzung am 22. September 1948, pp. 48, 4452; Wortprotokoll über die 8. Sitzung am 6. Oktober 1948, pp. 3033; Wortprotokoll über die 12. Sitzung am 14. Oktober 1948, pp. 37-40; Verhandlungen des Hauptausschusses, 29. Sitzung am 5. Januar 1949, pp. 351 seq.).

Since the Parliamentary Council did not assign the "cultural side", i.e., programming, to the telecommunications system but rather viewed this as a matter for the states, then this precludes the assumption that it adopted in the Basic Law a term "telecommunications system" that covers broadcasting as a whole. The statutory regulations permitted or prescribed under Article 5 of the Basic Law mainly have to do with the contents of programs, i.e., - in the language of the Parliamentary Council - the "cultural side" of broadcasting. In accordance with its unambiguous will, such regulations were not to be assigned to the telecommunications system.

6. The competence to regulate the telecommunications system under Article 73 no. 7 of the Basic Law is thus limited to transmission related matters.

a) The Federation is not entitled to farther-reaching legislative powers for broadcasting, not even by virtue of the context of the subject matter (cf. BVerfGE 3, 407 [421]; BVerfGE 8, 143 [149]). Neither studio technology nor the issue related to the broadcasting of programs entail that the regulation of these - to the extent that it is possible and required - is an indispensible prerequisite for the regulation of transmission related matters of broadcasting (cf. BVerfGE 3, 407 [421]). Transmission technology and the broadcasting of programs are areas that can be separated and regulated individually. To this extent, "broadcasting" is not a whole that can only be sensibly regulated uniformly by the Federation.

b) To the extent that the Federation can regulate matters of broadcasting under Article 73 no. 7 of the Basic Law, it may also create statutory rules regarding its "organization". In other words, the Federation has the authority to enact rules on the organization (the operators) of broadcasting transmission facilities. It may be left aside whether the Federation's legislative competence here is derived from Article 73 no. 7 of the Basic Law directly or by virtue of the interrelated context or whether - to the extent that administration is at issue - from Articles 83 et seq. of the Basic Law. The Federation thus might, for instance, establish by law institutions of public law with legal personality, to which could be transferred the construction and transmission related operation of federally owned facilities for broadcasting (Article 87.3 of the Basic Law).

   However, the Federation may only enact organizational rules for such institutions that are limited to the establishment and technical operation of transmission facilities (but see infra III 1 and E I 5). Organizational regulations for the broadcaster and for the broadcasting of programs are the province of the state legislature. Such regulations have - on account of Article 5 of the Basic Law - much greater significance than provisions on the organization of establishment and technical operation of transmission facilities. To the extent that provisions of an organizational nature have to be enacted for institutions responsible for both the broadcasting of programs and the operation of transmission facilities, the competence for transmission related affairs thus rests with the state legislature by virtue of the contextual interrelationship.

c) Authority to regulate broadcasting going beyond the area of transmission related matters is also not available to the Federation under Article 73 no. 7 of the Basic Law simply because "awards" under s. 2 FAG to establish and operate radio facilities and contracts on the use of such facilities have to be made subject to terms (conditions) with respect to the organization of the broadcasting of programs and the contents of programs in order to safeguard Article 5 in conjunction with Article 1.3 of the Basic Law (cf. the Reasoning accompanying the Government's draft of an Act on Broadcasting, BT III/ 1957 Drucks. 1434). If the competence for the telecommunications system with regard to broadcasting is limited to transmission related matters, then the Bundespost is required in making such awards and contracts to give sole consideration to transmission related aspects (see infra E I 4). "Terms" extending beyond this area would be impermissible.

7. a) The Federation's legislative competence for the telecommunications system also permits regulations that reserve for the Federation the exclusive right to establish and operate radio facilities for the purpose of broadcasting. The radio monopoly of the Reich provided for in the 1928 Act on Telecommunications Facilities can be traced back to the monopoly over telegraphy and, ultimately, to the monopoly over postal services

(cf. s. 1 of the Act on the Telegraph System of the German Reich of 6 April 1892 [RGBl., p. 467], and the Amending Act to the latter of 7 March 1908 [RGBl., p. 79], as well as the Radio Ordinance of 1924; cf. also Krüger, supra pp. 5 et seq.).

In this regard, the Basic Law did nothing to change the traditional competence of the Reich. To the extent that its regulations are relevant, s. 1 FAG has thus become federal law.

Article 5 of the Basic Law does not oppose this, since, in contrast to the assertion of the Applicants, it does not require that the broadcasters of programs also control the transmission related facilities and that they must be able to operate these facilities themselves (see infra E III).

b) Nevertheless, the Federation must observe the principle of action for the benefit of the Federation (cf. BVerfGE 4, 115 [140]; BVerfGE 6, 309 [361 seq.]; BVerfGE 8, 122 [138 et seq.]; infra E II). This principle would be violated if the Federation were today to rely on its radio monopoly and make use of its authority to regulate the telecommunications system so as to deprive the existing public broadcasting companies of the right to exercise control over the transmission facilities owned and operated by them. The same would apply if the Federation were to divest these companies by statutory regulation of the frequencies they use and then, in allocating frequencies available now or in the future, not to give them appropriate consideration pursuant to the state regulations on the broadcasters of programs.

8. Thus, under Article 73 no. 7 of the Basic Law, the Federation has the authority to regulate the establishment and operation of broadcasting transmission facilities. s. 3.1 of the Interstate Treaty falls in the area of this sole legislative competence of the Federation insofar as it reserves for the Norddeutschen Rundfunk the exclusive right to establish and operate such transmission facilities. To this extent, s. 3.1 of the Interstate Treaty is incompatible with Article 73 no. 7 of the Basic Law in conjunction with Article 71 of the Basic Law and therefore null and void. Insofar as s. 3.1 of the Interstate Treaty reserves for the Norddeutschen Rundfunk the exclusive right to broadcast programs, it is compatible with Article 73 no. 7 of the Basic Law.

S. 3.1 of the Interstate Treaty regulates only the establishment and operation of transmission facilities, as well as the broadcasting of programs, but not their reception. It may therefore be left unresolved whether and to what extent the Federation may enact regulations on broadcasting reception facilities and on the fees for the operation of such facilities and how these fees are to be legally qualified.

III.

The granting of the exclusive right to broadcast programs to the Norddeutschen Rundfunk does not conflict with the Federation's legislative powers for broadcasting that might result from provisions of the Basic Law other than Article 73 no. 7 of the Basic Law.

1. Provisions of this variety might include, for example, Article 21.3 of the Basic Law (rights of political parties), Article 73 no. 1, of the Basic Law (defence and protection of the civilian population), Article 73 no. 9 of the Basic Law (industrial property rights), Article 73 no. 10 of the Basic Law (*inter alia*, international control of crime), as well as Article 74 no. 21 of the Basic Law (*inter alia*, ocean and costal shipping, inland navigation, inland waterways, meteorological services) and Article 74 no. 22 of the Basic Law (road traffic). These Federation competences merely permit the regulation of partial aspects of programming (particularly, the allocation of transmission times to political parties and the broadcasting of certain announcements) or various legal questions of broadcasting (e.g., in the nature of copyright). Further Federation competences might be inferred by virtue of contextual interrelationships from its responsibilities, e.g., for national defence, customs and matters of the Federal Office of Criminal Investigations. All of these federal competences, however, do not - even when seen as a whole - engender any legislative powers to regulate the broadcasting of programs. In other words, they do not affect the monopoly of the Norddeutschen Rundfunk provided for under state law, regardless of its obligation to observe individual federal regulations. In this regard, it may be left aside to what degree these federal legislative powers have to do exclusive competences and to what extent the Federation has made use of its competences in the area of concurrent legislation.

2. It may remain left aside whether the Federation's responsibilities for foreign affairs and for pan-German issues likewise only permit the regulation of partial aspects of programming and individual issues of broadcasting or whether these responsibilities reach further and allow the Federation to enact regulations for such programs intended for broadcast abroad or for Germans resident in German territories outside the Federal Republic of Germany. It may also be left unresolved whether on account of its responsibilities for foreign affairs and pan-German issues, the Federation may establish by law a superior federal authority or an institution of public law for broadcasting programs and also to set down by statute for this authority or institution the guiding principles resulting from Article 5 Basic Law for the broadcasting and broadcasters of programs. Such broad Federation competences, which are not to be decided upon in the instant proceedings, would only relate to the broadcasting and broadcasters of such programs that are solely or predominantly intended for broadcast abroad or for Germans outside the Federal Republic of Germany.

By way of s. 3.1 of the Interstate Treaty, the Norddeutschen Rundfunk has been reserved the exclusive right to broadcast programs "for the general public". By this is meant - if not exclusively, then at least primarily - "the general public" of the Federal Republic of Germany. The monopoly granted to the Norddeutschen Rundfunk thus may not conflict with the competences that the Federation might have regarding the regulation of programs specifically intended for broadcast abroad or for Germans outside the Federal Republic of Germany.

3. The Federation cannot derive any responsibilities from Article 5 Basic Law. Article 5 of the Basic Law is not a norm describing competences but rather binds that authority entrusted with the regulation of the broadcasting of programs.

IV.

In contrast to the assertion of the Federal Government, the Federation does not have any authority flowing from the nature of the matter to regulate by law the broadcasting of programs intended to serve the supra-regional function of national representation within the country, i.e., the self-depiction of the nation before the population of the Federal Republic of Germany. The Federation is endowed with just as little corresponding administrative competences. It is also unable under Article 87.3 of the Basic Law to establish by law for this purpose a superior federal authority or an institution of public law (see infra E I 6). It therefore requires no review whether this might involve exclusive Federation legislative powers or whether the monopoly provided by s. 3.1 of the Interstate Treaty to the Norddeutschen Rundfunk to broadcast programs would be compatible with such federal competence.

V.

The exclusive right of the Norddeutschen Rundfunk to broadcast programs also does not conflict with Article 5 of the Basic Law (see infra E III).

VI.

Thus, the Hamburg Act relating to the Interstate Treaty on the Norddeutschen Rundfunk is, insofar as it refers to s. 3.1 of the Interstate Treaty, only incompatible with the Basic Law and therefore null and void to the extent that it reserves for the Norddeutschen Rundfunk the exclusive right to establish and operate transmission facilities for radio and television.

In all other respects, the Act is compatible with the Basic Law to the extent that it refers to s. 3.1 of the Interstate Treaty.

E.

I.

By way of the founding of the Deutschland-Fernsehen-GmbH, the Federation violated Article 30 in conjunction with Articles 83 et seq. of the Basic Law. In accordance with the development of German law, broadcasting is a public function. When the State exercises this function in some form, it becomes a "State function" whose fulfilment under Article 30 of the Basic Law is a matter for the states, insofar as the Basic Law has not prescribed or permitted otherwise. The Basic Law has not prescribed or permitted otherwise in favour of the Federation with regard to the broadcasting of programs (but see infra 5).

1. a) It may be left aside whether the provision of Article 30 of the Basic Law, which is fundamental for the federal structure of our constitutional order, covers every State activity whatsoever. In any case, falling under this competence-establishing norm is that activity by the State serving the fulfilment of public functions, regardless of whether the means of public law or private law are resorted to. Any other interpretation would, particularly in view of the growing scope of non-intervening public administration, not do justice to the meaning of Article 30 of the Basic Law. It would also conflict with the historical background of this provision (cf JÖR 1 (1951) p. 295 et seq.; the

comments by Representative Dr. Laforet, Parl.Rat., Ausschuß für Zuständigkeitsabgrenzung, Wortprotokoll über die 5. Sitzung am 29. September 1948, pp. 124, 127 seq., 135, and the remarks by Representative Dr. Hoch, id. at pp. 129, 138, 145; cf. also Parl.Rat. Verhandlungen des Hauptausschusses, 48. Sitzung am 9. Februar 1949, p. 626).

b) The broadcasting of programs has since 1926 traditionally belonged in Germany to the functions of public administration. Decisive for the inclusion of broadcasting in the area of public administration was the fact that "broadcasting was and is a means of publication and a carrier of news and information of the first order" and that it "operated in the political sector" (cf. Hans Schneider, Expert Opinion, p. 8). The fact that some of the presentations of broadcasting may have been termed "free personal activity" that do not exhibit "any internal relationship to public functions" (cf. Scheuner, Expert Opinion, p. 21) has since then only played a minor role in the legal relations between the State and broadcasting. Ever since the origins of broadcasting, dissemination of news in the broadest sense (cf. Hans Schneider, supra) prompted, and was used to justify, the inclusion of the broadcasting of programs in the sphere of public functions.

This is not contradicted by the fact that under the Weimar Constitution, programs were broadcast by companies organized under private law. Controlling in this regard was not the view that the broadcasting of programs was a matter of private commercial activity but rather, *inter alia*, the fact that the Reich postal services lacked as a result of inflation the resources to undertake this function itself (cf. Bredow, supra, pp. 12, 19; Bausch, supra, p. 19). However, the Reich postal services made an effort to obtain voting majorities in the organs of the broadcasting companies while forgoing financial investments. In 1926 it succeeded in achieving this objective (cf. Bredow, supra, pp. 29 seq.; Pohle, supra, pp. 39 seq., 48 seq.; Bausch, supra, pp. 31 et seq., 58). By way of the reform in 1932, private capital was completely expelled; all shares in the Reich broadcasting corporation and in the regional programming companies that were still privately owned were transferred to the Reich and the states (cf. Pohle, supra, pp. 124 et seq.; Bausch, supra, pp. 90 et seq.).

It is irrelevant in this context whether the responsibilities claimed by the Reich were compatible with the allocation of competences between the Reich and the states and whether the influence on broadcasting exercised by the Reich and the states (see supra D II 5) was compatible with the right of freedom of expression and the prohibition of censorship (Article 118 of the Weimar Constitution). Of sole importance here is that this exercising of influence can only be understood as the result of the view that the broadcasting of programs does not belong simply in the public sector but rather in that of public functions.

The period between 1933 and 1945 must also be left out of consideration here. Following 1945, the view of broadcasting as a public function became even more deeply rooted in that institutions of public law were established as broadcasters of programs. In addition, the Federal Act of 29 November 1960 established two public institutions, and the draft of this Act provided such an institution for the second television channel. The functions fulfilled by the broadcasting institutions of public law belong to the area of public administration (BVerfGE 7, 99 [104]).

c) In summary, it can be stated that broadcasting in Germany has become a public service under public responsibility. When the State concerns itself with broadcasting in some form, it thus exercises a function of public administration.

Similar in result: Superior Administrative Court of Hamburg, Decision of 10 July 1956, III 11/56 - DVBl. 1957, 67 [68]; Ipsen, Die Rundfunkgebühr, 2 d ed. 1958, pp. 40 seq.; Krause, supra, pp. 106 et seq.; Krüger, supra, pp. 16, 78; Maunz, BayVwBl. 1957, 4 [5]; Quaritsch, JIR 8 (1957/1958) p. 339 [341 seq.]; Weber, in Der Rundfunk im politischen und geistigen Raum des Volkes, p. 67; Ridder, Kirche, Staat, Rundfunk, 1958, pp. 42 seq.; but see Superior State Court of Munich, Decision of 24 October 1957 - 6 U 1010/57 - NJW 1958, 1298 [1299 seq.]; Aspelt, Festschrift für Nawiasky, 1956, p. 375 [381]; Peters, supra, p. 33.

Thus, in contrast to the view of the Federal Government, the broadcasting of programs as a function of public administration is covered by the delineation of competences between the Federation and the states (Article 30 of the Basic Law), even in those cases in which the State, as here, has resorted to forms of private law.

2. The Federal Government has asserted that the fulfilment of functions of public administration with the means of private law is only covered by Article 30 of the Basic Law when this involves the implementation of laws. Because the founding of the Deutschland-Fernsehen-GmbH is allegedly not implementation of law, Article 30 of the Basic Law does not come into play.

However, Article 30 of the Basic Law applies both to the fulfilment of public functions pursuant to law and to that outside the law. This result is compelled by the relationship of Article 30 of the Basic Law to Section VIII of the Basic Law (Articles 83-91 of the Basic Law) and by the fact that this Section has to do with federal administration in that the latter is administration outside the law.

Articles 83 to 86 Basic Law deal with the implementation of federal laws on account of the separation of competence peculiar to German federalist law to enact and implement federal laws. The contrasting of the "implementation of federal laws" and the "federal administration" in the heading to Section VIII would, however, be incomprehensible if the following articles were merely to cover administration pursuant to law. The areas of federal administration listed in Articles 87 to 90 Basic Law and particularly in Article 87.1 of the Basic Law are to a great extent administered outside the law. That applies to the Foreign Services, the Federal Railways and the Bundespost as well as to the administration of the federal highways, federal roadways and federal waterways. Articles 87.1, 89 and 90 of the Basic Law are not limited to according the Federation, in addition to the competence to implement laws, the power to maintain federal administrative structures (cf., in particular, Article 89.2 sentence 2 and Article 87b.1 sentence 2 of the Basic Law, in which the functions of federal administration are detailed). Articles 83 et seq. of the Basic Law thus also regulate federal administration not dealing with the implementation of laws see Laforet, DÖV 1949, 221 et seq.; Nawiasky, Die Grundgedanken des Grundgesetzes, 1950, p. 122; Peters, Festschrift für Erich Kaufmann, 1950, p. 281 [290]; Hans Schneider, Expert Opinion, pp. 18 seq., 36; but see Köttgen, JÖR 3 [1954], p. 67 [73, 78, 80].

But if Section VIII of the Basic Law also deals with federal administration outside of the law, then this means - as was not misinterpreted by the Federal Government - that the principle underlying Article 30 of the Basic Law also applies to this administration. The founding of the Deutschland-Fernsehen-GmbH is thus to be evaluated under Article 30 of the Basic Law, even though it was not undertaken in implementation of a law.

3. The Federal Government asserts that the principle behind Article 30 of the Basic Law - basic jurisdiction of the states - is only restated in Section VIII of the Basic Law in Article 83 of the Basic Law and in that provision, only for administration in implemetation of law; this is said to justify the conclusion that the priority of the states (Article 30 of the Basic Law) does not apply to administration outside the law. Section VIII of the Basic Law is alleged to have generally prescribed "otherwise" within the meaning of Article 30 of the Basic Law for this administration.

However, one must look not only at Article 83 of the Basic Law is evaluating the relationship between Section VIII of the Basic Law and Article 30 of the Basic Law. This Section does not merely regulate federal administration in implementation of law but rather also, as explained, that outside the law. For the latter as well, this Section has prescribed "otherwise" within the meaning of Article 30 of the Basic Law. Section VIII thus does not in general prescribe "otherwise" with regard to administration outside the law in such a way that it is exempted from the priority of the states set down in Article 30 of the Basic Law.

4. a) The words "postal and telecommunications system" in Article 73 no. 7 of the Basic Law and "Bundespost" in Article 87.1 of the Basic Law describe the same area (see supra D II 3 c). Under Article 73 no. 7 of the Basic Law, the Federation may regulate the establishment and technical operation of broadcasting transmission facilities (see supra D II 2, 3, 4, 6, 7, 8). Similarly, under Article 87.1 of the Basic Law, the Bundespost may also itself establish and operate such facilities. Thus, the Federation has not violated Article 30 in conjunction with Articles 83 seq. of the Basic Law by way of the construction of postal-owned transmitters designed to serve the broadcasting of a second television channel (see supra A III 1).

b) The broadcasting of programs, on the other hand, does not belong to the "postal and telecommunications system" within the meaning of Article 73 no. 7 of the Basic Law (see supra D II). Although Article 87.1 of the Basic Law provides that the "Bundespost" is to be managed as federal administration, the Basic Law has not prescribed "otherwise" within the meaning of Article 30 of the Basic Law. The founding of the Deutschland-Fernsehen-GmbH is therefore not covered by Article 87.1 of the Basic Law either directly or by virtue of the contextual interrelationship (cf. supra D II 6).

c) The competence to regulate the postal and telecommunications system does not cover the authority to set down by statute the guiding principles prescribed or permitted by Article 5 of the Basic Law from a substantive or organizational standpoint for the broadcasting and broadcasters of programs (see supra D II, in particular, 3, 5, 6; D III). This means that the Federation may not makes awards under s. 2 FAG and contracts regarding the use of federally owned broadcasting facilities dependent on "terms" going beyond the area of transmission related affairs.

In contrast to the view of the Federal Government, farther-reaching administrative competences are also not available to the Federation on account of Article 1.3 of the Basic Law. This provision is just as unable to be considered a competence-establishing norm as Article 5 Basic Law. Pursuant to their responsibilities as delineated by the Basic Law, the Federation and the states are called upon to safeguard basic rights. The states are responsible for ensuring "freedom of broadcasting". In this regard, the Federation's possibilities for action are limited to those granted to it by the Basic Law for the event that a state fails to observe the Basic Law.

d) Legislative and administrative competence for the broadcasting of programs thus rests with the states. The transmission facilities needed for broadcasting programming are subject to the Federation's legislative competence (but see supra D II 6, 7). Under Article 87.1 of the Basic Law, the Federation is also endowed with corresponding administrative powers and is particularly responsible for the allocation of frequencies to the transmitters; however, it may only undertake this allocation and the conclusion of contracts regarding the use of federally owned transmission facilities from transmission related aspects. With respect to the cooperation between the Federation and the states required for this, the principle of action for the benefit of the Federation must be controlling. This also applies to the area of so-called "cable technology".

It would not be compatible with the principle of action for the benefit of the Federation (cf. infra II) if the Federation were to divest these companies of the frequencies they use and then, in allocating frequencies available now or in the future, not to give them appropriate consideration pursuant to the state regulations on the broadcasters of programs. The same would apply were it to rely on its radio monopoly and make use of its administrative powers in such a way as to deprive these companies of the right of control over the transmission facilities owned and operated by them.

5. The founding of the Deutschland-Fernsehen-GmbH is not compatible with Article 30 and Articles 83 et seq. Basic Law simply because the Basic Law prescribes or permits in Article 87.1 of the Basic Law federal administrative competences for foreign affairs and pan-German issues.

It may remain unresolved to what extent the Federation is entitled to administrative competences under this aspect with regard to the broadcasting of programs. These would not extend any further than the legislative powers (see supra D III 2). They could at best justify the creation of institutions to transmit programs solely or predominantly intended for broadcast abroad or for Germans resident in German territories outside the Federal Republic of Germany. The fact that the Deutschland-Fernsehen-GmbH is not solely or predominantly to serve such purposes requires no explanation.

6. a) Finally, the founding of the Deutschland-Fernsehen-GmbH can also not be justified from the standpoint of Article 30 and Articles 83 et seq. of the Basic Law with the argument that the broadcasting of programs is a "supra-regional" function or that the Basic Law has permitted the broadcasting by the Federation of such programs that are to serve national representation within the country. In accordance with the nature of the matter, the Federation has no administrative or legislative competences in this area.

b) Competence in accordance with the nature of the matter is established under the "unwritten principle, which is established by the essence of things and thus not in need of express recognition by the Reich Constitution, that certain areas can be regulated by the Reich and only by the Reich because they represent by their nature matters peculiar to the Reich and a priori removed of specific legislative competence" (Anschütz, HdbDStR I, 367; see BVerfGE 11, 89 [98 seq.], BVerfGE 11, 6 [17]). These prerequisites for the recognition of natural federal competence continue to apply today. Conclusions from the nature of the matter must conform to this term and compel a certain solution that excludes a solution appropriate to other possibilities (BVerfGE 11, 89 [99]).

This is not the case here.

c) Frequencies do not respect state boundaries. To this extent, the broadcasting of programs displays effects that may be termed "supra-regional". This physical "supra-regionalness" is, however, not capable of establishing natural federal responsibility.

The broadcasting of programs, particularly television programs, requires substantial financial investment. For this reason, the first television channel is, as currently broadcast, predominantly a cooperative channel, to which all broadcasting companies contribute. The high costs required for producing full television programming would exceed the financial possibilities of individual companies. One may therefore speak of a financially conditioned "supra-regionalness" in the broadcasting of television programs. However, the exceeding of regional financial resources cannot justify the assumption that in accordance with the nature of the matter, the Federation has responsibility (cf Köttgen, Die Kulturpflege und der Bund, in: Staats- und Verwaltungswissenschaftliche Beiträge, 1957 p. 183 [191]).

It is also not possible to derive natural federal jurisdiction from the fact that a function (e.g, the broadcasting of television programming) is not performed by each state (the particular broadcasting company) separately but rather by the states (the broadcasting companies) jointly or pursuant to specific agreement. The fact that the joint or coordinated fulfilment of a function by the states (the broadcasting companies) is, regardless of what the motives might be for cooperative work, in and of itself no reason that could justify natural federal jurisdiction. For a federal State, it is a decisive difference whether the states agree or whether the Federation can regulate and administer by law an affair even against the will of the states.

d) The necessity of national representation within the country, i.e. the self-depiction of the nation before the population of the Federal Republic of Germany, is just as unable to give rise to natural federal competence to broadcast programs as the requirement of safeguarding continuity of tradition.

It is certainly necessary that these matters be supported by the State. However, it is also unmistakeable that with these, functions are designated that are unable to be defined more specifically. There are many institutions and presentations of a cultural nature that are intended to serve national representation within the country. Above all, the entire educational system can be understood as the safeguarding of continuity of tradition.

With regard to the furtherance of these functions by way of broadcast programs, controlling is the delineation of the jurisdictions of the Federation and the states by the Basic Law. From the nature of the matter, the Federation would only have jurisdiction to broadcast such programs when these involved affairs of the Federation that from the outset are removed from the jurisdiction of the states and that can thus only be handled by it. This is not the case here. It does not necessarily follow from the nature of the function of "national representation within the country" and "safeguarding continuity of tradition" that the support of these by broadcast programs of the Federation is compelled (cf. BVerfGE 11, 89 [98 seq.]). This is all the more so in that the Federation's exercise of influence on the content of programs, without which their "national representative" and tradition supporting character would be difficult to achieve, would be subject to narrow boundaries by Article 5 Basic Law.

e) Article 135.4 Basic Law, which, in the event of an "overriding interest of the Federation", permits a divergence from the passage of property regulated in Article 135.1-3 of the Basic Law (cf. BVerfGE 10, 20 [36 seq.]), cannot be used to support the position of the Federal Government. Article 135.4 Basic Law contains a "special competence" that can be used by the Federation in establishing direct federal administration without its being bound by the requirements of Article 87.3 sentence 1 of the Basic Law (legislative competences of the Federation) (BVerfGE 10, 20 [45]). This provision is intended to enable the Federation to restore the "organical frame work of collections and libraries of national importance which have been torn apart during war times." (BVerfGE 10, 20 [47]). For instance, only on the basis of the competence granted it under Article 135.4 of the Basic Law was the Federal legislature also able to transfer to the "Prussian Cultural Holdings" Foundation (Act of 25 July 1957, BGBl. I, p. 841) the future administration of Prussian cultural holdings (BVerfGE 10, 20 [45 seq.]). Article 135.4 is a special provision. This rule would be superfluous if the Federation were endowed under other provisions of the Basic Law with the authority to assume responsibility for national representation and the maintenance of tradition.

The founding of the Deutschland-Fernsehen-GmbH thus falls under Article 30 Basic Law. The Basic Law has, within the meaning of this provision, neither prescribed nor permitted "otherwise" in favour of the Federation so as to enable this. Thus, the founding of the Deutschland-Fernsehen-GmbH violates Article 30 in conjunction with Articles 83 et seq. of the Basic Law.

II.

In the German Federal State, all constitutional relations between the overall State and its component parts, as well as the constitutional relations between the component parts, are dominated by the unwritten constitutional principle of the reciprocal duty on the Federation and the states to act for the benefit of the Federation (cf. Smend, Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat, Festgabe für Otto Mayer, 1916, pp. 247 et seq.). The Federal Constitutional Court has developed from this a number of specific legal duties. With regard to its deliberations on the constitutionality of the so-called horizontal equalization of financial burdens, the Court said: "The essence of the federalist principle does not merely establish rights but also duties. One of these duties is that the financially powerful states are, to a certain extent,

to provide assistance to the financially weaker states" (BVerfGE 1, 117 [131]). In cases in which the law calls for cooperation between the Federation and the states, this constitutional principle may also establish a stronger duty on the participants to take part and result in the situation where an immaterial objection by one of the participants that conflicts with universal cooperation is legally irrelevant (BVerfGE 1, 299 [315 seq.]). In making decisions with regard to the granting of Christmas bonuses to public employees, the states must maintain federal allegiance and therefore pay regard to the overall financial structure of the Federation and the states (BVerfGE 3, 52 [57]). This legal barrier following from the concept of federal allegiance becomes even more apparent in the exercising of legislative powers: "If the effects of a statutory rule do not remain limited to the territory of a state, the state legislature must pay regard to the interests of the Federation and the remaining states" (BVerfGE 4, 115 [140]). The constitutional principle of the duty to act for the benefit of the Federation can also give rise to the duty on the states to respect international treaties of the Federation (BVerfGE 6, 309 [328, 361 seq.]). Finally, under certain circumstances, a state may be obligated with respect to its duty of federal allegiance to take action pursuant to municipal supervision against communities that interfere with their measures with exclusive federal competence (BVerfGE 8, 122 [138 et seq.]). Similarly, with regard to the exercise of federal competences in the area of broadcasting, fundamental significance is, as explained above (cf. supra I 4 d and D II 7 b), attributed to the principle of action for the benefit of the Federation.

It is evident from previous holdings that this principle both gives rise to additional, specific duties on the states as against the Federation that go beyond those expressly set forth in the Constitution and additional duties on the Federation as against the states and results in specific limitations on the exercise of powers provided in the Basic Law to the Federation and the states.

The instant case provides an invitation to develop further the constitutional principle of action for the benefit of the Federation in yet another direction: The procedure and style of the negotiations that become necessary under the Constitution between the Federation and its components parts or between the states also are subject to the requirement of action for the benefit of the Federation. In the Federal Republic of Germany, all states have the same constitutional status; they are States that are entitled to equal treatment in transactions with the Federation. Whenever the Federation seeks a constitutionally relevant agreement on an issue under the Constitution that interests and affects all states, this duty of action for the benefit of the Federation prohibits it from operating according to the principle of divide et impera, i.e., to work toward a division of the states, to seek an agreement only with some of them and put pressure on others to accede to it. This principle also prohibits the Federal Government from treating state governments differently in negotiations affecting all states depending on their political composition; in particular, in the politically decisive deliberations, it may not invite only representatives of the state governments with similar political convictions and exclude the state governments siding with the opposition on the federal level. In cases such as these, politicians at the federal and state level belonging to any given party initially have the right in political meetings to clarify and coordinate with one another their positions regarding the solution of the problem of interest to the Federation and the states and then to agree during negotiations between the Federation and the states on further, joint steps. The necessary negotiations between the Federation and the states, i.e. between the governments and their speakers, must also, however, conform with the above-described principles.

The protracted efforts to agree on a new regulation of the broadcasting system entered a new stage when at the start of 1958 the Federal Government proposed federal regulation. After the draft of a federal act had been repeatedly discussed during 1959 with representative of the states, the states agreed in January 1960 to set up a four-member Commission, to be composed of two Christian-Democrat and two Social-Democrat members of state governments; it was to take up the negotiations with the Federation on the part of the state governments. However, this Commission was never invited by the Federal Government to take part in the negotiations. Only one of its members, the Minister-President of the Rhineland-Palatinate belong to the Christian-Democrat Union, took part in a number of discussions - not in this capacity but rather as member of his party - between politicians and representatives of the Christian-Democrat and Christian-Socialist Union, which also included members of the Federal Government (cf. the letter of the Minister-President of the Rhineland-Palatinate to Federal Minister Dr. Schröder of 17 November 1960). Insofar as the participants in these discussions came to pertinent agreements, he took it upon himself to inform this Commission and the remaining state governments. Proposals and plans were developed and formulated during these meetings, but they were not made the subject of negotiations by the Federal Government with the state governments or with the Commission set up by them. This particularly applies to the idea, first proposed in one of these talks on 8 July 1960, to establish a corporation with limited liability, to be founded by the Federation and the states for the broadcast of a second television channel, as well as - likewise discussed in a meeting of 15 July 1960 attended solely by politicians of the Christian-Democrat and Christian-Socialist Union - to the draft of articles of incorporation, which were to be signed on 25 July 1960. The fact that the state governments headed by Social-Democrat Minister-Presidents were informed of these plans by the Minister-President of the Rhineland-Palatinate by way of letter of 16 July 1960 and invited by him to a meeting with the other Minister-Presidents to discuss these plans on 22 July 1960 did not relieve the Federal Government of its obligation to negotiate directly with all state governments on the plan proposed by it. Its failure to do so violated the duty to act for the benefit of the Federation.

However, also the way in which the states were treated by the Federal Government in the last days before the founding of the Corporation by the Federal Government is incompatible with this duty. The Federal Government knew that the Minister-Presidents of the states first received on 22 July 1960 the opportunity to discuss in their official capacity the plan to establish a corporation composed by the Federation and the states to broadcast a second television channel. The Minister-Presidents, including those belonging to the Christian-Democrat and Christian-Socialist Union, did not accept the Federal Government's proposal without reservation but rather made counter-proposals. The Federal Government was informed of the results of these meetings by way of letter of 22 July 1960. Nevertheless, the Federal Government insisted that the articles of incorporation be signed on 25 July 1960 in the form it had provided. The Federal Government's letter bears the date 23 July 1960, was posted in Bonn on 24 July 1960 at 5:00 p.m. and received by the addressee, the Minister-President of the Rhineland-Palatinate, on 25 July 1960 at 4:15 p.m., i.e., at a time when the articles of incorporation had already been signed and notarized (cf. the letter of the Minister-President of the Rhineland-Palatinate of 17 November 1960). Such a procedure is simply incompatible with the requirement of action for the benefit of the Federation - even though the Federal Government may have had reason to be annoyed at the persistent opposition of the states or several state governments. It is irrelevant here whether the Federal Government considered the negotiations with the states to

have failed and whether it was able to pursue the, in its view, constitutionally permissible course of founding the Corporation without the participation of the states; rather, the point is that each state government, as the constitutional organ of a component State of the Federal Republic of Germany, was able to expect the Federal Government would not respond to the states' counter-proposals, which can be considered a new plan, with a fait accompli - and this within an unreasonably short period.

Finally, the duty to act for the benefit of the Federation is contravened by the way in which the Corporation was founded. Again, it is irrelevant whether the Federal Government was able to implement the plan to found the Corporation, which in its view was constitutionally unobjectionable. One may conceive of situations in which the Federation founds a corporation in the interest of the states, whose shareholders include, in addition to the Federation, a "trustee" for the states. However, when it is clear, as here, that the states are unwilling to participate in the corporation with limited liability as planned by the Federation, then the Federation violates the requirement of action for the benefit of the Federation when it selects a "trustee" for the states and, with his assistance, founds a corporation that the states reject.

The Federal Government's conduct climaxes in the act of foundation that called the Corporation into life. The unconstitutionality of the procedure attaches so grievously to the act of foundation because for this reason as well the situation created by it cannot become the starting point of a constitutionally permissible activity corresponding to the Corporation's charter. In this sense, the founding of the Corporation violates the constitutional requirement of action for the benefit of the Federation.

III.

It may be left aside whether and to what extent a state - with respect to the principle of action for the benefit of the Federation - also has a claim as against the Federation that the latter not disregard the mutual constitutional order in such a way as to violate the interests of the states as component States of the federal State. In any event, the substance of Article 5 Basic Law - which has yet to be described - and the constitutional guarantee of freedom of broadcasting contained therein are of such fundamental importance for the entire public, political and constitutional life in the states that they may demand that in the area of the broadcasting system, the Federation not infringe upon the freedom guaranteed by the Basic Law. This constitutional position of the component State in the federal State may be defended by the state against the Federation in a constitutional dispute pursuant to Article 93.1 no. 3 of the Basic Law and ss. 68 et seq. of the Federal Constitutional Court Act. For this reason, it may also be asserted in this dispute that by founding the Corporation, the Federation has violated Article 5 of the Basic Law.

Article 5 Basic Law contains more than just the citizen's basic individual right against the State that it respect a sphere of freedom within which he may express his opinion without restraint. In particular, by way of Article 5.1 sentence 2 of the Basic Law, the institutional autonomy of the press is also guaranteed, from the procurement of information to the dissemination of news and opinion (BVerfGE 10, 118 [121]). It would conflict with this constitutional guarantee if the State were either directly or indirectly to regulate or control the press or some part of it. The exercising of influence by the State would only be compatible with

this constitutional guarantee of freedom of the press if this were not to alter substantially the concept of a free press on account of the competition with the wealth of newspapers and magazines independent of the State.

The significance of Article 5 of the Basic Law for broadcasting cannot be assessed without taking into account the above-described substance of Article 5. Irrespective of a special status of the broadcasting system, which shall be treated in the following, broadcasting is, as the press, one of the indispensible means of modern mass communication, by way of which influence is exercised on public opinion and helps shape this public opinion. Broadcasting is more than just a "medium" for the formation of public opinion; it is an imposing "factor" in the formation of public opinion. This participation in the formation of public opinion is by no means limited to news programs, political commentary, or series on political problems of the present, past or future; the formation of opinion takes place to the same extent in dramas, musical presentations, and broadcasts of comedy programs, up to and including the way in which a presentation is staged. Through the selection and structuring of the programs, every broadcaster's programming will exhibit a certain trend, particularly as regards the decision on what is not to be broadcast, what will not be of interest to the viewer or listener, what can be ignored without damage to the formation of public opinion, and how that which is broadcast is to be formed and spoken. It becomes clear from such a perspective that institutional freedom for broadcasting is no less important than for the press, in that broadcasting is also an indispensible means of modern mass communication and factor of public formation of opinion at least as important as the press. This is clearly expressed in Article 5 of the Basic Law, where in para. 1, sentence 2, "freedom of reporting by means of broadcasts and film" are guaranteed alongside freedom of the press.

This does not however answer the question as to the way in which this freedom of broadcasting in general and that of reporting by broadcasting in particular are to be ensured so as to satisfy Article 5 of the Basic Law. It is here that broadcasting's special status become important, through which it differs from the press. It is of course incorrect that newspaper publishers, newspaper printers and newspapers can be founded and operated in any given number. However, the difference between the press and broadcasting is that within the German press as a whole, there exist a relatively large number of independent publications that compete with one another in their direction, political bias or basic religious stance, whereas in the area of broadcasting, both technical reasons and the extremely large financial investment required for broadcasting programs means that the number of such broadcasters must remain relatively small. This special situation in the area of the broadcasting system calls for special precautions in order to realize and maintain the freedom of broadcasting guaranteed by Article 5 of the Basic Law. One of the means serving this purpose is the principle on which the existing broadcasting companies have been built: for the broadcasting of programs, the law creates a juridical person of public law that is removed from State influence or at most subject to limited State supervision; their collegial organs are de facto composed of a reasonable mix of representatives from all important political, religious and societal groups; they have the power to control the forces responsible for programming structure and to correct them in such a way as to satisfy the principles set forth in the law for the reasonable, proportional inclusion of all parties with an interest in broadcasting. It does not conflict with Article 5 of the Basic Law when an institution subject to such requirements is provided under present technical conditions with a monopoly for the broadcasting of programs on the state level; but Article 5 of the Basic Law does not imply the necessity that such a monopoly be established for an institution within the state.

In order to ensure the freedom in the area of broadcasting, Article 5 of the Basic Law does not, however, call for the form found in the state broadcasting laws and adopted for the broadcasting companies under federal law. In particular, the Federal Constitution does not require that broadcasters of programs may only be public corporations. Private companies can also be operators of broadcasts of this nature when their form of organization offers adequate assurance that all socially relevant forces have their say in a manner similar to that in public corporations and that freedom of reporting remains uninfringed. The Constitution does not prohibit such a company when, for example, the law makes available a special form of incorporation ensuring the specific purposes of broadcasting, particularly its institutional freedom, and subjects to State supervision every corporation broadcasting programs that satisfies the requirements, similar to banking or insurance supervision.

Article 5 of the Basic Law at least requires that this modern instrument for the formation of public opinion is not put at the mercy of the State or one particular social group. Broadcasters of programs must thus be organized in such a way that all conceivable groups are able to have influence in their organs and have their say in overall programming and that for the contents of overall programming, guiding principles are binding that guarantee of minimum of substantive balance, objectivity and mutual respect. This can only be ensured when this organizational and substantive principles are generally made binding by law. Article 5 of the Basic Law therefore calls for the enactment of such laws.

It may not be inferred from Article 5 of the Basic Law that broadcasters necessarily be the owners of transmission facilities or endowed with control over them and, as broadcasters, necessarily have the right to operate these facilities. Article 5 of the Basic Law also does not prevent representatives from the State from being accorded a reasonable share in the organs of the "neutralized" broadcaster. On the other hand, Article 5 of the Basic Law precludes the State from directly or indirectly dominating a public or private company that broadcasts programs.

The Deutschland-Fernsehen-GmbH founded by notarized contract of 25 July 1960, whose purpose is "to broadcast television programs designed to provide broadcasting recipients in all of Germany and abroad with a comprehensive picture of Germany", was originally composed of the Federal Republic of Germany and Federal Minister Schäffer as shareholders; since the resignation of the shareholder Schäffer, who had provided his capital "on behalf of the states of the Federal Republic of Germany", the sole shareholder is the Federal Republic of Germany. The Corporation is thus completely in the hands of the State. It is an instrument of the Federation and is dominated by the Federal Government and the Federal Chancellor by virtue of their constitutional competences. This determination cannot be countered by the reference to the contents of the articles of incorporation and the Corporation's charter, which only forms a component part of the articles. Even if one were to assume that the Corporation's organs, particularly the Supervisory Council and the Director, work relatively independently and that the principles for programming established in the charter presently take into account the requirements of Article 5 of the Basic Law - the institutional freedom of broadcasting, the decisive fact remains that the law and charter of the Corporation fail to offer any assurance that the present form of the Corporation will not be changed. Just as the charter was amended with the resignation of the shareholder Schäffer, it can also be further amended at any time. The "meeting of the shareholders" can adopt any amendment and can ultimately even decide to

dissolve the Corporation and reorganize it with new organs (including associated personnel changes). It is an elementary difference whether the above-stipulated organizational precautions and substantive principles designed to maintain freedom of broadcasting are contained in a law or in articles of incorporation.

The founding and existence of the Deutschland-Fernsehen-GmbH therefore violate Article 5 of the Basic Law.

bb) Translation of the Sixth Broadcasting Decision - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 83, 238*

Headnotes:

1. a) Article 5.1 sentence 2 of the Basic Law (Grundgesetz - GG) requires that the state guarantees the basic service to be provided by public broadcasting under a dual broadcasting system.

   b) The limits to the guarantee of the existence and future development of public broadcasting that this implies follow from the function that the latter must fulfil in connection with the process of communication protected under Article 5.1 of the Basic Law.

   c) The guarantee of the existence and future development of public broadcasting also extends to new services using new technology that may in the future assume the functions of conventional broadcasting.

2. a) Under a dual broadcasting system, the legislature is not constitutionally bound to maintain strict separation of public and private broadcasters. No obligation to adhere to a "consistent model" can be inferred from the Basic Law.

   b) To the extent that the legislature opens the way to the possibility of a cooperative broadcasting undertaking or other form of joint responsibility for programming, it must ensure that the ability of public broadcasting to fulfil its mandate to provide basic service remains undiminished. This presupposes in particular that programming content can be identified and attributed to the responsible source.

   c) The legislature itself must make the decision as regards the choice of a broadcasting model. It may not leave this decision to broadcasters. This is where the legally permissible possibilities for cooperation between public and private broadcasters find their limits.

   d) The publication of printed matter with content that is primarily related to programming is covered by broadcasting freedom if such publication activities can be attributed to the sphere of activity of broadcasting as a marginal flanking activity.

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

3. a) Under a dual broadcasting system, the Basic Law permits, but does not require, lower standards for private broadcasting than for public broadcasting in terms of the breadth of programming and the guarantee of balanced diversity.

   b) Diversity of opinion is an objective criterion for selecting private broadcasters for approval. In this context, the legislature was within its rights to take into account the involvement of editorial employees in the selection of and responsibility for programming (s. 7.2 sentence 3 of the Broadcasting Act for the Land of North Rhine-Westphalia (Rundfunkgesetz für das Land Nordrhein-Westfalen - LRG NW)).

   c) The legislature must provide adequate criteria for the allocation of transmission capacity between public and private broadcasting.

4. a) There can be no objection on constitutional grounds to the goals underlying the North Rhine-Westphalian "two-column model" for local broadcasting. The model is in principle suitable for ensuring broadcasting freedom at the local level.

   b) When the internal organization of private broadcasting is pluralistic in nature, the legislature must determine which social forces and groups may become involved in broadcasting. There can be no objection on constitutional grounds to a statutory catalogue of socially relevant groups as long as the selection is objective in the sense of guaranteeing balanced diversity.

   c) The involvement of municipalities in the cooperative broadcasting undertaking and the operational entity responsible for local broadcasting in North Rhine-Westphalia is not in violation of the freedom of broadcasting from governmental control.

5. a) The supervisory bodies that oversee broadcasting are not intended to represent organized interests or opinions, but to ensure diversity of opinion in the area of broadcasting.

   b) The legislature has considerable operating latitude as regards the composition of these supervisory bodies. Article 5.1 sentence 2 of the Basic Law requires only that the composition of the supervisory bodies be suitable for maintaining broadcasting freedom.

Judgment of the First Senate of 5 February 1991 based on the oral hearing of 30 October 1990 - 1 BvL 1/85 and 1/88 - ...

Facts:

The matter submitted for abstract judicial review related to provisions of the Act on "West German Broadcasting Cologne" (Gesetz über den "Westdeutscher Rundfunk Köln") (WDR-G) in the version promulgated in the year 1985 and the North Rhine-Westphalian Land Broadcasting Act (Landesrundfunkgesetz - LRG) of 1988, which regulates private broadcasting at the Land and local levels. On the one hand, the dual broadcasting system that was also introduced in North Rhine-Westphalia by this legislation ensured WDR a relatively strong competitive position; on the other hand, the requirements imposed upon private broadcasters as regards diversity and programming were similar to those imposed upon public broadcasters. With what is referred to as its "two-column model," the legislature chose a unique construct for local broadcasting that

was intended to ensure the existential viability of the local press on the one hand and prevent dual journalistic monopolies over both broadcasting and the press on the other hand. This construct consists of a press-related operational entity with municipal participation on the commercial and technical end and a combined broadcasting undertaking controlled by representatives of the public and organizations for the journalistic end that may broadcast locally only under cooperation agreements. The composition of the Broadcasting Board (Rundfunkrat) of WDR was fundamentally changed; in particular, the number of representatives of groups from society at large was increased at the expense of representatives of governmental institutions. In addition, representatives of the areas of culture and social affairs were seated on the Broadcasting Board with voting rights. The same model was adopted for the composition of the Broadcasting Commission (Rundfunkkommission) of the Land Authority for Broadcasting (Landesanstalt für Rundfunk - LfR), the umbrella institution for private broadcasting in North Rhine-Westphalia.

The Federal Constitutional Court ruled that the challenged laws were essentially compatible with the Basic Law.

Extract from the Grounds:

B.

The challenged provisions of the Act on "West German Broadcasting Cologne" and the Land Broadcasting Act are essentially compatible with the Basic Law, albeit only a few of them if construed in conformity with the Basic Law. Only s. 3.1 of the Land Broadcasting Act is in violation of Article 5.1 sentence 2 of the Basic Law.

I.

As the Federal Constitutional Court has elaborated in its established case law, broadcasting freedom under Article 5.1 sentence 2 of the Basic Law is an instrumental freedom. It serves to permit free formation of personal and public opinion, and to be sure in a comprehensive sense that is not restricted to mere reporting or mediation of political opinions. Free formation of opinion takes place through a process of communication. It presupposes freedom to express and disseminate opinions on the one hand and freedom to take cognizance of opinions and acquire information on the other hand. By guaranteeing the freedoms to express opinions, disseminate opinions and acquire information as fundamental rights, Article 5.1 of the Basic Law at the same time seeks to afford this process of communication constitutional protection (see BVerfGE 57, 295 [319-320]). Broadcasting is a "medium and a factor" in the process through which the formation of opinion takes place, which process enjoys constitutional protection (see BVerfGE 12, 205 [260]). In view of its salient importance for communication, free formation of opinion is possible only to the extent that broadcasting itself is also free to provide comprehensive and truthful information. Given the state of modern forms of mass communication, protection of the mediatory function of broadcasting as a fundamental right is therefore an indispensable prerequisite for achievement of the legislative objective of Article 5.1 of the Basic Law.

An understanding of Article 5.1 sentence 2 of the Basic Law that is limited to prevention of governmental influence and otherwise leaves broadcasting to the forces of society would not do justice to the instrumental character of broadcasting freedom. The fundamental right to broadcasting freedom does to be sure also, and primarily, provide protection against the state. In

addition, however, express regulation is required to ensure that broadcasting, like the state, is not delivered into the hands of individual groups within society, but rather takes up on and propagates the variety of issues and opinions that play a role in society as a whole. To this end, material, organizational and procedural regulation is necessary that is aligned with the function of broadcasting freedom and suitable for achieving what Article 5.1 of the Basic Law as a whole is intended to guarantee (see BVerfGE 57, 295 [320]). The decision as to the form this regulation takes in detail is the affair of the legislature. The Basic Law neither prescribes a specific model nor does it compel consistent implementation of a model that is chosen. Indeed, as far as the Basic Law is concerned, only the guarantee of free and comprehensive reporting is what counts.

If the legislature decides in favour of a dual broadcasting system in which both public and private providers co-exist, it must as a result ensure that the balanced diversity in reporting required by the Basic Law is in the end achieved by the overall offering of all providers. Under a dual system, the Basic Law also does not allow for releasing private broadcasters from this requirement due to the fact that the public broadcasters are obliged to provide balanced coverage. For, in view of the balanced coverage required of public broadcasters, any restriction or one-sidedness on the part of the private sector would result in a lack of balance in the overall offering and thereby defeat the purpose of Article 5.1 of the Basic Law (see BVerfGE 57, 295 [324]).

The legislature may not, however, make approval of private broadcasting, to which there can be no objection on constitutional grounds, contingent upon conditions that would significantly inhibit, if not preclude, private broadcasting (see BVerfGE 73, 118 [157]). In this context, the legislature may also take into account the implications as regards programming selection that result from the fact that private broadcasting is financed by advertising and make it difficult for private broadcasters to comply with the requirements of Article 5.1 sentence 2 of the Basic Law to the same extent as the public broadcasters, which are financed primarily through fees. a) This difference justifies application of standards for private broadcasting that are not as high as those for public broadcasting in terms of breadth of programming and the guarantee of balanced diversity. Concessions of this nature are, however, acceptable and constitute no lasting threat to the purpose of the provision contained in Article 5.1 sentence 2 of the Basic Law only as long as and insofar as it is effectively ensured that the public is provided with the requisite basic service by public broadcasting without any compromises (see BVerfGE 73, 118 [157 et seq.]).

In this context, the term "basic service" stands neither for the minimum service which public broadcasting is obligated to provide or could be obligated to provide without implications for the requirements to be met by private broadcasters, nor does it draw a line between or divide responsibilities between public and private broadcasters, for example, to the effect that the former are responsible for informational and educational programming content and the latter for entertainment offerings. In fact, it is necessary to ensure that public broadcasters offer programs for the entire public that provide comprehensive information covering the full spectrum of responsibility of conventional broadcasting and that this program offering provides diversity of opinion in a manner consistent with the Basic Law (see BVerfGE 74, 297 [325-326]).

If the legislature decides in favour of a dual broadcasting system, it must therefore in view of the still limited reach, variety of programming and scope of private broadcasting ensure that the public is provided with basic service by guaranteeing the availability of the necessary technical,

organizational, personnel and financial conditions for public broadcasting (see BVerfGE 73, 118 [158]). It would be incompatible with this duty to restrict public broadcasting to its current level of development in terms of programming, funding and technology. Indeed, given present conditions, the duty to provide basic service under a dual system can be fulfilled if not only the existence of public broadcasting in its present state is secured, but also its future development (BVerfGE 74, 297 [350-351]).

II.

The provisions of the West German Broadcasting Act on the guarantee of the existence and future development of WDR (s. 3.3 and 3.7 to 3.9 in conjunction with s. 33.2 and s. 47 of the West German Broadcasting Act) are compatible with the Basic Law. If construed restrictively, s. 6.2 of the Land Broadcasting Act is also compatible with the Basic Law.

1. a) There can be no reservations on constitutional grounds to the required narrow interpretation of the general clause contained in s. 3.3 sentence 1 of the West German Broadcasting Act.

   The question as to whether the legislative power to regulate broadcasting freedom also includes the right to allow WDR to engage in economic activities of all kinds can remain open. For the law does not provide for any such authority. Indeed, the provision forms the statutory basis for a general guarantee of the existence and future development of WDR that is given substance and concretely described in other provisions of the Act. There can be no reservations on constitutional grounds to such a guarantee as has in the meantime also been proclaimed in the preamble to the interstate agreement on the reform of broadcasting (Interstate Broadcasting Agreement [Rundfunkstaatsvertrag]) of 1/3 April 1987. To the contrary, it is constitutionally required under the dual broadcasting system as long as private providers do not completely assume responsibility for conventional broadcasting that is grounded in Article 5.1 sentence 2 of the Basic Law (see BVerfGE 73, 118 [155 et seq.]). Under this condition, which the petitioners also do not dispute, public broadcasters are charged with providing the public with basic service, which is to be understood to mean comprehensive service. The guarantee of the existence and future development of public broadcastings means nothing other than ensuring those conditions that make it possible to provide the public with basic service.

   In view of the rapid progress being made in the area of broadcasting, in particular in the area of technology, a guarantee based on the status quo would not suffice to ensure fulfilment of the responsibility to provide basic service. The guarantee can therefore not be limited to the conventional technology involved in terrestrial transmission. If other forms of transmission appear or replace terrestrial transmission, the use of such new forms of transmission will also be covered by the guarantee of basic service. The same applies to the programming offered by public broadcasters, which must remain open to new interests on the part of the public or new formats and content. The term "basic service" is open and dynamic as regards content and time and relates exclusively to the function that broadcasting is intended to fulfil in connection with the process of communication protected by Article 5.1 of the Basic Law. The limits to the guarantee

of the existence and future development as regards the provision of basic service therefore follow exclusively from the function of broadcasting. In any case insofar as the statutory guarantee of the existence and future development of public broadcasting is based on its responsibility within the dual system, it is grounded in the Basic Law.

The regulation under challenge operates within this framework. The general clause contained in s. 3.3 sentence 1 of the West German Broadcasting Act stipulates that the possible activities of WDR mentioned therein are allowed only "in the exercise of its responsibilities." They are therefore prerequisite to and limit the guarantee of the existence and future development.

The responsibilities that WDR must fulfil are also defined in the Act with sufficient clarity and precision. The definition of responsibilities contained in s. 3.3 of the West German Broadcasting Act refers initially to s. 3.1 of the West German Broadcasting Act. That provision charges WDR with responsibility for broadcasting within the meaning of the conventional formal definition of broadcasting under legislation governing fees. However, this responsibility is then provided with substantive content in s. 4 and ss. 5.4 and 5.5 of the West German Broadcasting Act. s. 4.1 sentence 1 of the West German Broadcasting Act provides the decisive standard here. It contains those normative prescriptions that summarize and define the responsibility for programming and which WDR must therefore respect when taking any measure or making any decision.

Accordingly, WDR produces and transmits broadcasts as both a medium and a factor in the process of free formation of opinion and in the interest of the general public. With this formulation, which is borrowed from the case law of the Federal Constitutional Court, the legislature has emphasized the special conditions that apply to broadcasting freedom as a freedom that serves to form opinion. As a result, it is made clear at the legislative level that the exercise of broadcasting freedom must always serve to guarantee free and comprehensive formation of opinion. It assumes a position of responsibility toward the general public. This leaves room for a public provider's own interests, including such as serve to secure the existence and future development of the provider, only if such interests seem to be committed in trust for the benefit of the general public and can for that reason be justified.

The duty to serve the interests of the general public is also expressed in the provision contained in s. 4.1 sentence 2 of the West German Broadcasting Act that assigns responsibility for fulfilment of the guarantee to the significant political, intellectual social forces and groups in the transmission area. At the same time, however, it also ensures that the actual exercise of responsibility for broadcasting remains in the hands of the broadcaster and is not transferred to the relevant forces and groups within society. In fact, the purpose of oversight by society is precisely the opposite, i.e., to empower independent broadcasting to discharge its duties responsibly in the interest of free formation of opinion.

This duty is defined more concretely in s. 4.2 of the West German Broadcasting Act. The responsibility of WDR for providing informational content is emphasized in this context: its broadcasts must provide a comprehensive overview of international and

national affairs in all significant areas of life. Programming is, however, not limited to this, but must in addition to information also provide education and entertainment. It must offer programs devoted to culture, art and useful advice. Finally, WDR must pursuant to s. 4.3 of the West German Broadcasting Act take into account the regional structure and cultural diversity of the transmission area. Withdrawal from certain programming areas by WDR or neglect or preferential treatment of specific areas, for example, with an eye to increasing revenues or competition with private broadcasters, would therefore be incompatible with this provision.

This broadly defined responsibility for programming is expanded to include diversity of content and opinion by s. 5.4 and s. 5.5 of the West German Broadcasting Act. These formulations on the other hand, which are based on pronouncements of the Federal Constitutional Court, are intended to ensure that broadcasting does not distort the process of formation of opinion through programming that is one-sided or neglects the interests of minorities.

Taken as a whole, the provisions of ss. 4 and 5.4 and 5.5 of the West German Broadcasting Act reflect the requirements that public broadcasting must satisfy under the Basic Law as regards basic service within the context of a dual system. These provisions establish the functional obligations imposed upon WDR in connection with the exercise of its powers under s. 3.3 of the West German Broadcasting Act. The guarantee of the existence and future development contained in s. 3.3 of the West German Broadcasting Act is thus coupled with and legitimized and limited by the responsibility for providing basic service. This counteracts the danger that, the petitioners assert, WDR could on the basis of s. 3.3 of the West German Broadcasting Act evolve into a large, quasi-private corporation that would basically pursue exclusively economic goals, thereby undermining the dual broadcasting system.

b) There can also be no reservations on constitutional grounds as regards s. 3.3 sentence 2 of the West German Broadcasting Act, which stipulates in particular that WDR may offer new services using new technology.

…

2. The possibilities for cooperation with third parties that the legislature has afforded WDR in s. 3.8 in conjunction with s. 47 and s. 3.9 together with s. 47 of the West German Broadcasting Act and in s. 6.2 of the Broadcasting Act are also compatible with the Basic Law.

…

c) There can be no reservations on constitutional grounds as regards the required restrictive construction of the provision contained in s. 6.2 of the Land Broadcasting Act. Article 5.1 sentence 2 of the Basic Law also does not prevent the legislature from making provision for mixed forms that combine public and private broadcasting. The legislature's regulatory powers are not restricted to choosing between different broadcasting models. It may in fact also combine them or include individual elements of one model in another as long as it respects the requirements of the freedom of formation of opinion.

It is not possible to infer otherwise from the Fifth Broadcasting Decision of the Federal Constitutional Court (BVerfGE 74, 297). Cooperation such as that permitted by s. 6.2 of the Land Broadcasting Act was not at issue in that decision. To the contrary, the Federal Constitutional Court affirmed that the Baden-Württemberg legislature could pursue a policy based on essential separation of public and private broadcasting and was therefore not required by the Basic Law to make provision for extensive possibilities for cooperation between the two sectors within the dual system (see BVerfGE 74, 297 [349]).

It is not, however, possible to draw the opposite conclusion to the effect that cooperation between the two sectors is unconstitutional. In fact, the legislature also enjoys operating latitude in this regard.

WDR's interest in private cooperative broadcasting undertakings does not deliver broadcasting into the hands of the state since WDR itself must be organizationally independent of the state and also does not relinquish this form of organization through involvement in a cooperative broadcasting undertaking. The one-sided influence of a specific segment of society is also not to be feared from this involvement since WDR's internal structure is pluralistic and it also cannot discard this structure through involvement in a cooperative undertaking.

The possibility of involvement in cooperative undertakings allowed by s. 6.2 of the Land Broadcasting Act also does not subject private broadcasting to conditions that make its situation significantly more difficult or its existence impossible. The creation of a cooperative broadcasting undertaking consisting of public and private members requires voluntary agreement by both sides. There is no legal compulsion to enter into such an agreement. Nor is it possible to discern any factual circumstances that would constitute such compulsion. In particular, commencement of transmission by a private cooperative broadcasting undertaking is not dependent upon the involvement of public broadcasting. Indeed, private broadcasters whose cooperative undertaking WDR may become involved in must also be economically and organizationally in a position to be able to provide broadcasting that meets accepted journalistic standards without WDR (s. 5.1 of the Land Broadcasting Act). There was obviously never any thought of private broadcasters that can meet the conditions for approval only by partnering with a public broadcaster.

S. 6.2 of the Land Broadcasting Act assigns WDR a minority role in ongoing collaboration. This further reinforces the provision contained in s. 6.1 sentence 2 of the Land Broadcasting Act, which prohibits dominant influence of any one party over programming. The general rule of s. 47.2 of the West German Broadcasting Act, which obligates WDR to secure the necessary influence over management in the case of interests in other enterprises, is superseded in the case of private cooperative broadcasting undertakings by the special provision contained in s. 6.2 of the Land Broadcasting Act. In view of these safeguards, any possible advantage that WDR does in fact retain will not be such that it can stifle private broadcasting.

The legislature adequately counteracted the danger that WDR could escape its obligation to provide the public with basic service through cooperation with private broadcasting undertakings in s. 6.2 of the Land Broadcasting Act through reference to the applicable provisions of law that apply to WDR. However, compliance of public broadcasting with its statutory obligations can be ensured and verified only if the programming of the two sectors is kept separate such that programming can be attributed to one of the two broadcasters. Such separation is therefore required on constitutional grounds, precisely as in the case of s. 3.9 of the West German Broadcasting Act, when use is made of the possibility provided for in s. 6.2 of the Land Broadcasting Act.

The possibility afforded by s. 6.2 of the Land Broadcasting Act does not, however, go so far as to allow public broadcasters and private cooperative broadcasting undertakings to agree to a transition from a dual model to a cooperative model that would make it possible to distinguish between the two but would involve broadcasting exclusively in the form of joint programming. The decision as to the choice of broadcasting model represents a matter that is of fundamental importance as regards the exercise of fundamental rights that the legislature may not relinquish and leave to an agreement among broadcasters (see BVerfGE 57, 295 [324]).

This is where the possibility for cooperation under s. 6.2 of the Land Broadcasting Act finds its limits.

…

III.

The requirements that the Land Broadcasting Act lays down for the approval and operation of private broadcasting undertakings in its ss. 11 and 12.3 as well as in s. 7.2 sentence 3 are compatible with the Basic Law. On the other hand, regulation of assignment of frequencies pursuant to s. 3 of the Land Broadcasting Act is in violation of Article 5.1 sentence 2 of the Basic Law.

1. There can be no objection on constitutional grounds to the programming requirements for private broadcasting in ss. 11 and 12.3 of the Land Broadcasting Act. The right to broadcasting freedom granted under Article 5.1 sentence 2 of the Basic Law does not entitle holders of that right to make use of it as they see fit. As an instrumental freedom, the right is guaranteed not primarily in the interest of broadcasting, but rather in the interest of free formation of opinion by individuals and the public. The legislature therefore has a duty to structure the broadcasting system in such a manner as to achieve this end. As regards the legal aspect of programming, it follows from this that both diversity of content and diversity of opinion must be appropriately reflected in overall programming. This requirement to be met by overall programming applies independently of whether the legislature decides in favour of a public or a private broadcasting system.

It is also not possible to infer otherwise from the "consistent model" principle invoked by the petitioners. The Basic Law prescribes no models for the broadcasting system, but only a purpose: freedom of broadcasting. The broadcasting system must be able to fulfil its responsibility to serve free formation of opinion by individuals and the public. This responsibility exists

independent of any model. Any organizational form that takes this into account is compatible with the Basic Law. The operating latitude of the legislature is not limited to the choice of a model and subsequent commitment to a consistent model. The legislature may in fact choose any combination of models as long as it does not lose sight of the purpose of Article 5.1 of the Basic Law. Accordingly, the Federal Constitutional Court left no doubt but that pluralistic internal structures may also be prescribed for private broadcasters (see BVerfGE 57, 295 [325]; 73, 118 [171]).

The purpose may, however, be achieved in different ways under the various systems. Under a dual broadcasting system in which public and private broadcasters compete with one another, it would appear constitutionally permissible not to impose standards as regards the breadth of programming and the guarantee of balanced diversity upon private broadcasting that are as high as those imposed for public broadcasting as long as and to the extent it is effectively ensured that the responsibility for broadcasting is in any case fulfilled by the latter without any compromises. Even then, a lack of balance may be accepted only if not serious (see BVerfGE 73, 118 [158-159]).

These principles do not, however, make it possible to conclude that the legislature must lower the requirements imposed upon private broadcasters in terms of diversity of content and opinion. In particular, it is not possible to infer from the Lower Saxony judgment that private broadcasters may be held only to a "basic standard" in terms of balanced diversity. Indeed, according to that judgment, such a basic standard suffices only for the purposes of ongoing oversight of private broadcasters, but not for initial approval (see BVerfGE 73, 118 [158-159]).

In fact, in view of the requirement of balanced diversity that applies to the public broadcasting sector without restriction, relaxation of the standard on the side of private broadcasters may result in distortion of the balance of programming as a whole, which given the legislative goal of Article 5.1 of the Basic Law would seem to be acceptable only within narrow limits. The constitutional grounds for this, but also the limits, are found in the principle to the effect that the legislature may not impose requirements on the private broadcasting sector that would make operation significantly more difficult, if not impossible (see BVerfGE 73, 118 [157]). The legislature has the freedom to establish programming requirements for private broadcasters as long it does not exceed these limits.

It cannot be ascertained that the North Rhine-Westphalian legislature has exceeded these limits. The programming requirements that the legislature imposes upon private broadcasters are to be sure more stringent that those of other German *Länder*, but not as stringent as those imposed upon WDR. In both s. 4 of the West German Broadcasting Act as well as in s. 11 of the Land Broadcasting Act, the legislature proceeds from the assumption that, regardless of its legal form and the nature of the providers, broadcasting is both a medium and a factor in the process of free formation of opinion and the affair of the general public (s. 4.1 sentence 1 of the West German Broadcasting Act and s. 11 sentence 1 of the Land Broadcasting Act). For WDR, this entails a responsibility to provide a comprehensive overview of international and national events in all areas of life, to inform, educate and entertain with its content and to offer programs devoted to culture, art and useful advice (s. 4.2 of the West German Broadcasting Act). Private cooperative broadcasting undertakings, on the other hand, must contribute to the availability of comprehensive information and free formation of opinion by individuals and the

public, serve to educate, advise and entertain and fulfil the responsibility of broadcasting in the area of culture only within the context of the respective programming category (s. 11 sentence 2 of the Land Broadcasting Act). In addition, WDR must also take into account the regional disparity and cultural diversity of the transmission area whereas private broadcasters are only obliged to present public affairs in North Rhine-Westphalia in the case of all full-service stations (s. 4.3 of the West German Broadcasting Act, s. 11 sentence 3 of the Land Broadcasting Act).

The same applies as regards the programming principles of s. 5 of the West German Broadcasting Act and s. 12 of the Land Broadcasting Act. Whereas WDR must reflect the diversity of prevailing opinion and intellectual, scientific and artistic trends with the greatest possible breadth and completeness, the corresponding obligation of private full-service stations is limited to ensuring diversity of opinion (s. 5.4 of the West German Broadcasting Act and s. 12.3 of the Land Broadcasting Act). WDR must ensure that the significant forces of society in the transmission area are heard; the Land Broadcasting Act expands this to include significant political, intellectual and social forces and groups (s. 5.4 no. 2 of the West German Broadcasting Act, s. 12.3 sentence 2 of the Land Broadcasting Act). Both types of broadcasters must devote appropriate time to the treatment of controversial issues of general importance (s. 5.4 sentence 2 WDR-G, s. 12.3 sentence 3 of the Land Broadcasting Act).

It cannot be ascertained that this imposes conditions on private broadcasters that make it significantly more difficult or even impossible for them to produce and disseminate broadcasts. Compliance with the requirements of ss. 11 and 12.3 of the Land Broadcasting Act does to be sure require that they to some extent forgo programs with mass appeal. Since advertising revenues are dependent upon audience ratings, it is not possible to exclude the possibility that this will reduce their earnings. The restrictions do not, however, go so far as to threaten to make private broadcasting totally unprofitable. The law allows broadcasters considerable freedom as regards the decision as to how to comply with program requirements. It prescribes neither a programming plan nor a breakdown of programming. In fact, broadcasters are free to allocate time to and schedule programs with mass appeal and other programs as they see fit. The law therefore only compels operators of full-service stations to forgo programming that consists entirely of entertainment or one-sided informational and educational programs. It is, however, up to them to calculate prices and costs so that the undertaking is still financially viable.

2. The provision regulating approval contained in s. 7.2 sentence 3 half-sentence 2 of the Land Broadcasting Act is not in violation of the Basic Law. The legislature had the right to choose from among several applicants on the basis of various criteria, including the degree of editorial involvement ("internal broadcasting freedom").

S. 7 of the Land Broadcasting Act contains the provision that governs the standards the Land Authority for Broadcasting must apply when making decisions as to approval in cases in which the number of applicants satisfying the conditions for approval exceeds available transmission capacity. According to constitutional case law, such decisions fall into the area of express regulation of broadcasting, for which the legislature is itself responsible. According to the principles elaborated in the Third Broadcasting Judgment, access to private broadcasting may neither be left to chance or free interaction of the forces at play nor entrusted to the unfettered discretion of the executive. It is possible to take into account the principle of equality through a system that permits allocation of broadcasting time and, if need be, proportionate reduction of

such time. If that does not suffice or the legislature opts for a system under which only licenses for full-service stations are issued to individual broadcasters, the legislature must establish criteria for selection that ensure that all applicants have the same chances of success. The degree to which these chances materialize must depend upon objectively relevant criteria that can be reasonably met by the individual applicants (see BVerfGE 57, 295 [327]).

The North Rhine-Westphalian regulatory process satisfies these requirements. This results, however, not solely from the fact that the law establishes no legal obligations for private broadcasters. Applicants are to be sure subject to no legal restrictions as regards their choice of activities and may independently decide whether and how they want their editors to take part in the programming process. The provision is, however, binding upon the Land Authority for Broadcasting as regards its selection decision and is in that respect thoroughly suitable for influencing the activities of private broadcasters. It must therefore withstand measurement against the standard of Article 5.1 sentence 2 of the Basic Law.

This standard is, however, adequately respected. The selection criterion "internal broadcasting freedom," which is the only thing that the applicants consider unconstitutional, is the last in a series of gradated criteria. It is applied only when it was not possible to reach a decision at one of the previous levels. In accordance with the selection principles established by the Federal Constitutional Court, the law is intended first of all to reach an agreement among applicants (s. 7.1 of the Land Broadcasting Act). Only if such agreement is not reached with the help of the Land Authority for Broadcasting does the provision establishing priorities contained in s. 7.2 of the Land Broadcasting Act take effect. In this context, diversity of opinion is the guiding aspect for the legislature: full-service stations take precedence over specialized programs (sentence 1); in the case of several applicants proposing full-service stations, that applicant is to be accorded priority approval that can be expected to provide programming with the greatest diversity of opinion (sentence 2). As indications of such diversity, the law makes mention of the programming schedule, the composition of the cooperative broadcasting undertaking and otherwise the organizational measures serving to provide diversity of opinion (sentence 3 half-sentence 1). Only in this context is the degree of editorial involvement also to be taken into account (sentence 3 half-sentence 2).

Diversity of opinion is an objective criterion for selection within the meaning of constitutional case law. Broadcasting freedom serves free and comprehensive formation of opinion. This can succeed only if plurality of opinion with the greatest possible depth and completeness in broadcasting, which is one of the most important sources of information and a significant factor in the formation of opinion, is taken into account. If the legislature makes a choice from among several applicants for a license on the basis of the degree of diversity of opinion that can be expected from their programming, this contributes to furtherance of the legislative goal of balanced diversity in private broadcasting as well as in public broadcasting.

The legislature also had the right to consider involvement of editorial staff in the selection of and responsibility for programming as a suitable means of securing compliance with the diversity requirements. By reason of the very intention of the legislature, such involvement neither serves to implement co-determination strategies or strategies intended to foster democracy, nor is it intended to increase the influence of any given group within society upon broadcasting programming. The petitioners fail to recognize this. The legislature decided, as it is may, in favour

of a pluralistic internal model for private broadcasting as well as for public broadcasting. This legislative concept, unlike in the case of the press, leaves no room for advocacy broadcasting. To the contrary, the provider must in principle give equal voice to all existing tendencies of importance in its programming. At the level of legal organization, this requirement is reflected in the fact that approval is issued only to cooperative broadcasting undertakings under s. 6.1 sentence 1 of the Land Broadcasting Act. Dominant influence on the part of any one member within a cooperative broadcasting undertaking must be excluded (s. 6.1 sentence 2 of the Land Broadcasting Act). According to s. 5.1 sentence 3 of the Land Broadcasting Act, cooperative broadcasting undertakings must be in a position to provide broadcasting that meets accepted principles of journalistic practice. s. 13 of the Land Broadcasting Act guarantees editorial staff the right to exercise their journalistic responsibilities independently under the overall responsibility of the broadcaster and their employment contracts.

Further involvement of editorial staff in the selection of and responsibility for programming is intended to strengthen the position of that professional group that is directly involved in fulfilling the responsibility of broadcasting in its capacity as a medium and a factor in the formation of opinion within the broadcasting undertaking, which is based on the division of labour. For that reason, editorial involvement is not a matter of ceding to outside influence, but rather a right to be consulted internally as regards the exercise of the function protected by Article 5.1 sentence 2 of the Basic Law. As such, this right is not afforded to editors in the interest of their professional self-fulfilment or to allow them to assert their subjective views, but rather so that they can fulfil their mediatory function.

Given this understanding, it is also not possible to raise the objection that the provision will in the end tend to threaten rather than be conducive to broadcasting freedom because of its inherent potential for extension. Editorial involvement remains subject to the diversity requirement. It may not therefore be allowed to assume a maximum dimension that would endanger broadcasting freedom, but rather only the optimal dimension conducive to such freedom. Co-determination that no longer served objective broadcasting freedom, but only the personal freedom of editorial staff could not be used to establish priorities as regards the decision of the Land Authority for Broadcasting and therefore also not improve an applicant's chances of receiving approval. For this reason, competition for a broadcasting license among several applicants also cannot be escalated indefinitely. In the case of an internally pluralistic private broadcasting model that does not give broadcasters the freedom to choose programming as they see fit, it is also reasonable to take into account such possibilities for co-determination as a criterion for selection as long as it serves to ensure diversity and not the self-interest of editorial staff.

The provision is also not lacking in respect for the principle of certainty as required under the rule of law because of its non-compulsory nature and the internal limits to the involvement of editors. It does to be sure leave applicants for a license uncertain as to the degree of editorial involvement that must be proposed in order to improve their chances of receiving approval. This results, however, from the competitive situation in which the applicants find themselves. This uncertainty must be accepted since an upper limit beyond which the involvement of editors can no longer serve the interest of balanced diversity can in any case be inferred from s. 7.2 sentence 3 of the Land Broadcasting Act.

3. The manner in which the allocation of transmission capacity is regulated by s. 3.1 sentence 1 of the Land Broadcasting Act is incompatible with the Basic Law. It is in violation of the requirement of freedom from governmental interference that follows from Article 5.1 sentence 2 of the Basic Law.

The Federal Constitutional Court has from the very beginning emphasized in its case law on broadcasting freedom that freedom of broadcasting within the meaning of Article 5.1 sentence 2 of the Basic Law refers primarily to freedom of reporting from governmental interference (see BVerfGE 12, 205 [262-263]). This requirement relates to the function of broadcasting as a medium and a factor in the formation of opinion. It must be possible to exercise this freedom without governmental influence. On the other hand, Article 5.1 sentence 2 of the Basic Law does not prevent the state from establishing the overall conditions for exercising this function. To the contrary, the Basic Law obligates the state to regulate and safeguard broadcasting freedom in an appropriate manner (see BVerfGE 57, 295 [320]).

This presupposes, among other things, regulation of the issuance of approval to broadcast and criteria for the selection of applicants from the private sector (see BVerfGE 57, 295 [326-327]; 73, 118 [153-154]). The legislature may, however, not allow the government to influence the choice, content and production of programs (see BVerfGE 73, 118 [182-183]).

The regulatory provision contained in s. 3.1 sentence 1 of the Land Broadcasting Act is in violation of these requirements.

The allocation of transmission capacity does not to be sure have any direct influence on programming. It does, however, determine the relative shares of total programming of public and private broadcasters. But broadcasting freedom not only protects against direct governmental influence on programming, but also counteracts indirect influence (see BVerfGE 73, 118 [183]). The danger of any such influence cannot be excluded on the basis of the provision contained in s. 3.1 sentence 1 of the Land Broadcasting Act. This danger results from the persistent shortage of transmission capacity. The Land government consequently does not have a large number of frequencies available when it makes decisions as regards the allocation of broadcasting capacity. As a rule, such decisions will involve the assignment of a single frequency that has become available. Under these circumstances, the Land government not only makes an abstract decision between public or private use of a frequency or channel, but at the same time makes a choice from among concrete applicants for a possibility to broadcast that has become available and the programming they propose. In actual fact, this will regularly involve a choice between additional WDR programming and private programming. When making such decisions, the Land government is bound only by s. 3.2 of the Land Broadcasting Act, which makes provision for the minimum transmission capacity to be allocated private broadcasters. The Land government otherwise enjoys free rein. This does not suffice to effectively exclude the danger of governmental influence on programming.

The requisite approval of the Main Committee of the Landtag cannot assuage these constitutional concerns. The principle of freedom of broadcasting from governmental interference that derives from Article 5.1 sentence 2 of the Basic Law relates not only to the executive branch, but also to the legislative (see BVerfGE 73, 118 [182]). The legislature is also one of the powers of government and is as such subject to public criticism and oversight. Since this, on

the other hand, is significantly dependent upon the freedom of the media, the parliament and its constituent bodies may not be allowed to have any influence over the programming of broadcasters. The question as to whether s. 3 of the Land Broadcasting Act is also in violation of the principle regarding the reservation of legislative powers is therefore no longer relevant.

The does not, however, mean that the Landtag may not operate in this area at all. The Land government or the Land Authority for Broadcasting would not be prohibited on constitutional grounds from establishing general criteria for making concrete decisions as to the allocation of transmission capacity that satisfy the requirements of the reservation of legislative powers, but would in fact be required to do so.

IV.

The North Rhine-Westphalian regulations governing local broadcasting (ss. 23 to 30 of the Land Broadcasting Act) are compatible with the Basic Law.

…

V.

The provisions governing the composition of the supervisory bodies of WDR and private broadcasters (s. 15 of the West German Broadcasting Act and s. 55 of the Land Broadcasting Act) are compatible with the Basic Law.

1. The composition of the supervisory bodies satisfies the requirements pursuant to Article 5.1 sentence 2 of the Basic Law.

The express regulation of the broadcasting system required of the legislature by Article 5.1 sentence 2 of the Basic Law also incorporates suitable organizational safeguards that in connection with the underlying regulatory model ensure that broadcasting is not delivered into the hands of any individual group or group within society and that the relevant forces of society are heard in the context of the overall offering (see BVerfGE 57, 295 [325]). The Federal Constitutional Court has from the very beginning proceeded in its case law on broadcasting on the basis of the assumption that the supervisory bodies of public broadcasters consisting of representative of the relevant groups within society constitute an organizational means of safeguarding freedom of broadcasting in compliance with the Basic Law (see BVerfGE 12, 205 [261 et seq.]). The same holds for the external supervisory bodies of private broadcasters, which are similarly constituted (see BVerfGE 73, 118 [171]).

However, the purpose of creating supervisory bodies consisting of representatives of the relevant groups within society, which primarily take the form of organizations, is not to delegate responsibility for programming to them and is certainly not to make them the holders of the fundamental right to broadcasting freedom (However, BVerfGE 31, 314 [337] - dissenting opinion).

In fact, the supervisory bodies consisting of representatives of society are custodians of the interests of the general public. Their role is to oversee the individuals and bodies responsible for programming in order to ensure that all major political and intellectual forces and groups within society are adequately heard within the context of overall programming, that programming does

not serve the interests of a single party or group, interest group, confession or intellectual persuasion and that reporting takes into account adequately and fairly the views of the various individual, groups or institutions involved (see BVerfGE 60, 53 [65-66]).

The responsibility of the supervisory bodies is therefore - regardless of the fact that most members by virtue of their positions represent specific interests - not to represent such interests and certainly not to declaim the interests of their respective organizations through the programming. Indeed, the involvement of organized interests serves only as a means of attracting custodians of the interests of the general public who are independent of governmental bodies and contribute experience from the various areas of society. The members of supervisory bodies are therefore not appointed to align programming with the particular views and goals of the organizations that delegate them for the purposes of promotion of the endeavors of the latter. To the contrary, the pluralistic composition of the supervisory bodies is intended precisely to counter the danger of one-sided influence and programming and ensure that diversity of views and activities in all areas of life is reflected in the programming (see BVerfGE op. cit., p. 66).

This function calls for objective selection and balance of the relevant forces in society to take into account in principle the existing diversity and safeguard the effective influence of the organizations that represents these forces (see BVerfGE 57, 295 [325]). Which of the forces in society are in particular relevant cannot be inferred from Article 5.1 sentence 2 of the Basic Law. It is therefore in principle the affair of the legislature to decide how the supervisory bodies are to be formed. The legislature enjoys broad latitude of operation in this regard. This includes the power to define the concrete criterion for social relevance, to determine which forces are to be considered on the basis of this criterion, to choose the groups to be assigned to these various forces and to select and evaluate those eligible to designate appointees. In this context, the regulatory content of Article 5.1 sentence 2 of the Basic Law requires only that the composition of the supervisory bodies selected by the legislature be suitable for upholding broadcasting freedom. Within these limits, the legislature's decision-making prerogatives are subject to no further restriction by broadcasting freedom.

The operational power of the legislature is not, however, limited only by the prohibition of arbitrariness pursuant to Article 3.1 of the Basic Law, as the Land government submits. By availing itself of the relevant forces in society to oversee broadcasting, the legislature accepts the conditions inherent in the representation of organized interests, which it cannot avoid by committing the members of the supervisory bodies to the interests of the general public. There is likely to be a conflict between the principle chosen to recruit such members and their official duties. The persons who are delegated to the supervisory bodies to represent their interest groups, but are expected to refrain from asserting any special interests within those bodies must make a difficult distinction between these two roles that the law can at best encourage, but cannot guarantee.

Since the law provides that members of the Broadcasting Board and the Broadcasting Committee (Rundfunkausschuss) are not bound by any instructions or duties, those members who want to make decisions independently of the interests they represent are in a position that is temporarily unassailable. This independence cannot, however, preclude voluntary advocacy of specific interests and certainly not assessment of the interests of the general public from a limited perspective. Since actions taken within broadcasting boards will under these circumstances regularly be at least partially dictated by special interests, a supervisory body that is grossly

one-sided will not be conducive to ensuring diversity of opinion in the area of broadcasting and therefore also not satisfy the requirements of Article 5.1 sentence 2 of the Basic Law. There can on the other hand be no objection to any over- or underrepresentation of comparable groups that does not cross the threshold to gross distortion.

The nature of representation of organized interests is also such that the interests of the general public will not be identical to the sum total of organized interests. In fact, interests exist that are not organized at all or could be organized only with difficulty. Organizational representation is for that reason always only an incomplete means of safeguarding the interests of the general public. If the legislature opts for supervision of broadcasting with the help of the relevant forces in society, it is then not compelled by Article 5.1 sentence 2 of the Basic Law to ignore less relevant forces or interests that defy organization. To the contrary, involvement of persons in such bodies who either represent no organized interests or precisely such whose influence is weak can counteract the restriction of diversity and orientation of supervisory bodies along party lines inherent in representation through organized interests.

S. 15 of the West German Broadcasting Act and s. 55 of the Land Broadcasting Act satisfy these requirements.

The North Rhine-Westphalian legislature has not implemented the principle of enlistment of members of the Broadcasting Board and the Broadcasting Committee from among representatives of relevant groups within society in an absolute manner. In fact, these occupy only the largest of a total of four benches ("organizational bench"). A series of members are chosen by the Landtag ("governmental bench"); others come from different cultural areas ("cultural bench"); and yet others are chosen to represent weakly organized groups, i.e., senior citizens, the disabled and foreigners ("citizens' bench"). The legislature specifically intends for this mixed principle to counter the dangers that lie in exclusive representation through organized interests. The establishment of a separate "cultural bench" is justified in the draft of the law on the basis of the similarity between the nature of the areas included and that of the purpose of broadcasting. Unlike the members of the "organizational bench," the members of the "cultural bench" do not become members of the Broadcasting Board in their capacity as representatives of groups or institutions, but because of their involvement in a specific area. Here too, however, groups or institutions have the right to designate them.

Omission of organizations of newspaper publishers, refugees and women is just as much not in violation of Article 5.1 sentence 2 of the Basic Law as the weighting of employee and employer organizations. There is no danger that this could deliver broadcasting into the hands of a single group within society. It is likewise not possible to ascertain any gross distortion in the spectrum of interests. This also applies as regards women's organizations. The legislature has to be sure not taken women's organizations into account, but does require that women be appropriately taken into account for the purposes of electing or delegating members of the supervisory bodies. More cannot be required as regards Article 5.1 sentence 2 of the Basic Law. Whether other forms of representation would achieve the goal of the legislature more effectively need not be decided by the Federal Constitutional Court.

2. There is also no violation of Article 3 of the Basic Law.

4. Article 5.3 - Freedom of Arts, Research and Teaching

a) Mephisto - BVerfGE 30, 173

Explanatory Annotation

In this decision the Court had to balance the freedom of the arts with personality rights of a deceased actor whom his son found unfavourably represented in a novel and who had successfully sought an injunction against the publication of the book. The author had depicted the ruthless adaption to the Nazi regime by the actor to further his acting career. The Court held that the freedom of the arts not only protects the artist himself but also the publisher as one necessary element in bringing the art to the people. The Court also made it clear that the fact that Article 5.3 does not contain any language for the justification of infringements of this right has consequences. Rather than resorting to the limitations spelled out in Article 5.2 for the free speech provision in Article 5.1 or the very broad limitations contained in the subsidiary fallback right contained in Article 2.1, the Court developed the concept of constitutionally inherent limitations of rights, which is to be applied to all rights in the Basic Law not containing specific language for the justification of limitations. Constitutionally inherent limitations arise from a conflict between the fundamental right in question, here Article 5.3, and other rights and interests protected by the Constitution. In this case the conflicting right was the personality rights of the deceased actor. The Court explained that the dignity core of personality rights as protected by Article 1.1 does not cease with the death of the person, whereas the personality rights protected in Article 2.1 only protect living persons. Hence, the freedom of the arts had to balance with the opposing dignity core of the deceased's personality rights.

From then on the Court had to specify its role in relation to the regular courts, which had granted the injunction on the basis of the Civil Code. The Court emphasized that it is not a court of appeal and that it cannot overturn decisions by other courts unless these other courts either did not take fundamental rights of the Basic Law into consideration or misconstrued them in a manifest manner. In this case the regular courts had dealt with the relevant fundamental rights considerations in detail. The balancing act of the regular courts in favour of the actor and against the publisher might have turned out differently at the Constitutional Court. But whereas a Court of Appeal can replace a lower court's decision when it feels that their own interpretation of the respective law is the "better" interpretation, the Constitutional Court can overturn decisions of the regular courts only if that interpretation of the respective law was a constitutionally "wrong". The distinction between 'better interpretation' of regular law and 'constitutional wrong' interpretation of regular law is a fine one and many observers have criticized the Constitutional Court for all too quickly and too often behaving like an appellate court thus interfering with the jurisdiction of the regular courts. This case, however, is rather an example of the Constitutional Court having been too reluctant as the non-publication of a book is a very grave matter.

Translation of the Mephisto Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 30, 173*

1. The guarantee in Art. 5 III, I is an objective value-laden basic norm regulating the relationship between art and the state. It also guarantees the individual freedom of the artist.

2. The freedom of art guaranteed covers not only the artistic creation as regards the work produced, but also the artwork's exhibition and dissemination.

3. A publisher of a novel may invoke the basic right of artistic freedom, too.

4. The freedom of art is not limited under Article 5.2 of the Basic Law. Nor is Article 2.1 half-sentence 2 of the Basic Law applicable here.

5. The resolution of the tension between the right to the artistic freedom and the protection of the personality must take account of the constitutional value system; thereby it is of special importance to take into consideration human dignity that is guaranteed in Article 1.1 of the Basic Law.

Judgment of the First Senate of 24 February 1971 - 1 BvR 435/68 -

Facts:

The complainant seeks constitutional review of the injunction obtained by the adopted son and sole heir of Gustaf Gründgens, actor and theatre director, against the printing, distribution, or publication of a book by Klaus Mann entitled Mephisto, a Novel, or How to Get on in the World.

The novel portrays the rise of Hendrik Höfgen, a talented actor who in order to make a career for himself as an artist in collusion with Nazi powers, is false to his true political leanings and rides roughshod over all human and ethical considerations. The psychological, intellectual, and sociological factors which made such a career possible are all laid out.

The model for Hendrik Höfgen was the actor Gustaf Gründgens, one of the Hamburger Kammerspieler in the 1920s, when he was a friend of Klaus Mann and briefly married to his sister Erika. Gründgens and his career are reflected in numerous characteristics of Hendrik Höfgen, including his physical appearance, the plays he acted in, and his appointments as State Councillor and Director-General of the State Theatre of Prussia.

In August 1963 the complainant announced the publication of Mephisto, and suit was brought by the adoptive son and sole heir of Gustaf Gründgens, who died in October 1963. The claim alleged that anyone at all familiar with German theatre in the 1920s and 1930s would link Höfgen with Gründgens; that in addition to many recognizable facts the novel contained many hurtful fictions which helped to give a false and highly derogatory picture of Gründgens's character. The novel was not a work of art but a roman-à-clef written to avenge Gründgens's marriage to Mann's sister Erika, which he believed dishonourable.

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* Translation by J. A. Weir; © Basil Markesinis.

Extracts from the Grounds:

III.

Article 5.3 sentence 1 of the Basic Law declares that along with science, research, and teaching, art is free. By its terms and intention the guarantee in Article 5.3 sentence 1 is an objective value-laden basic norm regulating the relationship between art and the state. It also guarantees the individual freedom of the artist.

1. The field of 'art' must be determined by the distinctive structural features of the artistic enterprise. The essence of artistic endeavour lies in the free creative process whereby the artist, in his chosen communicative medium, gives immediate perceptible form to what he has felt, learnt, or experienced. Artistic activity involves both the conscious and the unconscious, in a manner not rationally separable. Intuition, imagination, and knowledge of the art all play a part in artistic creation; it is not so much communication as expression, indeed the most immediate expression of the artist's individuality.

The freedom guaranteed covers the artistic creation as regards both the work produced and the effect produced by it. The two form an indissociable unity. The exhibition and dissemination of the work are as important as its creation for art as the specifically artistic enterprise; indeed, the 'area of effect', public access to the work of art, is the ground in which Article 5.3 of the Basic Law is rooted. A glance back at the artistic policy of the Nazi regime shows that to guarantee merely the individual rights of artists cannot ensure the freedom of art: the basic right would prove hollow unless it extends from the personal zone of the artist to the area of impact.

2. It is not here possible to give an exhaustive definition of the scope of the constitutional guarantee of freedom of art in all its various forms. Nor is it necessary for the case in hand, since it is common ground in the courts below, between the parties and probably all experts that the novel in question ranks as a work of art. We may therefore concentrate on factors relevant to the appraisal of an example of the narrative art which by dealing with actual events courts the risk of conflicting with the rights and interests of the persons portrayed.

In putting real events in a work of art the artist 'recreates' them for he sunders them from their actual context and places them in a novel setting dominated by his concern for striking presentation rather than by their own actuality. Artistic unity may, and sometimes must, prime the truth of the occurrence.

The role and purpose of Article 5.3 sentence 1 of the Basic Law is above all to give protection against encroachment by the public power on any specifically artistic undertakings, actions, and decisions. One cannot without inhibiting the free development of the creative artistic endeavour prescribe how the artist should react to reality or reproduce his reactions to it. The artist is the sole judge of the 'rightness' of his response. To this extent the guarantee of artistic freedom means that one must not seek to affect the manner in which the artist goes about his business, the material he selects, or the way in which he treats it, and certainly not seek to narrow the area in which he may operate or lay down general rules for the creative process. As to narrative works of art the constitutional guarantee means that the artist must be free to choose and treat his topic free from attempts by the state to limit the area of specifically artistic judgment by rules or binding value-judgments. This applies also, indeed especially, when the artist is dealing with actual events: 'committed art' is not excluded from the constitutional guarantee.

3. Article 5.3 sentence 1 of the Basic Law is a comprehensive guarantee of the freedom of artistic activity. Thus where intermediaries are needed in order to establish relations between the artist and the public they too are protected by the constitutional guarantee. As a product of the narrative art needs to be reproduced, distributed, and published in order to have any effect on the public, the publisher's function as intermediary is indispensable, so the constitutional guarantee extends to his activity as well. Thus, as publisher of the novel, the complainant may invoke the basic right contained in Article 5.3 sentence 1 of the Basic Law (see also BVerfGE 10, 118, [121]; 12, 205 [260] on the freedom of the Press).

4. Art having its special nature and rules, its guarantee by Article 5.3 sentence 1 of the Basic Law is absolute. The clear terms of that provision foredoom any attempt to limit it, whether by narrowing the idea of art in the light of one's value-judgments or by extending or invoking the limitations applicable to other constitutional provisions.

The Bundesgerichtshof was quite right to state that Article 5.2 of the Basic Law which limits basic rights under Article 5.1 is inapplicable here. The different guarantees in Article 5 of the Basic Law are systematically separated, and this shows that the limitations in Article 5.2 are inapplicable to matters covered by Article 5.3, since Article 5.3 is a lex specialis in relation to Article 5.1. Nor is it acceptable to sever parts of a narrative work of art, call them expressions of opinion under Article 5.1 and then apply to them the limitations laid down in Article 5.2. Nor do the travaux préparatoires of Article 5.3 support the view that the authors of the Constitution regarded freedom of art as a subspecies of freedom of expression or opinion.

…

Nor can one accept that the freedom of art is limited under Article 2.1 sentence 2 of the Basic Law by the rights of others, by the constitutional order or by the moral law. Such a view would be incompatible with the constant holding of this Court that Article 2.1 of the Basic Law is subsidiary and the individual freedoms special in a manner which bars the extension of the community priority of Article 2.1 sentence 2 of the Basic Law in the light of the use of Article 2.1 of the Basic Law. Nor are these limitations applicable to the area of effect of works of art.

5. Yet there are limits to this freedom. The freedom incorporated in Article 5.3 sentence 1 of the Basic Law, like all basic rights, is rooted in the Constitution's conception of man as a responsible person free to develop within society. The absolute nature of the guarantee of artistic freedom means that its limits are to be found only within the Constitution itself. The freedom of art is not subject to mere statute, it cannot be qualified by the general legal system or be at the mercy of any vague clause about essential interests of state and society which lacks constitutional basis and is uncontained by the rule of law. If the guarantee of artistic freedom gives rise to any conflict, it must be resolved by construction in terms of the order of values enshrined in the Basic Law and in line with the unitary system of values which underlies it. As part of this system of basic rights the freedom of art is coordinate with the dignity of man as guaranteed by Article 1 of the Basic Law, the supreme and controlling value of the whole system of basic rights (BVerfGE 6, 32 [41]; 27, 1 [6]). Given the effect which a work of art may have on the social plane, the guarantee of artistic freedom may come into conflict with the area of human personality, equally protected by the Constitution.

A person's claim to respect and value may be affected by an artist's use of details of character and career of actual people as in addition to being an aesthetic reality, such a work also has existence in the realm of social facts and the social effects are not dissipated by being artistically transmuted. Such social effects while taking place beside the artistic effects must nevertheless be appraised with regard to the scope of the guarantee of Article 5.3 sentence 1 of the Basic Law, since in the work of art the 'real' and 'aesthetic' worlds are unified.

6. The courts below were right in this connection to invoke Article 1.1 of the Basic Law in their appraisal of its protective effect on the area of personality of the late actor Gustaf Gründgens. It would be inconsistent with the constitutional mandate of the inviolability of human dignity, which underlies all basic rights, if a person could be belittled and denigrated after his death. Accordingly, an individual's death does not put an end to the state's duty under Article 1.1 of the Basic Law to protect him from assaults on his human dignity.

In addition, the Bundesgerichtshof and Oberlandesgericht held that Article 2.1 of the Basic Law also had radiant protective effects in private law for Gründgens, though to a degree diminished by his death. However, only a living person is so entitled: the right of personality cannot survive death. An essential precondition of the basic right under Article 2.1 of the Basic Law is the existence of at least a potential or a future person. It is irrelevant that a person may be affected during his lifetime by what the legal situation will be after his death, though this weighed with the Bundesgerichtshof. It is no derogation from the freedom of action and selfdetermination guaranteed by Article 2.1 of the Basic Law to hold that the protection of the personality expires on death.

7. The resolution of the tension between the protection of the personality and the right to the artistic freedom cannot turn solely on the 'social' effects of a work of art but must also take account of specifically aesthetic considerations. The conception of man which underlies Article 1.1 of the Basic Law is as much infused with the guarantee of freedom in Article 5.3 sentence 1 of the Basic Law as the latter is influenced by the value implicit in Article 1.1 of the Basic Law. The individual's claim to social respect and value is not superior to artistic freedom, but neither can art simply ignore the individual's claim to proper respect.

Only by weighing all the circumstances of the given case can one decide whether the publication of a work which artistically deploys true details about an actual person poses a serious threat of encroachment on the protected area of his personality. One consideration must be whether and how far the artistic treatment of the material and its incorporation into the work as an organic whole have made the 'copy' independent of the 'original' by rendering objective, symbolical, and figurative what was individualized, personal, and intimate. If such an aesthetic appraisal reveals that the artist has indeed produced, or even intended to produce, a 'portrait' of the 'original', the outcome will depend on the extent of the artistic alienation and how seriously the 'falsification' damages the reputation or memory of the subject.

IV.

This Court must therefore decide whether in balancing the protection afforded by Article 1.1 of the Basic Law to the personality of the late Gustaf Gründgens and his adopted son against the guarantee of artistic freedom under Article 5.3 sentence 1 of the Basic Law the courts

below have upheld the principles just stated. However, in this Court the opinions on that matter are equally divided, so it cannot hold that the decisions under attack infringed the Constitution (s. 15.2 sentence 4 of the Federal Constitutional Court Act).

…

3. This Court has always held that a Verfassungsbeschwerde empowers it to review judicial decisions only within narrow limits, and that in particular it cannot review the facts as found and evaluated, the construction of mere law or its application in the individual case, which are matters for the regular courts. These principles apply equally when review is sought of the balancing of the protection afforded to the parties to a civil suit by Article 1.1 of Article 5.3 sentence 1 of the Basic Law.

…

This Court is not, like a court of appeal, empowered to substitute its own opinion of the case for that of the proper judge. In cases like these it can only hold that the basic right of the losing party has been infringed if the judge has either failed to recognize that it is a case of balancing conflicting basic rights or has based his judgment on a fundamentally false view of the importance, and especially the scope, of either of those rights.

When the judgments under attack are so tested, it emerges that the Oberlandesgericht and the Bundesgerichtshof recognized that a balancing act was required in order to resolve the tension between the rights emanating from Article 1.1 of the Basic Law and Article 5.3 sentence 1 of the Basic Law, and that the judgments as a whole do not seem to be based on a fundamentally erroneous view of the importance or scope of the two basic rights.

…

b) Anachronistic Procession, BVerfGE 67, 213

Explanatory Annotation

Article 5.1 of the Basic Law protects the freedom of speech, press, movies and broadcasting and the freedom of information. Article 5.3 of the Basic Law protects the freedom of the arts and sciences and hence the freedom of artistic expression. The difference between the two provisions is the norm between them, Article 5.2 of the Basic Law. Article 5.2 contains language pertaining to possible limitations of the freedom of communications. It only applies to Article 5.1 and not to Article 5.3, which is one of the few guarantees for which the Basic Law does not contain specific limitation language. That does not mean that these rights are absolute rights. Instead, they belong to the group of fundamental rights, which can only be restricted in the defence of other constitutionally protected rights and interests.[80] What that means in detail is controversial but the prevailing view is that these "unconditional" rights should be harder to restrict than those rights of the Basic Law whose scope can be reduced under the limitation

80 So-called "constitutionally-immanent" restrictions.

language provided and that the "unconditional" rights should not in essence be subject to the same scope of limitations that are available in Article 2.1 or 5.2 of the Basic Law. The result is that it can be legally relevant whether something is qualified as regular communication or as art. However, it should be kept in mind that the Constitutional Court's approach since the famous *Lüth*-decision has been to emphasize the "constitutive significance" of free speech for a democratic society and to restrictively interpret the limitation language in Article 5.2 of the Basic law in the light of this constitutive significance. Whether the application of Article 5.3 really increases the level of protection in the light of the construction of Article 5.1 of the Basic Law is therefore highly unlikely.

In any case, the political street theatre, which formed the backdrop of this case, with links all the way back to Percy Bysshe Shelley's poem "The Masque of Anarchy written on the Occasion of the Massacre in Manchester" in 1819/1820 and a Berthold Brecht poem based on Shelley's work, took place as a protest against the - ultimately unsuccessful - candidature of the late Bavarian politician Franz-Josef Strauss for the chancellorship in 1980. Strauss was a polarizing figure in German politics and the protests were fierce. The Street Theatre depicted him in the context of Nazi symbols, potraying images of World War III, corruption and other unfavourable allegations. Strauss reacted by instituting criminal proceedings under the insult-provision of s. 185 of the German Criminal Code and the organizers were sentenced to fines.

The Constitutional Court did not agree with the regular courts. In its view the interpretation of individual elements of the street theatre as insulting was a wrong approach. Works of art must be looked at in their entirety and - in the context of evaluating any insulting content - must then be interpreted from various angles. The Constitutional Court concluded that this approach leaves open other ways of interpretation that are not altogether insulting.

Whereas this decision of 1984 came to the right conclusion it is lamentable that the Constitutional Court did not place the street theatre into the broader context of political controversy and political campaign. The Court's general approach has always been that the closer the incriminated speech is to the political discourse in the broadest sense, the more protected it is. Conversely, the more the incriminated speech is removed from this discourse and largely communicated to defame or injure a private individual, the less protection is warranted. In this case the issue was political campaigning and protest against a candidate for high office. Free speech must prevail and rather technical explanations of how certain artistic expressions can or cannot be understood are really beside the point.

Translation of the Anachronistic Procession Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 67, 213*

Headnote:

Judgment concerning the scope of the guarantee of artistic freedom (Article 5.3 sentence 1 of the Basic Law (Grundgesetz - GG)) for the purposes of assessment under criminal law of a political street theatre.

Order of the First Senate of 17 June 1984 - 1 BvR 816/82 -

Facts:

During the campaign for the 1980 Bundestag elections, political opponents of the CDU/CSU candidate for the chancellorship, Bavarian Minister-President Franz Josef Strauss, staged a political street theater in different cities and communities in the Federal Republic in the form of a procession consisting of vehicles and pedestrians. This street theater took its inspiration from a poem by Bertold Brecht: "The Anachronistic Procession or Freedom and Democracy;" one of the figures in the piece appeared wearing, among other things, a mask of Franz Josef Strauss in a wagon with various "Nazi big-shots."

After a criminal complaint was filed by the Bavarian Minister-President, the complainant, an actor in the street theater, was sentenced to a fine by the Local Court (Amtsgericht); the Local Court considered the very formation in preparation for the procession a defamation of the Bavarian Minister-President. The appeal on points of law to the Bavarian Higher Regional Court (Bayerisches Oberstes Landesgericht) was unsuccessful.

The Federal Constitutional Court reversed the criminal convictions in response to the constitutional complaint of the complainant.

Extract from the Grounds:

C.

The constitutional complaint is founded. The challenged decisions violate the fundamental right of the complainant under Article 5.3 sentence 1 of the Basic Law.

I.

The constitutional complaint is directed against criminal convictions, which are in principle not amenable to review by the Federal Constitutional Court for the purposes of the establishment of facts or the interpretation and application of criminal law. The Court must, however, ensure that the ordinary courts respect fundamental rights and apply the corresponding standards. In this regard, the limits to its possibilities for intervention depend in particular upon the severity of the alleged interference with fundamental rights: The threshold for a violation of objective constitutional law requiring correction by the Federal Constitutional Court is reached when a decision of the criminal courts reveals errors in the establishment of facts or interpretation that

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

are based on a fundamentally erroneous assessment of the importance of a fundamental right and in particular of the scope of its area of protection and which are also of a certain substantive importance in the concrete legal case (see BVerfGE 66, 116 [131] - Springer/Wallraff -; see also in connection with the guarantee of artistic freedom even earlier BVerfGE 30, 173 [188, 196-197]).

Furthermore, the more permanent the ultimate effect of a conviction on the sphere of the fundamental rights of the convicted party, the more stringent the requirements become that must be met in terms of justification of this encroachment and the more extensive the possibilities for review available to the Federal Constitutional Court (see BVerfGE 42, 143 [148-149] - DGB).

Conviction for a criminal offence is as a sanction itself already more severe than conviction for a civil offence, which may involve a cease and desist order, a retraction or payment of damages (BVerfGE 43, 130 [136] - political flier). In the case of a sanction under criminal law for an act that may fall under the guarantee of artistic freedom, there is also the danger that the negative effects as regards the exercise of this freedom, which is guaranteed without a reservation of legislative powers because of its especial importance, may extend beyond the concrete case. Given this situation, the Federal Constitutional Court cannot limit its review to the question as to whether the challenged decisions are based on a fundamentally erroneous assessment of the importance of Article 5.3 sentence 1 of the Basic Law and in particular the scope of its area of protection. Nor may individual errors of interpretation be disregarded (see BVerfGE 42, 163 [169]; 43, 130 [136-137]; 54, 129 [136]; 66, 116 [131]).

II.

The "Anachronistic Procession" event falls into the area protected by the fundamental right of artistic freedom (Article 5.3 sentence 1 of the Basic Law), against which the decisions under challenge must be measured as described below.

1. This guarantee of freedom contains first of all by virtue of its wording and meaning a basic objective standard that governs the relationship between the area of life subsumed under "art" and the state. At the same time, the provision guarantees everyone who is active in this area a right to personal freedom. It applies in equal measure to both the "creative phase" of artistic activity and the "effective phase" consisting of the presentation and dissemination of works of art, which is the phase that gives the public access to works of art (BVerfGE 30, 173 [188-189]).

This guarantee was included in the Basic Law under the impression of the grievous experiences that artists were compelled to tolerate under the rule of force imposed by the National Socialist regime. This is also of importance for the purposes of interpretation of Article 5.3 sentence 1 of the Basic Law: The guarantee of artistic freedom may not be restricted either by narrowing the definition of art by the application of quality standards or by an expansive interpretation or analogy on the basis of restrictions that apply to other provisions of the Basic Law (BVerfGE, loc. cit., [191]).

2. The area of life referred to as "art" must be defined in terms of the structural characteristics that are determined by the nature of art and unique to art alone. It is not possible to describe by a term that is equally valid for all forms of expression of artistic activity and for

all classes of artistic Endeavour how far this extends the scope of the guarantee of artistic freedom under the Basic Law and what it entails in detail (see BVerfGE op. cit. [183-184]).

a) One cannot infer an adequate definition from previous attempts undertaken in the area of the theory of art (including the reflections of practicing artists on their activities) to achieve clarity as to the nature of art so that it is not possible to proceed from an established definition of art in the extrajudicial area. The fact that there is a lack of any consensus as regards objective standards in the theory of art also has to do with a special characteristic of artistic life: the specific objective of the "avant-garde" is to expand the boundaries of art. This and widespread mistrust on the part of artists and art theoreticians of rigid forms and strict conventions are characteristics of the area of life referred to as art that must be respected and indicate in themselves that only a broad definition of art can lead to appropriate solutions.

b) The impossibility of defining art in general does not imply a release from the constitutional duty to protect the freedom of the area of life consisting of art, which is to say, to decide for the purposes of concrete legal application whether the prerequisites of Article 5.3 sentence 1 of the Basic Law are in place.

To the extent that formulas and criteria for delimitation have been developed in scholarly literature and case law for dealing in practice with laws that involve "art" as a constituent element, this does not suffice for interpretation of the constitutional guarantee since interpretation under ordinary law is oriented towards the various purposes of the provisions of law.

As far as can be determined, further-reaching attempts to arrive at a definition for the purposes of constitutional law concern only individual aspects; they can claim validity only for individual areas of artistic activity (see from the exhaustive literature, for example, Ropertz, Die Freiheit der Kunst nach dem Grundgesetz, Diss. Heidelberg 1963; Erbel, Inhalt und Auswirkungen der verfassungsrechtlichen Kunstfreiheitsgarantie, 1966; Knies, Schranken der Kunstfreiheit als verfassungsrechtliches Problem, 1967; von Noorden, The Freiheit der Kunst nach dem Grundgesetz [Article 5.3 sentence 1 of the Basic Law] und die Strafbarkeit der Verbreitung unzüchtiger Darstellungen [s. 184.1 no. 1 of the Criminal Code], Diss. Cologne 1969; Müller, Freiheit der Kunst als Problem der Grundrechtsdogmatik, 1969; Vogt, Die Freiheit der Kunst im Verfassungsrecht der Bundesrepublik Deutschland und der Schweiz, Diss. Zurich 1975; each of which with many further references).

Nevertheless, these efforts include viable aspects that in their entirety make it possible to decide in the concrete individual case whether the subject matter falls into the area protected by Article 5.3 sentence 1 of the Basic Law.

3. a) The Federal Constitutional Court has emphasized that "free creative expression" is essential for artistic activity, "in which the impressions, perceptions and experiences of the artist are manifested directly through the medium of a specific visual language." All artistic activity, the Court stated, consists of intertwined conscious and unconscious processes that defy rational resolution. The Court went on to add that intuition, fantasy and artistic understanding work together in the process of artistic creativity; it is not

primary communication, but expression, and to be sure the most direct expression of the unique personality of the artist (BVerfGE 30, 173 [189]). Similar attempts at substantive, value based description in the scholarly literature also emphasize the characteristics of creativity, expression of personal experience, visualization and communicative transmission of meaning (see Scholz in Maunz/Dürig/Herzog/ Scholz, GG, Article 5.3, marginal notes 24 and 29; Scheuner, Die Bundesrepublik als Kulturstaat, in Bitburger Gespräche, Jahrbuch 1977-1978, p. 113 [126]; Würtenberger, Vom strafrechtlichen Kunstbegriff, in Festschrift für Eduard Dreher, 1977, p. 79 [89]; Geiger, Zur Diskussion über die Freiheit der Kunst, in Festschrift für Gerhard Leibholz, 1966, p. 187 [191]).

The visual manifestation of the "Anachronistic Procession" satisfies the requirements so described. Creative elements can be seen not only in Brecht's poem, but also in the way it was visually transposed. The poem and its presentation can be considered sufficiently "formed." The intention is to express and make immediately visible general and personal historical experiences - against the backdrop of the current political situation.

b) Even if one sees the essence of a work of art in the fulfilment of the requirements of the genre of a specific type of work from a formal, typological perspective, that is, if one adopts as a basis a more formal definition of art that derives only from the activity and results of, for example, painting, sculpting or literature (see Müller, op. cit., in particular pp. 41-42; Knies, op. cit., p. 219), it is still not possible to deny the "Anachronistic Procession" the quality of a work of art. The poem that serves as the basis for performance is just as much a classic form of artistic expression as the rendition in the form of theatre staged by actors (with masks and properties) on the basis of a concrete script. The fact that the performance involved the specific form of "street theatre" also does not change this in any way; permanently installed stages do not enjoy priority over traveling theatre, a form of theatre with a long tradition.

c) Even if one considers the characteristic criterion for artistic expression to lie in the fact that it is possible due to the variety of its substantive content to repeatedly derive further-reaching meanings from the presentation through further interpretation such that a virtually inexhaustible transmission of information results (see von Noorden, op. cit., pp. 82 et seq., the "Anachronistic Procession") fulfils this criterion. The very special form of street theatre described above results in the creation of distance from viewers such that they are aware as they watch that a "play" is being performed. The thrust of the poem, which is already amenable to manifold interpretation, does to be sure more become more explicit when the poem is updated and makes reference to contemporary persons and events, but the statement it makes is nonetheless still ambiguous, especially since this statement is not composed directly, but rather indirectly of various elements (for example, thought provoking texts, puppets, persons in costume, groups of persons).

d) Since the performance of the "Anachronistic Procession" does therefore fall within the area of protection of Article 5.3 sentence 1 of the Basic Law, this is not changed by the superficial and clearly political motives of the producers. Binding rules and values

for artistic activity also cannot be imposed when artists deal with current events; the area of "committed art" is not excepted from the guarantee of freedom (BVerfGE 30, 173 [190-191]).

III.

1. Art is as regards its independence and its own laws guaranteed without reservation by Article 5.3 sentence 1 of the Basic Law; neither the "threefold bar" in the second half of the sentence contained in Article 2.1 of the Basic Law nor the constraints of Article 5.2 of the Basic Law apply directly or by analogy (BVerfGE 30, 173 [191-192]). On the other hand, the limits contained in other provisions of the Basic Law that serve to protect other significant legal interests embodied in the constitutional order under the Basic Law may also be directly imposed on artistic freedom. This applies in particular in the case of the right of personality, which is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law. However, artistic freedom in turn imposes limits on the right of personality. When defining these limits in a concrete case, it does therefore not suffice to establish through judicial proceedings the existence of an impairment of the right of personality - in the form of defamation in this case - without taking into account artistic freedom: it is necessary to establish whether this impairment is so serious as to require subordination of artistic freedom; a slight impairment or the mere possibility of a serious impairment do not suffice for this purpose in view of the considerable importance of artistic freedom. If of course a serious impairment of the right of personality can be established beyond a doubt, it cannot be justified on the grounds of artistic freedom.

2. The Local Court failed to recognize the resultant requirements under constitutional law:

a) Artistic statements are subject to and require interpretation; an overall view of the work constitutes an indispensable element of such interpretation. It is therefore not permissible to remove individual parts of a work of art from its context and subject them to independent examination for the purposes of establishing whether they are to be considered a criminal offence. Constitutional grounds for objection therefore exist if the Local Court assumes that the incriminating actions took place outside the actual performance and concludes from this that Article 5.3 sentence 1 of the Basic Law is not applicable. At the same time, even the purely practical necessity of making visible preparations (formation of the procession) or regrouping (event in Kassel) was not recognized. It is also necessary to take into account here that it is thoroughly possible for visible preparations to constitute part of the overall artistic concept in modern theatre.

Symbolic representation with the use of puppets and banners may to be sure also have a declaratory value outside the performance. However, the producers in fact avoided this by covering the procession when traveling across the country. The fact that the performance of the procession in Sonthofen could not begin immediately also does not in any way change this assessment. Neither the complainant nor the producers were responsible for this; this was caused by orders from regulatory authorities. They can also not be held responsible for the photographs taken by the police "as evidence." Photographs taken by journalists fall into the category of promotional advertising and are comparable to the preview photos that are commonly used in the case of permanently installed theatres.

Likewise, as follows from the above, it is inconsistent with constitutional law to want to establish a case of defamation not - as is required by Article 5.3 sentence 1 of the Basic Law - on the basis of an overall perspective, but exclusively on the basis of the plague wagon.

b) The Local Court also failed to recognize that such an overall perspective, which would have been appropriate, would have yielded several possible interpretations.

A definitive decision as to the standard to be applied when artistic statements are to be assessed under criminal law is not necessary here, especially since this is hardly possible either in general or for all art forms. A person who is completely unfamiliar with the forms in which art manifests itself can certainly not set the standards when it comes to understanding art; on the other hand, however, it is also not possible to take as a reference a person with a comprehensive education in art, in any case not if - as here - the manifestation is directed at a random audience on a public street. In this case, it suffices to ask how a passer-by who was prepared to take into account the entire procession and the performance of the poem as well could perceive the "plague wagon."

Even then it would be possible to think that the joint plaintiff is sitting in the same wagon as the Nazi big-shots, can be equated with them and that he supports their political goals. Taking into account the specific content of the poem, it would be just as possible to get the impression that the intention is to be sure to show a struggle against these Nazi big-shots that is, however, just as hypocritical and mendacious as the divorce from the Nazi past portrayed in the Brecht poem.

Another observer could come to the conclusion that the joint plaintiff is combating, albeit unsuccessfully, manifestations of National Socialism. A spectator who indirectly or directly puts the intentions of the script in the foreground of his thoughts would similarly see such a struggle, but accompanied by the additional thought that as an influential politician described as leaning to the right the joint plaintiff would especially require such distance and that the old National Socialist ideas were again prevailing.

It is not in any case proper to decide with the help of the figure of the "reflective passer-by" exclusively in favour of that of the possible interpretations suggested by the description of the facts in the judgment of the Local Court (further possibilities would by no means seem excluded) that is relevant under criminal law and to postulate only a casual, naive observer who ignores the "fight" with the puppets. This also constitutes a violation of Article 5.3 sentence 1 of the Basic Law.

3. The decisions under challenge are based on these errors. The possibility cannot be excluded that the courts would have decided otherwise in view of the requirements of constitutional law presented above. The decisions therefore had to be overruled; the matter was referred back to the Local Court. The court must respect the principles presented above in respect of the relationship between artistic freedom and the general right of personality in the new proceedings and decision.

VII. Article 6 of the Basic Law

Marriage, Family, and Children

1. Life Partnership, BVerfG, 17.7.2002, 1 BvF 1/01, http://www.bverfg.de/e/fs20020717_1bvf000101en.html (BVerfGE 105, 313)

Explanatory Annotation

The - often quite controversial - debate over the legal recognition of homosexual partnerships (same-sex unions, same-sex marriage or civil unions) has been raging in several countries for quite some time now. The United States Supreme Court famously ruled in 2015 that the various states must license the marriage between two people of the same-sex and recognize such marriages performed out-of-state.[81] In Ireland, the people spoke in favor of same-sex marriage in a referendum with a margin of over 60%,[82] leading to an amendment of the Irish Constitution allowing for the marriage of same-sex couples.[84] In Australia, the question was put to the people in a plebiscite conducted by the Australian Bureau of Statistics as a postal vote, again with more than 60% voting in favor.[84] Taiwan is the latest jurisdiction, and the first one in Asia, to provide for same-sex marriage by way of legislation[85], implementing a decision of its Constitutional Court from 2017[86] and overcoming significant opposition in society. Overall around 30 states and jurisdictions are now allowing for same-sex marriage, and more recognize same-sex partnerships as an institution distinct from marriage.[87] Same-sex relationship law and practice has been and continues to be an area where sweeping change has happened in comparatively short periods. At the same time, it is an area where the planet remains in stark division not only between continents. In essence, same-sex marriage has so far gained traction only in North- and in significant parts of South America, Western Europe, Australia, and New Zealand.[88] Conversely, all of Asia and Africa (with the notable exceptions of South Africa and Taiwan) and all of Eastern Europe have not amended their legal frameworks in this respect. Russia, for example, is looking at this issue more like a "culture war" than as a human rights issue and in 2013 passed legislation banning "propaganda for non-traditional sexual relationships".[89]

81 Obergefell v. Hodges, 135 S. Ct. 2584, available at https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (last accessed 1.9.2019).

82 See https://www.refcom.ie/previous-referendums/marriage-presidential-age/ and https://www.rte.ie/news/results/2015/referendum/ssm/ (last accessed 1.9.2019).

83 Thirty-fourth Amendment of the Constitution Act, 2015, http://www.irishstatutebook.ie/eli/2015/ca/34/enacted/en/print.html (last accessed 1.9.2019).

84 See https://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0 (last accessed 1.9.2019).

85 Act for Implementation of J.Y. Interpretation No. 748, 22.5.2019, http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748 (last accessed on 21.10.2019).

86 Judicial Yuan Interpretation No. 748, 24.5.2017, http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748.

87 Felter, Claire/Renwick, Danielle, Same Sex Marriage – Global Comparisons, Council on Foreign Relations, last updated 27 June 2019, https://www.cfr.org/backgrounder/same-sex-marriage-global-comparisons (last accessed on 21.10.2019.

88 Id., see Interactive Map "Expanding LGBT Rights and Protections".

89 Human Rights Watch, Russia: Anti-LGBT Law a Tool for Discrimination - An Anniversary Assessment, 29.6.2014, https://www.hrw.org/news/2014/06/29/russia-anti-lgbt-law-tool-discrimination (last accessed 1.9.2019).

Selected Fundamental Decisions of the Federal Constitutional Court

It is perhaps surprising that in Germany the same-sex marriage issue has so far not advanced to the Constitutional Court. It has remained in the realm of legislation. In June 2017 Parliament, passed the Act for the Introduction of the Right to Marriage for Persons of the Same-Sex, which came into effect on 1 October 2018.[90] This Act replaced the Act on Registered Life Partnerships which had created the opportunity for same-sex couples to enter into a civil union, which was largely but not entirely a kind of marriage under a different name.[91]

The Life Partnership Act was challenged before the Constitutional Court.[92] The constitutional backdrop to this legislation is Article 6.1 of the Basic Law, which affords to marriage and family the special protection of the law. The Constitutional Court made it quite clear that, whereas the Basic Law does not explain what a marriage is, it is inherently a union between a man and a woman. It is for this very reason that the Court had no difficulty fending off arguments that the same-sex civil union might infringe on the protection to be afforded to the traditional marriage. The traditional marriage was still open to anyone who wished to engage in this traditional instrument and homosexual couples were excluded from marriage. The Court construed traditional marriage and same-sex unions as mutually exclusive, making it impossible for a married person to engage in a parallel civil union and *vice-versa*. In essence, the Court followed a "separate-but-equal" doctrine concerning the two institutions. They were regarded as different institutions, to be treated differently, and mutually exclusive. It follows that same-sex couples cannot engage in "marriage" (*Ehe*) and that heterosexual couples cannot engage in a civil union. With regard to other partnerships of mutual support that do not have a sexual context, such as between siblings, the Court saw the distinguishing criterion in the fact that such partnerships are not exclusive; therefore, it did not constitute discrimination to bar such partnerships from the civil union.

The decision is relevant for another constitutional issue that arose in the context of the federal nature of the German state. When the legislation was passed it was evident that it would not gain a majority in the federal chamber of states, the *Bundesrat*. As a result, the legislation was split into two pieces, one dealing with the substance matter of the civil union and the other dealing with the procedural implementation, for example, the determination of the relevant *Länder* authorities for conducting the civil union. Only the latter invoked the necessity for the federal chamber, the *Bundesrat*, to assent to the legislation. The Court saw no fault in splitting up the legislation in this manner thereby reducing the scope of power of the *Länder* in the federal legislative process and preceding a trend of rebalancing the allocation of powers and finances between the *Länder* and the center that became a theme of the constitutional federalism reform amendments of the Basic Law in 2006 and 2009.[93]

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90 Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts, 20.7.2017, BGBl. I-2787, German text available via http://https://dejure.org/2017,26444 (last accessed 21.10.2019).

91 Act on Registered Life Partnerships, 16.2.2001, BGBl. I-266 last amended by Act of 18.12.2018, BGBl. I-2639, English text available at http://www.gesetze-im-internet.de/englisch_lpartg/index.html (last accessed 1.9.2019).

92 BVerfG, 17.7.2002, 1 BvF 1/01, http://www.bverfg.de/e/fs20020717_1bvf000101en.html (last accessed 1.9.2019).

93 For more background on these reforms see, for example, Benz, Arthur/Sonnicksen, Jared, Advancing Backwards: Why Institutional Reform of German Federalism Reinforced Joint Decision-Making, 48/1 Publius: The Journal of Federalism, 2018, 134 et seq., https://doi.org/10.1093/publius/pjx055; For a critical assessment of the first reform package of 2006 see Scharpf, Fritz, German Federalism: A Reform that Misses the Mark, Max Planck Research 2/2007, https://www.mpg.de/207429/federalism (last accessed 1.9.2019).

The new 2017 act providing for full marriage equality has not been challenged. The *Land* Bavaria considered such a challenge but decided not to proceed for lack of sufficient chances of success before the Constitutional Court. The argument run by opponents mainly centered around the question whether a statutory amendment was sufficient to introduce same-sex marriage or whether this would have required an amendment of Article 6 of the Basic Law with a redefinition of marriage. Article 6 simply uses the term marriage without any explanation or definition and demands that the institute of marriage be afforded protection. One can safely assume that the drafters of Article 6 did not even think of same-sex marriage when they wrote the Basic Law. Whereas the method of historical interpretation is part of the standard program of constitutional interpretation in Germany, what in the USA is referred to as "originalism" in constitutional interpretation[94] is not a persuasive tool. It is not the Constitutional Court's main task to determine what the dead wanted for the living. It is therefore quite conceivable that the Constitutional Court would look at the concept of marriage ("*Ehe*") and dynamically interpret this concept in the light of present-day conditions. But even if it did not want to do this: The protection of the traditional heterosexual marriage does not require the prohibition of same-sex marriage.

It should also be noted that the life-partnership and subsequent same-sex marriage legislation also had an impact on various other areas where marriage (and previously life partnerships) provide privileges that non-married (or previously partnered) did not enjoy. For example, the Court found it unconstitutional that a civil partner was denied the right to adopt the adopted child of the other civil partner (successive adoption) while it permitted the adoption of an adopted child of a spouse and the adoption of a biological child of a civil partner (stepchild adoption).[95] On taxation, the Court found unconstitutional that same-sex life partners did not enjoy the same level of thresholds for inheritance tax exemptions.[96] The Court lamented similar discrimination concerning survivors' pensions for civil service employees.[97]

Translation of "Life Partnership Act" Decision, BVerfG, 17.7.2002, 1 BvF 1/01, http://www.bverfg.de/e/fs20020717_1bvf000101en.html

Headnotes:

1. Where a statute has been passed and is to be corrected, which is admissible in exceptional cases, it is necessary for the statute to be plainly incorrect. The incorrectness may be shown not only by the text of the statute, but in particular also by taking into account its meaning in context and the parliamentary background materials of the statute.

94 For a recent comprehensive look at this controversy in the US see Solum, Lawrence B. Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113/6 Northwestern University Law Review 2019, pp 1243 et seq.

95 BVerfG, 19.22013, 1 BvL 1/11, http://www.bverfg.de/e/ls20130219_1bvl000111en.html (last accessed on 1.9.2019).

96 BVerfG, 21.7.2010, 1 BvR 611/07, http://www.bverfg.de/e/rs20100721_1bvr061107en.html (last accessed on 1.9.2019).

97 BVerfG, 7.7.2009, 1 BvR 1164/07, http://www.bverfg.de/e/rs20090707_1bvr116407en.html (last accessed on 1.9.2019).

2. If the Federal Government or the *Bundestag* (lower house of the German parliament) divides a subject-matter between a number of statutes in order to prevent the *Bundesrat* (upper house of the German parliament) from preventing provisions that in themselves are not subject to its consent, this is constitutionally unobjectionable.

3. The introduction of the legal institution of the registered civil partnership for same-sex couples does not infringe Article 6.1 of the Basic Law. The particular protection of marriage in Article 6.1 of the Basic Law does not prevent the legislature from providing rights and duties for the same-sex civil partnership that are equal or similar to those of marriage. The institution of marriage is not threatened by any risk from an institution that is directed at persons who cannot be married to each other.

4. It does not infringe Article 3.1 of the Basic Law that persons of different sex cohabiting with each other and groups of people related to each other and living together have no possibility of becoming registered civil partnerships.

Extract from Grounds:

A.

The applications for judicial review relate to the compatibility of the Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships of 16 February 2001 (Federal Law Gazette I p. 266; hereinafter: Civil Partnerships Act, LPartDisBG), which entered into force on 1 August 2001, with the Basic Law. **[1]**

I.

The aim of the Act is to reduce discrimination against same-sex couples and to give them the opportunity to give their partnerships a legal framework. For this purpose, the registered civil partnership has been created as a family-law institution for a long-term same-sex partnership, with a large number of legal consequences. **[2]**

1. In the year 2000, at least 47,000 same-sex couples were cohabiting in the Federal Republic of Germany (see Eggen, *Gleichgeschlechtliche Lebensgemeinschaften*, 2nd part, in: *Baden-Württemberg in Wort und Zahl* 12/2001, pp. 579 ff.). According to a study commissioned by the German Federal Ministry of Justice and carried out by Buba and Vaskovics in the year 2000, same-sex couples do not essentially differ from different-sex couples in their expectations of the partnership, its permanence, their mutual readiness to support each other and assumption of responsibility for each other. More than half of the interviewees living in same-sex partnerships expressed the desire to live in a legally binding partnership (Buba/Vaskovics, *Benachteiligung gleichgeschlechtlich orientierter Personen und Paare*, study commissioned by the German Federal Ministry of Justice, 2000, pp. 75 ff., 117 ff.). Same-sex couples are prohibited from marrying. **[3]**

2. The first parliamentary initiatives for legislation for homosexual partnerships in the Federal Republic of Germany date back to the 11th parliamentary term of the German *Bundestag* (the lower house of the German parliament; cf. the resolution proposal of the parliamentary party of the Green Party of 18 May 1990, *Bundestag* document, *Bundestagsdrucksache* - BTDrucks 11/7197). In 1994, in a resolution, the European Parliament called on the member states of the European

Union to avoid unequal treatment of persons of same-sex orientation in their individual legal and administrative provisions, and appealed to the Commission to grant homosexuals access to marriage or to corresponding legal institutions (cf. Official Journal of the European Communities C 61 of 28 February 1994, 40-41; *Bundestag* document 12/7069, p. 4). There now exist provisions on same-sex partnerships in several European countries (cf. the study of the *Max-Planck-Institut für ausländisches und internationales Privatrecht*, ed. von Basedow *et al. Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, 2000). They extend from partnerships in the Scandinavian countries that are treated as equal to marriage in their effects to the *pacte civil de solidarité* (PACS) in France with its possibility of the registration of same-sex and different-sex partnerships, which has fewer legal effects than marriage and can be dissolved more easily. In the Netherlands, same-sex couples may now be married. **[4]**

In July 2000, the parliamentary parties of the SPD (*Sozialdemokratische Partei Deutschlands*) and BÜNDNIS 90/DIE GRÜNEN introduced a bill for an Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships to the legislative procedure (*Bundestag* document 14/3751). The FDP (*Freie Demokratische Partei*) parliamentary party also tabled a bill (*Bundestag* document 14/1259). After the first readings of both bills, referral to the committee stage and the examination of expert witnesses, the Committee on Legal Affairs of the *Bundestag*, which had overall responsibility, on 8 November 2000 recommended that the FDP bill should be rejected and the bill of the governing parliamentary parties should be accepted, but in a version divided into two statutes: firstly, as the Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships with the provisions on registered civil partnerships and on the essential legal consequences associated with them (Civil Partnerships Act, LPartDisBG), and secondly as the Act to Supplement the Civil Partnerships Act and other Acts (*Gesetz zur Ergänzung des Lebenspartnerschaftsgesetzes und anderer Gesetze, Lebenspartnerschaftsgesetzergänzungsgesetz*, Civil Partnerships Act Supplementary Act, LPartGErgG) with in particular procedural-law implementing regulations (*Bundestag* document 14/4545 with annexes). The reason for this was the intention of the governing parliamentary parties to divide the original bill into a bill not requiring the approval of the *Bundesrat* (the upper house of the German parliament) and a bill requiring the approval of the *Bundesrat*. Consequently, the bill of the Civil Partnerships Act was not to name an authority responsible for registering the civil partnership (Committee document (*Ausschuss-Drucksache*) 14/508 [Committee on Family Affairs, Senior Citizens, Women and Youth (*Ausschuss für Familie, Senioren, Frauen und Jugend*)] and 14/944 [Committee on Labour and Social Affairs (*Ausschuss für Arbeit und Sozialordnung*)]). This was approved by the majorities in the consulting committees and was also expressed in the report of the Committee on Legal Affairs of 9 November 2000 (*Bundestag* document 14/4550). However, in the text attached to the resolution recommended by the Committee on Legal Affairs of the draft of a Civil Partnerships Act, not all the provisions had been amended in line with this. The Civil Partnerships Act was accepted by the *Bundestag* in this wording (Minutes of plenary proceedings (*Plenarprotokoll*) 14/131, p. 12629 D) and was passed by the *Bundesrat* unaltered; the *Bundesrat* did not make an application to the Mediation Committee (*Vermittlungsausschuss*) and did not establish that this statute was subject to approval (*Bundesrat*, Minutes of plenary proceedings, 757th session, p. 551 C, D). **[5]**

When the Federal Ministry of Justice pointed out two obvious errors, in its opinion, in subsections 3 and 4 of Article 1 § 3 of the Civil Partnerships Act, the Presidents of the *Bundestag* and the *Bundesrat* agreed to a correction of the provisions objected to as incorrect. The signing and

promulgation of the Act on 16 February 2001 (Federal Law Gazette I p. 266) then followed in the corrected version. The applications for an interim injunction against the entry into force of the Act, made by the *Land* governments of the *Land* (*Freistaat*) Bavaria and the *Land* (*Freistaat*) Saxony were unsuccessful before the Federal Constitutional Court (*Bundesverfassungsgericht*; cf. judgment of 18 July 2001 - 1 BvQ 23/01 and 1 BvQ 26/01 -, *Neue Juristische Wochenschrift* 2001, 2457). **[6]**

Now there are implementation regulations for the Civil Partnerships Act in all *Länder* (states), establishing jurisdiction in civil partnership matters and associated procedural rules. **[7]**

The Civil Partnerships Act Supplementary Act, on the other hand, was approved by the *Bundestag* but has not yet been approved by the *Bundesrat* (*Bundestag* document 14/4875). The Mediation Committee applied to by the *Bundestag* (*Bundestag* document 14/4878) has as yet made no resolution thereon. **[8]**

3. The Act challenged in the applications for judicial review governs the creation and dissolution of a registered civil partnership for same-sex couples. The civil partnership is created by a contract between two persons of the same sex; the statements necessary for this purpose must be made before the competent authority (Article 1 § 1.1). A further requirement for entering into a civil partnership is that both partners make a declaration as to their property status (Article 1 § 1.1 sentence 4). On the application of one or both partners, the civil partnership is terminated by a decree of annulment (Article 1 § 15). **[9]**

The partners are bound to each other in care and support and committed to plan their lives together. They are responsible for each other (Article 1 § 2). The statute does not require sexual intercourse. The legal consequences of the registered partnership are in part based on the legal consequences of marriage, but they also diverge from the latter. Thus, the partners owe each other support. This applies to a modified extent also to persons living apart and after the termination of the partnership (Article 1 §§ 5, 12 and 16). The partners must make a statement on their financial status; they may choose between a property regime of equalisation of surplus and a contract governing their financial relations (Article 1 §§ 6 und 7). They may choose a joint name (Article 1 § 3). The civil partner or former partner of a parent who has lived for a long period in a domestic community with the child has a right of access (Article 2 number 12, § 1685.2 of the German Civil Code). A partner is deemed to be a member of the other's family (Article 1 § 11). A right of intestate succession of the civil partner corresponding to that of the spouse has been introduced (Article 1 § 10). In social security law too, entering into the civil partnership has legal consequences (Article 3 §§ 52, 54 und 56). Thus, for example, in the statutory health insurance scheme civil partners are covered by the family insurance (Article 3 § 52 number 4). In the law concerning foreign nationals, the provisions relating to the right of entry of foreign families that apply to marital relationships are correspondingly extended to same-sex partnerships (Article 3 § 11). In addition the Civil Partnerships Act grants the partner of a parent with sole custody, with the consent of the latter, the authority to make joint decisions in matters of the child's everyday life, known as "limited custody" (Article 1 § 9). **[10]**

The statute challenged and the supplementary statute that has not yet come into existence provide no adjustment of old-age pension rights between the civil partners if their partnership is annulled, and no rules on pensions in case of death. Similarly, joint adoption of minors is excluded. The supplementary statute contains provisions on tax law and state welfare law, but the Civil Partnerships Act does not. **[11]**

B.

The applications are unfounded. The Civil Partnerships Act is compatible with the Basic Law. **[45]**

I.

The Civil Partnerships Act was passed in conformity with the Basic Law. It was not subject to the approval of the *Bundesrat*. **[46]**

1. The Act contains no provisions that require approval under Article 84.1 of the Basic Law. **[47]**

a) The requirement of approval in Article 84.1 of the Basic Law is intended to protect the Constitution's fundamental decision, with regard to the jurisdiction of the *Länder* in administrative matters, to protect the federal structure of the state and prevent alterations to the federal structure being introduced by way of legislation below the constitutional level bypassing the objections of the *Bundesrat* (cf. BVerfGE 37, 363, (379 ff.); 55, 274 (319); 75, 108 (150)). On the basis of this purpose of Article 84.1 of the Basic Law, a statute does not require approval merely because it affects the jurisdiction of the *Länder* to implement it by causing the *Länder* to act or cease to act administratively in a particular sphere. Instead, the requirement of approval by the *Bundesrat* follows from a provision of federal law establishing *Land* authorities or governing their procedure (cf. BVerfGE 75, 108 (150)). A provision establishing new *Land* authorities does not refer solely to a federal statute providing for new *Land* authorities, but also to a federal statute laying down the duties of a *Land* authority in detail. In contrast, the statute governs the procedure of the *Land* authorities if it bindingly determines the manner and form in which a federal statute is implemented. This includes the case where substantive legal provisions of the statute not merely require the administrative authorities to act, but at the same time prescribe a specific procedural manner of acting in administrative matters (cf. BVerfGE 55, 274 (321); 75, (152)). **[48]**

b) Measured against this, the provisions of the Civil Partnerships Act cited by the applicants contain no rules of administrative procedure in the meaning of Article 84.1 of the Basic Law. **[49]**

aa) Article 1 § 1.1 of the Civil Partnerships Act governs only the substantive-law requirements for the creation of a registered civil partnership. The Act does not contain a federal-law provision governing the administrative procedure when civil partnerships are registered. It does require that the declarations necessary to create a civil partnership must be made to an authority, but it leaves open which authority is competent to receive the declarations. Nor does it make provisions for the procedure when the parties make mutual declarations. It neither specifies a particular registration procedure nor lays down what form the cooperation of the competent authority is to take when a civil partnership is created. Formal requirements on private individuals making declarations of intention such as are contained, for example, in Article 1 § 1.1 sentence 1 of the Civil Partnerships Act,

are not provisions governing administrative procedure in the meaning of Article 84.1 of the Basic Law. The *Länder* used the scope they were given and in the implementation provisions passed by them have now created varying jurisdictions of *Land* authorities who have to exercise their administrative activity in registering civil partnerships under the relevant *Land*-law rules. **[50]**

bb) Article 3 § 25 of the Civil Partnerships Act does not create the jurisdiction of a *Land* authority. Admittedly, Article 17a of the Introductory Act to the German Civil Code (now Article 17b of the Introductory Act to the German Civil Code), which was newly introduced by this statute and which determines the application of the relevant law for registered civil partnerships, in Article 17a.2 sentence 1, provides that the rule in Article 10.2 of the Introductory Act to the German Civil Code applies with the necessary changes. Under sentence 1 thereof, on or after marriage spouses may choose their future name by declaration to the registrar of births, deaths and marriages. However, this reference does not mean that the registrar has mandatory jurisdiction to receive civil partners' declarations as to their name too. Against the background that the Civil Partnerships Act itself has left it open which authority is to have jurisdiction over the creation of registered civil partnerships, the provision that Article 10.2 of the Introductory Act to the German Civil Code is to apply merely with the necessary changes is to be understood to mean that the reference is to the substantive-law content of Article 10.2 sentence 1 of the Introductory Act to the German Civil Code, but not that a provision as to jurisdiction was made in this way. **[51]**

cc) Equally, Article 3 § 6 of the Civil Partnerships Act does not give new jurisdiction to the registry offices, but applies their existing jurisdiction to another group of persons when, supplementing § 2 sentence 1 of the Minorities Name Alteration Act (*Minderheiten-Namensänderungsgesetz*), it extends the alteration of the birth name of a person subject to the conditions of § 1 of the Act, that is, by declaration to the registrar of births, deaths and marriages, not only, in the case of a declaration of the spouse to this effect, to the family name, but also to the partnership name, provided the civil partner agrees to the change of name by declaration to the registrar. This does not entail a change of the content of the registrar's duties (cf. BVerfGE 75, 108 (151)). **[52]**

dd) The fact that the aliens' authorities under Article 3 § 11 of the Civil Partnerships Act, which relates to §§ 27a, 29.4 and 31.1 of the Aliens Act (*Ausländergesetz*), may now also issue a basic residence permit (*Aufenthaltserlaubnis*), residence permit for specific purposes (*Aufenthaltsbewilligung*) or residence permit for exceptional purposes (*Aufenthaltsbefugnis*) to foreign civil partners of a foreigner in order to establish and maintain the civil partnership merely extends the factual circumstances subject to which a residence status may be established. As a result of this, the duty of the aliens' authorities is quantitatively increased, but its content is not changed. A requirement for approval can certainly not be derived from the fact that the aliens' authorities are now obliged to base their considerations when exercising their discretion in the case of civil partnerships on Article 2.1 in conjunction with Article 1.1 of the Basic Law, not, as in the case of marriages, on Article 6.1 of

the Basic Law. In exercising the discretion granted them, authorities must always taken into account the fundamental rights of those affected, no matter on what fundamental right they may rely. **[53]**

ee) Finally, Article 3 § 16 number 10 of the Civil Partnerships Act also does not make the Act subject to approval under Article 84.1 of the Basic Law. As a result of the revision of § 661.3 number 1 letter b of the Code of Civil Procedure (*Zivilprozessordnung*), the international jurisdiction of German courts under § 606a of the Code of Civil Procedure now includes the case where a civil partnership is created before a German registrar of births, deaths and marriages. This provision does not impose a duty on the registrar, but by its wording links the jurisdiction of German courts in civil partnership matters to the requirement that a German registrar of births, deaths and marriages was involved when the civil partnership was created. It governs the judicial proceedings, for which Article 84.1 of the Basic Law is not applicable (cf. BVerfGE 14, 197 (219)). It is conceivable that there could be an objectively unjustified unequal treatment of civil partners whose partnership, by reason of the differing jurisdiction provisions of the *Länder*, was created not before a registrar of births, deaths and marriages but before another competent authority; but this result could be avoided by interpreting § 661.3 number 1 letter b of the Code of Civil Procedure in conformity with the Basic Law. **[54]**

2. Nor does the fact that in Article 1 § 3.3 and § 3.4 competencies of the registrar of births, deaths and marriages were named before the Civil Partnerships Act was finally consented to and pronounced lead to the statute being subject to approval. This version of the statute was corrected in a manner that is constitutionally unobjectionable. **[55]**

a) Even if the Basic Law contains no provisions on the correction of adopted bills, the requirements of a functioning legislature, justify, following the traditional government practice, being able to correct printer's errors and other evident errors in the bill without again involving the legislative bodies, as is provided in § 61 of the Joint Rules of Procedure of the federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien*, GGO) and in § 122.3 of the Rules of Procedure of the *Bundestag* (*Geschäftsordnung des Bundestages*; cf. BVerfGE 48, 1 (18)). **[56]**

Admittedly, the correction of adopted bills is admissible only within very narrow limits outside the resolution procedure in Article 76 ff. of the Basic Law, because of the right of the legislative bodies to respect and to the preservation of their exclusive competence to decide the content of legislation. The criterion for defining such limits in detail and for the admission, in exceptional circumstances of the correction of an adopted bill, is that it is obviously incorrect. An obvious incorrectness may be shown not only in the text of the statute, but in particular also by taking into account its meaning in context and the parliamentary background materials of the statute. The decisive factor is that the correction does not affect the legally significant substantive content of the statute and with it the identity of the statute (cf. BVerfGE 48, 1 (18-19)). **[57]**

b) On the basis of these criteria, the correction carried out of Article 1 § 3.3 and 3.4 of the Civil Partnerships Act did not exceed the limits of what is constitutionally admissible. **[58]**

aa) The obvious incorrectness of the version of Article 1 § 3.3 and 3.4 of the Civil Partnerships Act passed by the legislative bodies consists in the clear contradiction between on the one hand the text of the statute, which by reason of the recommendation as a resolution by the Committee on Legal Affairs of 8 November 2000 (*Bundestag* document 14/4545) was before the *Bundestag* when it passed resolutions on the second and third reading of the bill and on which the proceedings in the *Bundesrat* were based, and on the other hand the reasons for justification of this statute given by the Committee on Legal Affairs in its report of 9 November 2000 (*Bundestag* document 14/4550), which both equally constitute the basis for the consultation and enactment of the legislative bodies. **[59]**

At the beginning of November 2000, the SPD and BÜNDNIS 90/DIE GRÜNEN parliamentary parties introduced in the Committee on Legal Affairs responsible and in the committees on Family Affairs, Senior Citizens, Women and Youth, (Committee document, *AusschussDrucks* 14/508) and on Labour and Social Affairs (Committee document 14/944), which were co-consulting, a motion for alteration of the bill, which, just as for other provisions, in particular Article 1 § 1 of the bill, for all paragraphs of Article 1 § 3 also provided that the registrar of births, death and marriages should be deleted as the authority competent to receive declarations and the effectiveness of declarations on the partnership name should be made subject to making the declarations before the authority responsible. This motion was the basis of the resolution of the committees and received a majority in favour there. The recommendation for a resolution forwarded to the *Bundestag* by the Committee on Legal Affairs then, however, contained alterations to this effect only of paragraphs 1 and 2 of Article 1 § 3 of the bill, while it was recommended for paragraphs 3 and 4 that the unchanged previous versions should be accepted, still containing the reference to the registrar of births, deaths and marriages. In the report of the Committee on Legal Affairs, which was also forwarded to the *Bundestag*, to which the recommended resolution referred, in contrast, it was stated with regard to the whole of Article 1 § 3 that the changes recommended here were provisions consequent on the alteration of Article 1 § 1.1 of the Civil Partnerships Act. There was express reference to its reasoning. This included the statement that the bill did not name an authority that is to be responsible for registering the civil partnership. **[60]**

This reasoning of Article 1 § 3 of the Civil Partnerships Act contradicts the text version of its paragraphs 3 and 4, and when taken into account together with the account of how it originated it shows that the wording of these paragraphs was incorrect. The contradiction between the text and the reasoning also entered the bills approved by the *Bundestag* and the *Bundesrat*. Both of them, on the basis of the resolution recommended by the Committee on Legal Affairs of the *Bundestag*, based their resolutions on the unchanged text of Article 1 § 3.3 and 3.4 of the

Civil Partnerships Act. But the resolution was passed subject to the premise that had resulted in the amendment of Article 1 § 1 of the bill; it was intended that there should be no naming whatsoever of a competent authority in the bill. **[61]**

bb) The version of Article 1 § 3.3 and 3.4 of the Civil Partnerships Act corrected in the proceedings under § 61.2 of the Joint Rules of Procedure of the Federal Ministries and pronounced in this form conforms with the intention of the legislature expressed in the statute. **[62]**

If Article 1 § 1 of the Civil Partnerships Act, which creates the institution of the registered civil partnership and governs the essential requirements for the creation of this community of persons, in its wording and reasoning does not lay down the authority that is to be responsible for registering the registered civil partnership, and if this failure to mention the authority is consistently repeated not only in the further following statutory provisions but also in the two first paragraphs of Article 1 § 3 of the Civil Partnerships Act, in that references are only to the authority responsible, then this makes it clear that the legislature wishes to leave it to the *Länder* to decide which authority they will determine as responsible for civil partnership matters. It is consistent with this if in the corrected and pronounced version of Article 1 § 3.3 and 3.4 of the Civil Partnerships Act now, taking over the text on which the resolution adopted by the Committee on Legal Affairs was based, there is no attempt whatsoever to make a statement as to the authority to which the civil partners' declarations on names law are to be made. **[63]**

cc) Furthermore, this is confirmed by the opinions on the correction proceedings. These opinions unanimously state that the statute was not intended to make a decision on the jurisdiction of a particular authority in civil partnership matters. The suggestion of correcting Article 1 § 3.3 and 3.4 of the Civil Partnerships Act came from the office of the Committee on Legal Affairs, with reference to a copying error to this effect made when the recommended resolution was drafted. Thereupon, the Federal Ministry of Justice informed both the President of the *Bundestag* and the President of the *Bundesrat* on the error in copying the resolutions drafted in the Committee on Legal Affairs to the recommended resolution, defined this as an obvious error and commenced the correction procedure under § 61.2 of the Joint Rules of Procedure of the Federal Ministries. In the course of this procedure, the representatives of the parliamentary parties in the Committee on Legal Affairs were involved in the matter. In the oral hearing, the *Bundestag* member Beck (BÜNDNIS 90/DIE GRÜNEN), without contradiction from the members present von Renesse (SPD), Geis (CDU/CSU) and Braun (FDP), submitted that the representatives of all parliamentary parties had agreed to the correction. In letters of 7 and 12 December 2000, the Presidents of the *Bundestag* and the *Bundesrat* approved the correction. **[64]**

3. The government parliamentary parties first introduced a Bill to End the Discrimination of Same-Sex Partnerships: Civil Partnerships (*Gesetzentwurf zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*, *Bundestag* document 14/3751); in the course of the legislative procedure, at the recommendation of the *Bundestag* Committee on Legal Affairs,

this bill was divided into the Act of the same name that is to be reviewed in the present proceedings, with its substantive provisions on the registered civil partnership, and a bill with predominantly procedural implementation regulations (*Bundestag* documents 14/4545 and 14/4550 with annexes); this division does not violate the Constitution. Above all, the division that was carried out does not make the Civil Partnerships Act subject to approval. **[65]**

a) The *Bundestag* is not constitutionally prevented from dealing with a legislative project in several statutes, in the exercise of its legislative freedom. In doing this, as in the present case, even in the course of the legislative procedure, it may collect the substantive provisions it intends in one statute against which the *Bundesrat* has only a right of objection, and for the provisions intended to govern the administrative procedure of the *Länder* it may design another statute, which requires approval; in practice, this happens quite frequently (cf. BVerfGE 34, 9 (28); 37, 363 (382)). **[66]**

The *Bundestag*'s possibility, by dividing the contents of a statute into two or more statutes, of restricting the *Bundesrat*'s right of approval to one part of the intended legislation follows from the Bundestag's right to legislate. Such a division does not inadmissibly restrict the right of the *Länder* to cooperate in the legislation of the Federal Government, nor is there a shift of the constitutionally allocated weights of the *Bundestag* and the *Bundesrat* in legislation (cf. BVerfGE 37, 363 (379-80); 55, 274 (319); 75, 108 (150)). **[67]**

aa) In the area of concurrent legislative powers, which under Article 74.1 number 2 of the Basic Law also includes matters of civil status and thus the introduction of the registered civil partnership as a new civil status, the *Länder*, under Article 72.1 of the Basic Law, have power to legislate as long as and to the extent that the Federal Government has not made use of its legislative power by statute. This guarantees the original legislative power of the *Länder* to legislate quantitatively and qualitatively wherever the federal legislature has not yet passed legislation. But if the federal legislature, under the conditions of Article 72.2 of the Basic Law, makes use of its legislative power, the *Bundesrat* merely cooperates in federal legislation under Article 50 of the Basic Law. Here, the requirement that the *Bundesrat* approves a statute under the Basic Law is the exception to the rule (cf. BVerfGE 37, 363 (381)). *Inter alia*, this requirement exists under Article 84.1 of the Basic Law if the statute exclusively or together with other legislation contains provisions on the establishment of authorities or on administrative procedures and thus encroaches on the competence of the *Länder* under Article 83 of the Basic Law to implement federal statutes as matters of their own concern their own and to pass the necessary *Land* law provisions for this purpose. The *Bundesrat*'s approval of such a statute is intended to ensure that the *Länder* are not deprived of their legislative competence in the administrative procedure by a federal statute below the constitutional level against the will of the majority of the *Bundesrat*. This blocking effect guarantees that they have influence on the contents of the federal statute as a whole. For the requirement of the approval of the *Bundesrat*, by the case-law of the Federal Constitutional Court, extends to the whole statute as a legislative unit, that is, also to the provisions that in themselves do

not require approval (cf. BVerfGE 8, 274 (294); 37, 363 (381); 55, 274 (319)). In the present case it is not necessary to decide whether, in view of the criticism in the literature (cf., for example, Lücke in: Sachs, *Grundgesetz, Kommentar*, 2nd ed. 1999, Article 77 marginal number 15; Maurer, *Staatsrecht I*, 2nd ed. 2001, § 17 marginal numbers 74 ff.) this case-law should continue to be followed, for in the present case the legislature did not choose this approach. **[68]**

If the federal legislature, in contrast, omits provisions relating to administrative procedure in a statute, this corresponds to the model of the constitutional allocation of competence between the Federal Government and the *Länder* under Article 83 and Article 84 of the Basic Law. The *Bundesrat*, under Article 77.3 of the Basic Law, has merely a right of objection to such a statute; under Article 77.4 of the Basic Law, an objection may be rejected by the *Bundestag*. **[69]**

bb) The same applies to the case where the federal legislature does intend to pass not only legislation under substantive law but also regulations for its implementation in the administrative procedure of the *Länder*, and instead of including both sets of provisions in one statute, it puts each in a separate statute. If, as a result, the requirement of the *Bundesrat*'s approval relates only to the statute that contains the procedural part, this does not constitute a shift detrimental to the *Länder* of the competencies laid down in the Basic Law. For the *Bundesrat* has a right of approval of substantive-law federal legislation - except in the special cases laid down in the Basic Law - only where the federal legislature encroaches upon the area of competence of the *Länder* under Article 83 et. seq. of the Basic Law. But such an encroachment is effected only by the procedural statute, which is separated from the substantive-law content of the legislation. **[70]**

The division prevents the *Bundesrat* acquiring a right of approval with regard to the substantive-law provisions too, as a result of dealing with substantive-law and procedural-law provision together. At the same time it ensures that the *Bundestag* can legislate on the matters allocated to it that do not require approval without being dependent on the approval of the *Bundesrat*. If the *Bundestag* chooses to proceed in this way, it bases the structure of its legislation precisely on the constitutional division of competence between the Federal Government and the *Land* governments. The *Länder*, as the present case shows, suffer no loss of competence as a result of this. They have now themselves on their own responsibility passed the necessary procedural regulations for the implementation of the Civil Partnerships Act. **[71]**

b) Whether the *Bundestag*'s right of disposal with regard to the division of legal material into several statutes is subject to constitutional limits in the individual case, and when such limits, if they exist, are overstepped, need not be decided here either (cf. BVerfGE 24, 184 (199-200); 77, 84 (103)). The decision of the federal legislature to collect the provisions not requiring approval on the new institution of the registered civil partnership in one statute and to make the provisions thereof that are subject to approval the content of a separate state is free of arbitrariness. **[72]**

aa) If the *Bundestag* is presumed to have had a motive in dividing the material of the statute between two statutes only in order in this way to deprive the *Bundesrat* of the possibility of preventing the intended substantive-law provisions together with the procedural provisions by refusing its approval, this manner of proceeding does not appear to be arbitrary. Under the assumption made till now until now that a whole statute becomes subject to approval if it contains only one provision that is subject to approval (cf. BVerfGE 8, 274 (294); 55, 274 (319)), such a division is a legitimate way to prevent a process of extension of the requirement of approval of statutes and to make it possible for parliament to realise its enactment. To conclude from such a motive on the part of the legislature that its procedure was abusive would in the last instance lead to imposing a duty on the *Bundestag* always to pass procedural regulations itself and together with the substantive law. On the one hand this would make it possible for the *Bundesrat* to exercise its influence more strongly on substantive law too, but on the other side it would gradually deprive the *Länder* of legislative competencies where they have original jurisdiction under the Constitution. Such an approach might lead to a general shift of constitutional competencies, which is precisely what Article 84.1 of the Basic Law is intended to prevent, but in contrast, dividing the legal material into two statutes could not have this result. **[73]**

bb) Nor are the substantive-law provisions contained in the Civil Partnerships Act, contrary to the applicants' opinion, a "torso of a statute". They are comprehensible in themselves and sufficiently definite. They structure the legal position in such a way that the persons affected can allow their conduct to be guided by them. There was in particular no necessity for the legislature to legislate on the right of maintenance for civil partners and the tax treatment of maintenance payments based on this in one and the same statute. The maintenance rights of spouses have also always been defined separately from their tax treatment by the legislature in the taxation statutes. **[74]**

Finally, the Act is also enforceable. This is unequivocally confirmed by the various implementation regulations of the *Länder*. **[75]**

II.

The Civil Partnerships Act is also constitutional from a substantive point of view. **[76]**

1. It is compatible with Article 6.1 of the Basic Law. The introduction of the new institution of the registered civil partnership for same-sex couples and its legal structure infringe neither the freedom of marriage guaranteed in Article 6.1 of the Basic Law nor the institutional guarantee laid down there. The registered civil partnership is also compatible with Article 6.1 of the Basic Law in its character as a fundamental principle on which values are based. **[77]**

a) As a fundamental right, Article 6.1 of the Basic Law protects the freedom to enter into a marriage with a partner one has chosen oneself (cf. BVerfGE 31, 58 (67); 76, 1 (42)). This right to unhindered access to marriage is not affected by the Civil Partnerships Act. **[78]**

aa) Even after the introduction of the registered civil partnership by the Civil Partnerships Act, the path to marriage is still open to every person who has the capacity to marry. However, marriage is only possible to a partner of the other sex, since the fact that the spouses are of different sexes is an inherent characteristic of marriage (cf. BVerfGE 10, 59 (66)) and the right of freedom to marry relates only to this. Even after the Civil Partnerships Act, same-sex couples are still unable to marry. The only legal institution open to them for a long-term commitment is the registered civil partnership. **[79]**

Similarly, the Act neither directly nor indirectly affects the freedom of heterosexual couples to marry. Since they cannot enter into a registered civil partnership, this institution cannot prevent them from marrying. **[80]**

bb) Access to marriage is not restricted by the Civil Partnerships Act. Under the statute, a civil partnership that has already been entered into does not prevent marriage. The Civil Partnerships Act does not create an express impediment to marriage in this case. However, in the case of such a constellation, the registrar of births, deaths and marriages must examine whether, as a requirement of marriage, the partners have a serious intention to be married, and the registrar must refuse to participate in the wedding if such an intention is missing (§1310.1 sentence 2 in conjunction with § 1314.2 number 5 of the German Civil Code). **[81]**

However, the legislature left it open whether a marriage entered into when a registered civil partnership already existed has legal consequences for the continuing existence of the civil partnership and if so, what these would be. The answer to these questions is thus in the last instance left to case-law. **[82]**

This gap in the statute can be closed constitutionally only if consideration is paid to the protection owed to marriage under Article 6.1 of the Basic Law. Here it is important to take into account that marriage as the form of a close two-person relationship between a man and a woman is characterised by personal exclusivity. Marriage might lose this characteristic if one or both of the spouses remained permitted to keep their civil partnership with another partner, which is also intended to be permanent. The protection of marriage under Article 6.1 of the Basic Law requires that alongside marriage no other legally binding partnership of a spouse should be permitted, and in Article 1 § 1.2 of the Civil Partnerships Act the legislature itself proceeded on this assumption. **[83]**

For this reason, it is suggested in the literature of legal scholarship that the possibility that the Civil Partnerships Act does not exclude, of entering into a marriage when a civil partnership exists, is linked to the legal consequence that the marriage dissolves the civil partnership by operation of law, so that it no longer legally exists (cf. Schwab, *Zeitschrift für das gesamte Familienrecht* 2001, p. 385 (389)). This would be a way to close the existing statutory gap in a way that did justice to Article 6.1 of the Basic Law. Admittedly, this solution has a more unfavourable

effect on the other partner than an annulment under Article 1 § 15 of the Civil Partnerships Act, but in view of the guarantee in Article 6.1 of the Basic Law it is acceptable. **[84]**

The requirement of protecting marriage as a way of life between a man and a woman, however, could also be done justice to if entering into a marriage were made subject to the requirements that there is no civil partnership or is no longer a civil partnership. Such an impediment to marriage could not inadmissibly restrict the guarantee of freedom in Article 6.1 of the Basic Law, because its factual reason would lie precisely in the nature and in the form of marriage (cf. BVerfGE 36, 146 (163)). Just as an existing marriage prevents a new marriage from being entered into (§1306 of the Civil Code), in order not to endanger the two-person relationship of marriage, it conforms to the protection of marriage to open it only to those who have not already bound themselves legally in another partnership. This possibility of giving marriage the required protection would, in addition, offer the protection of confidence to those who, in the registered civil partnership, have chosen a way of life that the legislature has now made available to them as a legally binding community of responsibility of a permanent nature. It would be guaranteed for them that their partnership could not be dissolved merely by the unilateral decision to marry of the other partner. It is true that a prohibition on entering into marriage while the civil partnership existed would as a general rule be objectively justified. However, it would restrict the freedom to marry. It need not be decided here whether the present statute also makes it possible for the gap to be filled by case-law in this respect. If one takes into account the far-reaching consequences of the termination or dissolution of a registered civil partnership for the personal life and the financial situation of the individual persons affected, which, depending on what legal construction is chosen in order to exclude marriage and civil partnership existing side-by-side, may be very different in nature, it would seem appropriate for the legislature itself to determine whether an existing civil partnership prevents a marriage taking place or a marriage leads to the dissolution of an existing civil partnership. **[85]**

b) When the legislature introduced the registered civil partnership in the Civil Partnerships Act, it did not violate the constitutional requirement of Article 6.1 of the Basic Law to offer and protect marriage as a way of life (institutional guarantee, cf. BVerfGE 10, 59 (66-67); 31, 58 (69-70); 80, 81 (92)). The object of legislation of the Act is not marriage. **[86]**

aa) The Basic Law itself contains no definition of marriage, but presupposes it as a special form of human cohabitation. The realisation of the constitutional protection of marriage therefore needs a legal provision that structures and restricts what form of partnership enjoys the protection of the Constitution. Here, the legislature has considerable freedom of drafting in determining the form and content of marriage (cf. BVerfGE 31, 58 (70); 36, 146 (162); 81, 1 (6-7)). The Basic Law guarantees the institution of marriage not in the abstract, but in the form that corresponds to current prevailing opinions, which are expressed definitively in the statutory provisions (cf. BVerfGE 31, 58 (82-83). However, in shaping marriage,

the legislature must take into account the essential structural principles that follow from the application of Article 6.1 of the Basic Law to marriage as it is actually encountered in connection with the nature of the fundamental right guaranteed as a freedom and in connection with other constitutional norms (cf. BVerfGE 31, 58 (69)). Part of the content of marriage, as it has stood the test of time despite social change and the concomitant changes of its legal structure and been shaped by the Basic Law, is that it is the union of one man with one woman to form a permanent partnership, based on a free decision and with the support of the state (cf. BVerfGE 10, 59 (66); 29, 166 (176); 62, 323 (330)), in which man and woman are in an equal partnership with one another (cf. BVerfGE 37, 217 (249 ff.); 103, 89 (101)) and may decide freely on the organisation of their cohabitation (cf. BVerfGE 39, 169 (183); 48, 327 (338); 66, 84 (94)). **[87]**

bb) This protection does not cover the institution of the registered civil partnership. The fact that the partners are of the same sex distinguishes it from marriage and at the same time constitutes it. The registered civil partnership is not marriage within the meaning of Article 6.1 of the Basic Law. It grants rights to same-sex couples. In this way, the legislature takes account of Article 2.1 and Article 3.1 and 3.3 of the Basic Law, by helping these persons to better develop their personalities and by reducing discrimination. **[88]**

cc) Marriage as an institution is not affected by the Civil Partnerships Act itself in its constitutional structural principles and its organisation by the legislature. There has been no change to its legal foundation. All the provisions that give marriage a legal framework and furnish the institution with legal consequences continue to exist (cf. Federal Constitutional Court, judgment of 18 July 2001 - 1 BvQ 23/01 and 1 BvQ 26/ 01 -, *Neue Juristische Wochenschrift* 2001, 2457-2458). No prohibition on giving same-sex partners the possibility of a legally similarly structured partnership can be derived from the institutional guarantee, precisely because it relates only to marriage. **[89]**

c) Article 6.1 of the Basic Law does not merely guarantee marriage in its essential structure, but also, as a binding value decision, requires special protection by the state order for the whole area of private and public law relating to marriage and the family (cf. BVerfGE 6, 55 (72); 55, 114 (126)). In order to satisfy the requirement of protection, it is in particular the duty of the state on the one hand to refrain from everything that damages or otherwise adversely affects marriage, and on the other hand to promote marriage by suitable measures (cf. BVerfGE 6, 55 (76); 28, 104 (113); 53, 224 (248); 76, 1 (41); 80, 81 (92-93); 99, 216 (231-232)). The legislature did not violate this in the Civil Partnerships Act. **[90]**

aa) Marriage is neither damaged nor adversely affected in another way by the Civil Partnerships Act. **[91]**

The particular protection accorded to marriage under Article 6.1 of the Basic Law prohibits treating it less favourably than other ways of life (cf. BVerfGE 6, 55 (76); 13, 290 (298-299); 28, 324 (356); 67, 186 (195-196); 87, 234 (256 ff.); 99, 216 (232-233)). **[92]**

(1) There is no such unfavourable treatment if the Civil Partnerships Act gives same sex couples the possibility of entering into a registered civil partnership with rights and duties that are close to those of marriage. **[93]**

It is true that in large areas the legislature has modelled the legal consequences of the new institution of the registered civil partnership on provisions of marriage law. But in this way, marriage or spouses are not treated less favourably that previously and not disadvantaged in relation to the civil partnership or civil partners. The institution of marriage is not threatened by any risk from an institution that is directed at persons who cannot be married to each other. **[94]**

(2) Nor does the Civil Partnerships Act violate the prohibition of discrimination in that the legislature refrained in this Act from at the same time adding to the Federal State Welfare Act (*Bundessozialhilfegesetz*) provisions that the income and property of both partners should be taken into account in the case of civil partners too in the means test that is a requirement for the grant of state welfare benefits. **[95]**

As a result, at present, in state welfare law, married couples are treated as a financial unit, but civil partners are not expressly also so treated. In the case of spouses, because of the aggregation of income that has to be made, this may lead to the reduction or elimination of the right to state welfare benefits, whereas civil partners without aggregation of income might receive unreduced state welfare benefits. However, any unfavourable treatment of married persons in this procedure was the result not of the Civil Partnerships Act, but of a lack of provisions to remedy this in the Federal State Welfare Act. The Civil Partnerships Act specifically does not privilege civil partners as against spouses with regard to the obligation to maintain each other. If the proper legal conclusions are not drawn from this in state welfare law, there may be a violation there of the prohibition on discrimination under Article 6.1 of the Basic Law, but not as a result of the provisions of the Civil Partnerships Act, which alone are the subject of these proceedings for the abstract review of a statute. **[96]**

bb) In introducing the new institution of the registered civil partnership, the legislature also did not violate the requirement of promoting marriage as a way of life. The Act does not divest marriage of any promotion that it previously enjoyed. It merely gives legal protection to another partnership and gives it rights and duties. **[97]**

cc) On account of the constitutional protection of marriage under Article 6.1 of the Basic Law, the legislature is not barred from treating marriage more favourably than other ways of life (cf. BVerfGE 6, 55 (76)). But the admissibility of giving favourable treatment to marriage over other ways of life in fulfilling and structuring the requirement to promote it does not give rise to a requirement contained in Article 6.1 of the Basic Law to disadvantage other ways of life in comparison to marriage. Judge Haas in her dissenting opinion fails to realise this

when she understands the requirement to promote marriage in Article 6.1 of the Basic Law as a requirement to disadvantage ways of life other than marriage. Article 6.1 of the Basic Law gives favourable treatment to marriage in a constitutional protection granted only to marriage and imposes on the legislature a duty to promote it with the means appropriate to it. But a requirement to treat other ways of life unfavourably cannot be derived from this. The extent of the legal protection and promotion of marriage is in no way decreased if the legal system also recognises other ways of life that cannot enter into competition with marriage as a community of heterosexual partners. Nor can it be justified constitutionally to derive from the special protection of marriage a rule that such partnerships are to be structured in a way distant from marriage and to be given lesser rights. However, the legislature's duty to protect and promote marriage does require it to ensure that marriage can fulfil the function accorded it by the Constitution. **[98]**

(1) If Article 6.1 of the Basic Law subjects marriage to special protection, the special element is the fact that marriage alone, in addition to the family, enjoys this constitutional protection as an institution, but no other way of life enjoys it. Marriage cannot be abolished nor can its essential structural principles be altered without an amendment of the Constitution (this has already been stated by von Mangoldt in the Committee for Fundamental Questions of the Parliamentary Council, *Ausschuss für Grundsatzfragen des Parlamentarischen Rates*, in: *Der Parlamentarische Rat* 1948-1949, Akten und Protokolle, vol. 5/II, 1993, edited by Pikart/Werner, p. 826). A constitutional duty of promotion exists for marriage alone. To attach to the special nature of the protection a meaning above and beyond this to the effect that marriage must always be protected more than other partnerships, even in its extent (this is the result reached by Badura, in: Maunz/Dürig, *Grundgesetz*, Article 6.1 marginal number 56 (date: August 2000); Burgi, in: *Der Staat*, vol. 39, 2000, pp. 487 ff.; Krings, *Zeitschrift für Rechtspolitik* 2000, pp. 409 ff.; Pauly, *Neue Juristische Wochenschrift* 1997, pp. 1955-1956; Scholz/Uhle, *Neue Juristische Wochenschrift* 2001, pp. 393-394; Tettinger, in: *Essener Gespräche zum Thema Staat und Kirche*, vol. 35, 2001, p. 140) has no basis either in the wording of the fundamental right or in its genesis. **[99]**

In the course of the deliberations in the Parliamentary Council, Article 6.1 of the Basic Law underwent a large number of amendments to the text, and here, the wording often alternated between a protection of marriage and a special protection of marriage (cf. *Parlamentarischer Rat, Hauptausschuss, 21. Sitzung, Protokoll*, p. 239; *Protokoll der 32. Sitzung des Grundsatzausschusses*, in: *Der Parlamentarische Rat* 1948-1949, *loc. cit.*, vol. 5/II, 1993, p. 910 (935); *Protokoll der 43. Sitzung des Hauptausschusses*, p. 545 (554-555); *Stellungnahme des Allgemeinen Redaktionsausschusses zur Fassung der 2. Lesung des Hauptausschusses*, p. 121; *Parlamentarischer Rat, Hauptausschuss, Protokoll der 57. Sitzung*, pp. 743-744). It cannot be inferred from these debates that these changes to the wording were made because marriage and the family were to have greater or

lesser protection. Instead, there are clear indications that these changes arose solely from the feeling for language of the persons in question. For example, when the *Deutscher Sprachverein* suggested deleting the word "special" ("*besonderen*") and choosing the wording "Marriage and the family ... are under the protection of the Constitution" ("*Ehe und Familie ... stehen unter dem Schutze der Verfassung*"), von Mangoldt said that this was exactly the same in content, but worded better (*Der Parlamentarische Rat* 1948-1949, vol. 5/II, *loc. cit.*). **[100]**

In the debates on Article 6.1 of the Basic Law, the question of the protection of new ways of life also played a substantial role (on this, cf. the contributions of Helene Weber, in: *Protokoll der 21. Sitzung des Hauptausschusses*, p. 240, and Elisabeth Selbert, in: *Protokoll der 43. Sitzung des Hauptausschusses*, pp. 552-553). Here, in particular the argument that the special protection of the family excluded the equal treatment of illegitimate children in Article. 6.5 of the Basic Law (cf. Weber and Süsterhenn in: *Protokoll der 21. Sitzung des Hauptausschusses*, 242-243) was unsuccessful. If Mangoldt, as rapporteur, in his Written Report on Article 6.1 of the Basic Law finally noted that this fundamental right was scarcely more than a declaration in the case of which it was not really evident what effect it had as directly applicable law (*Anlage zum stenographischen Bericht der 9. Sitzung des Parlamentarischen Rates*, p. 6), then this reflects that although there was agreement on subjecting marriage and the family to constitutional protection, there was no clarification as to what this means in detail for its relationship to other ways of life. At all events, a requirement of distance cannot be based on this. **[101]**

(2) Article 6.1 of the Basic Law protects marriage as it is structured by the legislature from time to time, preserving its essential fundamental principles (cf. BVerfGE 31, 58 (82-83)). As a partnership lived by human beings it is both a sphere of freedom and at the same time part of society, from whose changes it is not excluded. The legislature can react to these and adapt the structure of marriage to changed needs. In this way, the relationship of marriage to other forms of human cohabitation also changes. The same applies if the legislature does not restructure marriage by statute but provides for other partnerships. Therefore ways of life do not stand at a fixed distance from each other, but in a relative relation. At the same time, they may differ from or resemble each other by reason of their given structure not only in the rights and duties allocated to them, but also in their function and with regard to the group of persons who find access to them. Thus the protection of marriage as an institution cannot be separated from the persons who are addressed by the provision, for whom marriage it to be made available as a protected way of life. **[102]**

(3) The duty of the state to promote marriage must orient itself towards the protective purpose of Article 6.1 of the Basic Law. If the legislature itself, in creating norms, contributed to marriage losing its function, it would violate

the requirement of promotion under Article 6.1 of the Basic Law. Such a danger might exist if the legislature created another institution in competition with marriage, with the same function, and, for example, gave it the same rights and lesser duties, so that the two institutions were interchangeable. Such an interchangeability, however, is not associated with the registered civil partnership. It cannot enter into competition with marriage, if for no other reason that that the group of persons for whom the institution is intended does not overlap with the group of married persons. The registered civil partnership, because of this difference, is also not marriage with a wrong label, as is assumed in the two minority votes, but something different from marriage. Its different nature does not result from its name, but from the circumstance that not man and woman, but two persons of the same sex can create a union in the registered civil partnership. In their totality, the structural principles that characterise marriage give it the form and exclusivity in which it enjoys constitutional protection as an institution. Article 6.1 of the Basic Law, however, does not reserve individual structural elements of this group for marriage alone. It does not prohibit the legislature from offering legal forms for a permanent cohabitation to other constellations of persons than the union of man and woman. The characteristic of permanence does not make such legal relationships marriage. Nor is it discernible in any other way that they could harm the structure of this institution. **[103]**

2. The Civil Partnerships Act violates neither the special prohibition of discrimination of Article 3.3 sentence 1 of the Basic Law nor the general principle of equality in Article 3.1 of the Basic Law. **[104]**

a) The fact that the statute opens the registered civil partnership only to same-sex couples (Article 1 § 1.1 of the Civil Partnerships Act) embodies no unfavourable treatment of heterosexual couples on account of their sex under Article 3.3 sentence 1 of the Basic Law. **[105]**

The Act does not associate rights and duties not with the sex of a person, but takes as its starting point the combination of sexes of a community of persons, and to this community of persons it offers access to the registered partnership. It then allocates rights and duties to the persons in this community. Just as marriage, with its restriction to a two-person relationship between man and woman, does not discrimination against same-sex couples on account of their gender, the civil partnership does not discriminate against heterosexual couples on account of their gender. Men and women are always treated equally. They may enter into marriage with a person of the opposite sex, but not with one of their own sex. They may enter into a civil partnership with a person of their own sex, but not with one of the other sex. **[106]**

b) It does not infringe Article 3.1 of the Basic Law that persons of different sex cohabiting with each other and groups of people related to each other and living together have no possibility of becoming registered civil partnerships. **[107]**

Article 3.1 of the Basic Law prohibits treating a group of persons who are addressed by a statute differently from other persons addressed by the statute although there are no differences between the two groups of such a nature and such weight that they could justify the unequal treatment (cf. BVerfGE 55, 72 (88); 84, 348 (359); 101, 239 (269); established case-law). However, such differences do exist between same-sex couples and the other social communities of persons. **[108]**

aa) The registered civil partnership makes it possible for same-sex couples to put their partnership on a legally recognised basis and to bind themselves permanently and responsibly together, which has previously been impossible for them because they may not marry. In contrast, the desire of heterosexual couples to join themselves bindingly and permanently is, in the estimation of those concerned, just as important to them as that of same-sex couples is to them, and essentially also similar (cf. Buba/ Vaskovics, *loc. cit.*, 16, 245 ff.). But in contrast to same-sex couples, they have access to the institution of marriage for this purpose. The difference, that children of both spouses can be born to a permanent two-person relationship between man and woman, but not to a same-sex partnership, justifies directing heterosexual couples to marriage if they wish to give their relationship a permanent legally binding form. They are not disadvantaged by this. **[109]**

bb) There are also differences in the relation of the same-sex partnerships to the communities of mutual support between siblings or other relatives, and these differences justify different treatment. This relates even to the exclusivity of the registered civil partnership, which admits no further relationship of the same kind beside itself, whereas communities of mutual support between siblings and other relations are often part of further comparable relationships and also exist side-by-side with another relationship by marriage or partnership. Communities of mutual support between relations, in addition, are given a certain support even under existing law, a support that was first granted to same-sex couples in the form of the civil partnership. Thus, in connection with relations, there are rights to refuse to give evidence, rights of succession and in part also rights to a compulsory portion and for it to be given favourable tax treatment. **[110]**

cc) Admittedly, the legislature is not generally prevented from opening new possibilities for heterosexual couples or for other communities of mutual support to put their relationship in a legal form if this can be done without the given legal structure being interchangeable with marriage. However, there is no constitutional requirement to create such possibilities. **[111]**

3. Nor are the provisions in the statute on the rights to custody and succession of civil partners and on maintenance law objectionable from a constitutional point of view. **[112]**

a) aa) Under Article 1 § 9 of the Civil Partnerships Act, the civil partner of a parent with sole custody, with the agreement of the latter, has been given the power to share in decisions on matters relating to the child's everyday life if he or she lives together with the parent. At the same time, he or she has been given emergency custody for the situation where there is imminent danger and it is necessary to act

for the wellbeing of the child. The same now applies to the spouse of a parent with custody who himself or herself is not a parent (Article 2 number 13 of the Civil Partnerships Act: § 1687 b of the German Civil Code). In creating this "limited custody" for the civil partner, the legislature does not encroach on the parental rights of the parent without custody under Article 6.2 of the Basic Law. **[113]**

Article 6.2 sentence 1 of the Basic Law protects the care and upbringing of the children as a natural right of the parents and a duty incumbent in the first instance on them. The scope of protection of the parental right here fundamentally also includes the decision as to who has contact with the child and who is permitted to influence the child's education as a result of the transfer of the power to take decisions. Admittedly, the parental right needs to be further refined by the legislature (cf. BVerfGE 84, 168 (180)). It is incumbent on the legislature to allocate to each parent particular rights and duties if the conditions for a joint exercise of parental responsibility are lacking (cf. BVerfGE 92, 158 (178-179)), or to refer to the courts the decision as to the parent to whom parent parental custody is to be transferred to in the individual case. **[114]**

Article 1 § 9 of the Civil Partnerships Act takes up such a constellation where one parent has sole custody. It is not the "limited custody", which is based on the sole custody of the parent living in a civil partnership, that deprives the parent without custody of that custody, but the family-law provisions that give the parent no custody, or the family-court decisions that award sole custody not to this parent, but to the other parent. A parent's rights cannot be affected, if he or she has no custody in any case, if third parties who live together with the child, in agreement with the parent with sole custody, have some joint parental responsibility. **[115]**

bb) In "limited custody", the legislature has created a new power of custody for spouses and civil partners of a parent with custody who themselves are not parents of the child as part of a permanent legally binding partnership such as marriage or registered civil partnership; this does not constitute a violation of the principle of equality before the law of Article 3.1 of the Basic Law. The provision does not unfairly disadvantage parents without custody who do not live together with the parent with custody in a legally confirmed community. They are granted other legal possibilities of obtaining custody for their child alone or together with the other parent. Whether parents without custody should be given "limited custody" for other reasons need not be decided here. **[116]**

b) aa) Article 1 § 10.6 of the Civil Partnerships Act, which awards the surviving partner a compulsory portion, does not violate the testamentary freedom protected by Article 14.1 of the Basic Law. **[117]**

Testamentary freedom is the testator's right in his or her lifetime to provide for his or her property to pass in a different way than it would under the rules of intestate succession (cf. BVerfGE 58, 377 (398); 99, 341 (350-351). Here the

legislature is at liberty to determine the contents and limits of the right of succession. In drafting this statute in detail, the legislature must safeguard the basic content of the constitutional guarantee of Article 14.1 of the Basic Law, act in harmony with all other constitutional norms and in particular the principle of proportionality and the principle of equality before the law (cf. BVerfGE 67, 329 (340)). It is not evident that the statutory provision on the surviving partner's right to a compulsory share oversteps this limit, notwithstanding a general clarification as to which constitutional barriers the right to a compulsory share is subject to. **[118]**

The civil partner's right to succeed and right to a compulsory portion are part of the legal institution of the registered civil partnership, which gives the partners mutual rights and duties in a lifelong commitment. In their declaration that they intend to enter into the civil partnership the civil partners commit themselves to mutual care and support and to giving maintenance. This obligation to comprehensive mutual care justifies, just as in the case of spouses, providing a financial basis for the partner even after death by the right to a compulsory portion from the property of the deceased partner. **[119]**

bb) Nor is Article 14.1 of the Basic Law violated because the inheritance of other persons entitled to inherit is reduced by the partner's statutory right of succession and right to a compulsory portion. Even if Article 6.1 of the Basic Law contained a constitutional prohibition on granting the next of kin a reasonable financial minimum share of the estate, and if in this respect the family member favoured in this way were constitutionally protected as an heir under Article 14.1 of the Basic Law, which may be left open here (cf. BVerfGE 91, 346 (359-360)), this indicates nothing about the amount or the share owed to the heir from the estate. This is determined solely by the statutory allocation provision, which, in order to be in harmony with the guarantee of a right of succession, must be appropriately structured (cf. BVerfGE 91, 346 (360, 362)). **[120]**

The surviving civil partner's right of succession and right to a compulsory portion do not deprive that other relations of the deceased civil partner, who were already entitled to succeed. Another person entitled to inherit merely joins the group of persons entitled to inherit that are to be taken into account when the estate is distributed. In this way, the situation for the relations of the deceased who have rights of succession is no different than it would be if the testator were survived by a spouse or husband and not a civil partner. This structure does not constitute inappropriate treatment of the other persons entitled to inherit. **[121]**

c) It was intended that the maintenance burdens for civil partners created by Article 1 §§ 5, 12 and 16 of the Civil Partnerships Act should be taken into account in income tax law, but because this provision is part of the draft of the Civil Partnerships Act Supplementary Act, which has not yet been passed, this cannot be done; this does not makes the maintenance provisions of the Civil Partnerships Act unconstitutional. **[122]**

Admittedly, the financial burden resulting from maintenance duties is a special and unavoidable burden for the taxpayer, and it is a circumstance that reduces the taxpayer's financial capacity and the failure to take it into account may infringe Article 3.1 of the Basic Law (cf. BVerfGE 68, 143 (152-153); 82, 60 (86-87)). But the introduction of the maintenance duties for civil partners did not create a legal situation that ignores this burden from an income-tax point of view. Under § 33a of the Income Tax Act (*Einkommensteuergesetz*), on application income tax is reduced by the deduction from a taxpayer's total income of expenses incurred by that taxpayer for the maintenance of a person with a statutory right to support from the taxpayer, in the amount of a sum assessed for the calendar year in question. Since a civil partner's right to maintenance is laid down by statute, it is to be taken into account under § 33a of the Income Tax Act as an extraordinary expense. Whether this form of consideration is adequate in comparison to the tax treatment of spouses is not a question that relates to the Civil Partnerships Act. It would have to be clarified by a constitutional review of the income-tax provisions; the applications for judicial review do not comprise these. **[123]**

C.

With regard to the compatibility of the Civil Partnerships Act with Article 6.1 of the Basic Law, this decision was passed by five votes to three; with regard to its compatibility with Article 3.1 of the Basic Law, it was passed by seven votes to one; in other respects it was passed unanimously. **[124]**

2. Parental Duty of Contact, BVerfGE 121, 69

Explanatory Annotation

This decision[98] illustrates the relationship between constitutional provisions and those of regular statutory law and it touches upon an aspect of the law where it is questionable whether legal resolution, necessary as it was because of the existing dispute, was really the right avenue. A married father of two and father of an extramarital illegitimate child has been sued by the mother of the illegitimate child, who wanted to force the father to engage in contact with his child, which the father refused because of the negative effect this would have on his family. Section 1684.1 of the German Civil Code (family law section) entitles the child to contact with his or her parents and obligates the parents to engage in such contact. The lower court, while acknowledging the difficulty of forcing a parent to contact with his child, had, on the basis of a psychological expertise decided that this obligation of the father could be enforced and ordered the father to engage in such contact every three months and threatened a considerable fine if the father did not obey the order.

98 For the official press release in English see https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2008/bvg08-044.html (last accessed on 21.10.2019).

The Constitutional Court regarded the regular court's order as unconstitutional. It did so under the subsidiary personality rights guarantee of Article 2.1 of the Basic Law. However, there is a strong link to Article 6.2 of the Basic Law.[99] The reason for this approach lies in the procedural constellation: The father was invoking a right against the duty spelled out in Article 6.2 of the Basic Law and that "counter-right" could only flow from Article 2.1. The Constitutional Court saw no principal problem with s. 1684.1 of the Civil Code and its potential to force contact if that is deemed to serve the welfare of the child. However, as such enforcement of contact will invariably interfere with the right protected in Article 2.1 of the Basic Law to do or not to do as one pleases, the only question here is the welfare of the child as the third person involved. The test then, must not be whether such contact could perhaps benefit the child, but whether such contact could cause damage to the child. If a plausible risk is established, enforcement of the contact obligation is unconstitutional. As the psychologists in this case had determined that such contact could benefit the child they had also submitted that there is a plausible risk of damage should the father not open up.

The case illustrates that the law cannot choose what disputes are brought before it. This is also true for the German Constitutional Court in the light of Article 2.1 of the Basic Law, which has the propensity to turn any situation into a dispute on constitutional rights and thus elevate it to the constitutional level. In combination with the constitutional complaints procedure, which grants an individual right to bring such complaints to the Constitutional Courts, the Court must deal with such questions, which, for example in the United States, would in all likelihood fall victim to the *certiorari* procedure and would not be accepted by the Supreme Court and hence left to the regular courts.

Translation of the Parental Duty of Contact Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 121, 69*

Headnotes:

1. The duty to care for and bring up their child which is imposed on parents by Article 6.2 sentence 1 of the Basic Law (Grundgesetz - GG) is not owed exclusively to the state but also to the child. The child's right to parental care and upbringing in Article 6.2 sentence 1 of the Basic Law corresponds with this parental duty. It is for the legislature to elaborate the right and duty.

2. The encroachment on the fundamental right to protection of personality contained in Article 2.1 in conjunction with Article 1.1 of the Basic Law, which is associated with the imposition of an obligation on a parent to have contact with his or her child, is justified by the responsibility for his or her child imposed on the parent by Article 6.2 sentence 1 of the Basic Law and the child's right to parental care and upbringing. It is reasonable to oblige a parent to have contact with his or her child if this is in the child's best interests.

99 Article 6.2 of the Basic Law: "The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty."

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

3. If coercive measures are necessary to force an unwilling parent to have contact with a child, this contact is not usually in the best interests of the child. The encroachment on the parent's fundamental right to protection of his or her right of personality which results from the threat to apply coercive measures is not justified in this context unless there are sufficient indications which suggest that enforced contact will be in the child's best interests in an individual case.

Order of the First Senate of 1 April 2008 - 1 BvR 1620/04 -

Facts:

The constitutional complaint relates to the question of whether a parental duty of contact, which is enforceable by execution pursuant to s. 1684.1 of the Civil Code (Bürgerliches Gesetzbuch - BGB) against a parent who refuses to have contact with his or her child, can be enforced with the aid of coercive measures that may be threatened and imposed by s. 33.1 and s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit - FGG).

The complainant has two children, who are both minors, from his current marriage. The complainant also has a son from an extramarital relationship, who was born in February 1999. The complainant has recognized his paternity and pays child maintenance for his child. The complainant refuses, however, to have contact with his illegitimate son.

The Higher Regional Court (Oberlandesgericht) ordered that the complainant should have contact with the child in the presence of a social worker for two hours every three months. It threatened to impose a fine on him of up to to €25,000 if he did not comply.

The complainant's constitutional complaint alleges a violation of his fundamental rights under Article 2.1 in conjunction with Article 1.1 of the Basic Law and of Article 6.1 of the Basic Law; it is directed against the threat of a fine ordered by the Higher Regional Court on 21 January 2004 and indirectly against s. 33.1 sentence 1 and s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction which authorizes the Court to make such order.

Extract from the Grounds:

…

C.

The constitutional complaint is founded.

The order of the Higher Regional Court encroaches on the complainant's fundamental right to protection of his personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law to the extent that it contained the threat of a fine should the complainant refuse to have contact with his child (I.). The statutory duty of a parent to have contact with his or her child in s. 1684.1 of the Civil Code concretizes parental responsibility under Article 6.2 sentence 1 of the Basic Law in a manner which is not constitutionally objectionable. Under Article 6.2 sentence 1 of the Basic Law, a child has a right to parental care and upbringing which corresponds with

the parental responsibility and which has also been concreticized by the legislature in the right of a child to have contact with its parent in s. 1684.1 of the Civil Code. The legislature pursues a legitimate purpose in providing for the possibility of the threat of an imposition of a fine where a parent is unwilling to have contact with his or her child (II.). However, the threat of a fine to enforce the duty of contact of a parent who refuses to have contact with his or her child is not usually in the child's best interests and thus does not justify the encroachment on the parent's right of personality (III.). s. 33.1 sentence 1 and s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction are thus to be interpreted in accordance with the constitution as meaning that compulsory enforcement of the duty of contact of a parent who refuses to have contact with his or her child must be avoided unless there are sufficient indications in a specific case that enforcement would be in the child's best interests (IV.). The Higher Regional Court failed to take this sufficiently into account in its decision (V.).

I.

The threat of a fine based on s. 33.1 sentence 1 in conjunction with s. 33.3 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction to enforce the complainant's duty to cultivate contact with his child against his will encroaches on his fundamental right to protection of his right of personality.

1. This fundamental right protects the narrower personal sphere and the prerequisites for it. It extends to the right of respect for one's privacy. This includes the family sphere and personal relationships with other family members (see BVerfGE 96, 56 [61]).The same applies to the relationship between a parent and his or her child. What form their relationship takes will be determined by their respective personal feelings, attitudes and experiences which influence each other. The decision to have or to refuse contact with one's child expresses the parent's personal understanding of parenthood and his or her emotional relationship with the child. Nonetheless, it is not included in the inviolable core area of private conduct of life since it has a significant social connection with the child concerned whose interests and personal sphere are affected by this decision (see BVerfGE 96, 56 [61]).

2. If coercive measures are threatened to force a person to have contact with his child against his will, this constitutes an encroachment on his right to have his private sphere respected. He is compelled to meet with his child and cultivate personal contact with it contrary to his own wishes. This influences his personal relationship with the child and puts him under pressure to behave in a manner towards the child that he does not wish to behave in.

3. The fundamental right to the protection of privacy is not, however, guaranteed without restriction outside the inviolable core area of private conduct of life. It is restricted pursuant to Article 2.1 of the Basic Law through the constitutional order and the rights of others (see BVerfGE 99, 185 [195]).

A statutory basis is necessary for such restrictions from which their prerequisites and scope can be determined. Individuals are required to accept the restrictions which are undertaken in the overriding general interest or are undertaken in view of the constitutionally protected interests of third parties subject to the principle of proportionality (see BVerfGE 96, 56 [61]).

S. 33.1 sentence 1 in conjunction with s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction is the statutory basis upon which the Higher Regional Court relied in its decision to threaten to fine the complainant if he did not fulfil his duty of contact and with which it encroached on the complainant's fundamental right to protection of his personality. However, this provision itself only provides a general description of a duty to act which is imposed by the court and which depends on the will of the person concerned as the prerequisite for the threat of a fine; furthermore, it states that the purpose of the threat of a fine is to make the person concerned comply with the duty to act ordered by the court. Thus s. 1684.1 of the Civil Code must also be included in the examination of whether the purpose pursued by s. 33.1 sentence 1 in conjunction with s. 3.3 of the Act on Matters of Non-Contentious Jurisdiction is justified. The court ordered the complainant to have contact with his child on the basis of the provision in the Civil Code which obliges a parent to have contact with his or her child; this provision justifies the duty to act referred to in s. 33.1 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction. Whether the encroachment on a fundamental right resulting from the threat of a fine can be justified must be measured against this duty of contact.

II.

The legislature pursues a legitimate purpose in providing the courts in s. 33.1 sentence 1 in conjunction with s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction with the possibility of threatening to fine a parent to enforce a court-imposed obligation to have contact with his or her child.

1. The statutory duty of a parent to have contact with his or her child as laid down in s. 1684 of the Civil Code is a permissible concretization of the responsibility allocated to parents by the Basic Law.

a) Article 6.2 sentence 1 of the Basic Law guarantees parents the right to care for and bring up their child, but at the same time also makes this task a primary duty imposed on them. In this connection, parents may in principle decide to be free of state influence and may wish to live up to their responsibility as parents, according to their own ideas (see BVerfGE 107, 104 [117]). Nevertheless, their actions must be guided by what is in the best interests of the child since the parental right is a right to be exercised in the interests of the child (see BVerfGE 103, 89 [107]). They are guaranteed it for the sake of the child. The duty of parents to care for and bring up their child is not owed exclusively to the state which must guard the exercise of parental authority and which is obliged to intervene to protect the child if the parents do not live up to this responsibility (see BVerfGE 60, 79 [88]; 107, 104 [117]). Parents also directly owe their child a duty of care and upbringing.

The child has its own dignity and rights. As a subject of fundamental rights it is entitled to the protection of the state and the guarantee of its constitutionally anchored rights. When regulating interpersonal relationships, a constitution which places human dignity at the centre of its value system may not in principle grant anyone rights to the person of another who does not have duties attached to them and who does not respect the human dignity of the other person. The same applies to the relationship between a parent and his or her child. The parental right *vis-à-vis* the child is justified by the fact

that the child requires protection and help so that it can develop into a responsible member of society in keeping with the Basic Law's image of man (see BVerfGE 24, 119 [144]).

Thus this right cannot be separated from the duty of parents to offer this protection and help to the child for its well-being. In this context, the duty does not merely relate to the child, it is also owed to the child since the child is not the subject of the parental exercise of rights; it is a legal person and a subject of fundamental rights in whose best interest parents are obliged to act.

b) The child's right to parental care and upbringing under Article 6.2 sentence 1 of the Basic Law corresponds with the parental duty to care for and bring up the child which is imposed by Article 6.2 sentence 1 of the Basic Law. If a duty is imposed on one person which relates to another person and which is at the same time connected with a right to influence the other person, a right to make decisions for the other person, a right to represent the other person's interests and a right to have a significant and dominant influence on the development of the other person's personality, this will affect the core of such a person's life development and restrict his exercise of free will. The only justification for granting parents such far-reaching influence over the life of their child is the fact that the child cannot bear responsibility for itself and would come to harm if it were not given any help. If the child needs such support from its parents and if as a result its parents have a responsibility to act only in the child's best interests, then the child also has a right to expect its parents to care first and foremost for it and a right to also have its parents fulfil the duty which cannot be separated from their parental right. Thus the right of the child is based on parental responsibility and it is therefore protected by Article 6.2 sentence 1 of the Basic Law. It is closely connected to the fundamental right of the child to protection of its personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law since it guarantees the child family ties which are significant for the development of its personality. The personal relationship with its parents, their care, help and warmth and affection contribute significantly to the child being able to develop into a person who knows that he or she is respected and who learns to respect himself or herself as well as to respect others.

c) Nevertheless, the parental right with its concurrent duty requires statutory regulation as does the right of the child to the care and upbringing by its parents under Article 6.2 sentence 1 of the Basic Law. This applies to the parental right in particular because parents are jointly entitled to it. If parents are unable to agree on how to exercise their parental responsibility, then rules must be made which allocate them rights and duties *vis-à-vis* their child (see BVerfGE 92, 158 [61]).

In addition, statutory rules are necessary because legal authority in relation to the child is a prerequisite for the care and upbringing of a child also *vis-à-vis* third parties (see BVerfGE 84, 168 [180]) and, because of the watchdog position established for it by Article 6.2 sentence 2 of the Basic Law, the state has to ensure that the exercise of the parental right is guided by the best interests of the child and that the child's rights are respected. It must therefore regulate, on the one hand, how the child's right

to the care and upbringing by its parents in accordance with its best interests can be safeguarded and, on the other hand, when and under what circumstances it will limit the free exercise of the parental right for the child's sake.

d) Contact between parent and child is not merely a possible expression of parental upbringing, but a fundamental basis for the parent-child relationship and thus an essential part of Article 6.2 sentence 1 of the Basic Law. Especially in the case of a parent who does not live with his or her child, access to it is a significant prerequisite for personal contact with the child that would allow the parent to establish or maintain a closer relationship with it. Contact ensures that he or she can devote himself or herself to the child and can be involved in its development; it ensures that payment of maintenance is not the only way that the parent can exercise his or her parental responsibility. This is in keeping with the legislature's decision in s.1684.1 of the Civil Code, which grants a right of contact to parents irrespective of whether they have custody rights. Particularly in the case of a non-custodial parent, a right of contact is the main basis for exercising his or her parental right under Article 6.2 sentence 1 of the Basic Law.

On the other hand, the parental right to bring up a child which is protected by Article 6.2 sentence 1 of the Basic Law, is intended as a right in the interests of the child (see BVerfGE 75, 201 [218]; 103, 89 [107]) and has as its aim the child's well-being. However, it is in principle in the child's best interests if through contact with its parents it gains the opportunity to get to know its father and mother, to become close with them and with the help of the contact is able to continue a personal relationship with them. Through communication with its parents, the child can experience affection, can learn and can receive inspiration and advice that give it direction, help it to form opinions and aid it in developing into an independent and responsible person. As far as the child and its development are concerned, refusal to have contact with it and thus the severance of personal ties with it represent a significant withdrawal of parental authority; at the same time, it constitutes neglect of one of the significant parts of the duty of upbringing imposed on parents by Article 6.2 sentence 1 of the Basic Law. Article 6.2 sentence 2 of the Basic Law allocates the state a duty to monitor the exercise of parental responsibility in the best interests of the child, and parental contact is an important prerequisite for this; in exercise of this duty, the legislature has therefore obligated parents in s. 1684.1 of the Civil Code to have contact with their child and urged them to fulfil their responsibility to their child. In this connection, it has at the same time granted the child a right to have contact with its parents and thus concretisized the right of the child under Article 6.2 sentence 1 of the Basic Law to care and upbringing by its parents.

2. It is of course true that - through its regulation of their right to maintain their privacy and their personal relationships - the obligation of parents to have contact with their child does encroach on their fundamental right to protection of their right of personality since it obliges them to enter into a personal relationship with their child even if they do not wish to start or continue such a relationship. This encroachment is, however, justified in particular due to the

responsibility for their child guaranteed as well as imposed on parents by Article 6.2 sentence 1 of the Basic Law and due to the child's right to parental care and upbringing, which is also protected by this fundamental right.

The parental duty of contact serves the purpose pursued by the legislature in s. 1684.1 of the Civil Code of reinforcing the legally recognized right of the child to parental contact by imposing a corresponding duty on parents in order to enable the child to have the opportunity to meet with its parents. Such contact is of outstanding significance for the development of the child. The assumption of the legislature, when it imposed this duty on parents, that ongoing personal contact between a parent and a child would have a positive influence on the child's development and be in principle in the child's best interests is supported by scientific findings and therefore no objection can be raised in this connection. The duty of contact is also a suitable means of promoting the relationship between a child and its parents. The possibility cannot be ruled out that a parent subject to a duty of contact could be influenced by the duty to have contact with his or her child in s. 1684.1 of the Civil Code or a judicial order concretizing such duty, and that the parent could allow himself or herself to be persuaded to fulfil this duty in the interests of the child and thus allow the child to establish or continue a relationship with him or her, even where the parent was initially not interested in regular meetings with the child and did not of his or her own initiative seek personal contact with the child. Since no more lenient means of reinforcing the child's right of contact in its own interests and assisting in the enforcement of same are evident, a parental duty to have contact is also necessary.

After all, it is also reasonable to urge a parent to cultivate contact with his or her child. There is to be sure an encroachment on the parent's fundamental right to protection of his or her right of personality associated with the duty of contact and this encroachment is not slight. As a rule, the parent is not just expected to endure a meeting with his or her child. Instead, the parent is expected to give the child warmth and affection, to communicate with it and to establish or continue a personal relationship with it. This can lead to not insignificant psychological pressure for a parent who is not prepared to do this. However, one has to take into account that under Article 6.2 sentence 1 of the Basic Law parents do not merely have a right, but also a duty to care for and bring up their child. It is true that parents can fulfil this duty by committing their child to the care of another. However, parents do not release themselves from the responsibility that they bear for their child by delegating its upbringing to another. Without contact with a child, it is scarcely possible for a parent to exert the influence that is necessary for its best interests and instrumental for its personal development. Contact with the child is in this respect a significant prerequisite and the basis for the exercise of the parental right in the interests of the child.

If the legislature concretizes the duty of upbringing imposed on parents in Article 6.2 sentence 1 of the Basic Law by raising contact with the child to a parental duty, it makes clear the importance to be attached to contact between a parent and child in the upbringing of a child. Seen in this light the encroachment on the parent's right of personality following from the imposition of a duty of contact does not appear particularly serious. In addition, the parental duty of contact corresponds with the child's right to have contact with its parents that the legislature granted the child in s. 1684.1 of the Civil Code. The legislature took into account the child's right to care and upbringing by its parents based on Article 6.2 sentence 1 of the Basic

Law by concretizing and securing one significant point in an ordinary law which makes exertion of an influence on the child's upbringing possible. If one weighs the child's interest in having steady contact with both parents against a parent's interest in not wanting or no longer wanting to have personal contact with it, then one should accord the child's desire considerably more weight than the parent's wishes. This is because as a significant basis for the development and maintenance of a family relationship and for the receipt of parental support and upbringing, the contact of a child with its parents is of considerable importance for the development of its personality and is something that contributes in principle to its well-being.

It is thus reasonable to oblige a parent to have contact with his or her child - even if this entails an encroachment on the parent's personal sphere if this is in the best interests of the child. Thus the legislature followed a legitimate purpose that is supported by the Basic Law by making it possible through s. 33.1 sentence 1 in conjunction with s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction to threaten parents with a fine for failure to comply with their legal duty to have contact with their own child and with an order from the court instructing them to do so.

III.

However, as a rule, the threat of a fine to enforce the duty of contact of a parent against his or her express will is not suitable for achieving the sought purpose, i.e. to make it possible for the child to have contact with its parent in a way that would benefit the development of its personality and to assist in the enforcement of the child's right to have the parent exercise his or her responsibility in the child's best interests. If coercive measures are necessary to force an unwilling parent to have contact with a child, this contact is not usually in the best interests of the child. Where this is the case, the threat by the court to apply coercive measures constitutes an unjustified encroachment on the parent's fundamental right to the protection of his or her personality.

1. The effect of the threat of a fine may well be to motivate a parent who is actually not willing to have contact with his or her child, to have a meeting with the child, even against his or her will. The psychological and financial pressure exerted through the threat of a fine may bend the will of the parent and prompt him or her to exercise his or her right of contact.

Unlike in the case of a judicial duty of contact, which initially only urges the parent concerned to fulfil his or her parental responsibility and which clarifies his or her legal duty with concrete orders and thus gives him or her the option of reconsidering and following the order to have contact with the child without incurring a fine, the threat of a fine pressures him or her to meet the child and be confronted by it against his or her will. However, that which it is intended to compel the parent to do by the use of pressure does not just conflict with the parent's will. The compulsory enforcement of the duty of contact, which requires not just his or her presence, but his or her emotional warmth towards the child, conflicts with the feelings the parent harbours towards the child. Where a parent's rejection of any contact with the child has been declared and demonstrated in this manner, any contact with the child that eventuates cannot fail to affect the child; the pressure exerted on the parent alone would suffice to have an impact on the child. If the parent does not change his or her hostile attitude towards the child at a forced meeting with it, the child is faced with a situation in which it does not experience the

parental warmth and affection which is the purpose of the contact, but instead experiences personal rejection, and this not from just anyone but from, of all people, a parent. This poses a big risk that the child's self-esteem could be damaged. For it can scarcely understand why its parent does not want to know it and why he or she acts in such an unfriendly way and it could therefore blame itself. This usually does not benefit the child's well-being, but instead damages it.

Nevertheless, the possibility that a forced meeting with the child could lead to the parent opening himself or herself to the child and that this would not result in any mentionable damage to the child's well-being cannot be ruled out. However, if a parent does not show cooperation and if he or she still stubbornly refuses to meet the child inspite of a court order stating that he or she has a duty to do so, it is doubtful whether enforced contact can lead him or her to develop a positive attitude to the child. Thus there is much that would suggest that the child's best interests could at least be significantly impaired through contact enforced by applying coercive measures. It is, however, very difficult to predict with certainty whether this will occur in an individual case and whether the child will be damaged since it depends on the feelings of the parent and his or her reactions at the time which are scarcely foreseeable.

2. a) What counts in deciding if it would be suitable to use coercive measures to force a parent to have contact with his or her child in cases where he or she does not want such contact is not whether the contact could endanger the best interests of the child, but whether such contact is in the child's best interests. The legislature imposed a duty on parents to have contact with their child in order to strengthen the child's right of contact with its parents. This right was granted the child as being in its well-understood best interests. The legislature assumed that a child's contact with its parents was of outstanding significance for its development. This is an expression of its view that contact can establish or maintain an emotional relationship between a child and its parents and that the parent's warmth and affection during the contact is beneficial for the child's development so that contact is in the child's best interests. This benefit in relation to the child's best interests justifies the imposition on the parents of a duty to have contact with their child even though this encroaches on their fundamental right to protection of their rights of personality. However, this is only true to the extent that and for as long as contact with its parent actually serves the best interests of the child. If this is not achieved through the statutory means intended for this purpose, then this purpose cannot justify the encroachment on the parent's right of personality. This applies to not only the duty of contact imposed on parents, but in particular to the possibility offered by the law of enforcing the duty of contact against the parent's declared will through the threat of coercive measures. The proper metric for determining the suitability of contact achieved through coercion is whether the contact is in the child's best interests.

   The fact that s. 1684.4 of the Civil Code only permits restrictions on and the exclusion of the right of contact if the best interests of the child would otherwise be endangered does not hinder the aforegoing. This provision deals with the limits on the parental right of contact and not with the enforcement of the duty to have contact. Therefore, it does not apply to the relationship between a parent with a duty of contact and his or her child with a right to have contact.

If a parent wishes to exercise his or her right of contact, he or she may only be restricted from doing this over an extended period or permanently pursuant to s. 1684.4 of the Civil Code if the child's best interests would otherwise be endangered. By making the existence of a danger to the child's well-being the standard, the legislature has taken the parental right into account and sought to give it as much room as possible for development. Thus a limit on the parental right of contact is set at the point where the exercise of the right of contact threatens to conflict significantly with the best interests of the child.

The situation is different, however, in relation to the compulsory enforcement of a duty of contact against the will of a parent subject to this duty. In this case the function of enforcement is not the realization of the parent's right of contact; it instead represents an encroachment on the parent's right of personality. This kind of encroachment can, however, only be justified if the right of the child to contact with its parent, which is intended to be realized in this way, also achieves its objective of serving the child's best interests. If there is a risk that instead of the effect which the child's right to contact was intended to achieve the opposite will arise, then the exercise of the right is of no use to the child but can instead harm it. In such case the reason for limiting the right of a parent to conduct the relationship with his or her child according to his or her own wishes and needs disappears. Thus in the case of the compulsory enforcement of contact against the will of the parent obliged to have contact, the standard can only be whether this contact serves the child's well-being.

c) In view of the emotional and psychological strain to which a child can be exposed at a meeting with a parent who rejects it and who only attends the meeting under duress, one cannot, as a rule, start by assuming that contact under such circumstances is in the child's best interests. To be sure, there are - as far as can be seen - no social science studies on the reactions and attitudes adopted in relation to his or her child by a parent compelled by coercive measures to have contact with the child or on the effects on the child of a forced meeting with a parent who refuses contact with it which one could use as a basis for assessing whether, and if so, under what circumstances contact of such kind could be in the child's best interests in spite of the unfavourable conditions under which it takes place. The reason for this is presumably that until now only very few cases have occurred or have become known in which contact was brought about by means of coercive measures. For most of the contact disputes brought before the courts relate to cases in which, contrary to the will of the other parent, one parent complains about his or her right of contact with the child. On the other hand, the reason might be that the course such meetings take and how they can affect a child's psyche depend on the psychological state of the relevant persons at the time so that it is difficult to make generalizations on the basis of the results in an individual case. However, even if there are no valid scientific findings on the effects of enforced contact on a child to fall back on, it would seem evident that a parent who obviously does not want to have contact with his or her child and who does not allow a court order clarifying his or her duty to affect or change his or her hostile attitude towards the child will exhibit his or her unwillingness and hostility towards the child at a forced meeting. This is confirmed by the German Institute for

Youth Research (Deutsches Jugendinstitut) which assumes on the basis of its findings that the hostile attitude of a parent is a prognosis factor for difficult or damaging contact for the child. For if the child's own parent really does demonstrate his or her rejection, then this is likely to leave its mark on the child's psyche; especially since the first meeting or a meeting that occurs after a longer period with its parent will be a particularly emotional event which will trigger feelings of fear and expectation in the child. If the child is not only disappointed, but also feels that it is not accepted as a person, then it seems probable that the child will suffer emotional damage. Contact with its parent, during which such detriment to the child is likely, is not in the best interests of the child.

Nevertheless, one cannot rule out the possibility that there are cases in which there is a realistic chance that through its uninhibitedness towards strangers and its psychological stability a child might be able to overcome the resistance of the parent who wants to avoid it thanks to its open and friendly behaviour so that what was initially enforced contact can be in the child's best interests after all. There may also be cases in which forced contact between the child and its parent can be in the child's interests, even if the parent expresses his or her resistance to the meeting. As was stated by the German Institute for Youth Assistance and Family Law (Deutsches Institut für Jugendhilfe und Familienrecht) and the German Institute for Youth Research in their opinions, an interest in meeting an unknown parent arises in the course of a child's development, usually in adolescence or early adulthood. If a child or adolescent has developed this strong interest and if he or she is primarily concerned with meeting the parent to make his or her acquaintance - even if it is only a one-time meeting - then the fulfilment of this need can be more important for the child than the possibly associated experience of finding out that the parent wants to have nothing to do with it. This is to be clarified, if necessary, with the help of an expert. In such a case, even an enforced meeting with the parent can be in the best interests of the child. The older a child is and the more developed its own personality is, the more it can be assumed that even the compulsory enforcement of its own express and emphatic wish to have contact with its parent will be in its best interests. In such cases, the encroachment on the right of privacy of the parent concerned which is associated with enforced contact is not only suitable for achieving the sought purpose of allowing the child to have contact which would be in its best interests, but also justified. More weight should be attached to ensuring the child's best interests are met than to the interest of the parent in being spared from having to have contact with his or her child. In such a case, it is reasonable to expect a parent to have contact with his or her child and, if necessary, to use coercive measures to force him or her to do so.

In the case of children who have not yet developed stable personalities, on the other hand, one can usually begin by assuming that forced contact with the reluctant parent will not serve the child's best interests unless there are enough indications to the contrary in a concrete case. Where a parent unwilling to have contact with his or her child is threatened with coercive measures in order to enforce contact and these measures fail to achieve their purpose, then the encroachment on the fundamental right

to protection of personality of the parent refusing contact is not justified unless such coercive measures are suitable for achieving contact which is in the best interests of the child (see BVerfGE 99, 145 [164]).

IV.

The fact that pursuant to s. 33.1 sentence 1 and s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction, a parent who is unwilling to have contact with his or her child may be threatened with a fine even though this violates the parent's fundamental right to protection of his or her personality does not lead to a violation of the Basic Law by these provisions. This provision is thus to be interpreted in accordance with the constitution as meaning that compulsory enforcement of the duty of contact of a parent who refuses to have contact with his or her child must be avoided unless there are sufficient indications in a specific case that enforced contact would be in the child's best interests.

S. 33 of the Act on Matters of Non-Contentious Jurisdiction is a general provision on enforcement in non-contentious matters that covers a multitude of court imposed obligations relating to acts that depend on the will of the person obliged; the provision allows the courts to reinforce such obligations through the threat and imposition of a fine. This also applies, for example, to the duty of the parent with whom the child lives to hand over the child to the other parent who has a right of contact so as to allow contact at the times set down by the court. The provision is discretionary. It leaves the decision as to whether non-compliance with an imposed obligation should result in enforcement to the due discretion of the court. It thus allows the court to refrain from compulsory enforcement of the obligation. Thus the provision can also be interpreted in conformity with the Basic Law in the case of a duty of contact which the court has imposed on one parent. It leads to a finding that the use of coercive measures against a parent who stubbornly refuses contact should be avoided unless there are enough indications in a concrete case that forced contact will serve the child's best interests because as a rule such contact is not in the best interests of the child. In this respect the discretion granted to the courts by s. 33.1 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction is restricted by the Basic Law.

V.

The challenged decision of the Higher Regional Court does not satisfy the constitutional requirements and violates the complainant's fundamental right to the protection of his right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law, insofar as it threatened him with a fine.

When exercising the discretion to use coercive measures to compel a parent to have contact that s. 33.1 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction grants the courts, the Court failed to take into account that that it should have examined whether forced contact against the complainant's will would be in the child's best interests. Instead the standard it used for its examination was whether forced contact could endanger the child's best interests and answered this question in the negative. The Court assumed on the basis of the expert opinion it obtained that there was no risk of serious long-term damage to the child if the child had contact with the complainant in the company of a social worker. To this extent it did not exclude the

possibility of detrimental effects on the child, but considered them acceptable for the purposes of encouraging the complainant through the threat of coercive measures to comply with his duty of contact and to thus bring about contact between him and his child. However, this is not sufficient to justify an encroachment on the complainant's right of personality. For the Court did not give adequate consideration to the best interests of the child or the complainant's right to protection of its personality. It failed to recognize that contact may only be enforced against a parent who is obliged to have contact when this contact achieves its objective of serving the child's best interests.

3. Fundamental Rights Protection under the Basic Law and the European Convention of Human Rights - The Görgülü Decision, BVerfGE 111, 307

Explanatory Annotation

The right place for the Görgülü judgment to be explained in the context of a norm of the German Basic Law is not easy to find. The German Federal Constitutional Court referred to Article 6 because a father's right was at stake. Hence this decision is reported here as a matter of Article 6 of the Basic Law. Yet, the Görgülü judgment has another dimension which is of utmost importance under German constitutional law. The judgment deals with the question of the relationship between fundamental rights of the Basic Law and their protection by the Constitutional Court and fundamental rights of the European Convention of Human Rights and their interpretation and protection by the European Court of Human Rights.

This relationship between the Basic Law and the European Convention of Human Rights must be distinguished from the relationship between German law in general and the Basic Law in particular and the law of the European Union (EU). The EU is a supranational body to which the member states have transferred enumerated powers and the law of the European Union precedes the law of its member states, in principle even their constitutional law.

The European Convention of Human Rights and Fundamental Freedoms (ECHR) and the subsequent protocols[101] are treaties under international law within the framework of the Council of Europe[101]. Under Article 59.2 of the Basic Law, certain international treaties require "the consent or participation, in the form of a federal law […]" of Parliament. The ECHR therefore has the status of a federal law within the legal system of Germany. It follows that the provisions of the Convention do not have the status of constitutional norms, they are inferior in hierarchy. This notwithstanding, ECHR norms differ significantly from domestic statutory norms. Conflicts between domestic statutory norms are usually resolved by the application of conflict rules such as the principle expressed in "*lex posterior derogat legi priori*", i.e. the later norm prevails over the earlier one. In the case of the European Convention, however, this conflict rule does not apply. The Constitutional Court has always maintained, and confirmed in the decision reproduced here, that all courts must apply and interpret domestic law in conformity with Convention law. In an

100 For a hyperlinked list of Convention and protocols see http://www.conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG.

101 For more information on the Council of Europe see http://www.coe.int/.

earlier decision the Court had stated even more clearly that this also applies to domestic norms that entered into force after the Convention and its protocols[102]: in other words, the lex posterior rule does not apply when a post Convention norm of domestic German law stands in conflict with a norm of the European Convention of Human Rights.

The case at issue concerns a dispute between the applicant and the foster parents of the applicant's son. The applicant claimed the right to bring up his son to whom he had no had contact with because the mother had given up the child for adoption directly after birth and he had found out about the birth only later. The applicant's legal battle in Germany remained without success but the European Court of Human Rights (ECtHR) interfered and saw a violation of Article 8 of the ECHR[103]. The matter went back to the German courts and the lower court reacted in accordance with the ECtHR. However, the appellate court rejected this finding arguing that the ECtHR's decisions are binding only on the Federal Republic of Germany but not its courts and other organs. The Constitutional Court flatly rejected this truly absurd argument of the Court of Appeal. However the Constitutional Court also took the opportunity to explain its view of the relationship between the law of the ECHR and domestic constitutional law. The Court mainly confirmed what was already clear. Domestic statutory law must be applied in the light of the Convention and its guarantees and in the light of the concrete content of these guarantees as developed in the case law of the ECtHR. The ECHR is part of the domestic law of Germany and partakes in the rule of law. All other norms must therefore be interpreted in the light of the requirements of the norms of ECHR and, as shown above, this is also true for post ECHR domestic norms. In this decision the Court addressed the hypothetical constellation where a ECHR norm stands in conflict with a domestic constitutional norm. The Court held that if such a conflict cannot be resolved by interpretation of the constitutional norm, the provision of the Basic Law must prevail and the conflict between the two sets of norms can then only be resolved by an amendment of the Basic Law.

This finding is not surprising at all and legally absolutely correct. What surprises is the length with which this "non-question" was treated by the Court in the light of the fact that in the context of norms as abstract as the fundamental rights of the Basic Law and those protected by the ECHR it is hardly conceivable if not downright impossible to envisage a norm conflict that could not be resolved by interpretation.

102 BVerfGE 74, 358 (370), http://www.servat.unibe.ch/fallrecht/bv074358.html.

103 Article 8 states that "[E]veryone has the right to respect for his private and family life, his home and his correspondence." See ECtHR, Appl. No. 74969/01, Judgment of 26.2.2004, Görgülü, http://hudoc.echr.coe.int/eng?i=001-61646 (last accessed on 21.10.2019)

Translation of the Görgülü Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 111, 307*

Headnotes:

1. The principle that the judge is bound by statute and law (Article 20.3 of the Basic Law (Grundgesetz - GG)) includes taking into account the guarantee of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights (ECHR) as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECHR and the "enforcement" of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law.

2. In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights.

Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -

Facts:

In his constitutional complaint, the complainant challenges *inter alia* what he regards as the unsatisfactory enforcement of the judgment of the European Court of Human Rights (ECHR) of 26 February 2004 pronounced in his case and the disregard of international law by the Naumburg Higher Regional Court.

The complainant is the father of the child, Christofer, who was born illegitimate on 25 August 1999. The mother of the child, who at first did not name the complainant to the authorities as the father of the child, gave the boy up for adoption one day after his birth and first declared her prior consent to the adoption by the foster parents in a notarial deed of 1 November 1999; she repeated her consent on 24 September 2002. The boy has been living with the foster parents since 29 August 1999.

The complainant learned in October 1999 of the child's birth and released for adoption; his contact with the mother of the child had broken off in July 1999. Thereupon he proceeded with the adoption his son; he encountered difficulties at first, since his paternity was not recognised. Finally, his paternity was established by a judgment of the Wittenberg Local Court (Amtsgericht) of 20 June 2000.

In an order of 9 March 2001, the Wittenberg Local Court transferred the sole parental custody of Christofer to the complainant in accordance with his application. Upon the appeal of the foster parents and the Wittenberg Youth Welfare Office (Jugendamt), which was appointed official guardian after the birth, the Local Court's custody decision was reversed by order of 20 June 2001 of the Naumburg Higher Regional Court, and the complainant's application for

transfer of custody was dismissed on the merits. At the same time, the Higher Regional Court, of its own motion, excluded rights of access between the complainant and the boy until 30 June 2002 on the grounds of the best interest of the child.

The Third Chamber of the First Senate of the Federal Constitutional Court, by an order not stating grounds of 31 July 2001 - 1 BvR 1174/01 - refused to admit for decision the complainant's constitutional complaint against the order of the Higher Regional Court.

In September 2001, the complainant filed an individual application under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) at the European Court of Human Rights.

In a judgment of 26 February 2004, a chamber of the Third Section of the ECHR declared unanimously that the decision on custody and the exclusion of the right of access violated Article 8 of the Convention. On the basis of Article 41 of the Convention, the ECHR awarded the complainant EUR 15,000.00 in damages and EUR 1,500.00 to reimburse costs and expenses (see ECHR, No. 74969/01, Judgment of 26 February 2004 - Görgülü).

Thereupon, in the parallel proceedings on custody, the Wittenberg Local Court transferred sole parental custody to the complainant by an order of 19 March 2004 in accordance with his application. In addition, the Local Court, of its own motion by an order of the same date and with reference to this custody decision, issued a temporary injunction on the access rights of the complainant to his son. He was given the right, from April 3 2004, to have access to his son for two hours every Saturday, until there was a final and non-appealable decision in the custody proceedings.

b) The official guardian and the children's guardian appealed against the decision of the Local Court on access rights. The Naumburg Higher Regional Court first, by order of 30 March 2004, suspended the execution of the temporary injunction, and by a further order of 30 June 2004 cancelled the temporary injunction.

   In his constitutional complaint, the complainant challenges a violation of his fundamental rights under Article 1, Article 3 and Article 6 of the Basic Law, and of the right to fair trial. At the same time he applies for a temporary injunction on access to his son to be issued.

   …

C.

The constitutional complaint is well-founded. In its order of 30 June 2004, the Higher Regional Court violated Article 6 of the Basic Law in conjunction with the principle of the rule of law.

The authorities and courts of the Federal Republic of Germany are obliged, under certain conditions, to take account of the European Convention on Human Rights as interpreted by the ECHR in making their decisions (I.). The challenged decision of the Higher Regional Court does not do justice to this obligation, since the court does not pay sufficient attention to the judgment of the ECHR of 26 February 2004 in the case of the complainant (II.).

Selected Fundamental Decisions of the Federal Constitutional Court

I.

In the German legal system, the European Convention on Human Rights has the status of a federal statute, and it must be taken into account in the interpretation of domestic law, including fundamental rights and constitutional guarantees (1). The binding effect of a decision of the ECHR extends to all state bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention (2). The nature of the binding effect depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law (3). A complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law (4).

1. a) The European Convention on Human Rights and its protocols are agreements under public international law. The Convention leaves it to the States parties to decide in what way they comply with their duty to observe the provisions of the Convention (ECHR, Judgment of 6 February 1976, Series A20, no. 50 - Swedish Engine Drivers Union; ECHR, Judgment of 21 February 1986, Series A98, no. 84 - James and Others; see Geiger, Grundgesetz und Völkerrecht, 3rd ed. 2002, 405; Ehlers, in: idem (ed.), Europäische Grundrechte und Grundfreiheiten, 2003, s. 2 marginal nos. 2-3). The federal legislature consented to the above treaty in each case by a formal statute under Article 59.2 of the Basic Law (Act on the Convention for the Protection of Human Rights and Fundamental Freedoms, Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten of 7 August 1952, Federal Law Gazette (Bundesgesetzblatt - BGBl) II, p. 685; by the proclamation of 15 December 1953, Federal Law Gazette 1954 II p. 14, the Convention entered into force for the Federal Republic of Germany on 3 September 1953; there was a new proclamation of the Convention as amended by the 11th protocol in Federal Law Gazette 2002 II p. 1054). In doing this, the federal legislature transformed the Convention into German law and made an order on the application of the law to this effect. Within the German legal system, the European Convention on Human Rights and its protocols, to the extent that they have come into force for the Federal Republic of Germany, have the status of a federal statute (see BVerfGE 74, 358 [370]; 82, 106 [120]).

   This classification means that German courts must observe and apply the Convention within the limits of methodically justifiable interpretation like other statute law of the Federal Government. But the guarantees of the European Convention on Human Rights and its protocol, by reason of this status in the hierarchy of norms, are not a direct constitutional standard of review in the German legal system (see Article 93.1 no. 4.a of the Basic Law, s. 90.1 of the Federal Constitutional Court Act). A complainant can therefore not directly challenge the violation of a human right contained in the European Convention on Human Rights by a constitutional complaint before the Federal Constitutional Court (see BVerfGE 74, 102 [128] with further references;

Order of the First Chamber of the Second Senate of the Federal Constitutional Court of 1 March 2004 - 2 BvR 1570/03 -, Europäische Grundrechte-Zeitschrift - EuGRZ 2004, p. 317 [318]). However, the guarantee of the Convention influences the interpretation of the fundamental rights and constitutional principles of the Basic Law. The text of the Convention and the case law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law - and this the Convention itself does not desire (see Article 53 of the Convention; see BVerfGE 74, 358 [370]; 83, 119 [128]; Order of the Third Chamber of the Second Senate of the Federal Constitutional Court of 20 December 2000 - 2 BvR 591/00 -, Neue Juristische Wochenschrift - NJW 2001, pp. 2245 et seq.).

b) This constitutional significance of an agreement under international law, aiming at the regional protection of human rights, is the expression of the Basic Law's commitment to international law (Völkerrechtsfreundlichkeit); the Basic Law encourages both the exercise of state sovereignty through the law of international agreements and international cooperation, and the incorporation of the general rules of public international law, and therefore is, if possible, to be interpreted in such a way that no conflict arises with duties of the Federal Republic of Germany under public international law. The Basic Law has laid down in its programme that German public authority is committed to international cooperation (Article 24 of the Basic Law) and to European integration (Article 23 of the Basic Law). The Basic Law has granted the general rules of public international law priority over ordinary statute law (Article 25 sentence 2 of the Basic Law) and has integrated the law of international agreements, by Article 59.2 of the Basic Law, into the system of the separation of powers. In addition, it has opened the possibility of joining systems of mutual collective security (Article 24.2 of the Basic Law), created the duty to ensure the peaceful settlement of international disputes by way of arbitration (Article 24.3 of the Basic Law) and declared that the disturbance of the peace, and in particular preparing a war of aggression, is unconstitutional (Article 26 of the Basic Law). In this complex of norms, the German constitution, as is also shown by its preamble, aims to incorporate the Federal Republic of Germany into the community of states as a peaceful member having equal rights in a system of public international law serving peace (see also BVerfGE 63, 343 [370]).

However, the Basic Law did not take the greatest possible steps in opening itself to international law connections. On the domestic level, the law of international agreements is not to be treated directly as applicable law, that is, without an Act subject to the consent of the German parliament under Article 59.2 of the Basic Law, and - like customary international law (see Article 25 of the Basic Law) - not endowed with the status of constitutional law. The Basic Law is clearly based on the classic idea that the relationship of public international law and domestic law is a relationship between two different legal spheres and that the nature of this relationship can be determined from the viewpoint of domestic law only by domestic law itself; this is shown by the existence and the wording of Article 25 and Article 59.2 of the Basic Law. The commitment to

international law takes effect only within the democratic and constitutional system of the Basic Law.

The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted.

The Basic Law is intended to achieve comprehensive commitment to international law, cross-border cooperation and political integration in a gradually developing international community of democratic states under the rule of law. However, it does not seek a submission to non-German acts of sovereignty that is removed from every constitutional limit and control. Even the far-reaching supranational integration of Europe, which accepts the order to apply a norm, when this order originates from Community law and has direct domestic effect, is subject to a reservation of sovereignty, albeit one that is greatly reduced (see Article 23.1 of the Basic Law). The law of international agreements applies on the domestic level only when it has been incorporated into the domestic legal system in the proper form and in conformity with substantive constitutional law.

c) On this basis, the legal effect of the decisions of an international court that was brought into existence under an international agreement is determined according to the content of the incorporated international agreement and the relevant provisions of the Basic Law as to its applicability. If the Convention law of the European Convention on Human Rights, and with it the federal legislature on the basis of Article 59.2 of the Basic Law, has provided that the legal decisions are directly applicable, then they have this effect below the level of constitutional law. Under domestic law, it is first the duty of the competent non-constitutional courts to establish this legal effect.

2. a) The decisions of the ECHR have particular importance for Convention law as the law of international agreements, because they reflect the current state of development of the Convention and its protocols. Convention law itself accords varying legal effects to the ECHR's decisions on the merits. Under Article 42 and Article 44 of the Convention, the judgments of the ECHR become final and thus formally non-appealable. In Article 46 of the Convention, the States parties have agreed that in all legal matters to which they are party they will abide by the final judgment of the ECHR. It follows from this provision that the judgments of the ECHR are binding on the parties to the proceedings and thus have limited substantive *res judicata* (see H.-J. Cremer, in: Grote/Marauhn (eds.), Konkordanzkommentar, 2004, Entscheidung und Entscheidungswirkung, marginal nos. 56-57 with further references).

The substantive *res judicata* in individual application proceedings under Article 34 of the Convention is restricted by the personal, material and temporal limits of the matter in dispute (see Order of the Second Senate of the Federal Constitutional Court (preliminary examination committee) of 11 October 1985 - 2 BvR 336/85 - Pakelli,

Europäische Grundrechte-Zeitschrift 1985, p. 654 [656]; see also E. Klein, Binding effect of ECHR judgments, Festschrift für Ryssdal, 2000, p. 705 [pp. 706 et seq.]). The decisions of the ECHR in proceedings against other States parties merely give the states that are not involved an occasion to examine their domestic legal systems and, if it appears that an amendment may be necessary, to orient themselves to the relevant case law of the ECHR (see Ress, Wirkung und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane, Europäische Grundrechte-Zeitschrift 1996, p. 350). In this respect, Convention law has no provision comparable to s. 31.1 of the Federal Constitutional Court Act, under which all the federal and Land constitutional bodies and all courts and authorities are bound by the decisions of the Federal Constitutional Court. Article 46.1 of the Convention provides only that the State party involved is bound by the final judgment with regard to a specific matter in dispute (*res judicata*).

b) In the question of fact, the ECHR pronounces a declaratory judgment; the decision establishes that the State party in question - with regard to the specific matter in dispute, - complied with the Convention or acted in contradiction to it; however, there is no judgment of cassation that would directly quash the challenged measure of the State party (see Ehlers, loc. cit., s. 2 marginal no. 52; Polakiewicz, Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, 1993, pp. 217 et seq.; Steinberger, Human Rights Law Journal 1985, p. 402 [407]).

   If it is declared that there has been a violation of the Convention, the first consequence is that the State party may no longer hold the view that its acts were in compliance with the Convention (see Frowein, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, vol. VII, 1992, s. 180 marginal no. 14). In principle, the decision also obliges the State party affected with regard to the matter in dispute to restore, if possible, the state of affairs without the declared violation of the Convention (see Polakiewicz, loc. cit, pp. 97 et seq.; on the possibility of attaining the goal of *restitutio in integrum*, see the Recommendation of the Committee of Ministers of the Council of Europe No. R (2000) 2 of 19 January 2000). If the violation that has been found is still continuing, for example in the case of continued arrest in violation of Article 5 of the Convention or an encroachment upon private and family life in violation of Article 8 of the Convention, the State party is under an obligation to end this state (see most recently ECHR, No. 71503/01, Judgment of 8 April 2004, no. 198 - Assanidze, Europäische Grundrechte-Zeitschrift 2004, p. 268 (275); see also Breuer, Europäische Grundrechte-Zeitschrift 2004, p. 257 [259]; Grabenwarter, European Convention on Human Rights, 2003, s. 16 marginal no. 3; Polakiewicz, loc. cit., pp. 63 et seq.; Villiger, Handbuch der Europäischen Menschenrechtskonvention, 1999, s. 13 marginal no. 233). The State party would therefore commit a new violation of the European Convention on Human Rights if it failed to terminate or repeated its conduct that has been established to be contrary to the Convention (see E. Klein, Binding effect of ECHR judgments, Festschrift für Ryssdal, 2000, p. 705 [708]). However, it should be taken into account that the effect of the decision relates only to the *res judicata* and that the factual and legal position may change before new domestic proceedings to which the complainant is a party.

c) The fact that the ECHR may award the complainant a "just compensation" in the form of money if the domestic law of the State party involved permits only inadequate compensation (see Article 41 of the Convention) shows that the Convention allows the State party involved some latitude with regard to the correction of decisions that have already been made and that are non-appealable.

However, in its more recent case law relating to Article 41 of the Convention, the ECHR points out that the States parties, in ratifying the Convention, agreed to ensure that their domestic legal systems are in accordance with the Convention (Article 1 of the Convention). It is therefore, according to the ECHR, for the defendant state to remove every obstacle in domestic law that prevents a redress of the complainant's situation (see ECHR, loc. cit., Europäische Grundrechte-Zeitschrift 2004, p. 268 [275] with reference to ECHR, No. 39748/98, Judgment of 17 February 2004, no. 47 - Maestri).

If the State party affected is ordered to pay compensation to the successful complainant under Article 41 of the Convention, this judgment of the ECHR creates an obligation to perform (see Stöcker, Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte in der Bundesrepublik, Neue Juristische Wochenschrift 1982, p. 1905 (1908)). The granting of compensation is not necessarily part of the decision in the principal proceedings, but may be made at a later date, in order to give the parties the opportunity to reach an amicable agreement. In this way, Convention law recognises that in general only the State party affected can assess what legal possibilities of action exist in the national legal system for the enforcement of the decision.

d) The legal effect of a decision of the ECHR, under the principles of public international law, is directed in the first instance to the State party as such. In principle, the Convention takes a neutral attitude towards the domestic legal system, and, unlike the law of a supranational organisation, it is not intended to intervene directly in the domestic legal system. On the domestic level, appropriate Convention provisions in conjunction with the consent Act and constitutional requirements (Article 20.3, Article 59.2 of the Basic Law in conjunction with Article 19.4 of the Basic Law) bind all organisations responsible for German public authority in principle to the decisions of the ECHR.

This legal position corresponds to the conception of the European Convention on Human Rights as an instrument for protection and for the enforcement of particular human rights. The obligation of the States parties, integrated into federal law by the consent Act, to create a domestic instance at which the person affected can have an "effective remedy" against particular conduct by the state (Article 13 of the Convention) already extends into the domestic structure of the state system and is not restricted to the executive branch, which is competent to act externally. In addition, the States parties must guarantee the "effective implementation of any of the provisions" of the European Convention on Human Rights in their domestic law (see Article 52 of the Convention), which is possible in a state under the rule of law governed by the principle of the separation of powers only if all the organisations responsible for

sovereign power are bound by the guarantees of the Convention (on this, see Order of the Second Senate of the Federal Constitutional Court (preliminary examination committee) of 11 October 1985 - 2 BvR 336/85 - Pakelli, Europäische Grundrechte-Zeitschrift 1985, p. 654 [656]). In this view, the German courts too are under a duty to take the decisions of the ECHR into account.

3. The binding effect of decisions of the ECHR depends on the area of competence of the state bodies and the relevant law. Administrative bodies and courts may not free themselves from the constitutional system of competencies and the binding effect of statute and law (Article 20.3 of the Basic Law) by relying on a decision of the ECHR. But the binding effect of statute and law also includes a duty to take into account the guarantees of the Convention and the decisions of the ECHR as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECHR and the "enforcement" of such a decision in a schematic way, in violation of prior ranking law, may therefore violate fundamental rights in conjunction with the principle of the rule of law.

a) The obligation created by the consent Act to take into account the guarantees of the European Convention on Human Rights and the decisions of the ECHR at least demands that notice is taken of the relevant texts and case law and that they are part of the process of developing an informed opinion of the court appointed to make a decision, of the competent authority or of the legislature. Domestic law must if possible be interpreted in harmony with public international law, regardless of the date when it comes into force (see BVerfGE 74, 358 [370]).

   If there are decisions of the ECHR that are relevant to the assessment of a set of facts, then in principle the aspects taken into account by the ECHR when it considered the case must also be taken into account when the matter is considered from the point of view of constitutional law, in particular when proportionality is examined, and there must be a consideration of the findings made by the ECHR after weighing the rights of the parties (see Order of the First Chamber of the Second Senate of the Federal Constitutional Court of 1 March 2004 - 2 BvR 1570/03 -, Europäische Grundrechte-Zeitschrift 2004 p. 317 [319]).

   If, in concrete application proceedings in which the Federal Republic of Germany in involved, the ECHR establishes that there has been a violation of the Convention, and if this is a continuing violation, the decision of the ECHR must be taken into account in the domestic sphere, that is, the responsible authorities or courts must discernibly consider the decision and, if necessary, justify understandably why they nevertheless do not follow the international law interpretation of the law. Precisely in cases in which national courts, as in private law, have to structure multipolar fundamental rights situations, it is always important that various subjective legal positions are sensitively weighed against each other, and if there is a change in the persons involved in the dispute or a change in the actual or legal circumstances, this weighing up may lead to a different result. There may therefore be constitutional problems if one of the subjects of fundamental rights in conflict with another obtains an ECHR judgment in his or her favour against the Federal Republic of Germany and German courts schematically apply this decision to the private law relationship, with the result that the holder of

fundamental rights who has "lost" in this case and was possibly not involved in the proceedings at the ECHR would no longer be able to take an effective part in the proceedings as a party.

b) aa) If the ECHR has declared a domestic provision to be contrary to the Convention, either this provision may be interpreted in conformity with public international law when applied in practice, or the legislature has the possibility of altering this domestic provision that is incompatible with the Convention. If the violation of the Convention consists in effecting a specific administrative act, the authority responsible has the possibility of cancelling this act under the provisions of the law of administrative procedure (s. 48 of the Administrative Procedure Act (Verwaltungsverfahrensgesetz - VwVfG)). Administrative practice that is in violation of the Convention can be amended, and courts may establish the duty to do this.

bb) If judicial decisions violate the Convention, neither the European Convention on Human Rights nor the Basic Law imposes an obligation to accord to a judgment of the ECHR that establishes that a decision of a German court was made in violation of the European Convention on Human Rights the effect of removing the non-appealability of this decision (see Federal Constitutional Court, Europäische Grundrechte-Zeitschrift 1985, p. 654). Admittedly, it cannot be concluded from this that decisions of the ECHR need not be taken into account by German courts.

Under Article 20.3 of the Basic Law, judicial decisions are bound by statute and law. The constitutionally guaranteed independence of the judge, who is subject to the law, is not affected by this commitment, which is derived from the principle of the rule of law (Article 97.1 of the Basic Law; see BVerfGE 18, 52 [59]; 19, 17 [31-32]). Both the commitment to law and the commitment to statute put into concrete terms the judicial power that is entrusted to the judges (Article 92 of the Basic Law). Since the European Convention on Human Rights - as interpreted by the ECHR - has the status of a formal federal statute, it shares the primacy of statute law and must therefore be complied with by the judiciary.

With regard to the principle of legal certainty, it must be noted that the federal legislature in the year 1998, in s. 359 no. 6 of the Code of Criminal Procedure (Strafprozessordnung - StPO), introduced into the law of criminal procedure a new ground for reopening criminal proceedings (Act on the Reform of the Reopening of Proceedings under Criminal Law; Gesetz zur Reform des strafrechtlichen Wiederaufnahmerechts of 9 July 1998, Federal Law Gazette I p. 1802). This provides that it is admissible to reopen proceedings that ended in a non-appealable judgment if the ECHR has established that there was a violation of the European Convention on Human Rights or its protocols and the German judgment is based on this violation. This amendment of the law is based on the idea that a violation of the Convention whose effect continues in a specific individual case should be terminated, at all events in the area of criminal law, which is a particularly sensitive one for human rights, even if it is already non-appealable (see s. 79.1 of the Federal Constitutional Court Act), if the judgment of the ECHR is relevant to the national proceedings. In this way, the competent court is given the opportunity to

deal again, on application, with the case which has actually been closed, and to include the new legal facts in its development of an informed opinion. In this connection, the statute expresses the fundamental expectation that the court will change its original decision - which was contrary to the Convention - to the extent that this is based on the violation.

In other rules of procedure, there is no conclusive answer to the question as to how the Federal Republic of Germany, if the ECHR rules against it, is to react, if national court proceedings have been completed and are non-appealable. There may be facts and circumstances in which German courts may make a new decision, not about the *res judicata*, but about the matter on which the ECHR has established that there has been a violation of the Convention on the part of the Federal Republic of Germany. This may be the case, for example, when the court is intended to consider the matter again on the basis of a new application or changed circumstances, or the court in another constellation is still dealing with the matter. In the last instance, it is decisive whether a court, within the scope of the applicable law of procedure, has the possibility of making a new decision in which it can take account of the relevant decision of the ECHR.

In such case constellations, it would not be acceptable merely to refer the complainant to money damages, although restoration would fail neither for factual nor for legal reasons.

c) In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular with regard to a partial system of domestic law whose legal consequences are balanced and that is intended to achieve an equilibrium between differing fundamental rights.

Individual application proceedings under Article 34 of the Convention before the ECHR are intended to decide specific individual cases in the two-party relationship between the complainant and the State party, by the measure of the European Convention on Human Rights and its protocols. The decisions of the ECHR may encounter national partial systems of law shaped by a complex system of case law. In the German legal system, this may happen in particular in family law and the law concerning aliens, and also in the law on the protection of personality (on this, see, recently, ECHR, No. 59320/00, Judgment of 24 June 2004 - von Hannover v. Germany, Europäische Grundrechte-Zeitschrift 2004, pp. 404 ff.), in which conflicting fundamental rights are balanced by the creation of groups of cases and graduated legal consequences. It is the task of the domestic courts to integrate a decision of the ECHR into the relevant partial legal area of the national legal system, because it cannot be the desired result of the international law basis can it nor express the will of the ECHR, for the ECHR through its decisions itself to undertake directly any necessary adjustments within a domestic partial legal system.

In this respect, it is necessary for the national courts to evaluate the decision when taking it into account; in this process, account may also be taken of the fact that the individual application proceedings before the ECHR, in particular where the original

> proceedings were in civil law, possibly does not give a complete picture of the legal positions and interests involved. The only party to the proceedings before the ECHR apart from the complainant is the State party affected; the possibility for third parties to take part in the application proceedings (see Article 36.2 of the European Convention on Human Rights) is not an institutional equivalent to the rights and duties as a party to proceedings or another person involved in the original national proceedings.

4. The constitutional review of the interpretation and application of agreements under international law that have been given by statute the power of domestic German law is governed by the same principles that elsewhere too define the authority of the Federal Constitutional Court to review judicial decisions. The interpretation and application of agreements under international law by the ordinary courts can in principle be examined only to assess whether they are arbitrary or are based on a fundamentally incorrect view of the significance of a fundamental right or are incompatible with other constitutional provisions (see BVerfGE 18, 441 [450]; 94, 315 [328]).

Admittedly, as part of its competence the Federal Constitutional Court is also competent to prevent and remove, if possible, violations of public international law that consist in the incorrect application or non-observance by German courts of international law obligations and may give rise to an international law responsibility on the part of Germany (see BVerfGE 58, 1 [34]; 59, 63 [89]; 109, 13 [23]). In this, the Federal Constitutional Court is indirectly in the service of enforcing international law and in this way reduces the risk of failing to comply with international law. For this reason it may be necessary, deviating from the customary standard, to review the application and interpretation of international law treaties by the ordinary courts.

Against this background, it must at all events be possible, on the basis of the relevant fundamental right, to raise the objection in proceedings before the Federal Constitutional Court that state bodies disregarded or failed to take into account a decision of the ECHR. In this process, the fundamental right is closely connected to the priority of statute embodied in the principle of the rule of law, under which all state bodies are bound by statute and law within their competence (see BVerfGE 6, 32 [41]).

II.

The challenged decision of the Naumburg Higher Regional Court of 30 June 2004 violates Article 6 of the Basic Law in conjunction with the principle of the rule of law. The Higher Regional Court did not take sufficient account of the judgment of the ECHR of 26 February 2004 when making its decision, although it was under an obligation to do so.

1. The challenged decision does not reveal whether and to what extent the Higher Regional Court considered the fact that the right of access asserted by the complainant is in principle protected by Article 6 of the Basic Law. This constitutional protection is to be seen against the background of the court's remarks on the complementary guarantee in Article 8 of the Convention. The Higher Regional Court should have considered in an understandable way how Article 6 of the Basic Law could have been interpreted in a manner that complied with the obligations under international law of the Federal Republic of Germany.

2. The Higher Regional Court in particular assumes in a manner that is not acceptable under constitutional law that a judgment of the European Court of Human Rights binds only the Federal Republic of Germany as a subject of public international law, but does not bind German courts. All the state bodies of the Federal Republic of Germany are - to the extent set out here under C. I. above - bound by operation of law within their jurisdiction by the Convention and the protocols that have entered into force in Germany. They must take into account the guarantees of the Convention and the case law of the ECHR when interpreting fundamental rights and constitutional guarantees.

In the present case, the Higher Regional Court, by reason of the judgment of the ECHR of 26 February 2004, had particular cause to consider the grounds of that judgment, because the judgment, which established a violation of the Convention by the Federal Republic of Germany, dealt with the matter with which the Higher Regional Court was again concerned. Neither does the duty to take the decision into account adversely affects the Higher Regional Court's constitutionally guaranteed independence, nor does it force the court to enforce the ECHR decision without reflection. However, the Higher Regional Court is bound by statute and law, which includes not only civil law and the relevant procedural law, but also the European Convention on Human Rights, which has the status of an ordinary federal statute.

In the legal analysis in particular of new facts, in weighing conflicting fundamental rights such as those of the foster family and in integrating the individual case in the overall context of family law cases relating to the right of access, the Higher Regional Court is not bound in its particular conclusion. The order challenged, however, lacks a discussion of the connections set out above.

3. It is not necessary to decide whether the Higher Regional Court, in a way that is constitutionally unacceptable, proceeded on the assumption that a temporary injunction can be issued only on application and not - as in the present case - also of the court's own motion, and thus that the complaint was admissible (see for example Saarbrücken Higher Regional Court, OLG-Report 2001, p. 269 on the one hand, Brandenburg Higher Regional Court, OLG-Rechtsprechung Neue Länder - OLG-NL 1994, 159 and Naumburg Higher Regional Court, OLG Naumburg, Justiz-Ministerialblatt für Sachsen-Anhalt 2003, p. 346 on the other hand). At all events, the Higher Regional Court made its procedural remarks too without taking correct account of the judgment of the ECHR of 26 February 2004. However, this was of importance for the question as to whether the Local Court was obliged or entitled of its own motion to examine the granting of a right of access and if the factual requirements were satisfied - as was the case - to make contact by access possible by way of a temporary injunction.

D.

With the decision on the constitutional complaint in the principal proceedings, the application for a temporary injunction is also disposed of.

VIII. Freedom of Assembly - Article 8 of the Basic Law

1. Right of Assembly, BVerfGE 87, 399

Explanatory Annotation

Article 8 of the Basic Law guarantees the right to peacefully assemble and demonstrate. The details are regulated in a federal statute specifying under what conditions the police can interfere with the demonstration. The most severe interference is the dissolution of a demonstration, i.e. its break-up in case the demonstration turns violent or when other breaches of public security occur. Public security is a standing legal term defined as any breach of the law, especially of criminal law norms. If such a dissolution order is issued, the statute requires all participants to leave the venue of the demonstration immediately. Failure to do so constitutes a criminal offence usually punishable by monetary fines.

In this case the applicants had been sentenced to a fine of roughly 80 and 60 German Marks (now roughly 40 and 30 Euros) for taking part in a sit-in blockade of a military installation in Germany as part of a peace movement protest. Sit-in blockades interfere with the rights of others who can no longer enter or leave the installation blocked in this way. They can therefore in principle constitute a criminal offence. On these grounds the police issued a dissolution order, which the applicants had disobeyed.

The Constitutional Court, however, quashed the fines. It found that the regular courts could not just rely on the fact that the dissolution had been disobeyed but also needed to determine whether that dissolution order was in fact in compliance with the assembly statute. There were strong indications that this was not the case as the demonstrators had announced their intention to use a blockade as a means of demonstration and the relevant authorities had, in correct application of the principle of proportionality, only set some conditional requirements which had all been met. For example, the demonstrators had only blocked one of three entry points to the military barracks.

The case raises the issue of the difficulty that lies in having to make administrative decisions on the spot, with no time for legal analysis. It is clear that police orders have to be followed and that those affected by them at the time cannot be free to make their own individual assessment on the legality of the order and behave accordingly. Hence, if there is good cause for a police order issued "in action" the standard for its legality is usually determined on the basis available to the persons acting at the scene and in consideration of the circumstances under which the administrative decision had to be reached. Hence the legality of a dissolution order for a demonstration based on a credible bomb threat cannot depend on whether a bomb is actually found and the dissolution must be immediately enforceable as well, regardless of the personal views of those affected by the order on the scope of the risk. At the same time, the freedom of demonstration is one of the core communication freedoms and to levy a fine on someone because they disobeyed an order which later turns out to have been issued illegally would threaten this freedom. The risk of illegality must be borne by the governmental authorities at least when it comes to interference with fundamental rights.

Translation of the Right of Assembly Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 87, 399*

Headnote:

A conviction by the criminal courts for refusal to immediately leave the site of an assembly that has been dispersed pursuant to s. 29.1 no. 2 of the Assembly Act (Versammlungsgesetz - VersG) is incompatible with Article 8 of the Basic Law, if it fails to take into account the legality of the order to disperse.

Order of the First Senate of 1 December 1992 - 1 BvR 88, 576/91 -

Facts:

S. 15.2 of the Assembly Act permits dispersal of an outdoor assembly, in particular in the case of deviation from information provided upon registration or violation of conditions imposed for holding such assembly or if recognizable circumstances indicate that holding the assembly poses an immediate threat to public safety or order. Pursuant to s. 29.1 no. 2 of the Assembly Act, it is a regulatory offence not to leave a public assembly or procession immediately despite an order to disperse from the responsible authority.

The complainants took part in sit-in blockades in front of a Federal Armed Forces (Bundeswehr) base on 7 and 9 May 1989. The authority responsible for the assembly had previously restricted the blockade action by imposing certain conditions. After the police enforcement officers present on site dispersed the respective blockades, the complainants did not leave the site and were carried from the street by police officers. The Local Courts (Amtsgerichte) then sentenced them to low fines for violation of s. 29.1 no. 2 of the Assembly Act. The Local Courts failed to examine the legality of the underlying order to disperse more closely in making their decision. The appeals of the complainants to the Higher Regional Court (Oberlandesgericht) were without success. In response to the constitutional complaints of the complainants, the Federal Constitutional Court reversed the judgments of the Local Courts, declared the orders of the Higher Regional Court invalid and referred the matters back to the Local Courts.

Extract from the Grounds:

…

B.

The constitutional complaints are founded. The challenged decisions violate the fundamental rights of the complainants under Article 8.1 and Article 103 of the Basic Law (Grundgesetz - GG).

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Selected Fundamental Decisions of the Federal Constitutional Court

I.

1. Imposition of a fine by the criminal courts under s. 29.1 no. 2 of the Assembly Act without taking into account the legality of the dispersal of the assembly constitutes a violation of Article 8 of the Basic Law.

a) Article 8.1 of the Basic Law guarantees all Germans the right to assemble peacefully and unarmed. This right also covers the choice of the place, time, nature and subject of the event. Protection is afforded not only at events where opinions are made known or exchanged in verbal form, but also those at which participants give voice to their opinions in other ways (see BVerfGE 69, 315 [343]).

Sit-in blockades also enjoy the protection of the freedom of assembly. Apart from whether or not they are to be considered to constitute the use of force within the meaning of s. 240 of the Criminal Code (Strafgesetzbuch), they do not contain the elements of an offence of unpeaceable conduct within the meaning of Article 8.1 of the Basic Law that would deprive them of the protection of this fundamental right. Indeed, an assembly is not unpeaceable unless acts occur that constitute a certain danger such as, for example, violence or aggressive excesses against persons or property, but not simply because of inconvenience to third parties, even if such inconvenience is intended and not merely tolerated (see BVerfGE 73, 206 [248]).

The freedom of assembly is not, however, absolutely guaranteed. In the case of outdoor assemblies, interferences with fundamental rights are permissible by or pursuant to a law under Article 8.2 of the Basic Law. The Basic Law thus takes into account the fact that such assemblies necessitate precautionary measures to put in place the conditions for the exercise of the fundamental right on the one hand and protect colliding interests of third parties on the other hand (see BVerfGE 69, 315 [348]). Laws that restrict the freedom of assembly must, however, be compatible with the Basic Law and applied in complete compliance with it. Governmental bodies must construct laws that restrict fundamental rights in the light of the fundamental importance of Article 8.1 of the Basic Law and limit measures taken to that which is necessary for the protection of other legal interests of equivalent importance (see BVerfGE 69, 315 [349]).

b) The provision contained in s. 29.1 no. 2 of the Assembly Act is compatible with Article 8 of the Basic Law if construed in conformity therewith.

aa) Just as the dispersal of an assembly can occasion no misgivings as regards the principle of proportionality if the conditions pursuant to s. 15.2 of the Assembly Act exist (see BVerfGE 69, 315 [352]), it is also not possible to object to the refusal to leave the site of an assembly that has been ordered dispersed under s. 29.1 no. 2 of the Assembly Act being prosecuted as a regulatory offence. There are also no constitutional grounds for objection to the reference to the provisions of administrative law contained in s. 15.2 of the Assembly Act. The legislature may make provision for penalties or fines for violation of duties under provisions of administrative law and administrative orders in order to encourage compliance.

Whether this is done in the respective special legislation, i.e., in separate penal statutes, or in the Criminal Code itself is for the legislature to decide (see BVerfGE 75, 329 [343]).

Blanket offences, which become completely defined only through administrative provisions, are also compatible with the Basic Law if sufficiently specific (see BVerfGE 14, 245 [252]); established case law.

However, this type of regulatory method necessarily results in interaction between administrative law and laws governing criminal and regulatory offences. This can bind criminal court judges to administrative decisions on the one hand, but can on the other hand serve to establish adjudicatory authority as regards such decisions without thereby entailing any violation of the principles of separation of powers (see BVerfGE 75, 329 [346]; 80, 244 [256]).

No general statement on the reach of these constraints and this adjudicatory authority can be inferred from the Basic Law. It is primarily the affair of the legislature to decide whether punishability or prosecutability in connection with violations of administrative orders is to depend on whether such orders are legal or not. The legislature is, of course, bound to the requirements of the Basic Law, in particular those of the restricted fundamental right.

bb) It is uncertain whether s. 29.1 no. 2 of the Assembly Act implies protection of legal interests and therefore makes provision for fines only in the case of legal dispersals of assemblies or whether it even sanctions disregard for orders to disperse regardless of their legality. Different answers to this question are found in the case law and legal literature (see on the one hand, for example, Dusseldorf Higher Regional Court, NStZ 1984, p. 513, and Ott, Gesetz über Versammlungen and Aufzüge, 5th ed., 1987, s. 29 marginal note 9; Dietel/Gintzel/Kniesel, Demonstrations und Versammlungsfreiheit, 10th ed., 1991, s. 29 marginal note 7; Offczors, in: Ridder *inter alia*, Versammlungsrecht, 1992, s. 29 marginal notes 24 et seq., in particular 28; on the other hand, for example, Stuttgart Higher Regional Court, NJW 1989, p. 1870, and Meyer/Köhler, Das neue Demonstrations und Versammlungsrecht, 3rd ed., 1990, s. 29 note 4b).

Neither the text of the law nor the legislative materials permits an unambiguous conclusion.

The absence of any mention of enforcement in s. 29.1 no. 2 of the Assembly Act (in contrast to ss. 23, 26 no. 1, 29.1 nos. 1 and 3 of the Assembly Act) also permits no reliable conclusion since the materials show that this was included in the Assembly Act for other reasons (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] VII/550, p. 375).

Moreover, contradictions would result if prosecutability were to be dependent upon whether the elements of enforceability were explicitly mentioned. For example, persons taking part in an assembly who violate an illegal, but enforceable condition pursuant to s. 29.1 no. 3 of the Assembly Act would be committing a regulatory

offence because the elements of the fineable offence include the subjoinder "enforceable" in 1978, whereas the organizer of the assembly would escape punishment in the same case because s. 25 of the Assembly Act lacks this sub-joinder.

cc) Under these circumstances, according to the construction of s. 29.1 no. 2 of the Assembly Act that follows from Article 8.1 of the Basic Law, violations of orders to disperse may not be prosecuted without taking into account their legality.

Like freedom of expression, freedom of assembly is of fundamental importance for the development of a person's personality and the democratic order (see BVerfGE 69, 315 [343 to 347]). Prohibition and dispersal of an assembly represent the most extreme interferences with fundamental rights. They are therefore subject to stringent conditions and may be invoked only if necessary to protect legal interests of equivalent importance and if an immediate danger to public safety and order must be averted (see BVerfGE 69, 315 [353]).

Such decisions may be based only on actual circumstances; suspicion and presumption alone do not suffice (see BVerfGE op. cit. p. 353-354).

Dispersal of an assembly that does not satisfy these requirements is in violation of Article 8 of the Basic Law. Persons taking part in assemblies must nevertheless initially accept such orders. The duty to leave the site of an assembly that has been ordered dispersed cannot be made dependent upon the illegality of the order to disperse. Since it is always possible to determine this with certainty only in retrospect, dispersal of any assembly would become impossible as soon as one of the participants invokes the legality of the dispersal. When persons taking part in an assembly disobey a police order, the use of forcible means by the governmental is in principle permissible (s. 80.2 no. 2 of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung - VwGO)). The persons taking part in the assembly are left with only the possibility of having the illegality and, if appropriate, the violation of the Basic Law by the actions of the police established retrospectively by the courts. The violation of fundamental rights that occur through the illegal dispersal of an assembly can, of course, no longer be cured in this manner. The resultant impairment of the fundamental right to the freedom of assembly is, however, unavoidable without subordination of the protection of the other legal interests to be served by the restriction of the freedom of assembly.

What pertains to the enforcement of orders to disperse under administrative law does not, however, apply in the same manner to prosecution for disobedience under criminal law or laws governing regulatory offences. It is necessary to distinguish between the two. The reason why legality is not the critical aspect in the case of the execution of an order to disperse has to do with the situational dependence of the decision, the enforcement of which cannot be postponed until the legal issue is definitively or even tentatively resolved. This reason is lacking when it comes to the imposition of a sanction for failure to obey the order. This always takes place only after the occurrence and therefore permits definitive

clarification of the legal issue. If the legality of the order to disperse were nonetheless of no regard, the unavoidable impairment of the freedom of assembly that is inherent in an illegal order to disperse would without any commensurate necessity remain in effect against those persons who - as is subsequently found - legitimately invoked the right to freedom of assembly.

The question as to whether the legislature should nevertheless have been allowed to prosecute disobedience can remain open here. Such an intention cannot be inferred from the law. There is therefore also no occasion to examine the issue as to whether there is any reason that could be construed to legitimate such far-reaching interference under the Basic Law. Under these circumstances, it is possible to accommodate the right to freedom of assembly only if the sanction provided for by s. 29.1 no. 2 of the Assembly Act is restricted to cases involving legal dispersal of assemblies. Legality must therefore be established before a criminal court judge can impose a fine.

The dispute as to whether criminal court judges must await clarification of legality under administrative law, if such is requested, and whether they are bound by the results need also not be decided here. Since prior recourse to the administrative courts to contest dispersals of assemblies pursuant to s. 15.2 of the Assembly Act is not possible and a subsequent action as regards only the possibility of subsequent regulatory proceedings cannot be reasonably expected of the parties affected, criminal court judges must in any case when the legality of the dispersal of an assembly has not been clarified by the administrative courts themselves establish whether this is the case since it would otherwise not be possible to satisfy the requirements of Article 8 of the Basic Law.

2. A construction that permits prosecution for violation of an order to disperse pursuant to s. 29.1 no. 2 of the Assembly Act without taking into account its legality also violates Article 103.2 of the Basic Law.

According to this provision, an act may be punished only if punishability was provided for by law before the act was committed. This protection also extends to the prosecution of regulatory offences (see BVerfGE 81, 132 [135]; established case law).

This provision is intended on the one hand to ensure that the public addressed by a provision can anticipate what conduct is subject to a penalty or a fine and on the other hand to guarantee that the legislature makes decisions as regards punishability or prosecutability so that this is not left up to the courts. Article 103.2 of the Basic Law therefore excludes the application of any law that goes beyond the substantive content of a legal sanction (see BVerfGE 47, 109 [120]; 82, 236 [269]).

The legislature is certainly not prevented from the outset from imposing a penalty or fine on disobedience of an order without requiring that the legality of the order be prerequisite to such imposition (see BVerfGE 80, 244 [256]). A legislative decision to prosecute failure to obey orders to disperse without taking into account their legality cannot, however, as has been shown,

be unambiguously inferred from the law even if the legislative materials are taken into account. Under these circumstances, prosecution may not be construed to extend to include cases of illegal dispersal of assemblies, but must be restricted to violations of legal orders to disperse.

II.

The challenged judgments do not withstand review against these standards.

1. The Local Court should have taken Article 8 of the Basic Law into account for the purposes of construction and application of s. 29.1 no. 2 in conjunction with s. 15.2 of the Assembly Act. The sit-in demonstrations in which the complainant took part are included in the area of protection of Article 8.1 of the Basic Law. The imposition of fines for failure to leave protected assemblies represents an interference with the fundamental right. On the basis of the principles set forth, this is compatible with Article 8 of the Basic Law only if the dispersal of the assembly was legal. The Local Court neglected to examine this aspect.

In the proceedings involving the second complainant, it was not established that the dispersal of the assembly was legal. In the proceedings involving the first complainant, the Local Court did to be sure state that there was no indication to the effect that the dispersal of the assembly was illegal. The grounds do, however, suggest that the Court had considered only the correctness of the form of the announcement of the order to disperse. This is supported by the verbal announcement of the order and limitation to the finding that it was made twice and also taken note of. The Court did not, however, address the question as to whether the dispersal was ordered by the responsible authority as required by s. 29.1 no. 2 of the Assembly Act. The judgment in the proceedings involving the second complainant does not even specify who ordered the dispersal. It is only established that the police enforcement officers announced the dispersal.

The judgment in the proceedings involving the first complainant does certainly establish that the officer in charge of the police enforcement officers ordered the dispersal pursuant to s. 46.2 no. 2 of the Baden-Württemberg Police Act (Polizeigesetz) because the authority responsible for assemblies could not be reached. However, actual findings as to what sequence of events represented an imminent danger, which according to this provision is a prerequisite for intervention by police enforcement officers, are absent. The decisions do not contain any findings whatsoever as to the concrete events that posed an immediate danger to public safety. In that regard, the findings are limited to repetition of the pronouncement of the dispersal order, according to which there was an immediate danger of coercion. The factual basis for this assessment - whether, for example, vehicles were approaching the gate and other possibilities for entering or leaving the grounds of the base did not exist - cannot be inferred from the decisions under challenge.

It would, however, have been appropriate to review the legality of the dispersal. The authority responsible for assemblies did not prohibit the sit-in demonstrations, but only imposed conditions on the organizers with explicit reference to the principle of proportionality. The first complainant has submitted that the conditions were complied with and that only one of the three gates to the base was blocked. Under these circumstances, concrete findings would have been necessary to show why the means chosen by the authority responsible for assemblies, i.e., avoidance of danger, was inadequate and the police enforcement officers had to proceed to disperse the assembly.

The conviction of the complainant is based on a misapprehension of Article 8 of the Basic Law. It is not possible to exclude the possibility that the Local Court would have come to a different conclusion if it had adequately considered the fundamental right of freedom of assembly.

2. Apart from the issue of the legality of the order to disperse, since the complainants were sentenced to fines although it is not obvious that this is provided for in s. 29.1 no. 2 of the Assembly Act, the decisions under challenge are also in violation of Article 103.2 of the Basic Law.

2. Brokdorf, BVerfGE 69, 315

Explanatory Annotation

Brokdorf is a small town on the Elbe river just north of Hamburg. It is also the site of a nuclear power plant which during its planning and construction stages became the focus point of wide spread opposition and resistance by all kinds of groups ranging from citizen initiatives to political groups, environmentalists, anti-nuclear power activists and other more militant groups. The case concerned the prohibition of a mass demonstration of an expected 50,000 demonstrators for fears that the violence ensuing from it could not be contained. The Constitutional Court held this to be unconstitutional in the light of the freedom of demonstration as guaranteed by Article 8.1 of the Basic Law.

The decision is significant for several reasons. It clarified the relationship between Article 8 of the Basic Law and the federal statute on assemblies and demonstrations. Article 8.1 clearly stipulates that assemblies[104] can take place without official authorization or even notification to the relevant authorities. The assembly statute however requires such notification, at least 48 hours before the event. The Constitutional Court held that this regular statutory provision could escape unconstitutionality only if interpreted very restrictively. Notification can only be required where such notification does not interfere with the purpose of the demonstration and where the notification only serves the purpose to facilitate the demonstration or assembly itself and reduce the impact it has on the third parties. Its purpose is therefore restricted to giving the authorities the possibility to prepare, for example by informing the public of possible traffic jams etc. and to provide the necessary security and protection for the assembly and demonstration. If the notification is impossible because the assembly is an ad-hoc assembly it must not be required.

The second significance lies in the use of procedure to safeguard fundamental rights. The Court held that the administrative authorities and the organizers of such mass demonstrations must cooperate to ensure the safe conduct of the event. The more cooperation on the side of the organizers the higher the threshold will be for the necessary risk prognosis to justify the prohibition of the demonstration.

104 The term is applicable to stationary assemblies and moving demonstrations.

Finally the Court also stated that a demonstration or assembly cannot be prohibited or dissolved just because of a - real - risk of or actual occurrence of violent behaviour by some. If that were so any mass assembly or demonstration would be in danger of being prohibited because it is almost inherent that at least some will use the occasion for other than peaceful purposes. The right to assemble for the peaceful majority remains in place and a preventive prohibition of the whole assembly could only be justified as a *ultima ratio* measure if all else - preparation, cooperation with organizers, joint steps to secure the peaceful part of the event, deployment of riot police etc. - has failed and the exercise of this fundamental right for the peaceful majority cannot be secured because of the verified risk level.

Translation of the Brokdorf Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 69, 315*

Headnotes:

1. The citizen's right to actively participate in the process of the formation of political opinion and will by exercising the freedom of assembly ranks among the indispensable functional elements of a democratic society. The fundamental importance of this freedom must be taken into account by the legislature when enacting provisions of law that restrict fundamental rights and by the authorities and courts when interpreting and applying such provisions.

2. The provision of the Assembly Act (Versammlungsgesetz - VersammlG) that governs registration of events held outdoors and the conditions for the dispersal or prohibition of such events (s.s. 14 and 15) satisfies the constitutional requirements if it is interpreted and applied in such a manner

   a) that compulsory registration does not apply in the case of spontaneous demonstrations and non-compliance does not justify systematic dispersal or prohibition; and

   b) that dispersal and prohibition are possible only to protect equivalent legal interests and if in strict compliance with the principle of proportionality and only if an immediate threat to these legal interests can be inferred from discernible circumstances.

3. Governmental authorities are constrained to act in a manner favourable to demonstrations by taking as their model peaceful mass demonstrations and may not without adequate reason ignore positive experience. The more the organizers are for their part willing to take confidence building measures on their own or provide demonstration-friendly cooperation, the higher the bar becomes for governmental intervention on the grounds of a threat to public safety.

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

4. Unless it is to be feared that a demonstration will on the whole turn non-peaceful, or that the organizer and the organizer's supporters will strive for or at least tolerate such a turn of events, the protection of the freedom of assembly of peaceful participants that the Basic Law guarantees every citizen is preserved, even if excesses are to be expected from individuals or a minority of the participants. In such cases, preventive prohibition of an entire event requires as antecedent conditions stringent standards in respect of the assessment of dangers and previous exhaustion of all reasonably applicable means that would make it possible for peaceful demonstrators to exercise their fundamental rights.

5. The administrative courts must already at the level of injunctive relief proceedings take into account through more intensive examination the circumstance that immediate enforcement of a ban on a demonstration results as a rule in irreversible impairment of the exercise of fundamental rights.

…

Order of the First Senate of 14 May 1985 - 1 BvR 233, 341/81 -

Facts:

In early 1981, numerous civic action groups called for a mass demonstration against the construction of the nuclear power plant in Brokdorf on 28 February 1981. Before the assembly was even registered, the responsible county commissioner issued in the form of a blanket order a general ban on the assembly on the construction site covering an area of about 210 square kilometres and ordered that it be immediately enforced. This order was based on knowledge acquired by the police to the effect that there was a significant number of persons with violent intentions among the approximately 50,000 expected demonstrators who intended to forcibly occupy and disturb the construction site and commit other acts of violence. When the organizers subsequently applied for registration, the county commissioner referred to the ban on the demonstration which had already been ordered. A few of the organizers, the subsequent complainants before the Federal Constitutional Court (Bundesverfassungsgericht), appealed this decision and the general order and petitioned the court to restore the suspensory effect of the appeal. This petition was denied by the Lüneburg Higher Administrative Court (Oberverwaltungsgericht) in the second instance. The Higher Administrative Court gave as its grounds the late registration of the demonstration and the expected disturbances. The appropriate balancing of interests resulted therefore in the denial of the petition of the complainant for injunctive relief.

The constitutional complaints challenging immediate enforcement of the general order and the decision of the Higher Administrative Court were successful in part.

Extract from the Grounds:

…

B.

The constitutional complaints are admissible.

…

Immediate enforcement of the ban on the demonstration and confirmation thereof by the court prevented the complainants from conducting an authorized demonstration at locations indicated to the authority at the planned times. The complainants view these acts on the part of the public authorities as an encroachment upon legal positions that are protected by the Basic Law (Grundgesetz - GG). Since these acts were contested in court and since all legal remedies have therefore been exhausted, the legally prescribed conditions for admissibility have been met for their constitutional complaints, which were submitted on a timely basis (Article 93.1 no. 4a and Article 94.2 of the Basic Law, ss. 90 et seq. of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerGG). According to established case law, the admissibility of their constitutional complaints cannot be objected to on the grounds that all legal remedies have not been exhausted in the main proceedings since the injunctive proceedings are pursuant to s. 80.5 of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung - VwGO) legally independent of the former proceedings (BVerfGE 53, 30 [52]; 59, 63 [82] with further references.)

2. The constitutional complaints also do not lack the required legal interest. This interest is in particular not extinguished because the date of the demonstration has been exceeded and immediate enforcement of the ban has therefore become irrelevant. According to established case law, a legal interest remains intact even after the relief sought through the constitutional complaint becomes irrelevant, in any case if clarification of a constitutional issue of fundamental importance would otherwise be omitted and the interference involves an especially important fundamental right (BVerfGE 53, 30 [52]; 59, 63 [82] with further references.

That these conditions have been met follows from the preceding considerations.

The existence of this legitimate interest can also be affirmed in the case of the first complainants although they did not initiate an action in respect of the main issue after their appeal was dismissed. There were originally no reservations of any sort as regards the admissibility of their constitutional complaint, which was already lodged in the night prior to the planned demonstration (see the order on the temporary order applied for, BVerfGE 56, 244 [246]).

Their interest in judicial relief could therefore have been extinguished only due to subsequent circumstances. It is, however, in any case necessary to decide on the relief sought with their constitutional complaint in the proceedings of the second complainants; there is therefore no reason to apply stringent requirements as a prerequisite for admissibility in respect of the continued existence of the interest in judicial relief of the first complainants (see BVerfGE 50, 290 [320]; 62, 117 [144]).

Since, as was mentioned, the proceedings pursuant to s. 80.5 of the Code of Administrative Court Procedure must be considered legally independent for the purposes of constitutional review and since the first complainants have an interest in clarification of the conditions under which immediate enforcement of the ban on the demonstration would have been allowed under constitutional law, the mere circumstance that they did not lodge a constitutional complaint in respect of the main issue after the date of the demonstration elapsed, does not compel the assumption that the interest in judicial relief that originally existed was subsequently extinguished.

C.

The constitutional complaints are justified insofar as they are directed against the fact that the Higher Administrative Court confirmed in response to the appeal of the joined parties, immediate enforcement of the ban on the demonstration to an extent that exceeded that approved by the Administrative Court. The provisions of the Assembly Act contested indirectly that are relevant to the decisions under challenge ultimately withstand constitutional review.

I.

The fundamental right to freedom of assembly (Article 8 of the Basic Law) is the standard of constitutional review.

1. The measures under challenge in the initial proceedings and the underlying statutory provisions restricted the freedom of the complainants to conduct the planned demonstrations. This freedom is guaranteed in Article 8 of the Basic Law, which protects assemblies and processions - in contrast to mere gatherings or popular entertainment - as an expression of collective development of personality for the purposes of communication. This protection is not limited to events that involve argumentation and disputes, but covers multiple forms of collective activity, including non-verbal forms of expression. This also includes activities of the nature of demonstrations, where the freedom of assembly is used for the purposes of conspicuous or sensational expression of opinion. Since there was no evidence in the initial proceedings to the effect that the expression of certain opinions - for example, in speeches and songs or on banners - was to be prevented, it is not necessary to determine how the fundamental right to freedom of expression might also be applied as a standard of review in conjunction with Article 8 of the Basic Law for measures taken against demonstrations.

2. As a defensive right that also and primarily benefits minorities with differing opinions, Article 8 of the Basic Law guarantees holders of fundamental rights freedom of self-determination as regards the place, time, nature and content of an event and at the same time prohibits governmental compulsion to take part in or stay away from a public assembly. For this reason alone, fundamental rights enjoy a special status under a free system of government; the right to assemble freely with others without any special permission has always been a sign of the freedom, independence and empowerment of self-confident citizens. However, as applied to political events, the guarantee of freedom embodies at the same time a basic decision whose importance extends beyond protection against governmental encroachment upon the unhindered development of personality. In Anglo-American legal circles, the freedom of assembly rooted in the concept of natural law was recognized very early as an expression of popular sovereignty and accordingly as

the democratic right of citizens to participate actively in the political process (see Quilisch, Die demokratische Versammlung, 1970, pp. 36 et seq.; Schwäble, Das Grundrecht der Versammlungsfreiheit, 1975, pp.17 et seq.).

The importance of this freedom is also emphasized in the statements made by the Federal Minister of the Interior, the Trade Union of the Police (Gewerkschaft der Polizei) and the Federal Association of Citizens' Initiatives for Environmental Protection (Bundesverband Bürgerinitiativen Umweltschutz - BBU) and is now consistently acknowledged in the scholarly literature.

…

a) Freedom of expression has long been considered one of the indispensable and fundamental functional elements of a democratic society in the constitutional case law, which has up to now not dealt with the freedom of assembly. It is considered to be the most direct expression of human personality and as one of the very foremost human rights constitutive for a free democratic governmental order; for it is what makes the continuous intellectual debate and the confrontation of opinions that constitute a vital aspect of this form of government possible in the first place (see BVerfGE 7, 198 [208]; 12, 113 [125]; 20, 56 [97]; 42, 163 [169]).If the freedom of assembly is construed as the freedom of collective expression of opinion, it cannot in principle be treated differently. This is not opposed by the fact that the aspect of argumentation, which is as a rule characteristic of the exercise of freedom of expression, is less pronounced in the particular case of demonstrations. By expressing their opinions through their physical presence in full view of the public and without the intervention of media, demonstrators also develop their personalities in a direct manner. In their ideally typical form, demonstrations constitute the collective physical manifestation of convictions; on the one hand, the participants can experience confirmation of these convictions in community with others and, on the other hand, if only through their mere presence, the nature of their appearance and the way they interact with one another or the choice of the location, take a position - literally - and bear outward testimony to their standpoint. The danger that such manifestations of opinion will be abused for demagogic ends and emotionalized in a questionable manner, must be considered just as irrelevant for the purposes of basic assessment in the area of freedom of assembly as in the areas of freedom of expression and freedom of the press.

b) The fundamental importance of the freedom of assembly becomes especially discernible when the unique nature of the process of forming opinions in a democratic society is considered. As regards the free democratic order, the Communist Party of Germany (Kommunistische Partei Deutschlands - KPD) judgment states that it is predicated on the assumption that the existing governmental and social conditions that have developed over time are capable and in need of improvement; this presents a never-ending challenge that must be resolved through constant renewal of decisions of will (BVerfGE 5, 85 [197]). The path to formation of these decisions of will is described as a process of "trial and error" that through constant intellectual debate, reciprocal controls and criticism provides the best guarantee for a (relatively) correct political line as a resultant

and a balance between the political forces at work within the state (Op. cit. [135]; see also BVerfGE 12, 113 [125]).The subsequent judgment on party finance builds on these considerations and stresses that the process of formation of will in a democracy must flow from the people to the bodies of government and not the other way around, and the right of the citizenry to participate in the process of formation of political will is manifested not only by voting in elections, but also in the exercise of influence on the constant process of formation of political opinion, which in a democratic state must take place freely, openly, without regulation and be in principle "state-free." (BVerfGE 20, 56 [98-99]).

Citizens are involved in this process to varying degrees. Large associations, financially strong contributors of funds or mass media can exert considerable influence whereas the citizens tend to feel rather powerless. In a society in which direct access to the media and the opportunity to express opinions through the media is limited to a few, the individual is generally left, apart from organized participation in parties and associations, with only the possibility of collective influence by taking advantage of the freedom of assembly to hold demonstrations. The unhindered exercise of this freedom not only counteracts the feeling of political powerlessness and dangerous tendencies toward indifference to government. It is therefore ultimately in the well-considered public interest since the parallelogram of forces involved in the formation of political will cannot generally produce a relatively correct resultant unless all vectors are fairly strongly developed.

Moreover, assemblies are correctly identified in the scholarly literature as an essential element of democratic openness: "They offer ... the possibility of public influence on the political process, development of pluralistic initiatives and alternatives or also criticism and protest ...; they embody a certain primordial, unrestrained direct democracy that is suitable for protecting the political enterprise against stagnation in routine business" (Hesse, op. cit., p. 157; in agreement Blumenwitz, op. cit. [132-133]).

For in democracies with representative parliamentary systems and few rights to cast direct votes, the freedom of assembly assumes the importance of a fundamental and indispensable functional element. In this case - even when decisions are involved that have serious consequences for everyone and cannot be reversed following a change in power - the doctrine of majority rule applies in principle. On the other hand, even the influence of the electoral majority is quite limited between elections; governmental power is exercised by special agencies and administered by a dominating bureaucratic apparatus. Quite generally, the more effective the protection of minorities, the more legitimate become the decisions made by these agencies on the basis of the principle of majority rule; the acceptance of these decisions being influenced by whether the minority was able to exert adequate influence on the formation of opinion and will beforehand (see BVerfGE 5, 85 [198-199]).Demonstrative protest can become necessary in particular if the representative bodies fail to recognize possible abuses and undesirable developments or fail to recognize them on a timely basis or tolerate them out of consideration for other interests (see also BVerfGE 28, 191 [202]).The stabilizing function of the freedom of assembly within the representative system is correctly

described in the scholarly literature as allowing those who are dissatisfied to openly voice and vent their discontent and criticism and functions as a necessary prerequisite for a political early-warning system that indicates potential disruption, reveals shortcomings as regards integration and therefore also makes possible changes in the direction of official policy (Blanke/Sterzel, op. cit. [69]).

II.

The provisions of the Assembly Act that were relevant in the initial proceedings satisfy constitutional requirements if the fundamental importance of the freedom of assembly is taken into account when they are interpreted and applied.

1. Despite its elevated status, the freedom of assembly is not guaranteed without reservation. Article 8 of the Basic Law guarantees only the "right to assemble peacefully and unarmed" (see on this III 3.a below; pages 359-360 of the Official Collection [Amtliche Sammlung]) and also stipulates that this right to hold such events outdoors may be restricted by enactment of a specific law. As a result, the Basic Law takes into account the fact that a special need for regulation exists for the exercise of the freedom of assembly outdoors because of the contact with the outside world, namely, organizational and procedural regulation, in order to create the physical conditions for the exercise of the right on the one hand and to adequately protect conflicting interests on the other hand.

Whereas the Weimar Constitution specifically stipulated in Article 123 that outdoor assemblies could "be made subject to registration by Reich law and prohibited in the case of an immediate threat to public safety," the Basic Law makes do with a simple provision for restriction by enactment of a specific law that is apparently unlimited. This does not, however, mean that the force of this guarantee of the fundamental right is limited to the area to which the legislature assigns it on the basis of its substantive content. In fact, as the Federal Minister of the Interior also correctly stated, the same applies as in the case of the freedom of expression, which according to the wording of the Basic Law is subject to restriction within limits imposed by general laws, but its reach may not be arbitrarily relativized by ordinary laws (of fundamental importance on this BVerfGE 7, 198 [207-208]; see also BVerfGE 7, 377 [404]).

The legislature must in the case of all restrictive provisions respect the fundamental constitutional decision embodied in Article 8 of the Basic Law addressed above; the legislature may limit the exercise of the freedom of assembly only to protect other legal interests of equal weight and must strictly observe the principle of proportionality.

When the public authorities and courts interpret and apply laws formulated by the legislature that restrict the fundamental rights, the same also applies as in the case of the interpretation of provisions that restrict the freedom of expression (BVerfGE 7, 198 [208]; 60, 234 [240]; on the Law of Assembly - Decisions of the Federal Administrative Court [*Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE] 26, 135 [137]).

Intervention that restricts such freedom may prove necessary in the area of the freedom of assembly when the exercise of the fundamental right by a demonstrator interferes with the legal positions of others. In the case of such intervention, governmental bodies must also

consistently interpret laws that restrict fundamental rights in the light of fundamental importance of this fundamental right in a free democratic state and restrict their measures to that which is necessary to protect equivalent legal interests. Governmental measures that go beyond the application of laws that restrict fundamental rights and, for example, make access to a demonstration unreasonably difficult by obstructing access routes and carrying out tedious preventive controls or modifying the state-free, unregulated character of the demonstration through excessive observation and registration would be even more incompatible with these requirements (see on this BVerfGE 65, 1 [43]).

2. Of the provisions of the Assembly Act that the legislature enacted by virtue of the reservation of legislative power contained in Article 8.2 of the Basic Law, only compulsory registration, which is regulated in s. 14.1, and the constituent elements required for dispersal and prohibition contained in s. 15 were relevant for the purposes of reaching a decision in the initial proceedings. The provisions of law-governing assemblies that relate to prior registration and the submission of the name of a responsible leader do not require review; neither the administrative authority nor the courts have based their decisions on these provisions.

a) Compulsory registration pursuant to s. 14.1 of the Assembly Act was explicitly provided for under the Weimar Constitution as a permissible restriction on the freedom of assembly. According to the opinion of the Federal Administrative Court, registration as a rule restricts the fundamental right only insignificantly (BVerwGE 26, 135 [137-138]).

   The Federal Court of Justice (see "Decisions of the Federal Court of Justice in Criminal Cases" [*Entscheidungen des Bundesgerichtshofes in Strafsachen* - BGHSt 23], 46 [58-59]) considers the provision compatible with the Basic Law as do the majority of legal scholars. This is to be agreed with if it is taken into account that compulsory registration is not required without exception and that violation of this requirement does not automatically justify prohibition or dispersal of an event.

   Compulsory registration applies only to assemblies held outdoors because they often necessitate special measures due to the way they affect their surroundings. The particulars to be provided upon registration are intended to give the public authorities the information they need to be able to envision what traffic control and other measures have to be taken to ensure that the event is held with as little disturbance as possible on the one hand, and what is required in the interest of others and the community on the other hand, and how the two can be reconciled (see Bundestag document 8/1845, p. 10). According to the very prevalent view, timely registration is not mandatory in the case of spontaneous demonstrations that are held suddenly for reasons of the moment (see, for example, BVerwGE 26, 135 [138]; Supreme Court of the State of Bavaria [*Bayerisches Oberstes Landesgericht* - BayObLG], NJW 1970, p. 479; Dietel/Gintzel, op. cit., marginal notes 23 on s. 1 and marginal note 18 et seq. on s. 14 of the Assembly Act; Herzog, op. cit., marginal notes 48, 82 and 95 on Article 8 of the Basic Law; v. Münch, op. cit., marginal note 10 on Article 8 of the Basic Law; Hoffmann-Riem, op. cit., marginal note 47 on Article 8 of the Basic Law; Frowein, op. cit. [1085-1086]; Ossenbühl, op. cit. [65 et seq.]; P. Schneider, op. cit. [264-265]).

These are covered by the guarantee contained in Article 8 of the Basic Law; provisions of law-governing assembly do not apply to them if compliance with such provisions would make it impossible to achieve the end pursued through a spontaneous event. Recognition of such demonstrations despite the failure to comply with such provisions can be justified by the fact that Article 8 of the Basic Law in principle guarantees the freedom of assembly "without prior notification or permission" in its paragraph 1, that this freedom may certainly restricted by statute in the case of assemblies held outdoors under paragraph 2, that such restrictions do not, however, completely set aside the guarantee contained in paragraph 1 for certain types of events and that this guarantee provides exception from compulsory registration under the conditions mentioned above.

This appraisal of spontaneous demonstrations is based on the fact that regulatory requirements pertaining to assemblies must be applied in the light of the fundamental right of freedom of assembly and if appropriate yield to that right. The fundamental right and not the Assembly Act guarantees the admissibility of assemblies and processions; the Assembly Act only provides for restrictions if any are necessary. It is therefore consistent with this that failure to comply with the compulsory registration requirement does not in itself automatically result in prohibition or dispersal of an event. To be sure, anyone who acts as an organizer or leader and "conducts" an assembly that is not registered is liable to prosecution (s. 26 of the Assembly Act). s. 15.2 of the Assembly Act otherwise stipulates only that the responsible authority "may" disperse outdoor assemblies and processions if they are not registered. The Federal Minister of the Interior also considers preventive prohibition a possible sanction if and to the extent that this represents a more lenient means than dispersal, which is explicitly mentioned in the law. Dispersal and prohibition are, however, in any case not legal duties of the responsible authority, but rather permissible courses of action that the authority may in view of the considerable importance of the freedom of assembly in general properly avail itself of only in the presence of further prerequisites for intervention; failure to register and the concomitant deficiency of information merely facilitate such intervention.

Since compulsory registration is not required without exception and non-compliance does not peremptorily result in dispersal and prohibition, then is it is not possible to discern any reason why the obligation to register, which is based on important considerations of public interest, could be considered disproportionate under normal conditions. Whether and to what extent special considerations exist in the case of mass demonstrations that would, much as in the case of spontaneous demonstrations, justify a different assessment, is discussed in another context (see III.2 below; pages 357 et seq. of the Official Collection [Amtliche Sammlung]).

b) The provision contained in s. 15 of the Assembly Act, according to which the responsible authority may require that certain conditions be satisfied to hold an assembly or ban or disperse an assembly "if at the time of issuance of the order circumstances indicate that the public safety or order is immediately threatened by holding the assembly or procession", also withstands constitutional review when interpreted in conformity with the constitution.

The complainants and the Federal Association of Citizens' Initiatives for Environmental Protection raise doubts as regards the imprecision of the prerequisites for intervention, i.e., "threat to public safety or order," which for them becomes all the more problematic since the decision in respect of intervention is left to the discretion of lower administrative authorities and the police responsible for enforcement. The content of the above terms has in the meantime, as the Federal Minister of the Interior correctly submits, been made sufficiently clear by police law (see, for example, Drews/Wacke/Vogel/Martens, Gefahrenabwehr, 8th ed, 1977, vol 2, pp. 117-118 and 130-131).

According to this law, the term "public safety" encompasses the protection of central legal interests such as the life, health, freedom, honour, property and assets of the individual and the integrity of the legal order and governmental institutions, the existence of a danger to public safety generally being assumed in the case of a threat of a punishable violation of these protected interests. "Public order" is construed as the entire body of unwritten rules that must be observed because in accordance with the respective prevailing social and ethical views they are considered to represent an indispensable prerequisite for orderly human coexistence within a specific area.

These definitions do not alone, however, guarantee application of the law in conformity with the Basic Law. For the purposes of assessment under constitutional law, two restrictions are important that are contained in the law itself and have for effect that bans and dispersal essentially may be considered only to protect fundamental legal interests, whereas mere danger to the public order will generally not suffice.

Prohibition or dispersal is a last resort that presupposes on the one hand that the more lenient means of requiring that certain conditions be met has been exhausted (also according to BVerwGE 64, 55). This is based on the principle of proportionality. However, it limits not only the discretionary choice of means, but also the decision making discretion of the responsible authorities. The freedom of assembly protected by the fundamental right is subordinate only when it follows from a balance of interests that takes into account the importance of this freedom that it is necessary to protect other equivalent legal interests. Accordingly, in no case can simply any given interest justify restriction of this freedom; others must generally tolerate the inconveniences that necessarily result from the mass of people involved in the exercise of this fundamental right and cannot be avoided without detriment to the purpose of the event. Bans on demonstrations merely for reasons having to do with traffic issues can be excluded all the more since it is as a rule possible to achieve simultaneous use of roads by demonstrators and flowing traffic by imposing conditions.

The powers of the authorities to intervene are also limited by the fact that demonstrations may be banned and dispersed only in the case of an "immediate threat" to public safety or public order. The immediacy requirement represents a stronger restriction as regards the prerequisites for intervention than those provided under general police law. In any given case, it is necessary to assess the dangers. To be sure, this always involves an estimate of probability, but the bases for the estimate can and must be revealed. Accordingly, the law stipulates that this must be based on "discernible circumstances," which means it must be based on circumstances, facts and other details;

mere suspicion or conjecture cannot suffice. Taking into account the fundamental importance of the freedom of assembly, the authority may in particular if it issues a preventive ban not set the requirements for the assessment of danger too low, especially since the possibility of subsequent dispersal always remains available if the assessment should prove to be incorrect. It is otherwise left to the competent courts to initially determine what specific requirements are appropriate (see, for example, on the one hand Dietel/Gintzel, op. cit., marginal note 12 on s. 15 of the Assembly Act with reference to BVerwGE 45, 51 [61]; on the other hand Ott, op. cit., marginal note 5 on s. 15 of the Assembly Act and Werbke, NJW 1970, p. 1 [2]; similarly Bremen Higher Administrative Court (*Oberverwaltungsgericht*), DÖV 1972, p. 101 (102); Saarlouis Higher Administrative Court, DÖV 1973, p. 863 [864] and also the Report of the Committee on Legal Affairs on the Amendment [*Bericht des Rechtsausschusses zur Gesetzesnovelle*] 1978, Bundestag document 8/1845, p. 11).

They can hardly be prescribed by the Basic Law in isolation from concrete circumstances and may depend, for example, in the case of mass demonstrations upon the willingness of the organizers to cooperate during preparations and whether disruptions are feared only from outsiders or on the part of a small minority (see III.1. and 3.III below on this; pages 355 et seq. and 359-360 [of the Official Collection]).

All in all, s. 15 of the Assembly Act is in any case compatible with Article 8 of the Basic Law if it is interpreted and applied such that it can be guaranteed that bans and dispersal result only to protect equivalent legal interests in keeping with the principle of proportionality and only if an immediate threat to these legal interests can be inferred from the obvious circumstances.

III.

It is not possible to object on constitutional grounds if the provisions of law governing assembly discussed above are also applied to mass demonstrations. When they are applied, however, it is also necessary to take advantage of experience that has subsequently been gained and put to the proof in an effort to make it also possible to conduct such demonstrations peacefully.

1. On the basis of the reports on past experience obtained during the initial proceedings and the results of the Stuttgart Talks (see A.I.2. above; pages 319-320 [of the Official Collection]), various circumstances can contribute to the peaceful conduct of events such as the 1979 Gorleben Trek, the 1981 Bonn Peace Demonstration or the 1983 Southern German Human Chain. Apart from timely clarification of the legal situation, this also means that both sides must avoid provocations and incitement of aggression, that the organizers must exercise their influence on participants to encourage peaceful conduct and isolate perpetrators of violence, that the governmental authorities - if appropriate by making provision for areas with no police presence - remain discreetly in the background and avoid overreaction and in particular that the two sides establish contact on a timely basis so that they can get to know one another, exchange information and possibly even establish a basis for cooperation in a spirit of mutual trust that would also facilitate management of unforeseen conflict situations.

It is not necessary to determine whether an obligation to take this experience into account can already be inferred from the protective duty of the governmental authorities that in the opinion of the Trade Union of the Police derives from the basic constitutional decision embodied in Article 8 of the Basic Law, much as in the case of other fundamental rights of high standing guaranteed by the Basic Law and that it is intended to make it possible to conduct assemblies and processions and to protect the exercise of the fundamental right against disruption and disturbance by third parties. It is in any case necessary to draw upon recent constitutional case laws, according to which the fundamental rights not only influence the formulation of substantive law, but at the same time establish standards for the nature of the organizational and procedural means used to effect protection of fundamental rights as well as for application of existing procedural provisions in a manner conducive to protection of the fundamental rights (see the references BVerfGE 53, 30 [65-66 and 72-73]; from the period thereafter also BVerfGE 56, 216 [236] and 65, 76 [94]; 63, 131 [143]; 65, 1 [44, 49]).

There are also no objections to applying this case law to the freedom of assembly, especially since this fundamental right also contains significant implications in terms of law governing matters of a procedural and organizational nature; as a freedom, it embodies no statement as to the substantive form of assemblies and processions, but leaves this to the free self-determination of the organizers and is itself limited to organizational prerequisites for holding such assemblies and processions. The requirement that governmental authorities take as their model peaceful mass demonstrations held in the past and proceed in a manner favourable to demonstrations and not without adequate reason ignore positive experience reflects the effort to effect rights of freedom at the level of procedural law. A duty to not only consider such experience, but also to actually attempt to apply it can be justified on constitutional grounds by the fact that this is a more lenient means than intervention in the form of bans or dispersal. The more seriously governmental authorities support the peaceful conduct of mass demonstration in this manner, the more likely subsequent bans or dispersal are on the other hand to withstand review by the administrative courts if such efforts should fail.

The requirements may in the first place not be allowed to become so broad at the level of procedural law mentioned above as to fundamentally change the nature of the responsibility of the police for averting danger or, for example, make the use of flexible deployment strategies impossible. Likewise, and even more so, neither the organizers of mass demonstration nor the participants may be required to meet conditions that would detract from the character of demonstrations as contributions to the formation of political opinion and will that are in principle state-free, unregulated or dilute the organizers' right to freely determine the nature and content of demonstrations. This is not the case when organizers and participants are simply required to refrain from unruly conduct and keep the impairment of the interests of others to a minimum. This duty follows directly from the very guarantee of the fundamental right and harmonization of this right with the fundamental rights of others. Further reaching obligations in terms of procedural law could possibly be justified since the exercise of this fundamental right affects the greater community and the originators share responsibility for the consequences of mass demonstrations. It must remain the affair of the legislature to precisely define such obligations within the context and limits of its powers to restrict fundamental rights by enactment of a specific law, taking into account assessment of the above experience at the level of ordinary law. Even in the absence of such precise definition by the legislature, both the organizers of

demonstrations and participants would do well to take into account at their own initiative the recommendations for mass demonstration that can be inferred from proven experience insofar as possible. As regards administrative practice and the rulings of the courts, such willingness must in any case be honoured for constitutional reasons; for the more the organizers are prepared to take confidence building measures on their own or even cooperate in a manner conducive to the demonstration when a mass demonstration is registered, the higher the bar becomes to governmental intervention on the grounds of a threat to public safety and order.

2. Despite the opinion to the contrary of the Federal Association of Citizens' Initiatives for Environmental Protection, the Basic Law does not require that mass demonstrations be exempted from compulsory registration pursuant to s. 14 of the Assembly Act in much the same way as spontaneous demonstrations are.

…

Due to the organizational stratification of sponsorship of large scale events, it would, however, seem that an interpretation of s. 14 in conjunction with s. 15.2 of the Assembly Act that allows for the eventuality that individual groups or individuals may not feel able to assume general responsibility for registration or organization would be compatible with the Basic Law. Even if responsibility for registration and organization has been assigned only to a limited extent and the willingness to exhibit a capacity for dialogue and accept responsibility is present only to a limited degree, this may not be ignored when assessing possible sanctions for failure to register. The only result of such absence of a registrant with overall responsibility is that the threshold for intervention by the responsible authorities is lower in the case of disruptions - much as in the case of spontaneous demonstrations - if the authority has itself done everything within its power to make it possible to conduct a peacefully organized demonstration by fulfilling its procedural duties, for example, by offering to cooperate in a spirit of fairness.

3. In particular in the case of mass demonstrations, the important question, which was also of importance in the initial proceedings, frequently arises as to whether and under what conditions public disturbances caused by individuals or a minority can justify a ban on a demonstration or its dispersal due to an immediate threat to public safety and order pursuant to s. 15 of the Assembly Act.

a) The Basic Law guarantees only the "right to assemble peacefully and unarmed." The requirement of peacefulness, which was already contained in the St. Paul's Church Constitution as well as in the Weimar Constitution, clarifies something that already follows from the legal nature of the freedom of assembly when it is understood as a means of conducting intellectual debate and exercising influence on the process of formation of political will (see also Federal Court of Justice [*Bundesgerichtshof* - BGH] NJW 1972, p. 1571 [1573]).

   The case involved in the initial proceedings, which did result in violence, provides no occasion for drawing a more precise line between acceptable forms of influence and unruly conduct. A participant is in any case unruly if that person commits an act of violence against persons or property. A legal order that follow the departure from medieval government by force has given the state a monopoly on the exercise of force,

not least of all in the interest of weaker minorities, must strictly insist upon avoidance of such violence. That is also an essential prerequisite for the guarantee of the freedom of assembly as a means of active participation in the political process and - as the experience of the battles in the streets during the Weimar Republic showed - for a free democracy since the avoidance of violence involves measures that limit freedom. Peaceful conduct can be expected of demonstrators all the more so since they can only gain from this, whereas they will in the end inevitably be subdued in the case of violent confrontations with the forces of government and at the same time obscure the goals they are pursuing.

b) The issuance of an order prohibiting assembly also presents no special problems as regards constitutional issues in the case of mass demonstrations if it can be expected with a high degree of probability that the organizer and the organizer's followers are planning to commit violence or will at least tolerate such conduct on the part of others. Since they are not peaceful, such demonstrations are not even covered by the guarantee contained in Article 8 of the Basic Law in the first place; dispersal or a ban cannot therefore be construed as a violation of this fundamental right. The legal situation seems clear if, conversely, the organizer and the organizer's followers conduct themselves peaceably and disruptions are caused only by outsiders (counter demonstrations, disruptive groups). The scholarly literature correctly requires in such cases that measures taken by the authorities be directed primarily against those causing disturbances and that steps be taken against an assembly as a whole only under special circumstances that constitute a police emergency (Hoffmann-Riem, op. cit., marginal notes 23 and 53 on Article 8 of the Basic Law; Dietel/Gintzel, op. cit., marginal note 14 on s. 15 of the Assembly Act; see v. Münch, op. cit., marginal note 39 on Article 8 of the Basic Law; Drosdzol, Grundprobleme des Demonstrationsrechts, JuS 1983, p. 409 [414]; Frowein, op. cit. [1084]).

Unless collective disturbances are to be feared, i.e., if it is therefore not expected that a demonstration will as a whole turn violent or disruptive (see s. 13.1 no. 2 of the Assembly Act) or that the organizer and the organizer's followers will strive for (see s. 5 no. 3 of the Assembly Act) or at least tolerate such a turn of events, the protection of the freedom of assembly of peaceful participants that the Basic Law guarantees every citizen must then be preserved even if other individual demonstrators or a minority do commit disturbances (see v. Münch, op. cit., marginal note 18 on Article 8 of the Basic Law; Herzog, op. cit., marginal notes 59 and 60, 89 and 90 on Article 8 of the Basic Law; Hoffmann-Riem, op. cit., marginal note 23 on Article 8 of the Basic Law; Blanke/Sterzel, op. cit. [76]; Schwäble, op. cit., pp. 229 and 234; Schmidt-Bleibtreu/Klein, GG, 6th ed., 1983, marginal note 4 on Article 8).

Were the disruptive conduct of individuals be allowed to deprive the entire event and not only the perpetrators of the protection of fundamental rights, this would enable such individuals to "co-opt" demonstrations and make them illegal against the will of the other participants (also previously Saarlouis Higher Administrative Court, DÖV 1973, p. 863 [864-865]); in practice, any mass demonstration could then be banned since it is virtually always possible to produce "knowledge" of disruptive intentions on the part of some of the participants.

The fact that the protection offered by Article 8 of the Basic Law therefore remains in effect, must affect the provisions of law that restrict the fundamental rights (On measures involving criminal law and liability in the case of partially unpeaceful demonstrations see BGHSt 32, 165 [169]; Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 89, 383 [395]; see also the decision of the European Commission for Human Rights, EuGRZ 1981, p. 216 [217]).

The guarantee of fundamental rights, which may be restricted by enactment of a specific law, also does not prevent the authorities from ordering that measures, which may go so far as to include a ban, be taken against an entire demonstration on the basis of s. 15 of the Assembly Act to protect public safety. However, the preferred alternative is to consider dispersal at a later point in time, which does not from the outset deprive peaceful participants of an opportunity to exercise a fundamental right and leaves it primarily up to the organizer to isolate unruly participants. A preventive ban on an entire event due to fears of excesses by a violence prone minority is on the other hand - which is dictated by a duty to preserve optimal freedom of assembly with the appropriate resultant requirements of procedural law - permissible only under strict conditions and under application of s. 15 of the Assembly Act in compliance with the Basic Law. These include a high degree of probability of danger (see Saarlouis Higher Administrative Court, DÖV 1973, p. 863 [864]; Bavarian Administrative Court [*Bayerischer Verwaltungsgerichtshof* - BayVGH], DÖV 1979, p. 569 [570]; similarly Schwäble, op. cit., p. 229 and Drosdzol, op. cit. [415]) and previous exhaustion of all reasonably applicable means that would permit exercise of fundamental rights by peaceful demonstrators (e.g., through restriction of the ban to a specific physical area). In particular, a ban on an entire demonstration is a last resort that follows from the assumption that the more lenient expedient of cooperation with peaceful demonstrators to avoid any danger has failed or that such cooperation was impossible for reasons the demonstrators were responsible for. In the event a general preventive ban on a demonstration is being considered due to specific circumstances, it would seem appropriate in the case of mass demonstrations with participants who for the most part have peaceful intentions that such an unusual and severe measure be announced in advance as a rule, with a period set for the purposes of discussion of the feared dangers and appropriate counter measures.

…

IX. Article 9 of the Basic Law Freedom of Association/Collective Bargaining/Industrial Action

1. Short-Work Benefits (s. 116 of the Employment Protection Act), BVerfGE 92, 365

Explanatory Annotation

The freedom of association as protected in Article 9 of the Basic Law has two constitutive elements. The first is the general freedom of association protected in Article 9.1 for German citizens, i.e. the freedom to form and act through commercial and non-commercial associations. Article 9.2 of the Basic Law provides a constitutional basis to prohibit and dissolve such associations if they pursue criminal activities or aim at the abolition of the constitutional order.[105]

The second element is the special right spelled out in Article 9.3 of the Basic Law to form associations to safeguard and improve working and living conditions, namely trade unions and the complementing employers' associations. Not only does Article 9.3 of the Basic Law guarantee the right to form and act through trade unions and employers' associations, it also reserves to these associations the right to negotiate enterprise bargaining agreements. The government's role in setting the working conditions is only a reduced one and limited to working conditions applicable across all sectors of the economy. In principle, the government has no power to regulate matters typically contained in enterprise bargaining agreements. Legislation demanding a wage freeze or increase, for example, would be unconstitutional.[106]

In the case at issue the Constitutional Court upheld a legislative amendment, which made it harder for employees indirectly affected by a strike to be paid unemployment or so-called 'short-hour' benefits by the Federal Employment Agency. The issue had arisen in the wake of a new strike strategy by some German unions by which strikes were strategically targeted at certain vulnerable points in the supply chain thus crippling many businesses with relatively minimal strike action. Non-striking employees indirectly affected by this strategy by being laid-off or put on shorter hours for lack of supplies would then apply for unemployment benefits. The new legislation curtailed access to these benefits arguing that the Federal Employment Agency is bound by an obligation of neutrality in such employment disputes and must not indirectly finance the strike action of trade unions. The Court regarded the reasoning for the new legislation as within the margin of appreciation of the legislator because it could not be shown that the tougher access rules for social benefits could weaken the trade unions in their relationship with the employers' associations in such a way as to endanger the balance of power between these two sides and thus violate the guaranteed right of these associations to negotiate enterprise bargaining agreements.

105 Article 9.2 of the Basic Law does not apply to political parties for which Article 21.2 contains a special provision. Whether Article 9.2 applies to religious associations is controversial. The Statute on Associations (Vereinsgesetz) exempted religious associations from its scope until 2001. This privilege was legislated out of the statute in the wake of the terrorist attacks of September 11, 2001. However, regular statutory law does not regulate the application of the constitutional norms to certain constellations. Much speaks for the view that Article 4, the freedom of religion, is a special clause for religious associations and whereas this does not mean that religious associations cannot be controlled when acting criminally, it could mean that such associations, if indeed religious, could not be prohibited for lack of a legal basis specifying the details for a prohibition.

106 Cf. BVerfGE 94, 268 (284-5), available in german at http://www.servat.unibe.ch/fallrecht/bv094268.html.

Translation of the Short-Work Benefits Judgment, s. 116 of the Employment Promotion Act (Arbeitsförderungsgesetz - AFG) - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 92, 365*

Headnotes:

1. S. 116.3, sentence 1 of the Employment Promotion Act is compatible with the Basic Law (Grundgesetz - GG). If this provision of law results in a structural imbalance between parties to a collective bargaining agreement and such imbalance no longer permits equitable negotiation of employment and economic conditions and cannot be rectified on the basis of case law, the legislature must take measures to preserve collective bargaining autonomy.

2. The fundamental right to freedom of association must be regulated by the legal system insofar as relationships between parties with conflicting interests are involved. The legislature enjoys broad operating latitude in this context. In judging whether parity between the parties to a collective bargaining agreement has been impaired and what ramifications a provision of law has on the balance of forces, the legislature enjoys the prerogative of assessment.

Judgment of the First Senate of 4 July 1995 on the basis of the oral hearing of 4 April 1995 - 1 BvF 2/86 and 1, 2, 3 and 4/87 and 1 BvR 1421/86 -

Facts:

The petitions for judicial review and a constitutional complaint submit provisions of law for review by the Federal Constitutional Court that govern the conditions under which income replacement benefits (regularly short-work benefits) due to industrial actions in connection with a regionally limited labour dispute are paid to employees in the same industry in other collective bargaining regions who are temporarily unemployed.

S. 116.3 of the Employment Promotion Act stipulates that these benefits are to be suspended if demands of the same scope and nature are asserted for such employees and the outcome of the labour dispute will in all probability be adopted in their region ("principle of participatory involvement"). This version of s. 116 of the Employment Promotion Act together with complementary procedural rules, including the creation of a "neutrality committee", stem from the Act amending the Employment Promotion Act of 15 May 1986 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I, p. 740) - the Neutrality Act. The Neutrality Act was occasioned by the fact that the legislature felt that the previous legal situation, which allowed for uninterrupted payment of short-work benefits in regions not involved in disputes, represented a violation of the neutrality of the Federal Labour Office (Bundesanstalt für Arbeit - BfA) in the case of labour disputes.

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

In response to the abstract judicial review proceedings initiated by several Land governments and members of parliament belonging to the SPD fraction in the German Bundestag, the Federal Constitutional Court found that the provision under challenge was compatible with the Basic Law for the reasons set forth in its decision The Federal Constitutional Court dismissed the constitutional complaint filed by IG Metall [trade union] directly against s. 116 of the Employment Promotion Act.

Extract from the Grounds:

…

C.

The petitions for judicial review and the constitutional complaint are unfounded. The provision submitted for review does not in any case at the present time violate the freedom of association of the complainant and is otherwise also compatible with the Basic Law; this applies, however, to a certain extent only in the case of its interpretation in conformity with the Basic Law.

I.

S. 116.3 sentence 1 no. 2 of the Employment Promotion Act as amended by the Neutrality Act is not in violation of Article 9.3 of the Basic Law. The provision does to be sure restrict the freedom of association of trade unions. However, it does respect the constitutional limits to the regulatory power of the legislature.

1. a) The fundamental right under Article 9.3 of the Basic Law is primarily a freedom. It guarantees individuals the freedom to form associations for the purposes of the improvement of working and economic conditions and for the collective pursuit of this end. The parties involved must in principle be able to do so in freedom from the influence of government, independently and as they see fit. However, the right of associations to pursue themselves the ends mentioned in Article 9.3 of the Basic Law, through activities that derive from the specific nature of such associations is also protected (see BVerfGE 50, 290 [367] with further references). In principle, Article 9.3 of the Basic Law leaves the choice of the means that associations consider appropriate for achieving these ends to the associations themselves. The fundamental rights also protect industrial actions taken for the purposes of concluding collective bargaining agreements as activities of such associations. They are subsumed under freedom of association as to the extent that they are necessary to ensure functional collective bargaining autonomy (see BVerfGE 84, 212 [224-225]).

   This also includes strikes (see BVerfGE 88, 103 [114]).

   b) The fundamental right to freedom of association must be regulated by the legal system insofar as relationships between parties with conflicting interests are involved. Both parties to a collective bargaining agreement enjoy equal protection under Article 9.3 of the Basic Law although they exercise this right in opposition to one another. They also enjoy protection against governmental influence if they employ confrontational means

to resolve their conflicting differences that have a significant effect on their opponents and the general public. This protection necessitates rules for coordination to guarantee that their respective fundamental rights can coexist despite their opposition. The possible use of confrontational means presupposes a general legal framework to ensure that the intent and purpose of this freedom and its integration into the constitutional order are preserved[107].

The legislature enjoys broad operating latitude as regards the creation of this framework. The Basic Law does not stipulate how the legislature must define the opposing positions under the fundamental right in detail. It also does not require optimization of the conditions for confrontation. It is in principle left to the parties to a collective bargaining agreement themselves to adapt the confrontational means they use as circumstances change in order to maintain equality with the opposing side and achieve equitable collective bargaining agreements. The legislature is on the other hand also not prevented from modifying the overall framework for labour disputes either for reasons having to do with public interest or to restore parity (see BVerfGE 84, 212 [228-229]).

c) The limits to the operating latitude of the legislature are defined by the objective content of Article 9.3 of the Basic Law. Collective bargaining autonomy must be preserved as an area in which the parties to a collective bargaining agreement can in principle regulate their affairs on their own and without governmental influence (see BVerfGE 50, 290 [367]). Its functional viability may not be compromised. Associations must be able to achieve their constitutionally recognized purpose, which is to defend and improve the working and economic conditions of their members, in particular by concluding collective agreements. The system of collective bargaining agreements is designed to compensate for the structural disadvantage of individual employees in the context of concluding employment contracts through collective action, thereby permitting the negotiation of wages and working conditions to be fairly balanced. Collective bargaining autonomy is as a result functionally viable only as long as an approximate balance of forces - i.e., parity - exists between the parties to a collective bargaining agreement (see BVerfGE 84, 212 [229]).

A provision of law is therefore in any case incompatible with Article 9.3 of the Basic Law if the ability of one of the parties to a collective bargaining agreement to negotiate, which includes the ability to effectively conduct a labour dispute, is no longer given and its activities as an association are restricted to a greater extent than would be necessary to balance the opposing positions under the fundamental right (see BVerfGE 84, 212 [228-229]).

Concrete standards for assessing the balance of forces of the parties to a collective bargaining agreement cannot be inferred from Article 9.3 of the Basic Law. The details are the subject of strong disagreement in the scholarly literature on labour law. In its case law on labour disputes, the Federal Labour Court (Bundesarbeitsgericht - BAG) takes into account the effect the negotiating strength of the opposing parties can have in

107 See BVerfGE 88, 103 (115).

the context of the negotiation of collective bargaining agreements and how it can be influenced by confrontational means (Federal Labour Court [*Bundesarbeitsgericht* - BAG], Working Paper no. 64 on Article 9 of the Basic Law - labour disputes).

There are good reasons for this perspective. It gives the competent courts an appropriate standard for the review of disputed industrial actions against the principle of proportionality. There can be no reservations in this regard on constitutional grounds (BVerfGE 84, 212 [229 et seq.]).The legislature is, however, not bound to this perspective when regulating the freedom of association. It may also establish other rules to prevent one of the parties to a collective bargaining agreement from gaining a disproportionate advantage in collective bargaining negotiations. Its approach is not unconstitutional unless it is from the outset not suitable for achieving this end.

The legislature is, however, under no obligation to compensate for any disparity that is not of a structural nature, but based instead on the internal weaknesses of an association. The degree of organization of an association, its ability to attract and mobilize its members and similar factors lie outside the purview of responsibility of the legislature. The legislature is not bound to provide weak associations with the ability to assert their positions in the context of collective bargaining negotiations.

d) The answer to the question as to whether the provision deprives trade unions of the ability to carry out effective industrial actions is left to the discretionary judgment of the legislature. The adversarial strength of an association of employees in a dispute is dependent upon myriad factors that can scarcely be apprehended individually and have effects that are difficult to assess. The possibilities available to a trade union for adapting to changes in circumstances through the use of special means of conducting a dispute also cannot be readily discerned. In such a situation, the legislature bears the political responsibility for accurate recognition and assessment of the relevant factors. The Federal Constitutional Court may not apply its own assessment in place of that of the legislature. A statute does not become unconstitutional unless it becomes clearly evident that a false assessment has been made or the measure under challenge was from the outset such as to disturb an existing balance of forces or reinforce an imbalance.

e) An assessment of a provision of law pertaining to labour disputes that the legislature initially assumes to be unobjectionable may retrospectively prove to be inaccurate. Assumptions that are originally plausible may be refuted by subsequent developments; well-founded expectations as regards complex causal relationships may be disappointed. For example, protracted interference with the functional viability of collective bargaining autonomy may set in despite the fact that the original situation was in conformity with the constitution. Such developments must be corrected insofar as it becomes evident that structural imbalances have occurred that no longer permit equitable negotiation of working and economic conditions, and these cannot be compensated within the framework established by case law. The legislature then has a duty to take measures to protect freedom of association (see BVerfGE 25, 1 [13]; 49, 89 [130]; 50, 290 [335]).

2. Measured against these standards, the statute under challenge withstands constitutional scrutiny.

a) The regulatory principle chosen by the legislature is compatible with Article 9.3 of the Basic Law.

The legislature adopted the statute because it felt that payment of short-work benefits would represent interference in labour disputes to the advantage of the trade unions, thereby unjustifiably contributing to its position of strength; it was thought that payment of short-work benefits to employees outside the region affected by the dispute violated the neutrality of the Federal Labour Office if these employees were likely to benefit from the desired outcome of the labour dispute. The revised statute is based on the principle that those employees who are not themselves involved in a labour dispute should bear the risk of any loss of income in the case of such a dispute if they have (nearly) the same interest in a successful outcome as the striking employees themselves since they are also likely to benefit from that success. This cannot occasion any reservations on constitutional grounds. Participatory involvement is an obvious criterion for shifting the risk of lost income from the unemployment insurance system to employees whose interests coincide with those of their colleagues who are directly involved in a labour dispute. It is natural to take this coincidence of interests as the basis for the suspension of short-work benefits.

b) In actual fact, the legislature proceeded from the assumption that it would be easily possible for the complainant to cause considerable disruption of production in different regions through a strike in a single region due to the high level of integration of production in the metalworking industry. This assumption is not disputed by the complainant and is also confirmed by the labour dispute of the year 1984. When a dispute is conducted in this manner, strong pressure is exerted on the employer's side. The efforts made by the employers affected by the remote effects and their regional organizations to persuade the employers directly affected by the dispute and their regional organizations to make compromises will vary as a function of the economic burden they must bear due to production stoppages. The assumption to the effect that internal pressure from employees "locked out in the cold" upon the trade union is lessened by the payment of short-work benefits is also sufficiently plausible.

c) There can be no objection to the evaluative assessment of the legislature to the effect that a shift in parity resulted from the construction of the previous version of s. 116 of the Employment Promotion Act that stemmed from the case law of the social courts as based on the case law of the labour courts regarding the risk of lost income. The legislature makes such evaluations of complex issues as part of its political responsibility for safeguarding the interests of the public.

No sufficient indications exist to the effect that the functional viability of collective bargaining autonomy is impaired by the statute under review in such as way as to justify the constitutional reservations of the complainant and the petitioners.

aa) Such impairment would manifest itself most probably in its effect on the ability of the complainant to conduct a dispute, which as is generally acknowledged is most affected by the statute. The complainant has long been conducting collective bargaining disputes in various regions and is according to it submissions, which have not been contradicted in this regard, dependent upon being able to conduct disputes in such a manner. Due to the high degree of integration in the metalworking industry, disruption of production outside the region in which industrial actions are carried out is especially frequent.

It has become clear, however, that the complainant is able to avoid suspension of payment of short-work benefits in other regions by asserting principal demands in those regions that differ significantly from those at issue in the region involved in the labour dispute. The complainant's assertion to the effect that it is hardly possible to advance demands in the various collective bargaining regions that differ significantly as regards wages and working hours within an area that is on the whole as economically homogeneous as the Federal Republic of Germany is clearly documented by the catalogue of demands presented by the complainant.

Finally, it is also evident that the revised statute restricts the complainant's ability to employ confrontational means. This was illustrated in particular by the collective bargaining dispute in Bavaria in the year 1994/95. The complainant selectively struck enterprises that produce end-user products and are therefore integrated to a relatively limited extent with other enterprises at the technical level. Much was spoken in favour of the fact - and this is also not called into question by the employers - that the complainant was forced to adopt this tactic in order to avoid the consequences of the statute and the internal pressure that would otherwise have been expected from the other regions. It is obvious that employees cannot hold out without any support in the case of a lengthier labour dispute since their livelihood depends upon a regular income. It is also obvious that it would represent a significant burden for the complainant to have to provide strike benefits for all indirectly affected members throughout Germany.

Overall, it is therefore not possible to ignore the fact that the statute under challenge restricts the ability of the complainant to conduct disputes. The complainant is not only prevented from employing a coercive strategy that is intended to selectively provoke production stoppages in other regions in order to exert pressure on the employer side in those regions. Indeed, the opposite obtains and the complainant must see to it that the ramifications of a labour dispute are restricted to the region involved in the dispute since employees in other regions would bear the full brunt of the remote effects, as they could not survive very long without short-work benefits. In that regard, the effect of the statute goes beyond the declared goal, which is to prevent what are referred to as strikes by proxy: The trade union is also subject to significant restrictions as regards industrial actions if it attempts to limit the actions to the territory involved in the labour dispute. For practical purposes, it no longer can strike enterprises whose production is integrated with that of other enterprises in the same industry in other collective bargaining regions.

bb) Despite this restriction of the ability of the complainant to conduct disputes, it is not (yet) possible to ascertain unconstitutional interference with the functional viability of collective bargaining autonomy.

…

cc) On the other hand, this labour dispute has also revealed further risks as regards the functional viability of collective bargaining autonomy. Had it come to lock outs by the employer side, unemployment in other regions could have taken on a dimension that would have significantly weakened the complainant's coercive power. The complainant submits in that regard that this would have been virtually inevitable since a lockout would have been possible only in the case of those enterprises that were not struck by the complainant, which are to a great extent integrated with enterprises in the metalworking industry in other regions. In any case, the employers would themselves have had the possibility to deliberately provoke remote effects in other regions through lockouts by selected enterprises. Assuming that it would in this case also have resulted in suspension of short-work benefits for the respective employees, the statute could in fact have resulted in disruption of parity if employers had conducted the dispute in such a manner.

However, these risks also do not (yet) suffice to question the constitutionality of the statute under challenge. On the one hand, it is not at present possible to ascertain whether the employers can actually employ a lockout tactic to deliberately achieve remote effects in a labour dispute in such a manner as to result in structural imbalance between the parties to a collective bargaining agreement. They too expose themselves to internal pressure if they provoke production stoppages in other regions to any significant extent. This could overtax the solidarity among their members, which is already weak since they compete against one another. In addition, the legal issues raised by such conduct of a labour dispute have not been clarified. The representative of *Gesamtmetall* [umbrella association of regional employers' associations in the German metal and electrical industry] and the Federal Labour Minister (Bundesarbeitsminister) have referred in this regard to the case law on labour disputes of the Federal Labour Court with respect to proportionality in the case of defensive lockouts. The Federal Labour Court has up to now dealt exclusively with lockout orders in this context and in so doing not taken into account employees that are indirectly affected (see Federal Labour Court, Working Paper no. 64 and 84 on Article 9 of the Basic Law - labour disputes). However, this case law relates to labour disputes that were still carried out under the former version of s. 116 of the Employment Promotion Act. It is evident that the Federal Labour Court proceeded at the time on the basis of the assumption to the effect that short-work benefits would regularly be paid in those regions not involved in the dispute. Despite the Court's original assumptions to the effect that defensive lock outs may not result in disproportionate restriction of the adversarial strength of employees, lockouts may, however, result in effective limitation of the indirect effects of such industrial actions under the revised statute. In addition, the Federal Social Court also had no opportunity to deal with application of s. 116.3

of the Employment Promotion Act in the case of employees who were put out of work due to the remote effects of lockouts. The wording of the statute under challenge does not make any distinction between the indirect effects of strikes on the one hand and lockouts on the other hand, but a construction to the effect that such a distinction exists cannot be excluded. It could be required to preserve the functional viability of collective bargaining autonomy if a disproportionate structural advantage of employers would otherwise result in the case of labour disputes.

Accordingly, it is on the whole both factually and legally uncertain whether the statute under challenge will result in such an imbalance in the adversarial strength of the parties to collective bargaining agreements in future labour disputes, as to make negotiations on an approximately equal basis no longer possible. If this should occur, the legislature would be required to take appropriate measures to preserve collective bargaining autonomy. As long as this does not happen, it is the affair of the courts to construe and apply the applicable rules in the light of Article 9.3 of the Basic Law.

II.

Based on the reasoning that follows, s. 116.3 sentence 2 second alternative of the Employment Promotion Act, which stipulates that a demand is also considered to have been asserted if it can be viewed as having been adopted on the basis of the conduct of a party to a collective bargaining agreement in connection with the intended conclusion of a collective bargaining agreement, is also compatible with Article 9.3 of the Basic Law.

1. Freedom of association also protects self-determination of associations as regards their own organization, their decision making procedures and their conduct of affairs (BVerfGE 50, 290 [373-374]). The government must make available appropriate legal forms to associations that guarantee adequate possibilities for legal action in order to guarantee this protection. This applies as regards both their internal structures as well as their ability to act externally. In addition, the government may impose only such restrictions on the right of association to self-determination as may be required to protect other fundamental rights or constitutionally protected legal interests.

2. The statute does not encroach on the right to self-determination when its purpose is to prohibit abusive suppression of a demand within the meaning of s. 116.3 sentence 1 of the Employment Promotion Act. Abusive conduct does not merit protection.

A construction of s. 116.3 sentence 2 of the Employment Promotion Act that goes any further would on the other hand encroach on the right to self-determination of associations in a manner that would be unconstitutional.

…

III.

The revised provision contained in s. 116.3 sentence 1 of the Employment Promotion Act is not in violation of Article 14.1 of the Basic Law. Even if it did encroach on protected property rights, encroachment would be justified.

1. The right to property guaranteed under Article 14.1 of the Basic Law also includes rights to social security benefits that by virtue of their nature as exclusive rights inure to the holders for their private use; these rights enjoy the protection afforded to property if they derive from not insignificant contributions of the insured and serve to secure their livelihood (see BVerfGE 53, 257 [289 et seq.]; 72, 9 [18-19]; 74, 203 [213]).This includes rights to unemployment compensation in any case if the employee through payment of contributions during the legal vesting period has fully earned the benefits (BVerfGE 72, 9 [18-19]).

There is some question as to whether any further rights under unemployment insurance fall into the guaranteed area of protection of property and this has not yet been clarified in the case law of the Federal Constitutional Court. It is in particular doubtful whether short-work benefits, which are primarily at issue as regards the area of application of s. 116.3 sentence 1 of the Employment Promotion Act, inure to the insured for their private use. They are also based on contributions of the insured and serve to secure their livelihood in the event of loss of wages due to short-work hours. Unlike in the case of unemployment compensation, however, it is not necessary to await the end of a vesting period. In addition, payment of short-work benefits is also intended primarily to enable enterprises affected by short-work hours to retain experienced employees. The right to short-work benefits does not therefore automatically apply in the case of foreseeable short-term unemployment. In fact, it is contingent upon announcement of suspension of work that cannot be made by the employee, but only by employers or representatives of employees (s. 72.1 of the Employment Promotion Act). Although financed by contributions, short-work benefits represent solidarity based compensation that benefits both employers and employees.

2. The question as to the extent to which rights to short-work benefits may nevertheless be considered protected property rights need not be conclusively decided here. Even if that is assumed to be the case, the statute under challenge does not encroach upon these rights in a manner that is unconstitutional.

Whether the Act worsens the previous legal situation at the expense of the insured and therefore possibly encroaches upon their protected interest in insurance benefits or only clarifies that which was already intended to be achieved by the version of the law from 1969 also need not be decided. For the reduction in insurance benefits asserted by the petitioners is justified by the end pursued by the legislature.

S. 116.3 sentence 1 of the Employment Promotion Act is intended to ensure the neutrality of the Federal Labour Office in labour disputes. This is a legitimate goal. There can be no objection on constitutional grounds to the actual assumptions underlying the concern of the legislature to the effect that this neutrality would no longer be guaranteed if short-work benefits were to be paid. Here too, reference may be had to the comments on Article 9.3 of the Basic Law.

The statute is also suitable for guaranteeing the neutrality of the Federal Office in the case of labour disputes with remote effects. The notion of participatory involvement permits categorization of recipients of benefits on the basis of criteria designed to achieve this purpose. No equally effective means can be ascertained that encroaches less extensively upon the rights of employees to insurance benefits.

The encroachment would also not be disproportionate in the narrower sense. On the one hand, the right that would be encroached upon is afforded the insured for their private use at most to a very limited extent. In addition, the effect of the statute is in practice to motivate trade unions - and possibly also employers - to proceed in such a manner as to avoid short-work hours in other regions in the case of labour disputes. Moreover, the rights of only those employees who can be expected to share in the benefits from the successful outcome of a labour dispute would be encroached upon.

On the other hand, the guarantee of the neutrality of the Federal Labour Office is an important consideration to which the legislature had the right to afford precedence over these rights.

IV.

The statute does not violate the general equality provision (Article 3.1 of the Basic Law). In the case of work stoppages due to strikes, it does to be sure result in unequal treatment of employees in the same industry in regions that are not involved in the dispute as compared with employees in other industries. However, this unequal treatment is objectively justified.

1. Depending on the area of regulation and the distinguishing characteristics involved, the constraints imposed upon the legislature by the general principle of equality vary, ranging from mere prohibition of arbitrariness to strict compliance with the requirements of proportionality. The variance in the scope of operating latitude of the legislature is reflected in the gradation of the intensity of control in the case of constitutional review (see BVerfGE 88, 87 [96 et seq.]). Accordingly, a relatively stringent standard applies here. The statute under challenge results in significant unequal treatment of classes of persons whose members cannot in fact avoid the unequal legal consequences.

2. The restriction of the suspension statute to employees of the same industry is accordingly appropriate.

…

2. *Article 9.2 of the Basic Law: Prohibition of Associations*

BVerfG, 13.7.2018, 1 BvR 1474/12,
http://www.bverfg.de/e/rs20180713_1bvr147412en.html
"Prohibition of Associations"

Explanatory Annotation

Article 9.1 and 9.2 of the Basic Law deal with the freedom of association, i.e., the freedom of people to organize themselves to pursue self-defined purposes.[108] The freedom of association is also reflected in the Basic Law in two other, more special guises. Article 9.3 of the Basic Law deals with the freedom to form "coalitions", i.e., to engage in collective bargaining (see below in this chapter). Article 21 of the Basic Law deals specifically with political parties as associations that have a particular responsibility in the democratic process of the Federal Republic. One of the issues for both general associations and political parties is the question of whether the state can interfere with such associations and even prohibited and dissolve them if they are found to pursue objectives considered to be unconstitutional. Article 9.2 of the Basic Law and Article 21.2 affirm that this is possible, albeit with slightly different criteria. These criteria are strict in both cases but even stricter for political parties. The joined cases reproduced here concern the prohibition of three quite diverse associations. The first one concerned the prohibition of an organization operating as the "International Humanitarian Aid Organisation", the second one pertained to an "Organisation Supporting Domestic Political Prisoners and Their Families", the third one concerned the prohibition of a Frankfurt Chapter of the Hells Angels bikie club.

Article 9.1 is an example of a right guaranteed by the Basic Law only for German citizens. Non-citizens are not protected by this norm and could only take constitutional recourse to Article 2.1 as a subsidiary "catch-all" right. However, the freedom of association is also governed by the Statute Governing Public Associations[109], and this statute does not limit the freedom of association to just citizens. Non-citizens also enjoy the freedom of association but largely and primarily as a statutory right. Citizens have the additional protection of the Basic Law, which could defend against statutory amendments.

The language of Article 9.2 of the Basic Law is somewhat misleading as it implies that such unconstitutional associations are prohibited *ipso jure*, quasi automatically.[110] That is, however, not the case. Prohibition requires an administrative act which is governed by § 3 (and subsequent sections) of the Association Statute and which picks up on the reasons for prohibition specified in Article 9.2 of the Basic Law, which allows for the prohibition of associations if they

108 BVerfG, 12.7.2017, 1 BvR 2222/12, http://www.bverfg.de/e/rs20170712_1bvr222212.html, para. 78 (decision only available in German).

109 Statute Governing Public Associations (Association Statute) [Gesetz zur Regelung des öffentlichen Vereinsrechts (Vereinsgesetz)], available in German only at https://www.gesetze-im-internet.de/vereinsg/BJNR005930964.html (last accessed on 21.10.2019).

110 The English translation referred to here formulated "shall be prohibited", https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0057 (last accessed on 21.10.2019). The German version reads more like "are prohibited" ("sind verboten").

"contravene the criminal laws", or "are directed against the constitutional order" or "the concept of international understanding".[111] In contrast to the political parties, the prohibition of associations is not the prerogative of the Constitutional Court.[112] However, the Constitutional Court has jurisdiction to hear constitutional complaints if the relevant authorities issue such a declaration and the case reproduced here triggered the supervising powers of the Court in this manner. The Constitutional Court takes great care in interpreting and explaining these criteria.[113]

Translation of the "Prohibition of Associations" Decision, BVerfG, 13.7.2018, 1 BvR 1474/12, http://www.bverfg.de/e/rs20180713_1bvr147412en.html

Headnotes:

1. Article 9(1) of the Basic Law protects the formation and the existence of associations. Article 9(2) of the Basic Law, as a manifestation of a pluralist and at the same time militant constitutional democracy, sets a limit to freedom of association.

2. Any interference with freedom of association must comply with the principle of proportionality. When the requirements for a prohibition under Article 9(2) of the Basic Law are met, the association must be prohibited; however, if there are measures available that are less restrictive but equally effective for protecting the legal interests specified in Article 9(2) of the Basic Law, these take precedence.

3. The power to prohibit an association under Article 9(2) of the Basic Law must be interpreted strictly.

    a. An association meets the requirements for a prohibition under Article 9(2) first alternative of the Basic Law when its apparent aim or its activity is, in essence, to provoke, encourage or enable its members or third parties to commit criminal offences or to facilitate them by supporting or by recognisably identifying with criminal actions.

    b. An association meets the requirements for a prohibition under Article 9(2) second alternative of the Basic Law when it opposes the constitutional order by openly taking an actively belligerent stance against the fundamental principles of the Constitution.

    c. An association meets the requirements for a prohibition under Article 9(2) third alternative of the Basic Law when it actively advocates and promotes violence or similarly serious actions violating international law, such as terrorism in international

111 § 3.2 of the Association Statute for the relevant authorities who can make this determination. For associations operating country wide is the Federal Minister for the Interior. The states have to designate a respective authority for associations operating in their jurisdictions.

112 BVerfG, 13.7.2018, 1 BvR 1474/12, http://www.bverfg.de/e/rs20180713_1bvr147412en.html, para. 122.

113 Id. at paras. 105–114; 125 et seq.

relations or among parts of the population. This may also be the case when an association supports third parties, where this support is objectively capable of significantly, severely, and deeply compromising international understanding, and where the association is aware of this fact and at least approves of it. However, in this respect, prohibitions of associations may not prevent every form of humanitarian aid in crisis areas merely because this might indirectly promote terrorism.

4. To the extent that the prohibition of an association pursuant to Article 9(2) of the Basic Law is founded in actions protected by fundamental rights or impairs other fundamental rights, these fundamental rights must be taken into account in the context of justifying the interference with Article 9(1) of the Basic Law. The prohibition of an association must not forbid what is otherwise protected by fundamental freedoms, and it must not be biased against particular political opinions.

Facts:

[Excerpt from Press Release No. 69/2018]

The three associations were prohibited on the basis of the Associations Act. The International Humanitarian Aid Organisation (*Internationale Humanitäre Hilfsorganisation e.V.* - IHH) is accused of having indirectly supported a terrorist organisation by channelling financial donations to it and thus actively contravening the concept of international understanding. The Organisation Supporting Domestic Political Prisoners and Their Families (*Hilfsorganisation für nationale politische Gefangene und deren Angehörige e.V.* - HNG) is accused of having encouraged imprisoned right-wing extremists, in its association magazine, in their attitude to combat the foundations of the constitutional order of the Federal Republic of Germany, thus actively and belligerently opposing the constitutional order and contravening criminal statutes. The association Hells Angels MC Charter Westend Frankfurt am Main is accused of having supported its members in committing criminal offences. The three associations unsuccessfully sought legal recourse before the administrative courts against the orders prohibiting them issued by the Federal Ministry of the Interior and the Ministry of the Interior of the *Land* Hesse. Their constitutional complaints are directed against the orders and the judicial decisions, and indirectly against the provision that allows for their prohibition in the Associations Act.

[End of excerpt]

[...] **[1]**

I.

1. In [German] constitutional law, the right to "form associations or organisations" was first granted by the Weimar Constitution (*Weimarer Reichsverfassung* - WRV) under Art. 124(1) first sentence WRV. Art. 124 WRV guaranteed this right in respect of all Germans and for all purposes, Art. 130(2) WRV specifically guaranteed it in respect of civil servants, Art. 137(2) WRV for religious purposes and Art. 159 WRV in respect of coalitions. There was no specific provision on political parties in the Weimar Constitution, in contrast with today's Art. 21 of the Basic Law (*Grundgesetz* - GG). At the time, the legislature itself was authorised to determine the scope of

freedom of association, given that the Constitution provided a limit to this freedom in the form of criminal statutes directed precisely against associations. In response to attacks on politicians of the Weimar Republic, in particular to the assassinations of Walther Rathenau and Matthias Erzberger, numerous associations were prohibited on the basis, up until 1929, of the Republic Protection Act (*Republikschutzgesetz*) of 21 July 1922 (Reich Law Gazette, *Reichsgesetzblatt* - RGBl p. 585), because they sought to undermine the republican form of government of the Reich or a *Land*. Yet the new State Court (*Staatsgerichtshof*), established in 1922 to protect the Republic, generally interpreted the provisions on prohibition restrictively; for instance, to justify a prohibition, it required planned and systematic efforts […]. Later, on numerous occasions, associations were prohibited or at least monitored under Art. 48(2) WRV, on the basis of emergency decrees issued by the President of the Reich. The fact that the *Länder* were primarily competent and had discretion to prohibit associations had a decisive impact on the Weimar Republic. Not only were associations prohibited in one *Land* able to move to another *Land* and continue to exist, but, in addition, decisions regarding the prohibition of associations were subject to particular political pressure, which ultimately prevented effective actions against precisely those associations that actively combatted democracy […]. **[2]**

2. The Constitution of the Free State of Bavaria (*Verfassung des Freistaates Bayern* - BayVerf) of 2 December 1946 (Law and Ordinance Gazette, *Gesetz- und Verordnungsblatt* - GVBl p. 333), which entered into force prior to the Basic Law, also left the prohibition of associations to the discretion of the respective authorities under Art. 114(2) BayVerf. The provision was interpreted to the effect that action against associations could only be taken by means of a prohibition. This was considered a problem because "according to this provision, only the most restrictive means can be used, even though less restrictive means could be successful - perhaps even more so." (cf. Nawiasky/Leusser, Die Verfassung des Freistaates Bayern, 1948, p. 129, original quote in German). **[3]**

3. In Art. 9(1) GG, in contrast with the Weimar Constitution, freedom of association was guaranteed for the first time regardless of statutory provisions. In addition, freedom of labour coalitions (Art. 9(3) GG), freedom of political parties (Art. 21 GG) and freedom of religious associations (Art. 140 GG in conjunction with Art. 137(2) WRV) are expressly laid down in the Basic Law. Art. 9(2) GG now provides a uniform legal framework for the prohibition of associations throughout Germany. **[4]**

The provision on prohibition, Art. 9(2) GG, was not the object of in-depth deliberations or substantive discussions by the Parliamentary Council (*Parlamentarischer Rat*). The Constitutional Convention at Herrenchiemsee adopted the proposal by Sub-Committee I of the Committee on Fundamental Policy Issues (*Ausschuss für Grundsatzfragen*), which designed the right to freedom of association "while at the same time prohibiting the pursuit of unlawful and immoral aims and the endangerment of democracy and international understanding" (Der Parlamentarische Rat 1948-1949, vol. 2, p. 222). The draft of Bergsträsser, an MP who was the rapporteur on this issue, was also part of the deliberations. According to this draft, associations were to be prohibited if they "pursued unlawful aims or combatted democracy or international understanding or did not reject the use of force to reach their goals" (Der Parlamentarische Rat 1948-1949, vol. 5/I, p. 25). In particular, the Committee on Fundamental Policy Issues advocated that a prohibition

could also be justified on the basis of the aims and the activities of an association (Der Parlamentarische Rat 1948-1949, vol. 5/II, pp. 685, 703 and 704). The following version of Art. 9(2) GG, which is still applicable today, was adopted: "Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited." **[5]**

a) In the early years after the Basic Law entered into force, it was widely assumed that the prohibition of an association would directly come into effect once the requirements of a prohibition under Art. 9(2) GG were fulfilled (cf. *Bundestag* document, *Bundestagsdrucksacke* - BTDrucks 4/430, p. 12). At first, the courts set a low threshold for finding that there are reasons for a prohibition (cf. Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE 1, 184). However, in 1956, the Federal Administrative Court (*Bundesverwaltungsgericht*) held that an association could only be prohibited if the authorities had established that the requirements of Art. 9(2) GG were met (BVerwGE 4, 188). The Associations Act (*Vereinsgesetz* - VereinsG), which entered into force in 1964, provided a statutory basis for prohibitions from then on. Its purpose was to set out the procedure for the authorities to prohibit associations (cf. BTDrucks 4/430, pp. 8 and 9) and thus align associations law with the requirements of the Basic Law, the case-law of the Federal Administrative Court and other developments that had taken place. **[6]**

b) In response to the terrorist attacks of 11 September 2001, the First Act Amending the Associations Act of 4 December 2001 (Federal Law Gazette, *Bundesgesetzblatt* - BGBl I p. 3319) was enacted. It extended the scope of application of the provisions on the prohibition of associations to encompass religious associations, by abolishing the so-called "religion privilege" (*Religionsprivileg*) (cf. BTDrucks 14/7026, p. 6). Since 2001, the number of prohibitions of associations has increased considerably, to more than 60 overall. This number is higher than all prohibitions imposed between 1964, when the Associations Act entered into force, and 11 September 2001. **[7]**

4. The Associations Act of 5 August 1964, in the version of 10 March 2017, now provides the statutory basis for the prohibition of associations. It is designed as an act implementing Art. 9(2) GG ([…]). Pursuant to the Act's § 1(1), its aim is to protect the freedom of association as well as to counteract its abuse so as to uphold public safety and order (§ 1(2) VereinsG). Pursuant to § 3 VereinsG, an association may "only be treated as a prohibited association (Article 9(2) of the Basic Law) if, by order of the authority competent for prohibitions, it has been established that its aims or activities contravene criminal statutes or that they are directed against the constitutional order or the concept of international understanding; it must order the dissolution of the association (prohibition)". **[8]**

a) An order prohibiting an association pursuant to § 3(1) first sentence first half-sentence VereinsG establishes that the requirements for a prohibition are met, and orders the dissolution of the association. Subsequently, the only act the association may undertake is to seek to revoke the prohibition order in court proceedings […]. **[9]**

[…].

C.

The constitutional complaints are unfounded. **[96]**

I.

1. The freedom of association in Art. 9(1) GG protects the right of individuals to unite and to exist as an association (cf. BVerfGE 13, 174 <175>; 84, 372 <378>). Art. 9(1) GG thus guarantees the principle of free establishment of social groups (cf. BVerfGE 38, 281 <302 and 303>; 80, 244 <252 and 253>) initiated by private individuals and independent of the state (cf. BVerfGE 146, 164 <193 and 194, para. 78>). For constitutional law purposes, the legal capacity of an association, which depends on certain characteristics set out by the legislature, is irrelevant (cf. BVerfGE 13, 174 <175>; 84, 372 <378>). However, special constitutional protection is granted to those associations to which the Basic Law accords a special status as political parties (cf. BVerfGE 107, 339 <358>; 144, 20 <194 para. 512>) and religious communities. **[97]**

Both for its members and for the association itself, the protection of the fundamental right under Art. 9(1) GG comprises the establishment of the association, selfdetermination regarding its organisation, its decision-making procedures and its management (cf. BVerfGE 50, 290 <354>), i.e. the right to be established and to exist in the chosen united form (cf. BVerfGE 13, 174 <175>; 80, 244 <253>). By contrast, activities that go beyond measures to establish an association and to ensure its continued existence are not covered by the guarantee of Art. 9(1) GG (cf. BVerfGE 70, 1 <25>). Rather, they are protected according to those fundamental rights and equivalent guarantees under whose scope of protection they fall. The establishment of an association does not expand the fundamental rights protection with regard to the individual actions of its members (cf. BVerfGE 54, 237 <251>), but acting within an association does not lower fundamental rights protection either. Where an association's activities fall within the scope of protection of other fundamental rights, interferences must in principle be measured against those fundamental rights; yet for the prohibition of associations, even if it affects other fundamental rights, the specific provision of Art. 9(2) GG is primarily applicable […]. **[98]**

2. Interferences with the freedom of association must be measured against the principle of proportionality. The constitutional legislature (*Verfassungsgeber*) expressly provided prohibition as the most restrictive means available in Art. 9(2) GG. **[99]**

a) In Art. 9(2) GG the constitutional legislature (cf. […] para. 5 above) did not restrict the scope of protection of freedom of association from the outset (still in this vein, BVerwGE 134, 275 <306 and 307>, para. 86), but rather added an express limit to the collective right to the continued existence of associations protected under Art. 9(1) GG (cf. BVerfGE 80, 244 <253>; see also BVerfGE 30, 227 <243>; 84, 372 <379>; […]). In this respect, the wording of the fundamental right differs from the wording of provisions in *Land* constitutional law, which only guarantee freedom of association for constitutionally protected aims (Art. 13(1) of the Constitution of the *Land* Rhineland-Palatinate, *Verfassung für Rheinland-Pfalz,* Ordinance Gazette, *Verordnungsblatt* - VOBl p. 209; formerly Art. 19(1) of the Constitution of the *Land* Baden, *Verfassung des Landes Baden*, of 18 May 1947). In contrast to these provisions, Art. 9(2) GG - in a distinct subsection of Art. 9, separate from the determination of the scope of

protection - determines when an association is to be prohibited entirely, i.e. under which circumstances the most serious interference with an association's fundamental rights can be justified under constitutional law. **[100]**

Freedom of association is guaranteed even in light of the possibility of restricting it that arises from Art. 9(2) GG. The provision on prohibition must be seen in the historical context of the rise of a totalitarian system (cf. BVerfGE 5, 85 <138>; paras. 2 et seq. above); it is a mechanism of the "preventive protection of the constitutional order" (Stern, Staatsrecht, vol. 1, 2nd ed. 1984, p. 183, original quote in German). In this respect, Art. 9(2) GG, together with Art. 21(2) and Art. 18 GG, are manifestations of the Basic Law's commitment to a "militant democracy" (*streitbare Demokratie*) (cf. BVerfGE 5, 85 <139>; 25, 88 <100>; 80, 244 <253>). Therefore, the Basic Law does not provide any discretion with regard to the decision to prohibit an association […]. If it is established that an association meets one of the prohibition requirements pursuant to Art. 9(2) GG, it must be prohibited. The constitutional legislature did not provide for any possible gradation of the legal consequences. This is confirmed by the provision's legislative history. In this respect, it is different from the provisions applicable during the Weimar Republic (see para. 2 above), but similar to the provision on the prohibition of political parties in Art. 21(2) GG, notwithstanding the question whether prohibition proceedings are to be brought at all (cf. BVerfGE 144, 20 <231 and 232 paras. 600 and 601>, regarding differences <228 and 229 para. 595>). The Parliamentary Council decided not to make the prohibition of associations in Art. 9(2) GG discretionary, in contrast with Art. 114(2) of the Constitution of the Free State of Bavaria of 2 December 1946, which pre-dates the Basic Law. Compulsory prohibition in the Basic Law is also intended to counteract any politically one-sided exercise of the power to prohibit associations. As such, Art. 9(2) GG is the manifestation of a pluralist and at the same time militant constitutional democracy. **[101]**

b) Prohibitions of associations, just like any interference with the fundamental rights of an association, are subject to the principle of proportionality, derived from the rule of law, which restricts acts of public authority in favour of freedoms protected by fundamental rights. The principle of proportionality requires that the least restrictive yet equally effective means be used in respect of associations, in order to accommodate legitimate public interests (similarly BVerwGE 61, 218 <220 et seq.>; for exceptions since BVerwGE 134, 275 <306 et seq.>, paras. 86 and 87; cf. BVerwGE 153, 211 <232 and 233>, paras. 48 and 49 with further references). Art. 9(2) GG does not preclude interferences with the fundamental rights of associations that are less restrictive than its prohibition, such as the prohibition of certain activities of the association or measures directed at individual members. […] **[102]**

The prohibition of an association, as the most serious form of an interference, can only be imposed where such less restrictive and equally effective means are not sufficient for achieving the objectives of the prohibition requirements set out in Art. 9(2) GG. Thus, in particular, an association cannot be prohibited based solely on isolated actions taken by individual members; rather, these actions must define the association and be attributable to it. The less the prohibition requirements are met by

the actions of the association's organs themselves, by the majority of its members, or by third parties controlled by it, the more it must be clearly ascertainable that the association is aware of them, approves of them and identifies with them (cf. BVerwG, Judgment of 3 December 2004 - 6 A 10.02 -, juris, paras. 62 et seq.), and that the objective of Art. 9(2) GG can thus be achieved only by prohibiting the association. In that sense, the prohibition provision of Art. 9(2) GG is a manifestation of, and not an exception to, the principle of proportionality. **[103]**

3. Art. 9(2) GG provides the prohibition of an association as a limit to freedom of association when the association is directed against or contravenes the following legal interests of paramount importance: criminal statutes, the constitutional order and the concept of international understanding. Only these expressly provided reasons justify prohibition as the most serious interference with the fundamental rights of an association; in accordance with the principle of proportionality, which requires that the prohibition must be necessary, they are to be interpreted strictly. Thus, an association cannot already be considered to be pursuing prohibited aims where actions related to the association and directed against the protected legal interests laid down in Art. 9(2) GG occurred only in the past and only in isolated cases. Rather, the prohibition of associations is designed to prevent future infringements of the protected legal interests, particularly those infringements arising from the organisational structures of the association as a group of many persons with a common purpose (cf. BVerfGE 80, 244 <253>). In this respect, the power to prohibit an association under Art. 9(2) GG must be interpreted strictly as well. **[104]**

a) According to the first alternative of Art. 9(2) GG, the prohibition of an association is justified if its aims or activities contravene criminal statutes. These criminal statutes only encompass punishable offences of general application. Criminal provisions that only specifically target associations as such are not to be taken into account, since otherwise freedom of association would ultimately be subject to legislative discretion [...]. Also, a prohibition cannot be based on regulatory offences (*Ordnungswidrigkeiten*). **[105]**

An association's aims or activities are contrary to criminal statutes if organs, members or even third parties contravene criminal statutes and this is attributable to the association, either because it is apparent that they represent the association and the association at least approves of this, or because the association deliberately provokes, encourages, enables or facilitates criminal offences. This may also be the case when an association approves of and promotes such actions after the fact, thus identifying with them, or when at first only certain activities contravene criminal statutes, yet these are then continued with the knowledge and support of the association. However, as an independent mechanism of preventive protection of the constitutional order, the prohibition of associations is not tied to the existence of a conviction under criminal law (cf. BVerwGE 80, 299 <305 and 306>; BVerwGE 134, 275 <280 and 281>, paras. 17 and 18). The prohibition of an association only satisfies the requirements of proportionality (see paras. 102 and 103 above) when taking action against individual criminal offences would not suffice given that punishable actions are planned or committed within the organisation itself […], i.e. that violating criminal statutes largely defines the organisation. This is not the case when individual members of an association direct their actions against the protected legal interests or when the association primarily pursues lawful aims. **[106]**

b) According to the second alternative of Art. 9(2) GG, the prohibition of an association is justified if the association is directed against the constitutional order. Similarly to the "free democratic basic order" of Art. 18 and Art. 21(2) GG (cf. BVerfGE 144, 20 <202 et seq. paras. 529 et seq.>), the protected legal interest of the "constitutional order" covers the fundamental principles of the Constitution (cf. BVerfGE 6, 32 <38>), which are human dignity pursuant to Art. 1(1) GG, the principle of democracy and the principle of the rule of law (cf. BVerwGE 134, 275 <292 and 293>, para. 44 with further references […]). **[107]**

According to Art. 9(2) GG, an association must be "directed" against these fundamental principles. Its prohibition is not justified merely on the basis of an association's criticism or rejection of these principles or its advocating a different order. Taking into account Art. 5 [freedom of expression] and Art. 3(3) first sentence GG [prohibition of discrimination], Art. 9(2) GG does not prohibit a certain ideology or world view, and it does not target specific attitudes or political beliefs (cf. BVerfGE 124, 300 <333>; regarding the prohibition of political parties BVerfGE 144, 20 <224 para. 585>). The dissemination of anti-constitutional ideas or of certain political views is, as such, still within the boundaries of free political debate (cf. BVerfGE 5, 85 <141>). Just as the Basic Law, relying on the power of free public debate, guarantees freedom of expression even for the enemies of freedom (cf. BVerfGE 124, 300 <330>), it relies on free organisation within society and the power of civic engagement in free and open political debate in principle when guaranteeing freedom of association (cf. BVerfGE 124, 300 <320 and 321>). Therefore, to justify the prohibition of an association, it is decisive whether the association takes an actively belligerent stance (*kämpferisch aggressive Haltung*), outwardly and against the fundamental principles of the Constitution (cf. BVerfGE 124, 300 <330>). This is confirmed by the provision's legislative history, given that the Parliamentary Council drew attention to the fact that the provision was intended to address associations that combat democracy or that do not reject violence (see para. 5 above). **[108]**

Conversely, a prohibition can also be considered prior to an association posing a specific threat to the free democratic basic order (regarding prohibitions of political parties BVerfGE 144, 20 <199 para. 522; 223 para. 581>) or prior to actually jeopardising the fundamental principles of the Constitution. Unlike Art. 21(2) GG, which requires that a political party "seek" to abolish the free democratic basic order, the wording of Art. 9(2) GG renders it sufficient that an association be "directed" against the constitutional order (cf. BVerfGE 144, 20 <228 para. 595>). The Parliamentary Council deliberately did not adopt the proposal to also include "jeopardising" in Art. 9(2) GG, which was put forward by the Constitutional Convention at Herrenchiemsee, based on the Constitution of the Free Hanseatic City of Bremen (Der Parlamentarische Rat 1948-1949, vol. 2, p. 581). Rather, by way of Art. 9(2), the constitutional legislature opted for preventive protection of the constitutional order as a manifestation of its commitment to a militant democracy (cf. BVerfGE 80, 244 <253>). Thus, the power to prohibit associations makes it possible to counter organisations before it is too late […]. Unlike in the case of political parties, the prohibition of associations neither depends on their potentiality, meaning specific and

weighty indications that make it seem possible that their actions may succeed (cf. BVerfGE 144, 20 <224 and 225 para. 585>), nor on the territorial reach of their actions (cf. BVerfGE 144, 20 <340 et seq. paras. 933 et seq.>). The fact that an association takes an active and belligerent stance and aims to destroy essential elements of the constitutional order is sufficient to justify its prohibition. **[109]**

c) According to the third alternative of Art. 9(2) GG, the prohibition of an association is justified if it is directed against the concept of international understanding. **[110]**

The prohibition of the use of force under international law guides the reason that justifies the prohibition in Art. 9(2) GG. This is in line with Art. 26(1) GG and follows the spirit of the Constitution's openness to international law (cf. BVerfGE 141, 1 <26 and 27 paras. 65 and 66>). Art. 2(4) of the Charter of the United Nations obliges states in their international relations to refrain from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations. This concept of international understanding concerns both conflicts between states and internal conflicts among different parts of the population and threats posed by terrorist organisations […]. This is presumably also the scope of application of Art. 9(2) GG. **[111]**

An association is directed against the concept of international understanding when it actively advocates and promotes violence or comparable serious actions violating international law in international relations […]. An association itself can do this directly; yet the requirements for prohibition can also be met if the association is directed against the concept of international understanding through its support of third parties. This includes financial support of terrorist actions and organisations, if this support is objectively likely to impair the concept of international understanding significantly, severely, and deeply, and if the association is aware of this fact and at least approves of it. Here, too, the principle of proportionality must be taken into account; prohibition is the most serious interference with constitutionally protected freedom of association and can only be justified if the association's stance carries great weight and defines the association. **[112]**

4. To the extent that the prohibition of an association pursuant to Art. 9(2) GG is based on actions protected by fundamental rights or otherwise impairs other fundamental rights, these fundamental rights must be taken into account in the context of justifying the interference with Art. 9(1) GG. Prohibitions of associations must not forbid what is otherwise protected by fundamental freedoms. Yet the collective exercise of fundamental rights also cannot result in more extensive fundamental rights protection (cf. BVerfGE 54, 237 <251>; […]). **[113]**

Therefore, prohibitions of associations can, in principle, neither be based solely on such statements of opinion as protected under constitutional law by Art. 5(1) GG (on the link with statements of opinion cf. BVerfGE 113, 63 <82>; […]), nor can they be based on other behaviour that is subject to effective constitutional protection. Thus, prohibitions of associations must not be directed one-sidedly against particular political opinions, even if they are imposed based on opposition to the constitutional order, because this would violate the prohibition of discrimination under Art. 3(3) first sentence GG […]. Art. 3(3) first sentence GG imposes the

setting of strict requirements. Accordingly, prohibitions of associations cannot be based on political opposition to the constitutional order when such views are merely expressed; rather, such opposition must be pursued in an active and belligerent manner (see paras. 108 and 198 above; […]). A prohibition can only be based on opposition to international understanding when the use of force is actively advocated and promoted (see para. 112 above). **[114]**

5. The framework of international law that must be observed within the German legal order does not result in protection of freedom of association different from Art. 9(2) GG. In particular, this holds true with regard to the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, to the extent that they have entered into force in the Federal Republic of Germany (Act on the Convention for the Protection of Human Rights and Fundamental Freedoms of 7 August 1952, BGBl II p. 685; official notice of 15 December 1953, BGBl II 1954 p. 14; new official notice of the Convention in the version of Protocol No. 11 in BGBl II 2002 p. 1054). Their texts, together with the case-law of the European Court of Human Rights, serve as guidelines for interpretation in determining the content and scope of fundamental rights and rule-of-law principles under the Basic Law, to the extent that this - as the Convention itself makes clear (cf. Art. 53 European Convention on Human Rights - ECHR) - does not result in limiting or lowering the protection afforded by fundamental rights under the Basic Law (cf. BVerfGE 111, 307 <317>; 120, 180 <200 and 201>; 128, 326 <366 et seq.>; established case-law). **[115]**

Art. 11(1) first half-sentence ECHR guarantees freedom of association; it is deemed a yardstick for the state of a democratic society, since democracy, pluralism and freedom of association are directly interrelated (cf. ECtHR <GC>, Gorzelik and others v. Poland, Judgment of 17 February 2004, No. 44158/98, § 88; ECtHR, Fondation Zehra et autres c. Turquie, Judgment of 10 July 2018, No. 51595/07, § 50). Yet where an association jeopardises state institutions or the rights and freedoms of others, it can be prohibited under Art. 11(2) ECHR in order to protect these (cf. ECtHR <GC>, Gorzelik and others v. Poland, ibid. § 94). The interference must be prescribed by law and must be necessary in a democratic society; that is to say, just as in German constitutional law, it must be proportionate, and, in particular, it must correspond to a pressing social need (cf. ECtHR <GC>, Gorzelik and others v. Poland, ibid., § 96). This does not exceed the requirements arising from fundamental rights. **[116]**

II.

Thus, the constitutional complaints are unfounded. Both the provision regarding prohibitions in associations law as well as the challenged decisions issued by the authorities competent for prohibitions and by the regular courts that upheld them are compatible with the fundamental rights requirements. **[117]**

1. To the extent that the constitutional complaints indirectly challenge the statutory basis authorising the prohibition of associations in § 3(1) first sentence VereinsG, they are unsuccessful. The statutory provision does indeed lack an express requirement of proportionality, even though such a requirement must be observed also with regard to the prohibition clause in Art. 9(2) GG. However, the proportionality requirements arising from the rule of law can be satisfied by means of interpretation. The provision on prohibition of an association does not preclude the use of less restrictive means, if this renders the prohibition unnecessary, as a consequence of its aims, activities or stance. **[118]**

Substantively, the statutory basis for the prohibition of associations in § 3(1) first sentence VereinsG reflects the constitutional provision of Art. 9(2) GG and does not exceed it. With regard to the three limits to the freedom of association, the wording of § 3(1) VereinsG matches the wording of Art. 9(2) GG, apart from one linguistic nuance. This is within the legislature's leeway to design (cf. BVerfGE 80, 244 <254 and 255>). **[119]**

The statutory provision is also sufficiently specific. Such specificity is not lacking simply because a provision requires interpretation (cf. BVerfGE 45, 400 <420>; 117, 71 <111>; 128, 282 <317>; established case-law). Uncertainties must merely not go so far as to render the actions of the competent state agencies unpredictable or withdraw these from the scope of judicial decision-making (cf. BVerfGE 118, 168 <188>; 120, 274 <316>; established case-law). In the case at hand, there are no indications for this. **[120]**

2. The challenged decisions are compatible with the constitutional requirements; […] [regarding] the prohibition of complainant no. I, this at least applies with regard to its outcome. **[121]**

a) Unlike the prohibition of political parties, the prohibition of associations is not decided in proceedings before the Federal Constitutional Court (cf. BVerfGE 13, 174 <176 and 177>). Therefore, in particular, it is not incumbent on the Federal Constitutional Court to establish the necessary facts; its review is in principle limited to examining whether the findings by the authorities and the courts are plausible. **[122]**

b) The constitutional complaint of complainant no. I - 1 BvR 1474/12 - is unsuccessful. The Judgment of the Federal Administrative Court […] ultimately satisfies the constitutional requirements. **[123]**

The Federal Administrative Court assumes that an association is directed against the concept of international understanding within the meaning of § 3(1) first sentence VereinsG in conjunction with Art. 9(2) GG if it provides considerable financial support, over a long period of time, to an organisation which forms part of another organisation promoting violence in the relations between peoples, if it does so knowingly and identifies with this organisation and the acts of violence it commits. This is compatible with the requirements arising from Art. 9(2) GG. According to it, an association meets the requirements for prohibition if it advocates and promotes violence or comparable serious actions violating international law (see paras. 111 and 112 above). The court sets out in detail that the organisation indirectly supported by complainant no. I is to be classified as a terrorist organisation and that its nature is incompatible with the concept of international understanding (see (aa) below). The stance justifying the prohibition can be attributed to complainant no. I (see (bb) below). Ultimately, the requirements of proportionality are met, given that complainant no. I is defined by its identification with prohibited actions; therefore, no less restrictive means were available to achieve the objective of the prohibition (see (cc) below). The prohibition is essentially based on the channelling of financial donations to a terrorist organisation. There are no indications to suggest that the donations were a form of humanitarian aid in crisis areas, which would be protected against prohibitions of the association under humanitarian international law (see (dd) below). **[124]**

aa) By channelling considerable financial donations to an organisation that, by its nature, is incompatible with the concept of international understanding, complainant no. I supported this organisation. The Federal Administrative Court sets out in detail that the supported organisation, Hamas, violates the concept of international understanding, because it ignores basic principles of international law, including, in particular, the prohibition of the use of force under international law and the rejection of terrorism (on this term BVerfGE 141, 220 <266 para. 96>; 143, 101 <138 and 139 paras. 124 and 125>). The European Union also currently qualifies the supported organisation as a group involved in terrorist acts (cf. II no. 8 of the list annexed to Council Decision <CFSP> 2017/1426 of 4 August 2017 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision <CFSP> 2017/154). Furthermore, the Federal Administrative Court sets out that the supported organisation operates on the basis of an anti-Semitic charter and refuses to accept the prohibition of the use of force and local peace agreements. This is sufficient evidence that the nature of the supported organisation is contrary to international law. **[125]**

bb) Hamas's stance against the concept of international understanding, which is incompatible with Art. 9(2) GG, can be attributed to complainant no. I. A prohibition of an association can also come into play in cases where international understanding, protected under Art. 9(2) GG, is jeopardised indirectly, by means of financial donations supporting terrorism. However, not every form of humanitarian aid in crisis areas may be halted by means of prohibitions of associations pursuant to § 3(1) first sentence VereinsG on the grounds of their indirect effects promoting terrorism (see paras. 134 et seq. below). Attributing the actions of third parties to an association that merely channels financial donations is subject to strict requirements. In this respect, the court comprehensibly sets out that the donations were objectively capable of significantly, severely, and deeply compromising international understanding, and that complainant no. I was aware of this and at least approved of it. **[126]**

[…] **[127-128]**

cc) The proportionality requirements also apply to the justification of the prohibition of an association pursuant to Art. 9(2) GG (see paras. 102 and 103 above), and, ultimately, are met here. The prohibition of an association, as the most serious interference with its fundamental rights, is only constitutional if no less restrictive means are available to remedy or prevent infringements of protected legal interests. **[129]**

(1) However, the Federal Administrative Court makes the general statement that there is nothing to suggest that it would be appropriate under the principle of proportionality to permit the continued existence of an association that meets one of the prohibition requirements merely because it also pursues activities that are not prohibited. This statement is not compatible with the constitutional requirements. It exceeds the constitutionally required objective of

limiting any interference with fundamental freedoms to what is necessary. According to the court's statement, a prohibition of certain activities, which would be less restrictive than the overall prohibition of an association, would not be considered even if these activities only represented a minor share of the association's activities. It may well be true that, where such less restrictive means are available, associations may try to avoid a prohibition by diversifying their activities, as assumed by the Federal Administrative Court. Yet the limitation to proportionate actions under constitutional law cannot be ignored in order to counter such motives from the outset. Rather, it must be reviewed in each specific case whether an activity is so defining of the stance of an association that the mere prohibition of certain activities would not be as effective as the prohibition of the association. **[130]**

(2) In this case, though, it is not objectionable that the Federal Administrative Court takes into account the requirements of proportionality in the context of the prohibition requirements (see also BVerwGE 134, 275 <307 and 308> para. 87; BVerwGE 154, 22 <42>, para. 45). This leads to a strict interpretation of the reasons justifying the prohibition (see para. 104 above). According to the case-law of the regular courts, in order to justify a prohibition, associations must be defined by the prohibited aims (on the stance against the constitutional order cf. already BVerwGE 80, 299 <306 et seq.>, and on the stance against the concept of international understanding cf. meanwhile BVerwGE 154, 22 <39 and 40>, para. 41). By reviewing whether an association is defined by such aims, the courts take into account the fundamental rights requirement that an association may only be prohibited if no less restrictive means are available to protect the legal interests designated in Art. 9(2) GG (see paras 102 and 103 above). **[131]**

(3) It is true that the Federal Administrative Court does not expressly set out that no less restrictive means would be as effective as a prohibition of the association to protect the legal interests designated in Art. 9(2) GG. It does not expressly establish that complainant no. I is defined by its stance against the concept of international understanding to such an extent that less restrictive means could not be equally effective to avert a threat to international understanding. However, it follows from the detailed findings of the court that this is the case. […] **[132]**

dd) It is compatible with fundamental rights requirements, even when taking into account the Constitution's openness to international law (cf. BVerfGE 141, 1 <26 et seq. paras. 65 et seq.>), that the Federal Administrative Court assumes that an association's activities related to humanitarian aid also meet the prohibition requirement where the association directly supports an organisation whose activities promote actions of another organisation that violates the concept of international understanding. In this respect, the prohibition of an association pursuant to Art. 9(2) GG may not serve to prohibit humanitarian actions that are permissible under international law. **[133]**

(1) Not every financial donation made by an association to social organisations that provide primary care to the population in conflict zones justifies the prohibition of an association under Art. 9(2) GG on the grounds that it is directed against the concept of international understanding. By themselves, the general "benefits deriving from increased acceptance and financial relief", which might arise when charitable groups and associations with social aims are supported in areas that are controlled by terrorists, are not a sufficient basis for prohibiting an association that channels donations to such crisis areas. While humanitarian aid regularly contributes to easing the strain on the parties to a conflict, the rules of international humanitarian law and humanitarian aid apply, which ensure that humanitarian aid in such areas is not prevented at the expense of the suffering population. According to these rules, humanitarian aid provided by means of financial donations can only justify the prohibition of an association pursuant to Art. 9(2) GG where the aid itself violates the principle of neutrality. The rules on providing humanitarian aid in conflicts specify when this is the case. **[134]**

The aim of international humanitarian law is not simply to restrict the means of warfare, but also to protect civilians. Therefore, the provisions regarding humanitarian aid in armed conflicts set forth in the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV; BGBl II 1954 p. 917) and the Additional Protocol I relating to the Protection of Victims of International Armed Conflicts (AP I; BGBl II 1990 p. 1550) are intended to allow for sufficient supplies of food, medical supplies and shelter to the population. Under international humanitarian law, states that are not parties to an armed conflict are obliged to allow the free passage of goods and personnel for the purpose of aid, provided impartially and without any adverse distinction, in armed conflicts (Art. 23(1) and Art. 59(3) GC IV, Art. 70(2) AP I). Yet under Art. 23(2) GC IV, this only applies where no definite advantage accrues to military efforts. In addition, the aid provided must be necessary for the population, and the general principles of humanity, neutrality and impartiality must be observed. As set out in detail by the German Red Cross in these proceedings, this is meant to ensure that the aim of humanitarian aid is solely to alleviate suffering […]. This applies to occupations (Art. 59(3) GC IV) and is also to be applied to situations that have not escalated into armed conflict or which do not formally constitute occupation. **[135]**

At the same time, states are obliged under international law to prevent the direct or indirect financing of terrorism. Art. 2(1) and Art. 4 of the International Convention for the Suppression of the Financing of Terrorism of the United Nations of 9 December 1999 (Terrorist Financing Convention, BGBl II 2003 p. 1923) define the cases in which funds are provided or collected directly or indirectly, unlawfully and wilfully with the intention that they should be used or in the knowledge that they are to be used, in full or in part, to commit criminal offences or acts of violence in armed conflicts.

Further, according to Art. 21 of the Terrorist Financing Convention, obligations under international humanitarian law remain unaffected; thus, it does not impede neutral humanitarian aid. **[136]**

These rules allow a distinction between permissible humanitarian aid from aid that violates the concept of international understanding within the meaning of Art. 9(2) GG. Even financial donations to areas controlled by terrorists are thus not directed against the concept of international understanding where these must be granted "free passage" as means of humanitarian aid within the meaning of Art. 23(1) and Art. 59(3) GC IV, Art. 70(2) AP I. When an association makes donations with the intention to alleviate suffering, and when it observes the general principles of humanity, neutrality and impartiality, it does not meet the prohibition requirement under Art. 9(2) GG. **[137]**

(2) The Federal Administrative Court did not fail to recognise these standards. It does not base its affirmation of the prohibition of complainant no. I on financial support alone, but rather sets out in detail that the social associations and projects supported were not neutral and that complainant no. I itself did not intend to act neutrally. The challenged decisions are thus compatible with the requirements laid down in the Basic Law. **[138]**

c) The constitutional complaint of complainant no. II is unfounded. Its prohibition can be based on the prohibition requirements in Art. 9(2) GG, according to which an association must be prohibited if its aims and activities are directed against the constitutional order and contravene criminal statutes. **[139]**

aa) The authority competent for prohibitions and the Federal Administrative Court, which affirmed the authority's decision, found that complainant no. II opposes the constitutional order (see (1) below) actively and belligerently (see (2) below). This finding is not objectionable under constitutional law. For the rest, too, it is proportionate (see (3) below). **[140]**

(1) Complainant no. II calls into question fundamental principles of the "constitutional order" within the meaning of Art. 9(2) GG. The authority and the court base this finding on the fact that the association specifically rejects human rights, core elements of the rule of law and democratic principles, which are considered the cornerstones of society by the Basic Law. The authority and the court specify in a comprehensible manner that the association's statements, its regular publications and activities express its clear proximity and explicit commitment to the "agenda, ideas and overall design" of National Socialism and its commitment to the former NSDAP and its main functionaries. Complainant no. II calls the Federal Republic of Germany "corrupt", "degenerate", "forced upon the people" and "disgraceful", seeks democracy's downfall, and propagates anti-Semitism and quasi-religious conspiracy theories. In addition, it rejects democracy and calls on its members to defeat the constitutional order. It also disseminates a racist doctrine that is not only incompatible with Art. 3(3) first sentence GG but also with the

respect of human dignity and human rights (Art. 1(1) and (2) GG). It is not objectionable under constitutional law that the authority and the court therefore consider that the constitutional order within the meaning of Art. 9(2) GG is affected. **[141]**

(2) It was compatible with constitutional requirements for the authorities and the Federal Administrative Court to assume that complainant no. II is "directed" against the constitutional order within the meaning of Art. 9(2) GG. **[142]**

(a) The statement by the Federal Administrative Court that no proof is needed for specific actions is not to be understood to mean that a particular attitude or opinion would already be sufficient. The court itself explicitly clarifies this. It highlights that the mere rejection of the constitutional order is not sufficient to justify a prohibition. Freedom in the constitutional order includes that this order may be called into question. The court's findings establish that the statements which underlie the prohibition are not merely "verbal radicalism". **[143]**

(b) The prohibition in question is based on the assumption that the association's attitude is actively belligerent and justifies a prohibition, given that the association not only rejects and disdains the foundations of constitutional democracy under the Basic Law, but also actively seeks to "undermine" them and calls upon its members to combat them. This is not objectionable under constitutional law. In its submission, the Centre for Criminology points out that prisoners with extremist backgrounds in particular are easily influenced and that, according to empirical studies, prisoners with a right-wing extremist background show a comparatively high affinity to violence. The preventive nature of Art. 9(2) GG, as an element of the militant democracy under the Basic Law (see paras. 101, 109 above), allows for the prohibition of an association even before violence is used. Further, it is not relevant how effective the association's active and belligerent actions are. Unlike the requirements for the prohibition of a political party under Art. 21(2) GG, activities of an association directed against fundamental elements of the constitutional order are sufficient to prohibit the association even at the municipal or local level in "delimited social spaces" (cf. BVerfGE 144, 20 <340 et seq. paras. 933 et seq.>). The decisive factor is whether the overall character of the association, including its formal and actual purpose, its apparent stance, its organisation and the activities of its organs and members, clearly meets the prohibition requirements. According to the Federal Administrative Court's findings, there is no doubt that this is the case here, given the statements of leading members of the association. **[144]**

According to these statements, one must create "liberated national space", "the rat system" must be combatted, one must never capitulate, which will not be possible without violence, and "what is needed is a bang that cripples everything". According to the court's findings, the association's

communication with prisoners who are rightwing extremists is aimed at radicalising them so that they will again commit violent acts upon their release from prison. Furthermore, in its magazine, complainant no. II called upon its readers to name "public prosecutors, heads of police operations or judges" so that they could be "brought to justice" at a later date. Given that the objective of complainant no. II's magazine is to promote criminal offences with an extremist background and to make threats against state officials, its similarity in nature to National Socialism goes beyond a shared political attitude. The objective can therefore justify the prohibition of the association pursuant to Art. 9(2) GG. The prohibition of the association is thus comprehensibly based on the active and belligerent stance the association as such takes against the constitutional order. **[145]**

(c) A prohibition linked to such statements does not raise constitutional concerns, even with regard to Art. 5(1) GG (cf. BVerfGE 124, 300 <331 et seq., 335>). In particular, this prohibition of the association is not based on the "mere holding and stating" of opinions and attitudes deemed to be right-wing extremist, but on an actively belligerent stance. **[146]**

(d) It clearly follows from the findings of the Federal Administrative Court that no one-sided action was taken against complainant no. II on the basis of its political views - which would have been contrary to Art. 3(3) first sentence GG - but rather because it openly opposes the constitutional order in an active and belligerent manner. There is no general fundamental principle of anti-National Socialism in the Basic Law (BVerfGE 124, 300 <330>). Therefore, under Art. 9(2), Art. 18 and Art. 21(2) GG, free political discourse does not *per se* end where the dissemination of anti-constitutional ideas as such begins (cf. BVerfGE 124, 300 <330>). Rather, the Basic Law protects the core elements of constitutional democracy against attacks from within that go beyond political debate in that the attacks seek to destroy the very prerequisites of these core elements. In this case, the advocacy of Nazi rule is not linked merely to a particular political opinion. The prohibition of complainant no. II is, in that respect, also not directed generally against an approving attitude in respect of individual measures of the Nazi regime (cf. BVerfGE 124, 300 <337>). Rather, the association was prohibited because it identifies with the Nazi regime's violent means in particular, which reflects an active and belligerent stance against the free democratic basic order (see paras. 108 and 109 above; […]). **[147]**

(3) Furthermore, the prohibition of complainant no. II is also proportionate. It was necessary because complainant no. II is defined by its opposition to the constitutional order. Therefore, it was not an option to take less restrictive action solely against the statements upon which the prohibition of the association is essentially based and which can be attributed to the association. **[148]**

(a) The prohibition of an association can be based on statements of its board members. They are organs of the association that also represent it *vis-à-vis* the public. The same applies with regard to members whose actions have an apparent link to the association. **[149]**

It is also not objectionable under constitutional law that statements taken from prisoners' letters which are printed in the association's magazine are attributed to complainant no. II. As "letters to the editor", they are not necessarily written by members of the association, but rather by those prisoners who are supported by complainant no. II as "national prisoners" as well. However, according to the Federal Administrative Court, the magazine of complainant no. II does not contain a "free exchange of opinions": the "letters to the editor" are not letters from the outside containing reactions to the contents of the magazine, but rather they make up its essential content. Printing selected letters is a main focus of the association's activities; the Federal Administrative Court finds that it selects these letters to sustain those "offenders who have already acted, as combatants" against the democratic system. **[150]**

(b) Only taking action against these statements was ruled out, as complainant no. II is largely defined by its stance against the constitutional order, according to the findings of the authority competent for prohibitions and of the Federal Administrative Court. The authority and the court could thus assume that individual measures would not be equally effective in countering the association's stance against the protected legal interests of Art. 9(2) GG. **[151]**

bb) The decisions of the authority competent for prohibitions and the Federal Administrative Court to also impose a prohibition because complainant no. II's aims and activities contravene criminal statutes (Art. 9(2) first alternative GG) are also compatible with the constitutional requirements. **[152]**

(1) The prohibition is based on specific reasons that can justify it in a constitutionally sound manner. According to the factual findings, complainant no. II's aim is to uphold and reinforce prisoners' motives and also the attitude which subjectively serves to apologetically justify their actions. In particular, the association makes unequivocal statements regarding the future use of force, thus promoting the contravention of general criminal statutes. The court comprehensibly demonstrates that the association sought to consolidate the "fanatically aggressive attitude" of the prisoners, who could therefore be expected to commit further criminal offences; and that such offences had also been announced in the association magazine. The presumption that this promotes criminal offences is confirmed by findings from research submitted in these proceedings by the Centre for Criminology. As an independent mechanism of preventive protection of the constitutional order, the prohibition of associations is not tied to convictions under criminal

law (see para. 106 above). The prohibition of complainant no. II is also not simply based on an ideology or attitude; rather, there is specific proof of activities contravening criminal statutes. **[153]**

(2) It is not objectionable to attribute activities by members and third parties to complainant no. II. **[154]**

The Federal Administrative Court has not failed to recognise the constitutional requirements where it attributes to complainant no. II, on the basis of its bylaws, not only the support of a selected group of criminal offenders, but also the efforts to uphold and strengthen their attitude and thus their willingness to commit criminal offences in future. Where actions are taken directly by an association's organs or the majority of its members, these actions can readily be attributed to the association, which is why the magazine, as central to its activities, is relevant here in respect of complainant no. II. **[155]**

In this respect, the behaviour of third parties who are supported like members by the association, as is the case here, may also be taken into account […]. While the prisoners are not third parties "controlled" by the association, in the sense of the prisoners being its tools, the association in fact recognisably supported their actions according to the Federal Administrative Court's findings. The Federal Administrative Court specifically substantiates how complainant no. II "glorifies" these offenders and their crimes and identifies with them in the magazine, which is central to the association. **[156]**

However, the prohibition of an association cannot be based on the fact that it supports prisoners in their social reintegration (*Resozialisierung*). The guarantee of inviolable human dignity under Art. 1(1) GG is specifically designed to prevent the legal system from abandoning persons, even if they have contravened the law. Prisoners, too, deserve a chance at reintegrating into society (cf. BVerfGE 33, 1 <10 f.>; 98, 169 <200 and 201>). Thus, it is an objective of detention to enable prisoners to, "in future, lead a life in social responsibility without committing criminal offences" (§ 2 of the Prison Act, *Strafvollzugsgesetz* - StVollzG). However, this was not the objective pursued by complainant no. II. **[157]**

(3) The prohibition satisfies the proportionality requirements also with regard to the contravention of criminal statutes. It is true that there is a failure to properly recognise the protection of the freedom of association in Art. 9(1) GG where, in the context of the prohibition of an association pursuant to Art. 9(2) GG, there is no review as to whether less restrictive means are available for preventing the contravention of criminal statutes (see para. 106 above). Even though the Federal Administrative Court did not expressly take this into account in the challenged decision, it still satisfies the fundamental rights requirements. According to the factual findings, it is constitutionally

sound to assume that there was no scope for refraining from prohibiting the association. The prohibition of an association is only disproportionate where it is ascertainable that less restrictive means can be applied that would do away with the association's stance, without prohibiting the entire association. There were no indications of less restrictive means in the complainant's case. The prohibition is neither based on the behaviour of only some individual members, against whom individual action could be taken, nor is it linked only to one certain activity that might have been prevented without otherwise restricting the association. Moreover, the Federal Administrative Court was right to assume that complainant no. II's magazine was just as defining for the association as the crimes of the persons it deliberately and knowingly supported. **[158]**

cc) The fact that the authority competent for prohibitions tolerated the existence of the complainant for more than 30 years cannot be invoked against the prohibition. The time elapsed does not in any way reflect whether and when the requirements for prohibition were met. It was also not required under constitutional law to subject the prohibition of complainant no. II to a time limit. **[159]**

d) The constitutional complaint of complainant no. III is also unfounded. The decision by the Higher Administrative Court of the *Land* Hesse to apply § 3(1) first sentence VereinsG is compatible with Art. 9 GG. **[160]**

aa) Complainant no. III claims that a prohibition without a prior hearing of the association violates its rights, but this claim cannot be upheld. While it is a general requirement under the rule of law that decisions by public authorities that impose a burden be made only after the persons concerned are given the opportunity to be heard (foundational BVerfGE 9, 89 <95 and 96>), this is not required in every case. By way of exception, overriding public interests may justify that the persons concerned are not heard. The legislature laid this down, for instance, in § 28 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz* - VwVfG). In the case of the prohibition of associations, it is not objectionable under constitutional law that the persons concerned are not heard where there are indications to suggest that they would otherwise hide evidence or assets. This was the case here. **[161]**

bb) The Higher Administrative Court, in line with the criteria of Art. 9(2) GG, assumes that complainant no. III's aims and activities contravene criminal statutes. It presumes that the criminal offences underlying the prohibition do not have to be the primary aim of the association, nor must they be committed on an ongoing basis. The Higher Administrative Court finds that the prohibition of complainant no. III is justified since the organisation poses a specific threat to public safety and order, and that no less restrictive means are available to eliminate this threat. This meets the constitutional requirements. In its interpretation of § 3(5) VereinsG, the court highlights that the criminal members of the association regularly presented a united front in representing the association; that the criminal offences were clearly recognisable as activities of the association; and that the association at least

tolerated this. The court was also right to take into account the association's admission procedures, the clothing contributing to the members' sense of identity and the fact that the association expressly distanced itself from being bound by the law. An article of clothing with the slogan "You don't respect our life, we don't respect your laws" is, as such, protected by Art. 5(1) first sentence GG. However, a statement of opinion that is permissible in isolation can also be an indication for an organisational context that contravenes criminal statutes when the statement precisely expresses the association's defining self-image (see para. 106 above). **[162]**

The Higher Administrative Court was entitled to attribute to complainant no. III those actions which the association backed through its support of criminal members, and its conveying the impression that it sought or approved of their behaviour. The court bases its decision on the fact that it has become apparent that the criminal members always received the protection they expected. This meets the fundamental rights requirements. **[163]**

As such, visits to an association's members in prison do not provide a reason justifying a prohibition (see para. 157 above). However, in the case of complainant no. III, it is understandable that the court assumed that the manner in which these visits were organised revealed the infrastructure of the association, which did not seek the prisoners' social reintegration, but publicly approved of criminal offences, i.e. especially going "beyond the usual friendly favours" by expressly having leading figures of the association make the visits and by organising them in a professional system. As such, the prohibition of the association is a reaction to the organisation's "momentum", and in particular to the specific threat emanating from the actions of the association, against which Art. 9(2) GG is directed. **[164]**

cc) The prohibition is also proportionate. According to the court's analysis, no less restrictive means were available that could have reached the objective of Art. 9(2) GG just as effectively. It is not objectionable under constitutional law that the Higher Administrative Court of the *Land* Hesse specifically attributed several serious crimes to complainant no. III (regarding the standards, see paras. 105 and 106 above) and thus affirmed that the association violates criminal law, which ruled out less restrictive means. **[165]**

Unlike the authority competent for prohibition, the court did not classify the list called "MC Germany Rules" and the association's bylaws as defining. Based on specific facts, the court assesses in detail the recognisability of membership in the association in the course of the commission of criminal offences; the cooperation between members in committing criminal offences, and in particular the association's reaction to the criminal offences themselves through their organisation of visits to prisoners; the association's actions in respect of drug-related offences; its admission of new members who have committed a string of violent offences and making such persons its leaders; members' commission of criminal offences while wearing the association's clothing; and the storage of weapons and

ammunition in the association's clubhouse. Given these circumstances, it is not objectionable under constitutional law to assume that the association as such is defined by actions contravening criminal statutes. Thus, isolated measures could not be as effective in reaching the objective of Art. 9(2) GG as would be the prohibition of the association. **[166]**

In the proportionality test, it must be taken into account when an association also performs and supports lawful activities, yet this does not rule out a prohibition. Here, no alternative conclusion is merited on the basis that complainant no. III had not been prohibited for a long time. Rather, the Higher Administrative Court emphasises that law enforcement authorities and courts have prosecuted criminal offences by the association's members since its establishment, and that the authorities competent for protection against threats have sought to uncover the structures that contravene criminal law. These findings in particular are compatible with the proportionality requirements that apply to the prohibition of an association (see paras. 102 and 103 above). **[167]**

3. Article 9.3 of the Basic Law: Collective Bargaining/Industrial Action

BVerfG, 12.6.2018, 2 BvR 1738/12,
http://www.bverfg.de/e/rs20180612_2bvr173812en.html
"Civil Servants and the Right to Strike"

Explanatory Annotation

As already shown in the context of the previous decision, Article 9.3 of the Basic Law also guarantees the right to take collective action in industrial disputes. From the perspective of employees that includes the right to strike. However, the right to strike never applied to that part of the public service referred to in Article 33.5 of the Basic Law as the "professional civil service" who operate under "traditional principles" governing this special status as civil servants. Part of these "traditional principles" applicable to civil servants are such principles as, among other things, lifelong tenure, i.e. comprehensive job security, and an entitlement and subjective and justiciable right to adequate pay. However, these "traditional principles" also comprise a trade-off: that civil servants do not enjoy the right to strike. This very long-standing restriction for civil servants had become controversial in the light of decisions of the European Court of Human Rights (ECtHR) in Strasbourg.[114]

The ECtHR is the judicial organ with the ultimate and final authority to interpret the European Convention of Human Rights (ECHR) of which Germany is a party (Articles 19, 46 ECHR). The ECHR, as an international (regional) human rights treaty, creates obligations of result. As the ECtHR has consistently stated, it is "primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used to discharge its

114 ECtHR, Appl. No. 68959/01, 21.4.2009, Enerji Yapi-Yol Sen v. Turkey; ECtHR [GC], Appl. No. 34503/97, 12.11.2008, Demir and Baykara v. Turkey; see also the judgment by the ECtHR rendered just after the German Constitutional Court had spoken in this case: ECtHR, Appl. No. 44873/09, 20.11.2018, Ognevenko v. Russia. All decisions available via https://hudoc.echr.coe.int.

obligations under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment."[115] In other words, the member states must create a legal reality in compliance with the guarantees of the ECHR. One such guarantee is Article 11 ECHR, which guarantees the freedom of assembly and association and thus covers in scope what the Basic Law covers in its Articles 8 and 9. The ECtHR had in its decisions regarding collective action in a public service setting found that the right to strike was, in principle, part of the protection of Article 11 ECHR. This notwithstanding, the ECtHR found that trade-union freedom could be compatible with the prohibition on the right to strike in respect of certain categories of public servants but that such restrictions not blanketly be extended to all public servants. In other words, any such prohibition must be justified by considerations that the ECtHR could accept as rendering the restriction necessary as a "pressing social need" recognition of which is necessary in a democratic society.

The German Supreme Administrative Court (*Bundesverwaltungsgericht*) had to engage with this jurisprudence of the ECtHR in a case concerning disciplinary actions taken against teachers who possessed the status of professional civil servants and had actively supported collective action by colleagues who did not enjoy this special status but where part of the ranks of the general public service (and hence not prohibited from striking).[116] It concluded that the German prohibition of the right to strike for civil servants could not stand because of its broad scope that goes beyond restricting just those civil servants exercising core functions of the state such as the military, the police or civil servants involved with similar functions of state authority. The Supreme Administrative Court held that teaching at primary or secondary schools could not, in that sense, be considered functionally as the exercise of state authority in that narrower sense.[117] Consequently, the Court concluded that the broad exclusion of the right to strike for all staff with civil servant status violates Article 11 ECHR.

So, what does this mean for the striking civil servant? The issue shifts to the question of the relationship between the ECHR, an international human rights treaty, and domestic German law, in this case Article 33.5 of the Basic Law, which is the legal basis for the prohibition of civil servants to strike. According to Article 59.2 of the Basic Law, such treaties require the consent of Parliament in the form of a federal law. Domestically, the ECHR, therefore, possesses the status of federal law.[118] Any conflict with hierarchically higher constitutional law, in this case Article 33.5 of the Basic Law, could only be resolved by applying the standard rules of constitutional interpretation. In application of these rules, the Supreme Administrative Court found that standard legal interpretation could not resolve the conflict.[119] In other words, the courts

115 ECtHR [GC], Appl. No. 15172/13, 29.5.2019, Mammadov v. Azerbaijan, paras. 148, 153, with further references to previous decisions.

116 BVerwG, 2 C 1/13, 27.2.2014, BVerwGE 149, 117, available in German at https://www.bverwg.de/de/270214U2C1.13.0 (last accessed on 25.8.2019).

117 Id (Fn. 68), paras. 39 et seq., 44, 46.

118 BVerfG, 12.6.2018, 2 BvR 1738/12, para. 127, http://www.bverfg.de/e/rs20180612_2bvr173812en.html (last accessed 25.8.2019).

119 Id (Fn. 68), paras. 57 et seq., 63.

cannot "override" standing domestic statutory or constitutional law by applying conflicting treaty provisions, here Article 11 ECHR. If interpretation cannot resolve the norm conflict, Parliament must act, either by amending the relevant legislation or by amending the Constitution.

The Supreme Administrative Court's judgment against the striking civil servants opened the pathway for the case to reach the German Constitutional Court and allowed the Constitutional Court to strengthen its views on the existing and long-standing restrictions for civil servants in Germany with regards to collective bargaining and industrial action. In particular, the Constitutional Court disagreed with the Supreme Administrative Court that the legal situation in Germany is incompatible with Germany's obligations under Article 11 ECHR and that differentiation between those civil servants who exercise core sovereign authority and those who do not (teachers) is required. The Constitutional Court regarded such distinctions as being practically unworkable because the determination of whether certain official acts fall under one or the other category is too difficult already and the same civil servant will often be involved in acts of both types.[120] But most importantly the Constitutional Court forcefully argued that holistically viewed the German legal framework of the civil service is compatible with the requirements of Article 11 ECHR as interpreted consistently by the Strasbourg Court. The Constitutional Court points to the fact that the system in Germany around the civil service, from the principle of life tenure to the fact that alimentati121[121] and working conditions of the civil service are regulated by parliamentary statute (and hence not susceptible to collective bargaining in the narrow sense).[122] The Court emphasized the fact that under the current system, civil servants have a subjective, justiciable and enforceable right under Article 33.5 of the Basic Law to adequate compensation for their work commensurate with their status and rank in the civil service. This right could not survive if the sector were participating in the general regime of collective bargaining. The Court explicitly pointed to the fact that there must not be "cherry-picking", i.e., having the right to industrial action and at the same time a justiciable subjective right to a certain status-adequate compensation.[123]

The Constitutional Court, who has indeed used its power to secure adequate compensation for certain classes of civil servants in several cases decided in the recent past[124], made a strong and rather convincing case for justifying the restrictions placed on civil servants concerning their collective bargaining or industrial action capabilities. One of the problems underlying the actual issue, in this case, is the fact that especially the profession of teachers is marked by severe

120 BVerfG, 12.6.2018, 2 BvR 1738/12, para. 161, http://www.bverfg.de/e/rs20180612_2bvr173812en.html (last accessed 25.8.2019).

121 Id (Fn. 70), para. 151.

122 Id (Fn. 70), para. 162.

123 Id (Fn. 70), para. 158.

124 BVerfG, 14.2.2012, 2 BvL 4/10, http://www.bverfg.de/e/ls20120214_2bvl000410.html (only in German), regarding University professors (BVerfGE 130, 263); BVerfG, 5.5.2015, 2 BvL 17/09, http://www.bverfg.de/e/ls20150505_2bvl001709en.html (English), regarding judges and public prosecutors; BVerfG, 17.11.2015, 2 BvL 19/09, http://www.bverfg.de/e/ls20151117_2bvl001909.html (only in German), regarding civil servants and their remuneration in general in Saxony.

inequality with varying numbers of teachers employed in state schools as civil servants working side by side with regular public servants. This inequality creates very different working conditions for teachers doing the same job but having one or the other status.

Translation of the „Civil Servants and the Right to Strike" decision, BVerfG, 12.6.2018, 2 BvR 1738/12, http://www.bverfg.de/e/rs20180612_2bvr173812en.html

Headnotes:

1. The personal scope of protection of Art. 9(3) of the Basic Law also includes civil servants (*Beamte*) (cf. Decisions of the Federal Constitutional Court 19, 303 <312, 322>). While the fundamental right of labour coalitions (*Koalitionsfreiheit*) is guaranteed without explicit reservation, it can, however, be restricted by conflicting fundamental rights of third parties and other rights of constitutional status.

2. a. The ban on strike action for civil servants is an independent and traditional principle of the career civil service system (*Berufsbeamtentum*) within the meaning of Art. 33(5) of the Basic Law. It meets both requirements necessary for being qualified as a traditional principle: traditionality and substantiality.

   b. The legislature must have regard to the ban on strike action for civil servants as an independent and traditional principle of the career civil service system. It is closely linked to the civil service principle of alimentation, the duty of loyalty, the principle of lifetime employment and the principle that the legal relationship under civil service law, including remuneration, must be regulated by the legislature.

3. a. The provisions of the Basic Law must be interpreted in a manner that is open to international law. At the level of constitutional law, the text of the European Convention on Human Rights and the case-law of the European Court of Human Rights serve as guidelines for the interpretation of the content and scope of fundamental rights and rule of law principles of the Basic Law (cf. Decisions of the Federal Constitutional Court 74, 358 <370>; 111, 307 <317>; 128, 326 <367 and 368>; established case-law).

   b. According to Art. 46 of the European Convention on Human Rights, the Contracting Parties have undertaken to abide by the final judgment of the European Court of Human Rights in any case to which they are parties (cf. also Decisions of the Federal Constitutional Court 111, 307 <320>). Beyond the scope of application of Art. 46 of the European Convention on Human Rights, however, the specific circumstances of the case must particularly be considered to provide for contextualisation when using the case-law of the European Court of Human Rights as guidelines. The Contracting Parties must also identify statements regarding principal values enshrined in the Convention and address them. The direction and guidance have a particularly strong impact if parallel cases within the same legal order are at issue that means (other) proceedings in the state affected by the initial decision of the European Court of Human Rights are affected.

c. The limits to an interpretation that is open to international law follow from the Basic Law. The possibilities of interpretation in a manner open to the Convention end where such an interpretation no longer appears tenable according to the recognised methods of interpretation of statutes and of the Constitution (cf. Decisions of the Federal Constitutional Court 111, 307 <329>; 128, 326 <371>). Furthermore, where the Basic Law is interpreted in a manner open to the Convention, the case-law of the European Court of Human Rights must be integrated as carefully as possible into the existing, dogmatically differentiated national legal system.

4. The ban on strike action for civil servants in Germany is in accordance with the principle of the Constitution's openness to international law; in particular, it is compatible with the guarantees of the European Convention on Human Rights. Also with respect to the case-law of the European Court of Human Rights, it cannot be established that German law conflicts with Art. 11 of the European Convention on Human Rights.

Facts:

The constitutional complaints, which have been joined for a joint decision, concern the question whether German civil servants (*Beamte*) have the right to participate in strike actions. [...] **[1]**

I.

[…] **[2-6]**

II.

[Excerpt from Press Release no. 46 of 12 June 2018]

The complainants are, or were, teachers with civil servant status at schools in three different federal states (*Länder*). In the past, they took part in protests and strikes organised by a trade union during working hours. In response to their participation, the competent disciplinary authorities imposed sanctions on the complainants. The authorities held that by participating in these events, the civil servants had breached fundamental duties under civil service law. In particular, civil servants were not allowed to be absent from work without permission. In the initial proceedings before the regular courts, the complainants challenged the respective disciplinary orders, ultimately without success.

C.

[…]

The constitutional complaints are unfounded. The challenged decisions of the authorities and the courts do not violate the rights of the complainant no. I. and complainants no. II. to IV. **[111]**

I.

The standards of review under constitutional law applicable to the claimed violations of fundamental rights particularly follow from the freedom of labour coalitions (*Koalitionsfreiheit*) guaranteed by Art. 9(3) of the Basic Law (*Grundgesetz* - GG) (1.), the traditional principles of the career civil service system (*Berufsbeamtentum*) within the meaning of Art. 33(5) GG (2.), and the principle of the Constitution's openness to international law (3.). **[112]**

1. a) [...] The freedom of labour coalitions protects all individuals in their capacity as professionals (employees and employers) and does not exclude specific professional fields. Thus, the personal scope of protection of Art. 9(3) GG also includes civil servants in addition to employees in the public sector (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* - BVerfGE 19, 303 <312, 322>). **[113]**

   b) The material scope of protection of Art. 9(3) GG extends to the right to engage in activities that are typical of labour coalition (aa) including the right to strike action (bb). **[114]**

      aa) According to the Federal Constitutional Court's established case-law, the fundamental right under Art. 9(3) GG is primarily a right to freely engage in activities that are typical of labour coalition (cf. BVerfGE 17, 319 <333>; 19, 303 <312>; 28, 295 <304>; 50, 290 <367>; 58, 233 <246>; 93, 352 <358>; 146, 71 <114 para. 130>) which guarantees the individual freedom to establish associations that serve to promote economic and working conditions and to jointly pursue this aim. […] **[115]**

      bb) To the extent that the aims protected under Art. 9(3) GG can only be pursued by use of specific means, these means are also protected under the fundamental right (cf. BVerfGE 84, 212 <224 and 225>). The means protected under Art. 9(3) GG are for instance measures of industrial action that are aimed at the conclusion of collective agreements. At least to the extent that they are necessary to ensure effective free collective bargaining, they are subject to the freedom of labour coalitions (cf. BVerfGE 88, 103 <114>; 92, 365 <393 and 394>; 146, 71 <114 and 115 para. 131>). Art. 9(3) third sentence GG also indicates this (cf. BVerfGE 84, 212 <225>). **[116]**

2. While the fundamental right of labour coalitions is guaranteed without explicit reservation (cf. e.g. BVerfGE 92, 26 <41>), that does not mean that any restrictions are excluded from the outset. Even fundamental rights that are guaranteed without explicit reservation can be restricted by conflicting fundamental rights of third parties and other rights of constitutional status (cf. e.g. BVerfGE 28, 243 <261>; 84, 212 <228>; 92, 26 <41>; 146, 71 <118 para. 141>). The traditional principles of the career civil service system guaranteed by Art. 33(5) GG (cf. BverfGE 19, 303 <322>) can be considered such a limitation with constitutional status. **[117]**

   a) Art. 33(5) GG is directly applicable law and contains a regulatory duty of the legislature and a guarantee of the career civil service system as an institution (cf. BVerfGE 117, 330 <344>; 119, 247 <260>). The traditional principles of the career civil service

system within the meaning of Art. 33(5) GG are the core of structural principles which were generally or at least predominantly recognised as binding and observed during a longer tradition-forming period, in particular in times of the Weimar Constitution (cf. BVerfGE 8, 332 <343>; 46, 97 <117>; 58, 68 <76 and 77>; 83, 89 <98>; 106, 225 <232>; 107, 218 <237>; 117, 330 <344 and 345>; 117, 372 <379>; 121, 205 <219>; without reference to the Weimar Constitution BVerfGE 145, 1 <8 para. 16>). Historically, the development of the career civil service system is closely linked to the development of the state under the rule of law [...]. As an institution, the career civil service system is based on expertise, professional performance and loyal exercise of duties. It is intended to ensure a stable administrative system that functions as an equalising factor *vis-à-vis* the political forces shaping the state (cf. BVerfGE 7, 155 <162>; 119, 247 <260 and 261>; established case-law). **[118]**

b) The point of reference in Art. 33(5) GG, which applies to all civil servants, is not the established civil service law, but the career civil service system (cf. BVerfGE 117, 330 <349>). Thus, only such provisions are protected that significantly shape the image of the career civil service system in its traditional form so that their removal would affect the career civil service system as such (cf. BVerfGE 43, 177 <185>; 114, 258 <286>). This requirement of substantiality already follows from the nature of an institutional guarantee which has the purpose of determining the core of structural principles [...] as a binding framework for the legislature when it drafts legal provisions. The Federal Constitutional Court made this clear by stating that not only must Art. 33(5) GG be taken into account, but also be observed in that respect (cf. BVerfGE 8, 1 <16 and 17>; 11, 203 <210>; 61, 43 <57 and 58>). Yet, Art. 33(5) GG does not preclude further developments of civil service law as long as the provisions essential to the image and function of the career civil service system are not subject to structural change (cf. BVerfGE 117, 330 <348 and 349>; 117, 372 <379>). The obligation to take Art. 33(5) GG into account entails an openness to developments that enables the legislature to adjust the provisions of public service law to the respective developments in statehood and thereby adapt the civil service law to current circumstances. Maintaining the general structure of the career civil service system as required by Art. 33(5) GG leaves sufficient room to fit the historically developed institution into the framework of our present statehood (cf. BVerfGE 3, 58 <137>; 7, 155 <162>; 70, 69 <79>) and adjust it to the functions which the Basic Law assigned to public service (*öffentlicher Dienst*) in the free democracy under the rule of law and the principle of the social state. **[119]**

c) The core of structural principles, which must be observed and is therefore excluded from profound structural changes by the general legislature, includes among others the civil servants' duty of loyalty (cf. BVerfGE 39, 334 <346 and 347>; 119, 247 <264>), the principle of lifetime employment (cf. BVerfGE 71, 255 <268>; 121, 205 <220>), the principle of alimentation (cf. BVerfGE 8, 1 <16 et seq.>; 44, 249 <265>; 49, 260 <271>; 70, 251 <267>; 99, 300 <314>; 106, 225 <232>; 117, 372 <380>; 139, 64 <111 para. 92>; 140, 240 <277 para. 71>) and the corresponding principle that remuneration of civil servants must be determined unilaterally by law (cf. BVerfGE 44, 249 <264>; cf. also BVerfGE 8, 1 <15 et seq.>; 8, 28 <35>). These characteristic

structural elements do not exist independently, but are related to each other (on the principle of lifetime employment and the principle of alimentation cf. BVerfGE 119, 247 <263>; 121, 205 <221>; on the duty of loyalty and the principle of alimentation cf. BVerfGE 21, 329 <345>; 44, 249 <264>; 130, 263 <298>; on the civil servants' duty of loyalty and on the employers' duty of care cf. BVerfGE 9, 268 <286>; cf. also BVerfGE 71, 39 <59>). **[120]**

aa) The civil servants' duty of loyalty is one of the traditional principles of the career civil service system and part of the core of the institutional guarantee under Art. 33(5) GG (cf. already BVerfGE 9, 268 <286>). This duty of loyalty bears special importance even in a modern administrative state whose professional and efficient exercise of functions depends upon an intact, loyal, dutiful staff of civil servants who are deeply committed to the state and its constitutional order (cf. BVerfGE 39, 334 <347>). Civil servants are bound to serve the common good and thus to exercise their duty in a disinterested manner and they must set aside their own interests when carrying out the duties entrusted to them. Engaging in activities of industrial disputes and the use of economic pressure to assert one's own interests, in particular measures of collective industrial disputes within the meaning of Art. 9(3) GG like the right to strike are not compatible with the civil servants' duty of loyalty (cf. BVerfGE 119, 247 <264> with further references). The guarantee of positions that are legally and financially secured has the purpose of enabling civil servants to fulfil their duty of loyalty. **[121]**

bb) The purpose of the principle of lifetime employment is to ensure the civil servants' independence in the interest of an administration under the rule of law. It is the legal and financial security that provide a guarantee that the career civil service system can contribute to the fulfilment of its duty - assigned to it by the Basic Law - of ensuring a stable and lawful administration in the context of the political power play (cf. BVerfGE 121, 205 <221>). This also and above all includes the fact that civil servants cannot be removed from office arbitrarily and at the whim of political bodies. Lifetime employment guarantees that civil servants cannot be removed from the office they hold according to their legal status; this guarantee is of fundamental significance because it provides civil servants with the independence regarding the exercise of their duties, which is necessary in the interest of them being bound by law and justice (cf. BVerfGE 121, 205 <222>; 141, 56 <71 para. 38>). **[122]**

cc) The principle of alimentation obliges the employer to support civil servants and their families with an appropriate lifetime alimentation and to ensure an appropriate maintenance (*Lebensunterhalt*) according to the development of the general economic and financial conditions and the general standard of living. The level of this maintenance is also corresponding to the grade, the responsibilities related to their office, and the relevance of the career civil service system for the general public (cf. BVerfGE 8, 1 <14>; 117, 330 <351>; 119, 247 <269>; 130, 263 <292>; 139, 64 <111 and 112 para. 93>; 140, 240 <278 para. 72>). Remuneration of civil servants is not considered a compensation for certain specific services, but

the employer pays civil servants in "return" for being available to the employer with their entire personality. It is the prerequisite that civil servants can completely commit themselves to public service as a lifetime profession and fulfil the function, assigned to them in the state system, of ensuring a stable administration, thereby constituting a balancing factor to the political forces that shape the state (cf. BVerfGE 7, 155 <162 and 163>; 21, 329 <345>; 39, 196 <201>; 44, 249 <265>; 117, 372 <380>; established case-law). This leads to the irrefutable conclusion that the securing of an appropriate maintenance must be regarded as a particularly significant traditional principle, which must be observed by the state (BVerfGE 8, 1 <16 and 17>; 117, 372 <380 and 381>). **[123]**

The direct objective guarantee of an appropriate maintenance under Art. 33(5) GG also establishes an individual right each civil servant holds *vis-à-vis* the state that is equivalent to a fundamental right (cf. BVerfGE 99, 300 <314>; 107, 218 <236 and 237>; 117, 330 <344>; 119, 247 <266>; 130, 263 <292>). […] **[124]**

d) […] **[125]**

3. The provisions of the Basic Law must be interpreted in a manner that is open to international law. While the European Convention on Human Rights ranks as statutory federal law and is therefore below constitutional rank (a), it must be taken into account when interpreting fundamental rights and the constitutional principles of the rule of law (b). This also applies to the interpretation of the European Convention on Human Rights by the European Court of Human Rights (c). This significance of the European Convention on Human Rights and thus also of the case-law of the European Court of Human Rights is based on the Constitution's openness to international law and its substantive focus on human rights (d). Using them as guidelines for interpretation does not require that the statements of the Basic Law and those of the European Convention on Human Rights be schematically aligned or completely harmonised, but that the values be included (e). Beyond Art. 46 ECHR, special importance must be attached to the specific context of the decision by the European Court of Human Rights when interpreting the Basic Law. Where it is methodologically untenable or incompatible with the Basic Law to include values of the European Convention on Human Rights, the Constitution's openness to international law is limited (g). **[126]**

a) The European Convention on Human Rights and its protocols are international treaties. The Convention leaves it to the Contracting Parties to decide in what way to comply with their duty to observe the provisions of the Convention (cf. BVerfGE 111, 307 <316> with further references). The federal legislature approved of the indicated conventions by formal act in accordance with Art. 59(2) GG (Act on the Convention for the Protection of Human Rights and Fundamental Freedoms - *Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten* of 7 August 1952, Federal Law Gazette, *Bundesgesetzblatt* - BGBl II p. 685; according to the publication of 15 December 1953, BGBl II 1954 p. 14, the Convention entered into force for the Federal Republic of Germany on 3 September 1953; the Convention was newly published in the version of the 11th Protocol in BGBl II 2002 p. 1054). With this approval, the federal legislature issued the respective order giving effect to international law. Within the German legal system, the European Convention on

Human Rights and its protocols - to the extent that they entered into force in Germany - have the rank of statutory federal law (cf. BVerfGE 74, 358 <370>; 111, 307 <316 and 317>). **[127]**

b) At the same time, the guarantees provided by the European Convention on Human Rights also have constitutional significance as they influence the interpretation of fundamental rights and the constitutional principles of the rule of law (cf. BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <316 and 317, 329>; 120, 180 <200 and 201>; 128, 326 <367 and 368>; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* - BVerfGK 3, 4 <8>; 9, 174 <190>; 10, 66 <77>; 10, 234 <239>; 20, 234 <247>). According to established case-law of the Federal Constitutional Court, the text of the European Convention on Human Rights and the case-law of the European Court of Human Rights serve, at the level of constitutional law, as guidelines for the interpretation of the content and scope of fundamental rights and constitutional principles of the rule of law provided that this does not lead to restricting or lowering the protection of fundamental rights under the Basic Law - which is also not the intent of the Convention (cf. Art. 53 ECHR) (cf. BVerfGE 74, 358 <370>; 111, 307 <317>; 120, 180 <200 and 201>). **[128]**

c) Pursuant to Art. 46 ECHR, the decisions of the European Court of Human Rights rendered in proceedings against Germany must be abided by. When using the European Convention on Human Rights as guideline for interpretation, the Federal Constitutional Court also takes into account decisions of the European Court of Human Rights even if they do not concern the same issue. This is based on the factual function of direction and guidance attached to the case-law of the European Court of Human Rights with regard to interpreting the European Convention on Human Rights, also beyond the decision of a specific case (cf. BVerfGE 111, 307 <320>; 128, 326 <368>; BVerfGK10, 66 <77 and 78>; 10, 234 <239>). Since the Basic Law is intended to avoid conflicts between domestic law and Germany's obligations under international law, where possible and with regard to the at least factual precedent character of the decisions of international tribunals, the effects of decisions of the European Court of Human Rights on the domestic level are, in that respect, not restricted to the duty, derived from Art. 20(3) GG in conjunction with Art. 59(2) GG, to take account of these decisions regarding only the circumstances on which the specific decisions are based (cf. BVerfGE 111, 307 <328>; 112, 1 <25 and 26>; BVerfGK 9, 174 <190, 193>). The Constitution's openness to international law thus expresses an understanding of sovereignty that is not only in favour of an integration into international and supranational contexts and their further development, but requires and expects them. Against this background, even the "final say" of the German Constitution is not opposed to an international and European dialogue of courts, but provides its normative basis. **[129]**

d) Using the European Convention on Human Rights and the case-law of the European Court of Human Rights as guidelines for interpretation at the level of constitutional law beyond individual cases serves to give effect to the guarantees of the European Convention on Human Rights as extensively as possible in Germany, and, in addition,

it may contribute to avoid the Federal Republic of Germany being held in violation (BVerfGE 128, 326 <369>). The substantive orientation of the Basic Law to human rights is expressed in the German people's profession of inviolable and inalienable human rights in Article 1(2) GG in particular. In Article 1(2) GG, the Basic Law accords special protection to the core of human rights. In conjunction with Article 59(2) GG, it is the basis for the constitutional duty of using the European Convention on Human Rights in its specific manifestation as an interpretation guideline even when applying German fundamental rights. Article 1(2) of the Basic Law is therefore not a gateway to give the European Convention on Human Rights direct constitutional rank, but the provision is more than a non-binding programmatic statement in that it provides a principle for the interpretation of the Basic Law and spells out the fact that its fundamental rights must also be understood as a manifestation of general human rights and have incorporated the latter as a minimum standard (cf. BVerfGE 74, 358 <370>; 111, 307 <329>; 128, 326 <369> […]). **[130]**

e) Using the European Convention on Human Rights as a guideline for interpretation of the provisions of the Basic Law is focussed on the outcomes: It does not aim at schematically aligning individual constitutional concepts in parallel (BVerfGE 137, 273 <320 and 321 para. 128> with further references), but serves to avoid violations of international law. While it may often be easier to remove or avoid violations of international law if domestic law is harmonised with the Convention, this is not imperative under international law: The Convention leaves it to the Contracting Parties to decide how they comply with their duty to observe the provisions of the Convention (cf. BVerfGE 111, 307 <316>; 128, 326 <367>). In light of this, it must be stated that similarities of norm texts must not cover up the differences which follow from the context of the legal systems. This applies to the interpretation of concepts of the Basic Law in a manner that is open to international law and, in a similar way, to the interpretation based on comparative analyses of constitutions. The human rights content of the relevant international treaty must be "adapted" to the context of the receiving constitutional system in an active process (of acknowledgment) (cf. BVerfGE 128, 326 <370> […]). **[131]**

f) According to Art. 46 of the European Convention on Human Rights, the Contracting Parties have undertaken to abide by the final judgment of the European Court of Human Rights in any case to which they are parties (cf. also BVerfGE 111, 307 <320>). Beyond the scope of application of Art. 46 ECHR, however, the specific circumstances of the case must particularly be considered to provide for contextualisation when using the case-law of the European Court of Human Rights as guidelines. […]. In this context, it must first be considered that, unlike the law of the European Union (cf. BVerfGE 75, 223 <244 and 245>), the European Convention on Human Rights does not have precedence of application (*Anwendungsvorrang*) over domestic statutory law for lack of a respective national order giving effect to international law. In that regard, the rights under the Convention do not take precedence over the German constitutional order, but rather are an important principle for the interpretation of the Basic Law. Therefore, beyond its *inter-partes* effect taking account of the case-law of the European Court of Human Rights primarily means to

identify statements regarding principal values enshrined in the Convention and address them [...]. If possible, a conflict with principal values enshrined in the Convention must be avoided. Acknowledging the Convention's direction and guidance function therefore requires elements of comparability with national law. When the case-law of the European Court of Human Rights is taken into account, the specific facts of the decided case and its background (in terms of legal culture) must be included as well as possible specific particularities of the German legal order. They conflict with an indiscriminate transfer in terms of a mere "parallel alignment of concepts". The direction and guidance have a particularly strong impact if parallel cases within the same legal order are at issue that means (other) proceedings in the state affected by the initial decision of the European Court of Human Rights are affected. **[132]**

g) The limits of an interpretation that is open to international law follow from the Basic Law. The possibilities of interpretation in a manner open to the Convention end where such an interpretation no longer appears tenable according to the recognised methods of interpretation of statutes and of the Constitution (cf. BVerfGE 111, 307 <329>; 128, 326 <371>; cf. BVerfGE 123, 267 <344 et seq.> on the absolute limit of the core of the constitutional identity of the Basic Law pursuant to Art. 79(3) GG). If German courts have latitude for interpreting and balancing within the scope of recognised methods of the interpretation of laws, they are obliged to give precedence to an interpretation that is in accordance with the Convention. The situation is different only if observing the decision of the European Court of Human Rights violates, for instance due to a changed factual basis, clearly opposing statutory law or German constitutional provisions, in particular fundamental rights of third parties (cf. BVerfGE 111, 307 <329>). It is therefore not contrary to the objective of openness to international law if the legislature does not observe international treaty law in exceptional cases, provided this is the only way to avert a violation of fundamental constitutional principles (cf. BVerfGE 111, 307 <319>). **[133]**

Moreover, an interpretation of fundamental rights in a manner that is open to international law may not result in a limitation of the protection of fundamental rights as afforded by the Basic Law; this is also excluded by the European Convention on Human Rights itself (cf. Art. 53 ECHR, on this cf. BVerfGE 111, 307 <317>). Above all, this obstacle to acknowledging international law may become significant in multi-polar fundamental rights relationships in which the increase of liberty for one holder of fundamental rights means a decrease of liberty for the other at the same time (cf. BVerfGE 128, 326 <371> with further references). **[134]**

Furthermore, where the Basic Law is interpreted in a manner that is open to the Convention, the case-law of the European Court of Human Rights must be integrated as carefully as possible into the existing, dogmatically differentiated national legal system (cf. BVerfGE 111, 307 <327>; 128, 326 <371>). Therefore, international law concepts must not be adopted indiscriminately. Particularly where, with regard to guarantees that have a similar text, a concept of the European Court of Human Rights has developed autonomously and differs from the corresponding Basic Law concept, the principle of proportionality as a principle inherent in the Basic Law is available for taking account

of assessments of the European Court of Human Rights from the perspective of the Basic Law: in light of this, "using them as interpretation guidelines" may mean that aspects considered by the European Court of Human Rights in its weighing of interests are also included in the constitutional review of proportionality (cf. BVerfGE 111, 307 <324>; 128, 326 <371 and 372>; BVerfGK 3, 4 <9>). **[135]**

II.

The acts of public authority challenged by the constitutional complaints are not objectionable under constitutional law. Partly based on different reasons, the authorities ultimately assumed that German civil servants are subject to a ban on strike action. In doing so, they did not disregard the relevant constitutional requirements. It is true that the complainant no I. and the complainants no. II. to IV. fall within the scope of protection of the freedom of labour coalitions (1) and that the measures challenged in the initial proceedings constitute an interference with the fundamental right under Art. 9(3) GG (2.). However, these interferences are justified under constitutional law (3.). A different assessment cannot be reached even with regard to the guarantees of the European Convention on Human Rights (4.). **[136]**

1. The freedom of labour coalitions has no direct constitutional limits due to the traditional principles of the career civil service system (Art. 33(5) GG) (a). The matter at hand falls within the material scope of protection of Art. 9(3) of the Basic Law (b). **[137]**

a) So far, the case-law of the Federal Constitutional Court contains no specific statements with regard to the relation between Art. 9(3) GG and Art. 33(5) GG. [...] **[138]**

However, a systematic and teleological interpretation leads to the conclusion that the traditional principles of the career civil service system are conflicting constitutional law and may justify limiting Art. 9(3) GG; they are not direct constitutional limits to the freedom of labour coalitions [...]. Such an interpretation takes account of the prominent status of fundamental rights as core of the free democratic order (cf. BVerfGE 31, 58 <73>) and avoids a premature and abstract balancing of interests with the consequence of realising one legal interest at the expense of another [...]. Rather, this approach takes full account of the principle of practical concordance by which two interests protected by the Constitution are reconciled in such a way as to find the most careful balance. Each of these interests must be realised to the largest extent possible so that it can reach its maximum effectiveness. This also holds true for the structural principles of Art. 33(5) GG which do not exclude a balancing with other interests from the outset [...]. **[139]**

b) [...] Repeatedly, and most previously in its decision on the Act on Uniformity of Collective Agreements (*Tarifeinheitsgesetz*), the Federal Constitutional Court held that measures of industrial action that are aimed at the conclusion of collective agreements, at least to the extent that they are necessary to ensure effective free collective bargaining, are protected under Art. 9(3) GG (cf. BVerfGE 84, 212 <225>; 88, 103 <114>; 92, 365 <393 and 394>; 146, 71 <114 and 115 para. 131>). A statement to the effect that a strike must always be held in connection with the conclusion of a collective agreement, can, however, not be found in the Court's previous decisions. In

fact, for actions to be protected under Art. 9(3) GG it is decisive that they are initiated by trade unions and related to collective bargaining (cf. BVerfG, Order of the Third Chamber of the First Senate of 26 March 2014 - 1 BvR 3185/09 -, juris, para. 26 et seq.). The Federal Labour Court does not (no longer) exclude a strike called by a trade union in support of a strike aimed at the conclusion of a collective agreement from the scope of protection of Art. 9(3) GG [...]. In line with an interpretation that is in accordance with the Constitution's openness to international law, such a broad understanding of Art. 9(3) GG and the effort to guarantee a protection of fundamental rights as extensive as possible expressed therein, also draws on the assessments of the European Court of Human Rights regarding Art. 11 ECHR. According to these assessments, secondary strikes are at least an accessory aspect of the freedom of labour coalitions (cf. ECtHR, National Union of Rail, Maritime and Transport Workers v. United Kingdom, Judgment of 8 April 2014, no. 31045/10, § 77). In the proceedings at hand, the alleged participation of the complainant no I. and the complainants no. II. to IV. in (token) strike actions called by the trade union *Gewerkschaft Erziehung und Wissenschaft* (GEW) took place in connection with collective bargaining for the public sector conducted at that time and is therefore not obviously unsuitable to contribute to reaching the aims pursued in the course of the main labour dispute. **[140]**

2. The challenged decisions of the authorities and the courts impair the fundamental right under Art. 9(3) GG. Any curtailing of the fundamental rights guarantees limits the freedom of labour coalitions. All regulations and measures complicating the exercise of fundamental rights at any stage are therefore considered impairments by the state. […] The disciplinary sanctioning of the complainant no. I. and the complainants no. II. to IV. for their actions by orders issued by their employers and the upholding of the challenged decisions by the disciplinary courts restrict the possibility to participate in labour disputes. **[141]**

3. However, the impairment of the freedom of labour coalitions is justified by sufficiently weighty interests that are protected under constitutional law. **[142]**

It is unobjectionable under constitutional law that the decisions challenged by the constitutional complaints consider the ban on strike action for civil servants to be a traditional principle with constitutional status (a), which the legislature must not only take into account but observe (b). A legal provision that expressly lays down the ban on strike action for civil servants is not required (c). Nor does the status-related ban on strike actions for civil servants disproportionately interfere with the guarantee under Art. 9(3) GG (d). **[143]**

a) The ban on strike action for civil servants is an independent and traditional principle of the career civil service system within the meaning of Art. 33(5) GG. It meets both requirements necessary for being qualified as a traditional principle: traditionality (aa) and substantiality (bb). **[144]**

The wording of Art. 33(5) GG does not specify what is considered a traditional principle under the Constitution. [...] **[145]**

[…] **[146]**

aa) The ban on strike action for civil servants fulfils the element of traditionality which is essential for being regarded as an independent and traditional principle of the career civil service system. [...] The ban on strike actions for civil servants […] traces back to a line of tradition established (at least) in the state practice of the Weimar Republic, and, on this basis, proves to be traditional within the meaning of Art. 33(5) GG. **[147]**

[…] **[148]**

bb) In substantive terms, the ban on strike action is closely linked to the foundations of the German career civil service system under constitutional law, in particular to the duty of loyalty under civil service law and to the principle of alimentation. In view of that, the requirement of substantiality is satisfied. **[149]**

[…] **[150-151]**

According to the present constitutional concept of the career civil service system, the ban on strike action is inseparably linked to the principle of alimentation and the duty of loyalty. A right to strike for civil servants is incompatible with these two principles which are essential elements of a civil servant's functions; rather, the ban on strike action for civil servants guarantees and justifies the present set-up of the described structural principles of the career civil service system. Against this background, the ban on strike action for civil servants under Art. 33(5) GG is an independent structural principle of the career civil service system that is necessary for the system and thus fundamental. […] Abandoning it would fundamentally challenge the order of the career civil service system as it exists in Germany [...]. **[152]**

b) The ban on strike action is part of the institutional guarantee under Art. 33(5) GG and must be observed by the legislature. A right to strike, even for some groups of civil servants only, would fundamentally reshape the understanding and regulations of the civil service. It would erode the principles of alimentation, of the duty of loyalty, of lifetime employment, and the principle that material rights and duties, including remuneration, must be regulated by the legislature. At the very least, it would require fundamental changes to these principles, which are essential to the functioning of the civil service. If a right to strike was granted, there would be no scope, for instance, for regulating remuneration by law. If civil servants' remuneration or parts of it could be negotiated by means of labour disputes, the existing possibility for civil servants to enforce alimentation, guaranteed by the Constitution, before the courts - and hence the guarantee of subjective rights under Art. 33(5) GG - could no longer be justified. Yet the alimentation principle, in combination with the principle of lifetime employment, serves to ensure the independent exercise of duty and guarantees civil servants the means necessary to fulfil their obligation to fully dedicate themselves to their office. In order to ensure that, the Federal Constitutional Court has identified the duty of the employer to remunerate civil servants commensurate with their office as an essential part of the principle of alimentation (cf. BVerfGE 130, 263 <292>; 139, 64 <111

and 112 para. 93>; 140, 240 <278 para. 72>; 141, 56 <70 para. 35>; 145, 249 <272 para. 48>; 145, 304 <324 and 325 para. 66>). A (partial) abandonment of these closely linked core principles would challenge the career civil service system as such and thus the matter regulated in Art. 33(5) GG […]. Therefore, a right to strike for civil servants would not merely mean to adapt the provisions of the public service law to the current developments of statehood and the civil service law to current circumstances. Rather, it would interfere with the core of structural principles guaranteed under Art. 33(5) GG. Hence, the obligation to observe the ban on strike action blocks the way to profound structural changes effected by the general legislature […] **[153]**

c) A legal provision that expressly lays down a ban on strike action for civil servants is not required under constitutional law. […]. **[154]**

The disciplinary orders challenged by the present constitutional complaints referred, among other legal bases, to the provisions on the absence from work included in the Land laws on civil servants. In addition, the orders partially also referred to the Law on the Status Rights of Civil Servants in the *Länder* (*Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern* - BeamtStG) regulating the fundamental duties of civil servants, which include the disinterested exercise of duty for the common good and the obligation to follow instructions (§§ 33-35 BeamtStG). [...] If the fundamental duties of civil servants specifically regulated by law include to fully dedicate themselves to their office and to exercise their duties in a disinterested manner and in good faith (cf. also § 61(1) of the Law on Federal Civil Servants, *Bundesbeamtengesetz* - BBG, § 34 BeamtStG) it is inferred that measures of collective industrial disputes to assert common (own) professional interests are prohibited (cf. also Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE 53, 330 <331>). It is not required under constitutional law to further regulate the ban on strike action beyond this. **[155]**

d) To the extent that it concerns the participation of civil servants in labour disputes, the restriction of the freedom of labour coalitions is not objectionable under constitutional law. The ban on strike action for civil servants has its basis in Art. 33(5) GG and accommodates the principle of practical concordance. **[156]**

aa) Like the remaining core of structural principles of the career civil service system within the meaning of Art. 33(5) GG, the ban on strike action for civil servants serves the purpose of maintaining a stable administration (cf. BVerfGE 56, 146 <162> with further references), of ensuring the fulfilment of state functions and thereby the functioning of the state and its institutions. This goal, which the Constitution also guarantees through other provisions of Art. 33 GG, is achieved *inter alia* by a staff of civil servants, whose working conditions are unilaterally determined by the state, whose labour can always be requested, in particular in times of crisis, and which refrains from participating in a power struggle with the employer or the democratically legitimated legislature. The conflict between Art. 9(3) GG and Art 33(5) GG must be resolved in accordance with the principle of practical concordance, which means that conflicting constitutional law positions

must be assessed in terms of how they interact and they must be balanced in such a way that they are as effective as possible for all persons involved (cf. BVerfGE 28, 243 <260 and 261>; 41, 29 <50 and 51>; 93, 1 <21>; 134, 204 <223 para. 68>; established case-law). **[157]**

bb) The conflict between the freedom of labour coalitions and Art. 33(5) GG must be resolved in favour of the ban on strike action for civil servants. The weight of the interference with Art. 9(3) GG is not unreasonable for civil servants. On the one hand, the right to strike [...] is only one element of the freedom of labour coalitions. A ban on strike action does not result in the complete irrelevance of the freedom of labour coalitions and does not render it entirely ineffective. On the other hand, the legislature has created provisions designed to help compensate for the restriction of Art. 9(3) GG for civil servants. Although the mentioned provisions of § 118 BBG and § 53 BeamtStG as well as the civil service laws of the *Länder* do not accord any co-decision rights to the trade unions' umbrella organisations, they are granted participation rights when legal provisions for the civil service are drawn up. According to the explanatory memorandum to the law, this participation was created to compensate for the ban on strike action (cf. *Bundestag* document - BTDrucks 16/4027, p. 35). Another element of these compensating measures is the alimentation principle under civil service law. It grants civil servants the right, which is equivalent to fundamental rights, to subject the state's duty of alimentation to judicial review and, enforce it before the courts if necessary. In this reciprocal system of interrelated rights and duties, expansions or restrictions of one right or duty of the civil service generally also result in changes to the other rights or duties. The civil service status does not permit "cherry-picking" (cf. also BVerfGE 130, 263 <298>). [….] A right to strike (for certain groups of civil servants) would trigger a chain reaction with regard to the structuring of the civil service and would affect essential principles of civil service law and related institutions [...]. Granting the right to strike would raise the question of its effects on the introduction of a collective bargaining system and the commitment to collective agreements of civil servants and employers, on the continued validity or change of the alimentation principle and the principle of lifetime employment, on single aspects like health insurance benefits and the civil servants' exemption from payment of social security contributions and on the possibility to enforce the right to alimentation commensurate with the civil servants' office before the courts. [...] **[158]**

cc) Balancing the positions as carefully as possible in terms of practical concordance cannot be achieved by granting of a restricted right to strike that is subject to special requirements which must be developed by judicial decisions or provided for by statutes, as for example an obligation to notify of or obtain an approval for a planned strike action. [...] A (restricted) right to strike that is subject to such conditions would reduce the negative effects of the strike action on the realisation of fundamental rights by third persons, e.g. parents, students and the impairments on the functioning of the administration. Furthermore, an obligation of notifying or obtaining an approval would allow the administrative bodies to at least partly

ensure that their duties are fulfilled. [...] However, this would only be possible - and this is an important objection because of the unpredictability - if a sufficient number of civil servants would decide not to participate in the strike action or could be excluded from participating in the strike by imposing a ban in individual cases. **[159]**

In case of longer lasting labour disputes and the participation of persons with operative functions in schools, the educational mandate of the state pursuant to Art. 7(1) GG (cf. on this BVerfGE 47, 46 <71>; 93, 1 <21>; 98, 218 <244>), i. e. a functioning school system (cf. BVerfGE 138, 1 <29 para. 80>) - which is also protected under constitutional law - can no longer be ensured on a continued basis. [...] **[160]**

A weighing of the freedom of labour coalitions against the traditional principles of the career civil service system in accordance with the principle of practical concordance does also not require that the ban on strike action be limited to a particular group of civil servants by taking into account their functions stipulated in Art. 33(4) GG [...]. This would mean that for civil servants whose main role is to exercise public authority within the meaning of this provision, a ban on strike action would continue to be in effect; all other civil servants would have to be granted a right to strike [...]. Dividing civil servants into groups that have or do not have the right to strike based on their different functions would entail difficulties of distinction that are connected to the concept of public authority. [...] To clearly determine whether a specific official act involves the exercise of public authority is already extremely difficult. It is also difficult to make a distinction in cases where the specific official act is not the determining factor, but where it must be clarified whether a particular civil servant who performs different functions (partly public authority functions, partly non-public authority functions) as a result of a delegation, reassignment or transfer is to be accorded the right to strike. Regardless of these considerations, the recognition of a right to strike for "civil servants in marginal areas" would mean forgoing the guarantee of a stable administration and the exercise of state functions other than those stipulated in Art. 33(4) GG. Besides, a right to strike based on functional criteria within the meaning of Art. 33(4) GG would create a special category of "civil servants with the right to strike" or "civil servants subject to collective agreements" [...]. This category would be added as a "third pillar" to the refined system of public service. While the alimentation principle would continue to apply for civil servants who exercise core functions of public authority, other civil servants would be given the possibility of enforcing demands regarding their working conditions through labour dispute measures where applicable, while keeping their civil servant status. In addition to the existing problem of proper distinction and of equal treatment with regard to employees in the public service, this would raise the question to what extent this category of personnel could still be regarded as having the legal status of civil servants [...]. **[161]**

[…] **[162]**

4. The ban on strike action for civil servants in Germany is in accordance with the principle of the Constitution's openness to international law; in particular, it is compatible with the guarantees of the European Convention on Human Rights. The European Court of Human Rights has further developed its case-law with regard to Art. 11 ECHR in a number of proceedings (a). When taking into consideration the decisions' essential principal values, a conflict between German law and the European Convention on Human Rights can presently not be established (b). Regardless of this, and with regard to the particularities of the German system of career civil service, the Senate finds that the requirements to restrict the right to strike stipulated in Art. 11(2) ECHR would also be met (c). **[163]**

a) Art. 11(1) ECHR grants every person the right to freedom of peaceful assembly and to freedom of association with others; this also includes the right to form and join trade unions for the protection of his interests. In its recent case-law, the European Court of Human Rights has further specified the guarantees of Art. 11(1) ECHR and the conditions of interference under Art. 11(2) ECHR. **[164]**

aa) In the case Demir and Baykara v. Turkey (Judgment of 12 November 2008 no. 34503/97, § 145) the Grand Chamber of the European Court of Human Rights held that the freedom of association of Art. 11(1) ECHR includes the right to form and join a trade union, the prohibition of closed-shop agreements and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members. For its interpretation of the provision, the European Court of Human Rights has taken into account other international instruments (Convention No. 87 and No. 98 of the International Labour Organisation, European Social Charter) and their interpretation by the competent organs as well as the practice of the European states (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 85). In that specific case which concerned a collective agreement between the Turkish trade union Tüm Bel Sen and a Turkish municipality, the European Court of Human Rights held that members of the administration of the State cannot be excluded from the scope of Art. 11 ECHR. At most, restrictions can be imposed in accordance with the requirements of Article 11(2) ECHR. However, the groups of persons stated in the exceptions set out in Article 11(2) second sentence ECHR are to be construed strictly (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 107, 119). The Turkish Government omitted to show a pressing social need for the exclusion from the right to collective bargaining (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 163 et seq.). The explanation that civil servants enjoy a privileged position in relation to other workers is not sufficient in this context (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 168). **[165]**

The concurring opinion of Judge Spielmann concerning the aforementioned Judgment of 12 November 2008, joined by Judges Bratza, Casadevall and Villiger, emphasises the importance of the right to freedom of labour coalitions also for the public service (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment

of 12 November 2008, no. 34503/97, Separate Opinion of Judge Spielmann §§ 1 et sq.) According to the opinion, it must be taken into account that, in many legal systems, the statutory situation of civil servants is governed by laws or regulations, from which no derogation can be made by means of individual agreements. Referring to Nicolas Valticos (Droit International du Travail, Vol. 8 [Droit du Travail], 2nd Edition 1983, p. 264 et seq.), the separate opinion states that the concept of relation between the state and its civil servants varies depending on the country. In some countries civil servants and other public officials - or most of them - tend to be treated as workers in the private sector, as regards, for example, collective bargaining and even the right to strike. In other countries, however, the traditional notions are still recognised. It is further stated that another problem stems from the fact that the definition of civil servant varies in scope depending on the country, according to the extent of the public sector and to whether or not a distinction is made - and also to what degree - between civil servants as such and public-sector employees in a broader sense (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, Separate Opinion of Judge Spielmann § 6). Even though the right to bargain collectively has been finally recognised by the decision of the Grand Chamber of 12 November 2008, certain exceptions or limits must nevertheless always be possible in the public service, provided that the role of staff representatives in the drafting of the applicable employment conditions or regulations remains guaranteed (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, Separate Opinion of Judge Spielmann § 8). The authorising of public officials to make their voices heard certainly implies that they have a right to engage in social dialogue with their employer, but not necessarily the right to enter into collective agreements or that states have a corresponding obligation to enable the existence of such agreements. States must therefore be able to retain a certain freedom of choice in such matters (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, Separate Opinion of Judge Spielmann §§ 8 and 9). **[166]**

bb) In the case Enerji Yapi-Yol Sen v. Turkey in 2009, concerning the application of a civil servants trade union, the Chamber of the Third Section of the European Court of Human Rights held that a ban on strike action interferes with the guarantees of Art. 11(1) ECHR. It states that a strike enables a trade union to make its voice heard and that it is an important factor enabling the trade-union members to protect their interests (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, § 24). However, the right to strike is not an absolute right and can be subject to conditions and restrictions. The Chamber also held that the principle of freedom of trade unions is in accordance with a ban on strike action for civil servants exercising public authority on behalf of the state. In the case Enerji Yapi-Yol Sen v. Turkey, a circular placed a prohibition on the right to strike on all civil servants without considering the goals stipulated in Art. 11(2) ECHR. The Turkish government failed to

demonstrate that the restriction it imposed was necessary in a democratic society (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no 68959/01, § 32). **[167]**

cc) Even before that, in its Judgment of 27 March 2007, the Chamber of the Second Section of the European Court of Human Rights decided on the scope of Art. 11 ECHR with regard to the legal situation in Turkey (cf. ECtHR, Karaçay v. Turkey, Judgment of 27 March 2007, no. 6615/03). First, the European Court of Human Rights set out that the personal scope of protection of Art. 11(1) ECHR was comprehensive and did not a *priori* exclude civil servants (cf. ECtHR, Karaçay v. Turkey, Judgment of 27 March 2007, no. 6615/03, § 22). The disciplinary warning imposed in case of the applicant, an electrician who participated in a strike held in connection with the remuneration of civil servants, would not have been necessary in a democratic society. (cf. ECtHR, Karaçay v. Turkey, Judgment of 27 March 2007, no. 6615/03, §§ 37 and 38). **[168]**

dd) On 17 July 2008, the Chamber of the Second Section of the European Court of Human Rights decided in the case Urcan and others v. Turkey on applications of a number of Turkish teachers on whom disciplinary sanctions had been imposed by Turkish courts for going on strike for one day. In this context, the European Court of Human Rights held that these sanctions constituted an interference with Art. 11 ECHR with regard to the freedom of assembly. It further stated that the measure was not justified within the meaning of Art. 11(2) ECHR, since the interference had not been necessary in a democratic society (cf. ECtHR, Urcan and others v. Turkey, Judgment of 17 July 2008, no. 23018/04 and others, §§ 26 et seq.). **[169]**

ee) After the decisions in the cases Demir and Baykara v. Turkey and Enerji Yapi-Yol Sen v. Turkey, the European Court of Human Rights repeatedly dealt with the guarantees under Art. 11 ECHR in application proceedings brought against Turkey. In the case Kaya and Seyhan v. Turkey, the Chamber of the Second Section ruled on sanctions imposed on two teachers and trade-union members who participated in a day of action against a law concerning the organisation of the public service (cf. ECtHR, Kaya and Seyhan v. Turkey, Judgment of 15 September 2009, no. 30946/04, §§ 5 and 6). The European Court of Human Rights held that the disciplinary measures imposed on the applicants did not correspond to a compelling social need and thus were not necessary in a democratic society. These measures constituted a disproportionate impairment of the applicants' right to freedom of assembly (cf. ECtHR, Kaya and Seyhan v. Turkey, Judgment of 15 September 2009, no. 30946/04, § 31). **[170]**

ff) In the case Saime Özcan v.Turkey the Chamber of the Second Section, on 15 September 2009, again ruled on an application of a teacher who also was a tradeunion member and had participated in a national day of strike fighting for the improvement of working conditions of civil servants. Referring to the decisions on the cases Urcan and others v. Turkey and Karaçay v. Turkey, the Chamber

concluded that the initial criminal conviction of the teacher was a violation of Art. 11 ECHR (cf. ECtHR, Saime Özcan v. Turkey, Judgment of 15 September 2009, no. 22943/04, §§ 22 et seq.). In its Judgment of 13 July 2010 in the case Çerikci v. Turkey that concerned a Turkish municipal civil servant's participation in a strike and the disciplinary measures subsequently imposed, the Chamber of the Second Section referred to its findings in the case Karaçay v. Turkey and again held that there was a violation of Art. 11 ECHR (cf. ECtHR, Çerikci v. Turkey, Judgment of 13 July 2010, no. 33322/07, §§ 14 and 15). **[171]**

b) When considering the findings of the European Court of Human Rights in the aforementioned cases, it can neither be established that the current legal situation in Germany is not in compliance with the European Convention on Human Rights, nor that domestic law conflicts with the Convention. If domestic law does not conflict with the Convention, questions concerning the limits of the Constitution's openness to international law, which have been raised in the constitutional complaint proceedings, are not essential for the decision in the present case. In particular, there is presently no need to clarify, whether the ban on strike action for civil servants, which is a traditional principle of the career civil service system and a traditional element of the German state structure (cf. paras. 144 et seq. above), also is a fundamental constitutional principle [...]. Nonetheless, many arguments would support this. **[172]**

[...] The Judgment pronounced against Turkey as well as the other decisions in the application proceedings Demir and Baykara v. Turkey, Karaçay v. Turkey, Urcan and others v. Turkey, Kaya and Seyhan v. Turkey, Saime Özcan v. Turkey, Çerikci v. Turkey do not attain immediate legal validity for the Federal Republic of Germany […] (cf. also BVerfGE 111, 307 <320>). In this context, it must be taken into account that *inter partes* statements concerning a specific case are made before the background of the respective relevant legal system and that conceptual similarities must not cover up differences that arise from the context of legal orders (cf. also BVerfGE 128, 326 <370> […]). Decisions of the European Court of Human Rights also have a specific relevance for the interpretation of domestic law in compliance with the Convention that goes beyond Art. 46 ECHR and results from their direction and guidance function. The guidance function has a particularly strong impact if it applies to parallel cases within the same legal order, that means (other) proceedings in the contracting state affected by the initial decision of the European Court of Human Rights are affected [...]. Beyond this impact on parallel cases, the direction and guidance function must be taken into account by reviewing one's own legal order (cf. BVerfGE 111, 307 <320>) and by adopting the principal values formulated by the European Court of Human Rights in terms of abstract, general guidelines (cf. also BVerfGK 3, 4 <9>). **[173]**

Art. 9(3) GG and the related case-law of the Federal Constitutional Court specify that German civil servants are also subject to the personal scope of protection of the freedom of labour coalitions without exception (cf. BVerfGE 19, 303 <312, 322> […]), but cannot exercise the right to strike as one manifestation of Art. 9(3) GG due to conflicting constitutional law (Art. 33(5) GG); thus, they are in accordance with the principal values enshrined in the Convention. Regarding the scope of protection and

restrictions of Art. 11 ECHR, the European Court of Human Rights has developed principal statements in terms of values that must be considered in the context of an interpretation that is open to the Convention. In the case Demir and Baykara v. Turkey, the Grand Chamber elaborated on the scope of protection when assessing the guarantees under Art. 11 ECHR (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 96 et seq.). Regarding the personal scope of protection, the Chamber concluded that members of the state administration cannot generally be excluded from the scope of Art. 11 ECHR, and that, at most, restrictions can be imposed on those members (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 107). Moreover, it held that these restrictions must not impair the very essence of the freedom of association (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 97 [...]). A similar assessment can be found in the Judgment in the case Karaçay v. Turkey, which states that the right to join trade unions guaranteed by Art. 11(1) ECHR is afforded to everyone and also civil servants are not automatically excluded from it (ECtHR, Karaçay v. Turkey, Judgment of 27 March 2007, no. 6615/03, § 22). **[174]**

Particularly with regard to the right to strike, the European Court of Human Rights, in the case Enerji Yapi-Yol Sen v. Turkey, put forward the abstract principle of interpretation that a strike enables trade unions to make their voice heard and to protect their interests (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, § 24). German law does not conflict with this assessment either. As far as the representation of civil servants in Germany is concerned, the umbrella organisations of the competent trade unions are not granted a right to strike, but the right to participate in the drafting of general provisions concerning the working conditions under civil service law (cf. § 118 BBG and § 53 BeamtStG and the provisions of civil service laws of the *Länder*). Even if this procedure does not and, due to the lack of any commitment to collective agreements, cannot create the atmosphere of pressure that is inherent in labour disputes, it enables trade unions to make their voice heard by means of a compensation and balancing measure. **[175]**

c) Regardless of the question whether the ban on strike action for civil servants constitutes an interference with Art. 11(1) ECHR, it is in any case justified under Art. 11(2) first sentence (aa) and Art. 11(2) second sentence ECHR (bb) based on the particularities of the German system of the career civil service. **[176]**

aa) (1) In Germany, the ban on strike action is prescribed by law within the meaning of Art. 11(2) first sentence ECHR. This requires that a basis exists in domestic law (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, § 26). Such a basis exists. The laws on civil service of the Federation and the *Länder* include specific provisions for all civil servants regarding their absence from work without permission and their obligation to follow instructions. Participating in strike action without permission is incompatible with these provisions. Moreover, the ban on strike action for civil servants is a manifestation of Art. 33(5) GG that has been recognised by the highest courts for decades […]. **[177]**

(2) Ensuring a functioning public administration, in the specific case of the complainants ensuring the fulfilment of the state's educational mandate and a functioning school system (Art. 7(1) GG), which was the argument used to justify the disciplinary measures, serves to maintain order and thus pursues a legitimate aim within the meaning of Art. 11(2) first sentence ECHR. **[178]**

(3) Due to the particularities of the German system of career civil service, the ban on strike action is also necessary in a democratic society. As was stated by the European Court of Human Rights in its decision on the case Demir and Baykara v. Turkey, a justified interference with Art. 11(1) ECHR requires that there is a pressing social need; moreover, the restriction must be proportionate (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 119). According to the European Court of Human Rights, Turkey, however, failed to demonstrate that the absolute prohibition for civil servants to form trade unions stipulated in Turkish law fulfils such a pressing social need. The mere fact that the relevant laws do not provide for the possibility to form trade unions is not sufficient (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 120). The explanation that Turkish civil servants enjoy a privileged position is not sufficient in this context either (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 168). In the proceedings Enerji Yapi-Yol Sen v. Turkey, the Turkish government also failed to demonstrate that there was a need for the impugned restriction of the right to strike action in a democratic society, by claiming that Art. 11 ECHR did not guarantee that trade unions could take certain actions (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, §§ 29, 32). **[179]**

Moreover, in the case Demir and Baykara v. Turkey, the European Court of Human Rights held that the Contracting Parties only have a limited margin of appreciation when defining the general legal concept of a pressing social need (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 119). However, the case did not concern the guarantee of a right to strike action. It has not been particularly held to be an element of the core guarantees of Art. 11 ECHR by the European Court of Human Rights to this date (cf. ECtHR, Na- tional Union of Rail, Maritime and Transport Workers v. United Kingdom, Judgment of 8 April 2014, no. 31045/10, § 84). Rather, with regard to the margin of appreciation concerning restrictions of the freedom of trade unions, it made the following differentiation: If a legislative restriction strikes at the core of trade-union activity, the national legislature has a lesser margin of appreciation and more is required to justify the resulting interference, in the general interest, with the exercise of trade-union freedom. Conversely, if it is not the core but a secondary or accessory aspect of trade-union activity that is affected, the margin of appreciation is wider and the interference is more likely to be proportionate (cf. ECtHR, National Union of Rail, Maritime and

Transport Workers v. United Kingdom, Judgment of 8 April 2014, no. 31045/10, § 87). With regard to secondary strike action, the European Court of Human Rights held that it did not affect the core of the freedom of association, but merely constituted a secondary or accessory aspect and therefore a wider margin of appreciation concerning restrictions were to be recognised to the national authorities (cf. ECtHR, National Union of Rail, Maritime and Transport Workers v. United Kingdom, Judgment of 8 April 2014, no. 31045/10, § 88). **[180]**

Against this background, a ban on strike action for German civil servants and specifically for teachers with civil servant status is justified under Art. 11(2) first sentence ECHR. In the present constitutional complaint proceedings, teachers with civil servant status participated in strike action called by the German Education Union (*Gewerkschaft Erziehung und Wissenschaft* - GEW). This union represents both teachers with civil servant status and teachers with employee status. Based on the legal situation in Germany, the GEW negotiates collective agreements with the Employers' Association of the *Länder* (*Tarifgemeinschaft der Länder*) for teachers with employee status only. These collective agreements do not apply to civil servants; in their case, the federal legislature and the respective Land legislatures, which have exclusive competence for determining the working conditions of civil servants, decide whether and to what extent the outcomes of collective bargaining for employees in the public sector are transferred to civil servants. In part, the complainant no. I. and the complainants no. II. to IV. sought to bring about such a transfer of collective bargaining outcomes by means of their participation in strike action. This behaviour was (at least also) intended to support a strike action aimed at the conclusion of a collective agreement, and shows a certain similarity to a secondary strike; thus, this behaviour is not a core aspect of the guarantees of Art. 11(1) ECHR. The wide margin of appreciation that is generally granted to the Federal Republic of Germany in such cases has not been exceeded in the case at hand. The ban on strike action, which is applicable to parts of the public service and which is also a recognised constitutional tradition, is not a manifestation of the civil servants' privileged status (permanent employment status, entitlement to health insurance benefits, pensions) and is not justified merely based on their function to maintain the administration and the protection of third party rights. Rather, it is decisive that in the system of German civil service law, the civil servant status entails interrelated rights and duties; expansions or restrictions of one right or duty of the civil service generally also result in changes to the other rights or duties. [...] Granting a right to strike to civil servants would fundamentally change the system of German civil service law and thus call it into question. This system is a particular national tradition of the Federal Republic of Germany; it is due to the fact that there is a great diversity between the States of Europe in the sphere of cultural and historical development (cf. also ECtHR <GC>, Lautsi et al. v. Italy, Judgment of 18 March 2011, no. 30814/06, § 68 […]). **[181]**

The balancing of interests against the rights and freedoms of others to be undertaken under Art. 11(2) first sentence ECHR also has to include the fact that in the case of the complainant no. I. and the complainants no. II. to IV., the ban on strike action serves to safeguard the right to education, and thus serves to protect a human right enshrined in Art. 2 of the First Protocol ECHR and in other international treaties [...]. **[182]**

As a compensation for the ban on strike action [...] Germany has established a participation of umbrella organisations of the trade unions in the drafting of statutory provisions concerning the civil service […]. To further compensate for the civil servants' lacking possibility to influence their employment conditions by measures of labour dispute, Art 33 (5) GG affords them the subjective public right to have the constitutionality of their alimentation reviewed in court (cf. BVerfGE 139, 64 et seq.; 140, 240 et seq. […]). This possibility of judicial review, traditionally granted only to the civil servants and not to public service employees, and the subjective rights granted under Art. 33(5) GG would be almost completely meaningless if civil servants had a right to strike. **[183]**

bb) In addition, as (former) teachers with civil servant status, the complainant no. I. and the complainants no. II. to IV. are members of the administration of the state within the meaning of Art. 11(2) second sentence ECHR. In the opinion of the European Court of Human Rights, this exception provision neither excludes a specific sector nor is it an independent reason to justify the restriction, but an addition to Art. 11(2) first sentence ECHR, for which a review of proportionality is specifically required (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 97, 107, in derogation from the European Commission on Human Rights, Council of Civil Service Unions and others v. United Kingdom, Decision of 20 January 1987, no. 11603/85 […]). **[184]**

Pursuant to Art. 11(2) second sentence ECHR, the exercise of the guarantees under Art. 11(1) ECHR can be restricted for members of the armed forces, of the police or of the administration of the state. The restrictions that can be imposed on the above-mentioned groups of persons must be construed strictly (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 97 [...]; in particular regarding members of the administration of the state cf. ECtHR <GC>, Vogt v. Germany, Judgment of 26 September 1995, no. 17851/91, § 67). Thus, one aspect to be assigned to the concept of administration of the state could be the exercise of public authority on behalf of the state (cf. ECtHR Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, § 32 with reference to ECtHR <GC>, Pellegrin v. France, Judgment of 8 December 1999, no. 28541/95, §§ 64 et seq. […]). **[185]**

So far, the European Court of Human Rights has not answered the question, whether teachers employed at state schools in Germany are members of the administration of the state within the meaning of Art. 11(2) second sentence

ECHR. Rather, the Court left the question unanswered in two proceedings against the Federal Republic of Germany, because it was not essential for the decision of these cases (cf. ECtHR <GC>, Vogt v. Germany, Judgment of 26 September 1995, no. 17851/91, § 68; ECtHR, Volkmer v. Germany, Judgment of 22 November 2001, no. 39799/98). **[186]**

In the opinion of the Senate, teachers with civil servant status are members of the administration of the state within the meaning of Art. 11(2) second sentence ECHR. However, it would be excessive and no longer be compatible with the requirements of the European Convention on Human Rights to consider all public service employees of a state - even employees of state-run commercial or industrial concerns (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, § 32) - members of the administration of the state. As the legal facts already show, civil servants who, pursuant to Art. 33(4) GG, stand in a relationship of service and loyalty defined by public law, make up the smaller part of personnel in comparison to public service employees in the two-track German public service system. On 30 June 2016, only about 1.7 million persons of almost 4.7 million employees working in the public service held the status of civil servant or judge (cf. *Statistisches Bundesamt* [Destatis], public service personnel, at: https://www.destatis.de) **[187]**

Moreover, in case of teachers at state schools, which is the relevant group in these proceedings, the state has a special interest in the discharge of duties by civil servants. The school system and the state's educational mandate are of great significance under the Basic Law (Art. 7 GG) and the constitutions of the *Länder*. In some of the *Länder*, the employment of teachers with civil servant status is the rule (cf. Art. 133(2) of the Constitution of the Free State of Bavaria). It is true that teachers do not primarily fulfil government duties (cf. BVerfGE 119, 247 <267>). Thus, Art. 33(4) GG does not conflict with hiring teachers as employees in the public service, which is in fact practiced in Germany to a varying degree depending on the respective *Land*. The employment of teachers without civil servant status is not based on their function or the duties they perform, but generally on special factual reasons [...]. Some of the teachers employed without civil servant status do not fulfil the personal requirements necessary to become civil servants; in other cases the state based its decision to establish an employee relationship on practical administrative considerations. In the past, the hiring of teachers without civil servant status lead to more flexible types of employment; for instance, the Free State of Saxony reacted to the (then) necessary reduction of overemployment in the education sector that had been caused by demographic changes after the German reunification. Due to the factual separation of the employment relationships of teachers in Germany, it can hence not be denied that teachers with civil servant status are (to be treated as) members of the administration of the state within the meaning of Art. 11(2) second sentence ECHR. Teachers exercise such important duties that the decision on granting them the status of a civil servant must be reserved to the state. **[188]**

III.

The constitutional complaints are also unfounded with regard to the violation of Art. 9(3) GG in conjunction with Art. 20(3) GG claimed by the complainants in the proceedings 2 BvR 1738/12 and 2 BvR 1068/14. **[189]**

1. The binding effect of law and justice also includes a duty to take into account the guarantees of the European Convention on Human Rights and the decisions of the European Court of Human Rights as part of a methodologically tenable interpretation of the law. Both, failing to consider a decision of the ECtHR and "enforcing" such a decision in a schematic way, in violation of higher-ranking law, may therefore violate fundamental rights in conjunction with the principle of the rule of law (cf. BVerfGE 111, 307 <323 and 324>). [...] If decisions by the European Court of Human Rights are relevant for the evaluation of the facts of a case, the aspects, which the European Court of Human Rights took into account in the course of its balancing must principally also be included in the constitutional assessment, i.e. in the review of proportionality, and the results of the balancing must be addressed (cf. also BVerfGK 3, 4 <9>). **[190]**

2. The challenged decisions fulfil these requirements. For the evaluation of the respective facts of the case, the courts took into account Art. 11 ECHR as interpreted by the European Court of Human Rights and addressed it. [...] Thus, the courts neither failed to examine the guarantees of the European Convention on Human Rights nor to take into account the decisions of the European Court of Human Rights. **[191]**

X. Article 21.2 of the Basic Law: The Prohibition of Political Parties

Application of the Federal Council (*Bundesrat*) of the Federal Republic of Germany to declare unconstitutional and to dissolve the National Democratic Party of Germany pursuant to Article 21.2 of the Basic Law, BVerfG, 17.1.2017, 2 BvB 1/13, http://www.bverfg.de/e/bs20170117_2bvb000113en.html (BVerfGE 144, 20–367) "Application to Prohibit the National Democratic Party"

Explanatory Annotation

Political parties are associations and as such they are in principle addressees of the freedom of association in Article 9 of the Basic Law, which is part of the catalog of fundamental rights protected by the Basic Law in Articles 1 to 19 of the Basic Law. However, Article 21 of the Basic Law is especially dedicated to political parties attributing to them a constitutional role in the "formation of the political will of the people and establishing a legal framework around their organization, especially the necessity of a party internal democratic structure, and their financial conduct. The details are governed by a special statute, the Political Parties Act.[125] The constitutional status afforded to political parties has legal consequences, not least with regard to the public funding of political parties[126] but also concerning entitlements for access to public spaces and public infrastructure, e.g., to conduct party conferences or political rallies. The Constitutional Court has played a massive role in shaping the law around political parties; its decisions concerning party and campaign financing have sometimes ventured into the grey area of law-making rather than merely interpreting the Basic Law. The Constitutional Court's views went from prescribing direct state contributions for political parties to limiting subsidies to a reimbursement scheme for campaign costs and then back again to a general contribution to the party finances.[127] In the light of the enormous role that political parties play in securing a functioning political system because they channel the various and many political opinions into packages that can be presented as electoral choices, and given that the constitutional status of political parties is connected to concrete entitlements ranging from monetary subsidies[128] to access to infrastructure, the question of the prohibition and dissolution of political parties becomes an issue that transcends the treatment of "ordinary" associations. It is for this reason that

125 Political Parties Act as Promulgated on [Parteiengesetz in der Fassung der Bekanntmachung vom] 31.1.1994 (BGBl. I S. 149), last amended on 10.7.2018 [zuletzt gändert on 10.7.2018] (BGBl. I S. 1116); English text version available at https://www.bmi.bund.de/SharedDocs/downloads/DE/gesetztestexte/Parteiengesetz_PartG_engl_042009.html.

126 Cursory overview in English available from the German Parliament at https://www.bundestag.de/en/parliament/function/party_funding; see also Library of Congress, Campaign Finance: Germany, 2009 (somewhat outdated but still of general value), https://www.loc.gov/law/help/campaign-finance/germany.php (last accessed on 22.8.2019).

127 The major decisions of the Constitutional Court can be found in BVerfGE 8, 51; 12, 276; 20, 56; 24, 342; 85, 264.

128 § 18.2 of the Political Parties Act sets the absolute ceiling for state contributions to the political parties in 2019 at EUR 190 Million. The monies distributed from this amount are roughly calculated on the basis of votes received by the respective parties in federal, state and European Parliament elections and by a 45% co-contribution for every Euro paid by party members as membership dues or donations (up to EUR 3300) made to a party. For the complex details see § 18.3 of the Political Parties Statute.

Article 21.4 of the Basic Law attributes the power to declare a political party unconstitutional exclusively to the Constitutional Court. The Act on the Federal Constitutional Court[129] stipulates in § 43 that only the Federal Parliament (*Bundestag*), the Federal Council (*Bundesrat*), the Federal Government, and, for parties only operating in a constitutive state (*Land*), the respective state government[130], can apply to the Constitutional Court for such a declaration. The legal consequences of a declaration of unconstitutionality are stipulated in § 46.3 of the Act on the Federal Constitutional Court and consist of the dissolution of the party, a prohibition to create a replacement party, and the option to confiscate the assets of the unconstitutional party.

There have been only two successful declarations of unconstitutionality of political parties. Both go back to the beginning of the Federal Republic of Germany under the still relatively new Basic Law. The declarations concerned a successor organization of the Nazi party called "*Sozialistische Reichspartei*"[131] and the Communist Party of Germany (KPD)[132].

In those decisions, the Constitutional Court erected fairly steep thresholds for a party to be declared unconstitutional. Article 21.2 of the Basic Law makes such a declaration contingent on a party seeking "to seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany."[133] The Court interprets these requirements restrictively. It is not sufficient to pursue political goals, which might as such not be compatible with the Basic Law. The Basic Law can be amended. It follows that such an amendment can be sought as part of a political platform. There are only some core elements which are beyond any constitutional reform (Article 79.3 of the Basic Law), but even some of those, e.g., the principles of the republic or federalism, do not qualify as being exempt from being politically pursued. Only the core principles down in Article 1 (human dignity) and Article 20 (democracy, the rule of law) are relevant in the context of declaring a party unconstitutional.[134] However, merely politically pursuing a revision of these core elements of a free society is also not sufficient. The party in question must systematically go out to fight these principles.[135] Violence or criminal activity is not necessarily required but, of course, a potent indicator for such a pursuit the defeat of these core principles beyond just the mere voicing of political opinion.[136]

129 The English Text of this Act (Bundesverfassungsgerichtsgesetz, BVerfGG) is available at https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.html (last accessed on 21.10.2019).

130 According to Article 62 of the Basic Law the Federal Government consists of the (federal) cabinet ministers and the Chancellor.

131 BVerfGE 2, 1, SRP-decision of 23.10.1952.

132 BVerfGE 5, 85. KPD-decision of 17.8.1956. For more background on both of these cases see Franz, Paul, Unconstitutional and Outlawed Political Parties: A German-American Comparison, 5/1 Boston College International and Comparative Law Review 1982, 51.

133 Article 21.2 of the Basic Law as translated and available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0121 (last accessed on 21.10. 2019).

134 BVerfG, 17.1.2017, 2 BvB 1/13, http://www.bverfg.de/e/bs20170117_2bvb000113en.html, paras. 536 et seq. (BVerfGE 144, 20–367).

135 Id. at paras. 575 et seq.

136 Id. at para. 580.

The 2017 decision translated below concerns the National Democratic Party (NPD), also a Nazi party. An earlier attempt to have the party declared unconstitutional failed in 2003 for procedural reasons because it turned out during the proceedings, *inter alia*, that the party leadership both on the federal and state levels consisted of a number of persons who were clandestinely working for the various state and federal Offices for the Protection of the Constitution (*Amt für Verfassungsschutz*); it was thus unclear whether the incriminating material was attributable to the party or to the services watching the party.[137]

The renewed attempt to have the party declared unconstitutional failed again, even though the Constitutional Court acknowledged that the party "seeks, because of its aims and the behavior of its adherents, to abolish the free democratic basic order."[138] However, the Court concluded that the party is presently so weak that it is not conceivable that its "seeking" could succeed.[139] In doing so, the Court explicitly departed from its interpretation of the term "seeking" in its 1956 decision against the Communist Party, where it had specifically stated that the lack of any reasonable prospects of success for the party could not bar the prohibition of that party.[140]

It should also be noted that the Constitutional Court, despite not declaring the party unconstitutional, invested considerable effort in arguing that its approach is fully in line with the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights regarding the prohibition of political parties under Article 11 of the ECHR.[141] In other words, the Court indirectly expressed its view that it could have declared the party unconstitutional under application of the ECHR but it chose not to by construing Article 21.2 of the Basic Law even stricter. The reasons for emphasizing this otherwise moot point could lie in the fact that whereas the application against the party was unsuccessful, it nonetheless led to profound legal consequences. The Constitutional Court emphasized that Article 21 of the Basic Law as it stood at the time of the decision was a black-and-white, binary provision. If the criteria were fulfilled, there was only one outcome, namely the declaration of unconstitutionality. The Court, however, also stated that this could change if the Basic Law were amended accordingly to allow for counter-measures against extremist parties fulfilling some of these criteria below the threshold of the mandatory dissolution of the party.[142] The Federal Parliament (*Bundestag*) and

137 BVerfG, 18.3.2003, 2 BvB 1/01, http://www.bverfg.de/e/bs20030318_2bvb000101.html, paras. 77 et seq. (available only in German). The institutions of the Office for the Protection of the Constitution exist independently both on the federal and on the state levels. They are domestic (only) secret services tasked with gathering information from open sources and clandestinely about efforts directed against the Basic Law and the existence of the Federal Republic ranging from terrorist or espionage to domestic extremist parties and their activities. For more information see https://www.verfassungsschutz.de/en/index-en.html (last accessed on 23.8.2019).

138 BVerfG, 17.1.2017, 2 BvB 1/13, http://www.bverfg.de/e/bs20170117_2bvb000113en.html, Headnote 9(a) and para 633.

139 Id. at paras. 633 et seq.

140 Id. at para. 586.

141 Id. at paras. 607 et seq., 625.

142 Id. at paras. 527, 625.

the Federal Council (*Bundesrat*) reacted to this "signposting" rather quickly (in July 2017, barely 6 month after the decision) with an amendment of Article 21 of the Basic Law and the addition of a new subsection 3, which makes it possible declare a party unconstitutional without this necessarily leading to the dissolution of the party and to instead, as a lesser means, bar such a party from receiving any public funds, be it by way of public party and campaign financing or be it by way of tax benefits for such parties or contributions to such parties.

The right-wing extremist party at issue in this the decision may have won the day not only by avoiding dissolution but also by prompting the Constitutional Court to construe the already strict criteria for the declaration of unconstitutionality even stricter, i.e. for the Court now demanding that such a party must additionally meet a minimum threshold of a prospect of success for its attempt to remove the core principles of the Basic Law of human dignity, democracy and the rule of law. But that win came at considerable expense because of the subsequent amendment of the Basic Law and its Article 21 which was the result of a not particularly subtle hint by the Court that such an amendment is indeed conceivable.

Translation of the "Prohibition of Political Parties" Judgment, BVerfG, 17.1.2017, 2 BvB 1/13, http://www.bverfg.de/e/bs20170117_2bvb000113en.html (BVerfGE 144, 20–367)

Headnotes:

1. The prohibition of a political party under Art. 21(2) of the Basic Law (*Grundgesetz* - GG) is the sharpest weapon, albeit a double-edged one, a democratic state under the rule of law has against an organised enemy. Its aim is to counter risks emanating from the existence of a political party with a fundamentally anti-constitutional tendency and from the typical ways in which it can exercise influence as an association.

2. The requirement that political parties be free from interference by the state (*Gebot der Staatsfreiheit*) and the principle of a fair trial are indispensable when it comes to carrying out proceedings for the prohibition of a political party.

    a) The use of police informants and undercover investigators at the executive level of a political party during ongoing proceedings to prohibit the political party is incompatible with the requirement that there be no informants at the party's executive level.

    b) The same applies to the extent that an application for the prohibition of a political party is essentially supported by materials and facts that informants or undercover investigators have played a crucial role in authoring.

    c) Under the principle of a fair trial, observation of a political party may not serve the objective of spying out the party's procedural strategy; thus obtained information relating to the party's procedural strategy may not be used during the proceedings in a way which is detrimental to the political party's defence.

    d) An obstacle resulting in discontinuation of proceedings is the *ultima ratio* of possible legal consequences of violations of the Constitution. In order to establish whether there is an irremediable procedural obstacle to proceedings for the prohibition of

a political party, 'procedural requirements under the rule of law, on the one hand, need to be balanced against the preventive purpose of these proceedings, on the other hand.

3. The concept of the free democratic basic order within the meaning of Art. 21(2) GG only covers those central fundamental principles which are absolutely indispensable for the free constitutional state.

    a) The free democratic basic order is rooted primarily in human dignity (Art. 1(1) GG). The guarantee of human dignity covers in particular the safeguarding of personal individuality, identity and integrity and elementary equality before the law.

    b) Furthermore, the principle of democracy is a constitutive element of the free democratic basic order. The possibility of equal participation by all citizens in the process of forming the political will as well as accountability to the people for the exercise of state authority (Art. 20(1) and (2) GG) are indispensable for a democratic system.

    c) Finally, the concept of the free democratic basic order is further determined by the principle that organs of the state be bound by the law (Art. 20(3) GG) - a principle which is rooted in the principle of the rule of law, and by independent courts' oversight in that regard. At the same time, protection of the freedom of individuals requires that the use of physical force is reserved for the organs of the state which are bound by the law and subject to judicial oversight.

4. The concept of "abolishing" (*beseitigen*) the free democratic basic order describes the abolishment of at least one of the constituent elements of the free democratic basic order or its replacement with another constitutional order or another system of government. The criterion "undermining" can be assumed to be met once a political party, according to its political concept, noticeably threatens the free democratic basic order with sufficient intensity.

5. The fact that a political party is seeking to abolish or undermine the free democratic basic order must be clear from its aims or from the behaviour of its adherents.

    a) The aims of a political party are the embodiment of what a party intends to achieve politically.

    b) Adherents in this sense are all persons who support a party's cause and profess their commitment to the party, even if they are not members of the political party.

    c) Activities of a political party's organs, specifically the party's executive committee and its leading functionaries, can generally be attributed to the political party. Statements or actions by ordinary members can only be attributed to the political party if they are undertaken in a political context and the political party has approved or condoned them. In the case of adherents who are not members of the political party, influence or approval, in whatever form, of their behaviour by the political party is generally a necessary condition for attributing such behaviour to the party. There can be no blanket attribution of criminal offences and acts of

violence if there is no specific link for such an attribution. No differing assessment may be inferred from the principle of indemnity.

6. In order to prohibit a political party, it is not sufficient that its aims are directed against the free democratic basic order. Instead, the party must "seek" to undermine or abolish the free democratic basic order.

    a) The notion of "seeking" requires active behaviour in that respect. The prohibition of a political party does not constitute a prohibition of views or ideology. In order to prohibit a political party, it is necessary that a party's actions amount to a fight against the free democratic basic order.

    b) It requires systematic action of the political party that amounts to a qualified preparation for undermining or abolishing the free democratic basic order or aims at endangering the existence of the Federal Republic of Germany.

    c) It is not necessary that this results in a specific risk to the goods protected under Art. 21(2) GG. Yet it requires specific and weighty indications which suggest that it is at least possible that the political party's actions directed against the free democratic basic order of the Federal Republic of Germany or against its existence could be successful.

    d) The use of force is in itself a weighty indication justifying the assumption that action against the goods protected under Art. 21(2) GG is successful. The same applies if a political party creates, in regionally restricted areas, an "atmosphere of fear" which is likely to undermine in the long term the free and equal participation of all in the process of forming the political will.

7. Art. 21(2) GG leaves no room for assuming that there are other (unwritten) criteria.

    a) A party's similarity in nature to National Socialism alone does not justify prohibiting it. A party's similarity in nature to National Socialism does, however, provide an indication that this political party is pursuing anti-constitutional aims.

    b) A separate application of the principle of proportionality is not required.

8. The mentioned requirements which need to be met to establish that a political party is unconstitutional are fully compatible with the requirements for a prohibition of political parties that the European Court of Human Rights has derived from the European Convention on Human Rights (ECHR).

9. Measured against these standards, the application for prohibition is unfounded:

    a) The respondent seeks, by reason of its aims and the behaviour of its adherents, to abolish the free democratic basic order. The respondent intends to replace the existing constitutional system with an authoritarian national state that adheres to the idea of an ethnically defined "people's community" (*Volksgemeinschaft*). This political concept disregards the human dignity of all those who do not belong to its ethnically-defined *Volksgemeinschaft* and is thus incompatible with the principle of democracy as set out in the Basic Law.

b) The respondent advocates aims which are directed against the free democratic basic order and systematically acts towards achieving those aims in a qualified manner.

c) However, there are no specific and weighty indications suggesting even at least the possibility that these endeavours might be successful.

Facts:

The subject of the proceedings is the application by the *Bundesrat* to establish the unconstitutionality of the National Democratic Party of Germany (NPD) and to dissolve it pursuant to Art. 21(2) of the Basic Law (*Grundgesetz* - GG), Art. 93(1) no. 5 GG, § 13 no. 2 and §§ 43 et seq. of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG). **[1]**

[Excerpt from press release no. 4/2017 of 17 January 2017]

The National Democratic Party of Germany (NPD) advocates a concept aimed at abolishing the existing free democratic basic order. The NPD intends to replace the existing constitutional system with an authoritarian national state that adheres to the idea of an ethnically defined "people's community" (*Volksgemeinschaft*). Its political concept disrespects human dignity and is incompatible with the principle of democracy. Furthermore, the NPD acts in a systematic manner and with sufficient intensity towards achieving its aims that are directed against the free democratic basic order. However, (currently) there is a lack of specific and weighty indications suggesting that this endeavour will be successful; for that reason, the Second Senate of the Federal Constitutional Court, in its judgment pronounced today, unanimously rejected as unfounded the *Bundesrat*'s admissible application to establish the unconstitutionality of the NPD and its sub-organisations (Art. 21(2) of the Basic Law, *Grundgesetz* - GG).

[End of excerpt]

I.

1. The respondent was founded on 28 November 1964 as a collective movement of national democratic forces. By as early as September 1965 its political party organisation covered almost the whole of the Federal Republic of Germany and, with election results of between 5.8% and 9.8% of the valid votes cast and a total of 61 members of parliament it gained seats in the federal state parliaments (*Landtage*) of Baden-Wuerttemberg, Bavaria, Bremen, Hesse, Lower Saxony, Rhineland-Palatinate and Schleswig-Holstein. In 1969, with a proportion of 4.3% of second votes, it failed to reach the five-percent hurdle in the *Bundestag* election. In the following 35 years, the respondent was unable to gain any seats in federal state parliament (*Landtag*) or *Bundestag* elections. **[2]**

It was not until 2004 that it was again able to gain representation in a federal state parliament; in the *Landtag* election in Saxony, it gained 9.2% of the valid votes cast. In 2006 it was also able to do so in Mecklenburg-Western Pomerania with 7.3% of the valid votes cast. Despite losing votes in the subsequent *Landtag* elections in these two federal states, it managed to retain a presence in both federal state parliaments (with election results in Saxony in 2009 of

5.6% of the valid votes cast and of 6.0% in Mecklenburg-Western Pomerania in 2011). Due to the abolished electoral threshold for European Parliament elections, the respondent gained representation in the European Parliament in 2014 with its MEP Udo Voigt with 1.0% of the valid votes cast. **[3]**

Currently, the respondent is not represented in any parliament at federal or *Land* level. It achieved a 1.3% share of second votes in the *Bundestag* election in 2013. With 4.9% of valid votes cast, it narrowly failed to retain its representation in the *Landtag* election in Saxony in 2014, and in the *Landtag* election in Mecklenburg-Western Pomerania in 2016 with a 3.0% share of second votes. In the most recent *Landtag* elections in the former West German federal states it achieved between 0.2% (Bremen) and 1.2% (Saarland), and between 1.9% (Saxony-Anhalt) and 4.9% (Saxony) in the former East German federal states. **[4]**

Since the 2014 local government elections (cf. regarding the election results para. 904 et seq.), the respondent has, according to the uncontested information provided by the applicant, 367 seats at municipal level, most of which are in the former East German federal states. **[5]**

2. The respondent's membership numbers reached a peak of 28,000 in 1969 and sank steadily in subsequent years; by its own information it had merely 3,240 members in 1996. Following the election of Udo Voigt as the party's chairman in 1996, its membership increased once more, reaching a (new) peak of 7,014 members in 2007, after which it declined again to 5,048 by 31 December 2013. At the party's national convention (*Bundesparteitag*) in Weinheim in November 2015, its chairman Frank Franz declared, however, that there had been a growth in membership numbers again for the first time in years. He provided specific details of this in the oral hearing, citing a rate of increase of 8% over the previous year. **[6]**

3. The respondent is organised into (sixteen) federal state associations as well as regional and district associations. Under § 6(1) first and second sentences of its party statute (in the latest version of 21/22 November 2015), the national convention is the "supreme organ of the NPD. It determines the setting of political objectives and convenes for an ordinary convention at least every other calendar year." Under § 7(1) first sentence of the NPD statute, the party's executive committee (*Parteivorstand*) is responsible for the "political and organisational leadership of the NPD". **[7]**

4. The respondent has its own youth organisation, the "Young National Democrats" (*Junge Nationaldemokraten* - JN), founded in 1969, which had roughly 350 members in 2012. The "National Democratic University Union" (*Nationaldemokratischer Hochschulbund e.V.* - NHB) was founded as a sub-organisation of the respondent as early as 1966, but no longer has a presence in university politics. In 2003, the "Municipal Political Union of the NPD" (*Kommunalpolitische Vereinigung der NPD* - KPV) was founded to represent the interests of municipal representatives nationally, and in 2006 the "National Women's Ring" (*Ring Nationaler Frauen* - RNF) was founded, which sees itself as the "mouthpiece and point of contact for all national women whether party member or not" and had around 100 members in 2012. Under § 7(3) first sentence of the NPD party statute (in the version of 21/22 November 2015), the (federal) chairpersons of these associations are members of the NPD executive committee by virtue of their office "if they are members of the NPD". **[8]**

5. The financial report for 2013 shows membership subscriptions for 2013 of EUR 488,859.96 (2014: EUR 459,157.77) and just under EUR 804,000 (2014: EUR 866,000) in donations; together these make up approximately 43.4% (2014: 43.6%) of the party's total income (cf. *Bundestag* document (*Bundestagsdrucksache* - BTDrucks) 18/4301, p. 109; BTDrucks 18/8475, p. 109). **[9]**

6. The company *Deutsche Stimme Verlags GmbH*, founded by the respondent, publishes the party newspaper *Deutsche Stimme* (German Voice). According to the respondent, this had a circulation in mid-2012 of 25,000 copies. The company has its own video channel, DS-TV. Beyond this, the respondent is also responsible for various regional publications and makes intensive use of the Internet. It has a presence on Facebook, Twitter and, with video channels, on YouTube (cf. also paras. 852 and 853). **[10]**

II.

Proceedings instigated in 2001 by applications initiated by the Federal Government, the German *Bundestag* and the applicant in the present proceedings to establish the unconstitutionality of the respondent and to have it dissolved were discontinued by order of the Second Senate of 18 March 2003 (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* - BVerfGE 107, 339). **[11]**

III.

In a brief of 1 December 2013 the applicant applied, on the basis of its decision of 14 December 2012 (*Bundesrat* document, *Bundesratsdrucksache* BRDrucks 770/ 12), for the unconstitutionality of the respondent and its sub-organisations to be established and for its party organisation and that of its sub-organisations to be dissolved, for the prohibition of creating or continuing substitute organisations, and for its assets and those of its sub-organisations to be confiscated. It based this application on the first alternative in Art. 21(2) first sentence GG. **[12]**

[...] **[13-74]**

III.

[...] **[497-498]**

IV.

[…] **[499-509]**

C.

The standard for establishing the unconstitutionality of a political party in accordance with Art. 21(2) GG must take into account both the continuing claim to validity of the norm and its exceptional nature (I.). If these two factors are complied with by a determination of the constituent elements that need to be met to prohibit a political party (II.) such a determination is, pursuant to the case law of the European Court of Human Rights (ECtHR), compatible with the stipulations of the European Convention on Human Rights (ECHR) (III.). The law of the European Union is not decisive in respect of the conditions under which a political party […] may be prohibited (IV.). **[510]**

I.

[…] **[511]**

1. a) Art. 21 GG accorded political parties their own constitutional status for the first time. Unlike the Weimar Constitution (*Weimarer Reichsverfassung* - WRV), which refrained from giving political parties a constitutional classification, the Basic Law accords them a special status, which is elevated in comparison to that of associations within the meaning of Art. 9(1) GG (cf. BVerfGE 107, 339 <358>). They are elevated by Art. 21 GG to the rank of constitutional institutions (cf. BVerfGE 1, 208 <225>; 2, 1 <73>; 20, 56 <100>; 73, 40 <85>; 107, 339 <358>) and acknowledged as being necessary "factors of constitutional life" (BVerfGE 1, 208 <227>). The prerequisite for their carrying-out of the constitutional task assigned to them of participating in the formation of the political will of the people is their freedom of foundation and activities which is guaranteed in Art. 21(1) GG. **[512]**

   b) [...] **[513]**

   c) Establishing the framework for prohibiting political parties in Art. 21(2) GG was an expression of the aspiration of the constitutional legislature (*Verfassungsgeber*) to create the structural conditions for preventing a repetition of the catastrophe of National Socialism and of developments in the system of political parties such as occurred in the final phase of the Weimar Republic (cf. BVerfGE 107, 339 <362>). The aim of Art. 21(2) GG is to counter risks emanating from the existence of a political party with a fundamentally anti-constitutional tendency and from the typical ways in which it can exercise influence as an association (cf. BVerfGE 25, 44 <56>). In accordance with the claim "No absolute freedom for the enemies of freedom" (cf. BVerfGE 5, 85 <138>), such a political party should not be given the opportunity to abuse the freedom of political parties enjoyed under Art. 21(1) GG to fight against the free democratic basic order. **[514]**

2. This concept of protecting freedom by restricting freedom does not contradict the Constitution's fundamental decision in Art. 20(2) GG in favour of a process that is free from interference by the state of politically free and in favour of an open formation of opinion and will by the people in relation to the organs of the state (cf. BVerfGE 20, 56 <100>; 107, 339 <361>). In order to permanently establish a free democratic order, it is not the intention of the Basic Law to guarantee also the freedom to abolish the conditions for freedom and democracy and to abuse the guaranteed freedom for the purpose of abolishing that very order. Therefore, the aim of Art. 21(2) GG is to protect those underlying fundamental values which are indispensable for the peaceful and democratic co-existence of the citizens. **[515]**

Against this background, the Basic Law selects, from the pluralism of aims and values which have taken shape in the political parties, certain fundamental principles for structuring the state. These principles, once democratically approved, should be acknowledged as absolute values and therefore resolutely defended against any attack. The aim is to create a synthesis between the principle of tolerance towards all political opinions and the commitment to certain inviolable fundamental values of the state order. Accordingly, Art. 21(2) GG expresses the deliberate

constitutional will for the solution of a problem of boundaries in the free democratic state order, enshrining the experience of a constitutional legislature (*Verfassungsgeber*) who in a certain historical situation no longer believed in being able to realise, in a pure form, the principle of the neutrality of the state *vis-à-vis* the political parties, and a commitment to a - in this sense - militant democracy (cf. with regard to the whole matter BVerfGE 5, 85 <139>). **[516]**

The respondent is therefore wrong to object that the prohibition of a political party which would result in the elimination of an entire political tendency violates the democratic principle of the sovereignty of the people ("The people are always right"). […] **[517]**

3. The possibility provided by Art. 146 GG for the creation of a genuinely new Constitution does not run counter to the applicability of Art. 21(2) GG. Irrespective of whether Art. 146 GG is applicable merely in the case of a complete constitutional novation, having regard to the principles of Art. 79(3) GG, or also covers a complete rewriting of the Basic Law […], the Basic Law remains fully in force until a new Constitution freely adopted by the German people enters into force (cf. BVerfGE 5, 85 <128>). Even if Art. 146 GG were to give the constitutional legislature (*Verfassungsgeber*) the opportunity to create a completely new Constitution, this would not legitimise actions by any political party actively aimed at undermining or abolishing the free democratic basic order while the Basic law is applicable. […] **[518]**

4. Nor can inapplicability of Art. 21(2) GG be substantiated by the assertion that the provision is merely of a transitional nature in that it aims for structuring the transition from National Socialism to the free democratic order and that the norm has now lost its claim to validity […]. **[519]**

The provision could at best be deemed to have lost its claim to validity if it had been designed as a mere transitional arrangement. There is nothing in the wording of the provision to suggest that this is the case. Moreover, the protective purpose of Art. 21(2) GG, which has the aim of averting threats to the free democratic basic order arising from strengthened anti-democratic political parties by prohibiting them, is not restricted to the phase during which the free democracy under the Basic Law is constituted. […] **[520]**

5. Finally, the respondent's opinion is incorrect […] that prohibition of a political party [can] only be regarded as legitimate if the political party is involved in violent subversive movements. **[521]**

[…] For a political party to be prohibited it is sufficient that the political party in question "seeks" (*darauf ausgehen*) to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany. Accordingly, Art. 21(2) GG is not a provision that aims at averting specific threats. Rather, it aims to prevent, by way of preventive protection of the Constitution (cf. BVerfGE 5, 85 <142>; 9, 162 <165>; 107, 339 <386>; regarding Art. 9(2) GG: BVerfGE 80, 244 <253> […]), specific threats to the free democratic basic order from arising in the first place. Thus, a re-definition of the concept of the prohibition of political parties in Art. 21(2) GG following the Constitution's emergency regulations can be ruled out. […] **[522]**

6. In interpreting Art. 21(2) GG, due regard must be given to the fundamental constitutional decisions in favour of openness of the process of formation of political will, of freedom of

expression (Art. 5(1) GG) and freedom of political parties from interference by the state (Art. 21(1) GG), as well as of the provision's exceptional nature as a consequence of the above. **[523]**

a) The Basic Law proceeds from the assumption that the only way to forming the will of the state is to have a constant intellectual exchange between social forces and interests and between political ideas and thus also between the political parties propagating them (cf. BVerfGE 5, 85 <135>). It relies on the power of this engagement as the most effective weapon against the spread of totalitarian and inhuman ideologies (cf. BVerfGE 124, 300 <320>). In Art. 21(1) GG it assigns a special role to the political parties as necessary instruments for the formation of the political will of the people (cf. BVerfGE 107, 339 <361>). Accordingly, prohibition of a political party is a serious interference with the freedom of formation of the political will and the freedom of political parties under Art. 21(1) GG, which can only be justified under particular conditions. Art. 21(2) GG, as an "exceptional norm which curtails democracy", must be applied with restraint (cf. Meier, loc. cit., p. 263). For this reason, a restrictive interpretation of the provision's individual constituent elements is required which takes account of the rule-and-exception relationship between the freedom of political parties enshrined in Art. 21(1) GG and the prohibition of political parties under Art. 21(2) GG. There is at the same time no scope for assuming the existence of unwritten constituent elements which would extend the provision's scope of application […]. **[524]**

b) The restrictive interpretation of the constituent elements under Art. 21(2) GG furthermore takes account of the fact that the peremptory legal consequence of the prohibition of a political party that follows from the establishment of its unconstitutionality is its dissolution. **[525]**

Any administrative intervention against the existence of a political party is ruled out until the Federal Constitutional Court has established its unconstitutionality, however hostile its behaviour may be towards the free democratic basic order (cf. BVerfGE 40, 287 <291>; 47, 198 <228>; 107, 339 <362>). […] In its present form, the Basic Law tolerates the threat linked to activities of a political party for the sake of political freedom, until its unconstitutionality has been established (cf. BVerfGE 12, 296 <306>; 47, 198 <228>; 107, 339 <362>). **[526]**

If, on the other hand, the Federal Constitutional Court's review results in the finding that the constituent elements of Art. 21(2) GG are met, the unconstitutionality of the political party must be established and it must be dissolved. The respondent is wrong in assuming that Art. 21(2) GG merely provides the possibility for establishing the unconstitutionality of a political party but leaves it to the "responsible citizen" to "execute" such a finding of constitutional law by not voting for a political party which has been found to be unconstitutional; therefore, in the respondent's opinion, the dissolution of a political party as envisaged in § 46(3) first sentence BVerfGG oversteps the boundary of what is constitutionally permissible. This opinion is not compatible with the concept of the provision of Art. 21GG. […] **[527]**

II.

The application for prohibition by the applicant concerns the legally protected good of the "free democratic basic order" (1.), which a political party must "seek" (4.) to "undermine or abolish" (2.) "by reason of its aims or the behaviour of its adherents" (3.). There are no other unwritten constituent elements for the prohibition of a political party (5.). **[528]**

1. The term "free democratic basic order" has been fleshed out in the case-law of the Federal Constitutional Court (a). Its regulatory content cannot be defined by means of general recourse to Art. 79(3) GG but is limited to those principles which are absolutely indispensable for the free democratic constitutional state (b). In that respect, the principle of human dignity (Art. 1(1) GG), which is specified in greater detail by the principles of democracy (d) and the rule of law (e), is at the forefront (c). **[529]**

a) aa) [...] **[530-534]**

b) aa) The concept of the free democratic basic order within the meaning of Art. 21(2) GG requires concentration on a few central fundamental principles which are absolutely indispensable for the free constitutional state. This limited approach seems to be required not least because of the exceptional nature of the prohibition of political parties. The fundamental decision by the Constitution in favour of an open process of formation of political will means that it must also be possible to critically challenge individual elements of the Constitution without causing the prohibition of the political party. Exclusion from the process of forming the political will can only be considered when what is being questioned and rejected is what is absolutely indispensable for guaranteeing free democratic co-existence and is thus not negotiable. **[535]**

bb) Such a focus on the central fundamental principles which are indispensable for democracy cannot be achieved by having recourse to the inalterable core of the Constitution as defined in Art. 79(3) GG. Unlike Art. 108 of the Draft Constitution drawn up by the Herrenchiemsee Convention (*Verfassungsentwurf des Verfassungskonvent auf Herrenchiemsee* - HerrenChE), the version of Art. 79(3) GG as adopted by the Parliamentary Council (*Parlamentarischer Rat*) does not only prohibit amendments of the Basic Law which would result in abolishing the free and democratic basic order […]. **[536]**

The regulatory content of Art. 79(3) GG goes beyond the minimum content of what is indispensable for a free democratic constitutional state. In particular, the free democratic basic order does not include the principles of the republic and of federalism as covered by Art. 79(3) GG, since constitutional monarchies and centralised states can also be in accordance with the guiding principle of a free democracy […]. **[537]**

c) The free democratic basic order is rooted primarily in human dignity (Art. 1(1) GG). This is recognised in the case-law of the Federal Constitutional Court as the highest value of the Basic Law (cf. BVerfGE 5, 85 <204>; 12, 45 <53>; 27, 1 <6>; 35, 202 <225>; 45, 187 <227>; 87, 209 <228>; 96, 375 <399>). Human dignity is not subject

to disposition. The state must respect and protect it in all its forms (cf. BVerfGE 45, 187 <227>). This deprives the state and its legal system of any absoluteness and any "natural" precedence. **[538]**

aa) The guarantee of human dignity covers in particular the safeguarding of personal individuality, identity and integrity and elementary equality before the law […]. This understanding is based on a conception of human beings as persons who can make free and self-determined decisions and shape their destiny independently (cf. BVerfGE 45, 187 <227>; 49, 286 <298>). The subjective quality of human beings is linked to an entitlement to social worthiness and to respect which forbids degrading people to "mere objects" of state action (cf. BVerfGE 122, 248 <271>). **[539]**

Even though it may be so that the effectiveness of this "object formula" is limited […], it is at any rate appropriate for identifying violations of human dignity wherever the quality of the human being as a subject and the resulting entitlement to respect is fundamentally called into question […]. This is especially the case if a perception supports a genuine and thus absolute precedence of a collective over the individual human being. Human dignity only remains inviolable if the individual is treated as fundamentally free, if albeit bound into society, and not the other way round as fundamentally unfree and subjugated to a superior instance. The absolute subjugation of a person to a collective, an ideology or a religion amounts to a violation of the value accorded to all human beings for their own sake simply by virtue of their being persons (BVerfGE 115, 118 <153>). It violates the individual's quality as a subject and constitutes an interference with the guarantee of human dignity which fundamentally violates the free democratic basic order. **[540]**

bb) Human dignity is egalitarian; it is founded exclusively in the fact that a person belongs to the human race, regardless of features such as origin, race, age or gender […]. Inherent in the individual's entitlement to respect as a person is the recognition of the individual as an equal member of the legally-constituted community […]. Thus, a legally devalued status or degrading inequality of treatment is incompatible with human dignity […]. This is in particular the case if such inequalities of treatment violate the prohibitions of discrimination under Art. 3(3) GG, which flesh out human dignity, regardless of the fundamental question of the human dignity content of the fundamental rights (cf. in this regard BVerfGE 107, 275 <284>). Anti-Semitic concepts or concepts aimed at racist discrimination are therefore incompatible with human dignity and violate the free democratic basic order. **[541]**

d) The principle of democracy is a constitutive element of the free democratic basic order. Democracy is the form of rule of the free and equal. It is based on the idea of free self-determination of all citizens (cf. BVerfGE 44, 125 <142>). Insofar the Basic Law is based on the assumption of the intrinsic value and dignity of the human being who is enabled to be free; at the same time it guarantees the human rights which are the

core of the principle of democracy by means of the right of citizens to determine in freedom and equality, by means of elections and other votes, the public authority which affects them in personal and objective terms […]. **[542]**

aa) The possibility of equal participation by all citizens in the process of forming the political will as well as accountability to the people for the exercise of state authority (Art. 20(1) and (2) GG) are indispensable for a democratic system. How these requirements are complied with is not decisive for the question of compatibility of a political concept with the free democratic basic order. Thus, a rejection of parliamentarianism, if it is accompanied by the demand for replacing it with a plebiscite system, cannot justify the accusation that this violates the free democratic basic order. It is a different case, however, if the aim of disparaging parliament is to establish a one-party system. **[543]**

In democracy, the formation of the political will takes its way from the people to the organs of the state and not vice versa (cf. BVerfGE 44, 125 <140>; 69, 315 <346>; 107, 339 <361>). The democratic principles of freedom and equality require equal opportunities for participation for all citizens. Only then the requirement of an open process of formation of the political will is complied with. Concepts involving the permanent or temporary arbitrary exclusion of individuals from this process are therefore not compatible with this requirement. […]. **[544]**

bb) [...] **[545]**

cc) The Basic Law has opted for a representative parliamentary democracy, which is why the election of parliament is particularly significant when it comes to creating the necessary relationship of accountability between the people and the government (cf. BVerfGE 83, 60 <72>). Accordingly, anyone who disparages parliamentarianism without demonstrating in what other way due regard can be given to the principle of sovereignty of the people and how the openness of the process of forming the political will can be guaranteed, departs from the framework of the free democratic basic order. **[546]**

e) Finally, the principle of the rule of law is an indispensable part of the free democratic basic order within the meaning of Art. 21(2) first sentence GG. […].The principle that the public authority is bound by the law (Article 20(3) GG) and oversight in that respect by independent courts are determinative for the concept of the free democratic basic order. At the same time, the protection of the freedom of the individual requires that the use of physical force is reserved for the organs of the state which are bound by the law and subject to judicial oversight. Thus the state's monopoly on the use of force […] must likewise be regarded as part of the free democratic basic order within the meaning of Art. 21(2) first sentence GG. **[547]**

2. The second requirement for establishing the unconstitutionality of a political party in accordance with Art. 21(2) first sentence GG is that it should be seeking to "undermine" or "abolish" the free democratic basic order in the sense described above. **[548]**

a) [...] **[549]**

b) Considered in a differentiated way, the concept of "abolishing" (beseitigen) describes the abolishment of at least one of the constituent elements of the free democratic basic order or its replacement with another constitutional order or another system of government […]. **[550]**

c) The term "undermine" (*beeinträchtigen*) has, in contrast to the term "abolish", an independent regulatory content which extends the area of application of Art. 21(2) first sentence GG. **[551]**

aa) Contrary to the respondent's view, the constituent element of "undermining" is not merely an insignificant editorial error on the part of the constitutional legislature (*Verfassungsgeber*). **[552]**

(1) [...] **[553-554]**

(2) [...] **[555]**

bb) On this basis, the criterion "undermining" can be assumed to be met once a political party, according to its political concept, noticeably threatens the free democratic basic order. Such an "undermining" can therefore already be deemed to take place if a political party is working in a qualified manner to bring about the suspension of the existing constitutional order, even without being clear about what constitutional order is supposed to replace the existing one. It is sufficient for it to be attacking one of the constituent elements of the free democratic basic order (human dignity, democracy and the rule of law), since these are interlocked and mutually dependent […]. A political party which rejects and fights against one of the central principles of the free democratic basic order cannot avoid prohibition by professing allegiance to the other principles […]. The decisive factor is […] whether a political party deliberately attacks those fundamental principles which are indispensable for free and democratic co-existence […]. **[556]**

3. The fact that a political party is seeking to abolish or undermine the free democratic basic order must […] be clear from its "aims" or from the "behaviour of its adherents". Its "aims" and the "behaviour of its adherents" are accordingly the only sources of information for establishing the unconstitutionality of a political party. **[557]**

a) The aims of a political party are the embodiment of what a party intends to achieve politically, irrespective of whether these are intermediate or final aims, short-term or long-term aims or main or ancillary aims (cf. BVerfGE 5, 85 <143 et seq.> […]). They normally result from the party's programme and other official party statements, from the writings of authors recognised by the political party as authoritative about the political ideology of the party, from speeches given by its leading functionaries, from training and propaganda materials used in the party and from newspapers and magazines published or influenced by it (cf. BVerfGE 5, 85 <144>). **[558]**

It is the political party's real aims not its purported ones which are decisive. It is not required that a political party openly professes its anti-constitutional objectives. (cf. BVerfGE 2, 1 <20>; 5, 85 <144> […]. Thus it is not necessary to limit the determination of the aims pursued by a political party to its programme or official statements […], even though, as a rule, the programme is an essential source of information for establishing what the political party's objectives are. **[559]**

b) As well as in themes addressed in its programme, the intentions of the political party can be reflected in the behaviour of its adherents (cf. BVerfGE 2, 1 <22>). Adherents in this sense are all persons who support a party's cause and profess their commitment to the party, even if they are not members of the political party (cf. BVerfGE 2, 1 <22>; see also BVerfGE 47, 130 <139>). […] **[560]**

However, not all behaviour by adherents can be attributed to a political party. Attributing certain behaviour to a party may be problematic in particular if the political party has no possibility of influencing such behaviour. The determining factor is therefore whether the political will of the political party in question is recognisably being expressed in the respective adherent's behaviour. This will normally be taken to be the case if the behaviour reflects a fundamental tendency existing in the political party or if the political party explicitly espouses such behaviour. […] **[561]**

aa) Activities of a political party's organs, specifically the party's executive committee and its leading functionaries, can generally be attributed to the political party […]. Activities of the political party's publication organs and the behaviour of leading functionaries of sub-organisations are also automatically attributable to it. **[562]**

bb) Statements or actions by ordinary members can only be attributed to the political party if they are undertaken in a political context and the political party has approved or condoned them. Attribution appears likely if the statement or action has a direct link to a party event or other party activities, especially if the party does not distance itself from it. If an organisational link to party activities is lacking, the political party has to be aware of the political statement or action by the member at issue and nonetheless condone or even support the statement or action, even though counter-measures (exclusion from the party or disciplinary measures) would be possible and could reasonably have been expected. **[563]**

cc) In the case of adherents who are not members of the political party, influence or approval, in whatever form, of their behaviour by the political party is generally a necessary condition for attributing such behaviour to the party. As a rule, activities by the political party itself which influence or justify the behaviour of its adherents would be required. […] Specific facts must exist, however, which justify regarding the adherents' behaviour as an expression of the political party's will. Merely voicing approval in retrospect will only be sufficient for attributing the adherents' behaviour to the party […] if the political party thus recognisably espouses this as part of its own anti-constitutional endeavours. **[564]**

dd) If members of a political party commit criminal offences, this is only relevant in proceedings to prohibit the political party if such offences are connected with the legally protected goods set out in Art. 21(2) first sentence. **[565]**

ee) There can be no blanket attribution of criminal offences and acts of violence if there is no link for such an attribution. In particular, and contrary to the opinion stated by the applicant, the creation of or support for a certain political climate does not on its own permit attributing criminal actions committed in that political climate to a political party. It must rather be specifically determined whether the criminal action should be regarded as part of the anti-constitutional endeavours of the political party. Within the framework of Art. 21(2) first sentence GG, criminal acts committed by third parties, for example, may be attributed to a political party only if the political party has rendered material or organisational assistance, if personal links exist between the political party and the group committing the act or if members of the political party were involved in the act in question. **[566]**

ff) Parliamentary statements may be attributed to a political party in proceedings to prohibit that political party. Contrary to the view of the respondent, no differing assessment may be inferred here from the principle of indemnity […]. **[567]**

Under Art. 46(1) first sentence GG, a member of parliament may not be subjected to court proceedings or disciplinary action or otherwise called to account for any utterance made in the *Bundestag*. […] For this reason, the fact that the loss of a mandate, in the event of the prohibition of a political party based on parliamentary utterances, is merely an indirect consequence of parliamentary action does not generally rule out the applicability of Art. 46(1) first sentence GG. **[568]**

In interpreting Art. 46(1) first sentence GG, however […], the fundamental decision of the Constitution in favour of a "militant democracy" must be taken into consideration (cf. insofar with regard to Art. 10 GG: BVerfGE 30, 1 <19>) and a balance must be struck in accordance with the principle of practical concordance between protection of indemnity under Art. 46 GG and protection of the free democratic basic order under Art. 21(2) first sentence GG. […] Protection of indemnity may indeed be taken into consideration in any decision on the loss of mandate resulting from the prohibition of a political party. […] **[569]**

4. […] **[570]**

a) In interpreting the criterion of "seeking" (*darauf ausgehen*) account must be taken of the decision on values in the Constitution in favour of openness of the process of forming the political will (Art. 20(1) and (2) first sentence GG), freedom of political expression (Art. 5(1) GG) and the freedom of political parties (Art. 21(1) GG). An interference with these constitutional goods which a prohibition of a political party involves is only permitted to the extent required by the protective purpose of Art. 21(2) GG. It is therefore required that a political party actively espouses its aims and thus works towards undermining or abolishing the free democratic basic order or endangering the existence of the Federal Republic of Germany. **[571]**

[…] **[572]**

Art. 21(2) GG does not place sanctions on ideas or convictions. The provision does not involve the prohibition of views or ideology, but the prohibition of an organisation […]. Intervention under Art. 21(2) GG only comes into question once a political party takes its anti-constitutional aims into the public sphere and acts against the free democratic basic order or the existence of the state. Thus, beyond a mere "professing" of its own anti-constitutional aims, the political party must exceed the threshold of actually "combating" the free democratic basic order or the existence of the state […]. Only an understanding of "seeking" which takes the precondition of exceeding this threshold into account satisfies the requirement of interpreting Art. 21(2) GG restrictively. **[573]**

b) […] **[574]**

c) The criterion of "seeking" presumes systematic action in the sense of qualified preparation for undermining or abolishing the free democratic basic order or endangering the existence of the Federal Republic of Germany. **[575]**

aa) For the presumption of systematic action by the political party it is necessary for it to be continually working towards the realisation of a political concept that is contrary to the free democratic basic order. This can only be assumed if the individual action is an expression of a fundamental tendency that is attributable to the political party (cf. BVerfGE 5, 85 <143>). Efforts by individual party adherents cannot be taken to establish that the political party is unconstitutional if the attitude of the political party is otherwise loyal to the goods protected under Art. 21(2) first sentence GG (cf. BVerfGE 5, 85 <143>). […] **[576]**

bb) Moreover, the systematic action of the political party must amount to a qualified preparation with regard to achieving its aims directed against the goods protected under Art. 21(2) GG. Insofar there must be a target-oriented connection between the political party's own actions and abolishing or undermining the free democratic basic order. **[577]**

Art. 21(2) GG does not, conversely, require action which is punishable under criminal law. […] **[578]**

[…] **[579]**

Accordingly, if the prohibition of a political party does not require the use of illegal or criminally relevant means or methods, these can nonetheless provide important indications both that the aims of this political party violate the free democratic basic order and that the political party is seeking to realise these aims within the meaning of Art. 21(2) GG. If, for example, it can be established that adherents of a political party use force in a manner which can be attributed to the party for achieving its political aims, it may be inferred from this that the political party does not recognise the state's monopoly of the use of force which is rooted in the principle of the rule of law and that it is pursuing insofar aims directed at undermining the free democratic basic order. […] **[580]**

d) It is not required that the actions of the political party in themselves pose a specific threat to the goods protected under Art. 21(2) first sentence GG. This is clear from the wording, the provision's history and its purpose. **[581]**

aa) [...] **[582]**

bb) [...] **[583]**

cc) […] By their very nature, proceedings to prohibit a political party have the character of a preventive measure (cf. BVerfGE 5, 85 <142>; 9, 162 <165>; 107, 339 <386>; […]). They are not aimed at defending against already existing threats to the free democratic basic order but at preventing such threats from possibly emerging in the future. **[584]**

e) In accordance with the exceptional character of the prohibition of a political party as the preventive prohibition of an organisation and not a mere prohibition of views or of an ideology, there can, however, be a presumption that the criterion of "seeking" has been met only if there are specific weighty indications suggesting that it is at least possible that a political party's actions directed against the goods protected under Art. 21(2) GG may succeed (potentiality). **[585]**

Conversely, if it is entirely unlikely that a party's actions will successfully contribute to achieving the party's anti-constitutional aims, there is no need for preventive protection of the Constitution by using the instrument of the prohibition of the political party, which is the sharpest weapon, albeit a double-edged one, a democratic state under the rule of law has against its organised enemies (cf. BVerfGE 107, 339 <369>). On the contrary, the prohibition of a political party may be considered only if the political party has sufficient means to exert influence due to which it does not appear to be entirely unlikely that the party will succeed in achieving its anti-constitutional aims, and if it actually makes use of its means to exert influence. If this is not the case, then the requirement of "seeking" within the meaning of Art. 21(2) GG is not met. The Senate does not concur with the deviating opinion set out in the judgment in the case of the Communist Party of Germany (*Kommunistische Partei Deutschlands* - KPD) which held that the lack of any prospect, as far as humanly measurable, that the political party will be able to realise its unconstitutional aims at any time in the foreseeable future does not bar a prohibition of the party (cf. BVerfGE 5, 85 <143>). **[586]**

Whether there exists a sufficient degree of potentiality in terms of whether a party will achieve its aims must be determined on the basis of an overall assessment. This would take into account the situation of the political party (membership numbers and whether they are rising or falling, organisational structure, degree of mobilisation, campaigning capability and financial situation), its impact in society (election results, publications, alliances and supporter structures), its representation in public offices and representative bodies, the means, strategies and measures it deploys and all other facts and circumstances from which it can be inferred whether it appears possible that the aims pursued by the political party will be realised. This requires that there are sufficient specific and weighty indications suggesting that the actions of the political party against the goods protected under Art. 21(2) first sentence GG may succeed. This must take

account both of the prospects for the political party's success in merely participating in the struggle of political opinions and also of the possibility that the party's political aims will be successfully achieved by other means. **[587]**

As a rule, the criterion of "seeking" will be met if a political party tries to achieve its unconstitutional aims through the use of force or by committing crimes. Not only does the use of force imply disregard of the state's monopoly on the use of force, but it also involves a serious interference with the principle of free and equal participation in the formation of the political will. It also indicates a certain potentiality in terms of whether a party will achieve its aims. The use of force is in itself a weighty indication that action against the goods protected under Art. 21(2) first sentence GG may be successful. The same applies if a political party acts below the threshold of conduct punishable under criminal law in a manner which restricts the freedom of the process of forming the political will. This is the case, for example, if a political party creates an "atmosphere of fear" or threat which is likely to undermine in the long term the free and equal participation of all in the process of forming the political will. In that respect it is sufficient if such impairments are brought about in regionally restricted areas. It does, however, require that the party's actions are likely, seen objectively, to curtail the freedom of the formation of the political will. Insofar, purely subjective feelings of threat are not sufficient. **[588]**

Contrary to the applicant's view, it is not sufficient for meeting the criterion of "seeking" that the political party's statements are designed to be realised politically and that they can lead to actions; all statements made by political parties meet this requirement. On the contrary, specific weighty indications are required, suggesting that the call for action involved in the dissemination of the political party's unconstitutional ideology might be successful. **[589]**

5. Art. 21(2) GG leaves no room for assuming that there are other (unwritten) criteria besides the prerequisites for the prohibition of a political party that have been set out above. Neither can a party's similarity in nature to National Socialism provide a sub-stitute for the criteria set out in Art. 21(2) GG (a), nor can the principle of proportionality be applied in proceedings regarding the prohibition of political parties (b). **[590]**

[...] **[591-597]**

ee) A party's similarity in nature to National Socialism must, however, be taken into account in any examination of the individual criteria under Art. 21(2) first sentence GG. Conclusions may thus be drawn from the glorification of the NSDAP or the trivialisation of the crimes committed by the National Socialists as to the real aims being pursued by the political party, which may possibly not be completely clear from its programmatic materials. The central principles of National Socialism ("*Führer*" principle, ethnic definition of the "people" (*Volk*), racism and anti-Semitism) violate human dignity and at the same time violate the requirements of equal participation by all citizens in the process of forming the political will of the people and, due to the "*Führer*" principle, the principle of the sovereignty of the people. Thus a party's similarity in nature to National Socialism is an indication

that this political party is pursuing aims which are detrimental to the free democratic basic order. […] **[598]**

b) [...] **[599]**

The fact, however, that the constitutional legislature (*Verfassungsgeber*) adopted an exhaustive provision in Art. 21(2) first sentence GG which leaves no room for a separate examination of proportionality bars the applicability of the principle of proportionality in proceedings for the prohibition of a political party. […] In Art. 21(2) first sentence GG, the constitutional legislature (*Verfassungsgeber*) has provided for the mandatory establishment of the unconstitutionality of the political party if the constituent elements are met. There is no scope for decision-making within which the principle of proportionality could be applied […]. **[600]**

[...] **[601-606]**

III.

The mentioned requirements that result from the standards set out above and which need to be met to establish that a political party is unconstitutional are fully compatible (2) with the case-law of the European Court of Human Rights (ECtHR) on prohibitions of political parties, which it derived from the European Convention on Human Rights (ECHR) (1) and which the Federal Constitutional Court takes into consideration as an aid to interpretation (cf. BVerfGE 128, 326 <366 et seq.>). **[607]**

1. Since the ECHR does not specifically regulate the rights of political parties, the standard for conformity of prohibitions of political parties with the Convention is Art. 11 ECHR in particular (cf. ECtHR <Grand Chamber - GC>, United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, no. 133/1996/ 752/951, §§ 24 et seq.; ECtHR <GC>, Socialist Party and Others v. Turkey, Judgment of 25 May 1998, no. 20/1997/804/ 1007, § 29; ECtHR, Yazar and Others v. Turkey, Judgment of 9 April 2002, no. 2723/93 et al., §§ 30 et seq.; ECtHR, Parti de la Democratie <DEP> c. Turquie, Judgment of 10 December 2002, no. 25141/94, §§ 28 et seq.). At the level of justification, the ECtHR's examination additionally considers the question of inapplicability of rights under the Convention due to Art. 17 ECHR (cf. ECtHR <GC>, United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, no. 133/1996/752/951, § 60; ECtHR <GC>, Socialist Party and Others v. Turkey, Judgment of 25 May 1998, no. 20/1997/804/1007, §§ 29 and 53; ECtHR <GC>, Freedom and Democracy Party <ÖZDEP> v. Turkey, Judgment of 8 December 1999, no. 23885/94, § 47). **[608]**

a) Here, the ECtHR explicitly recognises the possibility of prohibiting a political party in order to protect democracy. This must, however, satisfy the requirements of Art. 11(2) first sentence ECHR, which means that it must be provided for by law and must be necessary in a democratic society (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 103; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 82). **[609]**

b) According to the ECtHR the necessity of prohibiting a political party in a democratic society requires, firstly, that this pursues a legitimate aim. The legitimate aims in this regard are exhaustively set out in Art. 11(2) first sentence EHRC (cf. ECtHR <GC>, United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, no. 133/1996/752/951, §§ 40 and 41; ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 67; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 64; ECtHR, HADEP and Demir v. Turkey, Judgment of 14 December 2010, no. 28003/03, § 44; ECtHR, Eusko Abertzale Ekintza - Acción Nacionalista Vasca <EAE-ANV> c. Espagne, Judgment of 15 January 2013, no. 40959/09, § 54). **[610]**

c) A prohibition of a political party further requires a "pressing social need" to that end (cf. ECtHR <GC>, Socialist Party and Others v. Turkey, Judgment of 25 May 1998, no. 20/1997/804/1007, § 49; ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 104). **[611]**

aa) According to the ECtHR, whether such a need exists is a matter for decision in each individual case. In view of the far-reaching interference associated with prohibition for the political party and for democracy as such, prohibition only comes into question either if the political party is pursuing aims which are incompatible with the fundamental principles of democracy and the protection of human rights or if the means used by the political party are not lawful and democratic, in particular if it incites to violence or advocates the use of force […]. While it is true that a political party may promote a change in the law or the legal and constitutional structures of the state, it must use lawful and democratic means to do so and the proposed changes must for their part also be compatible with fundamental democratic principles (cf. ECtHR, Yazar and Others v. Turkey, Judgment of 9 April 2002, no. 22723/93 et al., § 49; ECtHR < GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 98; ECtHR, Parti de la Democratie <DEP> c. Turquie, Judgment of 10 December 2002, no. 25141/94, § 46; ECtHR, Parti Socialiste de Turquie <STP> et autres c. Turquie, Judgment of 12 November 2003, no. 26482/95, § 38; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 79; ECtHR, HADEP and Demir v. Turkey, Judgment of 14 December 2010, no. 28003/03, § 61). **[612]**

bb) With regard to the timing of an order to prohibit a political party, the ECtHR explicitly recognises the admissibility of preventive intervention. It is the opinion of the ECtHR that a state cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with democracy, even though the danger of that policy for democracy is sufficiently established and imminent. A state must reasonably be able to prevent the realisation of a political programme which contradicts the Convention (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., §§ 102 and 103; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., §§ 81 and 82). This grants the Convention's contracting states at least a certain margin

of appreciation in determining the right timing for prohibiting a political party […]. **[613]**

cc) Whether the prohibition of a political party corresponds to a pressing social need is determined by the ECtHR on the basis of an overall examination of the specific circumstances (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., §§ 104 and 105; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 83). The ECtHR finds in this regard that the historical experiences and developments in the Convention's contracting state in question should also be taken into consideration (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 124; ECtHR, Partidul Comunistilor and Ungureanu v. Romania, Judgment of 3 February 2005, no. 46626/99, § 58; ECtHR, HADEP and Demir v. Turkey, Judgment of 14 December 2010, no. 28003/03, §§ 69 et seq.; ECtHR, Republican Party of Russia v. Russia, Judgment of 12 April 2011, no. 12976/07, § 127). **[614]**

d) Finally, in the opinion of the ECtHR the prohibition of a political party must be proportionate to the aims pursued with the prohibition. In this regard, however, the ECtHR limits the test of "proportionality" (*Angemessenheit*) to the legal implications side of the scales and determines whether the consequences of the prohibition of the political party arising from national law are out of proportion to the seriousness of the threat to democracy established with regard to a pressing social need. As a rule, if a pressing need exists it finds that the prohibition is proportionate (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., §§ 133 and 134 ; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 93; ECtHR, Eusko Abertzale Ekintza - Acción Nacionalista Vasca <EAE-ANV> c. Espagne, Judgment of 15 January 2013, no. 40959/09, § 81). **[615]**

In just two cases where the use of force by individual party members was endorsed on a few occasions, the court found, irrespective of the existence of a pressing social need, that prohibition of the political party based on this conduct would be disproportionate (cf. ECtHR, Parti de la Democratie <DEP> c. Turquie, Judgment of 10 December 2002, no. 25141/94, §§ 61 et seq. and 64 et seq.; ECtHR, Parti pour une société démocratique <DTP> et autres c. Turquie, Judgment of 12 January 2016, no. 3840/10 et al., §§ 101 et seq.). In the case of the Turkish DTP, it explicitly drew attention to the fact that, in contrast to individual utterances by its members, the political party as a whole had stated its commitment to peaceful and democratic solutions and that it was not to be assumed that these individual statements could have any impact on national security or public safety (cf. ECtHR, Parti pour une société démocratique <DTP> et autres c. Turquie, Judgment of 12 January 2016, no. 3840/10 et al., §§ 85 et seq., § 98). **[616]**

2. The standard set out for establishing the unconstitutionality of a political party in accordance with Art. 21(2) GG is no less stringent than the requirements derived by the ECtHR from Art. 11(2) ECHR for the prohibition of a political party. **[617]**

a) Art. 21(2) first sentence GG plainly takes account of the requirement that the prohibition must be provided for by law. Furthermore, the protection of the free democratic basic order and of the existence of the state constitutes a legitimate aim within the meaning of Art. 11(2) ECHR. In this regard the ECtHR and the Federal Constitutional Court concur in proceeding from the assumption that a political party has to oppose not only individual provisions of the Constitution but also fundamental principles of the free constitutional state. **[618]**

b) If the criteria under Art. 21(2) first sentence GG are met, it can also be presumed that a pressing social need exists for prohibiting a political party. If a political party acts in a systematic manner in the sense of qualified preparation for undermining or abolishing the free democratic basic order and if there are specific and weighty indications suggesting the possibility that this action may succeed, this satisfies the requirements which the ECtHR has established in terms of the necessity for prohibiting the political party to protect democratic society in accordance with Art. 11(2) first sentence ECHR. Nothing else may be inferred from the reference by the ECtHR to the need for a sufficiently established and imminent threat (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 102). Contrary to one opinion voiced in the literature […], this cannot be taken to mean that, from the point of view of the ECtHR, the prohibition of a political party is only in compliance with the Convention if a specific threat to the free democratic order has already emerged and the success of the anti-constitutional endeavours of the political party is immediately imminent. **[619]**

Such a presumption is already contradicted by the fact that the ECtHR has in individual cases regarded approval of acts of terrorism as being sufficient for the prohibition of a political party without basing this on the size or significance of the prohibited regional political parties and the threats posed by them to the constitutional order (cf. ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., §§ 85 et seq.; ECtHR, Eusko Abertzale Ekintza - Acción Nacionalista Vasca <EAE-ANV> c. Espagne, Judgment of 15 January 2013, no. 40959/ 09, §§ 67 et seq.). The ECtHR moreover explicitly acknowledges the preventive character of the prohibition of political parties and grants states a margin of appreciation in determining the timing of prohibitions. In cases where it has found that imposed prohibitions of political parties are not in compliance with the Convention, it has also (additionally) drawn attention to the fact that the political parties concerned in these cases had no real chance of bringing about political change (cf. ECtHR, Yazar and Others v. Turkey, Judgment of 9 April 2002, no. 22723/93 et al., § 58; ECtHR, Parti de la Democratie <DEP> c. Turquie, Judgment of 10 December 2002, no. 25141/94, § 55; ECtHR, The United Macedonian Organisation Ilinden-Pirin and Others v. Bulgaria, Judgment of 20 October 2005, no. 59489/00, § 61). Accordingly, it cannot be inferred that the existence of a specific threat to the democratic constitutional state is a necessary criterion for the prohibition of a political party […]. **[620]**

Indeed, as the ECtHR explicitly states, the existence of a pressing social need to prohibit a political party must be established on the basis of an overall examination of the circumstances in the specific individual case and must take into account specific

national features (cf. ECtHR <GC>, United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, no. 133/1996/752/951, § 59; ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 124; ECtHR, Partidul Comunistilor and Ungureanu v. Romania, Judgment of 3 February 2005, no. 46626/99, § 58; ECtHR, HADEP and Demir v. Turkey, Judgment of 14 December 2010, no. 28003/03, §§ 69 et seq.; ECtHR, Republican Party of Russia v. Russia, Judgment of 12 April 2011, no. 12976/07, § 127). Therefore, in relation to Art. 21(2) GG, it must be taken into account that the provision is, above all, based on the historical experience of the rise of the Nazi party in the Weimar Republic and efforts to prevent recurrence of such incidents by means of early intervention against totalitarian political parties. Against that background, the notion that the prohibition of a political party should only be considered when a political party has become so strong that, if events are allowed to take their course, undermining or abolition of the free democratic basic order does not merely seem possible but is in fact probable, is incompatible with such efforts. In that respect, the determination in Art. 21(2) first sentence GG of an early timing for the prohibition of a political party that does not require waiting for a specific threat to the free democratic basic order to emerge is the result of the specific historical experience of the establishment of the tyrannical and despotic rule of the National Socialists. Against this background, a pressing social need to prohibit a political party in accordance with the case-law of the ECtHR may be presumed to exist if the requirements under Art. 21(2) first sentence GG are met, namely if there are specific and weighty indications which suggest that it is at least possible that the political party's actions directed against the free democratic basic order could be successful. **[621]**

c) The considerations of the ECtHR regarding the requirement of proportionality of the prohibition of a political party do not raise any concerns about the standard applicable under Art. 21(2) GG and its conformity with the Convention either. **[622]**

aa) The ECtHR generally considers the existence of a pressing social need to be sufficient to affirm the proportionality of the prohibition of a political party (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 133). Insofar as the court nevertheless exceptionally found that a prohibition would be disproportionate, this concerned two isolated cases of approval of acts of violence by individual functionaries of the political party in question (cf. ECtHR, Parti de la Democratie <DEP> c. Turquie, Judgment of 10 December 2002, no. 25141/94, §§ 61 et seq. and 64 et seq.; ECtHR, Parti pour une société démocratique <DTP> et autres c. Turquie, Judgment of 12 January 2016, no. 3840/10 et al., §§ 101 et seq.). Under circumstances like these, there would not have been room for establishing the unconstitutionality of a political party under the framework of Art. 21(2) first sentence GG either. There would be a lack of a fundamental tendency attributable to the political party to use force as a means of political debate (cf. para. 576). Moreover, mere utterances by individual party members against the free democratic basic order would probably not meet the requirement of being potentially suitable for achieving the pursued anti-constitutional aims, a requirement called for in the

context of the criterion of "seeking". Accordingly, the ECtHR's recourse to the requirement of proportionality does not amount to a tightening in relation to the criteria which have to be met within the framework of Art. 21(2) first sentence GG for the prohibition of a political party. **[623]**

bb) Likewise, the conformity of Art. 21(2) first sentence GG with the Convention is not called into question to the extent that the ECtHR, in its decision concerning the prohibition of the DTP, refers, with regard to proportionality, to the possibility under Turkish law of cutting the funds paid to a political party by the state rather than prohibiting it (cf. ECtHR, Parti pour une société démocratique <DTP> et autres c. Turquie, Judgment of 12 January 2016, no. 3840/10 et al., §§ 101 et seq.). It is a matter for the respective national law, having due regard for the requirements of the ECHR, to prescribe whether and to what extent sanctions may be imposed on political parties which pursue anti-constitutional aims. In this regard, the national legislature is at liberty to waive sanctions altogether, to create possibilities for graduated sanctions or to restrict itself to the sanction of prohibition of the political party. **[624]**

Therefore, the legislative concept of Art. 21(2) first sentence GG, which dispenses with differentiated possibilities for applying sanctions, is compatible with the Convention. The only possible legal consequence prescribed by this provision if its criteria are met is the establishment of unconstitutionality. The constitutional situation as it currently applies excludes sanctions below the level of prohibition of the political party, which would include a reduction or cessation of state funding. Contrary to the respondent's view, there is thus no room within the framework of Art. 21(2) GG for the application of the principle of proportionality (cf. para. 599 et seq.), unless the legislature amends the Constitution and introduces a different approach. This raises no concerns in terms of the Convention as long as the order to prohibit a political party complies with the criteria for the proportionality of a prohibition which are derived from the case-law of the ECtHR with regard to Art. 11(2) first sentence ECHR. This is the case if the criteria of Art. 21(2) first sentence GG are met. **[625]**

d) To the extent that the respondent derives from the 'Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures' of the Venice Commission of the Council of Europe of 10/11 December 1999 (CDL-INF<2000>001; cf. European Commission for Democracy through Law <Venice Commission>, Compilation of Venice Commission Opinions and Reports concerning Political Parties, CDL<2013>045, p. 38) the opinion that the prerequisite for a prohibition of a political party under the Convention is that the political party must be pursuing its political aims with the use of force and that this must be taken into consideration within the framework of Art. 21(2) GG, it is ignoring the fact that the Venice Commission's Guidelines are non-binding recommendations which the ECtHR has not adopted with regard to the requirements for a prohibition of a political party. Instead, it examines whether there is a pressing social need for prohibition both on the basis of the means employed by the political party and the aims it is pursuing (cf. ECtHR, Yazar and Others v. Turkey, Judgment of 9 April 2002, no. 22723/93 et al., § 51 et seq.;

ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 98; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 79; ECtHR, HADEP and Demir v. Turkey, Judgment of 14 December 2010, no. 28003/03, § 61). It may, therefore, be the case that the use or endorsement of force is sufficient as a condition for prohibiting a political party according to the standards of the ECtHR. It is not, however, an indispensable prerequisite for prohibiting a political party in accordance with the requirements of Art. 11(2) first sentence ECHR. **[626]**

IV.

The proposal by the respondent to suspend the proceedings and refer the questions raised by it in this connection to the Court of Justice of the European Union in accordance with Art. 267(1)(a) of the Treaty on the Functioning of the European Union (TFEU) for a preliminary ruling lacks any objective basis. **[627]**

1. [...] **[628]**

2. a) The Second Senate of the Federal Constitutional Court has already found, in its order of 22 November 2001 (BVerfGE 104, 214), that the European Union has no jurisdiction under the currently applicable treaties for ruling on the law relating to political parties. While it is the case that Art. 191 of the Treaty establishing the European Community (EC Treaty) acknowledged the function of political parties at European level in the process of European integration and was insofar the basis for the formation of joint parliamentary groups in the European Parliament, this does not mean that EU law contains any statement regarding whether and under what conditions a political party may be prohibited by a Member State of the European Union. Nor do general principles of EU law such as the rule of law, democracy and the protection of fundamental rights give rise to a question capable of being referred (cf. BVerfGE 104, 214 <218 and 219>). **[629]**

   b) This is also upheld following the entry into force of the Treaty of Lisbon. […] **[630]**

   c) No different conclusion can be drawn from Regulation (EC) No. 2004/2003 on the regulations governing political parties and rules regarding their funding at European level. This was issued on the basis of Art. 191 EC Treaty and does not establish any jurisdiction of the European Union beyond the regulatory content thereof. **[631]**

   Thus, the prohibition of national political parties remains an exclusive matter of national law. […] **[632]**

D.

Measured against these standards, the application for prohibition is unfounded. It is true that the respondent seeks, by reason of its aims and the behaviour of its adherents, to abolish the free democratic basic order (I.). Since, however, there are no specific and weighty indications suggesting that the achievement of the aims pursued by the respondent can possibly succeed, the criterion of "seeking" within the meaning of Art. 21(2) first sentence GG is not met (II.). **[633]**

I.

The respondent disrespects the fundamental principles which are indispensable for the free democratic constitutional state. Its aims and the behaviour of its adherents disrespect human dignity (1.) and the core of the principle of democracy (2.) and display elements that are similar in nature to the historical National Socialism (3.). The respondent's political concept advocates abolishing the free democratic basic order (4.). **[634]**

1. The respondent's political concept is incompatible with the guarantee of human dignity within the meaning of Art. 1(1) GG. […] The concept of the "*Volk*" it advocates is a negation of the personal right to respect deriving from the principle of human dignity and leads to the denial of fundamental equality before the law for all persons who do not belong to this ethnic *Volksgemeinschaft*. […] **[635]**

[…] **[636]**

a) The respondent's party programme violates the right of the person to be valued and respected which derives from the intrinsic value of human life and the dignity of human beings […] (aa).[…] **[637]**

aa) [...] **[638]**

(1) In line with its concept of the primacy of the *Volksgemeinschaft*, the respondent demands that the highest aim of German politics should be the preservation of the German *Volk*, defined by descent, language, historical experience and values. It demands the endeavour for the "unity of *Volk* and state" and the prevention of "foreign infiltration (*Überfremdung*) of Germany with or without naturalisation" […]. As a matter of principle foreigners should not, it claims, have the right to stay in Germany, but only the duty to return to their home countries […]. **[639]**

(2) On this basis, the respondent has developed a political concept which is mainly aimed at a strict exclusion […] of all ethnic non-Germans. […] **[640]**

(a) According to the respondent, fundamental rights explicitly apply to all Germans and the application of the principle of solidarity is limited to the community of all Germans […]. Accordingly, the respondent claims, measures by the state to promote the family should only promote German families. Ownership of German land may only be acquired by Germans […]. **[641]**

(b) In Chapter 10 of its party programme [the respondent demands] legislation to repatriate foreigners living here […]. Integration, it claims, amounts to genocide. The building of foreign religious buildings should be stopped; the fundamental right to asylum under Art. 16a GG should be abolished […]. **[642]**

(c) In Chapter 16, 'Education and Culture', the respondent objects to German and foreign schoolchildren being taught together […]. **[643]**

(d) In Chapter 17, 'Reform of the Legal System', the respondent demands a referendum on the reintroduction of the death penalty and full enforcement of life sentences. […] Moreover, […] a category of 'naturalised foreigners' […] should be added to police statistics […]. **[644]**

(3) The very aims set out in the respondent's party programme are incompatible with the guarantee of human dignity. […] **[645]**

In particular, […] the party's programme advocates a devalued legal status practically amounting to full deprivation of rights of all those who do not belong […] to its ethnically-defined *Volksgemeinschaft* […]. **[646]**

bb) The respondent must accept this programme being held against it. […] **[647]**

(1) [...] **[648-650]**

(2) [...] **[649]**

(a) [...] **[650]**

(b) At any rate, attribution […] is established […] by virtue of the confirmation of the programme's content by the relevant persons in the respondent's leadership. […] In its written submissions in the present proceedings the respondent has repeatedly made reference to this programme and nowhere has it distanced itself from it. In the oral hearing, Mr Franz, the party chairman, explicitly confirmed the applicability of the programme and the fact that it coincides with the respondent's convictions. […] **[651]**

[...] **[652]**

b) The incompatibility of the aims pursued by the respondent with the guarantee of human dignity […] is proven by virtue of its attributable publications and confirmed by statements made by its leading functionaries. […] **[653]**

aa) (1) The concept of the "*Volk*" advocated […] by the respondent is described as follows in the brochure 'Wortgewandt […]' published in its 2nd edition by the party's executive committee in April 2012: **[654]**

> A German is anyone who is of German origin and was thus born into the ethnic and cultural community of the German people. [...] An African, an Asian or an Oriental can never become a German because the award of a piece of printed paper […] can in no way change biological heredity, […] and members of other races remain […] foreign bodies, however long they may have lived in Germany. […]

[...] **[655-658]**

(a) The regional association of the *Land* of Bavaria made the following comment on Facebook in February 2015 about the arrival of African refugees: **[659]**

> To be German means to belong to the German *Volk*, not because of a deed of naturalisation but by birth and descent. One is German by virtue of one's blood and nothing else!
>
> So be proud and thankful, German women and German men, that you were born with the blessing of a German birth. [...]

bb) The supremacy of the *Volksgemeinschaft* over the individual, and its racial foundation [...] are made especially clear in statements by the Young National Democrats (JN) (1) [...]. **[660]**

(1) (a) D., the federal training director of the JN puts it thus [...]: **[661]**

> The community is supreme here. […] Our ideology places the *Volk* at the heart of all being. [...]

(b) [...] **[662]**

(c) In its "Guidelines - Political Concepts" (*Leitfaden - Politische Grundbegriffe*) published [...] by the federal executive committee of the JN in January 2013 it is stated that: **[663]**

> Freedom is the pursuit of the meaning of life, which is the preservation of the species. [...]
>
> [...] **[664-665]**
>
> The intermixing of peoples leads, it claims, to the loss of the "best and noblest virtues" and to the destruction of the respective *Volk*: **[666]**
>
> [...] The intermixing of different cultures has never led to a multicultural society as is so often claimed to exist today. All that ever came out of it was a mish-mash that led to destruction. [...]
>
> [...] **[667]**
>
> These statements culminate in a discussion of the concept of race, which is regarded by the JN as a "law of nature" and a fundamental element of its view of the world [...]. **[668]**

(d) These statements by the JN can be attributed to the respondent. [...] **[669]**

[...] **[670-680]**

cc) The consequence of the ethic definition [...] of the "German *Volksgemeinschaft* is the devaluation of the legal status of all persons who do not belong to this community. […] [S]tatements and activities attributable to the respondent prove the fact that this also applies to naturalised German citizens with an immigration background […]. **[681]**

(1) In the *Bundestag* election campaign in 2009 the respondent's regional association for Berlin sent a letter purporting to be an "unofficial announcement" to 22 politicians with an immigration background. Under the heading "Information provided by your repatriation of foreigners officer", its addressees […] were told to make preparations for their "journey home" […]. **[682]**

In the 2013 *Bundestag* election campaign, the respondent's regional association for Berlin once again sent a similar circular to candidates with an immigration background [...]. **[683]**

(2) [This accords with] a television interview by a German journalist with an immigration background with the respondent's deputy chairman, Ronny Zasowk. Asked what he would do with people like her [...], he replied that they would be given a deportation order and would have to leave Germany. They would be able to take movable goods with them and would receive compensation for the rest. **[684]**

[...] **[685]**

(3) In the 2009 *Landtag* election campaign in Thuringia, W., the then *Land* managing director of the respondent, said, regarding the candidature of S., a local politician of colour, **[686]**

Thuringia must stay German. We thank S. for his help as a guest worker [...]. But he is no longer needed today [...].

[...] **[687]**

c) [...] **[688-696]**

(3) Against this background, the conclusion drawn by the expert witness Prof. Kailitz and submitted in the oral hearing, namely that the respondent, on the basis of its world view, advocates the expulsion of millions of people from Germany, is understandable. At any rate, it denies those whom it defines as "non-Germans" the right to remain in Germany [...]. **[697]**

d) The disrespect for human dignity which can be inferred from [its] notion of an ethnically-defined *Volksgemeinschaft* is attested by numerous statements which are attributable to the respondent regarding attitudes towards foreigners (aa), immigrants (bb) and minorities (cc). **[698]**

aa) [...] **[699]**

(1) [...]

(2) Jürgen Rieger, as the respondent's deputy federal chairman, imputed [...] a lower level of intelligence to all dark-skinned people: **[701]**

Negroes have an intelligence quotient between that of a retarded German and that of a normal German.

(3) In a Facebook post in May 2015 the respondent's regional association for Bavaria warned German women against relationships with men of colour: **[702]**

[...] In the cities there is already the situation that you can't help meeting black Africans (Negroes) in the streets wherever you go. [...]

They have been brought here to finally destroy our *Volk*, our ethnic community! German women and girls, don't get involved with Negroes! Otherwise you will be committing a serious crime against your *Volk*!

The respondent's argument […] that the author of this post simply wished to draw attention to the exploding number of asylum seekers is contradicted by the objective declaratory content of the statement and glosses over the wording which deliberately parallels that of National Socialist slogans regarding dealings with Jews [...]. **[703]**

[...] **[704-706]**

bb) It is in particular asylum seekers and immigrants who are at the centre of inhuman statements [...]. **[707]**

(1) This is proven by the respondent's parliamentary activities. **[708]**

(a) (aa) In the *Landtag* of Saxony [...] Mr Apfel, the former leader of the NPD parliamentary group [...], said: **[709]**

[...] Give your consent, close the gateway for Moslem bombers, Gypsy criminal gangs and social parasites from all over the world.

(Plenary proceeding reports (*Plenarprotokoll*) 5/27 of 17 December 2010, p. 2657)

(bb) A brief enquiry by Member of Parliament Apfel of 4 February 2013 [...] included the question as to how many children were born with disabilities in Saxony in marriages between relatives […] entered into by immigrants. **[710]**

(cc) In the *Landtag* of Mecklenburg-Western Pomerania, Udo Pastörs used the term "degenerated people" [...] in relation to asylum seekers. In the same debate, Member of Parliament Tino Müller had previously spoken of "nine-headed gang of Negroes" […]. **[711]**

(b) [...] **[712]**

(2) Asylum seekers and immigrants [...] have also been regularly disparaged [...] in extra-parliamentary activities. **[713]**

(a) (aa) For example, Jürgen Gansel advocated on his Facebook page on 21 April 2015 the rapid deportation of "asylum fraudsters, Moslem extremists and criminal foreigners". **[714]**

(bb) [...] **[715]**

(cc) The respondent's regional association of the *Land* of Bavaria warns in a Facebook post [...]: "Take care! Don't get too close to the 'refugees'! You'll be risking your health! [...] And scabies, a skin infection with parasites, is the least harmful thing you can catch from them!" **[716]**

(dd) Maria Frank, the *Land* chairwoman of the Berlin National Women's Ring (RNF), speaking at a demonstration [...] in July 2013, described Moslems and black Africans generally as rapists, drug dealers and filthy: [...]. **[717]**

(ee) [...] **[718-719]**

(ff) [...] **[720]**

(b) (aa) All these utterances are aimed at depriving asylum seekers and immigrants of their human dignity. [...] The utterances also exceed [...] the limits of general criticism of immigration policy [...]. **[721]**

(bb) Each of these utterances is attributable to the respondent and its content is unmistakeable. **[722]**

[...] **[723-725]**

cc) In addition to asylum seekers and immigrants, the respondent also attacks religious and social minorities in a similar way, thus setting itself in opposition to human dignity. **[726]**

[...] **[727-734]**

In his 2009 Ash Wednesday speech given in the Saarland, Pastörs described citizens of Turkish origin as "sperm guns" and was as a result sentenced [...] to a term of imprisonment […] by the Saarbrücken Regional Court (*Landgericht*) [...] for incitement to hatred and violence. **[735]**

[...] **[736-739]**

(bb) High-ranking party functionaries of the respondent have also taken anti-Semitic stances in public utterances. **[740]**

(α) [...] **[741]**

[...] **[742]**

(β) Karl Richter stated on 8 January 2015: **[743]**

> [...] There have been Jews in the Occident for at least 1500 years only as traders, usurers, Christ-murderers and in the ghetto.
>
> [...]
>
> To put it briefly and bluntly: MY Occident is Christian and in at least the same part Germanic. I do not need the "Jewish" in my Occident, and - if I may be so bold - I set no great store by it.

(χ) [...] **[744]**

[...] **[745]**

(δ) The […] chairman of the respondent's regional association of the *Land* of Berlin, Sebastian Schmidtke, [was] convicted of slander for wearing a black t-shirt with the slogan "All Jews are Bastards". **[746-747]**

(ε) [...] **[748]**

(ζ) [...] **[749]**

(b) [...] **[750]**

[...] **[751]**

(3) The respondent's disrespect for human dignity is not limited to the […] mentioned groups. It is clear from statements of its opinions regarding other groups that it does not respect insofar the right to personal respect deriving from human dignity. **[752]**

[...] **[753-757]**

2. The respondent also disrespects the free democratic basic order with a view to the principle of democracy. It is true that this attitude cannot be inferred with the requisite unambiguousness from the NPD party programme (a). But its rejection of the fundamental design of free democracy is clear if other publications and utterances by leading functionaries attributable to the respondent are considered, too (b). [...] **[758]**

a) [...] **[759-761]**

aa) The political concept of the respondent is incompatible with the right of all citizens of a state to equal participation in the formation of the political will of the state. **[762]**

(1) (a) If the "rule of the *Volk*" (*Volksherrschaft*) presupposes the *Volksgemeinschaft*, as the respondent advocates [...], this necessarily results in an exclusion from the democratic process of those people who, by reason of their ethnicity, do not belong to the *Volksgemeinschaft*.[...] Rather, the excluding

nature of the *Volksgemeinschaft* involves a limitation, on grounds of ethnicity, of the right to equal participation in the formation of the political will which is incompatible with Art. 20(2) first sentence GG. **[763]**

(b) When asked about this in the oral hearing, Jürgen Gansel confirmed this finding. He drew an explicit distinction between rule by the *Volk* (*Volksherrschaft*) and rule by the population (*Bevölkerungsherrschaft*) and stated that Volksherrschaft was linked to the ethnic *Volk* of the state and therefore only existed in the Federal Republic of Germany to a limited degree. [...] [This] documents the fact that, in the view of the respondent, the right to democratic participation should be limited to members of the ethnically homogenous *Volksgemeinschaft*. **[764]**

[...] **[765]**

(2) (a) [...] **[766-767]**

bb) In addition, the respondent's anti-democratic stance is clear from its negation of the principle of parliamentary democracy. [...] **[768]**

(1) (a) The fundamental rejection of the existing representative parliamentary system [...] is made clear in an interview with Holger Apfel in *Deutsche Stimme* ("German Voice", issue 12/2008, p. 3): **[769]**

[...] Parliament degenerated into a cheap caricature of real rule by the *Volk* a long time ago.

(b) Similarly, the former chairman of the respondent's regional association of the *Land* of Saxony Anhalt, Matthias Heyder, said at the 2010 Bamberg programme party convention: **[770]**

What's out there is a cold, concreted-over, anti-social system that is hostile to the *Volk* and it doesn't need to be changed, it needs to be abolished.

[...] **[771-773]**

(2) At the same time, the respondent sets the idea of the *Volksgemeinschaft* against the principle of democracy, thus relativising the latter's claim to validity. **[774]**

(a) This becomes clear when W., the former deputy president of the regional association of the *Land* of Bavaria, writes: **[775]**

Rule by the *Volk* is put into practice more if a *Volk* is led in all areas of life by its most capable and most competent members than if it allows itself to be managed by a mere majority or by corrupt parliamentarians. [...]

(b) [...] **[776]**

(c) In the journal *Der Aktivist* […], D. fundamentally challenges the claim of democracy and the majority principle to validity: **[777]**

Democracy seems to have become a kind of religion for the people currently in power. [...] However, the constant mantra-like repetition of the assertion that it is in fact the "best form of society" is just not tenable. [...] There is no formula for the perfect form of the state; there is only the inner balance of the *Volk* with the state.

(d) Udo Pastörs emphasised at the NPD Swabian Day (*Schwabentag*) in Günzburg in 2011: **[778]**

What lies ahead of us is the last stretch of a corrupt system that has to be abolished because it endangers the preservation of the *Volk*, dear friends.

(3) [...] **[779-796]**

(δ) Karl Richter writes in *hier & jetzt* ("here and now", issue 15/2010, p. 4 et seq. <7>) under the headline 'What did you mean, Mr Homer? Ithaka in Bottrop - Why the 'Odyssey' should in fact be banned' (*Wie meinten Sie das, Herr Homer? Ithaka in Bottrop - warum die 'Odyssee' eigentlich verboten gehört*): **[797]**

Anyone who got into bed with foreign rule must go, with no messing about; scum that has to be cleaned out, we want to prevent it rising up again - as the myth knows.

(c) The respondent, as its party programme makes clear, advocates replacing the existing political system with the "national state" as "[t]he political organisational form of a *Volk*" […]. In this connection, according to the information submitted by the respondent's former party chairman and MEP Voigt in the oral hearing, there should be a return to the concept of the German Reich. This coincides with other statements which are attributable to the respondent. **[798]**

(aa) Following Udo Voigt, Claus Cremer wrote in an online post on the homepage of the regional association of the *Land* of North Rhine-Westphalia in June 2011: **[799]**

The Reich is our goal, the NPD our way.

(bb) Similarly, in 2011 Karl Richter and Eckart Bräuniger called for the (re)vival of a German Reich in *Deutsche Stimme* ("German Voice", issue 2/2011, p. 22) […]: **[800]**

Let us integrate the idea of the Reich into the themes and challenges of the present to secure the continued existence of what remains of the body of our *Volk* […]. Yes to Germany - yes to the Reich!

(cc) H., a former elected municipal council deputy from Lower Saxony called in the journal *Volk in Bewegung - Der Reichsbote* ("People in motion - Herald of the Reich") not only for the re-establishment of the German Reichbut also for the reinstatement of the constitution and laws […] which were in force on 23 May 1945. […]: **[801]**

[…] **[802-804]**

3. The respondent is similar in nature to National Socialism. Its concept of the *Volksgemeinschaft*, its fundamentally anti-Semitic stance and its disparaging of the existing democratic order reveal clear parallels to National Socialism (a). In addition, its proclaimed identification with leading personalities of the NSDAP, the use of selected National Socialist vocabulary, texts, songs and symbols as well as revisionist statements with regard to history demonstrate an affinity of at least relevant parts of the respondent with the mind-set of National Socialism (b). […] Taken together, this confirms the respondent's disrespect for the free democratic basic order (c). **[805]**

a) aa) The term and the concept of the *Volksgemeinschaft* are a central feature which the political concepts of the respondent and the NSDAP have in common. […] Point 4 of the 25-point programme of the NSDAP read: "Only those who are members of the *Volk* (*Volksgenossen*) can be citizens of the state. Only those who are of German blood, regardless of religion, can be *Volksgenossen*. Therefore, no Jew can be a Volksgenosse." Apart from the specific emphasis on the exclusion of Jewish people, this definition corresponds exactly to the respondent's ideas. **[806]**

[...] **[807]**

bb) Clearly, the respondent and the NSDAP also share a fundamentally anti-Semitic stance. […] **[808]**

cc) Finally, the rejection and disparaging of parliamentary democracy is a further feature shared by the respondent and National Socialism. […] **[809]**

b) Affinity with National Socialism is also expressed in various ways in the actions of the respondent: **[810]**

aa) These include […] references by leading representatives of the respondent glorifying protagonists of the Nazi regime: **[811]**

(1) As Thomas Wulff, former deputy chairman of the regional association of the *Land* of Hamburg, put it in a statement on the website www.altermediadeutschland.info on Hitler's birthday, 20 April 2013: **[812]**

May this party conference on the weekend of 20 April remind one or two delegates like a flash of lightning what the greatest son of our *Volk* […] was able to do. He was able to do it because, committing his whole person and

acting completely selflessly, incorruptible and prepared to make every personal sacrifice, he became the embodiment of the hope of millions! […]

[...] **[813-817]**

bb) The link with the National Socialist past is also clear from the use of National Socialist vocabulary, texts, songs and symbols. **[818]**

(1) [...] **[819]**

(2) Jürgen Gansel entitled his Facebook post on 12 January 2015 'People, rise up!', words used by Goebbels in his […] *Sportpalast* speech on 18 February 1943. The Brandenburg JN, too, in their Facebook post on 28 November 2014 used the wording "*Das Volk steht auf, der Sturm bricht los*" (The people rise, the storm breaks loose), which originally came from the poem 'Männer und Buben' (Men and Boys) by Theodor Körner. **[820]**

(3) [...] **[821-830]**

cc) Furthermore, it is clear that leading representatives of the respondent are endeavouring to glorify National Socialism and to relativise its crimes. **[831]**

[...] **[832-834]**

(4) In a press statement by the respondent dated 18 January 2010, Karl Richter stated that the national opposition would not "accept" the [...] 65th anniversary of the liberation of Auschwitz as a "ritual permanent stigmatisation of the German as a people of perpetrators (*Tätervolk*)": **[835]**

For the Holocaust has many facets and includes those burned to death and murdered in Dresden and Hiroshima [...]. [...]

(5) [...] In the *Landtag* of Saxony, Jürgen Gansel diagnosed "historical pornography in the shape of Holocaust memorial rituals and other forms of national masochism" [...]. Udo Pastörs spoke in the *Landtag* of Mecklenburg-Western Pomerania of a "one-sided cult of guilt" and "Auschwitz projections" [...]. In the same place Tino Müller stated: **[836]**

You are lying to our young people by hiding the fact that it was not the German Reich that declared war on Great Britain and France, but the British and French who declared war on us. [...]

Holger Apfel stated in the *Landtag* of Saxony: **[837]**

66 years after the end of the Second World War there must finally be an end to our *Volk* being beaten into servitude with the club of Auschwitz. 66 years after the end of the Second World War it is finally time to take off the sinner's hair shirt and the dunce's cap. The desk for tickets to Canossa, [...] should be closed once and for all. [...]

The then members of the respondent's parliamentary group in the *Landtag* of Mecklenburg-Western Pomerania demonstratively absented themselves from a minute of silence to commemorate the victims of National Socialism on 30 January 2013. **[838]**

c) The [...] evidence [...] documents to a sufficient degree - without there being any need for recourse to the expert opinion by the Institute of Contemporary History (*Institut für Zeitgeschichte*) submitted by the applicant - the links in terms of content between relevant parts of the respondent and historical National Socialism. **[839]**

The former federal chairman of the respondent, Holger Apfel, also confirmed this in the oral hearing and drew attention to the fact that "at least some party members still find themselves in many points in the world of the political ideas of the Third Reich". The former Hamburg *Land* chairman Wulff, he said, openly professes to be a National Socialist. According to Mr Apfel, proceedings to exclude Mr Wulff from the party failed. **[840]**

It may be presumed from all of this that a similarity in nature exists between the respondent and National Socialism. [...] **[841]**

[...] **[842]**

At the same time, this confirms the disparaging by the respondent of the free democratic basic order. [...] **[843]**

4. [...] **[844]**

II.

What precludes a prohibition of the respondent, however, is the fact that the criterion of "seeking" (*darauf ausgehen*) within the meaning of Art. 21(2) first sentence GG is not met. While the respondent does indeed advocate aims which are directed against the free democratic basic order and although it systematically acts […] towards achieving those aims [...] (1.), there are no specific and weighty indications suggesting even at least the possibility that these endeavours [...] might be successful (2.). **[845]**

1. The respondent works [...] in a systematic manner towards the realisation of its anti-constitutional aims (c). **[846]**

a) aa) The respondent has a nationwide organisational structure. [...] **[847]**

The respondent's financial report for 2013 shows that the respondent had 5,048 members [...] as of 31 December 2013. **[848]**

The respondent attempts to prepare its adherents for the political struggle by means of training courses and similar measures. [...] **[849]**

bb) The respondent is represented in the European Parliament by one member. It has no members in the *Bundestag* or in any federal state parliament. Some 350 members of local representative bodies […] are members of the respondent. [...] **[850]**

cc) The respondent's public relations work uses the entire spectrum of media opportunities. [...] **[851]**

[...] **[852-854]**

b) The basis of the respondent's political work is a self-contained strategic concept, which it describes as its "four pillar strategy" […]. **[855]**

c) The respondent systematically attempts to put these strategic goals into practice [...]. **[856]**

aa) (1) Within the framework of the first pillar of this strategy ("Fight for Hearts and Minds"), it endeavours to enhance its public acceptance by means of "national-revolutionary grass-roots work" [...]. The political message is not the primary factor here. [...] **[857]**

[...] **[858-860]**

bb) The aim of the "Fight for the Street" is the dissemination and implementation of the respondent's ideology. For this, it uses its media opportunities, election campaigns and - where it has one - its parliamentary presence. Beyond this, the respondent attempts to influence the formation of political opinion with [...] high-profile public activities [...]. **[861]**

(1) The respondent endeavours to address potential voters and sympathisers at an early age by using materials specifically aimed at young people [...]. **[862]**

[...] **[863-866]**

(2) The main focus of the respondent's publicity activities is on the topic of asylum. [...] **[867]**

(a) (aa) According to the applicant's submission, which remained uncontested, the respondent held a total of 192 events in 2015 which were directly attributable to it with more than 20 people attending each event and 23,000 people attending in total. In the view of the applicant, a further 95 events must be added to this, with a total of 20,000 people attending, since in particular rallies by MVGIDA and THÜGIDA [*translator's note: two regionally active anti-Islam organisations, both of which are offshoots of PEGIDA - Patriotische Europäer gegen die Islamisierung des Abendlandes, Patriotic Europeans against the Islamisation of the Occident*] are heavily influenced by the respondent. **[868]**

[...] **[869-871]**

(4) The attempt to disseminate the respondent's political ideology takes place on the basis of what is known as the "strategy of taking the floor" (*Wortergreifungsstrategie*) […] in direct confrontation with political competitors. [...] **[872]**

cc) The respondent also uses the "Fight for the Parliaments" to strive for its anti-constitutional aims and work towards their realisation in election campaigns and parliamentary work. […] **[873]**

[...] **[874-876]**

dd) The respondent's "Fight for the Organised Will" involves striving, on the basis of existing personal interconnections (1), to form a "comprehensive national opposition movement" under its own leadership (2). This uses co-operations with various different regional constellations of the extreme right-wing scene which is not affiliated with the NPD and preparedness to integrate members of this scene into the respondent who wish to join it (3). At the same time it seeks to collaborate with and influence the movements directed against an alleged "Islamisation of the Occident" (4). **[877]**

(1) A considerable number of persons at the respondent's executive levels used to be members of banned extreme right-wing organisations. […] **[878]**

[...] **[879-895]**

2. Even though all this shows that the respondent is committed to its anti-constitutional aims and is systematically working towards achieving them, its actions do not amount to a fight against the free democratic basic order in the sense of "seeking" (Art. 21(2) first sentence GG). There are no sufficiently weighty indications suggesting that it will succeed in achieving its anti-constitutional aims. […] **[896]**

a) [...] **[897]**

aa) Currently, parliamentary majorities enabling the respondent to impose its political concept are achievable neither through elections nor by means of forming coalitions. **[898]**

(1) At a supra-regional level, it has just one MEP in the European Parliament. […] **[899]**

Election results in European Parliament and *Bundestag* elections are stagnating at a very low level. In the last *Bundestag* election in 2013 the respondent […] gained 1.3 % of the valid second votes cast. […] In the 2014 European Parliament election it gained 1 % of the valid votes cast […]. **[900]**

In the former West German federal states, the respondent's election results varied at the last *Landtag* elections between 1.2 % (Saarland) and 0.2 % (Bremen) of the valid votes cast. Although the level was already low, it suffered further losses of votes in the *Landtag* elections in 2016 […]. **[901]**

There has also been a decline in the respondent's election results, albeit from a higher starting level, in *Landtag* elections in the former East German federal states. […] In Mecklenburg-Western Pomerania the respondent gained 7.3 % of the valid votes cast in the 2006 *Landtag* election, 6.0 % in the 2011 *Landtag* election and just 3.0 % in the 2016 *Landtag* election. **[902]**

In the more than five decades of its existence, the respondent has not been able to gain representation in any federal state parliament on a permanent basis. There are no indications that this development will change in the future. In addition, the other political parties represented in the parliaments […] have hitherto not been prepared to enter into coalitions or even *ad hoc* co-operations with the respondent. […] **[903]**

(2) Nor is the situation different at municipal level. Even though the respondent has more than 350 seats in local representative bodies throughout Germany […], it is very far from having the ability to influence the shaping of relevant policy. This is confirmed by the fact that the respondent's seats amount to around just one-thousandth of the estimated total number of more than 200,000 seats at municipal level. **[904]**

Nor does a consideration on a case-by-case basis yield any different assessment […]. **[905]**

[…] This is the case even when considering the municipalities upon which the applicant has laid particular emphasis, and in which the respondent gained a disproportionately high share of up to 27.2 % of the valid votes cast […] in the 2014 local government elections […]. **[906]**

The vast majority of the municipalities cited has a small number, in four digits, some even in just three digits […], of inhabitants which means that the high results in these individual cases were not sufficient even for one seat for the respondent in the respective municipal councils. […] At the relevant district level, the respondent did not gain more than 7 % of the votes in 2014 anywhere. […] **[907]**

[...] **[908]**

Thus, the respondent has no policy-shaping majorities of its own in the municipal parliaments of the former East German federal states. […] Moreover, it has just as few coalition options there as in the former West German federal states. […] **[909]**

bb) There are likewise no specific and weighty indications suggesting that the respondent will succeed in achieving its aim of abolishing the free democratic basic order by democratic means outside the parliamentary level. […] **[910]**

(1) Compared with its highest level of 28,000 in 1969, the respondent's membership numbers have clearly declined. […] Neither the respondent's merger with the German People's Union (DVU) nor opening itself up to the

neo-Nazi scene and the formation of its own regional associations in the former East German federal states have been able to put a permanent halt to the decline in membership. […] With a total of fewer than 6,000 members, the respondent's possibilities for action are limited significantly. **[911]**

(2) [...] **[912]**

(a) The Federation's Annual Report on the Protection of the Constitution (*Verfassungsschutzbericht*) for 2014 shows the respondent to be in a state of sustained crisis. Although it is still the most effective extreme right-wing political party, the report finds that it is suffering from internal strife, declining membership numbers, unsolved strategic issues, financial problems and the pending prohibition proceedings […]. **[913]**

[...] **[914-916]**

(aa) In this connection, the expert witness Prof. Jesse submitted his opinion in the oral hearing that the respondent is an isolated, ostracised political party whose campaign capability, such as it is, has declined in recent years. The expert witness Prof. Kailitz, too, stated in the oral hearing that the respondent is at present unable to reach the centre of society. [...] In the oral hearing the former party chairman of the respondent, Holger Apfel, said that the respondent has always been accorded an importance in public perception which has not matched the reality. He said that taboo-breaking had been deliberately staged in the parliaments in order […] to give the impression of an effective and professional organisation. **[917]**

(bb) The finding of a low level of effectiveness in society [...] is confirmed by reports of the constitutional protection authorities of the Federation and the federal states. All annual reports on the protection of the Constitution by the former West German federal states consistently show that attendance figures for the respondent's events are following a downward trend with numbers below three digits, while the number of counter-demonstrators has often been very much higher [...]. In the former East German federal states, it is also found that, apart from the respondent's anti-asylum campaigns (cf. para. 924 et seq.), the respondent's members frequently have only themselves for company at their events [...]. **[918]**

[...] **[919]**

(3) Nor is the respondent able to compensate in other ways for its structural deficits and low level of effectiveness in society. [...] **[920]**

[...] **[921-923]**

(c) This is also the case [...] to the extent that the respondent concentrates on activities directed against asylum seekers and minorities as part of its 'Fight for the Street'. [...] **[924]**

[...] While the respondent does indeed try to instrumentalise the refugee and asylum problems for its own purposes, it frequently acts not in its own name but under the umbrella of apparently neutral organisations [...]. When, on the other hand, it becomes evident that it is the respondent that is responsible for the event, attendance significantly declines. The applicant has itself submitted that the attendance figures at MVGIDA events declined from around 600 to 120 […] once the dominance of the respondent became evident. It was similar with the 'Schneeberger Lichtelläufen' event series directed against a local home for asylum seekers. While more than 1,500 people attended the first three events [...] only some 250 participants, most of them belonging to the respondent and its entourage, could be mobilised for the fourth event on 25 January 2014, for which the respondent took a more prominent, offensive stance as an organiser [...]. This documents the fact that the anti-asylum initiatives by the respondent have in individual cases been very successful in mobilising attendees. It is, [however], not discernible that this means that its social acceptance is increasing and that it will be able to assert its anti-constitutional aims through the process of forming the political will by democratic means. [...] **[925]**

(d) Finally, it does not seem likely that the respondent will be able to strengthen its impact by co-operating with forces which are not affiliated with it. [...] **[926]**

(aa) [...] **[927]**

[...] On the contrary, the respondent has been unable to achieve a "concentration of all national-minded forces" under its leadership. Its co-operation with unaffiliated forces takes place on an *ad hoc* basis without any firm organisational foundation. The respondent is not accorded a leading role. [...] **[928]**

[...] In the expert report by Prof. Borstel submitted by the applicant, co-operative ventures with extreme right-wing movements have been assessed as being existential for the respondent. Prof. Borstel reports, however, that these co-operations are temporary and on a regional basis, and that any permanent integration of the neo-Nazi groups and 'free' networks would run counter to the self-perception of these groups as extra-parliamentary resistance groups [...]. **[929]**

[...] **[930-932]**

b) [Finally, there are] no specific and weighty indications suggesting that the respondent exceeds [...] the boundaries of admissible political struggle of opinions in a manner that would satisfy the constituent element of "seeking". [...] **[933]**

aa) It is not discernible that the respondent is capable of asserting to a relevant degree its claims for territorial dominance in a manner which excludes equal participation in the formation of the political will. There are no "national liberated zones" (1). [...] **[934]**

(1) Contrary to its original assertion, the applicant admitted [this] in its brief of 27 August 2015 [...]. **[935]**

(2) In this connection, the tiny village of Jamel constitutes a special case, which cannot be generalised. [...] **[936]**

[...] **[937]**

The gaining of a majority in the village by right-wing extremists is reflected in the villagescape. [...] **[938]**

[...] **[939]**

There is no doubt that Jamel is a village permeated with extreme right-wing ideas. This is, however, a singular [case] that is limited to a few persons. As the expert witness Prof. Jesse has confirmed in the oral hearing, this situation cannot be transferred to other places, particularly not larger villages or towns. […] **[940]**

(3) Other examples of successful implementation of the respondent's claims for territorial dominance were not identified. **[941]**

(a) Contrary to the applicant's opinion, it cannot be assumed that the Hanseatic city of Anklam [...] is a zone of cultural hegemony of the respondent. [...] **[942]**

(aa) The applicant's reference in this context to a […] property which, as a "nationalist meeting centre" […] serves as a venue for right-wing extremists across the country […] cannot be taken as evidence of the assertion of claims to dominance. [...] **[943]**

(bb) Nor is the carrying out of a demonstration on 31 July 2010 under the title of "*Gegen kinderfeindliche Bonzen* [...]" (Against Child-Hating Bigwigs) called jointly by the respondent and the organisations *Nationale Sozialisten Mecklenburg* (Mecklenburg National Socialists) and *Freies Pommern* (Free Pomerania) evidence of the respondent's dominance in Anklam. [...] **[944]**

[...] **[945]**

(cc) Furthermore, the suggestion that the respondent has a dominant position in Anklam is also refuted by the fact that in the 2014 municipal council election the respondent won merely 9.3 % of the valid votes cast and accordingly took only two of the 25 municipal council seats there. There are, moreover, several active anti-right-wing extremism initiatives in Anklam. [...] **[946]**

(b) The same holds for Lübtheen, which the applicant has portrayed as a further example of a zone of domination [...]. The fact that several leading functionaries of the respondent [...] live and are active in Lübtheen, and possibly moved there deliberately, is not sufficient for the presumption of a situation of dominance. The same applies to the extent that the respondent uses a property prominently located in the town centre and that its representatives are present at events, even ones directed against right-wing extremism. **[947]**

[...] **[948]**

[...] Here, too, the fact that the respondent won 10.7 % of the valid votes cast in the 2014 municipal election and accordingly took only two of the 17 seats in the municipal council is evidence against the respondent's dominance. Apart from that, the applicant itself admits that the respondent would not be able to realise fully its claim to dominance, not least due to the citizens' initiative against right-wing extremism initiated by the mayoress. [...] **[949]**

(c) [...] **[950]**

bb) Nor are there sufficient indications that there is a fundamental tendency of the respondent to assert its anti-constitutional aims by violent means or by committing criminal offences. [...] **[951]**

(1) While the applicant refers [...] to the fact that the number of attacks on homes for asylum seekers peaked in 2015 with 1,031 criminal offences (177 of them crimes of violence) being committed, this cannot be attributed to the respondent. [...] It is not sufficient in this regard for the respondent to be involved in creating a climate of hostility to foreigners with its inhuman agitation. [...] This cannot be simply taken on its own to prove that it regards attacks on refugee homes as a means likely to aid the achieving of its ends or that it approves of them in any other way. [...] **[952]**

(2) Contrary to the applicant's view, it cannot be inferred from the general lack of law-abiding behaviour on the part of its adherents that the respondent is prepared to use force or commit crimes to achieve its […] aims. [...] **[953]**

(a) In this connection, the anonymised statistics by the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) submitted

by the applicant regarding delinquency of the respondent's executive committee members cannot be used to support the applicant's view [...]. **[954]**

(b) This is not altered by the fact that the applicant has reacted to the notice as to inadmissibility as evidence and submitted a list of 57 criminal convictions of the respondent's functionaries in total. A large number of these convictions had [...] no political background [...]. A political background is at least doubtful in the case of a number of other criminal offences. [...] Moreover, the convictions cover a period of 25 years, largely concern purely propaganda offences and predominantly involve petty crime, with some being for offences committed as juveniles. The number, subject and severity of the criminal offences on the list committed by individual members of the respondent are not sufficient […] to accuse it of having the intention of asserting its political aims by using force or by committing crimes. **[955]**

(3) Nor are the events and facts set out in detail by the applicant sufficient for an inference that the respondent is prepared to use force or fails to obey the law such that the constituent element of "seeking" within the meaning of Art. 21(2) first sentence GG is met. [...] **[956]**

[...] **[957-958]**

(b) The violent assaults and other criminal offences described by the applicant cannot be unreservedly attributed to the respondent. **[959]**

(aa) Since the perpetrators who caused the arson attacks on the barn in Jamel and on a sports hall in Nauen planned as emergency accommodation for asylum seekers have not yet been identified [...], these occurrences cannot be taken into consideration. The same applies to the damaging and removal of posters in the run-up to the demonstration in Anklam on 31 July 2010 [and the damage to property and threatening of the director of a socio-cultural meeting place in Güstrow]. **[960-961]**

Nor can any involvement by the respondent be established in the spraying […] in Demmin on 19 August 2010 and in Ueckermünde on 20 August 2010 of so-called "Stolpersteine" [*translator's note: "stumbling blocks" - small, square plaques set into pavements*] which had been placed to commemorate Jewish fellow citizens. The posters simultaneously pasted up in Ueckermünde suggest rather that this was an act carried out by an extreme right-wing movement […]. **[962]**

Similarly, the riots in Leipzig-Connewitz on 11 January 2016 cannot be attributed to the respondent. **[963]**

(bb) The riots in Dresden on 24 July 2015 and Heidenau on 21 August 2015 following demonstrations by the respondent cannot be attributed to the respondent. **[964]**

(α) The demonstration […] organised in Dresden […] was notified to the authorities by a member of the respondent and advertised as an event of the party. […] Violent clashes took place following this demonstration […]. **[965]**

[…] There is, however, nothing to show that the respondent incited these clashes or contributed to them in any other way. […] **[966]**

(β) The same applies to the riot which took place following the respondent's protest rally in Heidenau on 21 August 2015 […]. **[967]**

(cc) Attacks on constituency offices of other political parties in MecklenburgWestern Pomerania cannot be attributed to the respondent, either. Since the perpetrators of these attacks have not been identified, members or adherents of the respondent cannot be accused of being involved in carrying out these attacks. Nor can it be established that the respondent supported these attacks or took credit for them. **[968]**

[...] **[969]**

(c) Therefore, what remains is merely a small number of acts of violence involving members and adherents of the respondent (aa), which are not, however, sufficient to prove that it has a fundamental tendency to assert its anti-constitutional intentions by violent means or by committing criminal offences (bb). **[970]**

(aa) (α) These include the assault by JN functionaries on a rally by the German Association of Trade Unions (*Deutsche Gewerkschaftsbund* - DGB) in Weimar on 1 May 2015. […] **[971]**

[...] **[972]**

(β) Moreover, a total of twelve convictions have been handed down to members and adherents of the respondent for policy-related violent offences. […] **[973]**

(χ) The applicant also refers to […] two assaults on counter-demonstrators at events held by the respondent in Lingen and Aschaffenburg in 2013. In the oral hearing, the third-party expert Röpke also reported on further acts of violence by security staff. […] **[974]**

[...] **[975]**

(bb) […] Including the events described by the applicant and the third-party witness Röpke, this involves a total of 20 independent offences over a period of more than ten years. The vast majority of these cases does not involve the planned and deliberate use of force to assert political aims, but rather incidental scuffles at the margin of or leading up to political events […] A fundamental tendency of the respondent to assert its political aims by violent means or by committing criminal offences cannot (yet) be inferred from the individual cases which have been described. **[976]**

cc) Nor can it be established that the respondent's actions lead to an atmosphere of fear that is likely to undermine the right to free and equal participation in the formation of the political will. […] **[977]**

(1) (a) The list submitted by the applicant with freely-given information on threat experiences (Liste mit freien Angaben zu Bedrohungserfahrungen) drawn up by the psychologist Anette Hiemisch cannot be referred to as evidence establishing the creation of an atmosphere of fear by the respondent. […] This list […] does not show which organisations are the source of the threats in question, nor are dates, places or involved persons specified in detail. […] **[978]**

(b) The Senate cannot concur with the applicant's opinion that threats and intimidations by members of comradeships and other neo-Nazi groups can generally be attributed to the respondent. […] Comradeships and other neo-Nazi groups act autonomously and do not represent themselves as an "extended arm" of the respondent. […] **[979]**

(c) [...] **[980]**

(d) Nor can the events following a demonstration organised in October 2013 by the citizens' initiative *Schneeberg wehrt sich* (Schneeberg defends itself) be attributed to the respondent. […] After this demonstration, 30 to 50 attendees at the event carrying lit torches drew up outside the mayor's private house. […] There is no indication that the respondent instigated these events or supported them in any other way. […] **[981]**

(e) [...] **[982]**

(2) [...]

(a) Mere participation by the respondent in the battle of political opinions must […] remain outside the scope of consideration. As long as it does not exceed the boundaries of what is permissible in democratic discourse, this does not result in any limiting of third parties in the exercise of their democratic rights, regardless of any other motives the respondent may have and the subjective feelings of individuals concerned. **[984]**

(aa) [...] **[985-986]**

(bb) With regard to the resignation of the mayor of Tröglitz, it appears doubtful whether the boundaries of the permissible battle of political opinions [...] were exceeded. [...] **[987]**

Even though the mayor of Tröglitz may have subjectively felt the planned march of the demonstration announced by the NPD district council member T. past his house to be a threat to himself and his family, merely marching as announced along an approved route [...] does not yet in itself constitute an interference with the process of free and equal participation in the formation of the political will. **[988]**

(cc) [T]he protests against the use of the *Spreehotel* in Bautzen do not yet exceed the permissible boundaries of the battle of political opinions. [...] **[989]**

(dd) The same applies to the protest and call for a demonstration against the mosque in Leipzig-Gohlis with the motto *Maria statt Scharia!* (Mary, not sharia!) [...]". **[990]**

(b) It may be the case that other activities by the respondent have exceeded the permissible boundaries of the battle of political opinions […]. Nevertheless, it cannot be inferred from individual cases that they are objectively likely to bring about an […] atmosphere of fear which stands in the way of the exercise of democratic rights. **[991]**

[This is the case with regard to individual election campaign activities by the respondent and visits to refugee homes and the rally directed by the respondent's Berlin-Pankow district association against the Pankow borough mayor K. and the occurrences between 2007 and 2009 in Schöneiche near Berlin described by the applicant.] **[992-1000]**

(d) Finally, the respondent's activities with regard to forming militias and undertaking patrols are not objectively sufficient to amount to a creation of an atmosphere of fear, since, as far as is evident, lawful limits have not been exceeded and there has been no impermissible interference with the rights of third parties. [...] **[1001]**

(3) Moreover, to the extent that individual situations remain in which a potential threat exists or at least cannot be ruled out which may undermine the freedom of formation of the political will (a), this is not sufficient to infer that the respondent has a fundamental tendency to pursue its political aims by creating an atmosphere of fear (b). **[1002]**

[...] **[1003-1006]**

(b) [...] Like crimes which have been committed, the action of individual members of the respondent against the director of the multi-cultural meeting centre in Güstrow and against the mayor of Lalendorf are individual occurrences which cannot in a generalised way be laid at the door of the respondent. The same also holds for the references to the conduct of the respondent's security staff. The factual situations which have been described are not yet enough to justify the ordering of the prohibition of the party. [...] **[1007]**

dd) The Senate is not overlooking the fact that affected persons may feel that their constitutionally-guaranteed freedom of expression and action are seriously and sustainably undermined by behaviour of members or adherents of the respondent which is intimidating and deliberately provocative or crosses the boundary to criminality. The evidence presented in the oral hearing does not, however, show that the extent, intensity and density of such occurrences reaches the threshold for the prohibition of a political party determined by Art. 21(2) GG [...], which is high for the reasons set out above (cf. para. 523 et seq.). Intimidation and threats, as well as the building-up of potentials for violence, must be countered thoroughly and in due time with the means of preventive police law and repressive criminal law in order to effectively protect the freedom of formation of the political will as well as individuals affected by the respondent's behaviour. **[1008]**

XI. Privacy of Communications - Article 10 of the Basic Law

1. Eavesdropping, BVerfGE 30, 1

Explanatory Annotation

Article 10.1 of the Basic Law protects the privacy of postal or telecommunication (telephone, email etc.) from interference by the state, i.e. by the state security organizations. This covers measures such as intercepting letters and packages and wiretapping telephone lines insofar as entering the home or office of the victim is not necessary.[143]

As there are few rights without exceptions, Article 10.2 of the Basic Law provides a framework for justified infringements of the right guaranteed in Article 10.1. Any such restriction must be based on a law that spells out the conditions for such infringements in a transparent way and that can be qualified as a proportional limitation of this core privacy right.

This decision of the Constitutional Court, however, deals with the possible restriction spelled out in the second sentence of Article 10.2 of the Basic Law. This provision was added to Article 10.2 in 1968 and subsequently complemented by the passage of a statute regulating the details. The new Article 10.2 made it possible under limited circumstances that the targeted person would not be informed of the measures breaching his or her privacy, not even subsequently, and that no legal remedy to the courts would be available against such measures, again not even subsequently. Instead, there will be a Committee of five members of Parliament, which will be informed every six months on all ongoing measures and which will exercise legal supervision. This constitutional amendment was challenged under Article 79.3 under which amendments of the Basic Law passed in the constitutional amendment process must not violate the principles protected in Articles 1 and 20 of the Basic Law. At issue were especially the human dignity guarantee of Article 1, the right to a legal remedy protected in Article 19.4 and the separation of powers as one constitutive element of Article 20.2 and 20.3 of the Basic Law. Human dignity could be affected if one came to the conclusion that such secretive measures of which the victim is never informed reduce the victim to a mere object of government action. The fact that no recourse to the courts was possible could point in that same direction and the fact that the application of the measures was supervised by a legislative rather than a judicial committee gave rise to the separation of powers issue.

The applicants could not persuade the Court. Article 79.3 of the Basic Law, while restricting possible amendments, does not prohibit such amendments even if they touch on the principles protected. Only the removal of the core of the protected principles could justify a limitation of the constitutional amendment power of Parliament. Here the access to a Court was removed only in a very limited field of application and in addition compensated by a different form of legislative supervision. The same holds true for the separation of powers especially in the light of the fact that the Basic Law and its order of parliamentary order does not follow an absolute

143 In which case the issue will become one of Article 13 of the Basic Law, see below.

approach on the separation of powers in the first place. Finally the Court pointed out that some of the restrictions are inherent: If the collection of information for certain purposes is regarded as possible if only in limited circumstances, informing the addressee of these measures would be senseless and legal protection is indeed impossible.

However, there is one gap: If the information collected leads to criminal proceedings, the victim will know about this by way of the subsequent proceedings. If nothing follows from the collection of the information the victim could at least be informed after the measure has been terminated, if there are no reasons to assume that the effectivity of the measure will be in jeopardy in the case at issue or in similar circumstances. The victim could then seek judicial protection at least after the fact and this could not only be valuable to the affected person but also for future measures undertaken. The Constitutional Court pointed out exactly that and based that finding on the principle of proportionality. This gap in the legislation did not necessitate a finding of unconstitutionality because it can be achieved by interpretation as subsequent information of the affected persons is not precluded.

The Court also pointed out that the Basic Law, whereas providing the framework for a democratic and free society, has consciously opted to also defend this freedom and if necessary to do so by restricting the liberty of those who seek to undermine and abolish the Basic Law's framework for freedom. Provocatively and certainly with a degree of exaggeration one can say that the Basic Law guarantees no - better: a little less - freedom for the enemies of freedom or, to formulate it differently, that the Basic Law does not allow the rights and liberty protected by it to be used to overthrow the democratic and free order.

Translation of the Eavesdropping Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 30, 1*

Headnotes:

1. If a person affected is prevented from contesting an enforcement measure because that person has received no knowledge of an encroachment upon his or her rights, that person must be afforded the possibility of lodging a constitutional complaint directly against the law in the same manner as in those cases in which a constitutional complaint against an enforcement measure is for other reasons not possible.

2. As regards the principle of proportionality, Article 10.2 sentence 2 of the Basic Law (Grundgesetz - GG) must be construed to require subsequent notification of the subject of surveillance in those cases in which a threat to the purpose of the surveillance measure and a threat to the protection of the free democratic fundamental order or the existence or security of the Federation or a Land can be excluded.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

3. In respect of the principle of proportionality, Article 10.2 sentence 2 of the Basic Law requires that the Act on Article 10 of the Basic Law (Gesetz zu Art. 10 GG - G 10) must limit the admissibility of restriction of the privacy of correspondence, posts and telecommunications to cases in which concrete circumstances justify suspicion of anti-constitutional conduct and it is possible to cope with such anti-constitutional conduct in the concrete instance only through encroachment upon the privacy of correspondence, posts and telecommunications, after all other investigatory possibilities have been exhausted.

   The constitutional requirement to the effect that surveillance activities must be restricted to that which is unavoidably necessary does not preclude surveillance of channels of communication of third parties that can be assumed to serve the purposes of the suspect.

4. Article 10.2 sentence 2 of the Basic Law requires that the Act on Article 10 of the Basic Law make provision for review that is as regards its substance and procedure the equivalent of review by the courts even if the person affected has no opportunity to participate in such "substitute" proceedings.

5. Article 79.3 of the Basic Law prohibits general abandonment of the principles contained therein, but does not, however, preclude modification of basic constitutional principles through constitutional amendments.

6. The treatment of a person by the public authority that enforces the law must if it is to be considered to violate human dignity constitute a manifestation of disdain for the esteem to which that person is entitled as a human being.

7. The principle of the separation of powers allows, under exceptional circumstances for legal protection against acts of the executive not through the courts, but rather through independent institutions appointed or formed by the legislature within the functional area of the executive.

8. A majority of the legislature can also abuse its rights. A faction or coalition that appoints only persons of its own persuasion as members of the body provided for under s. 9.1 of the Act on Article 10 of the Basic Law and would endeavour to achieve membership by only such persons of the commission provided for under s. 9.3 of the Act on Article 10 of the Basic Law would in case of doubt be acting abusively.

Judgment of the Second Senate of 15 December 1970 on the basis of the oral hearing of 7 July 1970 - 2 BvL 1/69, 2 BvR 629/68 and BvR 308/69 -

Facts:

The currently valid versions of Article 10 and Article 19.4 sentence 3 of the Basic Law, which stipulate in particular that the privacy of correspondence, posts and telecommunications may also be restricted without notification of the person affected and without the possibility of recourse to the courts, stem from the Seventeenth Act to Amend the Basic Law (Siebzehntes Gesetz zur Ergänzung des Grundgesetzes) of 24 June 1968 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 709). At the same time, the Act on the Restriction of the Secrecy of Correspondence, Posts and Telecommunications (Gesetz zur Beschränkung des Brief-,

Post- and Fernmeldegeheimnisses) (referred to as the "G 10 Act") of 13 August 1968 (Federal Law Gazette I p. 949), which also introduced provisions governing the surveillance of telecommunication traffic in connection with criminal proceedings, regulated the possibilities for such encroachment and the procedure to be followed.

The government of the Land of Hesse initiated abstract judicial review proceedings against Article 10.2 sentence 2 of the Basic Law and against s. 9.5 of the G 10 Act, which excluded the possibility of recourse to the courts against restrictive measures ordered under the G 10 Act except in the form of oversight by a parliamentary control commission. A group of public prosecutors and lawyers also filed a constitutional complaint against the amendment of the Basic Law and against various provisions of the G 10 Act.

The Federal Constitutional Court then ruled by a vote of five to three that the challenged provisions were, with the exception of the exclusion of notification in individual cases involving no danger to the purpose of the restriction pursuant to s. 5.5 of the G 10 Act, in compliance with the Basic Law in the interpretation provided in the decision.

Extract from the Grounds:

…

C. I.

A decision as to the compatibility of Article 10.2 sentence 2 of the Basic Law, which was inserted by the constitutional amendment, with Article 79.3 of the Basic Law requires the interpretation of both provisions.

1. Interpretation of Article 10.2 sentence 2 of the Basic Law yields the following:

   a) The privacy of correspondence, posts and telecommunications was from the very outset not unconditionally protected by the Basic Law; indeed, restrictions - which in each case required a legal basis - were always permissible. This very general reservation of the possibility of restriction of the fundamental right was to be sure subject to limits as regards the prerequisite for and scope of restriction; it did, however, as regards the scope of application, from the very beginning also include the possibility of legislation that makes provision for restriction of the privacy of correspondence, posts and telecommunications for the purposes of protection against endangerment of the free constitutional order or the existence of the state. In that regard, the new sentence 2 inserted into Article 10.2 of the Basic Law is nothing new; it merely provides a concrete case for application of sentence 1, in that it circumscribes the measures involved in connection with the restriction of privacy of correspondence, posts and telecommunications that may be rendered permissible by law, for the purposes of protecting the free democratic fundamental order or the existence or security of the Federation or a Land.

      Whenever the Basic Law makes provision for restriction of fundamental rights, it is consistently done to provide effective protection for another - individual or collective - legal interest that takes precedence either in general or in a concrete case. Viewed

under this aspect, the provision contained in sentence 2 loc. cit. is consistent with the intent of the reservation. The existence of the Federal Republic of Germany and its free constitutional order represent a superior legal interest; fundamental rights may be restricted to the extent absolutely necessary for the purposes of providing effective protection of that interest.

What is new about the provision inserted through constitutional amendment is therefore not actually the "restriction" of the privacy of correspondence, posts and telecommunications - such restriction being considered to include "surveillance" of correspondence, post and telegraph traffic, "eavesdropping" on communication and the opening and reading of letters - but rather the additional authority to not inform the persons affected of such restrictions and the substitution of review by agencies and auxiliary agencies appointed by the legislature for recourse to the courts. The relationship between these special measures and the above-mentioned restrictions (eavesdropping and inspection of letters) is clear. Undertakings, plans and measures directed against the constitutional order and against the security and existence of the state are for the most part carried out by groups that conceal and carry out their work in secret and are well organized and especially reliant upon channels of communication that function without being disturbed. The authorities responsible for the protection of the constitution can carry out their work against such an "apparatus" effectively only if their surveillance activities remain secret in principle and are therefore also not divulged in the context of judicial proceedings. Even subsequent disclosure of a surveillance measure and subsequent discussion thereof in the context of judicial proceedings can give enemies of the constitution information on the methods and concrete field of observation of the authorities responsible for the protection of the Basic Law and the identity of previously unknown agents of the authorities, thereby compromising to a significant extent the effectiveness of the latter. The power not to inform a person affected of eavesdropping measures and to assign review of such measures to an authority that is not a court therefore contributes to the effectiveness of the authorities responsible for the protection of the Basic Law, and is actually what makes eavesdropping and the opening of letters purposeful in the first place. Article 10.2 sentence 2 of the Basic Law therefore also allows restriction of the privacy of correspondence, posts and telecommunications for the purposes of protection of the constitution and the state through covert interception and monitoring of telephone communication and radio transmissions, facsimiles, telegrams and letters without disclosure and judicial review afterwards.

b) A provision of the Basic Law may not be interpreted exclusively on the basis of its wording. Indeed, all interpretations of the provisions of the Basic Law must be compatible with the fundamental principles of the Basic Law and its system of values (BVerfGE 19, 206 [220]). In the case of the interpretation of Article 10.2 sentence 2 of the Basic Law, it is therefore necessary to take into account the context of the Basic Law and in particular fundamental decisions embodied in the Basic Law and general constitutional principles. In the present context, the fact that the Basic Law of the Federal Republic of Germany embodies advocacy of "militant democracy" is of special importance. It does not accept the abusive use of fundamental rights to combat

the free order (BVerfGE 28, 36 [48]). Enemies of the constitution may not be allowed to invoke liberty guaranteed by the Basic Law and under the protection of this liberty endanger, impair or destroy the constitutional order or the existence of the state (see Article 9.2, Article 18 and Article 21 of the Basic Law). The Basic Law explicitly makes provision for a separate institution for the purposes of protection of the constitution, i.e., the Office for the Protection of the Constitution (Verfassungsschutzamt) (see Article 73 no. 10 and Article 87.1 of the Basic Law). It cannot be the intent of the Basic Law to invest the supreme bodies of the state under the Basic Law with a duty and make provision for a separate office for such purpose on the one hand, but to deprive these constitutionally ordained bodies and the Office of the means required to fulfil their constitutional mandate.

Of no less importance is the fundamental decision embodied in the Basic Law as regards the limits imposed upon the fundamental rights due to considerations of public interest and for the purposes of protection of precedential legal interests (see, for example, Article 2.1 of the Basic Law). "The image of man under the Basic Law is not that of an isolated, independent individual; rather, the Basic Law embodies in negotiating the tension between the individual and the community a decision in favour of civic participation and civic responsibility of individuals without infringement upon the inherent value of the individual. This follows in particular from Articles 1, 2, 12, 14, 15, 19 and 20 of the Basic Law taken in their entirety. That means, however, that individuals must accept those restrictions upon their freedom of action that the legislature imposes in order to maintain and foster social coexistence within the limits of what may generally be considered reasonable in any given situation, provided that the independence of the individual is at the same time preserved" (BVerfGE 4, 7 [15-16]).

Finally, the Federal Constitutional Court has derived the principle of proportionality from a third fundamental decision embodied in the Basic Law, i.e., the principle of the rule of law, whereby the principle of proportionality requires in the case of restriction of issues involving fundamental rights that, only that which is absolutely necessary for the protection of a legal interest recognized by the Basic Law, in this instance the existence of the state and its constitutional order, may be provided by law and ordered in the individual case (see BVerfGE 7, 377 [397 et seq.]). It also follows from the principle of the rule of law that any governmental encroachment upon the freedom or property of citizens must be subject at least to effective judicial review.

This context, which includes Article 10.2 sentence 2 of the Basic Law, first of all provides confirmation of the interpretation that is obtained from the wording of the provision itself under (a). In particular, it follows that non-notification of the persons affected and substitution of another form of control for judicial protection are justified not only by the "nature of the matter" - precisely because the purpose of restriction of the privacy of correspondence, posts and telecommunications would not be achievable without these measures - but also enjoy constitutional legitimacy due to the fundamental decision in favour of militant democracy embodied in the Basic Law.

As regards the constitutional principle of proportionality, note must also be taken of the following: under Article 10.2 sentence 2 of the Basic Law, the law "may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature." As regards the principle of proportionality, the constitutional provision can only be construed to permit and require subsequent notification of persons subjected to surveillance in cases in which a threat to the purpose of the surveillance measure and endangerment of the protection of the free democratic fundamental order or the existence or security of the Federation or a Land can be excluded. The provision otherwise also leaves room for retention of normal recourse to the courts or institution of special judicial proceedings, instead of review by agencies appointed by the legislature, in the event this should be possible, without compromising protection of the free democratic fundamental order or the existence or security of the Federation or a Land.

Apart from this, the formulation "If the restriction serves to protect the free democratic fundamental order or the existence or security of the Federation or of a Land" allows the interpretation required under the principle of proportionality to the effect that infringement of the privacy of correspondence, posts and telecommunications must be limited to cases in which concrete circumstances justify suspicion of anti-constitutional conduct and it is possible to cope with such anti-constitutional conduct in the concrete instance only through encroachment upon the privacy of correspondence, posts and telecommunications after all other investigatory possibilities have been exhausted. This also limits the number of cases in which the persons affected are not informed.

It follows further from the constitutionally required limitation of surveillance measures to what is unavoidably necessary, that only such persons may be the subject of surveillance activities under Article 10.2 sentence 2 of the Basic Law, who have become subject to concrete suspicion of the above nature, such surveillance of course being not prohibited if in the course of surveillance due to the nature of posts and telephony as means of communication persons with whom a suspect maintains contact also necessarily become subjects of such surveillance. The constitutional requirement to the effect that surveillance activities be limited to that which is unavoidably necessary also does not exclude the possibility of surveillance of channels of communication of third parties that can be assumed to be used for the purposes of the suspect. In view of the above constitutional requirement, Article 10.2 sentence 2 of the Basic Law also authorizes surveillance for the sole purpose of acquiring knowledge of anti-constitutional activities. Finally, the interpretation of Article 10.2 sentence 2 of the Basic Law that follows from that constitutional requirement also prohibits making knowledge gained through surveillance available to other (administrative) authorities for their purposes and requires that materials collected, that are not or no longer of importance for the purposes of protection of the free democratic order, be promptly destroyed.

Finally, as regards "exclusion of recourse to the courts," the fact that "recourse to the courts shall be replaced" by review by agencies and auxiliary agencies appointed by the legislature assumes special importance in view of the constitutional principle of the rule

of law. This means that the law must in the context of implementation of this provision provide for review that is as regards its substance and procedure, the equivalent of review by the courts and in particular at least as effective even if the persons affected are given no opportunity to participate in such "substitute" proceedings. Under this interpretation, Article 10.2 sentence 2 of the Basic Law requires that legislation enacted for the purposes of its implementation make provision for and include among the agencies and auxiliary agencies to be appointed by the legislature, an agency that makes decisions independently of the judiciary, that are binding upon all parties involved in preparations for administrative decisions relating to and the execution of surveillance activities as regards the permissibility of surveillance activities and the question as to whether the persons affected are to be informed thereof and prohibits such surveillance activities if the legal prerequisites are not in place. This agency may be constituted within or without the legislature. It must, however, have at its disposal the requisite technical and legal expertise; it may not be bound by instructions; and its members must be appointed for a specific fixed term. It must have the power to oversee all agencies involved in preparations for, decisions relating to and the oversight of encroachment upon the privacy of correspondence, posts and telecommunications and all measures taken by such agencies. This control function must be exercised on an ongoing basis. All records that are relevant to the decision in the specific case must be made available to the controlling agency for this purpose. This control must constitute a judicial control. Article 10.2 sentence 2 of the Basic Law does, however, allow for provisions that also enable the controlling agency to require waiver or suspension of surveillance for reasons of expediency, i.e., to further reduce the number of instances of surveillance, in cases in which the legal prerequisites for surveillance are in place.

2. Interpretation of Article 79.3 of the Basic Law yields the following:

   a) The purpose of Article 79.3 of the Basic Law, which constitutes a bar to the amendment of the Basic Law by the legislature, is to make it impossible to do away with the substance and principles of the existing constitutional order through the formally legal means of a constitutional amendment and abusively use that order for purposes of subsequent legalization of a totalitarian regime. The provision therefore prohibits general abandonment of the principles enumerated therein. Principles are to begin with not "affected" as "principles" if they are taken into account in general and are modified for obviously objective reasons only for a special situation due to its unique nature. The formulation to the effect that modification of these principles is "inadmissible" has therefore no stricter meaning than the related formulation in Article 19.2 of the Basic Law, according to which "the essence of a fundamental right" may in no case be affected.

   b) The fact that, apart from the principle of the division of the Federation into *Länder* and the participation in principle of the *Länder* in the legislative process, Article 79.3 of the Basic Law describes "the principles laid down in Articles 1 and 20" as inviolate is also of importance in respect of its interpretation. This is different from a formulation

- and means to some extent more, to some extent less - to the effect that Article 79.3 of the Basic Law precludes amendment of the constitutional principle of respect for human dignity and the principle of the rule of law. More principles are "laid down" in Article 1 of the Basic Law than only the principle of respect for human dignity. Several principles are also laid down in Article 20 of the Basic Law; the "principle of the rule of law" is not, however, laid down therein, but rather only very specific principles underlying the principle of the rule of law: the principle of the separation of powers in paragraph 2 and the principle to the effect that the legislature is bound by the constitutional order and the executive and the judiciary by law and justice in paragraph 3. More can be inferred from the principle of the rule of law than the legal principles of Article 20 of the Basic Law referred to in Article 79.3 of the Basic Law, and the Federal Constitutional Court has developed such legal principles (e.g., prohibition of *ex post facto* laws, the principle of proportionality, resolution of the tension between legal certainty and justice in individual cases, the principle of the most complete legal protection possible). The conditional restriction of the power of the legislature to adopt constitutional amendments inherent in the formulation of Article 79.3 of the Basic Law must be taken all the more seriously for the purposes of interpretation since this is a provision governing exceptions that may in no case also prevent the legislature from modification of basic constitutional principles through constitutional amendment. Under this view, the principle derived from the principle of the rule of law to the effect that citizens must be afforded the greatest possible judicial protection does not figure among the "principles laid down" in Article 20 of the Basic Law; there is no mention of it in Article 20 of the Basic Law. Article 19.4 of the Basic Law, which contains a guarantee of recourse to the courts to this end, is therefore not immune from restriction and modification through constitutional amendment by virtue of Article 79.3 of the Basic Law.

c) As regards the inviolability of human dignity mentioned in Article 1 of the Basic Law, which according to Article 79.3 of the Basic Law is immune to amendment, everything depends upon the circumstances under which human dignity can be violated. This can obviously not be formulated in general terms, but rather always only in view of a concrete case. General formulations such as that to the effect that human beings may not be degraded to mere objects of state power can only suggest the area in which instances of violation of human dignity may be found. Human beings are not infrequently, mere objects not only of circumstances and social developments, but also of the law insofar as they must submit to the law without regard to their interests. It is not possible to find a violation of human dignity in this alone. They must in addition be subjected to treatment that calls into question in principle their quality as subjects or that constitutes in the specific case arbitrary disregard for human dignity. The treatment of a person by the public powers that enforce the law must if it is to be considered to be in violation of human dignity constitute a manifestation of disdain for the esteem to which that person is entitled as a human being, i.e., it must constitute "disdainful treatment."

II.

The interpretation of Article 10.2 sentence 2 of the Basic Law under I.1 is compatible with the interpretation of Article 79.3 of the Basic Law under I.2.

1. The omission of notification to the extent allowed by Article 10.2 sentence 2 of the Basic Law under the interpretation provided above is not incompatible with the principle of respect for human dignity, which under Article 79.3 of the Basic Law is also immune to amendment. For, since it makes reference to Article 1.1 sentence 1 of the Basic Law, Article 79.3 of the Basic Law does not in any case as regards its substantive content provide any more protection than Article 1.1 sentence 1 of the Basic Law itself. It is, however, indisputable that not every provision of law and order that without their consent restricts the freedom of citizens, charges citizens with duties or subjects citizens to measures that are unknown to them and remain unknown to them constitutes a violation of Article 1.1 sentence 1 of the Basic Law. This starts, for example, with the legal duty of physicians and certain authorities to report specific occurrences or with police investigations of certain individuals that ultimately prove to be inconclusive or unwarranted or with interception of private radio traffic. In the present context, the omission of notification is not a manifestation of disdain for an individual human being or that person's dignity, but a burden imposed upon citizens that they are required to bear for the sake of protection of the existence of their state and the free democratic order. The notion that such omission of notification could in practice lead to abusive eavesdropping practices, which would be incompatible with Article 1.1 sentence 1 of the Basic Law, does not constitute the basis for a legal argument in support of the incompatibility of Article 10.2 sentence 2 of the Basic Law in conjunction with Article 79.3 of the Basic Law. The possibility of illegal and unconstitutional abuse does not suffice to make the provision unconstitutional; to the contrary, when interpreting and assessing a provision of law, it must be assumed in a free democracy governed by the rule of law, that it will be applied properly and fairly.

2. The substitution of another form of legal control for recourse to the courts, also does not constitute a violation of human dignity in the present case. Respect for the quality of human beings as subjects does, to be sure normally require that they not only hold rights as subjects, but that they may also initiate proceedings to defend and assert their rights and present their case to the courts and in this sense therefore enjoy the protection of the courts. There have always been exceptions to this rule that do not offend human dignity. In any case, human dignity is not violated if the exclusion of judicial protection is motivated not by disregard or disrespect for an individual human being, but by the necessity of maintaining secret measures intended to protect the democratic order and the existence of the state. On the other hand, exposure of an individual to arbitrariness on the part of the authorities due to the exclusion of recourse to the courts would constitute a violation of human dignity. Precisely this is, however, excluded since it has been shown, Article 10.2 sentence 2 of the Basic Law requires legal control that is to be sure different, but equivalent, and also serves to protect the rights of the person affected.

3. The substitution of a different form of legal control for recourse to the courts as provided by Article 10.2 sentence 2 of the Basic Law also does not violate the principle of separation of powers, which is declared inviolate under Article 79.3 of the Basic Law and which Article 20.2 of the Basic Law guarantees by stating that the authority of the state will be exercised "through specific legislative, executive and judicial bodies." For this principle does not require strict

separation of powers, but permits under exceptional circumstances legislation by bodies of the government and administration or government and administration by legislative bodies. The principle of the separation of powers allows under exceptional circumstances for legal protection against measures of the executive not through the courts, but instead through independent institutions appointed or formed by the legislature within the functional purview of the executive. What is of the essence in this case is that the reason for the separation of powers is fulfilled, namely, reciprocal limitation and control of the powers of the state. The substitution of an independent institution under the executive for judicial control may not be simply undertaken discretionarily and arbitrarily, but only in cases in which a compelling, objectively obvious reason so requires and such that the core purview reserved to the judiciary is not infringed.

4. Finally, replacement of recourse to the courts by another form of independent legal control as is provided by Article 10.2 sentence 2 of the Basic Law and restricted omission of notification as allowed by Article 10.2 sentence 2 of the Basic Law do not conflict with the principle of the rule of law as referred to in Article 79.3 of the Basic Law. Only the principle mentioned in Article 20.3 of the Basic Law comes into consideration in this context: Executive power is bound by law and justice. This of course applies with the same force to authorities charged with protection of the constitution; the fact that persons affected receive no knowledge of surveillance measures and cannot seek recourse to the courts to verify the legality of the surveillance measures does not in any way change this. A provision of law that has for effect that a party affected need not under specific conditions be informed of surveillance measures and that recourse to the courts is replaced by review by agencies and auxiliary agencies appointed by the legislature cannot therefore infringe the principle of the rule of law, according to which all administrative authorities are bound to law and justice.

5. Finally, apart from the considerations under nos. 1 to 4, the compatibility of Article 10.2 sentence 2 of the Basic Law with Article 79.3 of the Basic Law follows from the general aspect that Article 10.2 sentence 2 of the Basic Law concerns modification of general constitutional principles, which as was shown above is inadmissible under Article 79.3 of the Basic Law.

D.

1. The Act on Article 10 of the Basic Law governs subject matter that falls under the legislative authority of the Federation. The legislative authority of the Federation to enact Article 2 of the G 10 Act, which governs the admissibility of measures to restrict the privacy of correspondence, posts and telecommunications in criminal proceedings through a change in the Criminal Procedure Code (Strafprozessordnung), is based on Article 74 no. 1 of the Basic Law.

The authority of the Federation to enact the provisions governing the restrictive measures in the area of non-criminal proceedings included in Article 1 of the G 10 Act derives from Article 73 nos. 1, 7 and 10 and Article 74 no. 1 of the Basic Law.

Article 1.2 of the G 10 Act serves to defend against anti-constitutional undertakings prior to criminal investigation. Admissible restrictive measures are limited to cases in which actual evidence exists to suspect that certain criminal acts have been planned, are being committed or have been committed. The restrictive measures under Article 1.2 of the G 10 Act therefore serve (at least indirectly) to prevent, investigate and prosecute criminal acts. The legislative

authority of the Federation therefore derives in this regard directly from Article 74 no. 1 of the Basic Law.

…

3. As regards the individual provisions of the Act on Article 10 of the Basic Law that are challenged in the present proceedings, the following applies: ...

b) As was also set forth under C.I.1, the principle of the rule of law and therefore Article 10.2 sentence 2 of the Basic Law in the mandated interpretation require that restrictive measures be made known as soon as the interests involved no longer justify secrecy. Since s. 5.5 of the G 10 Act excludes notification of the parties affected of restrictive measures in all cases, it is to some extent not covered by the interpretation of Article 10.2 sentence 2 of the Basic Law mandated by constitutional law that is presented above and in that respect incompatible with the Basic Law. This provision therefore had to be declared void since notification of the parties affected of restrictive measures is also excluded even if possible without compromising the purpose of the restriction.

c) Article 1 s. 2.2 sentence 2 of the G 10 Act and the last sentence of s. 100a of the Criminal Procedure Code in the version contained in Article 2 of the G 10 Act, according to which restrictive measures may also be taken against persons who can on the basis of certain facts be assumed to receive or transmit messages for, or from suspects or accused parties or whose connections can be assumed to be used by suspects or accused parties, are compatible with the Basic Law.

The provisions to be reviewed do not affect the right to occupational freedom. They basically do not even contain a provision at the level of the practice of a profession. Both provisions are not directed against the complainant explicitly in his capacity as a lawyer. They affect him, if at all, the same way they affect any other citizen. It is true, however, that activity as defense counsel is especially likely to bring a lawyer into close contact with suspects within the meaning of Article1 s. 2 of the G 10 Act or defendants within the meaning of s. 100a of the Criminal Procedure Code. If therefore a lawyer, as the complainant under (3) claims applies in his case, is involved almost exclusively as defense counsel in matters involving the security of the state and in proceedings involving capital crimes, the possibility cannot be excluded that the provisions under challenge will affect the exercise of his profession. This does not, however, make these provisions unconstitutional.

The freedom to exercise a profession may be restricted by law within the meaning of Article 12.1 sentence 2 of the Basic Law if reasonable considerations having to do with the public interest would seem to warrant it. In this case, the protection of the fundamental right is limited to a defense against obligations that are unconstitutional because they represent an excessive burden and are unreasonable (BVerfGE 7, 377 [405 and headnote 6a]); established case law since then. Reasonable grounds of public interest speak in favour of the provisions under challenge: the restrictive measures the legislature considers necessary in the area of the surveillance of correspondence, posts and telecommunications cannot be effective and are susceptible to circumvention if surveillance cannot be extended to cover facilities of certain contact persons of suspects

or defendants. This lies in the nature of the means of communication to be monitored. The particular nature of the purpose of the restrictive measures does not allow distinctions to be made between individual groups of possible contact persons. Under these circumstances, the extension of surveillance measures to the facilities of specific contact persons and possibly also lawyers' offices is not so unreasonable and burdensome for the party affected that they must not be accepted in view of the compelling necessity thereof.

2. *Federal Intelligence Service, BVerfGE 100, 313*

Explanatory Annotation

This decision dealt with a specific aspect of state interference with private communication: The intelligence gathering of the German Intelligence Agency. The special statute governing interference with private communication required under Article 10 of the Basic Law had been amended to give a broader role to the Agency in what is referred to as "strategic surveillance". The Agency had been given the power to engage in strategic surveillance only to gather information about a military armed attack on the territory of Germany. The object was not to gain information about persons but only information about relevant activities. In essence the Agency would record international telecommunication in bulk fashion and run computerized searches for certain nonpersonal markers. The amended statute expanded the role of the Agency to international terrorism, drug trafficking into Germany, military arms trafficking and money laundering and counterfeiting activities. Also broadened was the scope of passing on relevant information to the criminal prosecution authorities for gathering personal information. The Court did not mind the recording of international (not national) telecommunication and only exempted the counterfeiting from the scope of this activity because the Court qualified this activity not as sufficiently dangerous to warrant such significant interference with the right guaranteed in Article 10 of the Basic Law. The Court also took issue with some deficiencies of the statute pertaining to the nexus between the reason for gathering the intelligence and the use of that part of the data that is not immediately destroyed. The Court demanded that the statute be amended to clearly address this issue. In addition the Court demanded that insofar as the Agency reports to the Federal Government, the statute will have to clearly limit what the government can in turn do and what the government cannot do with this information to make sure that the information remains closely linked to the purpose of the intelligence gathering, which is not the prosecution of crimes. Insofar as the information is passed on directly to other agencies, e.g. for criminal prosecution, the Court held that the statute must limit the types of crimes to very serious ones in order to limit the effect of the intelligence gathering and remain within the bounds of the proportionality principle.

The decision reinforces the Court's approach that the gathering of information and the use of the data collected are two separate issues and the legality of data gathering does not imply the legality of the use of this data, even if the information pertains to criminal activity. The decision also emphasizes the principle of strict separation between police and criminal prosecution on the one hand and intelligence agencies on the other. Information gathered by intelligence agencies cannot simply be turned over and used by the police and for criminal prosecution purposes.

Translation of the Federal Intelligence Service Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 100, 313*

Headnotes:

1. Article 10 of the Basic Law (Grundgesetz - GG) not only provides protection from the state taking note of telecommunications contacts. Its protection also extends to the procedures by which information and data are processed following permissible acts of taking note of telecommunications contacts, and it extends to the use that is made of the obtained knowledge.

2. The territorial scope of protection of telecommunications privacy is not restricted to the domestic territory. Rather, Article 10 of the Basic Law is also applicable if an act of telecommunication that takes place abroad is, due to the fact that it is screened and evaluated on the domestic territory, sufficiently linked with domestic action of the state.

3. Article 73 no. 1 of the Basic Law grants the Federal government the competence to regulate the screening, utilisation and transfer of telecommunications data by the Bundesnachrichtendienst (Federal Intelligence Service). On the other hand, Article 73 no. 1 of the Basic Law does not entitle the Federal parliament to grant the Federal Intelligence Service powers that are aimed at the prevention or prosecution of criminal offences as such.

4. Whereas the Parliament empowers the Federal Intelligence Service to conduct telecommunications, monitoring that encroaches upon telecommunications privacy. Article 10 of the Basic Law obliges the Federal Intelligence Service to take precautionary measures against the dangers which result from the collection and utilisation of personal data. These precautionary measures include, in particular, that the use of obtained knowledge be bound to the objective that justified the collection of the data in the first place.

5. The competence of the Federal Intelligence Service under s. 1 and s. 3 of the G 10 Act to monitor, record and evaluate the telecommunications traffic for the timely recognition of specified serious threats to the Federal Republic of Germany from abroad and for the information of the Federal government is, in principle, consistent with Article 10 of the Basic Law.

6. The transfer of personal data that the Federal Intelligence Service has obtained from telecommunications monitoring for its own objectives to other government authorities is consistent with Article 10 of the Basic Law; it must, however, comply with the following prerequisites: (1) the data is necessary for the receiving agency's objectives; (2) the requirements placed on changes of objective as set forth in BVerfGE (Decisions of the Federal Constitutional Court) 65, 1 (44 et seq., 62) are met; and (3) the statutory thresholds for transfer comply with the principle of proportionality.

Judgment of the First Senate of 14 July 1999 - (1 BvR 2226/94, 2420/95 and 2437/95)

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Facts:

A.

The constitutional complaints concern the authority of the Bundesnachrichtendienst (Federal Intelligence Service) to monitor, record and evaluate telecommunications traffic and to transfer the data thus obtained to other public agencies. The constitutional complaints also challenge other regulations of the Gesetz zur Beschränkung des Brief, Post und Fernmeldegeheimnisses (Act on the Restriction of the Secrecy of Mail, Posts and Telecommunications) as amended in 1994 by the Verbrechensbekämpfungsgesetz (1994 Fight against Crime Act).

…

B.

With the exception of the constitutional complaint lodged by the second of the two complainants bringing the second constitutional complaint (1 BvR 2420/95), the constitutional complaints are admissible.

…

C.

The challenged regulations are not fully consistent with the Basic Law.

I.

The standard applied to the review of the constitutionality of the challenged legislation is, above all, Article 10 of the Basic Law. Article 10 of the Basic Law protects interests that are distinct from the right to informational self-determination that follows from Article 2.1 in conjunction with Article 1.1 of the Basic Law. As concerns telecommunications traffic, Article 10 of the Basic Law contains a special guarantee which supersedes the general protections of Article 2.1 (cf. BVerfGE 67, 157 [171]). To the extent that the possibility of taking recourse to a court against measures taken pursuant to s. 3 of the G 10 Act is concerned, Article 19.4 of the Basic Law is relevant as well. The same is true regarding the restrictions on the recourse to a court set forth in s. 9.6 of the G 10 Act. Apart from that, the constitutional complaints lodged by the first of the two complainants bringing the second constitutional complaint and both complainants bringing the third constitutional complaint are to be reviewed in accordance with the standards established in Article 5.1(2) of the Basic Law.

1. Article 10 of the Basic Law protects telecommunications privacy.

   a) Telecommunications privacy covers, first and foremost, the content of an act of communication. Public authority is, in principle, not supposed to have the possibility of obtaining knowledge about the content of the exchange of information and thoughts, whether oral or written that takes place via telecommunications equipment. In this context, Article 10 of the Basic Law draws no distinction between communication of a private nature and other communication, e.g. business or political communication

(cf. BVerfGE 67, 157 [172]). To the contrary, the protection of fundamental rights extends to all acts of communication that take place by means of telecommunications technology.

The protection of fundamental rights, however, is not restricted to shielding the content of an act of communication against the state taking note of it. The protection of fundamental rights also covers the circumstances of communication, particularly including: (1) information about whether, when and how often telecommunications traffic has taken place or has been attempted; (2) information about the individuals between whom telecommunications traffic has taken place or has been attempted; and (3) information about which subscriber lines have been used (cf. BVerfGE 67, 157 [172]; BVerfGE 85, 386 [396]). The state cannot, in principle, claim to be allowed to take note of the circumstances of acts of communication. The use of the medium of communication is supposed to remain confidential in all respects.

By withdrawing, in principle, individual acts of communication from the state's access, the fundamental right protecting telecommunications privacy intends to preserve the conditions of free telecommunication in general. The inviolability of telecommunications privacy, as a fundamental right, seeks to avoid the following: that the exchange of opinions and information by means of telecommunications equipment ceases altogether or is modified in its form and content because communication partners expect the state: (1) to interfere with their communication; or (2) to take note of the circumstances or the content of their communication.

Apart from that, the freedom of the use of telecommunications that is safeguarded by Article 10 of the Basic Law suffers if there is fear that the state utilises knowledge about the circumstances and the contents of acts of telecommunication in other contexts to the detriment of the telecommunications partners (cf., altogether, BVerfGE 65, 1 [42-43]; BVerfGE 93, 181 [188]). For these reasons, the protection provided by Article 10 of the Basic Law extends not only to the state taking note of acts of telecommunication that the telecommunications partners wish to keep to themselves, but also to the procedures by which information and data are processed that follow the state's taking note of protected acts of communication and the use of the knowledge obtained therefrom (concerning the right to informational self-determination, cf. BVerfGE 65, 1 [46]).

b) Certainly, Article 10.2 of the Basic Law permits restrictions of telecommunications privacy. Such restrictions, however, require, as does every restriction of a fundamental right, a legal regulation that serves a legitimate aim in the public interest and respects the principle of proportionality. Article 10 of the Basic Law also places special requirements on the parliament that particularly refer to the processing of personal data that has been obtained through interference with telecommunications privacy. The standards the Federal Constitutional Court developed for the right to informational self determination pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law, in its "Census" decision (cf. BVerfGE 65, 1 [44 et seq.]), can largely be applied to the more specific guarantee in Article 10 of the Basic Law.

One of these standards is that the prerequisites for and the extent to which privacy may be restricted must be clearly recognisable by an objective person in the regulations. In particular, the objective for which telecommunications privacy may be restricted must be precisely specified, naming the area of threat to which it refers. The data collected must also be suitable and necessary for achieving the objective of the restriction on telecommunications privacy. It would be incompatible with this principle to create, for unspecified objectives or for objectives that cannot yet be specified, a stock of data, the sources of which are not anonymous. Therefore, the storage and the use of collected data is, in principle, bound to the objective specified in the law that empowers the respective agency to take note of the collected data in the first place.

Acts of communication do not lose their Article 10 privacy protection because the state has been able to learn of the existence of the telecommunications contact; the standards established pursuant to fundamental rights apply equally to the transfer of data and information that has been obtained by an infringement of telecommunications privacy. The protection applies all the more, as the transfer of data, as a general rule, does not only result in an increase of the agencies or persons who are informed about the act of communication but also leads to the fact that the data is conveyed to a different context for altogether new uses. This after-effect of the transfer of data involves additional, possibly more serious, consequences for the monitored persons than when registered only in its original context of use.

Certainly, the principle of tying an encroachment on telecommunications privacy to a specific objective does not altogether preclude the possibility that the objective for such an encroachment might change. Any changes, however, require a statutory basis consistent in form and substance with the Basic Law. This means, *inter alia*, that a change of the objectives that justify encroachments upon privacy must be justified by interests of the common good that rise above the interests that are protected by the Basic Law. The new intended use of the data must refer to the missions and authorities of the agency to which the data is transferred, and its wordings must respect the principle of clarity. Moreover, the objective for which the data was originally collected must not contradict the new objective being offered as the justification for the collection or use of the data (cf. BVerfGE 65, 1 [51, 62]).

Assurance that the rule, which requires that all encroachments upon telecommunications privacy must be bound to a specific objective, is observed, can only be had if, after the data has been screened, it can still be determined whether the data was collected by means of an encroachment upon telecommunications privacy. Therefore, constitutional law requires that the data be marked accordingly.

Moreover, Article 10 of the Basic Law stipulates that the holders of fundamental rights are entitled to be informed of telecommunications monitoring that involved them. This requirement ensures the effective protection of fundamental rights, as without such notification, the monitored persons can neither claim that the screening and monitoring of their telecommunications contacts were illegal, nor can they assert possible rights regarding deletion or correction with respect to the collected data. Such a claim is not,

from the outset, restricted to the recourse to a court that follows from Article 19.4 of the Basic Law. First of all, it is rather a specific right to data protection that can be asserted *vis-à-vis* the state agency that processes information and data.

The Basic Law does not prescribe in detail the manner in which the monitored person is to be informed. The Constitution only requires that the people being monitored be notified in those cases where the data was collected secretly and the monitored persons were not entitled to demand that they be informed of the monitoring, or if the notification to which the monitored persons were entitled did not adequately take their rights into account (cf. BVerfGE 30, 1 [21, 31-32]). The duty to inform, however, is also subject to the reservation of Article 10.2 of the Basic Law. To the extent that the encroachment upon telecommunications privacy cannot achieve its aim if the monitored person is informed of the monitoring activity, it is not objectionable from the constitutional point of view to restrict the notification that monitoring is taking place accordingly. It may be sufficient to inform the monitored person about the encroachment after the fact (cf. BVerfGE 49, 329 [at 342-343]).

An encroachment upon telecommunications privacy can be imperceptible and the subsequent act of processing the obtained data is unfathomable for the unsuspecting subject of telecommunications monitoring; moreover, the possibility of restricting notification about an encroachment leads to gaps in legal protection. For these reasons, Article 10 of the Basic Law requires that controls be incumbent on state agencies and subsidiary agencies that are independent and not bound by instructions (cf. BVerfGE 30, 1 [23-24, 30-31]; BVerfGE 65, 1 [46]; BVerfGE 67, 157 [185]). The Constitution, however, does not prescribe how these controls are to be organised. The Parliament is free to choose the manner it regards as the most suitable, provided that it always adequately takes into consideration fundamental rights. One aspect of adequacy is that the controls cover each step of the process of telecommunications monitoring. The legitimacy of an encroachment upon telecommunications privacy, as well as the compliance with the legal regulations for the protection of telecommunications privacy, must be controlled.

Finally, as the screening and recording of telecommunications traffic and the use of the information thus obtained is bound to specific objectives, the obtained data must be destroyed as soon as it is no longer required for the specified objectives or for legal protection by recourse to a court.

c) Constitutional jurisprudence has not yet clarified how far the geographical range of the protection provided by Article 10 of the Basic Law extends. The Federal government assumes, though it remains an open question, that the constitutional protection of Article 10 only applies if there is a sufficiently close relationship to the territory of the Federal Republic of Germany. This interpretation leads to the conclusion that the Article 10 protection neither extends to foreign telecommunications traffic nor to persons living abroad. This question has not arisen in this way before because state power, as a general rule, could only be exercised on the territory of the state. Generally, the borders of the state were at the same time the borders of state power. Only the development of technology has made it possible for the state to extend its activities to the territory

of other states without having to be physically present there in the shape of representative entities. In particular, the use of satellites permits, *inter alia*, the monitoring of acts of communication conducted outside Germany without a physical connection to that foreign territory.

The starting point of the answer to the question about the territorial scope of Article 10 of the Basic Law is Article 1.3 of the Basic Law, which determines the scope of the application of the fundamental rights in general. The fact that this regulation provides that the fundamental rights bind the legislature, the executive and the judiciary in a comprehensive way, does not, however, result in a final determination of the territorial scope of application of the fundamental rights. The Basic Law does not content itself with defining the internal order of the German state but also determines the essential features of the German state's relationship to the community of states. In this respect, the Basic Law assumes that a delimitation between states and legal systems is necessary, and that coordination between states and legal systems is also necessary. On the one hand, the scope of competence and responsibility of organs of the German state must be taken into account when determining the scope of application of the fundamental rights (cf. BVerfGE 66, 39 [57 et seq.]; BVerfGE 92, 26 [47]). On the other hand, constitutional law must be coordinated with international law. International law, however, does not, in principle, preclude the validity of fundamental rights in matters that bear on relations with foreign countries. The territorial scope of the fundamental rights, however, must be drawn from the Basic Law itself, taking into account Article 25 of the Basic Law. When doing so, modification and differentiation may be permissible or required, depending on the relevant rules of constitutional law (cf. BVerfGE 31, 58 [72 et seq.]; BVerfGE 92, 26 [41-42]).

The protection of telecommunications privacy provided by Article 10 of the Basic Law, in accordance with the provisions of international law (cf. Article 12 of the Universal Declaration of Human Rights of 10 December 1948; Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950; in this context, cf. EGMR [Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, Decisions of the European Court of Human Rights], NJW [Neue Juristische Wochenschrift] 1979, p. 1755 [at p. 1756]), aims at assuring that telecommunications remain free of undesired or unnoticed monitoring and that the holders of fundamental rights can communicate in an unhindered way. The protection of telecommunications privacy relates to the medium of communication itself and intends to counteract the threats to confidentiality that result precisely from the use of this medium, which is more likely to be the object of encroachment by the state than direct communication between partners who are physically present (cf. BVerfGE 85, 386 [396]. Modern technology, like satellite and microwave technology, permits access to foreign telecommunications traffic by means of monitoring equipment that is located on the territory of the Federal Republic of Germany.

The screening and recording of telecommunications traffic with the help of the Federal Intelligence Service's reception equipment located on German soil already establishes a technical and informational relation to the respective participants in an act of

communication and, depending on the particular characteristics of data and information, establishes a contact to a specific territory. The evaluation, by the Federal Intelligence Service, of the acts of telecommunication that were screened in this way takes place on German soil. Under these circumstances, an act of communication abroad is linked with the action of the state on the domestic territory in such a way that the fundamental rights pursuant to Article 10 of the Basic Law are binding even if it must be supposed, for this binding effect to apply, that the territorial reference must be sufficiently close. Secret service activities that do not fall under the G 10 Act are not to be decided in this context, nor is the question of the legal situation of foreign communication partners abroad. In any event, pursuant to Article 19.3 of the Basic Law, Article 10 of the Basic Law does not apply to foreign legal entities.

2. Parts of the challenged regulations are also to be reviewed applying the standards of Article 19.4 of the Basic Law.

Article 19.4 of the Basic Law establishes the citizen's right to effective judicial review in cases in which it seems possible that their rights have been violated by acts of state power (by the German authorities). However, in Article 10.2(2) of the Basic Law makes an exception to this guarantee exclusively with respect to encroachments upon telecommunications privacy. Pursuant to Article 19.4(3) of the Basic Law, this exception is unaffected by the otherwise comprehensive guarantee of legal protection provided by the guarantee of recourse to a court. These provisions, however, do not set forth that the encroachments are not subject to any review whatsoever. Rather, recourse to a court is replaced by a review of the case by agencies and auxiliary agencies appointed by the parliament.

The right provided by Article 19.4 of the Basic Law, however, is not restricted to judicial review and judicial proceedings. If the guarantee of legal protection provided by the right of recourse to a court is supposed to ensure the possibility of safeguarding other material rights, this guarantee can, parallel to Article 10 of the Basic Law, require that a monitored person be informed of the monitoring activities, if this form of granting knowledge is the prerequisite of the monitored person taking recourse to a court (cf. BVerfGE 65, 1 [70]). However, Article 19.4 of the Basic Law, which must be made more concrete and implemented by laws, does not preclude limitations on the right that it secures.

The obligation to destroy data that is no longer needed, which exists in principle, must also be understood in light of Article 19.4 of the Basic Law. The guaranteed right of recourse to a court provided by Article 19.4 of the Basic Law prohibits measures that are aimed at and likely to frustrate the protection of the monitored person's right of recourse to a court (cf. BVerfGE 69, 1 [49]). In cases in which the monitored person strives for judicial review of state measures of information and data processing, the obligation to destroy data must therefore be reconciled with the guarantee of recourse to a court in such a way that legal protection is not undermined or frustrated.

3. The fundamentally private acts of communication protected by Article 10 of the Basic Law, including correspondence, post and telecommunication, can be further protected by guarantee of fundamental rights that are relevant because of the content or the context of a specific act of

communication. Guarantee of protection in addition to Article 10 may also be necessary in light of the impairment of fundamental rights that might result from use of the obtained data in new contexts.

To the extent that the complainants engage in the press sector and to the extent that they have claimed that they are hindered in this activity by the challenged regulations, the freedom of the press pursuant to Article 5.1(2) of the Basic Law can be considered as an additional guarantee of a fundamental right to telecommunications privacy. The freedom of the press not only refers to the dissemination of news and opinions in the press but also includes the prerequisites and auxiliary activities without which the press is unable to fulfil its function. This especially applies to the secrecy of its sources of information and to the mutual trust between the press and its informants (cf. BVerfGE 20, 162 [176, 187 et seq.]; BVerfGE 50, 234 [240]; BVerfGE 77, 65 [74-75]) as well as to the confidentiality of editorial work (cf. BVerfGE 66, 116 [130 et seq.]).

…

II.

The challenged regulations allow encroachments upon the aforementioned fundamental rights in several respects.

1. The monitoring and recording of acts of wireless international telecommunication by the Federal Intelligence Service encroaches upon telecommunications privacy.

As Article 10.1 of the Basic Law intends to protect the confidentiality of communication, every effort to take note of, record and utilise communication data by the state is an encroachment upon fundamental rights (cf. BVerfGE 85, 386 [398]). There is, therefore, no doubt that the fact that Federal Intelligence Service staff takes note of screened acts of tele-communication constitutes an encroachment upon fundamental rights. In order to determine whether this also applies to the measures that precede analysis by the Federal Intelligence Service, they must be regarded in their context that is determined by the objective of monitoring and of the use of the obtained data.

This means that the screening alone constitutes an encroachment, to the extent that it makes the communication available to the Federal Intelligence Service and is the basis of the subsequent comparison with the search concepts. Screening does not constitute an encroachment to the extent that acts of telecommunication between German subscriber lines were also screened in an untargeted manner and solely for technical reasons but were discarded by technical means immediately after signal editing without leaving any indication that monitoring had taken place. The mere fact that the obtained data cannot be immediately attributed to specific persons does not mean that there has been no encroachment; it was confirmed at the oral argument that in these cases it is also possible, without any difficulty, to establish references, especially to the identity of individuals.

The encroachment upon telecommunications privacy persists through the storage of the screened data, which makes the material available for comparison with the search concepts. The comparison itself constitutes an encroachment, as it comprises the selection of data for further

evaluation. This applies whether or not the comparison takes place automatically or is carried out by staff of the Federal Intelligence service who, for this objective, takes note of the content of the act of communication. As the further storage after screening and comparison serves to make the data available for evaluation, it is also an encroachment upon Article 10 of the Basic Law.

The examination made pursuant to s. 3.4 of the G 10 Act, which determines whether the personal data obtained by telecommunications monitoring is required for the objectives which justify these measures, also constitutes an encroachment. This examination is an act of selection by which the recorded data is either submitted to further use, stored for further use or destroyed.

An encroachment upon the right to telecommunications privacy also occurs when the Federal Intelligence Service, in the framework of its duty to inform the Federal government, transfers personal data that it has obtained through telecommunications monitoring. This transfer of the collected data expands the circle of those who know of the acts of communication and can make use of this knowledge. The Federal Intelligence Service's transfer of this recorded data to the receiving agencies, an act that is regulated in s. 3.5 and s. 3.3 of the G 10 Act, constitutes an encroachment upon telecommunication privacy, as does the further examination by the receiving agencies, which is regulated in s. 3.7 of the G 10 Act.

The limitation imposed by s. 3.8(1) and s. 3.8(2) of the G 10 Act on the duty to inform the monitored person about the monitoring taking place also constitutes an encroachment upon the fundamental right to telecommunications privacy.

2. Moreover, the guarantee of the right of recourse to a court provided by Article 19.4 of the Basic Law is impaired by: (1) the limitation, contained in s. 3.8(1) and s. 3.8(2) of the G 10 Act, on the duty to inform the monitored person that monitoring has taken place; and (2) the preclusion of the recourse to a court contained in s. 9.6 of the G 10 Act. Apart from that, the obligation to destroy personal data pursuant to ss. 3.6, 3.7 and 7.4 of the G 10 Act can have a detrimental effect on the judicial review of the measures.

3. To the extent that measures ordered on the basis of ss. 1.1 and 3.1 of the G 10 Act also cover telecommunications links of press publishers or journalists, an impairment of the fundamental right of the freedom of the press also occurs as a result of: (1) the authority to examine such acts of telecommunication that is conferred upon the Federal Intelligence Service pursuant to s. 3.4 of the G 10 Act; (2) the duty to inform the Federal government; (3) the authority to transfer data to other agencies pursuant to ss. 3.5 and 3.3 of the G 10 Act; and (4) the authority to examine the received data conferred upon these agencies pursuant to s. 3.7 of the G 10 Act.

III.

The authority to monitor and record telecommunications traffic pursuant to s. 1.1 and s. 3.1 sentence 2 nos. 1-6 of the G 10 Act is, essentially, in accord with Article 10 of the Basic Law. s. 3.1 sentence 2 no. 5 of the G 10 Act is not, however, consistent with this fundamental right to the extent that this provision permits monitoring in order to gather intelligence that is necessary to be able to timely recognise counterfeiting committed abroad and to counteract such a threat.

1. In the formal sense, there are no problematic constitutional considerations as against the provisions found in s. 1.1 and s. 3.1 of the G 10 Act. The legislative competence for the matters regulated by these provisions belongs to the Federal Republic of Germany. The Federal Republic's competence follows from Article 73 no. 1 of the Basic Law, which exclusively confers legislation in foreign affairs and defence to the Federal Republic of Germany.

…

b) The regulation in s. 1.1 and s. 3.1 sentence 2 nos. 1 to 6 of the 1994 Fight against Crime Act can be identified as belonging to the legislative competence over foreign affairs. This is obvious as regards the threat of an armed aggression (no. 1), which, apart from this, also belongs to the area of competence over defence, but also applies to the areas of threat specified under nos. 2 to 6.

…

2. The regulations in s. 1.1 and s. 3.1 of the G 10 Act also fulfil the prerequisites laid down by Article 10 of the Basic Law concerning the specificity and clarity of powers of encroachments upon telecommunications traffic.

In particular the Parliament has determined, in a sufficiently specific and clear manner, the objectives for which telecommunications links may be monitored and for which the intelligence thus gathered may be used. The threatening situations that are supposed to be timely recognised by observation or monitoring are described precisely enough and are further specified by reference to other laws. The scope of monitoring is determined by its limitation to international wireless traffic. In view of the mission and the workings of intelligence services, it was not possible to further specify the prerequisites that must exist for monitoring to take place.

3. As regards substance, however, s. 3.1 sentence 2 no. 5 of the G 10 Act disproportionately restricts telecommunications privacy. Apart from this, s. 3.1(2) of the G 10 Act complies with the requirements of the principle of proportionality.

a) The objective of timely recognising and counteracting the threats specified under numbers 1 to 6 of the provision is a legitimate interest of the common good. It is true that the threats specified under nos. 2 to 6, which were newly incorporated into the law, do not carry the same weight as the threat of an armed aggression, which has from the outset been regarded as a legitimate reason for telecommunications monitoring (cf. BVerfGE 67, 157 [178]). Whereas such an aggression jeopardises the existence of the state, the well-being of the population and the freely chosen liberal order of the state, the newly incorporated threats, as a general rule, do not affect the existence of the state or its order in the same fundamental manner. They do, however, concern high-ranking public interests whose violation would result in serious damage to external and internal peace and to the legal interests of individuals, albeit to different degrees.

b) Telecommunications monitoring on the basis of s. 3.1 of the G 10 Act is suitable for achieving the objective of the law.

The wide range of screening, which only in comparatively few cases is likely to yield information, is no argument against suitability. On the legal level, it is sufficient if there is an abstract possibility that the permitted measures achieve the intended objective, i.e. if the measures are not unsuitable from the outset but may contribute to the desired success (cf. BVerfGE 90, 145 [172]). This is the case here.

The requirement of suitability is also sufficiently taken into account on the level of implementation. On the one hand, monitoring takes place in a series of procedural steps that, by rendering the measures more specific, may promote their suitability. The determination of specific telecommunications links and the ordering of restrictions on the privacy of telecommunications links are meant to establish a framework that delimits the monitoring measures. The monitoring measures take place in regulated procedures, the elements of which comprise, in particular: (1) the application by the Federal Intelligence Service (ss. 4.2 no. 2 and 4.3 of the G 10 Act), which requires a statement of reasons; (2) the determination of the search concepts, which according to the text of the law must be suitable for achieving the aims of telecommunications monitoring (s. 3.2[1] of the G 10 Act); and (3) (previous) supervision by the panel of parliamentarians and the G 10 Commission (s. 3.1[1], s. 9.2 of the G 10 Act). On the other hand, monitoring is subject to subsequent control by the G 10 Commission, which is established pursuant to s. 9 of the G 10 Act. The panel of parliamentarians established pursuant to s. 9.1 of the G 10 Act is to be informed by the Federal Minister of the Interior, at intervals not greater than six months, about the state of implementation of the law.

…

In some of the listed areas of threat, however, it is likely that exactly the individuals or organisations that are the targets of monitoring are, due to their high degree of organisation and their use of modern infrastructure, in a position to evade telecommunications monitoring whereas unsuspected individuals who cannot make use of encryption technologies (as is the case with journalists, in view of their working conditions) become subjects of monitoring. The Federal Intelligence Service itself has stated that the poor results of monitoring in the areas of international terrorism and drug trade can, *inter alia*, be explained by the use of code words. In the oral argument the Federal government countered the objection that monitoring is unsuitable by stating that practical experience had shown that only relatively few of the screened telecommunications links were encrypted.

This leads to the conclusion that the question whether monitoring for the objective of early recognition of the respective threats fails due to the use of encryption technologies cannot, at least according to the present state of knowledge, be answered on an abstract level but only on account of practical experience. On the legal level, the permitted measures are not unsuitable from the outset. On the level of implementation, the Federal Intelligence Service and the supervisory bodies that are involved pursuant to the procedural arrangements are to ensure that in spite of the possibility of encryption, the suitability of the measures in the areas of threat that are the subject of an order restricting telecommunications privacy is maintained.

c) The law is necessary for achieving its aims. There are no means available that are equally effective, which less significantly impair the holders of fundamental rights. In particular, the possibility of cooperation with the states in which the sources of the threats arise is not equally promising. This is, on the one hand, due to the fact that cooperation requires previous knowledge about relevant facts. On the other hand, this is due to the fact that in many cases the threats are caused or condoned by government authorities abroad.

d) The restrictions on the right to privacy in telecommunication traffic instituted pursuant to s. 1.1 and s. 3.1 of the G 10 Act (screening, recording, storage, comparison) are, in essence, proportional in the narrower sense. Only restrictions instituted for the objective of recognising counterfeiting committed abroad (no. 5) fail to meet this requirement.

aa) The principle of proportionality requires that a loss of the freedom that is protected by the Basic Law is not disproportionate to the objectives of public interest that are served by the restriction of the fundamental right in question. Due to the fact that the individual is integrated in the community and depends on the community, the individual must tolerate restrictions of his or her fundamental rights if they are justified by prevailing public interests (cf. e.g. BVerfGE 65, 1 [44] with further references). The Parliament must, however, achieve an adequate balance between public interests and the interests of the individual. In this context, the important questions with respect to the fundamental rights of the individual are: (1) under what circumstances and how many holders of fundamental rights are subject to impairments; and (2) what is the degree of intensity of these impairments? The standards for determining this include: (1) which thresholds for intervention have been created; (2) the number of persons affected; and (3) the intensity of the impairments. The intensity of the impairment, in turn, depends on: (1) whether the communication partners' identities remain anonymous; (2) which calls and (3) which contents can be screened (cf. e.g., on the basis of the standard of Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law, BVerfGE 34, 238 [247]); and (4) what disadvantages threaten, or are justly feared by, the holders of fundamental rights on account of the monitoring measures. On the other hand the considerations of the public interests lie, as determined by the weight of the aims and interests served by the telecommunications monitoring. The decisive factors in this context are, *inter alia*: (1) how great are the dangers that are to be recognised with the help of telecommunications monitoring; and (2) how probable is their occurrence.

bb) Telecommunications privacy is seriously impaired by the challenged regulations.

…

The limitation is, first of all, apparent from the fact that, pursuant to sentence 1 of s. 3.1(1) of the G 10 Act, only wireless international telecommunications traffic is subject to monitoring. Monitoring measures do not extend to domestic telecommunications traffic. Restrictions of telecommunications privacy may include line bound traffic only in order to recognise the threat of an armed aggression,

but not concerning the other threats which have been newly incorporated into the law (s. 3.1[3] of the G 10 Act). Wireless traffic, i.e. traffic that is transmitted via microwave or satellite, presently amounts to approximately ten per cent of the entire telecommunications traffic but will, according to the independent, court appointed expert Professor Dr. Wiesbeck, continually increase due to technological progress.

Whether a specific act of communication takes place via line bound or wireless telecommunications systems, is, according to the experts' statements, determined automatically depending on the capacity and capacity utilisation of the transmission routes and is therefore unpredictable for the communication partners as well as for the Federal Intelligence Service. For these reasons alone, comprehensive screening is not feasible, at least as far as the international telecommunications traffic is concerned. It is true that in any telecommunications contact abroad, the individual engaged in this contact must be aware of the possibility that the contact is screened by the Federal Intelligence Service. Such a screening will in actuality, however, only rarely occur.

…

Other limitations on the monitoring permitted by the challenged regulations result from the fact that, in order to initiate telecommunications monitoring, it is necessary to determine the specific links and establish the monitoring thereof by specific orders. Furthermore, restrictions on telecommunications privacy resulting from monitoring will only occur if the threatening situation is sufficiently established by the Federal Intelligence Service and, in view of the Federal Intelligence Service's limited capacities, sufficient results are expected. It has become apparent in practice that considerations like limited resources and utility actually achieve a limiting effect: the orders concerning the areas of threat of international terrorism and drug trade, have, pursuant to s. 5.3(2) of the G 10 Act not been renewed due to the poor results of the monitoring.

On the other hand, the assumptions that formed the basis of the Federal Constitutional Court's 1984 decision, which found the weight of the impairment of fundamental rights arising out of telecommunications monitoring to be relatively low (BVerfGE 67, 157), are no longer valid. In that decision the Federal Constitutional Court proceeded on the assumption that the determination of telecommunications links and the ordering of restrictions on the privacy of telecommunications traffic issued after consultation with the parliamentary panel, as required by law, would result in a strong geographic restriction of the monitored areas and to a strong restriction of the monitored routes (cf. BVerfG, loc. cit., 174). Strategic surveillance was regarded as proportional, as the Court claimed that: (1) it serves an especially important objective, i.e. the prevention of an armed aggression against the Federal Republic of Germany; (2) there is very little probability that an individual will become the subject of surveillance; and (3) that surveillance places only a minor burden on the individual due to the fact that anonymity of the communication partners is, in principle, assured (cf. BVerfG, loc. cit., 178-179).

Certainly, telecommunications monitoring pursuant to s. 3.1 and s. 5.1 of the G 10 Act is still to be determined and ordered by the responsible Federal minister and requires approval by the parliamentary panel established pursuant to s. 9 of the G 10 Act. The change of the factual and legal framework conditions has, however, considerably diminished the limiting effect these procedures can be expected to have on the encroachments on telecommunications privacy, that are permitted by the challenged regulations. As long as strategic surveillance of telecommunications, as based on the original version of the G 10 Act, only referred to the threat of an armed aggression against the Federal Republic of Germany and as long as, according to political analysis, such an aggression only emanated from the Eastern Block, surveillance was restricted to the countries of the Warsaw Pact. Moreover, an order for monitoring under the previous regime, under the existing technical conditions, always referred to individual routes of communication, so-called corridors, e.g. specific collective cables for the transfer of long distance calls to the respective area.

Meanwhile, the incorporation of nos. 2 to 6 into the G 10 Act has considerably increased the quantity of threats about which intelligence should be gathered. Consequently, surveillance is no longer restricted to a single crisis region. This means that the geographical area that may be covered by monitoring measures has been considerably expanded. The observation of satellite radiuses has considerably increased the volume of screened telecommunication traffic links. Under these circumstances, mainly the search concepts as defined by s. 3.2 of the G 10 Act that are approved in the order establishing the monitoring measures, which control the selection of the monitored telecommunications contacts, serve to limit surveillance.

Finally, the anonymity of the act of communication is no longer assured as was the case under the previous regime. It is true that the search concepts as defined by s. 3.2 of the G 10 Act, apart from the exception in sentence 3 that is not under review here, may not contain any characteristics for identification that result in the targeted screening of specific acts of telecommunication traffic. This prohibition, however, no longer shields the subscriber lines to which it applies from the identification of the subscribers in the same way as it used to do. One reason for this is that, due to the development of technology, the information regarding the circumstances of an act of communication, including the parties' identities, is also gathered and retained. On the other hand, the identification of individuals now results from the fact that the threats that have been newly incorporated into the Act are, to a far greater extent, related to specific individuals than was the case with respect to the threat of war. Furthermore, the Federal Intelligence Service concedes that monitoring often only yields the desired intelligence of the identity.

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When judging the intensity of the impairment of fundamental rights, it is important that every participant in international telecommunications traffic is exposed to the monitoring measures whether or not there is a relationship between the monitoring

and his or her behaviour and whether or not the monitoring was provoked by his or her behaviour. As regards content, acts of communication of all kinds are screened in their entirety. In this context, it is possible that Federal Intelligence Service staff takes note of the communication. In this respect, the fact that the search concepts, due to the state of technological development, only insufficiently fulfil the function that is assigned to them by the Parliament, i.e. to make human access to the obtained material unnecessary until comparison has taken place, shows its effects.

According to the statements of the Federal Intelligence Service, which have been confirmed by the experts, only in the exceptional case of telex monitoring is fully automatic comparison of search terms feasible. Telex traffic, however, is less and less frequent. Contrary to this, fax traffic can only be automatically compared and reviewed to a limited extent and telephone traffic cannot be automatically compared and reviewed at all. This explains why most intelligence, by far, is gathered by means of so-called formal search concepts (foreign subscriber numbers) based on the exemption provision of s. 3.2(3) of the G 10 Act. According to the statement of the expert Professor Waibel, voice recognition procedures cannot yet be effectively employed, in spite of their continuous improvement, in the implementation of the G 10 Act nor will they be effective in the near future without human contribution. Independent of the practice of the Federal Intelligence Service, the Act does not preclude that the comparison is done by staff, even though the Parliament may have imagined comparisons taking place automatically.

When judging the intensity of the impairment of fundamental rights, the lack of anonymity of the participants in communications is to be considered as well. The fact that the intelligence gathered relates to specific individuals is not restricted to the screening and recording phase. In practical work with the intelligence gathered, this relation is preserved. According to the statements of the Federal Intelligence Service, this is necessary, in some of the cases, in the framework of evaluation, to assess and classify the intelligence. The Federal Intelligence Service eschews the use of technically possible temporary memory systems that would allow it to access the information regarding the circumstances of the call, including the parties' identities, only if it proves necessary to make use of information regarding the individuals involved in the communication contact in order to fulfil the tasks of the Federal Intelligence Service.

The risks that can objectively be expected or must be feared begin to emerge as early in the monitoring process as that point when the Federal Intelligence Service takes note of an act of communication. In fact, even before the Federal Intelligence Service takes note of acts of communication, the fear of being monitored, (and of the dangers of recording, subsequent evaluation, possible transfer and further utilisation by other authorities, that are connected with monitoring), may lead to inhibitions in communication, to communication disturbances and to the individual adapting his or her behaviour, in this context especially in order to avoid specific contents of conversation or specific terms. In

this context, not only the individual impairment of a large number of holders of fundamental rights must be taken into consideration. Rather, the secret monitoring of telecommunications traffic concerns the communication of society as a whole. Therefore, the Federal Constitutional Court has stated that the right to informational self-determination, which is comparable in this respect, also bears a relation to the common good that goes beyond the interest of the individual (cf. BVerfGE 65, 1 [43]).

cc) On the other hand, it is of importance that the restrictions of fundamental rights serve to protect high-ranking public interests.

Monitoring measures based on s. 3.1(1) and s. 3.1 sentence 2 no. 1 of the G 10 Act are supposed to yield intelligence about facts that are relevant under defence policy aspects so that threats to the Federal Republic of Germany involving armed aggression can be timely recognised. It is true that the nature of such a threat has changed with the dissolution of the Warsaw Pact. The Act, however, is not bound to the historical constellation that the parliament had in mind when enacting the law. Rather, the telecommunications monitoring regime can still be applied even if the threat that such measures are intended to counteract has shifted. This is true in the case of the threat of armed aggression. Even after the dissolution of the Warsaw Pact, this threat still exists.

In the new areas of monitoring, increased threats have developed due to the increase of internationally organised crime, in particular in the area of illegal trade with weapons of war and with drugs as well as in the area of money laundering. Even if such activities cannot, altogether, be put in the same category of importance as armed aggression aimed at the Federal Republic of Germany, they considerably affect, in any case, the foreign and security policy interests of the Federal Republic of Germany. Nor are the threats in the specified areas remote. In the area of weapons proliferation, the Federal government has furnished sufficient examples that are generally known.

The threats, the sources of which are predominantly located abroad and which are supposed to be detected by means of the authority to restrict telecommunications privacy, are of great importance. This still applies to the threat of armed aggression but also, as has been sufficiently established by the Federal Intelligence Service, to the threats of weapons proliferation, arms trade, and international terrorism. The aim behind the mission of foreign surveillance, i.e. to provide the Federal government with information that is of foreign and security policy interest for the Federal Republic of Germany, is of considerable importance if the Federal Republic of Germany is to act effectively in the field of foreign policy and maintain the reputation of its foreign policy.

dd) In a weighing of interests that takes these aspects into consideration, s. 3.1 sentence 2 nos. 1-4 and no. 6 of the G 10 Act are not objectionable from the constitutional point of view.

Contrary to the opinion of the complainant bringing the first constitutional complaint, the authority to monitor and record, and the other measures provided by the challenged Act is not out of proportion simply because it lacks intervention thresholds like the traditional concepts of 'konkrete Gefahr' (specific threat) in the field of resistance to threats and of "hinreichender Tatverdacht" (reasonable grounds for the suspicion of a criminal act) in the field of criminal prosecution. Certainly, telecommunications monitoring is conducted without an existing suspicion. Neither is the encroachment upon fundamental rights limited to the general risk that the individual may become the subject of an unjustified suspicion. In the framework of determining and ordering restrictions to telecommunications privacy, anyone can easily become the object of monitoring measures.

The different aims, however, justify that the prerequisites for encroachments on telecommunications privacy are determined differently in the G 10 Act than in police law and law of criminal procedure. On account of the legislative power of the Federal Republic of Germany flowing from Article 73 no. 1 of the Basic Law, the only possible aim of monitoring by the Federal Intelligence Service is foreign surveillance with respect to specified threatening situations that are relevant to foreign and security policy. This type of surveillance shows the following characteristics: (1) it is concerned with the external security of the Federal Republic of Germany; (2) its subject is threatening situations that originate abroad, not predominantly threatening situations and suspected threats that are related to individuals; and (3) intelligence in this respect can only to a limited extent be obtained by other means. In this context, the Federal Intelligence Service's sole mission is to collect and evaluate the information required for obtaining intelligence about foreign countries that are of importance for the foreign and security policy of the Federal Republic of Germany, and, on account of its duty to inform the Federal government, to provide it with information to support it in its decisions.

It is true that even the considerable threats, which telecommunications monitoring is supposed to counteract, would not justify, from the constitutional point of view, telecommunications monitoring for objectives of foreign surveillance without any prerequisites or limitations. The law, however, has not dispensed with such prerequisites. SS. 3.1(1) and 3.1(2) of the G 10 Act contain specified substantive standards and procedural safeguards, chiefly that monitoring is only permissible for collecting information about issues the knowledge of which is necessary for the timely recognition of the threatening situations. Under the procedural aspect, one of the prerequisites of the determination and ordering of monitoring is that the Federal Intelligence Service, in its application, conclusively establishes why the affected telecommunications links can provide, in a timely manner, information about one of the relevant threats.

Taking into account the safeguards provided in the G 10 Act, screening and recording for the objective of informing the Federal government do not appear to be disproportionate. Certainly, the number of screened telecommunications links is

not low. It is low, however, compared with the total number of telecommunications contacts, or even in comparison only with the number of international telecommunications contacts. In this context, the ban on targeted monitoring of specified individual subscriber lines contained in s. 3.2(2) of the G 10 Act is of great importance. In view of the fact that encroachments on telecommunications privacy are implemented without the existence of a suspicion, in view of the broad range of screened telecommunications contacts and of the possibility of identifying the participants in a telecommunications contact, proportionality would not be ensured without such a ban. The Federal Constitutional Court is not called upon to review the constitutionality of s. 3.2(3) of the G 10 Act because the complainants who have lodged admissible constitutional complaints are not affected by this regulation. Even if free communication, which Article 10 of the Basic Law is supposed to ensure, may be disturbed by the screening and recording of acts of telecommunication, the danger of disturbing it gains its full significance only through subsequent evaluation and especially by the transfer of the gathered information. In this respect, however, it can be adequately counteracted on the level of the authority to evaluate and transfer.

ee) Proportionality in the narrower sense is not ensured, however, with respect to the threat of counterfeiting committed abroad, as it is listed under no. 5 of the regulation.

Counterfeiting is neither a threat, the seriousness of which is comparable to the threat of armed aggression, nor does it concern legal interests that are as important as the other threats incorporated into s. 3 of the G 10 Act by the 1994 Fight against Crime Act. Counterfeiting also does not show, in all its forms of perpetration, the same potential for danger that characterises the other threats. Counterfeiting neither constitutes a threat to the existence or the safety of the Federal Republic of Germany that is necessarily connected with foreign countries, nor is it necessarily a considerable threat to the existence or the safety of the Federal Republic of Germany. This does not preclude that in individual cases, large scale counterfeiting committed abroad impairs the Federal Republic of Germany's monetary stability, and thus its economic performance, to a degree that is comparable to the other threats. The provision, however, is not limited to such cases. With respect to the threat posed by counterfeiting generally, the degree of the threat and the weight of the impairment of fundamental rights is out of proportion.

By incorporating respective limitations, however, s. 3.1 sentence 2 no. 5 of the G 10 Act can be given a wording that is consistent with the Basic Law. This part of the regulation is therefore not to be declared void but is only to be declared inconsistent with the Basic Law. The Parliament is obliged to create consistency with the Basic Law.

IV.

The provision of s. 3.4 of the G 10 Act, which obliges the Federal Intelligence Service to examine whether the personal data obtained by telecommunications monitoring is required for the objectives that justify these measures is not objectionable from a constitutional point of view when considered by itself. This provision does not sufficiently take account of the requirements, which follow from Article 10 of the Basic Law, that: (1) an infringement upon telecommunications privacy be bound to a specific use; and (2) that an infringement upon telecommunications privacy be proportional. To this extent, this provision is inconsistent with telecommunications privacy and the freedom of the press (which is to be considered alongside telecommunications privacy).

It is true that s. 3.4 of the G 10 Act complies with the principle that an infringement upon the right to telecommunications privacy be bound to a specified purpose to the extent that this provision of the G 10 Act requires that the Federal Intelligence Service examine whether the data that is obtained by means of telecommunications monitoring is suitable for a specified objective. Apart from that, this principle is observed by the fact that s. 3.6 (1) of the G 10 Act orders the destruction or deletion of the data if the examination has shown that the data is unnecessary for the objectives of the Federal Intelligence Service. The Act, however, does not sufficiently ensure that the use of the data that is not destroyed or deleted is bound to the objective that justified the collection of data in the first place. Possible uses other than the early recognition of the threats specified in the Act and the corresponding provision of information to the Federal government are not excluded. The regulations provided by the Federal Intelligence Service Act, which address the processing and utilisation of personal data, cannot fill this gap. s. 11 of the Federal Intelligence Service Act excludes the application of the general provisions in s. 14 of the Federal Data Protection Act for which the storage, modification and use of obtained data is permissible. Apart from this, s. 3.4 of the G 10 Act does not acknowledge the duty, which follows from Article 10 of the Basic Law, to identify and mark the object of protection of fundamental rights to make it possible to track the object of fundamental rights protection throughout the remaining steps of processing.

Nor does the challenged regulation make the further evaluation of the data dependent on meeting a threshold of proportionality. s. 3.3 of the G 10 Act, which establishes specified requirements for the utilisation of the data, makes no reference to the Federal Intelligence Service. Instead, the provision's objective (the prevention, resolution or prosecution of criminal offences identified by this article) is addressed to the authorities to which the Federal Intelligence Service, pursuant to s. 3.5 of the G 10 Act, is to transfer information. The Act does not contain provisions that ensure that the Federal Intelligence Service evaluates only the data obtained by telecommunications monitoring that shows a sufficient relevance to the work of the intelligence service for the areas of threat specified in ss. 1.1 and 3.1 of the G 10 Act. The fact that such a threshold is lacking is also of importance with regard to Article 5.1(2) of the Basic Law, because such a threshold would ensure that the Federal Intelligence Service takes the interests of the protection of informants and of the confidentiality of editorial work into account.

An interpretation of the provision that is consistent with the Constitution is not possible as it would not be in conformity with the requirements of specificity and clarity placed on legal regulations by Article 10 of the Basic Law. The challenged provision only requires amendment; its deficiencies do not result in the provision being void but only result in its inconsistency with the Basic Law. The Parliament is obliged to create consistency with the Basic Law.

V.

S. 12 of the Federal Intelligence Service Act obligates the Federal Intelligence Service to report to the Federal government, the content of the data obtained pursuant to its telecommunications monitoring activities. This obligation is challenged in these proceedings only to the extent that s. 3.3(2) of the G 10 Act excludes the reporting obligation from the requirements of s. 3.3(1) of the G 10 Act. In the framework of the Federal Intelligence Service's obligation to report to the Federal government, telecommunications' privacy is not sufficiently protected.

The effect of Article 10 of the Basic Law and Article 5.1 of the Basic Law (to the extent that acts of communication fall under the freedom of the press) also extends to the Federal Intelligence Service's duty to inform the Federal government of its telecommunications monitoring activities because informing the Federal government is one of the objectives for which the Federal Intelligence Service has been granted the right to conduct telecommunications monitoring. The protection provided by the obligation to report to the Federal government by no means becomes unnecessary simply because personal data obtained as a result of monitoring is judged to be of no importance as regards the fulfilment of the duty to inform the Federal government. The duty to inform the Federal government does not only require that the Federal Intelligence Service draw up situation reports. The Federal Intelligence Service is, as s. 12 of the Federal Intelligence Service Act explicitly emphasises, authorised to transfer personal data.

It certainly cannot be criticised that s. 3.3(2) of the G 10 Act excludes the duty to inform the Federal government established by s. 12 of the Federal Intelligence Service Act from the limitations of use pursuant to s. 3.3(1) of the G 10 Act, as the limitations provided in this sentence are not geared to the tasks of the Federal Intelligence Service. It is, however, inconsistent with Article 10 of the Basic Law that this provision also does not provide that telecommunications monitoring be bound to the objectives established in s. 1.1 and in ss. 3.1(1) and s. 3.1(2) of the G 10 Act that justify telecommunication monitoring. Moreover, the absence of an obligation to mark personal data constitutes a violation of Article 10 of the Basic Law.

…

As the challenged provision, considered on its own, does not contradict the constitution but only requires amendment, its deficiencies also do not result in the provision being void but only results in its inconsistency with the Basic Law. The Parliament is obliged to create consistency with the Basic Law. The Basic Law leaves the decision about the precise place in which this duty is fulfilled to the legislative discretion of the Federal government.

VI.

The provision of s. 3.5(1), in conjunction with s. 3.3(1) of the G 10 Act, that obliges the Federal Intelligence Service to transfer data obtained by telecommunication monitoring to other authorities for the execution of their duties is not entirely consistent with the provisions of Article 10 of the Basic Law and the complementary provisions of Article 5.1(2) of the Basic Law.

1. The objective of the regulation, however, is not objectionable from the constitutional point of view. The data and information that the Federal Intelligence Service has obtained from telecommunications' traffic when fulfilling its mission, are supposed to be utilised for the prevention, resolution or prosecution of criminal offences to the extent that they indicate offences committed by specified individuals. The Basic Law confers great importance to the prevention and resolution of criminal offences. The Federal Constitutional Court has therefore repeatedly emphasised the irrefutable requirement that criminal offences be effectively prosecuted and of an effective fight against crime. The Federal Constitutional Court has also repeatedly stressed the public interest in the truth being ascertained as completely as possible in criminal proceedings, for the conviction of offenders as well as for the exoneration of the innocent, and has described the effective resolution especially of serious criminal offences as an important mission of a polity governed by the rule of law (cf. BVerfGE 77, 65 [76] with further references; BVerfGE 80, 367 [375]).

2. The parliament has also complied with the requirement that it determines, precisely and specifically for each area, the objectives for which personal data may be transferred and further used (cf. BVerfGE 65, 1 [46]). This provision permits a transfer of data to the receiving agencies specified in s. 3.5 of the G 10 Act only to the extent that this is required for the execution of the receiving agency's duties. Thus, the provision refers to the intelligence service tasks, the administrative and monitoring duties and the missions of crime prevention, of the resistance to threats and of the prosecution of criminal offences that are assigned to the respective receiving agencies. S. 3.3(1) of the G 10 Act further delimits the objectives of use, in the framework of these agencies' tasks, to the prevention, resolution or prosecution of the listed criminal offences.

3. Moreover, the objectives justifying the transfer of data are consistent with the objective for which a restriction of telecommunications' privacy has already taken place, and which resulted in the collection of data (cf. BVerfGE 65, 1 [62]).

It is true that the Federal Intelligence Service's telecommunication monitoring without an existing suspicion is only permissible for strategic surveillance. The characteristic feature of this type of monitoring is that its aim is not to initiate measures against specific individuals but that it concerns threatening situations on an international level about which the Federal government is supposed to be informed. Only this limited objective justifies such a broad scope and the depth of encroachment upon fundamental rights, that results from monitoring without an existing suspicion. If the monitoring were, from the outset, justified by efforts aimed at the prevention or prosecution of criminal offences, the power to conduct such monitoring would not be consistent with Article 10 of the Basic Law (cf. BVerfGE 67, 157 [180-181]. Limitations on employing specified methods of collecting data, which are required by fundamental rights, may not be evaded by making legally gathered data available for objectives that would otherwise not justify monitoring.

Article 10 of the Basic Law does not, however, exclude all transfers of data to agencies that may not or should not be permitted, on their own, to conduct telecommunication monitoring without an existing suspicion. As the Federal Intelligence Service, on account of the liberal methods it is permitted to employ, necessarily screens a large number of acts of telecommunication that are from the outset irrelevant for the receiving agencies, it must, in any case, be ensured that these agencies are not permitted to access the complete stock of data. On the other hand, it does not contradict the primary objective for which the data is collected if information that is relevant to the prevention, resolution or prosecution of criminal offences (although it has been collected with different objectives in mind) is transferred to the agencies mentioned under s. 3.5 of the G 10 Act after careful examination of the data by the Federal Intelligence Service. The provisions of the challenged regulation that govern the transfer of data comply with the requirements that must be met in this context: i.e. a threshold for the transfer that is established in s. 3.5(1) as well as in s. 3.1(1) of the G 10 Act, and a particular review by an official who is qualified to hold judicial office established in s. 3.5(2) of the G 10 Act.

4. The challenged provisions are, on the other hand, not fully consistent with the principle of proportionality.

a) What is lacking, however, is not the suitability and necessity of the regulation for achieving the desired objective.

It is obvious that the transfer of data to agencies whose mission is, *inter alia*, the prevention, resolution or prosecution of criminal offences, aids the fulfilment of this mission. Nor has the circle of receivers been expanded to include agencies that cannot contribute to achieving the objective of the Act. Those agencies that are not entrusted with tasks concerning the prosecution of criminal offences but only perform administrative or intelligence services functions, have, in any case, within the boundaries of their mission, the possibility to prevent criminal offences.

There is no apparent means that would constitute a less intrusive encroachment while at the same time promising similar chances for success. Within the boundaries set by the authority they have been granted, the receiving agencies could not otherwise receive this information, which the Federal Intelligence Service can acquire due to its broader authorisation to monitor telecommunications. Moreover, the Parliament has ensured compliance with the principle of necessity by limiting the duty to transfer data to that data which is necessary for the execution of the receiving agency's duties.

b) The Parliament, however, has not complied with the requirements that the principle of proportionality, in its narrower sense, places on regulations that permit encroachment upon fundamental rights.

aa) The more narrowly construed principle of proportionality prohibits encroachments upon fundamental rights of an intensity that is out of proportion to the importance of the matter and the harm the individual citizen must suffer (cf. BVerfGE 65, 1 [54]). Rather, an adequate relationship between the importance of the fundamental rights in question and the seriousness of the restrictions on these fundamental rights must be established. In an overall balancing between the severity of the encroachment on the one hand, and the importance and urgency of the reasons

that justify the encroachment on the other hand, the bounds of reasonableness must still be respected (cf. BVerfGE 67, 157 [173, 178]; established case law).

The severity of the encroachment upon telecommunications privacy that results from the transfer permitted by the G 10 Act is best characterised by the fact that the transfer of personal data constitutes another break of telecommunications privacy that can result in an even greater impairment than the original encroachment (that took place with the monitoring). The effect of data transfer is not limited to the expansion of the group of persons that obtain knowledge of the circumstances and the content of an act of telecommunication. Taking note of an act of telecommunication may precede measures taken against the subjects of monitoring. The Federal Intelligence Service cannot take any measures that are directed against individuals, and the Federal government, which the Federal Intelligence Service is to inform about specified threatening situations, does not take measures against the participants in an act of communication in the framework of its political counter strategies. But the agencies to which the data is to be transmitted pursuant to s. 3.5(1) of the G 10 Act will, as a general rule, institute investigations against the subjects of monitoring that may lead to further inquiries and, as the case may be, to the institution of criminal proceedings.

In this context it is also of importance, for judging the intensity of the encroachment, that the Federal Intelligence Service has obtained the information by means of a method that, due to the broad scope of its power to monitor telecommunications, including the power to conduct monitoring that is not motivated by suspicion, very severely affects telecommunications' privacy. This is only consistent with Article 10 of the Basic Law because it merely serves strategic objectives and requires the identification of the participants in an act of communication only to facilitate the interpretation of the information, which is always fragmentary and therefore requires interpretation. Under these circumstances, the acceptability of the transfer of data to the designated agencies can only be ensured if the interests served by the transfer prevail over telecommunications' privacy and if there is a safe basis for the assumptions that: (1) the data is relevant to these interests; and (2) that the persons affected by monitoring are, with sufficient probability, involved in criminal offences. If this basis is lacking, the bounds of what is reasonable have been transgressed.

It is therefore imperative that the legal interest (the prevention, resolution and prosecution of the listed criminal offences) justifying the transfer be of great importance. A sufficient factual basis for the suspicion that criminal offences are being planned or have been committed is also imperative. A lower degree of probability (with respect to a possible or actual violation of the applicable legal interest) justifies transfer when the legal interest at stake is very important. Similarly, less cogent facts may form the basis of a suspicion justifying transfer when the legal interest at stake is very important.

The more important the legal interest is, the further the threshold for transfer may be shifted to a point in time prior to the threatening violation of a legal interest.

In order for acts of planning, together with the prerequisite of the existence of factual grounds, to be sufficient to serve as a threshold for the transfer of data, the legal interest must be of outstanding importance (cf. BVerfGE 30, 1 [18]). This means that if the Parliament confines itself to a few high-ranking legal interests when identifying the applicable legal interests and ascertaining if the damage that threatens them is extraordinarily high, the Parliament is not hindered from keeping the threshold for transfer relatively low. If the Parliament, on the contrary, considerably expands the catalogue of protected legal interests and also includes acts that show a low degree of threat in the success that is to be prevented, it must set a high threshold for transfer.

bb) The Parliament has not, in all respects, achieved this state of balance with regard to the elements of a criminal offence that justify the transfer of data. Certainly s. 3.5 in conjunction with s. 3.3 of the G 10 Act is not objectionable to the extent that it permits data transfer regarding persons against whom restrictions of telecommunications privacy pursuant to s. 2 of the G 10 Act have been ordered. To the contrary, the scope of the elements of a criminal offence is not sufficiently delimited with respect to suspicion related restrictions. This results from the interplay between the catalogues of relevant criminal offences, the factual basis for the suspicion of criminal offences and the duration of the threat to the legal interest.

…

This results in different consequences for the prevention of criminal offences on the one hand and for the resolution and prosecution of criminal offences on the other hand. These consequences spring from the fact that data transfer for the protection of legal interests can show different degrees of urgency. Whereas the prevention of criminal offences is part of the resistance to threats and is meant to protect the affected legal interest from threatening violation, i.e. is supposed to prevent success, the prosecution of criminal offences is aimed at the state sanctioning the violation of a legal interest that has already taken place and can no longer be prevented. If a telecommunications contact that is screened by the Federal Intelligence Service contains indications concerning the planning as well as the completion of criminal offences contained in the catalogue of s. 3.3(1) of the G 10 Act, this can, consequently, lead to a different legal assessment of a transfer carried out pursuant to s. 3.5 of the G 10 Act.

Because, in the case of the prosecution of a criminal offence, the violation of the legal interest has already taken place and the focus is now on sanctioning it, it is not justified to lower the threshold for the transfer of personal data that was obtained by means of encroachments upon telecommunications privacy pursuant to ss. 1 and 3 of the G 10 Act below the threshold that otherwise applies to encroachments upon telecommunications privacy pursuant to s. 100a of the Code of Criminal Procedure (Strafprozessordnung - stop) in crime prosecution. In the case of the transfer of the data collected by the Federal Intelligence Service, it appears necessary from the constitutional point of view, with regard to the fact

that encroachment in this case is no less serious, to establish the requirement of a factual basis for the suspicion that corresponds to the one prescribed by s. 100a of the Code of Criminal Procedure. Otherwise, the number of holders of fundamental rights affected could not be kept within the bounds of what is reasonable. s. 3.3(1) of the G 10 Act does not comply with this requirement. It lowers the threshold for transfer below the bounds of what is reasonable by establishing that factual grounds for the suspicion that criminal offences have been committed are a sufficient standard for the transfer of data, a standard, however, which is considerably lower than that established by s. 100a of the Code of Criminal Procedure.

To the extent that the prevention of criminal offences is concerned, the regulation does not comply with the interests that are protected by the Basic Law. All in all, the following circumstances result in a marked imbalance to the detriment of the fundamental rights affected: (1) that factual grounds are sufficient for a suspicion; (2) that the planning phase is included in the consideration; and (3) that less serious criminal offences also justify the transfer of data. In particular, a result of the circumstances that factual grounds are connected with the planning of criminal offences is that the power to monitor sets in at very early, preliminary stages of the threatened violation of a legal interest, which results in lowering the degree of probability and the certainty of predictions. Another consequence is that the power to monitor may be based on relatively low requirements as regards the factual basis.

…

The provisions cannot be interpreted to be in accord with the Constitution because, on the one hand, the Parliament can remedy the unconstitutionality of the provisions in different ways. The Federal Constitutional Court must not anticipate such a solution. On the other hand, an interpretation of the provisions that is in accord with the Constitution would not be consistent with the requirement of specificity and clarity that the Basic Law places on provisions that permit the transfer of personal data obtained by an encroachment upon fundamental rights and the change of the objective for which this data may be used. The Parliament is obliged to create consistency with the Basic Law.

VII.

S. 3.7 of the G 10 Act is inconsistent with Article 10 of the Basic Law.

Certainly, the regulation is, in itself, not objectionable from a constitutional point of view. When considered on its own, the regulation obliges the receiving agencies to evaluate whether they need the data transferred pursuant to s. 3.5 of the G 10 Act for the objectives specified in s. 3.3 of the G 10 Act. This is a step of selection that corresponds to the step regulated in s. 3.4 of the G 10 Act. This step is meant to ensure, as established in ss. 3.3 and 3.5 of the G 10 Act, that the objective for which data is collected in a specific case is identified and that collecting data in this case is bound to this objective. Thus, it complies with the requirements of

Article 10 of the Basic Law. Unlike s. 3.4 of the G 10 Act, the provision in s. 3.7(3) of the G 10 Act explicitly prohibits the further use of the data that is not needed but was not immediately destroyed due to the unreasonable effort this would involve. Moreover, fundamental rights interests, especially that of the freedom of the press, can be sufficiently protected within the framework of the concept of necessity that is established in s. 3.7(1) of the G 10 Act.

What is lacking, however, in this context as well as in the case of the corresponding powers of the Federal Intelligence Service, is the obligation to mark the data accordingly; the Parliament is to impose this obligation on the receiving agencies as a safety precaution in the context of binding the use of data to a specific objective. Without such an obligation, the data and information from transfers pursuant to the G 10 Act could be stored, after being examined for their relevance as established in s. 3.7 of the G 10 Act in such a way, or mix with other data and information, that their origin from a measure of strategic telecommunications monitoring is no longer recognisable. This would circumvent the restriction of use provided in s. 3.3 of the G 10 Act.

An interpretation consistent with the constitution is ruled out in this case as well. The Parliament is obliged to create consistency with the Basic Law.

VIII.

The provisions of s. 3.8(2) of the G 10 Act, which address the duty to inform the subject of telecommunication monitoring that such monitoring has taken place, is not consistent with the Basic Law.

1.

…

What applies in this context, however, is Article 10.2(1) of the Basic Law, which permits the restriction of telecommunications privacy for other objectives. Justification for such secrecy can include the risk that the disclosure of information or of methods applied, which are in the concrete case in question still to be kept secret, would jeopardise the fulfilment of the involved agency's mission (cf. BVerfGE 57, 250 [284]). Apart from the fulfilment of the involved agency's mission, overriding detriment to the good of the Federal Republic of Germany or to a Land (Federal state) that is to be expected if the affected person is informed, can, under certain circumstances, be taken into consideration as an opposing interest. In the intelligence service sector, this may be the case e.g. when foreign secret services are involved or in the field of counter intelligence (in this context, see the decision of the Oberverwaltungsgericht [Higher Administrative Court] of Berlin, NVwZ [Neue Zeitschrift für Verwaltungsrecht] 1987, p. 817 [at p. 819]). The protection of informants can also be regarded as a legitimate interest that justifies the maintenance of secrecy (cf. BVerfGE 57, 250 [284]).

2. However, s. 3.8 (2) of the G 10 Act violates Article 10 and Article 19.4 of the Basic Law.

Pursuant to this regulation, notification of the measures restricting telecommunications privacy can be excused if the data has been destroyed by the Federal Intelligence Service or a receiving agency within three months after it was obtained. Thus, the regulation only focuses on the point

in time when the data is deleted. For the decision whether or not to give notice to the subject of monitoring, it is not of importance what has happened to the data during the three month period. As the oral argument has shown, this results, in practice, in the monitored persons not being informed by the Federal Intelligence Service. Instead, the Federal Intelligence Service applies the regulation as if it established a duty to destroy data after three months.

Reasons of administrative practicability on which the regulation is based cannot justify such a far-reaching preclusion of the duty to give notice that telecommunications monitoring has taken place. It is true that, in view of the large number of screenings and in view of the fact that the material obtained largely proves irrelevant and is soon destroyed, there are legitimate reasons that justify withholding notification. The mere lapse of time, however, is not sufficient for justifying this, as it does not provide the assurance that within this period of time no further use has taken place.

As a general rule, it is the use to which collected data is put that constitutes the most grievous strain on a subject of telecommunications monitoring. Nonetheless, collecting the data itself constitutes an encroachment upon telecommunications privacy against which recourse to a court, in principle, must be possible. Under these circumstances, the fact that the affected person is not informed about the monitoring could, at most, be justified if the collected data was destroyed immediately, without further steps, as it was regarded as irrelevant. Without such a limitation, s. 3.8(2) of the G 10 Act thus restricts Article 10 and Article 19.4 of the Basic Law in a disproportionate manner.

As the provision can be made consistent with the fundamental rights by amending it, it is not to be declared void but is only to be declared inconsistent with the Basic Law. The Parliament is obliged to create consistency with the Basic Law.

IX.

However, the regulation on the preclusion of the recourse to a court in s. 9.6 of the G 10 Act is consistent with the Basic Law.

This regulation has its constitutional basis in Article 10.2(2) of the Basic Law. This sentence permits, in the case of restrictions on telecommunications privacy that serve to protect the free democratic basic order or the existence or the security of the Federal Republic of Germany or of a Land, the preclusion of the right to the recourse to a court if that right is replaced by a review of the case by agencies and auxiliary agencies appointed by the parliament. The Federal Constitutional Court has declared this regulation, by which the 1968 constitutional amendment altered Article 10 of the Basic Law, consistent with Article 79.3 of the Basic Law (cf. BVerfGE 30, 1 [26 et seq.]).

S. 9.6 of the G 10 Act keeps within the bounds of Article 10.2(2) of the Basic Law. The preclusion of the recourse to a court is limited to orders pursuant to s. 2 and s. 3.1 sentence 2 no. 1 of the G 10 Act and does not cover the threats specified in nos. 2-6 of this regulation. Parliamentary control is ensured by s. 9 of the G 10 Act. Apart from that, the persons affected do have recourse to a court, pursuant to s. 5.5(3) of the G 10 Act, after being informed of the measures restricting telecommunications privacy. s. 9.6 of the G 10 Act is declared to be inapplicable.

The question whether this also opens the recourse to a court in the cases of s. 2 and s. 3.1 sentence 2 no. 1 of the G 10 Act when the subjects of measures restricting telecommunications privacy have been informed is not important from the point of view of constitutional law. As regards the constitutional aspect, it is sufficient to state that when interpreting s. 5.5(3) of the G 10 Act, notifying the monitored person may not be made the prerequisite of opening the recourse to a court. Even if the person affected has learned about the monitoring of his or her telecommunications traffic from another source, he or she is free to take recourse to a court. The possibility of taking recourse to a court would be unnecessarily diminished if the person affected by monitoring would also have been in such cases dependent on information about the monitoring activity being provided.

X.

The regulations on the deletion of data in s. 3.6 and in ss. 3.7(2) and 3.7(3) as well as in s. 7.4 of the G 10 Act are also consistent with the Basic Law.

They comply with the requirement, which follows from Article 10 of the Basic Law, that data obtained by means of encroachments upon telecommunications privacy be deleted as soon as it is no longer needed for the objectives that justify the encroachment. It cannot be inferred that the regulations fall short of the required minimum protection of fundamental rights.

Nor can the regulations be criticised from the perspective of Article 19.4 of the Basic Law. The guarantee of recourse to a court, however, prohibits measures that undermine the protection afforded by this guarantee (cf. BVerfGE 69, 1 [49]). The duty to delete data that is no longer required must therefore, for those cases in which a judicial review of telecommunication monitoring conducted by the Federal Intelligence Service is possible, be coordinated with the guarantee of recourse to a court in such a way that this guarantee is not circumvented. The provisions, however, permit such an interpretation.

…

XI.

The provision of s. 9.2 (3) of the G 10 Act, which provides for the control of the monitoring measures by the Commission, is inconsistent with Article 10 of the Basic Law. It does not sufficiently ensure that the control covers the entire process of screening and utilisation of the data. Without such control, the challenged regulations that contain authorisations could not continue to exist. It is true that s. 9.2 (3) of the G 10 Act provides that the Commission decides about the permissibility and necessity of measures restricting telecommunications privacy. It is not clear, however, what is to be understood by measures restricting telecommunications privacy. The subsequent provision of s. 9.2 (4) of the G 10 Act, according to which the responsible Federal Minister is to immediately cancel any orders which the Commission declares impermissible or unnecessary, could be interpreted to mean that the authorisation to control only refers to the ministerial order.

Such a view, which is incompatible with Article 10 of the Basic Law, is not only in the range of possibility. Rather, the Federal government expressed exactly such an interpretation in a letter to the G 10 Commission dated 9 December 1996. In spite of its diverging interpretation

of the law, the Commission accepted this view and has since refrained from controlling in the cases of ss. 3.3, 3.5, 3.6 and s. 3.8 of the G 10 Act. Due to the strict requirements placed on specificity when personal data is involved, the regulation therefore requires that the scope of its application be clarified. This clarification is to be made by the Parliament.

Moreover it must be ensured that the G 10 Commission, in view of the fact that the Fight against Crime Act has considerably expanded the Federal Intelligence Service's monitoring activities, is provided with the staff needed to effectively fulfil its mission. Moreover, it must be ensured that sufficient control exists also in the administrative sector on the level of the *Länder* (Federal states) level, as far as the data obtained by eliminating telecommunication privacy is transferred to Land (Federal state) authorities pursuant s. 3.5 of the G 10 Act.

XII.

To the extent that this judgment obliges the parliament to create consistency with the Basic Law, its time limit for doing so is 30 June 2001.

In the meantime, s. 3.1 sentence 2 no. 5 of the G 10 Act may only be applied if counterfeiting committed abroad results in a threat to monetary stability in the Federal Republic of Germany. s. 3.3 (2) of the G 10 Act is to be applied with the limitation that the personal data contained in the Commission's report to the Federal government is marked and that it remains bound to the objectives that justified the collection of the data in the first place. s. 3.4 of the G 10 Act is to be applied with the limitation that the personal data may be marked and may not be used for other objectives than those specified in s. 3.1 of the G 10 Act. S. 3.5 (1) in conjunction with s. 3.3 (1) of the G 10 Act is applicable with the limitation that personal data may only be transferred in accordance with the prerequisites of the temporary injunction order issued on 5 July 1995, and that a record of the transfer is kept. In this respect, the Federal Constitutional Court refrains from changing the present state of the law again only for the short transition period until a new regulation is enacted, although this means that in this transition period, the parts of the regulation that the Parliament can enact again in the framework of a new regulation without violating the Basic Law may not be applied. If, on the contrary, the provision that has been declared unconstitutional were to remain applicable until the enactment of the new regulation, transfers of data would be possible that violate fundamental rights. In the oral argument, no evidence was provided that the temporary injunction order resulted in considerable detriment to the Federal Republic of Germany in the past. This aspect was the one that tipped the balance in the weighing of consequences. If the Parliament regards the state of the law that is valid in the transition period as hardly tolerable, it is the duty of the Parliament to change this state of the law by quickly enacting a new regulation.

S. 3.7 of the G 10 Act is to be applied with the limitation that the data must be marked. S. 3.8 (2) of the G 10 Act is applicable with the limitation that no utilisation of the data has taken place before it is deleted. s. 9.2 (3) of the G 10 Act is applicable with the limitation that the Commission's power to control also extends to measures pursuant to ss. 3.3, 3.5, 3.6 and 3.8 of the G 10 Act.

XII. Freedom of Movement (within the Federal Territory) - Article 11 of the Basic Law

BVerfG, 17.12.2013, 1 BvR 3139/08, http://www.bverfg.de/e/rs20131217_1bvr313908en.html – "Garzweiler Lignite Strip-Mining"

Explanatory Annotation

Article 11 of the Basic Law has not played a huge role in the constitutional history of the Basic Law and the Constitutional Court has not had a lot of opportunities to deal with this provision. As explained above, the freedom of the individual to "move away" from the concrete space and, for example, not be barred by a (prison) door, is covered by Article 2.2 of the Basic Law. Article 11 protects the freedom of German citizens – not aliens - to take residence within the country wherever they choose without restriction or to stay where they are.[144] Article 11.2 explains when this right can be justifiably restricted, for example, to combat the dangers of an epidemic or in situations involving natural disasters. The Constitutional Court's decision in the "Garzweiler" Lignite Strip-Mining case, however, did provide an opportunity for the Court to elaborate on Article 11. The case arose in the context of administrative and planning decisions allowing a large lignite strip-mining operation which involved the devastation of several communities and the resettlement of their inhabitants. Affected persons saw a violation of the free movement guarantee of Article 11 because they were forced to move away as their settlement was destroyed. The applicants also claimed that Article 11, beyond the freedom of movement, also guarantees the right to a "homeland".[145] The Court disagrees on both counts.

Translation of the "Garzweiler Lignite Strip-Mining" judgment, BVerfG, 17.12.2013, 1 BvR 3139/08, http://www.bverfg.de/e/rs20131217_1bvr313908en.html

Headnotes:

[…]

5. The fundamental right to freedom of movement does not grant a right to take up residence and to remain in places in those parts of the Federation's territory where regulations on real estate or land use conflict with a permanent residence, as long as they apply generally and are not intended to specifically target the freedom of movement of certain persons or groups of persons.

144 BVerfG, 17.12.2013, 1 BvR 3139/08, http://www.bverfg.de/e/rs20131217_1bvr313908en.html, para. 253.

145 The word "homeland" is used in the English translation provided by the Court. The German term is the word "Heimat". That word is indeed almost impossible to translate adequately. What is meant is not the "homeland" as in the US Department of Homeland Security, which stands for the territorial United States. The applicants describe what they mean by the word "Heimat" as an identity creating, sociocultural, territorially marked secure context where one chooses to take residence and builds to people and place. See BVerfG, 17.12.2013, 1 BvR 3139/08, http://www.bverfg.de/e/rs20131217_1bvr313908en.html, para. 46 (translation by the author; this paragraph was not part of the official translation and is hence only available in German).

Facts:

The constitutional complaints are directed against government and judicial decisions in connection with the realisation of a project for an opencast lignite mine project in North Rhine-Westphalia. The complainant in proceedings 1 BvR 3139/08 challenges the approval of the framework operating plan for the Garzweiler I/II opencast mine, while the complainant in proceedings 1 BvR 3386/08 challenges a condemnation order against a property it owns. **[1]**

A.

I.

1. Lignite coal in Germany is mined in large opencast mines. The economically reasonable implementation of projects regularly necessitates making use of settled areas and thus also the resettlement of entire localities. By far the largest part of the lignite thus mined is used for generating electricity. Lignite's share of power generation in Germany has been greater than 20 per cent for years. **[2]**

2. In North Rhine-Westphalia, lignite is mined on the statutory basis of the *Land's* planning laws and the mining laws. **[3]**

a) The *Land* Planning Act (*Landesplanungsgesetz* - LPlG) in the version largely relevant to the constitutional complaints, based on the new promulgation of 29 June 1994 ([…] hereinafter the "LPlG 1994"), establishes a special form of state planning for mining lignite, in the form of "lignite plans" (*Braunkohlenpläne*). **[4]**

Within the lignite planning area, the lignite plans specify the goals for regional development and Land planning to the extent necessary for orderly lignite planning. […] In preparing a lignite plan, as a general rule an environmental impact assessment […] and a social impact assessment must be performed […]; additionally, there is to be formal involvement of the public […]. Lignite plans are subject to the approval of the Land's planning authority in concert with the ministries responsible for the specialties involved, and in consultation with the committee of the Landtag (Land parliament), that is responsible for Land planning […]. **[5]**

b) aa) Under § 3 sec. 2 of the Federal Mining Act (*Bundesberggesetz* - BBergG) of 13 August 1980 […], lignite is a mineral resource that is separate from surface property rights (*bergfreier Bodenschatz*). Anyone desiring to mine lignite must obtain […] an authorisation or proprietary mining rights. **[6]**

Mining operations may be conducted only under plans prepared by the entrepreneur and approved by the competent authority […]. Main operating plans (*Hauptbetrieb-spläne*) must be prepared for building and conducting an operation for a period that is generally not to exceed two years […]. The competent authority may require framework operating plans to be prepared for a specified longer length of time that depends on the particular circumstances; these plans must include general information about the intended project, its technical implementation

and its prospective time schedule […]. Approval of an operating plan […] depends on the fulfilment of […] requirements intended primarily to protect against operational hazards, and also depends on compliance with general prohibitions and restrictions […]. **[7]**

The compulsory claiming of a property for mining purposes proceeds by way of condemnation (*Grundabtretung*). According to § 79 sec. 1 BBergG, such condemnation is permissible if it serves the common good, specifically by ensuring the market's supply of raw materials, maintaining mining employment, preserving or improving economic structure, or bringing about a reasonable and planned extraction of deposits. **[8]**

bb) Provisions essential to the constitutional complaints are § 48 BBergG, which must be complied with in approving operating plans, as well as the requirements for condemnation under § 77 sec. 1 and 2, § 79 sec. 1 and 2 BBergG, which are indirectly challenged by constitutional complaint 1 BvR 3386/08. […] **[9]**

[…] **[10-12]**

II.

1. The "Garzweiler" lignite opencast mine is named after the former Garzweiler district of the municipality of Jüchen, which was situated in the mined area. The first segment of the overall project was based on the Frimmersdorf lignite plan (Garzweiler I) from the year 1984. In 1987, Rheinbraun AG - a legal predecessor of RWE Power AG, the entity joined as party to the initial proceedings - applied for the preparation and approval of a lignite plan for the Garzweiler II mining area. **[13]**

2. a) By resolution of 20 December 1994, the Lignite Committee established the Garzweiler II lignite plan. This plan was approved by the Ministry for the Environment, Regional Development and Agriculture of the *Land* of North Rhine-Westphalia on 31 March 1995. **[14]**

[…] **[15]**

An environmental impact assessment and a social impact assessment were performed in the proceedings for the preparation of the Garzweiler II lignite plan. The latter review resulted in a more detailed resettlement plan for the localities that would be affected by mining up to approximately 2008. As part of the plan preparation procedure, the public was given the opportunity to provide comments during a period of several weeks in March 1994. **[16]**

b) As a regional development goal, the Garzweiler II lignite plan establishes that mining lignite will normally take priority over other claims on use or functions in the mining area, the general size and approximate geographical location of which are defined by the graphically presented mining boundary. The mining area thus outlined includes the Immerath district of the town of Erkelenz. […] **[17]**

c) In a decision of 16 February 2005, the Ministry of Transport, Energy and State Planning of the *Land* of North Rhine-Westphalia approved the "Immerath-Pesch-Lützerath Resettlement" lignite plan, which further outlined the resettlement of these localities on the basis of the Garzweiler II lignite plan. […] **[18]**

3. Almost contemporaneously with the application for the preparation and approval of a lignite plan for the Garzweiler II mining area, the joined party's legal predecessor presented to the then Cologne Mining Office a "Garzweiler I/II" framework operating plan conceived for the 1997-2045 mining period. In light of the ongoing lignite plan proceedings, Rheinbraun AG applied for a partial approval for areas located in the Frimmersdorf (Garzweiler I) mining area in 1992. This partial approval was granted in 1994. **[19]**

III.

[Excerpt from press release no. 76/2013 of 17 December 2013]

The complainant in proceedings 1 BvR 3139/08 owns a piece of land in the mining area, namely in the Immerath part of the town of Erkelenz. He lives in a house built on this land. His constitutional complaint challenges the official approval decision from the Düren Mining Office on the approval of the framework operating plan for the Garzweiler opencast mine of 22 December 1997, as well as the decisions by the authorities and administrative courts that affirmed that approval.

[End of excerpt]

1. […] **[20-43]**

2. […] He claims a violation of his fundamental rights under Art. 11 sec. 1, Art. 14 sec. 1, Art. 2 sec. 2 sentence 1 and Art. 19 sec. 4 sentence 1 GG. **[44]**

[…] **[45-48]**

I.

[…] **[247-248]**

II.

The approval of the framework operating plan for the Garzweiler I/II opencast mine does not interfere with the fundamental right to freedom of movement (1.) and consequently also does not violate the complainant's fundamental right to property (2.). **[249]**

1. The fundamental right to freedom of movement (a) does not protect the complainant against the need to surrender his residential property and relocate, as a consequence of the approval of the framework operating plan for the Garzweiler I/II opencast mine, because the scope of protection under Art. 11 sec. 1 GG does not extend to defending against state measures on the use of land that ultimately result in an involuntary surrender of one's place of residence (b). Nor does the fundamental right to freedom of movement confer an independent right to a

homeland - however, that does not result in a gap in protection for those affected (c). This understanding of the fundamental right to freedom of movement ultimately also corresponds to the jurisprudence of the European Court of Human Rights (d). **[250]**

a) In acknowledgement of the free and self-determined organisation of one's own life, Art. 11 GG guarantees freedom of movement for all Germans within the entire federal territory. Through a free choice of their place of settlement and residence, it protects their planning and organisation of their own lives against interference from the state. **[251]**

aa) Historically, the fundamental right to freedom of movement goes back to the tradition of the freedom of movement that was reserved for free persons in the Middle Ages […]. The German constitutions of the 19th and early 20th centuries then guaranteed the right to freedom of movement for all citizens; at that time, it was closely associated with freedom of profession or occupation (cf. § 133 of the Constitution of 1849 drafted in St. Paul's Church (*Paulskirchenverfassung*) and Art. 111 of the Weimar Constitution, as well as § 1 of the Freedom of Movement Act of the North German Confederation of 1867 […]; likewise the first draft of a fundamental right to freedom of movement in the Parliamentary Council (*Parlamentarischer Rat*) […]). Irrespective of the guarantee of occupational freedom as an independent fundamental right under Art. 12 GG, the guarantee of the free choice of a place for settlement and residence in a differentiated society based on the division of labour is a fundamental condition for a free choice of occupation and for independently gaining one's own livelihood. However, irrespective of its connections with a choice of occupation, the fundamental right to freedom of movement also guarantees a free choice of place of settlement and residence as an expression of self-determined organisation of one's own life. It acknowledges the right, by one's own free decision, to travel generally without hindrance and without any official permit anywhere in the federal territory, and remain there. **[252]**

bb) Freedom of movement within the meaning of Art. 11 sec. 1 GG means the right to settle or reside anywhere within the federal territory (cf. BVerfGE 2, 266 <273>; 43, 203 <211>; 80, 137 <150>; 110, 177 <190 and 191>). This includes entering Germany for the purpose of taking up residence here (cf. BVerfGE 2, 266 <273>; 43, 203 <211>; 110, 177 <191>) as well as freedom of movement between federal states, between municipalities, and within a municipality (cf. BVerfGE 110, 177 <191>; see also BVerfGE 8, 95 <97>). **[253]**
The fundamental right to freedom of movement guarantees not only the freedom to move into a location in the federal territory, but the right to remain in the place chosen in one's exercise of the right to freedom of movement, and thus also generally protects against forced resettlements. […] **[254]**

The right to settle or reside anywhere in the federal territory could be undermined and rendered ineffective if the fundamental right did not also include the right to remain or live in the freely chosen place. Otherwise, citizens would have no

constitutional protection, comparable to the right to move to a place, against being expelled from their chosen place by state measures immediately after exercising the right to freedom of movement. **[255]**

b) However, the fundamental right to freedom of movement does not grant a right to take up residence and to remain in places in those parts of the federal territory where regulations on real estate or land use conflict with a permanent residence, and thus already preclude or restrict taking up residence, or, if such regulations are established later, ultimately compel a person to move away. At least when they apply generally and are not intended to specifically target the freedom of movement of certain persons or groups of persons, such provisions do not fall within the scope of Art. 11 sec. 1 GG. **[256]**

aa) Article 11 sec. 1 GG in general confers a right to relocate and reside only in places where anyone can settle and reside. However, it does not confer an entitlement to establish and maintain the legal and factual requirements for permanent residence. The configuration of the legal requirements for the permissible land use associated with residence at a particular place therefore does not fundamentally affect the scope of protection of freedom of movement, but rather shapes the preconditions for exercising this fundamental right […]. The laws that thus structure the preconditions for exercising this fundamental right, include in case of the right to freedom of movement, which necessarily relies on the use of space, provisions on land use such as building codes, regional development laws, infrastructure planning laws, laws to protect nature and landscape, or - as in the instant case - mining law. **[257]**

This placement of regulations governing land use outside the scope of protection of the freedom of movement applies not only to restrictions on taking up residence, but also to those regulations that cause or even compel a person to move away or to leave a permanent residence. Just like the impediment to taking up residence under construction planning laws, expropriation of residential land for a planned subsequent infrastructure measure is a consequence of existing or changed conditions for exercising the right to freedom of movement, but it does not fall within the scope of protection of this fundamental right. […] **[258]**

bb) Both the article's legislative history ((1)) and its purpose of protection and system ((2)) support this interpretation of the right to freedom of movement. **[259]**

(1) The legislative history of Art. 11 GG shows that the debate about incorporating this fundamental right into the Basic Law, and about its configuration, was strongly shaped by the special challenges that West Germany faced in view of the large number of refugees in the American, British and French Occupation Zones, and the expectation of additional Germans intending to immigrate. This first of all concerned the question of whether under the conditions at that time it would even be possible to grant all Germans a right to freedom of movement (cf. the Third and Fifth Sessions of the Committee on Fundamental Questions, 21 and 29 September

1948 […]; Twentythird Session of the Committee on Fundamental Questions, 19 November 1948 […]; Forty-fourth Session of the Main Committee, 19 January 1949 […]). There are no in- dications in the documentation on Art. 11 GG that the right to freedom of movement, and its intentionally strict limiting provisions, were intended to significantly restrict the already existing and implemented legal possibilities for the planning and organisation of land use - for example by raising dams or building roads and railway tracks. On the contrary, the detailed discussion of the problem of restrictions at the Thirty-Sixth Session of the Committee on Fundamental Questions on 27 January 1949 […] strongly suggests the conclusion that the Parliamentary Council did not view an absence of the factual and legal conditions for taking up residence - for example, a lack of living space in a disaster area - as a restriction on the right to freedom of movement […]. **[260]**

(2) The fundamental right to freedom of movement unfolds its freedom-protecting intent by guaranteeing that all Germans have the possibility of moving from one location to another unhindered by state restrictions, and settling and residing there, whether for purposes of carrying out an occupation, or for other freely chosen reasons in the organisation their life. This freedom of movement is not reduced in its freedom-protecting intent by considering generally applicable rules for land use, and therefore does not need to be exempted from them. **[261]**

Article 11 sec. 1 GG does not guarantee that an intended settlement or taking of residence will be suitable or permissible under the land laws. If the general rules of land use or real estate, and their implementation, were to be understood as interference with the scope of protection of the fundamental right to freedom of movement, then in view of the narrow restrictions of Art. 11 sec. 2 GG a meaningful control of settlement development and other land use by means of the laws for regional development and construction planning, and the other instruments of spatially related planning, would scarcely be possible. The definition of the possibilities for restricting the right to freedom of movement in Art. 11 sec. 2 GG argues against understanding the scope of protection of Art. 11 sec. 1 GG to include the legal requirements for land use. Pursuant to Art. 11 sec. 2 GG , the right to freedom of movement may be restricted only by and pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free and democratic basic order of the Federation or of a Land, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect, or to prevent crime. None of the listed cases includes situations in which, based on space-relevant plans or other measures for land use taken by the state, the persons concerned are prevented from taking up residence in a certain place or compelled to abandon their home or change their place of residence. There is also no

indication of any kind that major projects taking up space, or other space relevant plans, are no longer permissible or should be intolerably impeded under the Basic Law. **[262]**

c) Article 11 sec. 1 GG does not guarantee an independent right to a homeland (*Recht auf Heimat*) in the sense of the urban and social environment permanently associated with a chosen residence […]. **[263]**

In view of the consequences of flight and expulsion, the Parliamentary Council deliberately declined to include an independent right to a homeland in the Basic Law (cf. Forty-second Session of the Main Committee, 18 January 1949 […]). If a chosen and occupied residence has a special quality for its occupant, which might have consolidated over time, with regard to the associated social contacts and ties within the geographic environment, and the residence being rooted in a specific urban context, the right to reside ensuing from Art. 11 sec. 1 GG gains more importance - if the protection of this fundamental right applies at all (see b above). Extensive resettlements in particular, such as the one required for large-scale opencast mining, impose extraordinary burdens on established social relations and local and regional ties, because they can result in the disappearance of entire communities, including all of their buildings and infrastructure. All of this must duly be taken into account when reviewing the proportionality of an interference with the fundamental right to freedom of movement, or, if its protection does not apply, the otherwise affected fundamental right (see 2. a below). **[264]**

d) A constitutional gap in protection for the persons affected arises neither because the Basic Law does not provide an independent right to a homeland, nor because the fact that a person is forced to abandon his or her residence or home due to real estate measures or land use regulations does not render the protection of Art. 11 sec. 1 GG applicable. The affected persons' particular hardships resulting from the loss of social, regional and urban ties, can be considered in the context of the fundamental rights protection under Art. 14 secs. 1 and 3 GG, insofar as interferences with the right to property are concerned (see 2. a below), and otherwise under Art. 2 sec. 1 GG. **[265]**

e) This interpretation of Art. 11 GG does not conflict with the jurisprudence of the European Court of Human Rights. That court viewed the resettlements occasioned by the Horno opencast lignite mine as an interference with both the right to respect for private and family life under Art. 8 ECHR and the right to freedom of movement enshrined in Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (cf. ECtHR, decision of 25 May 2000 - Complaint no. 46346/ 99 (Noack) -, Landes- und Kommunalverwaltung - LKV 2001, p. 69 <71 and 72>). In accordance with the limiting provisions stipulated in Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which are less strict than those in Art. 11 sec. 2 GG, the European Court of Human Rights held that this interference was justified. Ultimately this does not conflict with the Federal Constitutional Court's interpretation that on the basis of the strict limiting provisions under Art. 11 sec. 2 GG, the protection of the fundamental right to freedom of movement does not apply, however, that protection against the special burdens

caused by resettlement measures is provided primarily through Art. 14 or Art. 2 sec. 1 GG (see 2. a below). The European Convention on Human Rights and its interpretation by the European Court of Human Rights must be used to assist in interpreting the fundamental rights and the principles of the rule of law established by the Basic Law (cf. BVerfGE 111, 307 <315 et seq.>; 128, 326 <366 et seq.>; 131, 268 <295 and 296>). Using this aid of interpretation does not demand a schematic parallelisation of the terms of the Basic Law with those of the European Convention on Human Rights, but rather an incorporation of their values, to the extent that this is methodologically justified and compatible with the requirements of the Basic Law (cf. BVerfGE 111, 307 <315 et seq.>; 128, 326 <366 et seq.>; 131, 268 <295>). **[266]**

XIII. Freedom of Occupation - Article 12 of the Basic Law

1. Pharmacy, BVerfGE 7, 377

Explanatory Annotation

The "Pharmacy-decision" of the Constitutional Court is one of the early classics of the Court and a "must-know"-judgment for every law student in Germany. The reason for this is that the Court in this early (1958) decision set the standards for the occupational freedom protected in Article 12 of the Basic Law and also developed a detailed and somewhat specific three pronged proportionality test to be applied for any governmental authority impacting on this freedom of Article 12 of the Basic Law. It should also not be overlooked that the decision with its emphasis on individual freedom had a significant impact on the structure of the business world in Germany.

Until this judgment the operation of pharmacies in Germany, albeit being run as private businesses, required special authorization by the relevant authorities, which was only granted if the opening of a new pharmacy was deemed to be in the public interest, economically sound and with no negative impact on the economic soundness of neighbouring pharmacies. This was thought to be necessary so as to maintain a functioning network of pharmacies that were economically able to provide the level of service prescribed by law, for example pertaining to the stocking of a great number of medications at any given time.

The Court regarded this strictly needs-based and administratively-determined access quota to the occupation of a self-employed pharmacist as unconstitutional. It construed the freedom of occupation as a right, protecting the access to and free choice of an otherwise legal occupation and as a right protecting the exercise of this occupation. Article 12.1-2 of the Basic Law contains limitation language pertaining to the exercise or practice of an occupation only. On the basis of this the Court developed its famous three-pronged proportionality test. Government regulations of this exercise or practice, being authorized by the Basic Law, are on the lowest level and require only plausible reasoning and proportionality. Governmental restrictions on the access to a profession, however, must meet stricter proportionality standards. The Court differentiated subjective and objective access rules. Subjective access rules place a requirement on the person wishing to enter this profession such as passing a certain exam or possessing a certain qualification. It is in the hands of the person wishing to enter a profession so regulated to fulfil such subjective criteria. The test for these subjective access rules is a slightly stricter version of proportionality where the government must show that the subjective access rules are really necessary for an orderly exercise of the profession. The most serious interference is created by objective access rules, i.e. governmental regulation that places conditions on access to a profession, which cannot be fulfilled by the person seeking entry. Access quotas would be a good example or the specific access rules of economic soundness and non-interference with neighbouring businesses, as was the case in this decision. Such objective access rules can only be justified if they serve to protect against grave and real risks to an eminently important public interest. In the case at issue, the eminently important public interest was public health and the protection of functioning pharmacies as part of the public health protection system. The Court, however, did not accept that the objective restriction to the profession of self-employed pharmacist was necessary to achieve this goal.

The decision did have significant impact in the economic sector. However, not all professions are always measured by the same yardstick. The exclusive and legally very interesting institution of the German notary[146], for example, still today has many parallels with the pre 1958 pharmacist's situation. However, more than 50 years later the objective restrictions in some parts of Germany still stand.

Translation of the Pharmacy Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 7, 377*

Headnotes:

1. Article 12.1 of the Basic Law (Grundgesetz - GG) does not proclaim free enterprise to be an objective principle of the social and economic order, but guarantees the fundamental right of the individual to engage in any legal activity as an occupation or profession even if that activity does not correspond to a traditionally or legally defined "occupational profile".

2. The term "occupation or profession" in Article 12.1 of the Basic Law also includes in principle those activities that are reserved to the state as well as "governmentally regulated" occupations and professions. However, Article 33 of the Basic Law provides and permits a wide range of special conditions for occupations and professions that qualify as "public services".

3. If an activity can be exercised in the form of self-employment or non-self-employment and both forms of employment are of equal social weight, the choice of the one or the other of the two forms of occupational or professional activity and the transition from one to the other then constitutes a choice of occupation or profession within the meaning of Article 12.1 of the Basic Law.

4. The content and scope of the regulatory power of the legislature under Article 12.1 sentence 2 of the Basic Law can be determined rather objectively simply on the basis of an interpretation that takes into account the purpose of the fundamental right and its importance in the context of society; reference to the provision governing restriction of the essence of the fundamental rights (Article 19.2 of the Basic Law) is then not necessary.

5. The regulatory power alluded to in Article 12.1 sentence 2 of the Basic Law covers both the exercise and choice of an occupation or profession, but not to the same extent. This power pertains to the practice of occupations and professions and may only under that

146 There are historically three principal models for notaries in Germany. The "Prussian" model prevalent mainly in northern Germany works with subjective access rules and is hence in principle open to any lawyer. The "Bavarian" model works with objective access restrictions by allowing only for a certain number of notaries per notary district. Finally there is also the institution of the public notary as a civil servant in some pockets of southwestern Germany.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

aspect also encroach upon the freedom to choose an occupation or profession. As far as substantive content is concerned, the more the exercise of an occupation or profession is involved, the greater the latitude; the more the choice of an occupation or profession is involved, the less.

6. The fundamental right is intended to protect the freedom of the individual and the reservation of regulatory power is intended to ensure adequate protection of public interests. As regards encroachment by the legislature, the necessity of doing justice to both requirements entails making distinctions, for example, on the basis of the following principles:

    a) The freedom to practice an occupation or profession may be restricted if reasonable considerations of public interest would seem to warrant such restriction; the protection afforded by the fundamental right is limited to a defense against requirements of law that are unconstitutional because they represent an excessive burden and are unreasonable.

    b) The freedom to choose an occupation or profession may be restricted only insofar as compellingly required to protect especially important public interests. If such encroachment is unavoidable, the legislature must consistently choose that form of encroachment that limits the fundamental right the least.

    c) In the case of the encroachment upon the freedom to choose an occupation or profession through the imposition of specific conditions for commencement of the practice of an occupation or profession, it is necessary to distinguish between subjective and objective prerequisites: in the case of subjective prerequisites (in particular education and training), the principle of proportionality applies in the sense that the prerequisites may not be disproportionate to their intended purpose, which is to ensure that the occupational activity is properly exercised . The standard of proof for the necessity of objective prerequisites for admission to practice must be especially stringent; in general, such measures can be justified only if required to avert dangers to a public interest of overriding importance that have been demonstrated to exist or are extremely likely to occur.

    d) Regulations permitted by Article 12.1 sentence 2 of the Basic Law must consistently be implemented at the "level" that entails the least encroachment upon the freedom to choose an occupation or profession; the legislature may not move to the next "level" until it can be demonstrated with a high degree of certainty that the feared dangers cannot be effectively averted through (constitutional) means at the lower "level".

7. The Federal Constitutional Court must establish whether the legislature has respected the restrictions on its regulatory power that follows from the above; when the freedom to choose an occupation or profession is encroached upon by objective prerequisites for admission to practice, the Court may also establish whether this specific form of encroachment is compellingly required to protect a public interest of overriding importance.

8. In the area of law pertaining to pharmacies, only the freedom of establishment, which is understood to mean the absence of an objective restriction of admission to practice, is currently consistent with the Basic Law.

Order of the First Senate of 11 June 1958 - 1 BvR 596/56 -

Facts:

The complainant had been a licensed pharmacist since 1940; in 1956, he applied for issuance of an operating permit for the purposes of opening a pharmacy in the municipality of Traun-reut in Upper Bavaria. The application was rejected on the basis of the Bavarian Pharmacy Act (Bayerisches Apothekengesetz - BayApothekenG), which in its then current version required that a permit be obtained to operate a pharmacy. In order for an operating permit to be issued, the applicant had to be in any case licensed, be a German citizen within the meaning of Article 116 of the Basic Law, have been active as a licensed pharmacist for a certain period of time and be personally reliable and suitable. In addition, Article 3.1 of the Pharmacy Act required as conditions for issuance of an operating permit

"a) that the establishment of the pharmacy for the purposes for ensuring provision of the population with pharmaceuticals lie in the public interest and

b) that it be possible to assume that its economic base is secure and that it will not compromise the economic base of the neighbouring pharmacy to such an extent that the prerequisites for the proper operation of that pharmacy are no longer guaranteed."

The authority gave as the reason for its refusal to issue the operating permit that the needs of the local population were completely covered by the pharmacy already established in the municipality. The authority claimed that the establishment of the pharmacy did therefore not lie in the public interest (Article 3.1.a of the Pharmacy Act). In addition, it was stated, the economic base of the new pharmacy would not be secured and that of the existing pharmacy also threatened (Article 3.1.b of the Pharmacy Act).

The constitutional complaint challenging the negative decisions of the authority and, indirectly, Article 3.1 of the Pharmacy Act was successful.

Extract from the Grounds:

…

B. IV.

The question as to whether Article 3.1 of the Pharmacy Act is compatible with Article 12.1 of the Basic Law requires consideration of various fundamental aspects in respect of the importance of this provision of the Basic Law.

1. Article 12.1 protects the freedom of citizens in an area that is especially important to a modern society based on the division of labour: it guarantees individuals the right to pursue any activity for which they consider themselves suitable as an "occupation or profession," i.e., as the basis for their conduct of life. It involves a fundamental right, and not - as, for example, in

Article 151.3 of the Weimar Constitution (Weimarer Verfassung - WV) - a proclamation of "free enterprise" as an objective principle of the social and economic order. Individuals are guaranteed more than the freedom to operate their own business. The purpose of the fundamental right is indeed to protect economically meaningful work, but such work is also viewed as an "occupation or profession", i.e., in its relationship to the overall personality of human beings, which is fully formed and completed only through the fact that human beings devote themselves to activities that constitute their life's work and the basis for their lives and through which they at the same time contribute to the total social product. The fundamental right thus assumes importance for all social classes; as an "occupation or profession," work has the same value and the same dignity for everyone.

2. When the fundamental right is viewed in this light, a broad definition of the term "occupation or profession" is called for. It encompasses not only all occupations and professions that can be described in terms of specific "occupational profiles" that are defined by custom or law, but also atypical (admissible) activities freely chosen by individuals that may in turn also result in the establishment of new occupational profiles (In principle also BVerwGE 2, 89 [92]; 4, 250 [254-255]).

Occupations and professions involving activities that must, because of current notions as regards the organization of the community be reserved primarily to the state, are also covered by Article 12.1, in any case in the sense that they may also be freely chosen as occupations or professions by individuals and no one may be forced to choose them or prohibited from doing so. There is no reason to assume that the fundamental right does not "because of its nature" apply to such occupations and professions, as did the Federal Administrative Court (Bundesverwaltungsgericht) (BVerwGE 2, 85 [86]; 4, 250 [254]). However, Article 33 of the Basic Law contains and permits extensive special provisions for all occupations that represent "public services". They stem from the nature of the situation; the number of employment positions (and therefore in extreme cases under certain circumstances the actual impossibility of choosing the occupation for certain individuals) is in this case determined exclusively by the organizational powers (in the broadest sense) of the respective public law entity involved. The degree of freedom for individuals to choose an occupation or profession that therefore results is guaranteed by equal eligibility for all public offices for those who are equally qualified (Article 33.2 of the Basic Law).

"Governmentally regulated" occupations are possible and exist in many forms. They are also covered by Article 12.1.The answer to the question as to where such occupations should be situated between "free" professions, which are subject to certain regulatory requirements, and occupations that are completely integrated directly into the organization of the state will depend upon the nature and importance of the public functions to be fulfilled. The closer an occupation or profession is to "public service" due to regulatory controls and requirements, the greater the possibility that special provisions may in fact roll back the effect of the fundamental right contained in Article 12.1 by virtue of Article 33 of the Basic Law. The operating latitude of the legislature need not be examined more closely here since the Bavarian provision is consistent with the general situation as regards pharmacies in Germany (see BVerfGE 5, 25) - and despite certain regulatory requirements is in terms of its structure a provision that governs trade or business activity.

Article 12.1 makes no distinction between self-employment and non-self-employed professions; non-self-employment can also be chosen as an occupation or profession and this is in fact becoming increasingly common in modern society. If an activity can be exercised in the form of self-employment or non-self-employment and both forms of employment are of equal social weight, the choice of the one or the other of the two forms of occupational activity and the transition from one to the other then constitutes a choice of occupation or profession within the meaning of Article 12.1 of the Basic Law. This applies to the profession of pharmacists; self-employed pharmacists operate enterprises that constitute the basis of their economic existence, and non-self-employed pharmacists work for such enterprises. The general public and the members of the profession themselves are of the opinion that various "occupations" exist within the "pharmacist" profession; membership in one is not merely a preparatory and transitional phase for entry into the other. It is therefore necessary in the end to concur with the Federal Administrative Court (BVerwGE 4, 167 [170]) that the transition from the activity of an employed pharmacist to that of a self-employed pharmacist constitutes an act of choosing an occupation that is covered by the protection of Article 12.1 sentence 1 of the Basic Law.

3. The decisive aspects of the content and scope of the regulatory power of the ordinary legislature under Article 12.1 sentence 2 can be inferred from the general importance of Article 12.1 as presented above.

a) If free enterprise were the only principle that is constitutionally established in Article 12.1, it would have been only natural to implement this principle simply in connection with a general reservation of legislative power and guarantee free enterprise - as in the case of the Weimar Constitution - "pursuant to a law." The legislature would then, to be sure, also be bound by the principle, but could make provision for exceptions that seem proper and desirable within the context of its general economic policy. In view of the complexity of the modern economy, this would likely mean the tendency that has already long been prevalent towards restriction of completely free enterprise that originated during the early liberal period would be more pronounced. It would not be possible to object to this on constitutional grounds.

   The scope of discretion of the legislature becomes much narrower if one proceeds from the assumption that a real fundamental right of the individual citizen is involved here, that is also a fundamental right that in terms of the idea behind it is closely related to the development of human personality and which therefore is also in practical terms of paramount importance for the overall conduct of life of every individual - in contrast to those fundamental rights that serve only to protect against occasional isolated encroachments by public powers. In this case, effective protection of this fundamental right requires in principle that narrow limits be imposed on statutory encroachments.

   It is of course necessary to note that legislative discretion may be restricted only when it deals with the protection of fundamental rights. The Basic Law is in terms of economic policy neutral in that the legislature may pursue any economic policy it considers proper as long as it respects the Basic Law and in particular the fundamental rights (BVerfGE 4, 7 [17-18]). A statute enacted under Article 12.1 sentence 2 may therefore also not be objected to on constitutional grounds because it happens to

conflict with the rest of governmental economic policy or because it is not consistent with a specific economic doctrine underlying such general economic policy and of course even less so if the judge does not approve of the interpretation of economic policy manifested in that statute.

The legislature is subject to limitations only where they must be imposed on the basis of the fundamental right, i.e., on the basis of the correct interpretation thereof. The practical difficulty lies in the reconciliation of the freedom of discretion of the legislature that must be preserved in the area of economic, social and employment policy with the protection of the freedom to which, especially as regards the legislature, each individual also has a constitutional right.

b) If the regulatory possibilities of the legislature in the area protected by the fundamental right are examined on the basis of the definition contained in the Basic Law itself, the wording of Article 12.1 could be construed to indicate that the practice of an occupation or profession is subject to statutory regulation whereas the choice of an occupation or profession is completely beyond the reach of such regulation. This can, however, not be the intent of this provision. For it is not possible to separate the terms "choice" and "practice" when used in respect of an occupation or profession so that each refers only to a specific temporal phase of occupational or professional life that does not coincide with the other; indeed, the commencement of an occupational or professional activity represents not only the beginning of the practice of an occupation or profession, but also the choice of an occupation or profession, which is manifested precisely in the commencement of such activity - and frequently only therein; likewise, the intention of remaining in an occupation or profession that is expressed in the ongoing exercise of that activity and finally voluntary termination of such occupational or professional activity are basically at the same time acts of choice. The two terms describe the same complex of "occupational or professional activity" from different perspectives (Similarly Klein-v. Mangoldt note IV 2 [370 et seq.] on Article 12 following Über Freiheit des Berufs, Hamburg 1952).

As a result, an interpretation that would prohibit absolutely every form of encroachment upon the freedom to choose an occupation or profession on the part of the legislature cannot be correct; it would not correspond to the reality of life and would therefore also not yield lucid conclusions as regards the legal issues involved. Furthermore, a provision of law that would seem to regulate primarily the practice of an occupation or profession is in principle admissible even if it has an indirect effect on the freedom to choose an occupation or profession. This occurs especially when conditions are established for the assumption of an occupational or professional activity, i.e., the commencement of the practice of an occupation or profession, in other words when commencement of the practice of an occupation or profession is made contingent upon admission. Article 74 no. 19, which justifies the authority to regulate "admission" to certain occupations and professions, shows that it was not intended to have the Basic Law exclude absolutely all admission requirements. The historical development also shows the intention was to avoid authority to restrict admission in principle, but that there was on the other hand no intention of declaring the numerous existing restrictions

on admission inadmissible in general (Member of the *Bundestag* v. Mangoldt at the 5th and 23rd sessions of the Committee for Policy Issues [*Ausschuss für Grundsatzfragen*] on 29 September and 19 November 1948).

The framers of the Basic Law did not in this case, however, completely succeed in objective and terminological resolution of the issues involved; they ultimately chose a formulation that derives from the distinction commonly made between "choice" and "practice" in legislation governing trade or business and otherwise deliberately left regulation "largely" to the legislature (see Jahrb. d. öff. Rechts [new version] vol. 1 pp. 134, 136).

It is for the most part assumed in the case law and scholarly literature that the regulatory power pursuant to Article 12.1 sentence 2 of the Basic Law pertains to the practice and choice of occupation and professions in the sense elaborated above (see, for example, Hamel DVBl. 1958 p. 37 and the documentation indicated therein); for both the Federal Court of Justice (Bundesgerichtshof) and the Federal Administrative Court are of the opinion that the legislature may make the practice of certain occupations and professions subject to permission - in the form of "admission" - and require fulfilment of certain specific conditions for the issuance of such permission see, for example, BVerwGE 4, 167 [169]; 4, 250 [255]; German Federal Court of Justice in the opinions, "Decisions of the Federal Court of Justice in Criminal Cases" (*Entscheidungen des Bundesgerichtshofes in Strafsachen* - BGHSt). 4, 385 [391]; 7, 394 [399]).

In that respect Article 12.1 is a uniform fundamental right (to "occupational freedom"), in any case in the sense that the reservation of regulatory power in sentence 2 covers "in principle" both the practice and the choice of occupations or professions. This does not mean, however, that the powers of the legislature as regards each of these two "phases" of occupational or professional activity are equally extensive in terms of their substantive content. For the intention of the Basic Law, which is clearly expressed by the wording of Article 12.1, is to guarantee the "free" choice of an occupation or profession, while permitting regulation of practice, and this must always be respected. This can follow only from an interpretation based on the assumption that the regulatory power does not apply to both "phases" with the same objective intensity; in fact, the more the legislature encroaches upon the freedom to choose an occupation or profession, the less latitude it enjoys. This interpretation is also consistent with the basic concepts embodied in the Basic Law and the underlying image of man (BVerfGE 2, 1 [12]; 4, 7 [15-16]; 6, 32 [40]). The choice of an occupation or profession constitutes an act of self-determination and a decision based on the free will of the individual; it must remain to the greatest extent possible free from encroachment by the public powers. Individuals have a direct effect on society when they practice an occupation or profession; they may therefore in this regard be subjected to restrictions in the interest of other individuals and society as a whole.

To summarize: the regulatory power covers both the practice and choice of occupations and professions. However, this power exists in respect of the practice of an occupation or profession and may only under that aspect also encroach upon the freedom of

choice of an occupation or profession. As far as substantive content is concerned, the more the exercise of an occupation or profession is involved, the greater the latitude; the more the choice of an occupation or profession is involved, the less, it is.

c) In respect of the substantive content of the regulatory power that is described in such general terms as regards its purview, it is first necessary to clarify the meaning of the term "regulate," in particular in connection with the freedom to choose an occupation or profession. It cannot mean that the legislature has on the whole broader latitude for discretionary judgment than that otherwise allowed by a general reservation of legislative power and may regulate the entire area of employment law to a greater extent, thereby constitutively establishing the substantive content of the fundamental right in the first place (according to Scheuner, Handwerksordnung und Berufsfreiheit [reprint from "Deutsches Handwerksblatt"], 1956, for example, pp. 21, 27-28, 31, and Ipsen, Apothekenerrichtung und Article 12 GG, 1957, pp. 41-42).

If such an opinion were to prevail, the fundamental right would be debased since its substantive content would be left entirely to the discretion of the legislature although the legislature itself is bound by the fundamental right (Article 1.3 of the Basic Law). This would not be in keeping with the importance of precisely this fundamental right, would hardly be consistent with the specific (pleonastic) emphasis on the "free" choice of occupation or profession in Article 12.1 and would also be incompatible with the general tenor of the section on fundamental rights, which as the Federal Constitutional Court set forth in its decision of 16 January 1957 (BVerfGE 6, 32 [40-41]) no longer recognizes "empty" fundamental rights in the former sense. Moreover, when the legislature operates in the area protected by fundamental rights, the principle elaborated in the decision of 15 January 1958 (BVerfGE 7, 198 [208-209]) to the effect that the legislature must take as the basis for its regulatory acts the importance of the fundamental right within the social order also applies here. The legislature does not freely determine the substantive content of the fundamental right, but, rather, a substantive limit to legislative discretion may follow from the substantive content of the fundamental right. A clear substantive value based decision of the Basic Law for a concrete important area of life also exists in Article 12.1; the legislature does not therefore enjoy as much freedom in this case as, for example, in the case of application of the general equality provision, which represents a principle of law that applies to the public powers in general and the concrete substantive content of which remains to be established by the legislature for specific life situations on the basis of the relevant applicable aspects of justice.

On the other hand, "regulate" does not mean that the legislature may not restrict the fundamental right in any way. In principle, every regulation also involves making limits visible. But the obviously deliberate use of the term "regulate" by the framers of the Basic Law instead of "restrict," which is otherwise usual in the provisions governing fundamental rights, indicates that more specific prescription of the limits from within is meant, i.e., of the limits inherent in the nature of the fundamental right itself rather than limits through which the legislature itself might determine the substantive content of the fundamental right, namely, by narrowing the natural sphere of operation based on rational interpretation from without.

d) The fundamental right is intended to protect the freedom of the individual and the reservation of regulatory power is intended to ensure adequate protection of public interests. As was shown, the more the individual's right to freely choose an occupation or profession is called into question, the stronger is the effect of the individual's right to freedom; the greater the disadvantages and dangers that could arise for the public from complete freedom as regards the exercise of an occupation or profession, the more urgent is the need to protect the public interest. If an attempt is made to do justice in the most effective manner possible to both of these requirements, which are equally legitimate in a social constitutional state, a solution can be found only by carefully balancing the importance of the respective opposing and possibly even conflicting interests. Assuming at the same time that the free human personality is the supreme value from the overall perspective of the Basic Law and that it must therefore also be afforded maximum freedom as regards the choice of an occupation or profession, it then follows that this freedom may be restricted only insofar as is absolutely necessary in the public interest.

Accordingly, the Basic Law requires that certain distinctions be made in the case of encroachment on the part of the legislature on the basis of principles that may be summarized as described below:

The freedom to practice an occupation or profession may be restricted by way of "regulation" if reasonable considerations of public interest would seem to warrant such restriction. The freedom to choose an occupation or profession may on the other hand be restricted only insofar as compellingly required to protect especially important ("overriding") public interests, i.e.: insofar as such protection involves interests that after careful consideration must be accorded precedence over the individual's right to freedom and insofar as such protection cannot be ensured otherwise, namely, through means that restrict the freedom of choice of occupation or profession either not at all or less so. In the event that such encroachment upon the freedom to choose an occupation or profession is unavoidable, the legislature must consistently choose that form of encroachment that least restricts the fundamental right.

Several "levels" as it were exist as regards the scope of regulatory power:

> the legislature has most freedom when it regulates only the practice of an occupation or profession without affecting the freedom to choose that occupation or profession and furthermore only specifies in detail the nature and manner in which the members of an occupation or profession must conduct their occupational or professional activities. Considerable latitude exists here for taking into account aspects of a practical nature; such aspects serve to determine what conditions members of an occupation or profession must meet in order to avert disadvantages and dangers to the general public. The desire to promote an occupation or profession and thereby increase the total social product of its members may also justify certain provisions that restrict the freedom to practice an occupation or profession. The protection afforded by the fundamental right is therefore limited to a defense against requirements of law that are unconstitutional because they represent an excessive burden and are unreasonable; apart from these exceptions, the

> impairment of freedom of occupation or profession at issue here does not excessively affect those protected by this basic right since they are already in practice and their license to practice is not affected.

On the other hand, a regulation that makes commencement of the practice of an occupational or professional activity dependent upon fulfilment of specific conditions and thereby affecting the freedom of choice of occupation or profession, can be justified only insofar as it is intended to protect an overriding public interest that takes precedence over the freedom of the individual. In this context, it obviously makes an important difference - which has also long been emphasized in the case law and the scholarly literature (see Scheuner op. cit. p. 25 and documentation cited) - whether "subjective" prerequisites for admission to practice are involved, especially as regards education and training, or objective conditions that have nothing to do with personal qualifications and are beyond the control of the candidate.

The regulation of subjective prerequisites for commencement of the practice of an occupation or profession is inherent to the legal order governing that occupation or profession; it allows only candidates who meet certain qualifications, most of which are certainly of a formal nature, access to an occupation or profession. Such restriction is legitimate due to the nature of the matter at issue; it is based on the fact that many occupations and professions require specific technical knowledge and skills (in the widest sense of the term) that can be acquired only through theoretical and practical training and that the exercise or proper exercise of such occupations and professions without such knowledge would be impossible or inappropriate or, indeed, would entail dangers for the general public. The legislature only renders concrete and "formalizes" this exigency, which follows from a given life situation; that which is expected of the individual in the form of mandatory formal training is only something that such an individual would in principle actually have to accept anyway by reason of the matter involved in order to exercise the occupation or profession properly. This restriction of freedom therefore represents an adequate means for avoidance of potential disadvantages and dangers; it is also not unreasonable since it applies equally to all candidates for the occupation or profession and is known to them beforehand, which means that each individual can judge prior to choosing an occupation or profession whether he or she will be able to fulfil the required conditions. In this case, the principle of proportionality applies in the sense that the mandatory subjective prerequisites may not be disproportionate to their intended purpose, which is to ensure the proper exercise of the occupational or professional activity.

The situation is different when objective conditions must be met for admission to an occupation or profession. Fulfilment of such conditions is completely beyond the control of the individual. They run absolutely counter to the spirit of the fundamental right since even those who have already in fact chosen and were allowed to choose an occupation or profession through fulfilment of all required conditions may still be excluded from admission to the respective occupation or profession. The longer and more specialized the education and training, i.e., the more obviously the choice of such training also represents a choice of a specific occupation or profession, the more

> important this restriction of freedom becomes and accordingly the more serious its effect. Since the immediate disadvantages for the general public that result from the practice of an occupation or profession by professionally and morally qualified candidates are also not readily obvious, it is often not possible to clearly demonstrate the existence of a causal relationship between this restriction of the freedom of choice of occupation or profession and the desired effect. The danger that irrelevant motives may become involved is therefore especially great; in particular, it is only natural to suspect that the restriction of access to an occupation or profession is intended to protect those already in practice from competition, could be a motive that is generally felt could never justify encroachment upon the freedom to choose an occupation or profession. Apart from a possible conflict with the principle of equality, it is possible to violate an individual's right to freedom in an especially egregious manner through the choice of this most primitive and most radical means of excluding candidates who are (presumptively) professionally and morally completely suitable. It follows from this that the necessity of such a restriction of freedom must meet especially stringent standards of proof; in general, such encroachment upon the freedom of choice of an occupation or profession is legitimate only if required to avert dangers to a public interest of overriding importance that have been demonstrated to exist or are extremely likely to occur; the desire to promote other public interests or preservation of the social prestige of an occupation or profession through limitation of the number of members does not suffice even if such goals would otherwise justify legislative action.
>
> The legislature must implement regulations permitted under Article 12.1 sentence 2 at the "level" that entails the least encroachment upon the freedom to choose an occupation or profession and may proceed to the next "level" only when it can be proven with a high degree of probability that the feared dangers cannot be effectively combated with (constitutional) means at the preceding lower "level."

4. The Federal Court of Justice and the Federal Administrative Court also want to limit the legislature's freedom to establish objective conditions for admission by statute; however, they infer these limits exclusively from the provision contained in Article 19.2 of the Basic Law although they are not in agreement as regards the interpretation thereof (see Hamel DVBl. 1958 pp. 37 [38] and the documentation cited therein).

Viewed from the position taken here, the questions as to whether the prohibition of infringement of the substantive content of the fundamental rights would result in the imposition of further limits on the regulatory power of the legislature under Article 12.1 sentence 2 and what they might be like in detail can be ignored. For it follows from the above that an interpretation that takes into account the purpose of the fundamental right and its importance in the context of social life leads to an appropriate restriction of the regulatory power of the legislature.

5. The restrictions of regulatory power that follow from consideration of the fundamental right are substantive constitutional commandments that are directed primarily at the legislature itself. However, the Federal Constitutional Court monitors compliance with these commandments. When a restriction of the freedom of choice of occupation or profession at the "last level" (that of objective conditions for admission) is at issue, the Federal Constitutional Court must therefore

initially determine whether an overriding public interest is threatened and whether the provision of law can even serve to avert this danger in the first place. The Court must, however, also determine whether precisely this specific form of encroachment is compellingly required to protect that interest, in other words, whether the legislature could not have provided this protection through regulation at a preceding level.

It has been objected that review in the latter direction exceeds the authority of a court: it is argued that a court cannot appreciate whether a specific legislative measure is appropriate since it cannot know whether other equally effective means exist and whether they are amenable to implementation by the legislature and that this can be determined only if all life circumstances to be regulated are known, including political possibilities of legislation. This position, which its advocates would primarily for practical considerations use to impose narrow limits on the powers of review of the Federal Constitutional Court, is occasionally supported in theory by asserting that the Court would encroach upon the sphere of the legislature and thereby violate the principle of the separation of powers by claiming such extensive powers of review.

The Federal Constitutional Court cannot concur in this view.

The Court is charged with protecting the fundamental rights against the legislature. When limits upon the legislature follow from the interpretation of a fundamental right, the Court must be able to oversee compliance with such limits; it may not evade this responsibility if it wants to avoid invalidating the fundamental rights to a great extent in practice and depriving the function assigned to it by the Basic Law of its actual purpose.

The requirement that is often set forth in this context to the effect that the legislature must be free to choose from among several equally suitable means would fail to address the specific problem that is at issue here. It refers to the (usual) case of a fundamental right that involves no areas of protection that contain multiple levels (as, for example, in BVerfGE 2, 266). In this case, the legislature may, however, freely choose - within certain limits - among several equally suitable legal measures since they all pertain to the uniform substantive content of the same fundamental right without multiple levels. However, when dealing with a fundamental right that embodies areas of lesser and greater protection of a freedom, it must then in any case be possible for the Federal Constitutional Court to verify whether the prerequisites for a regulatory measure exist at the level at which that freedom enjoys the greatest protection, in other words, it must be possible to establish whether legislative measures at the preceding levels would not have sufficed, i.e., whether the actual encroachment was "compellingly required." If the legislature were to be allowed to freely choose from among "equally suitable means" that belong to different levels, this could in practice have for effect that precisely those forms of encroachment that restrict the fundamental right most severely, which are especially suitable for achieving the desired end due to their drastic effect, would be chosen most frequently and then have to be accepted without review. Effective protection of precisely that area of freedom that Article 12.1 of the Basic Law is intended to protect most sustainably would then no longer be ensured. ...

Since, therefore, the courts have already considered up to now that it is legally required and in fact possible in the interest of protection of the freedom of the citizenry to review laws under certain circumstances to establish whether they are necessary, it is even less possible to

remove such powers of review from the purview of the Federal Constitutional Court; for the Court is entrusted with the protection of fundamental rights precisely against encroachment by the legislature - in particular through the institution of the constitutional complaint - and is by virtue of its general standing as a constitutional body and court for constitutional issues much less susceptible than other courts to reproach for unjustified encroachment upon the legislative sphere.

(The Federal Constitutional Court applies these standards to Article 3.1 of the Bavarian Pharmacy Act below, assuming that the intent and purpose of the provision is to maintain the health of the pharmacy profession and thereby at the same time serve the health needs of the population. In so doing, the Court then finds that the legislature has not yet availed itself of more lenient possibilities for encroachment at the level of the practice of the profession to protect against the risk that could possibly arise from the manufacture and distribution of pharmaceuticals.

The Court then concludes as follows:

6. The above references to possible legislative measures are not to be construed to mean that the Federal Constitutional Court would like to make general legislative recommendations to the legislature; that is not its responsibility. It was only to do justice to its responsibility to ensure the most effective protection possible for fundamental rights that the Court was compelled to find that restriction to the narrowest area of protection afforded by the fundamental right to freely choose an occupation or profession may be contemplated only when the dangers to be averted cannot be prevented or attenuated by other regulatory measures that might be reasonably considered and do not restrict the fundamental right either at all or to the same extent. This finding would seem all the more necessary since the radical expedient of restrictive admission lies in the German tradition (see on this Urdang-Dieckmann op. cit. pp. 63-64)in the area of law pertaining to pharmacies although, as was shown, it follows from Article 12.1 of the Basic Law that it is first necessary to exhaust other legislative possibilities.

It is of course left to the legislature to decide whether to take the measures alluded to, which of them to choose and in what order to implement them. The Court has limited itself to the mention of such measures as are already under public discussion (at least among experts) and have already to some extent even been implemented or in any case would seem amenable to implementation in consideration of the overall situation.

Since legislative powers in this area reside to some extent with the *Länder* and are to some extent shared by both the Federation and the *Länder*, the Bavarian legislature could of course not, for example, claim that the possibilities alluded to here could provide an effective remedy only if the Federation were to make use of its legislative powers, but that the Land legislature is not obliged to encroach any further upon the area of the fundamental right in the absence of any such initiative on the part of the Federation. Such a suggestion would not be admissible in respect of the fundamental right of occupational freedom. Article 12.1 of the Basic Law makes no distinction between Federal and Land law in respect of statutory regulation of the practice of occupations or professions. The fundamental right under Federal constitutional law is universally

applicable and as such enjoys equal protection under Federal law and that of the *Länder*. The Federation and the *Länder* may not permit more serious encroachment upon the fundamental right by invoking their lack of legislative authority in respect of any given measure. Instead, in matters involving the protection of the fundamental rights of citizens, who after all are subject to both Federal law as well as Land law, the legislatures of the Federation and the *Länder* must accept treatment as a single entity. ...

2. Non-Smoker Protection, BVerfGE 121, 317

Explanatory Annotation

What has been a reality in many jurisdictions came relatively late to Germany - legislation regulating smoking in pubs, bars and restaurants. At issue in this decision of 2008 was legislation in the states of Baden-Württemberg and Berlin banning smoking in pubs. Exceptions were possible for certain types of establishments and the provision of separate smoking rooms was also possible. However, smoking was completely banned in discotheques because of the increased frequentation by younger people and the physical activities there, which were thought to increase the risk of passive smoking. These provisions were successfully challenged by a small 'one-room' publican who could not offer a separate non-smoking room and by operators of discotheques. The protective purposes of the regulations had to be balanced against the freedom of commercial activity guaranteed under Article 12 of the Basic Law. The Court did not deny that the legislator could indeed act on the increased health risks of passive smoking but saw a violation of the principle of proportionality because the legislation was inconsequent in the Court's view. The health risks involved either call for a total ban on smoking in pubs and restaurants and the legislator would have been free to impose such a complete ban or, if exceptions are provided for as was the case with the provisions at issue, they would have to take into account the special situation of 'one-room' smaller pubs as they are especially affected by the restrictions imposed. Whereas exceptions are not mandated by the Basic Law, once provided for, they must take into account and adequately reflect the protection of all interests involved, including specific commercial interests as brought forward by the applicants.

The Court, in other words, demanded systematic stringency. In this sense, the Court introduced an equal protection requirement into the proportionality test. If the legislator grants an exception for one group but not for another, this can have an effect on the outcome of the proportionality test and render the non-recognition of the interests of the disadvantaged group disproportional.

Translation of the Non-Smoker Protection Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 121, 317*

Headnotes:

1. If due to the scope for assessment, evaluation and action accorded to the legislature it decides in favour of a concept to protect non-smokers in food and drinking establishments seeking to balance health protection against, in particular, the occupational freedom of establishment operators, then exceptions to the ban on smoking must be drafted in such a way that they also cover certain groups of food and drinking establishments - in this case smaller establishments which primarily serve alcoholic beverages - in order to prevent such establishments from being exposed to an especially strong economic burden.

2. It is a violation of the principle of equality if the law allows smoking rooms in food and drinking establishments, but excludes discotheques from this privilege.

Judgment of the First Senate of 30 July 2008 - 1 BvR 3262/07 - / - 1 BvR 402/08 - / - 1 BvR 906/08 -

Facts:

The complainants are operators of food and drinking establishments and a discotheque in Baden-Württemberg and direct their complaints against provisions of Land law on the ban on smoking in food and drinking establishments.

The first and second complainants each operate single-room pubs. They allege that the ban on smoking has resulted in a drop in their turnover.

The first complainant alleges a violation of his fundamental rights under Article 12.1 and Article 14.1 of the Basic Law (Grundgesetz -GG). He alleges that s. 7 of the Non-Smoking Act of the Land Baden-Württemberg (Landesnichtraucherschutzgesetz - LNRSchG) is unconstitutional in that it bans smoking in single-room pubs in which a smokers' room cannot be established.

The second complainant alleges a violation of her fundamental rights under Article 12.1, Article 3.1, Article 2.1, Article 1.1 and Article 14.1 of the Basic Law. S. 2.1 no. 8 in conjunction with s. 4.3, s. 6.2, s. 7.2 of the of the Non-Smoking Act of the Land Berlin (Landesnichtraucherschutzgesetz - LNRSchG) are unconstitutional insofar as a ban on smoking applies to owner-operated single-room pubs, while at the same time smokers may under certain conditions be served food and drink in pubs with two or more rooms.

The third complainant operates a large discotheque. He submits that the challenged provision of Land law violates its fundamental right under Article 12.1 in conjunction with Article 3.1 of the Basic Law. s. 7 of the Non-Smoking Act of the Land BadenWürttemberg is unconstitutional in that it imposes a complete ban on smoking in discotheques.

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Extract from the Grounds:

B.

The constitutional complaints are admissible and founded.

I.

1. The ban on smoking in food and drinking establishments in s. 7.1 sentence 1 of the Non-Smoking Act of the Land Baden-Württemberg violates the first complainant's fundamental right to the free pursuit of his occupation (Article 12.1 of the Basic Law). The same applies in the case of the second complainant in view of the ban on smoking pursuant to s. 2.1 no. 8 of the Non-Smoking Act of the Land Berlin. A ban on smoking in food and drinking establishments is to be sure not as such incompatible with the Basic Law. However, a violation of the Basic Law does result from the fact that Land legislatures took no measures in the formulations of the protection of non-smokers they chose that, taken as a whole, also seem reasonable when the special burden upon a specific class of operators of food and drinking establishments are taken into account.

a) Although the ban on smoking in food and drinking establishments is primarily directed at patrons, it also encroaches on the protected area of freedom of occupation of operators of such establishments. The ban on smoking on the other hand is not to be measured against the standard of the guarantee of property (Article 14.1 of the Basic Law).

…

aa) The freedom to pursue a profession or occupation enjoys comprehensive protection under Article 12.1 of the Basic Law (see BVerfGE 85, 248 [256]).

This protection also extends to the right of individuals to determine the nature and quality of goods and services they offer on the market (see BVerfGE 106, 275 [299]). and as a result their right to choose freely their target audiences. Under this aspect, the ban on smoking restricts the freedom of operators of food and drinking establishments to pursue their occupation.

The ban on smoking in food and drinking establishments as regulated in the present cases by s. 7.1 sentence 1 of the Non-Smoking Act of the Land Baden-Württemberg and s. 2.1 no. 8 of the Non-Smoking Act of the Land Berlin deprives operators of food and drinking establishments of the possibility of determining themselves whether to allow patrons to smoke in their establishments or to prohibit them from doing so. As a result, operators of food and drinking establishments may decide whether they also want to offer the services and prestations of their establishment to patrons who would like to accept that offer in combination with the possibility of smoking only in exceptional cases provided for by law. It is not only made more difficult for operators of food and drinking establishments to proffer their offerings to smokers, but they are as a rule prevented from performing services, i.e., serving food and drink, for patrons who do not want to abstain from smoking in food and drinking establishments.

bb) This restriction on occupational activity is not merely the result of a ban directed at smokers, but represents direct encroachment on the freedom of operators of food and drinking establishments to pursue their occupation. It follows from the logic behind the legal statutes governing the ban on smoking in food and drinking establishments that these provisions also prohibit operators of food and drinking establishments from offering their services and prestations to those of their patrons who smoke, for the non-smoking laws under challenge combine the ban on smoking directed at patrons of food and drinking establishments with a duty on the part of the operators of such establishments to obviate violation of this ban and to prevent further violations (s. 8.2 sentence 1 in conjunction with s. 8.1 sentence 1 and 3 of the Non-Smoking Act of the Land Baden-Württemberg; s. 6.1 no. 2 in conjunction with s. 6.2 of the Non-Smoking Act of the Land Berlin).

b) In order to be able to withstand scrutiny against the guarantee of the freedom of occupation (Article 12.1 of the Basic Law), any encroachment on the freedom to exercise an occupation or profession must have a legal basis that is sufficiently warranted for reasons of the public good (see BVerfGE 7, 377 [405 and 406]; 94, 372 [390]; 101, 331 [347]).

Restrictions of the freedom of occupation that are unavoidable for reasons of the public good must satisfy the requirement of proportionality (see BVerfGE 19, 330 [336 and 336]; 54, 301 [313]; 104, 357 [364]).

As a result, any encroachments must be suitable for achieving the respective purpose and may not exceed that which is required in the interest of the public good (see BVerfGE 101, 331 [347); 104, 357 [364]). The means of encroachment may also not be excessively onerous (see BVerfGE 19, 330 [337]) so that the overall balance between the severity of such encroachment and the weight of the reasons for such encroachment still remains within the limits of the reasonable (see BVerfGE 103, 1 [10]; 106, 181 [192]).

The provisions under challenge in respect of the ban on smoking in food and drinking establishments do not satisfy these requirements in every respect. A legal basis is to be sure not lacking (aa); the bans are also based on legitimate purposes (bb); and the provisions are suitable and necessary for achievement of such purposes (cc). In the case of the formulations to be judged here, however, the ban on smoking results in an excessive burden upon a specific class of operators of food and drinking establishments that includes the first and second complainants (dd).

aa) Only a duly enacted law can satisfy the requirements for a legal basis for encroachment on the freedom of occupation (Article 12.1 sentence 2 of the Basic Law) (see BVerfGE 98, 265 [298]; 102, 197 [213]).There can be no objection to the challenged provisions under this aspect.

bb) With the ban on smoking in food and drinking establishments, the legislature is pursuing a goal in the public interest that is based upon reasonable considerations and may therefore in principle legitimate restriction of the freedom to exercise an occupation or profession.

(1) Both laws cite as their purpose protection of the public against the health risks of passive smoking (see s. 1.1 sentence 2 of the Non-Smoking Act of the Land Baden-Württemberg; s. 1 of the Non-Smoking Act of the Land Berlin). Protection of the public against health risks ranks among the public interests of salient importance (see BVerfGE 7, 377 [414]) that can even justify objective prerequisites for admission to the practice of an occupation or profession and therefore all the more so restrictions on the exercise of an occupation or profession. The voluntary nature of the decision of individuals to expose themselves to the burden of tobacco smoke, in particular when visiting food and drinking establishments, does not render the issue of health protection obsolete. In any case as long no adequate possibilities exist for non-smokers to find smoke-free rooms in food and drinking establishments, such a decision will typically not be indicative of acceptance of the health risks of passive smoking, but only *de facto* unavoidable toleration of this risk in order to be able to participate without restriction in society by frequenting the food and drinking establishments of their choice.

(2) There can be just as little objection on constitutional grounds to the fact that the Land legislatures considered passive smoking, i.e., environmental tobacco smoke (ETS), to constitute a risk to the health of the public and as a result took legislative action.

…

cc) Laws against smoking in food and drinking establishments are suitable and necessary for protection against the health risks of passive smoking.

…

(2) Since no other equally effective means is available that would restrict freedom of occupation to a lesser extent, laws against smoking are also necessary (see Drug and Addiction Report of the Commissioner for Narcotics of the Federal Government (*Drogen- und Suchtbericht der Drogenbeauftragten der Bundesregierung*), May 2008, p. 38).

There can in particular be no objections on constitutional grounds to the fact that the legislatures did not consider that obligating operators of food and drinking establishments to choose whether to operate their establishments as smoking or non-smoking establishments would be as equally effective as a law against smoking.

…

dd) The provisions under challenge are, however, not proportionate in the narrower sense of the term, for they place an unreasonable burden on operators of smaller one-room establishments that serve primarily alcoholic beverages.

(1) If the legislature adopts laws that encroach on the freedom to pursue an occupation, the overall balance between the severity of the encroachment and the weight of the reasons for such encroachment must remain within the limits of what is reasonable (see BVerfGE 102, 197 [220]; 112, 255 [267]).

(a) A ban on smoking in food and drinking establishments represents a serious encroachment on the right of operators of food and drinking establishments to freely pursue their occupation. Since operators of food and drinking establishments may no longer allow smoking on the premises of their establishments, they can reach the smokers among their potential patrons with their offerings, in particular food and drink, only with difficulty or, if the latter in no case want to abstain from smoking in food and drinking establishments, they can no longer reach them at all. Many smokers will, - at least temporarily - frequent food and drinking establishments less often or spend less time in such establishments since their stay will lose considerable appeal because of the ban on smoking. In view of the fact that smokers represent 33.9% of the adult population in Germany (see Drug and Addiction Report of the Commissioner for Narcotics of the Federal Government, May 2008, p. 38), this may, depending upon the orientation of the culinary offering and clientele appealed to by the offering, result in significant revenue shortfalls for the operators of food and drinking establishments. This is confirmed by a study of the Federal Statistical Office (Statistisches Bundesamt) according to which the revenue shortfall of food and drinking establishments - in particular those that concentrate on the sales of alcoholic beverages - was significantly greater in *Länder* with bans on smoking laws than in those *Länder* that still have no bans on smoking in food and drinking establishments (see Press Release of the Federal Statistical Office of 6 June 2008 - 207/08).

Even if reports from countries that have had no-smoking laws in force for a longer period of time to the effect that revenues recover or even improve are correct and this is also found to be the case in Germany, the operators of food and drinking establishments would have to accept lower revenues for a lengthier period of time until this development sets in. This alone can restrict or even make it necessary to shut down a business.

(b) On the other hand, however, bans on smoking in food and drinking establishments serve public interests of salient importance. This applies first of all to protection of the health of the public, which is accorded considerable importance within the order of values of the Basic Law (see BVerfGE 110, 141 [163]). A duty to provide protection on the part of the state can therefore be inferred from Article 2.2 of the Basic Law, which includes preventive action against health risks (see BVerfGE 56, 54 [78]).

In view of the number of deaths that scientific findings have shown can be attributed to passive smoking, protection of human life is also involved. In that respect, the Basic Law also provides justification for a protective duty that requires that the state protect and foster the life of each individual (see BVerfGE 39, 1 [42]; 46, 160 [164]; 115, 118 [152]).

There can be no objection on constitutional grounds to the assumption to the effect that a significant threat exists to these legal interests since the Land legislatures can in this respect rely on the prevailing scientific opinion to the effect that tobacco smoke is a health risk even in minimal quantities because of the genotoxic carcinogens it contains (see above B. I. 1. b bb (2) (a))

(2) It is the affair of the legislature to decide with respect to any given area of life whether, with what level of protection, and in what way to work counter to situations that may in the opinion of the legislature prove harmful (see BVerfGE 110, 141 [159]; see also BVerfGE 111, 10 [38 and 39, 43]). In this context, the legislature enjoys in principle discretionary, evaluative and operating latitude (see BVerfGE 96, 56 [64]).

This also enables the legislature to take into account interests that run counter to the goal it pursues in the interest of the public good when choosing its protective plan and thereby develop a solution by assigning and balancing conflicting legal interests. If in the case of certain exceptions a concrete protective duty cannot be inferred from the Basic Law that makes specific action compulsory, the creation and legislative deployment of a protective duty are left to the legislature as the body of government responsible for this.

(3) On the basis of the latitude that must be afforded the legislature, it would not be prevented from assigning health protection priority over the freedoms that this would restrict, in particular the freedom of the operators of food and drinking establishments to pursue their chosen occupation and the freedom of smokers to conduct themselves as they see fit, and imposing a strict ban on smoking in food and drinking establishments.

(a) Since health, and even more so, human life, ranks among the values that are of especially great importance, they may also be protected through the use of means that encroach significantly on freedom of occupation (see BVerfGE 17, 269 [276]; 85, 248 [261]; 107, 186 [196]). The legislature is therefore not bound on constitutional grounds to take into account the freedom of occupation of operators of such establishments by allowing for exceptions to a ban on smoking for food and drinking establishments in buildings and completely enclosed spaces. Indeed, the legislature may opt in favour of a plan for the protection of non-smokers that gives priority to the greatest possible reach and efficiency of protection against the risks of passive smoking, for if exceptions are made to the ban on smoking in food and drinking establishments, in particular for smoking rooms or food and drinking operations in tents, this would represent partial dispensation with the intended goal of health protection. In order to avoid the threat of "significant reduction of protection of non-smokers" that would otherwise result, the federal legislature allowed no exceptions from the ban on smoking in s. 1.3 sentence 2 of the Act on Protection against the Dangers of Passive Smoking (Gesetz zum Schutz vor den Gefahren des Passivrauchens) (of 20 July 2007, Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 1595) for public means of transport, i.e. in particular for trains, trams, busses and aircraft (see Bundestag document 16/5049, p. 9).

(b) If the legislature decides in favour of a strict ban on smoking due to the high rank of the interests to be protected, no exception need be made for those establishments that are to be classified as small food and drinking establishments because of their limited seating capacity and whose offering consists primarily of alcoholic beverages ("corner pubs").

A law restricting freedom of occupation that is as such in compliance with the principle of proportionality is to be sure in violation of Article 12. 1 in conjunction with Article 3.1 of the Basic Law if its provisions fail to take into account differences that typically exist within the occupational class affected. This must be assumed to be the case when the burden imposed upon members of that class is greater than that imposed upon others not only in respect of isolated special constellations that deviate without adequate objective reason from the norm, but also in respect of certain cases that are typical, albeit limited in number (see BVerfGE 25, 236 [251]; 30, 292 [327]; 59, 336 [356]; 68, 155 [173]; 77, 84 [113]).

The legislature may then be bound to take into account the different ramifications of statutory regulations through hardship provisions or by making further distinctions such as exceptions (see BVerfGE 34, 71 [80]).

It need, however, not be decided here whether smaller one-room food and drinking establishments fulfil these conditions for special consideration, for there is sufficient objective reason for justification of the imposition of a greater burden upon this class, including the threat to its economic existence, which is why differentiated regulation is not required (see BVerfGE 34, 71 [79]).

The legislature need not entertain the possibility of making an exception for small food and drinking establishments if it opts for a strict ban on smoking. For this would mean that it would be necessary despite the legislature's regulatory intent, which is covered by the order of values of the Basic Law, to completely and permanently forego protection of the public against the risks of passive smoking in respect of a not insignificant segment of the hospitality industry. However, the special professional and economic interests of operators of small food and drinking establishments also cannot compel the legislature to completely abandon its decision to strictly pursue public interests of salient importance in an area that presents not insignificant risks.

(c) A strict ban on smoking in food and drinking establishments is not disproportionate even in view of the interests of those patrons who want to smoke. The ban on smoking does to be sure result in a not insignificant restriction upon smokers since it is made less convenient for them to spend time in food and drinking establishments due to the obligation to abstain from smoking and visits to food and drinking establishments also represent a not insignificant aspect of participation in society. This impairment of the freedom of conduct of smokers (Article 2.1 of the Basic Law) would, however, not seem to be inappropriate due to the salient importance of the purpose of protection pursued with the ban on smoking, especially since it is still possible to leave an establishment temporarily to smoke. Smokers are not disfranchised in an impermissible manner in this case; in particular, they are not compelled to protect themselves against

risk (see BVerfGE 59, 275 [278 and 279]). The Land no-smoking laws are intended neither to prevent addiction nor to protect individuals against themselves. Instead, their purpose is to protect against the risks of passive smoking (see s. 1.1 sentence 2 of the Non-Smoking Act of the Land Baden-Württemberg; s. 1 of the Non-Smoking Act of the Land Berlin). What is involved is not the protection of the health of smokers but rather the protection of that of other persons in a given situation, who do not themselves smoke.

The non-smokers among the patrons of food and drinking establishments are similarly not forced to accept protection against the risks of passive smoking. The statutory regulation merely takes into account the circumstances that as long as there is not a sufficient number of places in non-smoking public rooms they have no choice other than to accept the health risk due to passive smoking when they frequent a food and drinking establishment (see above B. I. 1. b bb (1)). Non-smokers should be able to participate in this area of society not only at the price of jeopardizing their health.

(4) However, a proportionality test leads to different results if the decision does not involve a strict ban on smoking, but rather a plan for protection against the risks of passive smoking is chosen - as by the Land legislatures in the present cases - that assigns greater weight to the interests of operators of food and drinking establishments and smokers and, taking this into account, makes protection of health a relative goal, thereby partially abandoning it.

(a) The legislature could surely, as has been shown (see above B. I. 1. b dd (3)), also have allowed the opposing interests of operators of food and drinking establishments and smokers to be in effect completely ignored. However, in view of the discretionary, evaluative and operating latitude to which the legislature is entitled, it is not prevented from choosing an approach to protection that involves less stringent pursuit of protection of the health of non-smokers when weighed against the freedom of operators of food and drinking establishments and smokers. It cannot be ascertained that the Land legislatures in opting for such an approach incorrectly assessed the interests of the parties affected that were to be reconciled in a manner that is inconsistent with the Basic Law.

The choice of such a protective approach that allows more room for the freedom of operators of food and drinking establishments and smokers does not, however, remain without consequences at the level of the review of the proportionality of the encroachments of fundamental rights that remain nonetheless. The reason for this is that by deciding to adopt a specific approach the Land legislatures assess the advantages and disadvantages for the respective legal interests involved and balance these interests against one another as regards their implications for the various legal interests involved. In that regard, it is the legislature that determines, within the framework of constitutional requirements, the value of the interests of the general public it pursues that are to be weighed in the context of a proportionality test (see BVerfGE 115, 205 [234]).

(b) In Baden-Württemberg, the Land legislature first banned smoking in all food and drinking establishments without making any distinctions as regards size, previous use or special characteristics such as, for example, the nature of the regular clientele with s. 7.1 sentence 1 of the Non-Smoking Act. However, exceptions from the ban are then made for food and drinking operations under tents, outdoor venues and itinerant businesses in s. 7.1 sentence 3 of the Non-Smoking Act of the Land Baden-Württemberg. Finally, s. 7.2 of the Non-Smoking Act of the Land Baden-Württemberg makes provision for the possibility of maintaining separate smoking rooms. Comparable provisions are in effect in Berlin. The ban on smoking in food and drinking establishments (s. 2.1 no. 8 of the Non-Smoking Act) does to be sure also apply to food and drinking operations under tents (see s. 2.2 of the Non-Smoking Act), but the creation of smoking rooms is also allowed in Berlin pursuant to s. 4.3 sentence 1 of the Non-Smoking Act. As a result, important exceptions are made in both *Länder* in practice, and the goal of protection of health is thereby pursued with a lesser degree of intensity.

The compromises in terms of health protection become clear in connection with the creation of smoking rooms. If the legislature allows this exception from the ban on smoking in food and drinking establishments, the possibility cannot be excluded that smoking rooms will also be frequented by non-smoking patrons who follow smokers to such rooms or who retreat to such rooms because all seats are occupied in the non-smoking area. Especially affected are children and youths who are taken along to smoking rooms by the adults accompanying them and - under the no-smoking laws to be judged here - are not prohibited from being there. Although the Land legislatures are also not prevented from protecting the health of the personnel of food and drinking establishments in the interest of the public good (see above B. I. 1. b aa (1)), health risks are accepted in the case of those employees who must enter smoking rooms, in particular to serve patrons. Finally, scientific investigation indicates that the toxic substances in tobacco smoke that permeate smoking rooms cannot be reliably kept away from adjoining non-smoking premises and therefore also represent a burden to those in non-smoking areas (see Blank/Pötschke-Langer, in: Deutsches Krebsforschungszentrum (ed.), Erhöhtes Gesundheitsrisiko for Beschäftigte in der Gastronomie durch Passivrauchen am Arbeitsplatz, 2007, p. 18).

The situation as regards beer, wine and party tents, which are exempted from the ban on smoking in Baden-Württemberg (s. 7.1 sentence 3 of the Non-Smoking Act of the Land Ba-den-Württemberg), is in effect no different. Even in the case of temporary venues established for only a limited period of time, for which, however, no provision is made by law in Baden-Württemberg, the general exemption for food and drinking establishments under tents represents a significant limitation of protection of non-smokers since patrons have no possibility at all of escaping the burden of tobacco smoke. In this context, it is not sufficiently certain that tents are consistently or even only as a rule better ventilated than buildings and that the exposure of patrons to tobacco smoke is therefore significantly lower.

(c) Such exceptions are not required on constitutional grounds (see above B. I. 1. b dd (2)). The Land legislatures allowed them on the basis of their own evaluative and operating decisions, opting thereby in favour of approaches to protection of non-smokers that do not pursue absolute protection, but, taking into account conflicting interests, consider limited protection that makes allowance for various exceptions to be sufficient. Accordingly, the risks of passive smoking are to be sure considered to be significant, but - which is constitutionally defensible - they are not considered to be so serious that health protection should in every respect enjoy priority over the occupational interests of operators of food and drinking establishments and the freedom of conduct of smokers.

The Land legislatures remain bound to their decisions as to the intensity with which they want to pursue the protection of non-smokers in connection with the conflict with the interests of operators of food and drinking establishments and smokers even if - as in the present cases - the reasonableness of the ban on smoking for operators of smaller one-room food and drinking establishments must be assessed. If the legislature has on the basis of the latitude to which it is entitled, decided in favour of a specific assessment of the potential risks, evaluated the interests involved on this basis, and chosen a legislative approach, then it must also consistently follow up on this decision. Assessment of risks is not consistent if the same weight is not assigned to identical risks in the same law (see BVerfGE 107, 186 [197]).

(d) Accordingly, if the Land legislatures have made the current importance of the legitimate goal of health protection they are pursuing a relative consideration through extensive regulations governing exceptions by allowing in particular the interests of operators of food and drinking establishments to be taken into account, then the specific ramifications of the ban on smoking for smaller establishments that serve primarily alcoholic beverages logically assume greater weight in the context of the overall balance to be struck.

Such establishments are different from other food and drinking establishments not only because they cannot seat as many people and because they serve primarily alcoholic beverages and less food, but also because of the special structure of their clientele. Such food and drinking establishments are frequented for the most part by regular patrons, and of these a relatively large number are smokers. In this regard, the Federal Hotel & Catering Association referred in an additional opinion to investigations according to which the percentage of smokers among the patrons of such food and drinking establishments is at least 50% and in many cases exceeds three-quarters. Since the operators of such food and drinking establishments cannot provide smoking rooms due to the limited availability of space, their establishments become significantly less appealing to the clientele, consisting of smokers that they primarily serve. It can therefore be expected that many smokers will either no longer patronize such food and drinking establishments that do not allow them to smoke while there or spend significantly less time in such establishments.

That there is at least a tendency towards a concomitant shortfall in revenues is documented by the investigation of the Federal Statistical Office (see above B. I. 1. b dd (1) (a)) that has already been mentioned. According to that investigation, the shortfall in revenues of establishments that serve primarily alcoholic beverages, to which the food and drinking establishments under discussion may be assigned, has been significantly greater in those Bundesländer with bans against smoking in food and drinking establishments than in *Länder* in which such bans on smoking have not yet gone into effect. For example, the decrease in revenues was 9.8% in the third quarter of 2007 as compared with 6.8%, whereas the decrease was even as high as 14.1% as compared with 8.8% in the fourth quarter of the same year. The investigation shows at the same time the special vulnerability of food and drinking establishments that serve primarily alcoholic beverages, for the same comparison yielded no decrease in revenues for the third quarter for establishments that serve primarily meals and only a slight decrease in the fourth quarter.

It is also logical to assume that allowing separate smoking rooms will mean that patrons who do not want to abstain from smoking will abandon smaller food and drinking establishments that cannot provide such rooms and instead frequent larger establishments with smoking rooms. Not only did the Non-Smoking Action Alliance (Aktionsbündnis Nichtrauchen) express in its brief the opinion to the effect that the possibility of a migration from one-room food and drinking establishments to establishments with smoking rooms could not be ruled out; in addressing the question as to the possibility of migration of regular customers from corner pubs to the smoking rooms of larger food and drinking establishments, the German Cancer Research Center (Deutsches Krebsforschungszentrum - DKFZ) also stated that such behaviour on the part of the clientele would be very plausible for economic reasons. A survey conducted by the Baden-Württemberg Hotel & Catering Association on the implications of the ban on smoking from March 2008 also makes reference to such behaviour on the part of patrons. According to this survey, the no-smoking law had a negative effect, with 77.7% of the single-room establishments losing over 20% of their revenues and 61.3% of these establishments even reporting that their further existence was threatened. On the other hand, it was reported that the no-smoking law even had a positive effect on 11.4% of the establishments with several rooms. The above-mentioned survey by the TNS-Emnid Opinion Research Organization confirms that regular customers have migrated from small food and drinking establishments, for it shows that 24% of those surveyed switched from "single-room pubs" to larger food and drinking establishments, and in particular to establishments with separate smoking rooms, because of the ban on smoking.

The revenue shortfall caused by the ban on smoking also has serious repercussions for operators of smaller food and drinking establishments even if they are only temporary. Due to their smaller seating capacity, the operators of such establishments cannot generate high revenues and therefore also cannot build up larger reserves. As a result, revenue shortfalls with no change in overhead costs mean that weaker business phases cannot be bridged for a longer period of time and the operations of such establishments may soon become no longer profitable.

(e) In terms of the discretionary, evaluative and operating decisions upon which the plans for the protection of non-smokers are based in the present cases, the operators of small establishments that serve primarily alcoholic beverages cannot be reasonably expected to accept these special burdens that the ban on smoking creates for them.

The Land legislatures have allowed exceptions from the ban on smoking in food and drinking establishments for separate enclosed rooms. In the case of larger food and drinking establishments that have or can provide such separate rooms, only a relative ban on smoking applies; the legislature has therefore accommodated their interest in also being able to accommodate smoking patrons. On the other hand, an absolute ban on smoking does exist for smaller food and drinking establishments as long as separate rooms are not available and can also not be created - which will regularly be the case due to the fact that less floor space is available. The goal of protection is strictly pursued only in respect of the operators of such establishments. The health risks associated with passive smoking are therefore weighted differently when balanced against the freedom of occupation of the operators of food and drinking establishments.

Due to this unequal weighting, the ban on smoking results in a significantly greater economic burden for operators of smaller food and drinking establishments than for those of larger establishments. Only the latter can make their offerings more attractive by reserving smoking rooms for smokers. In the case of small food and drinking establishments, on the other hand, the disadvantages associated with the current absolute ban on smoking that affect them in particular may result in the existence-threatening revenue shortfalls described above. This will typically affect small establishments that essentially limit themselves to serving alcoholic beverages. Strict compliance with the ban on smoking is therefore expected of the operators of such establishments even at the price of losing their economic existence although the Land legislatures do not want to pursue the desired protection of health without restriction, but only insofar as the occupational interests of operators of food and drinking establishments are taken into account. However, in view of the retraction of the intended goal of protection, the degree of burden affecting them is no longer reasonable in relation to the benefits to which the Land legislature aspired with the relaxed ban on smoking for the general public.

This applies all the more so since it also would have been only logical to take into account precisely the interests of small establishments that primarily serve alcoholic beverages in the approach chosen for the formulation of protection of non-smokers since the latter are in any case especially disadvantaged by the ban on smoking in food and drinking establishments. In fact, however, as is shown by the legislative materials, no importance worth mentioning was attached to this aspect. To the contrary, the exceptions from the ban on smoking, and in particular the approval of smoking rooms, has created an additional cause of deterioration of the economic situation of these operators of food and drinking establishments. The Land legislatures are to a significant extent responsible for the fact that the economic situation of small food and drinking establishments has deteriorated even more due to their approach to and formulation of protection of non-smokers. Since smoking rooms cannot be made available for these establishments, their operators must not only absorb losses due to the smokers who

now completely abstain from patronizing their establishments or spend less time there, but they also suffer from the migration of those patrons who now frequent food and drinking establishments with smoking rooms. The legal situation thereby increases the burden on operators of smaller establishments by putting larger establishments that can provide separate smoking rooms at an advantage in terms of their ability to compete for business. Against this background, the various effects of the legal regulations on the different types of establishments cannot be dismissed as the mere manifestation of their respective economic performance and competition.

The Land legislatures must surely, be given credit in the present cases for the fact that the plan they chose to protect non-smokers, proceeds from the logical premise to the effect that a patron should have the possibility of finding a seat in any given food and drinking establishment where he will not be exposed to tobacco smoke. This principle is, however, already compromised by the fact that the loss of the seating capacity required for smokers reduces the capacity available in the non-smoking area, forcing patrons to take recourse to smoking rooms. Moreover, the basic idea of a ban on smoking with an exception for separate rooms in Baden-Württemberg is abandoned for one subclass by completely exempting food and drinking establishments under tents from the ban on smoking. In particular, however, the plan chosen for protection deviates from its own basic approach, which is to achieve a balance of interests, and does not take into account the interests of small food and drinking establishments, which are especially affected by the ban on smoking, but exclusively and one-sidedly the interests of the non-smoking patrons of food and drinking establishments.

However, frequentation of smaller one-room establishments that serve primarily alcoholic beverages is not typically of significant importance in terms of their participation in society, which means only slight improvement can be expected for the protection of non-smokers from current regulations. The number of 60,000 to 80,000 single-room food service establishments cited by the Federal Hotel & Catering Association (*DEHOGA Bundesverband*) as compared with a total of some 243,000 hotel and restaurant operations is in that regard not meaningful. That figure makes no distinction as to whether these single-room establishments serve primarily alcoholic beverages or meals, nor does it contain any indication of room size and as a result information as regards possibilities for providing smoking rooms. Due to the typically small seating capacity, the percentage of all food and drinking operations accounted for by single-room establishments also does not make it possible to infer that their total share of seating accommodations is commensurately large. Instead, the minor importance of smaller single-room food and drinking establishments that serve primarily alcoholic beverages for effective protection of non-smokers is reflected in the exceptionally high percentage of smokers among their patrons. In particular, however, the substantial revenue shortfalls following the entry into force of the bans on smoking show that the operators of such establishments have not been able since then to attract more non-smoking patrons with their hospitality offerings. The *Land* legislatures therefore must have assumed that an exception from the ban on smoking for smaller single-room establishments that serve primarily alcoholic beverages does not seriously detract from adequate protection of non-smokers since sufficient smoke-free seating is available in food and drinking establishments as a whole.

2. The constitutional complaint of the third complainant, which is directed against s. 7.2 sentence 2 of the Non-Smoking Act of the *Land* Baden-Württemberg, is also founded. Unlike the first and second complainants, the third complainant seeks no additional exception from the ban on smoking in food and drinking establishments, but instead objects to the fact that it was denied the benefit of exemption as already provided for by law. The complainant is successful. It is incompatible with Article 12.1 in conjunction with Article 3.1 of the Basic Law for discotheques that do not admit youths to be excluded from the possibility of providing smoking rooms pursuant to s. 7.2 sentence 1 of the Non-Smoking Act of the Land Baden-Württemberg.

a) Notwithstanding the requirements that derive directly from Article 12.1 of the Basic Law, provisions of law that govern the exercise of an occupation or profession can be valid only if they are also otherwise in every respect consistent with the Basic Law and in particular in compliance with the general principle of equal treatment under the law pursuant to Article 3.1 of the Basic Law (see BVerfGE 25, 236 [251]).

The general principle of equal treatment under the law pursuant to Article 3.1 of the Basic Law requires that the legislature treat matters that are essentially the same in the same manner and those matters differently that are essentially different (see BVerfGE 1, 14 [52]; 98, 365 [385]; 116 [180]); established case law.

This does not, however, completely prevent the legislature from making distinctions. Indeed, depending on the subject of regulation and the criteria for differentiation involved, the constraints imposed by the general principle of equal treatment under the law vary, ranging from mere prohibition of arbitrariness to strict compliance with the requirements of proportionality (see BVerfGE 110, 274 [291]; 117, 1 [30]); established case law.

Since the principle to the effect that all persons are equal before the law is primarily intended to prevent unwarranted differences in the treatment of individuals, the legislature is regularly bound to strict compliance in the case of matters involving unequal treatment of different classes of persons (see BVerfGE 88, 87 [96]). The fundamental right to equal treatment before the law is therefore violated if in the case of provisions of law that affect different classes of persons the legislature treats one class of persons addressed by a statute differently from any other class despite the fact that no difference exists between the two classes of such nature or weight as to justify such unequal treatment (see BVerfGE 102, 41 [54]; 104, 126 [144 and 145]; 107, 133 [141]; established case law).

However, these principles also apply if unequal treatment in respect of a matter results indirectly in unequal treatment of different classes of persons. For that reason, the more unequal treatment can negatively impact the exercise of freedom that enjoy constitutional protection, in particular the freedom of choice of occupation or profession protected by Article 12.1 of the Basic Law (see BVerfGE 62, 256 [274]), the narrower becomes the operating latitude of the legislature (see BVerfGE 92, 53 [69]; established case law).

The general principle of equal treatment under the law applies for unequal burden as well as for unequal privileges. Discriminatory exclusion from a privilege is also prohibited if it involves granting a privilege to one class of persons but denying it to another class (see BVerfGE 116, 164 [180] with further references).

b) Measured against this standard, the general exclusion of discotheques from the privilege that is to be seen in the exemption of separate smoking rooms from the ban on smoking pursuant to s. 7.2 sentence 1 of the Non-Smoking Act of the Land Baden-Württemberg is not warranted.

aa) The distinction to be assessed here between eating and drinking establishments in general and those that fall into the special category of "discotheques" (see s. 3.1 of the Licensing Act (Gaststättengesetz - GastG)) involves different treatment of matters. Nevertheless, the review must be based on the assumption to the effect that the legislature is bound to a more stringent standard since the unequal treatment of separate matters entails unequal treatment of classes of persons. The distinctions made in the provisions contained in s. 7.2 sentence 1 and 2 of the Non-Smoking Act of the Land Baden-Württemberg are responsible for the fact that, unlike operators of other food and drinking establishments, operators of discotheques are prevented from providing smoking rooms for their patrons. As a result, operators of discotheques cannot freely pursue their occupation and make the offerings of their food and drinking establishments attractive for smokers. Unequal treatment of the matters at hand therefore has a negative effect on the exercise of freedoms protected by fundamental rights, namely, occupational freedom, which the third complainant may invoke as a limited partnership pursuant to Article 19.3 of the Basic Law (see BVerfGE 105, 252 [265]; established case law)

bb) Sufficient reasons for such unequal treatment are lacking.

(1) According to the grounds provided in the draft of the law of the Land government of Baden-Württemberg, the purpose of the Non-Smoking Act of the Land Baden-Württemberg containing the ban on smoking with no exception for discotheques, is in particular to protect youths against the risks of passive smoking. According to the grounds, the fact that the concentration of harmful substances is especially high in discotheques is taken into account, which in combination with the physical activity of the patrons results in greater inhalation of the inside air containing the harmful substances (see *Landtag* document (*Landtagsdrucksache* - LTDrucks) 14/1359, p. 16).

It is also stated that the absence of an exception to the ban on smoking in discotheques is also necessary since the effects of the pressure to imitate and conform play an important role in the case of youth. Furthermore, it is submitted, if there is a smoking room in a discotheque and the core members of the group spend time there, peer pressure will also cause non-smokers to go there, exposing themselves thereby to passive smoking (See Landtag document 14/1359, p. 24).

(2) These reasons are not of such nature and weight as to justify unequal legal consequences for discotheques on the one hand and other food and drinking establishments on the other hand.

(a) This applies first of all to the extent that the legislature assumes a greater need for protection of patrons in the case of discotheques. The legislature does surely enjoy a certain latitude as regards its assessment of the risks threatening the general public. There can therefore be no objection on constitutional grounds to the fact that the Land legislature has based its assessment of the situation on the existence of an especially high concentration of harmful substances in discotheques. The legislature may rely in this context on relevant scientific investigations such as, for example, the results of the research project already mentioned that was carried out under the auspices of the Bavarian Land Office for Health and Food Safety (Landesamt für Gesundheit und Lebensmittelsicherheit) (see above B. I. 1. b bb (2) (b)). According to that research, a high level of contamination of the air with toxic and carcinogenic substances from tobacco smoke was ascertained in all food and drinking operations, no matter what the category, the highest level of contamination being found in discotheques. This circumstance does not, however, necessitate the general exclusion of this exception for discotheques if smoking rooms are approved for other food and drinking establishments. If smoking is allowed only in completely separate rooms, the argument to the effect that there is a greater danger of passive smoking in discotheques due to the specific nature of the operation no longer holds. Risks to patrons in non-smoking areas can be prevented through strict compliance with the requirements of s. 7.2 sentence 1 of the Non-Smoking Act of the Land Baden-Württemberg, which must also be observed in the case of smoking rooms in discotheques. According to this legislation, the fact that smoking rooms are provided may not compromise the interests of protection of non-smokers, which means that it is necessary to ensure - if necessary through the use of technical means - that no deterioration in the quality of the air by tobacco smoke can be detected outside the smoking rooms.

(b) Reference to the considerable importance of effects of pressure to imitate and conform in the case of youths or young adults cannot justify different treatment of discotheques as compared with other types of food and drinking establishments.

Due to the discretionary latitude of the legislature, there can surely be no objection on constitutional grounds to this assessment of the situation as regards the risks for youth. The ban on smoking in discotheques without provision for any exceptions is, however, not necessary in order to prevent youths from following their crowd or individuals to the smoking area. In order to achieve the desired protection of this class of the public, it suffices if - as, for example, stipulated by s. 4.3 sentence 2 of the Non-Smoking Act in the Land of Berlin - the exclusion of smoking rooms is limited to those discotheques that admit persons under the age of 18. The operators of many discotheques - including the third complainant - impose age limits for their clientele and in this manner decide for themselves whether they would prefer to forego providing smoking rooms or restrict admission. Such a regulatory situation that gives operators of discotheques options represents the milder means as compared with the general exclusion of smoking rooms.

The exclusion of smoking rooms is also not warranted for the purpose of preventing the effects of conformity and peer pressure among the adult clientele of discotheques. By generally allowing smoking rooms in food and drinking establishments, the Land legislature has already accepted the fact that non-smokers will also spend time in such rooms. This is, however, tantamount to acceptance of the effects of peer conformity among adults, which may not be eliminated through unequal treatment only in the case of discotheques. Even the increase in the effect of the pressure to conform that the legislature assumes to exist due to the fact that the patrons of discotheques are for the most part young adults can be counteracted in a less onerous manner by making smoking rooms less attractive. This would include in particular consideration of the possibility of prohibiting the installation of dance floors in smoking rooms. This is achieved by statute in, for example, the Free Hanseatic City of Bremen (s. 3.6 sentence 3 of the Bremen Non-Smoking Act (Bremisches Nichtraucherschutzgesetz - Brem-NiSchG)) and the *Länder* Rhineland-Palatinate (s. 7.1 sentence 2 of the Rhineland-Palatinate Non-Smoking Act (Nichtraucherschutzgesetz Rheinland-Pfalz)), Saarland (s. 3.5 sentence 2 of the Act on the Protection against the Risks of Passive Smoking (Nichtraucherschutzgesetz)) and Thuringia (s. 5 sentence 3 of the Thuringia Act on the Protection against the Risks of Passive Smoking (Thüringer Nichtraucherschutzgesetz-ThürNRSchutzG)).

II.

The fact that the provisions under challenge are in violation of the Basic Law does not make them invalid. Since several possibilities for reform are available to the Land legislatures, it is possible to ascertain only that the current provisions are incompatible with the Basic Law (see BVerfGE 117, 163 [199] with further references).

3. Glycol Wine, BVerfGE 105, 252 (and the Osho-Sect Judgment, E 105, 279)

Explanatory Annotation

A wine scandal and an Asian sect[147] do not appear to have anything in common, however, the two decisions rendered by the Constitutional Court on the same day in 2002 dealt with the same legal problem: Can the federal government issue a warning about a perceived danger by way of publishing information or giving certain answers in question-and-answer sessions in the Parliament, holding speeches or issuing reports?[148]

147 Osho was the name given by his followers to the Indian mystic Rajneesh Chandra Mohan. The movement was also known under the names Shree Rajneesh, or Bhagwan.

148 Due to this similarity of the legal issues in both judgments a translation is provided only for the Glycol Wine decision.

In the Glycol case the relevant federal minister had published a list of wines in which the poisonous chemical glycol had been found after testing. The publication made it clear that the results would only apply to the wines tested and that it is well possible that other wines from the same source might not be affected. The effect on the sales figures for wine was catastrophic when this glycol-scandal erupted but those businesses on the warning list were particularly affected, notwithstanding the fact that most of their wines were clean. In the Osho case the sect complained against negative reports, speeches and government answers to questions raised in Parliament on the dangers posed by "psycho-sects".

Warning implies a danger or risk against which the warning is directed. Risk prevention and damage control is, in addition to the prosecution of criminals, core police work. In Germany the police when exercising its preventive function fall under the exclusive jurisdiction of the *Länder*. The Federal Government has no power to act in this regard. The warnings could therefore have been regarded as unconstitutional for lack of jurisdiction at the federal level. The Court, however, held differently. It differentiated between action through legislation and executive action on the one hand, where the delineation of power between the federal level and the *Länder* must be adhered to and the exercise of mere political leadership ("*Staatsleitung*") on the other hand, i.e. leadership by communication with other state organs or the interested public. This leadership by communication is an inherent power of any government in general and, in these two cases, the Federal Government in particular. But even this communication effort must measure up to the fundamental rights protected by the Basic Law. In the Osho case this was the freedom of religion guarantee of Article 4 of the Basic Law, which the Court saw violated because of the use of unwarranted derogatory adjectives describing the Osho movement. In the Glycol case it was the freedom of occupation guarantee of Article 12. The Court saw no violation because the information published about the glycol-affected wines had been correct.

Both cases carried case numbers pointing to 1991.[149] It took the Constitutional Court 11 years to decide those cases. The facts of the two cases go back to 1985 and before. Whereas this is not the norm for the length of proceedings before the Constitutional Court it does illustrate that justice is not always swift when it comes to constitutional justice.

149 1 BvR 558, 1428/91 for the Glycol decision and 1 BvR 670/91 for the Osho decision.

Translation of the Glycol Wine Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 105, 252*

Headnotes:

1. Market-related information provided by the government does not restrict the area of the guarantee of the fundamental rights of the affected competitors under Article 12.1 of the Basic Law (Grundgesetz - GG), if the effect on factors that are relevant to the competitive process is consistent with the provisions of law governing the state's information activity and does not distort market conditions. The existence of a governmental responsibility and observance of the division of powers as well as compliance with requirements pertaining to the accuracy and objectivity of the information are the important constitutional aspects involved in this context.

2. The Federal Government may due to its responsibility for the administration of the state engage in information work whenever it bears a responsibility for the state as a whole, that can be discharged with the help of information.

Order of the First Senate of 26 June 2002 - 1 BvR 558, 1428/91 -

Facts:

In the spring of 1985, it became known that wine that had been adulterated with diethylene glycol (DEG) was being sold in Germany in not insignificant quantities. DEG is normally used as an anti-freeze and as a chemical solvent. This resulted in a considerable "media storm," uncertainty on the part of the population and a drastic drop in the consumption of wine.

Against this background, the Federal Ministry of Health (Bundesgesundheitsministerium - BGM) published lists of wines between July and December 1985 that had been found to contain DEG along with the names of the bottlers. The lists also contained mention of the fact it was thoroughly possible that wines from the same bottlers that did not contain DEG could also be on the market.

The complainants are winemakers whose wines appeared in the list. Their wine sales had decreased considerably, and they ultimately petitioned the Court to find the action of the Federal Ministry of Health illegal. The action was unsuccessful in all instances (most recently BVerwGE 87, 37).

The constitutional complaint was dismissed by the Federal Constitutional Court.

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Extract from the Grounds:

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C.

The constitutional complaints are unfounded. Publication of the list of wines containing DEG and the decisions of the court under challenge do not violate the fundamental rights of the complainants under Article 12.1 sentence 1, Article 14.1 sentence 1, Article 3.1 and Article 2.1 of the Basic Law.

I.

The fundamental right of the complainants under Article 12.1 of the Basic Law is not impaired.

1. Freedom of occupation under Article 12.1 of the Basic Law guarantees all Germans the right to freely choose and exercise their occupation or profession. An "occupation or profession" is any activity that is intended to be pursued over a prolonged period of time and serves to establish and maintain a livelihood (see BVerfGE 7, 377 [397 et seq.]; 54, 301 [313]; 68, 272 [281]; 97, 228 [252-253]). According to Article 19.3 of the Basic Law, this fundamental right also applies to artificial persons to the extent that they engage in an activity for commercial purposes that by virtue of its essence and nature is equally accessible to artificial and natural persons (see BVerfGE 50, 290 [363]; established case law).

This applies in the case of the complainants.

2. Under the existing economic order, the freedom pursuant to Article 12.1 of the Basic Law relates in particular to the occupational activity of individual persons or enterprises (see BVerfGE 32, 311 [317]).

This fundamental right does not, however, protect against the dissemination of accurate and objective information in the market that could be of importance in terms of the behaviour of market participants involved in the competitive process even if the content of such information negatively affects the situations of individual competitors. The Federal Government must, however, observe the legal requirements that govern information activity.

a) Although entrepreneurial occupational or professional activity in the market is governed by the principles of competition, the reach of the protection of the freedom to engage in such activity is also defined by the legal rules that permit and limit the competitive process. In this context, Article 12.1 of the Basic Law safeguards the right to participate in the competitive process under the conditions that govern its operation. Accordingly, the guarantee of the fundamental right does not include protection against effects that operate upon factors that govern the competitive process. In particular, the fundamental right includes no entitlement to success in the competitive process and assurance of the possibility of future earnings (see BVerfGE 24, 236 [251]; 34, 252 [256]).

Indeed, the situation of a market participant with respect to the competition, and as a result sales and income are subject to the risk of continual change as a function of market conditions.

b) An enterprise that is active in the market is exposed to communication and therefore also to criticism of the quality of its products or its actions. An enterprise that is so affected can defend itself against negative information through the use of its own information in a manner appropriate to the market, i.e., through its own advertising and emphasis on the quality of its product. For the protection of the freedom to exercise an occupation or profession extends to the projection of a public image, including advertising for the enterprise or for its products, for the purposes of promotion of the professional success of an enterprise (see BVerfGE 85, 97 [104]; 85, 248 [256]; 94, 372 [389]).

   The provision containing the fundamental rights does not, however, guarantee an enterprise an exclusive right to its public image and as a result to an unrestricted right to project that image in the marketplace. An enterprise may surely decide itself how it would like to present itself and its products in the context of the competitive process. But Article 12.1 of the Basic Law does not afford enterprises a right to be portrayed by others only the way they would like to be seen or the way they see themselves and their products. Contrary to the opinion of the complainants, such a right cannot also be established by way of analogy with the general right of personality, especially since this right also does not include such an entitlement (see BVerfGE 97, 125 [149]; 97, 391 [403]; 99, 185 [194]; 101, 361 [380]).

c) Competition functions on the basis of market participants having maximum access to information concerning factors that are relevant to the market. Being informed is what in the first place enables market participants to make decisions aligned with their own interests as regards the conditions for their participation in the market, especially as regards the supply of or demand for goods and services. The availability of such information contributes indirectly to the quality and variety of products available on the market. If, for example, consumers lack information that is relevant for making decisions, they cannot adequately determine whether an offering meets their needs. Informed activity on the part of consumers also has a retroactive effect on providers, who can as a result adapt to the needs of consumers. Accordingly, deficits in the availability of information that is relevant for making decisions threaten the self-regulating power of the market.

   However, the market is not an institution that guarantees the availability of a certain level, and certainly not a high level, of information. The information available in the market is frequently not complete. Information is often selectively disseminated. In addition, not all information available in the marketplace is equally likely to be received and processed in all consequence by those addressed. In such situations, the functionality of the market is enhanced when counterpoints are set in the form of information, including governmental information, or when the superior informational power of individual market participants is counterbalanced.

d) The goal of the legal system is to make possible a high level of information relevant to the market and thereby make the market transparent. This is achieved, for example, through legal measures to combat unfair competition, establishment of rules for advertising and measures to protect consumers, which is achieved primarily through the availability of information. In particular, s. 1 of the Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb - UWG) protects the operational functionality of competition based on merit against dissemination of information that is in violation of public policy because market participants are deceived. The legal system considers this to be anti-competitive (see in particular ss. 2 et seq. of the Act against Unfair Competition). Accordingly, the principle of truthfulness, which is understood to mean prohibition of deception, is viewed as the prevailing guideline of competition law (see Baumbach/Hefermehl, Wettbewerbsrecht, 22nd ed., 2001, marginal note 5 on s. 1 of the Act against Unfair Competition).

The case law provides a more concrete definition of the standards for protection against deception and therefore also for the accuracy of statements under the Act against Unfair Competition as regards requirements in terms of competitive activity in the area of commercial trade (see Federal Court of Justice, NJW 1987, p. 2930 [2931]; Decisions of the Federal Court of Justice in Civil Matters (*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ) 139, 368 [376]).

The goal of ensuring market transparency is, however, also served when information is disseminated by instances other than competitors (Decisions of the Federal Court of Justice in Civil Matters 65, 325 [332 et seq.]).

It also lies in the nature of the overall context of its activities as regards the competitive process that the government disseminates information relevant to competition without itself being a competitor.

e) Market-related information provided by the government does not restrict the area of the guarantee of the fundamental right of the affected competitors if the effect on factors that are relevant to the competitive process is consistent with the provisions of law governing the state's information activity and does not distort market conditions. The existence of a governmental responsibility and observance of the division of powers (aa) as well as compliance with requirements pertaining to the accuracy and objectivity of the information; (bb) are the important constitutional aspects involved in this context.

aa) Dissemination of information by the government presupposes responsibility on the part of the acting agency (1) and compliance with limits of authority (2).

(1) If the responsibilities of the government or the administration can be discharged through public information, the assignment of such responsibilities also includes in principle the power to engage in information activity.

This applies in the case of the administration of the state by the government. This responsibility is intended to achieve the political legitimacy that is important in a democracy and includes involvement in the fulfilment of concrete public duties lying

outside the sphere of administration activities. Administration of the state is not achieved exclusively through legislative means and influence on the enforcement of legislation through policy, but also through the dissemination of information to the public (see BVerfGE 105, 279 [279] - Osho Judgment).

Governmental participation in public communication has in the course of time undergone a fundamental transformation and continues to change under contemporary conditions. Expansion of the role of the mass media, the prevalence of modern information and communication technologies and the development of new information services also affect the nature of the performance of the duties of government. The official public relations activities of government have traditionally involved in particular the dissemination of information on governmental measures and projects, the presentation and explanation of plans for undertakings to be accomplished in the future and solicitation of support (see BVerfGE 20, 56 [100]; 44, 125 [147]; 63, 230 [241 et seq.]). Contemporary information activity goes much further than such public relations activities (see also Constitutional Court of the Land of North Rhine-Westphalia [V*erfassungsgerichtshof des Landes Nordrhein-Westfalen* - VerfGH NW], North Rhine-Westphalia Law Gazette 1992, p. 14 [15-16]).

For example, the responsibility of government in a democracy also includes informing the public of important matters outside of or well in advance of the government's own operational political activity. In a political system that is based on a high degree of personal responsibility on the part of citizens when it comes to solving social problems, the task of government also includes dissemination of information that enables citizens to participate in the management of problems under their own responsibility. Accordingly, citizens expect information from the government that would otherwise not be available for the purposes of forming their own personal opinions and guidance. This can in particular involve areas in which the public's source of knowledge is based on information that is dictated by special interests and entails the risk of being biased and the forces of society are not sufficient to create a satisfactory balance of information.

Administration of the state in this sense includes not only responsibility for facilitating the management of conflicts within the state and society through timely public information, but also for confronting new challenges in this manner, which often arise suddenly, for reacting quickly and expediently to crises as well as for providing citizens with guidance. Current crises in the area of agricultural and food products, for example, have shown how important it is for information that is accompanied by the authority of the government to be available to the public in order to be able to master such tension-ridden situations in an appropriate manner. Were the state to abdicate this responsibility to give the public guidance through education, advice and recommended actions and instead limit itself to legislative initiatives or await administrative measures of other governmental bodies, an important component of crisis management would be lacking that is quick, expeditious and suitable for keeping negative effects on third parties to a minimum. Silence on the part of the government would also be considered failure by many citizens. This can lead to a loss of legitimacy.

(2) The division of powers must also be respected when it comes to information activity. At the level of the Federation, the division of powers among the Federal Chancellor, the Federal Ministers and the Federal Government as a collegium derives from Article 65 of the Basic Law. In addition, the division of federal powers between the Federation and the *Länder* must be preserved (see BVerfGE 44, 125 [149]).

In this context, decisions as to institutional authority hinge upon whether the responsibility for information activity lies with the Federation or the *Länder* or whether parallel powers exist.

The responsibility for the administration of the state and the information activities of the Federal Government that represent an integral part of this responsibility is a manifestation of the overall responsibility of the state. Unlike in the case of legislative and administrative powers, the Basic Law contains no provisions that explicitly cover the power of the government to administer the state. Such powers are, however, tacitly assumed in the Basic Law, for example, in the provisions on the composition and responsibilities of the Federal Government (Article 62 et seq. of the Basic Law) or on the duty of the Federal Government to inform the Bundestag and its committees; the same applies to the duty of the government and its members to answer to the Bundestag and provide the members of the latter with the information required to discharge their duties (see on the latter BVerfGE 13, 123 [125-126]; 57, 1 [5]; 67, 100 [129]). The Federal Government may engage in information work wherever it bears responsibility for the administration of the state as a whole that can be discharged with the help of information. Indications of the existence of such a responsibility can be inferred from other provisions that govern powers, for example, from those governing legislation, and to be sure also independently of concrete legislative initiatives. The Federation is empowered to assume responsibility for the administration of the state in particular in the case of matters that are of a national nature due to the involvement of a foreign component or their cross-border importance and when such that information work throughout the country on the part of the government contributes to effective resolution of the problem. The Federal Government may in such cases take charge of the respective matter, present the issue and assess it for Parliament and the public and, if it considers it necessary to manage the problem, also issue recommendations or warnings.

In addition to empowering the Federal Government to engage in information activity in this manner, the Basic Law at the same time contains a different provision that concerns the *Länder* under Article 30 of the Basic Law. The provisions of Articles 83 et seq. of the Basic Law are not the standards that determine the power of the Federal Government in the area of information activity. Governmental activity does not include administration within the meaning of these provisions. The Federal Government is not empowered to enforce laws through administrative measures. As a result, the information activity of the Federal Government is unaffected by the provisions of law that empower administrative authorities to inform and warn the public in connection with the enforcement of laws such as s. 8 of the Product Safety Act (Produktsicherheitsgesetz - PSG) of 22 April 1997 (Federal Law Gazette I p. 934]), s. 69.4 of the Medicinal

Products Act (Arzneimittelgesetz - AMG) in the version promulgated on 11 December 1998 (Federal Law Gazette I p. 3586) or s. 6 of the Equipment Safety Act (Gerätesicherheitsgesetz - GSG) in the version promulgated on 11 May 2001 (Federal Law Gazette I p. 866).

The information power of the Federal Government does not by any means end where action by governmental bodies with other institutional powers could also be considered for the purposes of managing a crisis, for example, that of the Land governments in connection with their own responsibilities for the administration of the state or that of the administration in connection with the prevention of danger through the police. The purpose could be defeated if the information activities of the Federal Government were to be allowed to include all else required to manage crises, but not reference to the danger of specific circumstances. Completeness of information is an important element of credibility. As regards the aspect of the division of powers at the federal level, there can be no objection to dissemination of information by the Federal Government which to an extent commensurates with the problem and if appropriate in a manner that overlaps with the powers of other governmental bodies since such information activity neither excludes that of the Land governments in their own areas of responsibility nor prevents administrative authorities from discharging their duties.

bb) Article 12.1 of the Basic Law does not protect against the dissemination of information by an agent of governmental power that is substantively accurate and formulated to respect the requirement of objectivity and exercise appropriate restraint.

The substantive accuracy of information is in principle a prerequisite for fostering transparency in the market and as a result its ability to function. An agent of governmental power may, however, under special conditions also be empowered to disseminate information even if the accuracy of such information has not yet been conclusively determined. In such cases, the legitimacy of governmental information activities depends upon whether the facts of matter have been carefully determined possibly prior to dissemination using available sources of information, if appropriate also by hearing those affected, and in an attempt to achieve the reliability possible under the circumstances. If any uncertainty still remains as regards the facts, the state is nevertheless even then not prevented from disseminating the information, in any case not if it is in the public interest that market participants be informed of a circumstance, for example, a danger to consumers, that is important in terms of the course of action they might prefer to take. In such cases, it will be appropriate to inform market participants of any remaining uncertainty as regards the accuracy of the information in order to allow them to make their own decisions as to how to cope with that uncertainty.

Like any governmental activity, information is subject to the requirement of objectivity (see BVerfGE 57, 1 [8]). In the case of information that relates to the market, the requirements to be met also depend on necessities that have to do with the way competition functions. Assessment may not be based on irrelevant

considerations. Even if information is accurate, it may not be formulated in an unobjective or denigrating form. The dissemination of information must otherwise be restricted to what is necessary to convey the informational content, taking into account possible disadvantageous effects for any competitors affected.

cc) The area of the fundamental right guaranteed under Article 12.1 of the Basic Law is, however, restricted by activity on the part of the state when such activity is not limited to making available relevant information on the market, which market participants can use as a basis for making independent decisions with respect to their behaviour in the market as a function of their interests. Governmental information activities can constitute restriction of the area of the fundamental right that is guaranteed in particular when their intent and effect serve to replace a governmental measure that would qualify as encroachment upon a fundamental right. The specific constraints of the legal order may not be circumvented by choosing the functional equivalent of such encroachment; on the contrary, the relevant legal requirements pertaining to encroachments on fundamental rights must be fulfilled.

The protected area is also compromised when information proves to be inaccurate in retrospect and is nevertheless disseminated or not corrected despite the fact that it continues to be important in terms of market behaviour. The establishment of an encroachment upon the area of protection in such cases also establishes the existence of an illegal act since there can be no justification for further dissemination of information that is known to be inaccurate.

3. There can be no objection to the challenged publication of the list of wines containing DEG on the basis of these standards. Publication of the list with information on wines containing DEG that was indisputably accurate also did not encroach upon the area covered by the guarantee of the fundamental right of the complainants to exercise an occupation or profession even if it did affect possible sales of wine that did not contain DEG. Publication of the list does not qualify as encroachment. The government respected the legal limits to its information activities.

a) As a measure taken in the context of administration of the state, publication of the list fell into the area of responsibility of the Federal Government. It was in purpose, substance and effect intended to be different to an administrative act.

aa) The Federal Minister for Youth, Family and Health (Bundesminister für Jugend, Familie und Gesundheit) exercised a responsibility of the Federal Government for the administration of the state. Its action was intended to manage a crisis that was a cause of concern to the public and a threat to the supraregional wine market by making available information within the limits of governmental responsibility.

The publication contained relevant information on the market concerning the violation of standards of quality in the case of wine from specific areas and bottlers. The information created transparency and put the suppliers and purchasers involved in the wine market in a position to use knowledge that was important to them but would otherwise not have been accessible to make their own decisions

in the context of the market. The content and format of the publication showed that it also served many other purposes. The Federal Government wanted to accommodate public expectations of effective measures to manage the crisis and stabilize the supraregional wine market, which had largely collapsed. In this context, the government wanted to enable suppliers and purchasers to deal with the undesirable and possibly even dangerous situation in an informed and therefore independent manner. It was intended to enable wine merchants to adapt their offerings and consumers their purchasing behaviour on the basis of the information provided. In particular, the list gave wine merchants the possibility of removing the wines in question from their own selection of wines if appropriate as well as the possibility of advertising to make it clear that the German wine sector was involved only to a limited extent and that German wines were affected only to a limited extent. The dissemination of the information was intended to restore the confidence of the market participants in other wines. As regards wines containing DEG, the content of the list represented a warning to consumers; as regards other wines, it represented an all-clear signal. However, it was left up to the market participants to determine the corresponding consequences; the government limited itself to providing the findings of the investigation.

The list constituted a contribution of information against the background of uncertainty on the part of the public, and the Federal Government was also assigned political responsibility for the alleviation of this uncertainty. Its publication was intended to manage the crisis in a complex manner, in particular through the restoration of confidence in the supraregional wine market. It was not - unlike in the case of administrative measures to protect legal interests through the prevention of dangers - intended to deal with concrete individual cases and eliminate the resultant disadvantages for individual persons or classes of persons. The list was in particular not intended to cause the responsible administrative authorities to waive other measures for avoiding danger - for example, through the introduction and enforcement of a ban on the sale of wines containing DEG. Measures on the part of the *Länder* to avert danger remained possible, as did information activity by the Land governments.

bb) The Federal Minister for Youth, Family and Health acted within the limits of the affairs of his department in compliance with Article 65 sentence 2 of the Basic Law. The Federation had the institutional authority to act for the government. The "glycol scandal" had - as the courts also found - attracted the attention of the entire population and called for a supraregional reaction. The events even extended beyond the territory of the Federal Republic to Austria, where the adulteration with DEG was first detected. It was initially necessary to obtain information from that country through diplomatic channels and deal with issues involving regulation of wine imports by customs. In view of the lack of clarity as to the effects of DEG in wine, it was appropriate to involve the Federal Health Office (Bundesgesundheitsamt - BGA). Cross-border coordination that involved the Federation was also appropriate for the management of the crisis situation. A

reaction was also expected of the Federal Government. This was confirmed by a large number of interpellations in the Bundestag concerning the activities of the government as regards this issue. In addition, the media called for clarification and measures by the Federal Government. The government reacted to this manifestation of supraregional public interest in information. The Federal Government could assume that it would not have been possible to satisfy the need for information through activity on the part of the governments of the *Länder* alone. For that reason, efficient management of the various aspects of the problem was also a consideration that spoke in favour of the necessity of action on the part of the Federation.

b) Publication of the list did not violate standards of accuracy and objectivity.

The accuracy of the information contained in the list was beyond dispute. The details provided in the list were limited to information on the DEG content of the examined wines that was legally not allowed, which information was important in terms of market behaviour. It was made clear under the heading "Important Information" that it was possible that wine that was not adulterated with DEG was available on the market from the same bottler with the same designation and presentation . It was further stated that it should not be inferred from the indication of an appellation that all wines from that region could contain DEG, but that this could be deduced only in connection with the name of the bottler and the official number (Amtliche Prüfungsnummer).

The list also cannot be considered inaccurate on the grounds that the question as to the marketability and the health risks of wines with a low DEG content had not been resolved. There was a need for information on the part of broad segments of the uncertain public. The government communicated the information, to which it had access, on wines containing DEG. The accuracy of this information did not depend on whether a danger existed within the meaning of the regulatory requirements. There was also no obligation to maintain secrecy as regards the knowledge acquired through governmental investigation of the wines mentioned. Furthermore, the accuracy and objectivity of the information was not open to question because it was not possible to investigate all wines for reasons having to do with available capacity.

4. Since the fundamental right of the complainants under Article 12.1 of the Basic Law was not restricted by publication of the list of wines containing DEG, the court decisions under challenge also do violate this fundamental right, at least as regards the outcome. It is also not possible to object on constitutional grounds to the fact that the courts assumed that timely rough orientation for the consumers would have been impossible without mentioning the names of the bottlers and that the information would therefore only to a limited extent have been suitable for management of the problem by the individuals affected.

II.

The remaining challenges as regards fundamental rights are also unsuccessful.

1. Article 14.1 of the Basic Law is not violated for the very reason that the area of protection of the constitutional guarantee of property is not affected by the publication of the list.

The guarantee of property is intended to safeguard the freedom with regard to property of a holder of fundamental rights and to thus allow him to arrange his life autonomously. It protects concrete holdings of property against unjustified encroachment by the public powers. A general guarantee for the value of legal interests in property does not follow from Article 14.1 of the Basic Law (see BVerfGE 105, 17 [30]). Article 14.1 of the Basic Law covers only legal interests to which a legal subject is already entitled, but not opportunities and possible earnings in the future (see BVerfGE 68, 193 [222] with further references).

It follows from this that the impairment of possible sales due to the publication of the list advanced by the complainants does not affect any interest that is protected by Article 14.1 of the Basic Law. The property protected under the Basic Law is characterized by the fundamental right afforded the owner to exercise control over that property. This also covers the right of the owner to dispose of property. The right of the complainants to offer their wine on the market was not, however, restricted by the publication of the list. What was restricted according to their submission, was the actual possibility of continuing to sell the products and thereby realize the opportunity to effect the profitable sales inherent in that offer. Whereas the legal right to offer property for sale must be considered part of the estate that is acquired and protected under Article 14.1 of the Basic Law, the actual possibility of a sale has nothing to do with that which has already been acquired, but rather with commercial activity.

A different assessment also does not follow from the aspect of protection of an established and operating commercial enterprise. The Federal Constitutional Court has up to now left open, whether and the extent to which the guarantee of the right of property independently covers an established and operating commercial enterprise as the actual subsumption of the property and rights constituting the assets of a company (see BVerfGE 51, 193 [221-222]; 68, 193 [222-223]).

The constitutional complaints provide no occasion for deciding this question here. Even if mere sales and opportunities for profit or actual circumstances are of considerable importance for the company, they are not assigned to the protected estate of the individual enterprise by the Basic Law as property rights (see BVerfGE 68, 193 [222-223]; 77, 84 [118]; 81, 208 [227-228]).

The situation as regards the damage to the reputation of the company objected to by the complainants is no different. This is in any case not protected by Article 14 of the Basic Law insofar as it involves prospects and favourable opportunities. If the reputation of an enterprise is presented as the result of previous performance, it is also not assigned to the company within the meaning of the property rights protected by Article 14.1 of the Basic Law (see Philipp, Staatliche Verbraucherinformation im Umwelt and Gesundheitsrecht, 1989, pp.175 et seq.)

It is continually redefined in the market through the performance of the company and the image it projects on the one hand and through assessment by market participants on the other hand and is therefore subject to constant change. Article 14 of the Basic Law protects only legal rights assigned by law, but not the result of situational assessment of the market participants, even if this is serious in economic terms.

2. Article 3.1 of the Basic Law is, despite the opinion of the first complainant, not violated because no warnings were issued to the public in the past when monobromacetic acid or homogeneous acetic acid were detected in wine or sparkling wine. A legal measure does not become inequitable because other cases that may have been similar were treated differently. The complainants do not claim arbitrariness in this concrete case, for example, in the form of the use of motives that would have to be disapproved of on objective grounds.

3. Article 2.1 of the Basic Law is excluded as a standard since the questions regarding the protection of competing market participants raised by the constitutional complaints are covered by the objectively more specific fundamental right contained in Article 12.1 of the Basic Law (see BVerfGE 25, 88 [101]; 59, 128 [163]; established case law).

XIV. Inviolability of the Home - Article 13 of the Basic Law

1. Right to Inspect Business Premises, BVerfGE 32, 54

Explanatory Annotation

Article 13.1 of the Basic Law protects the home from intrusion by the state subject to now very lengthy exceptions (and counter-exceptions) stipulated - or rather narrated - in Sections 13.2 to 13.7. The case concerned the legality of a statutory right of representatives of the Chamber of Trades and Crafts to enter business premises to assess whether such a business could become a member of the Chamber. The two applicants operated a business that was potentially affected by this statutory right of entry and brought constitutional complaints against this new legislative provision. This complaint could only make sense under the assumption that business premises also partake in the protection of Article 13.1 and not only private residences. The Constitutional Court affirmed the broader scope of Article 13.1 to include business premises as well as private residences on the basis of a noteworthy comparative law exercise.

It should be noted that this question arose again years later in the case law of the European Court of Justice in Luxembourg (ECJ), the Court of the European Union, and the European Court of Human Rights (ECtHR) in Strasbourg, the Court of the European Convention of Human Rights (ECHR). In a case concerning cartel investigations by the Commission of the European Community (as it then was), the ECJ had held, that business premises are not protected by the European Union equivalent of Article 13.1, which the ECJ had in principle recognized under its own doctrine of fundamental rights of the European Union as part of the general principles of European Union law.[150] The ECtHR on the other hand in a later judgment indicated that the protection should be broader and include business premises as well, albeit with the proviso, that the intensity of the protection of business premises is less than that of private residences.[151] In other words the Strasbourg Court chose the same approach as the German Constitutional Court regarding the scope of the rights and the extent of the exceptions. The ECJ subsequently corrected its position and decided that business premises are protected, as demanded by the Strasbourg Court.[152]

150 ECJ, Case 46/87, 21.9.1989, 1989 ECR 2859 - Hoechst AG, para. 17-8, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61987CJ0046 (last accessed on 21.10.2019).

151 ECtHR, Appl. No. 13710/88, 16.12.1992, Niemietz/Germany, (available at http://hudoc.echr.coe.int/eng?i=001-57887 (last accessed on 21.10.2019).

152 ECJ, Case C-94/00, 22.10.2002, 2002 ECR I-9011, para. 29, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:62000CJ0094 (last accessed on 21.10.2019).

Translation of the Right to Inspect Business Premises Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 32, 54*

Headnotes:

1. The term "home" as used in Article 13.1 of the Basic Law (Grundgesetz - GG) must be broadly interpreted; it also encompasses workplaces, business premises and offices.

2. The interpretation of the terms "encroachments and restrictions" in Article 13.3 of the Basic Law must take into account the difference in the need for protection of private dwellings on the one hand and workplaces, business premises and offices on the other hand.

Order of the First Senate of 13 October 1971 - 1 BvR 280/66 -

Facts:

The complainants were proprietors of enterprises engaged in craft-like activities. With their constitutional complaint, they directly challenged the right to enter and inspect premises afforded to the Chamber of Skilled Crafts under s. 17 of the Trade and Crafts Code (Gesetz zur Ordnung des Handwerks - HwO) as it would also apply to them in respect of their business premises and offices. S. 17 of the Trade and Crafts Code reads as follows:

(1) Craftsmen who are entered in or are to be entered in the Crafts Register must provide the Chamber of Skilled Crafts with the information required for entry in respect of the nature and scope of their enterprise, the number of skilled and unskilled persons employed by the enterprise and craft-related examinations of the proprietor of the enterprise and the manager of the enterprise.

(2) Agents of the Chamber of Skilled Crafts are empowered to enter the premises and offices of parties required to provide such information and carry out audits and inspections on such premises and in such offices for the purpose specified in paragraph 1. Parties required to provide such information must tolerate such measures. The fundamental right stipulating that the home is inviolable (Article 13 of the Basic Law) is in this regard restricted.

(3) …

The constitutional complaint was unsuccessful.

Extract from the Grounds:

(The Court ruled as follows on the admissibility of the constitutional complaint lodged directly against s. 17.2 of the Trade and Crafts Code:)

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

…

2. Insofar as the constitutional complaint challenges s. 20 in conjunction with s. 17.2 of the Trade and Crafts Code, it is - despite the opinion of the Federal Minister of the Economy - to be considered admissible. The obligation of the complainants to tolerate the measures pursuant to s. 17.2 sentence 2 of the Trade and Crafts Code is directly established by force of law. This obligation does surely presuppose an act on the part of the Chamber of Skilled Crafts, namely, an order to enter the premises to carry out the audit or inspection. However, whether and when the Chamber actually exercises this right lies within its discretion. It may also dispatch its agents to the enterprise at any time without observing any formalities The complainants may not be advised either to contest an impending inspection through the administrative courts beforehand or to initially refuse to allow such inspection, thereby establishing the elements of a regulatory offence (s. 118.1 no. 2 of the Trade and Crafts Code) that may result in regulatory proceedings. They statutory obligation to tolerate inspections is immediately incumbent upon the complainants.
…

(The Court then proceeds to elaborate on the grounds for the constitutional complaint:)

…

C. II.

The complainants specifically challenge s. 20 of the Trade and Crafts Code insofar as this provision states that s. 17.2 is applicable. They consider that to allow agents of the Chamber of Skilled Crafts the right to enter their "premises and offices" for the purposes of carrying out "audits and inspections" constitutes a violation of their fundamental right to the inviolability of the home.

The wording and obvious intent of these provisions suggest the assumption that they are meant to allow entry of only premises used for commercial purposes, but not the private dwelling of the proprietor of the enterprise. The challenge of the complainants would therefore be without merit if business premises and offices did not even fall under the term "home" within the meaning of Article 13 of the Basic Law. The Federal Constitutional Court cannot, however, concur with this view, which is also held by the Federal Minister of Justice.

1. Article 13.1 of the Basic Law uses a long established formulation to describe the area of this fundamental right it protects. Article 10 of the Belgian constitution of 1831 had already expressed this fundamental right in a brief and memorable phrase: "*Le domicile est inviolable*". It was taken over without any change in the section on fundamental rights of the Frankfurt Imperial Constitution (Frankfurter Reichsverfassung) of 1848/49 (s. 140) and in Article 6 of the Prussian Constitution of 5 December 1848/31 January 1850. Article 115 of the Weimar Imperial Constitution (Weimarer Reichsverfassung) then provided: Every German's home is his sanctuary and is inviolable.

Within the jurisdiction of the Prussian Constitution, it was unanimously agreed in case law and the scholarly literature that the term "home" was to be broadly interpreted and also encompassed offices (including those of associations) (see Decisions of the Prussian Higher

Administrative Court [*Entscheidungen des Preußischen* OVG] in PrOVG 1, 375; 27, 325; 49, 207 and in PrVerwBl. vol. 25 (1903/04), p. 795; also Anschütz, The Verfassungsurkunde für den Preußischen Staat, vol. I, 1912, note II 1 on Article 6).

The teachings of constitutional law during the Weimar period overwhelmingly concurred in this opinion (according, for example, to Anschütz, Die Verfassung des Deutschen Reichs, 14th ed., 1933, comment 1 on Article 115; Giese, Die Verfassung des Deutschen Reichs, 8th ed., 1931, note 1 on Article 115).

During the preliminary work, the Herrenchiemsee draft (Article 5) of the version of Article 115 of the Weimar Imperial Constitution was initially used as the basis for the Basic Law. However, the authors finally reverted to the simple formulation of the Prussian Constitution and the Frankfurt Imperial Constitution. There was no intention to change the previous interpretation of the term "home" (see in particular the statements of the Members of the Bundestag Zinn and v. Mangoldt, JbÖffR 1, pp. 139 and 181).

The constitutional literature has consistently adopted this interpretation and includes offices in the area protected by the fundamental right. This serves to emphasize the continuity of the development of the law well as the protective purpose of the provision, which, it was argued, was to safeguard the spatial area for the development of the personality of the individual, including as well, undisturbed occupational activity. Reference is also made to the practical difficulties that would ensue from a narrower interpretation of the term "home" (see in detail the commentaries on the Basic Law: v. Mangoldt-Klein, 2nd ed., vol. I, p. 401; Bonner Kommentar - Zweitbearbeitung (Dagtoglou) - marginal note 21 on Article 13; Maunz-Dürig-Herzog, marginal note 1 on Article 13; also, for example, Gentz, Die Unverletzlichkeit der Wohnung, 1968, pp. 24 et seq. with further bibliography).

A look at foreign provisions shows that a broad interpretation of the term "home" predominates in the case of identical or substantially identical formulations of legal texts (see, for example, for Switzerland BGE 81 I, pp. 119 et seq.; for Austria the decision of the Constitutional Court [*Verfassungsgerichtshof*] of 22 November 1932 no. 1486, of 14 March 1949 no. 1747, of 2 July 1955 no. 2867 and of 16 December 1965 no. 5182, and Ermacora, Handbuch der Grundfreiheiten und der Menschenrechte; for Italy: Enciclopedia del Diritto XIII [1964], pp. 859 et seq. and Faso, La Liberte di Domicilio, 1968, pp. 34 et seq.; for the USA the dissenting opinion of Justice Frankfurter on Davis v. United States of 10 June 1946 - 328 US 582, 596 and 597 and See v. City of Seattle of 5 June 1967 - 387 US 541).

2. There is no reason to depart from the broad interpretation of the term "home" even if one takes into account the fact that the earlier provisions described above and to some extent also foreign provisions afford the legislature stronger rights of encroachment than are provided under Article 13 of the Basic Law. Since business premises and offices were already considered to belong to the area of the personal sphere of freedom of the citizenry in times when the protection of fundamental rights was in principle significantly less developed and therefore subject to the specific constitutional and statutory provisions intended to protect against trespass, it would be difficult to understand and run counter to the basic tendency of the framers of the Basic Law of 1949 if such premises were now to be generally excepted from the protection of this fundamental right. The interpretation that has since remained unchanged for more than a century

has become entrenched as a general legal conviction and lent the fundamental right reach that may be curtailed only if it can be demonstrated that compelling objective reasons require such dilution of substantive content and that the historical development at least does not stand in the way of such dilution. However, as has been shown, the opposite is the case. Not only has the traditional formulation of the fundamental right been taken over without any change, the statements by the authoritative authors that were made to justify this and have remained without contradiction clearly show that the previous interpretation should be retained along with the formulation that has been handed down. There is in no case any reason to suspect that there was any thought of restricting the fundamental right in view of very recent historical experience, which showed the vulnerability of precisely this area of life to encroachment by the public powers. Only a broad interpretation can do justice to the principle according to which in cases of doubt that interpretation is to be chosen that most strongly gives effect to the legal force of the fundamental right (BVerfGE 6, 55 [72]).

It is moreover consistent with the principles that the Federal Constitutional Court has developed for the purposes or interpretation of the fundamental right of occupational freedom. If occupational activity is considered to constitute a significant aspect of the development of an individual's personality and is therefore afforded an especially high level of importance in the context of the conduct of the life of the individual (BVerfGE 7, 377 [397]; 13, 97 [104-105]), it is then only logical to afford the spatial area in which this work takes place commensurately, effective legal protection and in any case refrain in the absence of any compelling necessity from curtailing the constitutional protection of such space already in place. In this context, mention must be made of the fact that only this interpretation also allows legal entities and associations to benefit from the protection of this fundamental right that they have, according to prevailing opinion enjoyed up to now.

The wording of Article 13.1 of the Basic Law can on the other hand not be considered of decisive importance. The linguistic cloak of this fundamental right has been such as to sacrifice legal precision for the solemn pathos of a memorable phrase. "Home" is in this context always to be understood in the sense of the "private spatial sphere."

3. The narrower interpretation of the term "home" advocated by the Federal Minister of Justice is obviously also motivated by a concern that it would not be possible to uphold many customary rights of administrative authorities to enter and inspect premises in connection with business, labour and fiscal oversight if business premises and offices were to be included in the area of protection of Article 13 of the Basic Law since they would no longer be covered by the restrictive provision contained in Article 13.3 of the Basic Law. Even if this were the case, it would seem questionable to define the sphere of operation of the fundamental right on the basis of the restrictive provision and argue, for example, thus: a narrower interpretation must be chosen that would render the restrictions meaningless because a broad interpretation would present practical difficulties. In fact, the substantive content of the fundamental right must be determined first; only then may restrictions on the exercise of the fundamental right that are defensible under the rule of law be defined, taking into account the basic presumption of freedom and the constitutional principles of proportionality and reasonableness. Furthermore, the practical difficulties feared by the Federal Minister of Justice can to a great extent be overcome, as will be shown, through a differentiating interpretation.

4. a) Inclusion of offices in the area of protection of Article 13 of the Basic Law means first of all that "searches" of such premises may in principle be ordered only by a judge (paragraph 2). The Federal Minister of Justice recognizes that the same need for protection exists in principle as in the case of dwellings, and he is of the opinion that there is no question of any restriction of the basic requirement for a previous judicial order in view of the protection against searches that also applies to commercial and business premises that has long been acknowledged in all constitutional democracies and also in Germany. This end cannot, however, be achieved with sufficient certainty as regards compliance with constitutional law with a narrower interpretation of the term "home."

   It is not necessary to decide in detail here how far the term "search" can be extended under constitutional law (see on this Decisions of the Federal Administrative Court [*Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE] 28, 285); for rights to entry and inspection under legislation governing the exercise of crafts are not searches.

   b) The inviolability of the home in principle is secured in Article 13.3 of the Basic Law by the fact that "encroachments and restrictions," which are not "searches," may be carried out only under very specific, precisely described conditions. In the case of homes in the narrower sense, the strict limitation of permissible encroachments reflects the basic requirement of unconditional respect for the private sphere of the citizenry. The Federal Minister of Justice does go too far in assuming that the restrictions in paragraph 3 are "in substance adapted (only) to dwellings;" for entry of business premises and workplaces by the responsible authorities can be expeditious and necessary "to combat the danger of an epidemic" as well as "to protect young persons at risk" (namely, under the aspect of protection of minors in the workplace). However, it may in fact seem that there is some question as to whether a sufficient constitutional basis exists for the right afforded governmental authorities under a series of laws, to enter business premises for control purposes and carry out inspections and audits of various kinds if offices are included within the sphere of operation of Article 13.3 of the Basic Law. In some cases, the purpose, which is "to confront an acute danger to public safety and order," will surely justify encroachment, especially under the broad interpretation of this clause such as that used as the basis for the decision of the Federal Constitutional Court of 13 February 1964 (BVerfGE 17, 232 [251-252]) that encompasses confrontation of pending danger. However, to the extent that the authorities responsible for the supervision of business, labour and fiscal matters are afforded the right to enter business premises and offices for the purposes of auditing books and records or inspecting merchandise and facilities by virtue of the proprietor's duty to disclose information, it would be possible to infer a constitutional basis for these measures compatible with customary interpretation only by extending the area of application of paragraph 3 to a degree that can no longer be justified. On the other hand, it is necessary to agree with the Minister in that such rights of entry and inspection often represent an indispensable control instrument for modern oversight of business activities; such rights are even becoming more important for effective and uniform law enforcement as governmental controls make inroads into the management of private companies and business oversight in the broadest sense becomes commensurately more sophisticated and intensive.

The Federal Minister of Justice assumes that it was not the intention of the Parliamentary Council to eliminate these rights - of which it was aware - of governmental authorities to enter and inspect premises; he is of the opinion that these cases were "obviously not taken into consideration" when Article 13.3 of the Basic Law was formulated. This opinion is also found in the scholarly literature (see, for example, the commentaries of Maunz-Dürig-Herzog, marginal note 22 on Article 13; v. Mangoldt-Klein, 2nd ed., vol. I, pp. 405-406 and Kern in Neumann-Nipperdey-Scheuner, Die Grundrechte, vol. II, pp. 105 et seq.).

Accordingly, as the Minister emphasizes, the federal legislature has always assumed since the Basic Law went into force that such rights to enter and inspect premises were not excluded by Article 13.3 of the Basic Law. Of course, the Minister correctly rejects reliance on customary law to justify continuation of this assessment. Very basic reservations speak against the assumption of any restriction of rights of freedom by customary law in view of the fact that the framers of the Basic Law always carefully adapted restrictions as a function of the nature of the individual fundamental rights. Establishment with certainty of a common legal conviction on the part of all parties involved would moreover be hardly possible in this area.

c) Given this situation, an interpretation would seem appropriate and permissible. One that starts initially with the terms "encroachments and restrictions" and interprets them in a manner that does justice to the protective purpose of the fundamental right, reflects the discernible will of the framers of the Basic Law, but also appropriately takes into account the objective necessities of the administration of the modern state. This interpretation is based on the assumption that - if business premises and offices are also in principle included within the area of protection of Article 13 of the Basic Law - the need for protection of all premises to be assigned to the "private spatial sphere" does in fact vary in degree. Business premises and offices are, because of the nature of their purpose, more amenable to greater openness "to the outside;" they are intended to be used for the purposes of social contact, and the occupant therefore releases them to a certain extent from the private intimate sphere to which the home in the narrower sense of the term belongs. It is in keeping with the greater need to keep disruptions at a distance from private life and the spatial sphere in which it unfolds that the terms "encroachments and restrictions" are more strictly interpreted when they refer to the home in the narrower sense. That means that a right to enter and inspect premises in provisions of the nature at issue here is excluded. For this is where the full effect of the protective purpose of the fundamental right, which is to safeguard the right of the individual "to be left in peace," (BVerfGE 27, 1 [6]) comes to bear. This also applies when a professional or commercial activity is exercised on these premises at the same time. In the case of premises used exclusively for commercial or business purposes, this need for protection is reduced by the purpose that the occupant himself wants them to fulfil. The activities that the occupant of these premises pursues necessarily have an effect toward the outside and can therefore also affect the interests of others and those of the general public. It is then logical that the authorities charged with the protection of these interests also monitor such activities on site within certain limits and may enter the premises for this purpose. This purposeful process is not actually

trespassing. The proprietor of the enterprise will accordingly not, as a rule, perceive entry of the premises by agents of the authorities as an encroachment upon his householder's rights. His psychological resistance might be directed against the inspection and audit itself, which he considers unnecessary, burdensome and therefore unreasonable; he will generally not view mere entry of the premises, which he himself has opened to the outside through its dedicated purpose, as a restriction of the sphere protected by his fundamental right.

If one assumes along with the Federal Minister of Justice that because of the inconsistency of the provision that Article 13.3 of the Basic Law was "from the outset" not supposed to apply to customary rights to enter and inspect business premises and offices, the assumption that the Parliamentary Council also proceeded from this "unbiased" perspective would not seem unwarranted. It must be left to the legislature to determine at the appropriate time whether there is occasion for unambiguous expression of this will through reformulation of the text of the Basic Law.

5. If the bounds of the rights to enter and inspect business premises and offices that are accordingly no longer to be qualified as "encroachments and restrictions" are defined objectively, namely, taking into account Article 2.1 of the Basic Law in conjunction with the principles of proportionality and reasonableness, it then follows that in particular the following conditions must be required:

a) the entry of premises must be authorized by a specific provision of law;

b) the entry of premises and the conduct of inspections and audits must serve a legitimate purpose and be necessary to achieve this purpose;

c) the law must make it possible to clearly recognize the purpose of entry, the objective and the scope of the permissible inspection and audit;

d) the entry of the premises and the conduct of the inspection and audit must be allowed only at times at which the premises are normally available for the respective business or commercial use.

Although entry of business premises and offices by agents of the authorities in connection with their duties is not to be considered a restriction of the right of inviolability of the home under these conditions, it cannot by the nature of things be excluded that the administrative action it serves to implement may as such be objected to under other constitutional aspects.

6. If these standards are applied, there can be no constitutional objections as regards the provisions ss. 20 and 17.2 of the Trade and Crafts Code under challenge here. They serve the legitimate interests of the administration and do not unreasonably burden the proprietor of the enterprise. His private dwelling is not affected.

2. *Acoustic Surveillance, BVerfGE 109, 279*

Explanatory Annotation

Article 13 of the Basic Law is devoted to the privacy of the home. Originally three short subsections were sufficient to achieve the goal. However, in 1998 four new subsections were inserted and Article 13 inflated to over 340 words. The reason for this amendment of Article 13 was to enable the acoustic surveillance of homes in the context of the prosecution of serious crimes in the context of organized crime and international terrorism.

The Court addressed the 'eternity clause' of Article 79.3, which limits the scope of constitutional amendments by safeguarding the principles of Article 1 and 20. As in the case concerning the privacy of mail and other communication, the Court went on to explain that this limitation of the constitutional legislator must be narrowly interpreted and does not preclude amendments to the scope of guarantees. It also does not preclude that the government in the context of the prosecution of serious crimes takes to clandestine measures of which those observed do not know.

However, the Court did define limits. Acoustic surveillance will not be compatible with the human dignity core of the protection of Article 13 if it reaches into the very private sphere of an individual. The Court specifically mentioned sexual relationships as one example and communication with close family members and a spouse as another, albeit even more complicated example, because the conversation with family members could, of course, also yield the very information about the criminal activity, which the observers are after. The surveillance activity must immediately be curtailed when such situations arise or are foreseeable; any information so obtained must be immediately destroyed and cannot be used in court. This obviously complicates matters for the authorities considerably as they will have to carefully tread and instantly decide when to turn the microphone off. The Court also placed time limits on this type of surveillance. Acoustic surveillance around the clock and for a longer time in the private home is not possible. The Court went on to hold that the specific provisions in the Criminal Procedure Code dealing with the acoustic surveillance are not sufficient to secure the limitations spelled out.

Translation of the Acoustic Surveillance Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts), BVerfGE 109, 279*

Headnotes:

1. Article 13.3 of the Basic Law (Grundgesetz - GG) in the version of the Act Amending the Basic Law (Gesetz zur Änderung des Grundgesetzes - GGÄndG) (Article 13) of 26 March 1998 (Federal Law Gazette (Bundesgesetzblatt - BGBl) I, p. 610) is compatible with Article 79.3 of the Basic Law (Grundgesetz).

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

2. The inviolability of human dignity under Article 1.1 of the Basic Law includes recognition of a core area of private conduct of life that is afforded absolute protection. This area may not be encroached upon through acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences (Article 13.3 of the Basic Law). As a result, the inviolability of the home (Article 13.1 in conjunction with Article 1.1 of the Basic Law) and the interest in prosecution of criminal offences may not be balanced against one another according to the principle of proportionality.

3. Not every form of acoustic surveillance of private dwellings constitutes a violation of the substantive content of human dignity under Article 13.1 of the Basic Law.

4. Legal power to permit surveillance of private dwellings must contain safeguards for the inviolability of human dignity and be consistent with the requirements defined in Article 13.3 of the Basic Law as well as the other constitutional requirements.

5. If acoustic surveillance of a private dwelling on the basis of such power does nevertheless result in the collection of information from the protected core area of private conduct of life that is afforded absolute protection, it must be terminated and the recordings deleted; any use of such information is prohibited.

6. The provisions of the Criminal Procedure Code (Strafprozessordnung - StPO) that govern the acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences do not completely satisfy the requirements of the Basic Law in respect of the protection of human dignity (Article 1.1 of the Basic Law), the principle of proportionality embodied in the principle of the rule of law, the guarantee of effective recourse to the courts (Article 19.4 of the Basic Law) and the right to a hearing in accordance with the law (Article 103.1 of the Basic Law).

Judgment of the First Senate of 3 March 2004 - 1 BvR 2378/98 -/- 1 BvR 1084/99 -

Facts:

The constitutional complaints are directed immediately at Articles 13.3 to 13.6 of the Basic Law and the provisions of the Criminal Procedure Code that permit acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences.

The new paragraphs 3-6 were inserted into Article 13 of the Basic Law by constitutional amendment in March 1998. They served as the basis for the inclusion of new provisions governing acoustic surveillance of private dwellings in the Criminal Procedure Code through the Act on the Improvement of the Fight against Organized Crime (Gesetz zur Verbesserung der Bekämpfung der Organisierten Kriminalität - OrgKVerbG) of May 1998.

According to the new s. 100c.1 no. 3 of the Criminal Procedure Code, technical means may be employed to monitor and record the words of a suspect spoken in the privacy of the home if certain facts support the suspicion that he has committed one of the criminal offences specified in the provision, i.e., one of what are referred to as catalogue offences. The catalogue includes in particular offences that are considered typical of the phenomenon of organized crime. Various offences against the security of the state are also included. According to s. 100c.2

sentence 1 of the Criminal Procedure Code, surveillance activities may be directed only against the actual suspects. However, s. 100c.2 sentence 5 of the Criminal Procedure Code makes it explicitly clear that the private dwellings of other persons may also be monitored if the presence of a suspect in such dwellings can be - with the same degree of suspicion, assumed. Surveillance may pursuant to s. 100d.2 of the Criminal Procedure Code be ordered only by a state security chamber of a Regional Court (Landgericht) or, in the case of imminent danger, by its president. As regards the interception and recording of communication between suspects and persons who enjoy the right to refuse to give testimony, s. 100d.3 of the Criminal Procedure Code makes a distinction between persons afforded the professional privilege mentioned in s. 53 of the Criminal Procedure Code and relatives and care professionals who have a right to confidential communication within the meaning of ss. 52 and 53a of the Criminal Procedure Code. Evidence may not be collected in the case of conversations involving persons who enjoy professional privilege. In the case of relatives and care professionals, on the other hand, the provision prohibits only the use of evidence and is not absolute, but explicitly subject to the application of the principle of proportionality. According to s. 100d.6 of the Criminal Procedure Code, legal remedies are also available after termination of surveillance activities.

SS. 100 et seq. of the Criminal Procedure Code govern the use of the knowledge obtained. Personal information acquired through surveillance under s. 100c.1 no. 3 of the Criminal Procedure Code may in principle be used for the purposes of criminal proceedings. This can also refer to the proceedings in connection with which the measure was ordered or other criminal proceedings (s. 100d.5 sentence 2 of the Criminal Procedure Code) involving a catalogue offence pursuant to s. 100c.1 no. 3 of the Criminal Procedure Code. Paragraph 1 also permits use for preventive police purposes to a limited extent.

The constitutional complaints directed immediately against Articles 13.3 to 13.6 of the Basic Law were dismissed; they were in part successful in respect of the surveillance measures in connection with criminal proceedings.

Extract from the Grounds:

…

C.

The constitutional complaints are, to the extent admissible, in part, founded. The amendment of Article 13.3 of the Basic Law does surely comply with the requirements of Article 79 of the Basic Law. The challenged provisions of the Criminal Procedure Code are on the other hand not entirely consistent with the Basic Law.

I.

Article 13.3 of the Basic Law, which was inserted by constitutional amendment, is in compliance with the Basic Law.

1. Article 13.3 of the Basic Law permits restriction of the fundamental right of inviolability of the home contained in Article 13.1 of the Basic Law. This fundamental right affords the individual a fundamental living space and guarantees the right to be left in peace within this

space (see BVerfGE 32, 54 [75]; 42, 212 [219]; 51, 97 [110]. Article 13.1 of the Basic Law protects the private spatial sphere in particular in the form of a defensive right (see BVerfGE 7, 230 [238]; 65, 1 [40]).

The provision, which is directed at the holders of public powers, contains a fundamental prohibition not only against entering and remaining in a private dwelling against the will of the occupant (see BVerfGE 76, 83 [89-90]), but also against the installation or use of acoustic surveillance devices (see BVerfGE 65, 1 [40]).

At the time of the creation of the Basic Law, the fundamental right under Article 13.1 thereof served primarily to protect occupants against the undesired physical presence of representatives of governmental power. Since that time, new possibilities for endangering the fundamental right have been added. The current state of technology also makes it possible to intrude upon the spatial sphere in other ways. The protective purpose of the provision containing the fundamental right would be defeated if the protection of private dwellings against surveillance with technical means were not also covered by paragraph 1 even when such means are used outside dwellings. Article 13.3 of the Basic Law therefore creates a constitutive restriction of the fundamental right under Article 13.1 of the Basic Law.

2. The formalities for the proper adoption of Article 13.3 of the Basic Law were complied with.

Article 13.3 of the Basic Law was inserted into the Basic Law by the Act Amending the Basic Law of 26 March 1998, which explicitly supplements the wording of the Basic Law (see Article 79.1 of the Basic Law). The law adopting the constitutional amendment was enacted by a two-thirds majority of the Bundestag and the Bundesrat in compliance with Article 79.2 of the Basic Law.

3. The legislature that adopted the constitutional amendment also respected the substantive limits to constitutional amendment drawn by the Basic Law.

a) Article 79.3 of the Basic Law prohibits amendments to the Basic Law that affect the principles laid down in Articles 1 and 20 of the Basic Law. These include the principle of respect for and protection of human dignity (Article 1.1 of the Basic Law), but also recognition of inviolable and inalienable human rights as the basis of every community, of peace and of justice (Article 1.2 of the Basic Law). In conjunction with the reference to the following fundamental rights contained in Article 1.3 of the Basic Law, the guarantees of these rights are in principle immune to restriction since they are indispensable to the maintenance of an order in compliance with Articles 1.1 and 1.2 of the Basic Law (see BVerfGE 84, 90 [121]).

   The fundamental elements of the principles of the rule of law and the social state expressed in Articles 20.1 and 20.3 of the Basic Law must also be respected.

   Article 79.3 of the Basic Law provides for an exception that must be narrowly interpreted; it does not prevent the legislature from adopting amendments to modify those aspects of these principles embodied in positive law for appropriate reasons (see BVerfGE 84, 90 [120-121]; 94, 49 [102-103]).

The Federal Constitutional Court must respect the right of the legislature to amend, restrict or even suspend individual fundamental rights as long as it does not affect the principles laid down in Articles 1 and 20 of the Basic Law. The legislature is not prohibited from modifying those aspects of these principles that are embodied in positive law for appropriate reasons (see BVerfGE 94, 49 [103-104]).What the substantive guarantee contained in Article 1.1 of the Basic Law encompasses as regards the individual fundamental rights must be established through independent interpretation of each individual provision.

Constitutional amendments are not to be measured against the guarantee of the essence of the fundamental rights contained in Article 19.2 of the Basic Law. This guarantee is binding upon the ordinary legislature, but not upon the legislature with the power to amend the Basic Law. An effect on the essence of a fundamental right within the meaning of Article 19.2 of the Basic Law may surely at the same time restrict the substantive content of human dignity covered by a fundamental right protected by Article 79.3 of the Basic Law in an individual case. The essence of a fundamental right may not, however, be equated with the aspect of human dignity contained in that right. The possibility of congruency in the individual case does not in any way change the fact that the aspect of human dignity contained in a fundamental right, which is protected by Article 79.3 of the Basic Law, is the sole standard for measurement of the restriction of a fundamental right through constitutional amendment.

b) Article 13.3 of the Basic Law is compatible with the guarantee of human dignity under Article 1.1 of the Basic Law.

A more tangible standard for the measurement of human dignity is obtained through examination of the specific situation in which a conflict may arise. Acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences will generally not violate the aspect of human dignity contained in Article 13.1 of the Basic Law and Article 2.1 in conjunction with Article 1.1 of the Basic Law. However, the nature and manner in which the surveillance of private dwellings is carried out may result in a situation in which human dignity is violated. Article 13.3 of the Basic Law works counter to this possibility through explicit legal precautions; further requirements also exist that can be inferred from interpretation of the Basic Law. The power to authorize acoustic surveillance of private dwellings under Article 13.3 of the Basic Law does not therefore violate Article 79.3 of the Basic Law, for the necessary provision of law can and must ensure that human dignity is not violated in the individual case. The power pursuant to Article 13.3 of the Basic Law covers the enactment of only such provisions as contain such a guarantee.

aa) Human dignity is a fundamental constitutional principle and a paramount constitutional value (see BVerfGE 6, 32 [36]; 45, 187 [227]; 72, 105 [115]). The substantive content of the guarantee of this term, which implies value judgments, must be concretely defined. This is done by the courts on the basis of the facts involved in the individual case by examining the respective area of life affected by provisions of law and isolating classes of cases and typical examples (see on

Article 100 of the Bavarian Constitution [*Verfassung des Freistaates Bayern* - BV], for example, Bavarian Constitutional Court [*Bayerischer Verfassungsgerichtshof* - Bay-VerfGH], BayVBl 1982, p. 47 [50]).

In this context, the term "human dignity" is often described through inference from the act of violation (see BVerfGE 1, 97 [104]; 27, 1 [6]; 30, 1 [25]; 72, 105 [115 et seq.]).

Immediately following the experiences of the period of National Socialism, phenomena such as abuse, persecution and discrimination were initially at the center of consideration. As the Federal Constitutional Court phrased it in one of its first decisions, what was at issue in particular was protection against "humiliation, stigmatization, persecution, ostracism, etc." (see BVerfGE 1, 97 [104]).

Thereafter, the guarantee of human dignity became the standard of measurement for new threats, for example, the abuse of the collection and use of data in the 1980s (see BVerfGE 65, 1).Violation of principles of humanity, including those involving the collection and dissemination of information, was one of the issues addressed by the courts in their efforts to deal with past injustice in the German Democratic Republic (see BVerfGE 93, 213 [243]).

Currently, the debate over the substantive content of human dignity is conditioned by questions involving the protection of personal identity and psychological and social integrity.

(1) The Federal Constitutional Court has repeatedly emphasized that it is incompatible with human dignity to make human beings mere objects of governmental power (see BVerfGE 30, 1 [25-26 and 39 et seq.]; 96, 375 [399]). For example, criminals may not be treated in a manner that violates their constitutionally protected right to social esteem and respect and thereby reduced to mere objects of crime prevention and prosecution (see BVerfGE 45, 187 [228]; 72, 105 [116]).

However, limits are also set to the potential of the term "object" (see BVerfGE 30, 1 [25]).

Human beings are not infrequently mere objects, not only of circumstances and social developments, but also of the law that they must obey. Human dignity is not violated merely because a person becomes the object of criminal prosecution measures, but it is when the nature of the measures taken is in principle such as to call into question the quality of the person involved as a subject. This is the case when treatment by the public powers is lacking in respect for the value that every human being represents in his own right. Such measures may also not be taken in the interest of achievement of efficient criminal justice and investigation.

In this context, covert activity on the part of the state does not in itself lead to a violation of the right to respect, which is afforded absolute protection. In the event a person becomes the object of observation, this does not compellingly entail a disregard

for that person's value as a human being. In the case of such observation, an inviolable core area of private conduct of life must be preserved (see on the guarantee thereof BVerfGE 6, 32 [41]; 27, 1 [6]; 32, 373 [378-379]; 34, 238 [245]; 80, 367 [373]).

Were the state to intrude upon this area, this would infringe the inviolable freedom guaranteed all human beings to personal development as regards strictly personal matters. Even the predominant interests of the general public cannot justify encroachment upon this core area of private conduct of life, which is afforded absolute protection (see BVerfGE 34, 238 [245]).

(2) The protection of human dignity is also concretely embodied in the fundamental right under Article 13.1 of the Basic Law. The inviolability of the home is intimately related to human dignity and at the same time closely associated with the constitutional requirement of unconditional respect for the individual's exclusively private sphere of - "strictly personal" - development. Individuals are to be afforded the right to be left in peace, especially in their private dwellings (see BVerfGE 75, 318 [328]; see also BVerfGE 51, 97 [110]).

Development of personality in the core area of private conduct of life includes the possibility of expressing internal processes such as emotions and feelings as well as thoughts, opinions and experiences of a strictly personal nature, and to do so without fear of surveillance by governmental agencies. This protection also encompasses emotional expression, expression of unconscious experience and forms of sexual expression. The possibility of such development presupposes that the individual has appropriate free space for such purposes. Confidential communication also requires a spatial substratum, in any case wherever the legal system affords special protection; for the strictly personal conduct of life and citizens rely on such protection. This will regularly be a private dwelling that can be closed to others. If individuals have such space, they can be alone and develop freely in accordance with standards they set for themselves. A private home is an "ultimate refuge" that constitutes a means of safeguarding human dignity. This does not require absolute protection of the premises constituting the private dwelling, but it does require protection of conduct on these premises to the extent that such conduct represents individual development within the core area of private conduct of life.

(3) This protection may not be relativized by balancing it against the interests of the prosecution of criminal offences on the basis of the principle of proportionality (see BVerfGE 34, 238 [245]; see also BVerfGE 75, 369 [380]; 93, 266 [293]).

There will always be suspicions of especially serious forms of crime and situations involving suspicions of such crimes that will to some seem to make the expediency of criminal justice outweigh the preservation of the human dignity of suspects.

However, Article 1.1 and Article 79.3 of the Basic Law prohibit an evaluation of such kind on the part of the state.

bb) Acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences violates human dignity when the core area of private conduct of life is not respected.

Whether the facts of a case warrant assignment to the inviolate core area depends upon whether the substantive content is of a strictly personal nature and therefore also upon the nature and intensity of the effect had upon the sphere of others or the interests of society (see BVerfGE 80, 367 [374]).

The specific circumstances involved in the individual case are what matter (see BVerfGE 34, 238 [248]; 80, 367 [374]).

Of decisive importance in a given situation is whether the inviolable core area of private conduct of life is affected in the individual case as evidenced by concrete indications or typically and without actual evidence to the contrary, for example, in the course of observation of expressions of innermost feelings or forms of sexual expression.

cc) The power to authorize surveillance of private dwellings by law under Article 13.3 of the Basic Law does not violate Article 79.3 in conjunction with Article 1.1 of the Basic Law since it permits only provisions of law and measures based on such provisions that respect these limits. Limitations to this constitutional power are contained in Article 13.3 of the Basic Law on the one hand, but also follow from other provisions to be taken into consideration in the course of a systematic interpretation of the Basic Law. To the extent that elements of the principle of proportionality are of importance, they do not call into question the absolute nature of the protection of human dignity. Furthermore, the principle of proportionality may be applied as an additional restriction only in cases in which a surveillance measure does not violate human dignity. In this context, commensurate limitations of the power to conduct acoustic surveillance of private dwellings are, however, also intended to exclude the possibility of violation of the substantive content of Article 13.3 as regards human dignity in connection with the execution of the corresponding measures.

(1) Article 13.3 of the Basic Law governs substantive and procedural prerequisites for legal encroachment.

Acoustic surveillance within the meaning of Article 13.3 sentence 1 of the Basic Law is permissible only to prosecute specific individuals, especially serious criminal offences when suspicion of such offences is supported by certain facts (see Bundestag document 13/8650, pp. 4 et seq.).

The legislature that adopted the constitutional amendment had at the time primarily criminal offences in mind that are typically perpetrated by groups that proceed in an organized manner and in particular by perpetrators involved in what is referred to as organized crime (see Bundestag document 13/8650, p. 4; 13/9660, p. 3). Investigations of such criminal offences will regularly not be limited to the possibility of public indictment, conviction and enforcement of punishment. Although the goal of the legislature that adopted the constitutional amendment that is documented in the legislative materials is achieved, which is to penetrate the core area of organized crime and permit elucidation of its structures, there is a possibility that this may indirectly serve at the same time to prevent further criminal offences.

Article 13.3 of the Basic Law also requires that alternative methods of investigating the matter be disproportionately difficult or unproductive. As a result, the very wording of the Basic Law makes it clear that acoustic surveillance is a measure that constitutes especially serious encroachment upon the fundamental right to protection of the home and represents the last resort in the context of prosecution of criminal offences. Surveillance of a private dwelling otherwise comes into question only when, and as long as, the suspect is likely to be present in that dwelling.

The legislature that adopted the amendment of the Basic Law ensured compliance with procedural requirements by requiring a judicial order for surveillance measures. In so doing, the legislature provided that the order must be issued in principle by a panel composed of three judges and for a limited period of time.

(2) Article 13.3 of the Basic Law does not explicitly describe all limits to the use of acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences that derive from the requirement that the inviolable core area of private conduct of life be afforded absolute protection. Further limits follow - as in the case of all provisions relating to fundamental rights - from other provisions of the Basic Law. In the case of modification of provisions relating to fundamental rights, the legislature that adopts a constitutional amendment is also under no obligation to reiterate all relevant constitutional rules that otherwise apply. Review against the standard of Article 79.3 of the Basic Law is therefore subject to Article 13.3 of the Basic Law in conjunction with such other constitutional rules.

(a) Restrictions of constitutional rights inserted through constitutional amendment must therefore be systematically interpreted against the background of other provisions containing fundamental rights, in particular Article 1.1 of the Basic Law, and construed by applying the principle of proportionality (see BVerfGE 30, 1 [20-21]).

In the case of a provision created through constitutional amendment, the limits to interpretation of constitutional law also lie where a provision with unambiguous wording and intent yields an opposite meaning, the substantive content of the provision to be interpreted is fundamentally redefined or the provision fails in an essential point to achieve its goal (see BVerfGE 11, 77 [84-85]; 33, 52 [69]; 54, 277 [299]; 82, 1 [11 et seq.]).

(b) There is no reason to assume that these limits have been transgressed in the present case. For Article 13.3 of the Basic Law authorizes only implementation in the form of legislation that adequately takes into account the limits to encroachment imposed by Article 1.1 of the Basic Law. This must also be complemented by reference to the principle of proportionality. Such interpretation is not in contradiction with the will of the legislature that adopted the constitutional amendment.

The deliberations over the constitutional amendment did surely involve significant controversy as regards the legal requirements to be put in place for acoustic surveillance of private dwellings, and efforts to modify the version of Article 13.3 of the Basic Law that was ultimately adopted were not successful. This did not, however, indicate that it was the will of the legislature that adopted the constitutional amendment to

exclude further concretization through other provisions of the Basic Law. For example, the report of the Committee on Legal Affairs of the Bundestag on the draft of the act to amend Article 13 of the Basic Law explicitly mentions that the possibility of electronic surveillance of private dwellings is excluded from the outset in cases that fall into the inviolable core area of private conduct of life protected by Article 1.1 of the Basic Law. Examples mentioned included priest-penitent communication and strictly personal communication with immediate family members. It was added that the principle of proportionality is applicable only when the core area that is afforded absolute protection is not affected. To take into account such cases, reference was made to the further necessity of ensuring that the more intensive the surveillance becomes, the more stringent become the requirements for permitting encroachment in the individual instance (see Bundestag document 13/9660, p. 4). These considerations show that the legislature that adopted the constitutional amendment also proceeded on the basis of the assumption of the necessity of restrictive interpretation of Article 13.3 of the Basic Law, especially as regards human dignity. The legislature assumed in this context that this requirement is also fulfilled by Article 13.3 of the Basic Law, which is already very detailed, without further explicit precautions.

The rejection of motions to include further restrictions in Article 13.3 of the Basic Law, in particular rights to refuse to give testimony, did not mean that the primacy of the guarantee of human dignity was called into question under the amended provision of the Basic Law. Corresponding statements are also not found in the records of the parliamentary deliberations. Furthermore, the relevance of other provisions of the Basic Law in conjunction with Article 13.3 of the Basic Law was explicitly emphasized, for example by the Member of the Bundestag Schily when he submitted that the fact that Article 1 of the Basic Law must be respected when deciding whether acoustic surveillance may be carried out could lead to a situation in which surveillance would have to be foregone from the outset (see Member of the Bundestag Schily, 214th session of the 13th German *Bundestag* of 16 January 1998, Stenographic Record vol. 191, p. 19549).

The Member of the Bundestag also expressed his opinion to the effect that those constitutional guarantees that apply in any case need not be mentioned in Article 13.3 of the Basic Law (see Member of the Bundestag Schily, 197th session of the 13th German Bundestag of 9 October 1997, Stenographic Record vol. 189, p. 17694).

(c) Article 13.3 of the Basic Law is to be understood to mean that its statutory embodiment must preclude collection of information through acoustic surveillance of private dwellings whenever investigatory activities would intrude upon the inviolable area of private conduct of life protected by Article 13.1 in conjunction with Article 1.1 and Article 2.1 of the Basic Law.

dd) Accordingly, this calls for provisions of law that respect the principle of statutory certainty and ensure that acoustic surveillance of private dwellings is by nature and manner such as not to entail any violation of human dignity. It is necessary to refrain from surveillance from the outset in situations in which there are indications to the effect that such activities will result in violation of human dignity. If

acoustic surveillance of a dwelling otherwise unexpectedly results in the collection of absolutely privileged information, it must be terminated and the recordings deleted; any use of such absolutely privileged data in connection with the prosecution of criminal offences is prohibited.

(1) Precautions intended to protect human dignity are necessary not only in situations in which an individual is alone, but also when such an individual is engaged in communication with others (see BVerfGE 6, 389 [433]; 35, 202 [220].

As human beings, individuals are also of necessity involved in social relationships within the core area of personality (see BVerfGE 80, 367 [374]).

A situation cannot therefore be classified as belonging to the inviolable area of private conduct of life or - if that area is not involved - to the social realm, which is under certain conditions exposed to governmental intervention, simply as a function of whether a matter of importance or concern to society is present; what is of decisive importance is in fact the nature and intensity in the concrete case (see BVerfGE 80, 367 [374]).

(2) The content of communication that contains information on criminal offences that have been committed does not fall into the inviolable core area of private conduct of life (see BVerfGE 80, 367 [375]).

It does not, however, follow from this that just any given link between the suspicion of commission of a criminal offence and the statements of a suspect suffices to confirm the existence of a concern of society. Recordings or statements made in the context of a conversation between two individuals that, for example, convey exclusively personal impressions and feelings and contain no indications of any concrete criminal offence do not take on the nature of a public concern simply because they may reveal the origins or motives for criminal conduct. A concern of society can on the other hand be assumed to exist with sufficient certainty in the case of statements that relate directly to a concrete criminal offence.

(3) Interception of non-public utterances spoken in private dwellings is prohibited in order to avoid encroachment upon the core area of private conduct of life when an individual is alone in a private dwelling or exclusively with other persons with whom that individual enjoys a special confidential relationship that falls into the core area of protection - for example, with family members or other very close confidants - and no concrete indications exist to the effect that the expected content of the communication will relate directly to a criminal offence. To be sure, not all communication between an individual and very close confidants in a private dwelling falls into the core area of private conduct of life. This is, however, to be assumed in the interest of effective protection of human dignity. Surveillance measures are prohibited when it is probable that absolutely privileged communication will be affected.

(4) The content of communication constitutes the standard to be applied for the purposes of classification of a situation. It will normally be possible to determine with certainty whether a situation is to be classified as belonging to the area that is strictly personal or to the social realm only after the information has been obtained. In order to safeguard

the core area of private conduct of life, actual indications must be present that make it possible to infer that the communication is such that it would at least typically not relate to the strictly private area before measures involving acoustic surveillance of private dwellings are undertaken. Investigatory measures are prohibited whenever it is probable that the interception of non-public words spoken in private dwellings will result in violation of the core area of protection.

In assessing a situation prior to the commencement of surveillance measures, prosecuting authorities must take into account possible indications of activities relating to the core area in the private dwelling that will be the object of surveillance. This is also possible in actual practice.

(a) Initial bases for assessment of the situation can be inferred from the nature of the premises to be subjected to surveillance:

(i) For example, communication that takes place in commercial and business premises will regularly be of a business nature and therefore typically involve a social relationship (see BVerfGE 34, 238 [248]).Communication in premises that are used exclusively for commercial or business purposes is surely included under the protection provided by Article 13.1 of the Basic Law, but does not in the absence of a link between the concrete communication and the core area of personality involve the substantive content of human dignity embodied in the fundamental right. Business premises are, because of their intended use, by their very nature more open to the outside (see BVerfGE 32, 54 [75]).

They will regularly lack the intimacy and security of a private dwelling. As a result, business premises will in the typical case be justifiably considered to enjoy less protection than private premises. If strictly personal communication does take place in such premises, absolute protection then does, however, apply when this becomes concretely evident.

Premises that are used for both working and residential purposes must be treated differently. In such cases, it is not to be assumed that communication that takes place in working quarters will be of a purely business nature. The same applies in the case of premises that are used for the purposes of exercising occupations or professions that entail special relationships of confidentiality that relate to the strictly personal sphere.

(ii) Communication is to be assumed to lie in the inviolable core area in the case of premises that typically or in the individual case function as an area of retreat for the purposes of the private conduct of life. It will, however, regularly not be possible to make distinctions as regards the individual rooms within a private dwelling. Strictly personal acts and communication must not be restricted to specific rooms within a private dwelling. Individuals generally consider each of the rooms in their homes to be equally accessible and feel equally unobserved everywhere. The variety of different personal uses of private dwellings defies any typical assignment of activities to specific rooms. The core area of the private spatial sphere cannot therefore be associated with specific areas within a private dwelling.

(b) It is also necessary to take into account that the probability of intrusion upon the core area of personality through surveillance measures depends upon who is present in the private dwelling, to be subjected to surveillance.

A weighty indication of the relevance of the content of communication to human dignity is the presence of individuals standing in a strictly personal relationship of confidence. Individuals form their personalities primarily through interaction with others, i.e., through communication. Marriage and the family are therefore specially important in the strictly personal area and in particular in the intimate sphere. For example, communication between spouses, the thematic content of which is especially likely to be unlimited because of the intimate nature of marriage, is predicated on the assumption that outsiders cannot acquire knowledge of such communication. The situation is no different in the case of communication with other close family members, for example, siblings and direct relatives, especially when they live in the same household. In addition to Article 13.1 of the Basic Law, Articles 6.1 and 6.2 of the Basic Law also come to bear in this context.

The protection of the core area of private conduct of life also includes communication with other individuals with whom a special relationship of confidence exists (see BVerfGE 90, 255 [260]).

This class coincides only partially with those parties mentioned in ss. 52 and 53 of the Criminal Procedure Code who have the right to refuse to give testimony. The prohibitions of surveillance that follow from the core area of private conduct of life are not identical with the right to refuse to give testimony in criminal proceedings. For example, s. 52 of the Criminal Procedure Code was not created to protect the relationship of confidence between the relatives mentioned in that section and defendants. It is primarily intended to take into account the predicament of witnesses who are bound to the truth and must fear doing harm to a relative. In addition, the right to refuse to give testimony derives from the formal criterion of kinship and not from a special relationship of confidence such as may also exist in particular with close personal friends.

The basic idea behind s. 53 of the Criminal Procedure Code does surely protect the relationship of confidence between witnesses and the defendant. However, this protection too is not provided because of the human dignity of defendants or their interlocutors in all cases covered by s. 53 of the Criminal Procedure Code. This assumption does, however, apply in the case of priest-penitent communication. For example, the protection of confessions or communication of a confessional nature is covered by the substantive content of the human dignity of the exercise of religion within the meaning of Articles 4.1 and 4.2 of the Basic Law. Communication with defence counsel also has the function of ensuring that defendants do not become mere objects in criminal proceedings, which is important for the preservation of human dignity. Communication with physicians may in the individual case be assigned to the inviolable core area of private conduct of life (see BVerfGE 32, 373 [379]).

The rights of members of the press and members of Parliament to refuse to give testimony on the other hand, do not relate directly to the core area of private conduct of life. These rights are guaranteed for the sake of the functionality of the respective institutions and not because of the protection of the personality of the defendants.

(5) Surveillance of private dwellings must even when permissible in principle be restricted to communication situations that are likely to include content that is relevant for the purposes of criminal proceedings. If appropriate, it is necessary to ensure that the acoustic surveillance of private dwellings remains limited to activities that take place within the dwellings that are relevant for the purposes of criminal proceedings, through suitable preliminary investigation that does not encroach upon the protection of the core area of private conduct of life. It is not permissible, for example, to encroach upon the absolute core area of private conduct of life to establish in the first place whether the collection of information relates to this area.

Temporal and spatial "total surveillance" will as a rule not be permissible for the very reason that the probability is great that strictly personal communication will be overheard. Human dignity is also violated in the case of surveillance that is conducted over a lengthier period of time and is so extensive that virtually all movements and expressions of life of the objects of the surveillance are recorded and can be used as the basis for a personality profile (on this risk see BVerfGE 65, 1 [42-43]).

(6) When the acoustic surveillance of a private dwelling is not prohibited because of the absence of sufficient outward indication of the probability that absolutely privileged communication will be recorded, the communication of a suspect may be monitored for the purposes of establishing whether it contains information suitable for use in criminal proceedings. There are no constitutional grounds under these conditions that militate against initial "screening" of the content of communication that is required for the purposes of assessment with a view to protection of human dignity. Suitable measures must, however, be taken to ensure maximum discretion (see BVerfGE 80, 367 [375, 381]).

For example, the protection afforded by Article 1.1 of the Basic Law may make it necessary to refrain from the use of automatic recording alone, in the case of eavesdropping on a private dwelling in order to be able to interrupt the investigatory activity at any time.

If in the course of the surveillance of a private dwelling a situation arises that must be considered to belong to the core area of private conduct of life, surveillance must be terminated. Recordings made nevertheless must be destroyed. Information so obtained may not be transferred to others or used. Article 13.3 of the Basic Law must be interpreted to mean that there must be regulations in place that prohibit the use of evidence obtained in connection with such recordings (on the constitutional foundation of such requirements see BVerfGE 44, 353 [383-384]; see also BVerfGE 34, 238 [245 et seq.]).

c) Article 13.3 of the Basic Law is also not in violation of the principle of the rule of law. It is therefore not necessary to determine the extent to which elements of the principle of the rule of law are declared immune to amendment under Article 79.3 of the Basic Law.

Article 13.3 of the Basic Law does not restrict the principle of proportionality but, to the contrary, also leaves its validity intact as regards the acoustic surveillance of private dwellings and in addition contains concrete clauses that take this principle into account.

The requirement of a fair trial is not compromised by Article 13.3 of the Basic Law. This principle includes the right to freedom of expression and self-determination within the framework of criminal proceedings, which is reflected *inter alia* in ss. 136a and 163a.4 sentence 2 of the Criminal Procedure Code. That means that no one may be compelled to incriminate himself of a criminal offence through his own testimony in the context of criminal proceedings or actively contribute to his conviction (see BVerfGE 56, 37 [49]).

Covert acoustic surveillance of private dwellings entails no such effect on communication.

The secrecy of measures undertaken in connection with the prosecution of criminal offences does not in itself violate the prohibition of deception rooted in the requirement of a fair trial. Covert interception of communication does surely take advantage of a mistaken impression on the part of the object of the surveillance as regards the insulated nature of the home. The utterances of the suspect are, however, based on a voluntary decision. The transfer of knowledge of these utterances to the representatives of governmental power is surely not voluntary. Investigation in secrecy is, however, an essential prerequisite to the success of various measures employed for the purposes of the prosecution of criminal offences, but this alone does not mean that they are in violation of the principle of the rule of law.

II.

The legal power to conduct acoustic surveillance of private dwellings under ss. 100c.1 no. 3, 100c.2 and 100c.3 of the Criminal Procedure Code and regulation of the prohibition of collection and use of evidence under s. 100d.3 of the Criminal Procedure Code do not adequately take into account the requirements that must otherwise be met under Articles 13.1 and 13.3 of the Basic Law and Article 2.1 in conjunction with Article 1.1 of the Basic Law, as regards the protection of the inviolable area of the private conduct of life, the formulation of the catalogue of offences and compliance with the principle of proportionality. They are only partially compatible with the Basic Law.

…

bb) The legislature also failed to take adequate precautions in s. 100d.3 of the Criminal Procedure Code to ensure that surveillance is terminated if a situation should unexpectedly occur that involves the inviolable core area of private conduct of life. Continuation of surveillance is in such cases illegal.

cc) Adequate provisions are also lacking to ensure that knowledge will not be used if acquired in connection with violation of the core area of private conduct of life and that information already collected is destroyed in such cases.

(1) The Basic Law imposes requirements upon the legislature in both regards.

(a) The Basic Law requires rules to the effect that no use may be made of data that stem from the core area of private conduct of life.

The risk of encroachment upon the core area of private conduct of life associated with the acoustic surveillance of private dwellings is acceptable under the Basic Law only if precautions are taken to ensure that no further implications ensue from violations that have exceptionally occurred. It is necessary to ensure that knowledge acquired through such encroachment is not used in any way in further investigatory proceedings or under other circumstances.

Comprehensive prohibition of the use of such knowledge is required first of all for the eventuality that prosecuting authorities exceed their authority and carry out acoustic surveillance of a private dwelling, for example, despite the existence of the probability that the surveillance will involve absolutely privileged communication. None of the information, no matter what its content, acquired during the period within which the collection of such information is prohibited may be used in criminal proceedings. This applies not only with respect to use as evidence in the main proceedings, but also if this information could be considered for use as the evidentiary basis for investigation in connection with other matters.

The use of such evidence is also prohibited when circumstances do not warrant an assumption that collection is prohibited, but a situation nevertheless develops during acoustic surveillance of a private dwelling that results in interception of communication of a strictly personal nature. There will in practice always be cases in which there are no sufficient outward indications that make it possible to determine whether absolutely privileged communication can or cannot be expected inside a dwelling. It will also not always be possible to confirm beyond all doubt suspicion of involvement in a criminal offence on the part of one of the close family members present in a dwelling. Reliable assessment by prosecuting authorities will be impossible in particular when unambiguous identification is not possible because of the social environment of a suspect despite appropriate effort - for example, through previous observation. It will not always be possible to determine in advance whether communication involves possible perpetrators of a crime. It is for that reason indispensable that prohibition of the collection of evidence be complemented by prohibition of the use of evidence in order to be able to ensure comprehensive protection of the core area. The use of data obtained in connection with activities involving the inviolable area of private conduct of life is absolutely prohibited on constitutional grounds and such data may be used neither in main proceedings nor as the basis for other investigations (see BVerfGE 44, 353 [383-384]).

(b) When information stemming from the core area of private conduct of life is collected, it must be deleted without delay. This applies notwithstanding the requirement of effective recourse to the courts provided under Article 19.4 of the Basic Law. In that

respect, it is of decisive importance that further retention of strictly personal data that ought not to have been collected entails a risk of exacerbation of a violation of the right of personality. Subsequent recourse to the courts would also only make it possible to ascertain that the interception and recording of the deleted information were illegal and that the data must be destroyed. However, this purpose is also adequately achieved as far as considerations having to do with constitutional law are concerned through immediate deletion when carried out on the basis of the finding of an authority to the effect that the recording was illegal. However, a possible interest on the part of the parties involved in acquiring complete knowledge as to what communication content was intercepted by the prosecuting authorities remains unsatisfied. This interest cannot, however, justify the risks of further violations of fundamental rights associated with further retention.

Not only the original tape, but also any copies made subsequently, must be deleted. In view of Article 19.4 of the Basic Law, prosecuting authorities must document in writing that the content of absolutely privileged communication was recorded and that the relevant recordings were for that reason completely deleted.

(2) The legislature has only partially fulfilled its duty to adopt provisions of law that satisfy these constitutional requirements.

…

III.

The legislature failed to limit the formulation of the catalogue of criminal offences, such as offences are, when viewed in the abstract, especially serious within the meaning of Article 13.3 of the Basic Law. Insofar as this was not the case, s. 100c.1 no. 3 of the Criminal Procedure Code does not satisfy Article 13.3 of the Basic Law. As a result, changes in legislation effected after submission of the constitutional complaint are also subject to review pursuant to s. 78 sentence 2 and s. 82.1 of the Federal Constitutional Court Act(Bundesverfassungsgerichtsgesetz - BVerfGG), which are to be applied accordingly in constitutional complaint proceedings (see BVerfGE 18, 288 [300]).

(a) The possible range of punishments provided for under the criminal statute indicates whether the legislature has classified a given crime as being especially serious. The catalogue of criminal offences of s. 100c.1 no. 3 of the Criminal Procedure Code includes, in addition to indictable offence, summary offences, including those that do not manifest any above-average degree of unlawfulness. The minimum penalties range from fines to imprisonment for three or for six months to imprisonment of one year or two, three, five or ten years. The maximum penalties also vary from three years to more than five and ten years up to life imprisonment.

The legislature may exercise discretionary judgment when defining the degree of unlawfulness of criminal offences and deciding which offences will warrant acoustic surveillance of private dwellings. According to Article 13.3 of the Basic Law, such offences must be, in the abstract, especially serious. The range of possible penalties

provides a standard of reference for such purposes. It is possible to assume that a criminal offence is especially serious within the meaning of Article 13.3 of the Basic Law only if the legislature imposes a penalty that in any case exceeds five years of imprisonment. The legal system is such that the maximum penalty of ten or more years of imprisonment is also provided for criminal offences punishable by a term of more than five years. Such penalties are reserved for offences that involve an especially serious unlawful act and therefore clearly depart from the category of crimes of medium seriousness.

(b) If this standard is applied, the reference of s. 100c.1 no. 3 of the Criminal Procedure Code to such criminal offences is in violation of the Basic Law since this section may be applied at best to the areas of crime of medium seriousness because of the penalty provided for.

…

IV.

The provisions contained in s. 101 of the Criminal Procedure Code on the acoustic surveillance of private dwellings that govern the duty to notify the parties involved is only partially consistent with Article 19.4 and Article 103.1 of the Basic Law.

1. S. 101.1 sentence 1 of the Criminal Procedure Code is incompatible with Article 13.1 and Article 19.4 as well as with Article 2.1 in conjunction with Article 1.1 of the Basic Law insofar it provides for notification of the persons affected by the acoustic surveillance of private dwellings only if this can be accomplished without any threat to the safety of the public or the continued use of an official assigned to an undercover investigation. The court's single opportunity to decide to postpone notification until six months after termination of the measure pursuant to s. 101.1 sentence 2 of the Criminal Procedure Code also fails to adequately ensure compliance of procedural law with the duty to make such notification as required by the Basic Law.

a) Article 13.1 of the Basic Law in conjunction with the requirement of effective recourse to the courts (Article 19.4 of the Basic Law) provides for holders of fundamental rights to be informed of measures involving the acoustic surveillance measures of private dwellings that affect them.

In the case of covert encroachment, holders of fundamental rights have in principle a right to be informed after the fact of surveillance measures undertaken by the government by reason of the guarantee of effective recourse to the courts (see BVerfGE 100, 313 [361] on Article 10 of the Basic Law).

Without such knowledge, the persons affected can neither assert the illegality of the collection of the information nor any rights they may have to have the recordings deleted. Subsequent notification is also required because no hearing has been held due to the covert nature of the encroachment. The Basic Law does not specify in detail how notification is to be made. Article 13 of the Basic Law requires only that

notification be made when data are collected covertly, but the right to notification has not been granted or the rights of the persons affected have not been adequately taken into account (see BVerfGE 100, 313 [361] on Article 10 of the Basic Law).

The duty to make subsequent notification that follows from the fundamental right is subject to the same restrictions as the fundamental right itself. When knowledge of an encroachment could defeat its very purpose, there can therefore be no objection on constitutional grounds to commensurate limitation of the extent to which such knowledge is made available.

In addition, the guarantee of recourse to the courts under Article 19.4 of the Basic Law requires notification in principle if this is a prerequisite to the possibility of seeking judicial relief. The possibility of limitation of this right is, however, also not excluded by Article 19.4 of the Basic Law, which is amenable to regulation by law (see BVerfGE 100, 313 [364]).

A right to notification of the fact that surveillance of a private dwelling was ordered and carried out inures to the respective persons affected from Article 13.1 and Article 19.4 of the Basic Law, but only in principle. The limitation of the duty to make notification on the other hand represents encroachment upon fundamental rights under Article 13.1 and Article 19.4 of the Basic Law that requires justification and must therefore also satisfy the requirements of proportionality (see BVerfGE 100, 313 [365, 398-399]). Since postponement of notification delays possibilities for recourse to the courts and the efficacy of judicial relief decreases with temporal distance from the measure ordered, postponement must be restricted to that which is absolutely necessary.

…

V.

The provisions contained in s. 100d.5 sentence 2 and s. 100f.1 of the Criminal Procedure Code on the use of personal information in other proceedings are not compatible with Article 13.1, Article 2.1 and Article 1.1 of the Basic Law, insofar as no duty is prescribed to identify the information that is made available to others for such use.

…

Exclusivity of purpose can be guaranteed only if it also remains obvious after the information is collected; that the data were acquired through acoustic surveillance of a private dwelling. Appropriate identification of data is therefore required by the Basic Law (see BVerfGE 100, 313 [360-361] on Article 10 of the Basic Law). The legislature must impose a duty to identify information not only on the authority that collects the data but also on authorities that receive such data in order to ensure the exclusivity of purpose. Otherwise, data stemming from the acoustic surveillance of private dwellings could be stored and co-mingled with other data in a manner that would make it no longer possible to recognize their origin (see BVerfGE 100, 313 [396-397]). The restrictions on the use of data provided under s. 100f.1 of the Criminal Procedure Code would then be circumvented.

VI.

The provisions governing the destruction of data contained in s. 100d.4 sentence 3 and s. 100b.6 of the Criminal Procedure Code, which like the provisions governing the transfer of data to others form a constitutionally relevant regulatory complex with the provisions governing the collection of such data, are in violation of Article 19.4 of the Basic Law.

…

The protection of Article 13.1 of the Basic Law, which also extends to subsequent phases of processing such data, does surely require in principle that legally acquired data be destroyed as soon as they are no longer required for the original purposes (see BVerfGE 100, 313 [362] on Article 10 of the Basic Law). The provisions of law governing the destruction of data must, however, at the same time satisfy the requirement of effective recourse to the courts. As a result, this may result in a specific conflict situation since it is on the one hand consistent with legislation governing data protection to delete data that are no longer needed and on the other hand the deletion of data makes effective recourse to the courts more difficult, if not impossible, because it is possible to review a matter only to a limited extent once records are destroyed (see Constitutional Court of Mecklenburg-West Pomerania [*Verfassungs-gerichtshof Mecklenburg-Vorpommern* - MVVerfG], LKV 2000, p. 345 [354]).

Against this background, the duty to destroy data must be balanced with the guarantee of recourse to the courts so that it is not thwarted or frustrated in cases in which the person affected seeks judicial review of governmental acts involving information and the use of data (see BVerfGE 100, 313 [364, 400]).

3. BVerfG, 20.4.2016, 1 BvR 966/09, http://www.bverfg.de/e/rs20160420_1bvr096609en.html "Covert Surveillance"

Explanatory Annotation

The rise of domestic and international terrorism and especially the 9/11 terror attacks in New York have led to a re-emphasis of the security aspect in the eternal struggle between freedom and its protection on the one hand, and the maintenance of public security on the other. The situation is further complicated by the fact that strengthening security by giving security agencies more and more powers inherently diminishes freedom and thus limits the sphere of personal autonomy. At the same time security, as in the creation of a secure space for people to be able to live the freedoms we so cherish, is a precondition for freedom. There is no freedom if there is no security. The balancing act is inherently difficult and always controversial. For Germany, the rise of terrorism in the new millennium was not an entirely new experience. In the 70's and 80's, the country already struggled with the violent leftwing terrorism of the so-called "Red Army Fraction" and similar groups and the considerable violence exercised by these

groups[153] and this struggle had led to considerable anti-terror legislation, of which one of the most notorious was so-called *Kontaktsperregesetz*, which allowed terrorists to be held in custody incommunicado to ensure that there would be no communication between imprisoned terrorists and those on the outside engaging in kidnapping to demand their release.[154] In the late 90's Article 13 of the Basic Law was amended to allow for acoustic surveillance outside of ("small acoustic surveillance") and inside ("large acoustic surveillance") to combat serious crime whether of terrorist or other backgrounds.[155] This domestic anti-terrorism agenda era more or less seamlessly segued into the 9/11 and post 9/11 era of Islamist terror, which is also marked by the increasing use of computers and their potential for processing vast amounts of data to allow for new forms of policing (security) and infringements on fundamental rights, not least privacy. Practically, most legislative acts passed to use these technologies in policing were challenged before the Constitutional Court. There are now about 20 decisions of the Court attempting to balance the quest for security with the need to maintain individual freedom.[156]

The 2016 judgment reported below deals with the Act on the Federal Criminal Police Office (BKA), a federal police agency roughly comparable to the FBI in the US, operating in a constitutional framework where police powers belong to the core powers of the *Länder* and operational power are limited for that reason already. Legislation amended in 2009 authorized the BKA to use covert surveillance practices, including the remote, software-based data collection from private computers and cloud data storage facilities[157] and provided for the possibility to transfer data obtained to other authorities. The Constitutional Court decided that the legislation is in principle compatible with the Basic Law and in particular with Article 13 of the Basic Law but that several constitutional shortcomings are resulting from the application of the principle of proportionality, which is given extensive scrutiny in this decision. As a result, the Court quashed some provisions of the legislation outright. For other provisions, the Parliament was given time to make the necessary corrections following the Court's instructions. Two dissenting opinions criticized the majority for going too far and placing too many restrictions of the security agencies and for behaving more like an alternative legislator than a court interpreting the law.

153 Other notable – better: notorious – groups were the "Movement 2 June" and the "Revolutionary Cells". See Rau, Markus, Country Report on Germany, in: Christian Walter et al. (eds.), Terrorism as a Challenge for National and International Law: Security versus Liberty?, 2004, 311 ff.

154 The Constitutional Court upheld the constitutionality of this incommunicado act in 1978, see BVerfGE 49, 24.

155 See Jestaedt, Matthias, The German Reticence Vis-à-Vis the State of Emergency, in: Auriel, Pierre et al (eds), The Rule of Crisis - Terrorism, Emergency Legislation and the Rule of Law, 2018, p. 241 (246-7). The acoustic surveillance in the private home was significantly curtailed by the Constitutional Court, see BVerfG, 3.3.2004, 1 BvR 2378/98, http://www.bverfg.de/e/rs20040303_1bvr237898.html (BVerfGE 109, 279) (in this book, previous judgment reported.

156 See Jestaedt, id. at p. 248-9 and the list of decisions provided there on p. 248 fn 20: BVerfGE 107, 299–339; 109, 279–391; 110, 33–76; 112, 304–321; 113, 348–392; 115, 118–166; 115, 320–381; 118, 168–211; 120, 274–350; 120, 378–433; 125,260–385; 129, 208–268; 130, 1–51; 130, 151–212; 132,1–39; 241–272; 133, 277–377; 139, 245–285; 140,160–211.

157 Such software is commonly referred to as "Remote Forensic Software". Software clandestinely installed on such computers to enable access are commonly referred to as "Trojans" and the activity of doing these things is called "hacking". In Germany, a colloquial term sometimes used for this new type of online search was the term "federal trojan" ("Bundestrojaner"), see https://en.wiktionary.org/wiki/Bundestrojaner (last accessed on 2.9.2019).

Translation of "Covert Surveillance" judgment, BVerfG, 20.4.2016, 1 BvR 966/09, http://www.bverfg.de/e/rs20160420_1bvr096609en.html

Headnotes:

1. a) The authorisation of the Federal Criminal Police Office to carry out covert surveillance measures (surveillance of private homes, remote searches of information technology systems, telecommunications surveillance, collection of telecommunications traffic data and surveillance outside of private homes using special means of data collection) is, for the purpose of protecting against threats from international terrorism, in principle compatible with the fundamental rights enshrined in the Basic Law.

   b) The design of these powers must satisfy the principle of proportionality. Powers that constitute a serious interference with privacy must be limited to the protection or legal reinforcement of sufficiently weighty legal interests; require that a threat to these interests is sufficiently specifically foreseeable; may, only under limited conditions, also extend to third parties from whom the threat does not emanate and who belong to the target person's sphere; require, for the most part, particular rules for the protection of the core area of private life as well as the protection of persons subject to professional confidentiality; are subject to requirements of transparency, individual legal protection, and supervisory control; and must be supplemented by deletion requirements with regard to the recorded data.

2. The requirements for the use and transfer of data collected by the state follow the principles of purpose limitation and change in purpose.

   a) The scope of a purpose limitation depends on the specific legal basis for the data collection: the data collection initially takes its purpose from the respective investigation procedure.

   b) The legislature may allow a use of the data beyond the specific procedure of the data collection in the context of the original purposes of the data (further use). This implies that the use of collected data is limited to the same authority acting in the same function and for the protection of the same legal interests. For data from the surveillance of private homes or from access to information technology systems, each further use must additionally also fulfil the relevant risk situation requirements applicable to the data collection.

   c) Moreover, the legislature may also allow for a further use of data collected by the state for other purposes than those determining the original data collection (change in purpose).

      The proportionality requirements for such a change must conform to the principle of a hypothetical re-collection of data. According to this, the new use of the data must serve the protection of legal interests or aim to investigate criminal offences of such weight that would, by constitutional standards, justify collecting them again with comparably weighty means. A specific risk situation, as required for the initial

data collection, is generally not required a second time; it is necessary but generally also sufficient that there be a specific evidentiary basis for further investigations.

With regard to data from the surveillance of private homes and from remote searches of information technology systems, a change in purpose is only permitted if the relevant risk situation requirements applicable to the collection of the data are again fulfilled.

3. The transfer of data to state authorities in third countries is subject to the general constitutional principles of purpose limitation and change in purpose. In assessing a new use, the autonomy of the other legal order must be respected. A transfer of data to third countries requires the ascertainment that, in the third country, the data will be handled in sufficient conformity with rule-of-law standards.

Facts:

A.

I.

The constitutional complaints are directed against the provisions of the Federal Criminal Police Office Act (*Bundeskriminalamtgesetz* - BKAG) inserted as Sub-Title 3a by the Act on Prevention by the Federal Criminal Police Office of Threats from International Terrorism of 25 December 2008 (Federal Law Gazette, *Bundesgesetzblatt* - BGBl I p. 3083), effective 1 January 2009. On the basis of Art. 73 sec. 1 no. 9a of the Basic Law (*Grundgesetz* - GG) (BGBl I p. 2034), created for this purpose in 2006, the federal legislature assigned the Federal Criminal Police Office tasks extending beyond its previous law enforcement duties, reaching into the domain of the protection against threats from international terrorism, a task hitherto reserved solely for the *Laender* (federal states). An additional subject-matter of the constitutional complaints is the previously existing provision in the Federal Criminal Police Office Act on the transfer of data to third countries, the scope of which has been extended by the newly attributed powers. **[1]**

II.

The constitutional complaints are directed, first, against the granting of various investigative powers. The challenged powers include the authorisation to question persons pursuant to § 20c BKAG, as well as the use of special means of data collection outside of private homes pursuant to § 20g secs. 1 to 3 BKAG including, in particular, the covert monitoring and recording of non-public speech, image recording, the application of tracking devices, and the use of police informants and undercover investigators. The constitutional complaints also challenge the power to carry out visual and acoustic surveillance of private homes pursuant to § 20h BKAG, to conduct electronic profile searching pursuant to § 20j BKAG, to access information technology systems pursuant to § 20k BKAG, to monitor on-going telecommunications pursuant to § 20l BKAG as well as to collect telecommunications traffic data pursuant to § 20m secs. 1 and 3 BKAG. Insofar, the challenges also encompass § 20u BKAG which deals with the protection of persons having the right to refuse to give evidence, as well as § 20w BKAG which sets out the duty to inform affected persons at the conclusion of the surveillance measure. **[2]**

Second, the constitutional complaints are directed at provisions on the use of data. This affects, firstly, the provision on the use of data collected in accordance with Sub Title 3a of the Act pursuant to § 20v sec. 4 sentence 2 BKAG by the Federal Criminal Police Office itself. The power pursuant to § 20v sec. 5 BKAG - with the exception of sentence 3 no. 2 - to transfer this data to other domestic public authorities is also challenged. Finally, § 14 sec. 1 sentence 1 nos. 1 and 3 and sentence 2, sec. 7 BK- AG, which generally permits the transfer of data to authorities in third countries, is also challenged. § 14a BKAG, which additionally establishes a separate power to transfer personal data to Member States of the European Union, however, is not at issue in this proceedings. **[3]**

[…] **[4]**

C.

Insofar as the constitutional complaints are directed against the investigative and surveillance powers, they are well-founded in several respects. **[86]**

I.

In respect of legislative competences, meanwhile, the challenged provisions are constitutional. **[87]**

[…] **[88-89]**

II.

The challenged surveillance and investigative powers authorise interferences with fundamental rights, which, depending on which fundamental right is affected and on the varying weight of the interference, must individually be measured against the principle of proportionality and the principle of legal clarity and specificity. The powers have in common that the potential interferences they authorise are for the most part very serious, yet since their objective is to protect against the threat of international terrorism, they have a legitimate aim and are, to that end, suitable and necessary. **[90]**

1. The challenged powers authorise the Federal Criminal Police Office to covertly collect personal data in the context of the protection against threats and the prevention of criminal offences. This allows for - depending on the power in question - interferences with the fundamental rights of Art. 13 sec. 1, Art. 10 sec. 1 and Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG, the latter both in its manifestation as the right to the guarantee of the confidentiality and integrity of information technology systems as well as the right to informational self-determination. **[91]**

All these powers provide the legal bases for investigative and surveillance measures which are usually carried out covertly without the knowledge of the parties concerned and can constitute a serious interference with privacy. Even if legitimate expectations of confidentiality are affected to differing degrees and the powers' weight of interference varies significantly, these powers generally all have a weight of interference which weighs heavily in any case. Only individual measures pursuant to § 20g secs. 1 and 2 BKAG constitute an exception. **[92]**

2. The constitutionality of the powers depends on the limits arising from each of these fundamental rights and the proportionality requirements which must be determined for each of the powers. According to the principle of proportionality, the granting of these powers must always pursue a legitimate aim and must be suitable, necessary and, in the strict sense, proportionate to achieving this aim (cf. BVerfGE 67, 157 <173>; 70, 278 <286>; 104, 337 <347 et seq.>; 120, 274 <318 and 319>; 125, 260 <316>; established case-law). **[93]**

Furthermore, the challenged powers are to be measured against the principle of legal clarity and specificity, which aims to increase the predictability of interferences for citizens, constitute an effective limit to administrative powers and enable effective judicial review (cf. BVerfGE 113, 348 <375 et seq.>; 120, 378 <407 and 408>; 133, 277 <336 para. 140>; established case-law). With regard to the powers in question here that pertain to the covert collection and processing of data, and that have the potential to constitute serious interferences with privacy, the principle sets up particularly strict requirements. Since affected persons can for the most part neither notice nor challenge the use of these powers, their content - in contrast to, for example, administrative law terms that are open to interpretation and executed by means of an administrative act - can only be rendered more specific to a very limited extent within the interplay between actual application and judicial review. Individually, however, the requirements differ, depending on the weight of the interference, and are thus tightly linked to the respective substantive requirements of proportionality (cf. BVerfGE 110, 33 <55>; 113, 348 <376>). **[94]**

3. The challenged provisions pursue a legitimate aim and are suitable and necessary to that end. **[95]**

a) The powers pursue a legitimate aim. They provide the Federal Criminal Police Office with means of gathering information which it can use in fulfilling its new task of protecting against threats from international terrorism. The term "international terrorism" as set out in the description of tasks in § 4a sec. 1 BKAG and its reference to § 129a secs. 1 and 2 of the Criminal Code (*Strafgesetzbuch* - StGB) is, in line with the EU Framework Decision of 13 June 2002 and international terminology (OJ L 164, p. 3; Draft Comprehensive Convention on International Terrorism, in: Measures to eliminate international terrorism, Report of the Working Group of 3 November 2010, UN Doc. A/C.6/65/L.10) and - in conformity with the notions of the constitution-amending legislature upon the creation of Art. 73 sec. 1 no. 9a GG (cf. *Bundestag* document, *Bundestagsdrucksache* - BTDrucks 16/813, p. 12), limited to specifically characterised criminal offences of particular weight. Criminal offences characterised as terrorism in this sense aim to destabilise society and comprise, in a reckless instrumentalisation of other people, attacks on the life and limb of random third parties. They are directed against the basic pillars of the constitutional order and of society as a whole. The provision of effective means of gathering information for protecting against terrorism constitutes a legitimate aim and is of great significance for a democratic and free basic order (cf. BVerfGE 115, 320 <357 and 358>; 120, 274 <319>; 133, 277 <333 and 334 para. 133>). **[96]**

b) The granting of the surveillance and investigative powers in question is suitable for achieving this aim. They provide the Federal Criminal Police Office with the means for gathering information that can play a role in countering the threat of international

terrorism. The different powers are, at least in principle, necessary for this. Each power allows specific measures that cannot always be replaced by others. Less intrusive measures that provide equally effective and broad possibilities for gathering information for protecting against international terrorism are not apparent. Evidently, this does not affect the fact that in each individual case, the exercise of these powers, too, must be in accordance with the concepts of suitability and necessity. **[97]**

III.

Limitations result mainly from the requirements of proportionality in the strict sense. Accordingly, the surveillance and investigative powers must be appropriately designed with a view to the weight of the interference. It is the legislature's task to balance the seriousness of the interferences with fundamental rights of the potentially affected persons that are at issue here, on the one hand, with the duty of the state to protect the fundamental rights of its citizens, on the other. **[98]**

1. The legislature must thereby take into account, on the one hand, the weight of the interference of the measures allowed by the challenged provisions. These allow - to differing degrees, depending on the power - far-reaching interferences with privacy and can, in individual cases, even intrude upon private refuges the protection of which is of particular significance for the safeguarding of human dignity. The legislature must also consider the developments of information technology which increasingly extend the scope of surveillance measures, facilitate their operability, and enable making connections, which can go so far as to create personality profiles. In each case, differentiations must be based on the respective power in question as well as the fundamental rights it affects. **[99]**

2. On the other hand, the legislature must ensure the effective protection of the fundamental rights and legal interests of citizens. With regard to the constitutional appropriateness test, it must be taken into account that the constitutional order, the existence and the security of the Federation and of the *Laender* (federal states), and life, limb and the freedom of persons are legally protected interests of significant constitutional weight. Accordingly, the Federal Constitutional Court has underlined that the security of the state, as a constituted power of peace and order, as well as the safety of the population it is bound to guarantee - while respecting the dignity and the intrinsic value of the individual - rank equally with other highly valued constitutional rights. It thus considers the state to be under an obligation to protect the life, physical integrity and freedom of the individual, which also means, in particular, to protect against unlawful interferences by others (cf. BVerfGE 115, 320 <346 and 347>; see also BVerfGE 49, 24 <56 and 57>; 90, 145 <195>; 115, 118 <152 and 153>). **[100]**

In testing appropriateness, it must also be considered that the challenged provisions do not constitute provisions whose broad scope of interference affect the entire population equally. Rather, these are predominantly provisions aimed at enabling security authorities to protect, in individual cases, legal interests having constitutional rank from serious threats as well as to prevent criminal offences of great weight. **[101]**

In light of the threat posed by international terrorism, the decision to collect data is also of particular significance for the exchange of information between domestic authorities as well as for rendering the cooperation with security authorities of other states as effective as possible. A

functioning exchange of information, which is in the interest of the constitutionally required protection of persons, presupposes the transfer of information gathered domestically and in return relies on information from third countries. **[102]**

IV.

For powers of investigation and surveillance constituting serious interferences with privacy, which are predominantly in question here, the Federal Constitutional Court has derived overarching requirements from the principle of proportionality in the strict sense. These concern specific wide-ranging potential threats to fundamental rights, in particular those entailed in the context of electronic processing of data (cf. BVerfGE 100, 313 <358 et seq.>; 115, 320 <341 et seq.>; 125, 260 <316 et seq.>; 133, 277 <335 et seq. para. 138 et seq.>), as well as individual case-by-case measures against persons who are being focussed on by the acting authorities (BVerfGE 107, 299 < 312 et seq.> - Collection of telecommunications traffic data -, BVerfGE 110, 33 <52 et seq.>; 113, 348 <364 et seq.>; 129, 208 <236 et seq.> - Telecommunications surveillance under federal, federal state and criminal procedural law -, BVerfGE 109, 279 <335 et seq.> - Surveillance of private homes -, BVerfGE 112, 304 <315 et seq.> - GPS observation -, BVerfGE 120, 274 <302 et seq.> - Online search -). **[103]**

1. Covert surveillance measures, to the extent that they seriously interfere with privacy, as most of the measures at issue here do, are only compatible with the Constitution if they pursue the aim of protecting or legally reinforcing sufficiently weighty legal interests when these are in danger or are violated, as evidenced by strong factual indications in the specific case. They generally require that the person targeted by the measure would be considered, by a reasonable person examining the objective circumstances, to be involved in a potential violation of a legal interest. A mere possibility based primarily on the intuition of the security authorities that further intelligence might be obtained is not sufficient for carrying out such measures (see BVerfGE 107, 299 <321 et seq.>; 110, 33 <56>; 113, 348 <377 and 378, 380 and 381>; 120, 274 <328>; 125, 260 <330>). The Constitution thus sets clear limits to lowering the threshold for crime prevention measures that are carried out covertly and can seriously interfere with privacy; in contrast, with regard to measures involving less serious interferences with privacy, the constitutionally permitted leeway in crime prevention matters is broader. **[104]**

With regard to the detailed design of the individual powers, what matters substantially for their appropriateness as well as the required specificity is that they be tailored to the weight of each codified interference. The more seriously the surveillance measures interfere with privacy and thwart legitimate expectations of confidentiality, the stricter the requirements must be. The surveillance of private homes and the access to information technology systems constitute particularly serious interferences with privacy. **[105]**

a) Covert surveillance measures must be limited to the protection or legal reinforcement of sufficiently weighty legal interests. **[106]**

For measures that serve a law enforcement purpose and are thus repressive in nature, the weight of the criminal offences in question is relevant for their classification, which the legislature has divided into significant, serious and particularly serious criminal offences, each defined in greater detail. Thus, the surveillance of private homes requires the suspicion of a particularly serious criminal offence (cf. BVerfGE 109, 279 <343

et seq.>); telecommunications surveillance or the use of telecommunications traffic data collected as a precaution requires the suspicion of a serious criminal offence (cf. BVerfGE 125, 260 <328 and 329>; 129, 208 <243>); while the collection of telecommunications traffic data with cause or observation by means of a GPS tracker, for example, requires a significant criminal offence - and, in the former case, one that is specified in the law - (cf. BVerfGE 107, 299 <321 and 322>; 112, 304 <315 and 316>; with regard to the latter decision, see also European Court of Human Rights (ECtHR), Uzun v. Germany, judgment of 2 September 2010, no. 35623/05, para. 70, Neue Juristische Wochenschrift - NJW 2011, p. 1333 <1336>, on Art. 8 of the European Convention on Human Rights - ECHR). **[107]**

With regard to measures that serve to protect against threats and are thus of a preventive nature, what matters is the weight of the legal interests being protected (cf. BVerfGE 125, 260 <329>). Covert surveillance measures that constitute a serious interference with privacy are only permissible with regard to particularly weighty legal interests. These include life, limb and the freedom of persons as well as the existence or security of the Federation or a *Land* (cf. BVerfGE 120, 274 <328>; 125, 260 <330>) In contrast, the Federal Constitutional Court has not deemed the unlimited protection of proprietary interests to be sufficiently weighty. However, the Court has held that access to data stored as a precaution (cf. BVerfGE 125, 260 <330>) or the surveillance of private homes also in cases of general danger (cf. BVerfGE 109, 279 <379>), or remote searches of information technology systems [translator's note: previous translations of the German term *Onlinedurchsuchung* have used "online search"; this translation uses "remote search" with the same meaning] in cases of danger to interests of the public that affect the existence of people (cf. BVerfGE 120, 274 <328>) are generally compatible with the Constitution. Against that background, the legislature is not hindered from uniformly establishing the relevant threshold for the protection of legal interests with regard to these surveillance measures. **[108]**

b) In the context of the protection against threats to the legal interests mentioned above, the collection of data by means of covert surveillance measures having a high interference intensity is generally only proportionate if there is a sufficiently specific foreseeable danger to these legal interests in an individual case and the person targeted by these measures appears, to a reasonable person examining the objective circumstances, to be involved therein (cf. BVerfGE 120, 274 <328 and 329>; 125, 260 <330 and 331>). **[109]**

These conditions also depend, in each case, on the type and weight of the interference. For the particularly serious interferences with privacy that the surveillance of private homes constitutes, Art. 13 sec. 4 GG requires imminent danger. The term "imminent danger" thereby not only refers, in the sense of the qualified protection of legal interests, to the extent, but also to the probability, of damage (cf. BVerfGE 130, 1 <32>). **[110]**

Furthermore, the requirements of a sufficiently specific foreseeable risk situation with respect to the mentioned legal interests must be determined in relation to the burden on the affected person. Sufficient from a constitutional perspective are the requirements for the prevention of specific, directly imminent or present threats from

persons subject to police action (*polizeipflichtige Personen*) according to the standards of general security law pertaining to the legally protected interests relevant here. The traditional police law term "specific threat" requires a factual situation that in the specific case, if left unhindered and provided that the events proceed in line with what is objectively to be expected, will lead, in foreseeable time, and with sufficient probability, to a violation of an interest protected by the police (cf. BVerfGE 115, 320 <364>; Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE 116, 347 <351>). An even closer temporal link is required when the respective legal authorisation requires a "directly imminent" or "present threat" (cf. BVerwGE 45, 51 <57 and 58>). **[111]**

However, the legislature is not constitutionally limited at the outset to creating, in respect of each type of function, criteria for interferences that reflect the usual model in security law of protecting against specific, directly imminent or present threats. Rather, it can set wider limits for particular fields, in order to aim at already preventing criminal offences, by lowering the requirements of foreseeability of the causal chain. However, the legal basis for the interference must then also require a sufficiently specified threat, in the sense that there be at least factual indications of the emergence of a specific threat to the legally protected interests. General experience alone is not sufficient for justifying an interference. Rather, certain facts must be determined that, in the individual case, substantiate the prognosis that an event leading to an imputable violation of the legally protected interests relevant here will occur (cf. BVerfGE 110, 33 <56 and 57, 61>; 113, 348 <377 and 378>). A sufficiently specific threat in this sense may already exist even where the causal chain leading to the damage is not yet foreseeable with sufficient probability, as long as certain facts already indicate that a threat to an exceptionally significant legal interest may occur. In such a case, the facts must allow the inference of, firstly, an occurrence that can be specified at least with regard to its type and which is temporally foreseeable, and, secondly, of the involvement of persons whose identity has at least been determined to the extent that the surveillance measure can target them specifically and is largely limited to them (BVerfGE 120, 274 <328 and 329>; 125, 260 <330 and 331>). With regard to terrorist offences, which are often committed at unforeseeable locations, planned far in advance by individuals who have no criminal record, and carried out in very different ways, surveillance measures may also be authorised if, despite the lack of a temporally foreseeable occurrence of a specific type, the individual behaviour of a person substantiates the specific probability that the person will commit such offences in the near future. For instance, this is conceivable in the case of a person entering the Federal Republic of Germany after having been abroad at a training camp for terrorists. **[112]**

In contrast, the weight of interference of covert police surveillance measures is not sufficiently taken into account when the factual grounds for the interference are shifted so as to include the preliminary stages of a still vague and unforeseeable specific threat to the legal interests protected by the provision. Linking the threshold for interference to the preliminary stages is constitutionally unacceptable if there are only relatively diffuse indications for potential threats, given the weight of the interference. The factual

situation at such a stage is often characterised by the rather ambivalent meaning of individual observations. While occurrences may remain harmless, they might also be part of a process that develops into a threat (cf. BVerfGE 120, 274 <329>; see also BVerfGE 110, 33 <59>; 113, 348 <377>). Such openness is not sufficient as a basis for carrying out covert and highly intrusive surveillance measures. For example, the mere knowledge that a person is attracted to a fundamentalist understanding of religion would not be sufficient for such measures. **[113]**

c) Tiered requirements arise with regard to the extent to which surveillance measures can be carried out in a target person's sphere where the measures also affect persons not responsible for particular actions or circumstances or who are not suspects and therefore bear no special responsibility. **[114]**

Access to information technology systems and the surveillance of private homes may only directly target persons responsible for impending or imminent dangers (cf. BVerfGE 109, 279 <351, 352>; 120, 274 <329, 334>). These measures constitute such a serious interference with privacy that they cannot be extended to other persons. It is not constitutionally objectionable for measures targeting the persons responsible to also cover third parties, so long as this is inevitable (cf. BVerfGE 109, 279 <352 et seq.>). Thus, the surveillance of the home of a third party may be authorised, if on the basis of certain facts it can be supposed that the target person will be present while the measure is carried out, will conduct conversations relevant to the investigation there, and the surveillance of that person's own home would not in itself be sufficient for investigating the factual circumstances (cf. BVerfGE 109, 279 <353, 355 and 356>). Likewise, a remote search may be extended to the information technology systems of third parties if factual indications suggest that the target person has saved information relevant to the investigation there and access solely to the target person's own information technology system would not be sufficient for achieving the aims of the investigation. **[115]**

The ordering of other covert surveillance measures directly targeting third parties is not impermissible *per se*. It is conceivable that the surveillance of persons - to be clearly defined - in the target person's sphere be authorised, for instance with regard to contacts or messengers. The justification for such authorisation lies in the objective nature of protecting against threats and of truth-finding in criminal investigations. The extension of such an authorisation to third parties is subject to strict proportionality requirements and requires a specific individual proximity of the person concerned to the threat or criminal offence being investigated. In that respect it is not sufficient that there merely be some sort of contact with the target person. Rather, further indications are needed showing that the contact is relevant to the object of the investigation and that there is thus a non-negligible probability that the surveillance measure will contribute to elucidating the threat (cf. BVerfGE 107, 299 <322 and 323>; 113, 348 <380 ad 381>). The surveillance of persons that - based merely on the fact that they have been in contact with the target person - attempts to find out whether this can result in further evidentiary bases for further investigations, is constitutionally impermissible. With regard to these contact persons, however, the Constitution does not

bar investigative measures that entail a lower level of interference from aiming to thereby attain the threshold for surveillance measures entailing a higher level of interference. **[116]**

2. Overarching procedural requirements also derive from the principle of proportionality. The investigative and surveillance measures in question here, which predominantly involve serious interferences, and regarding which it can be presumed that they will also record highly private information, and that are carried out covertly without the knowledge of the affected persons, as a rule require prior review by an independent body, in the form, for example, of a judicial order (on this, see also ECtHR, Klass and others v. Germany, judgment of 6 September 1978, no. 5029/71, para. 56; ECtHR (Grand Chamber), Zakharov v. Russia, judgment of 4 December 2015, no. 47143/06, paras. 258, 275; ECtHR, Szabó and Vissy v. Hungary, judgment of 12 January 2016, no. 37138/14, para. 77). For measures relating to the surveillance of private homes this already results from Art. 13 secs. 3 and 4 GG (cf. in this respect BVerfGE 109, 279 <357 et seq.>) and directly follows from the principle of proportionality (cf. BVerfGE 120, 274 <331 et seq.>; 125, 260 <337 et seq.>). **[117]**

The legislature must combine the imperative of a precautionary independent review framed in specific and legally clear form with strict requirements in respect of the content and the reasons for judicial orders. Also deriving from this is the requirement that the application for an order have a sufficiently substantiated justification and limits, which makes it possible in the first place for the courts or an independent body to exercise effective review. In particular, the authority submitting the application must provide comprehensive information on the situation in question (cf. BVerfGE 103, 142 <152 and 153>). In connection with this, it is the duty and obligation of the court or the other decision-makers to independently reach a decision on whether the covert surveillance measure being applied for fulfils the legal requirements. The needed material and staffing requirements must be provided by the judicial administration of the *Laender* and the Chief Justice of the competent court (cf. BVerfGE 125, 260 <338>). **[118]**

3. In addition to the constitutional requirements for the general conditions for interference, the respective fundamental rights in conjunction with Art. 1 sec. 1 GG give rise to particular requirements with regard to the protection of the core area of private life in the context of surveillance measures causing a particularly serious interference. **[119]**

a) The constitutional protection of the core area of private life guarantees a highly private area for the individual which is free from surveillance. It has its roots in each of the fundamental rights affected by surveillance measures in conjunction with Art. 1. sec. 1 GG and ensures a core of human dignity that is beyond the state's reach and provides constitutional protection against such measures. Even paramount interests of the general public cannot justify an interference with this absolutely protected area of private life (cf. BVerfGE 109, 279 <313>; established case-law). **[120]**

The possibility of expressing inner processes such as impressions and feelings, as well as reflections, views, and experiences of a highly personal nature belongs to the free development of personality in the core area of private life (cf. BVerfGE 109, 279 <313>; 120, 274 <335>; established case-law). Particular protection is afforded to non-public communication with persons enjoying the highest level of personal trust,

conducted under the reasonable assumption that no surveillance is taking place, as is the case, in particular, in a private home. This group of persons includes, in particular, spouses or partners, siblings and direct relatives in ascending or descending line, in particular if they live in the same household, and can also include defence counsel, doctors, the clergy and close personal friends (cf. BVerfGE 109, 279 <321 et seq.>). This group only partially overlaps with those persons who have the right to refuse to give evidence. These conversations do no lose their overall highly personal character merely because they combine highly personal with everyday matters (cf. BVerfGE 109, 279 <330>; 113, 348 <391 and 392>). **[121]**

In contrast, communication directly about criminal offences is not protected, not even when it also covers highly personal elements. The discussion and planning of criminal offences is not content that belongs to the core area of private life, but rather is of societal relevance (cf. BVerfGE 80, 367 <375>; 109, 279 <319 and 302, 328>; 113, 348 <391>). Of course this does not mean that the core area is subject to a general balancing requirement with regard to public safety interests. A highly personal conversation does not fall outside the core area of private life simply because it could provide helpful insights for the investigation of criminal offences or dangers. Recordings or statements made in the course of a dialogue that only reveal, for instance, inner impressions and feelings and do not contain any indications with regard to specific criminal offences, do not simply become relevant to society by the fact that they might elucidate the reasons or motives for criminal behaviour (cf. BVerfGE 109, 279 <319>). Furthermore, despite having some link to criminal offences, situations in which individuals are in fact encouraged to admit wrongdoing or to prepare for the consequences thereof, such as confessions or confidential conversations with a psychotherapist or defence counsel, belong to the core area of private life, from which the state is absolutely excluded (cf. BVerfGE 109, 279 <322>). There is sufficient societal relevance, however, when the subject of conversations - even with highly trusted persons - is directly focused on criminal offences (cf. BVerfGE 109, 279 <319>). **[122]**

b) Any surveillance measure must take into consideration the core area of private life. If it typically leads to the collection of data relevant to the core area, the legislature must provide provisions that guarantee effective protection in a legally clear manner (cf. BVerfGE 109, 279 <318 and 319>; 113, 348 <390 and 391>; 120, 274 <335 et seq.>). Powers that do not tend to lead to interferences do not require such provisions. Limits that in individual cases might arise here with regard to access to highly personal information must be applied directly, on constitutional grounds. **[123]**

c) The protection of the core area of private life is strict and cannot be relativized through a weighing with security interests in accordance with the principle of proportionality (cf. BVerfGE 109, 279 <314>; 120, 274 <339>; established case-law). This does not mean that every instance in which highly personal information is indeed collected constitutes a violation of the Constitution or of human dignity. Given the uncertainty of action and prognosis under which security authorities carry out their duties, an unintentional intrusion upon the core area of private life in the course of a surveillance measure cannot be excluded ahead of time in every case (cf. BVerfGE

120, 274 <337 and 338>). However, the Constitution does require that in the design of surveillance measures, the respect of the core area be drawn as a strict limit, insurmountable by considerations in individual cases. **[124]**

aa) Thus, firstly, it is absolutely impermissible to make the core area a target of state investigations and use information from these in any way or to otherwise use it as a basis for further investigations. Even if additional findings could result from it, a targeted interference with core privacy - not including the discussion of criminal offences (see above, C IV 3 a) - is ruled out from the outset. The protection of the core area cannot be subject to the proviso that interests must be balanced in individual cases. **[125]**

bb) Furthermore, it also follows that, when carrying out surveillance measures, the protection of the core area must be taken into account on two levels. Firstly, at the data collection level, arrangements must be made in order to rule out as far as possible the unintentional collection of information stemming from the core area. Secondly, at the level of the subsequent analysis and use of the information, the consequences of an intrusion into the core area of private life that was not prevented must be strictly minimised (see BVerfGE 120, 274 <337 et seq..>; 129, 208 <245 and 246>). **[126]**

d) In this context, the legislature must design the protection of the core area of private life differently for each surveillance measure, depending on the type of power and its proximity to the absolutely protected area of private life (cf. BVerfGE 120, 274 <337>; 129, 208 <245>). In doing so, it must, however, make legislative arrangements on both levels. **[127]**

At the data collection level, with regard to measures likely to result in interference, a pre-emptive examination must ensure that situations or conversations relevant to the core area are excluded to the extent that this can be done in advance, practicably and with a reasonable amount of effort (cf. BVerfGE 109, 279 <318, 320, 324>; 113, 348 <391 and 392>; 120, 274 <338>). Under certain circumstances, with regard to conversations with persons enjoying the highest level of personal trust, which are typically indicative of confidential situations, the presumption may be warranted that these belong to the core area and may not be subject to surveillance (cf. BVerfGE 109, 279 <321 et seq.>; 129, 208 <247>). The legislature may design this presumption to be refutable and in particular make it dependent on whether there are indications in an individual case that criminal acts will be discussed. In contrast, the fact that apart from highly personal issues, everyday matters will also be discussed is not sufficient to refute the highly confidential nature of a conversation (cf. BVerfGE 109, 279 <330>). In any case, the measure must be discontinued when it becomes apparent that the surveillance is intruding upon the core area of private life (cf. BVerfGE 109, 279 <318, 324, 331>; 113, 348 <392>; 120, 274 <338>). **[128]**

At the level of analysis and use of data, the legislature must provide for cases in which it was not possible to avoid collecting information relevant to the core area, by requiring, as a rule, the screening of the collected data by an independent body that

filters out the information relevant to the core area prior to use by the security authorities (cf. BVerfGE 109, 279 <331 et seq.>; 120, 274 <338 and 339>). However, the constitutionally required procedural safeguards do not, in every type of case, require the creation of independent bodies other than the investigative bodies of the state (cf. BVerfGE 129, 208 <250>). The necessity of such a screening depends on the type, as well as, if applicable, the design of the power in question. The more reliably the collection of information relevant to the core area is already avoided at the first level, the more likely a screening by an independent body can be dispensed with, and *vice versa*. This does not affect the fact that the legislature has the possibility to enact the necessary provisions to provide the investigative bodies of the state with short-term possibilities for action in exceptional cases in case of immediate danger. In any case, the legislature must provide for the immediate deletion of any highly personal data collected and ensure that it be cannot be used at all. The deletion is to be documented in a manner that renders a subsequent review possible (cf. BVerfGE 109, 279 <318 and 319, 332 and 333>; 113, 348 <392>; 120, 274 <337, 339>). **[129]**

4. Separate constitutional limits arise with regard to interplay between the different surveillance measures. Surveillance taking place over an extended period of time, encompassing almost every movement and expression of the person under surveillance and that could constitute the basis for a personality profile, is incompatible with human dignity (cf. BVerfGE 109, 279 <323>; 112, 304 <319>; 130, 1 <24>; established case-law). With the use of modern and in particular covert investigative methods, security authorities must, with respect to the potential for harm inherent in the "additive" interference with fundamental rights, coordinate to ensure that the overall extent of surveillance remains limited (cf. BVerfGE 112, 304 <319 and 320>). The limits on an exchange of data between authorities arising from the principle of purpose limitation (*Zweckbindung*) remain unaffected by this (see below, D I). **[130]**

5. Out of proportionality considerations, separate constitutional limits to covert surveillance measures may arise with regard to certain groups of professionals or other persons, whose activities are constitutionally deemed to be particularly confidential. The legislature must ensure that the authorities respect these limits when ordering and carrying out surveillance measures. **[131]**

As a rule, the legislature is not required to completely exempt certain groups of persons from surveillance measures in advance (cf. BVerfGE 129, 208 <262 et seq.>), given the already very high requirements for ordering such measures and the great significance of an effective protection against terrorist threats for the free and democratic order (cf. BVerfGE 115, 320 <357 and 358>; 120, 274 <319>; 133, 277 <333 and 334 para. 133>) and for the safety of persons, as well as with a view to the multitude of considerations to be balanced, and, at the same time, with a view to the necessity of limiting opportunities for misuse. Rather, it may generally predicate the protection of confidentiality upon a weighing of considerations in the individual case. **[132]**

The legislature has leeway to design with regard to establishing and delimiting the confidential relationships that are to be protected. It must balance the public's interest in the effective protection against threats with the weight of the measures for persons subject to professional

confidentiality who depend upon a particular degree of confidentiality. In doing so, it must not only take into account the specific weight of the interference that such a measure constitutes for these persons with regard to their generally relevant fundamental rights, but also consider its effects on other fundamental rights, particularly Art. 4 sec. 1, Art. 5 sec. 1 and Art. 12 sec. 1 GG, or the independent mandate pursuant to Art. 38 sec. 1 GG. Insofar as it subjects certain professional groups to a stricter protection, these groups must be suitably delimited from the surveillance targets. **[133]**

6. The principle of proportionality also sets requirements for transparency, the judicial protection of individuals, and supervisory control (BVerfGE 133, 277 <365 para. 204>; see also BVerfGE 65, 1 <44 et seq.>; 100, 313 <361, 364>; 109, 279 <363 and 364>; 125, 260 <334 et seq.>; established case-law; cf. similarly the Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data of 25 January 2012, COM/2012/010 final - as of the conclusion of the trilogue, 16 December 2015: 15174/15; as of 28 January 2016: 5463/16, annex). The requirements applicable in this respect are derived from the fundamental right in question in conjunction with Art. 19 sec. 4 GG (cf. BVerfGE 125, 260 <335>; 133, 277 <366 para. 206>). **[134]**

The transparency of data collection and processing should contribute to the emergence of trust and legal certainty as well as to the on-going addressing of the topic of data handling within a democratic discourse (BVerfGE 133, 277 <366 para. 206>). Its aim is to provide, as far as possible, subjective legal protection to affected parties, while at the same time counteracting the diffuse sense of threat emerging from covert state surveillance (cf. BVerfGE 125, 260 <335>; similarly Court of Justice of the European Union - ECJ, Digital Rights Ireland Decision, C-293/ 12, EU:C:2014:238, para. 37). The less it is possible to ensure subjective legal protection, the greater the significance of effective supervisory control and of transparency in the actions of the authorities *vis-à-vis* the public (cf. BVerfGE 133, 277 <366 and 367 para. 207>). **[135]**

a) Another requirement for the proportionate design of the surveillance measures in question is a legislative provision ordering an obligation to notify. Given that such measures must be carried out covertly in order to achieve their aim, the legislature, in order to ensure subjective legal protection within the meaning of Art. 19 sec. 4 GG, must ensure that the affected persons are generally notified, at least subsequently, of the surveillance measures. The legislature may provide for exceptions by weighing the notification against the constitutionally protected legal interests of third parties. These must, however, be restricted to what is absolutely necessary (BVerfGE 125, 260 <336>). […] If there are compelling reasons for ruling out a subsequent notification, this must be confirmed by a judge and reviewed at regular intervals (BVerfGE 125, 260 <336 and 337>). **[136]**

b) As a supplement to information-related interferences the carrying out or scope of which the affected persons cannot assess with certainty, the legislature must provide information rights. Restrictions are only permissible if they serve opposing interests of even greater weight. Legislative exclusionary criteria must ensure that the affected

interests are comprehensively weighed against one another, taking into account the individual case in question (BVerfGE 120, 351 <365>). Should the practical effectiveness of such rights to information nevertheless remain limited, given the type of tasks being performed - as for example in the case of covert data processing for the protection against threats from international terrorism -, this is constitutionally acceptable (cf. BVerfGE 133, 277 <367 and 368 paras. 209 et seq.>). **[137]**

c) In light of Art. 19 sec. 4 GG, a proportionate design of surveillance measures further requires that following notification, the affected persons may obtain, in a reasonable manner, judicial review of legality (in this respect see also Arts. 51 and 52 of the Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, loc. cit.). **[138]**

Moreover, proportionate design requires effective sanctions for violations of rights. If serious violations of the conditions for interference were to ultimately remain without sanction, resulting in atrophy of the protection of the right to personality due to its intangible nature, this would be contradictory to the duty of the state to effectively protect the development of personality. This could in particular be the case if the unauthorised collection or use of data were to routinely remain without any counterbalancing satisfaction or compensation for the affected person, due to lack of material damage. In this regard, however, the legislature has wide legislative discretion (cf. BVerfGE 125, 260 <339 and 340>, with further references). **[139]**

d) Since with regard to covert surveillance measures, the transparency of data collection and data processing as well as the facilitation of the protection of the rights of individuals can be ensured only to a very limited degree, the guarantee of effective supervisory control is all the more significant. With regard to surveillance measures that constitute serious interferences with privacy, the principle of proportionality therefore places more rigorous demands on the effective design of this supervision both at the level of the law itself and in administrative practice (cf. BVerfGE 133, 277 <369 para. 214>). **[140]**

To begin with, the guarantee of effective supervisory control requires a body vested with effective powers, such as, under current law, the Federal Data Protection Commissioner (see, fundamentally, BVerfGE 65, 1 <46>). It also requires to fully document the data collection. Technical and organisational measures must ensure that the data is available to the Federal Data Protection Commissioner in such a way that it can be evaluated in a practicable manner, and that the documents include sufficient information to match it with the process being overseen (BVerfGE 133, 277 <370 para. 215>). Since supervisory control has the function of compensating for a weak protection of the rights of the individual, it is particularly important that it be carried out regularly. Such supervision must be performed at reasonable intervals, the duration of which must not exceed a certain maximum of approximately two years. This must

be taken into account with regard to the funding of the supervisory body (cf. BVerfGE 133, 277 <370 and 371 para. 217>). Guaranteeing compliance with the constitutional requirements for effective supervisory control is the joint responsibility of the legislature and the authorities (cf. BVerfGE 133, 277 <371 para. 218>). **[141]**

e) Finally, to guarantee transparency and oversight, a legal rule on reporting duties is also needed. **[142]**

Since covert surveillance measures occur largely unnoticed by persons concerned and the public, and since the obligation to notify or the right to information can only counteract this to a limited extent by offering the subsequent possibility of the protection of subjective rights, regular reports by the Federal Criminal Police Office to Parliament and to the public on the exercise of these powers must be required by law. These are necessary and must be sufficiently substantial in order to facilitate a public discussion on the nature and scope of data collected by means of these powers, including the handling of the obligations to notify or delete, and thus subject the data collection to democratic oversight and review (cf. BVerfGE 133, 277 <372 paras. 221 and 222>). **[143]**

7. The provision of deletion requirements also belongs to the overarching proportionality requirements (cf. BVerfGE 65, 1 <46>; 133, 277 <366 para. 206>; established case-law). The purpose of these is to ensure that the use of personal data remains limited to the purposes that justified the data processing, and that the use is no longer possible once these have been achieved or settled. The deletion of the data must be documented in order to ensure transparency and oversight. **[144]**

V.

In various respects, the challenged police surveillance measures do not satisfy the constitutional requirements set out above with regard to their respective conditions for interference. **[145]**

1. § 20g sec. 1 to 3 BKAG is only partially compatible with the Constitution. **[146]**

a) § 20g sec. 1 BKAG permits surveillance outside of private homes using the particular means of data collection defined in greater detail in § 20g sec. 2 BKAG. It thus authorises the Federal Criminal Police Office to interfere with the right to informational self-determination (Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG). **[147]**

The provision, however, does not authorise interferences with Art. 10 sec. 1 GG. In contrast to §§ 20l, 20m BKAG, the powers listed in § 20g BKAG do not permit measures that interfere with the secrecy of telecommunications; nor do they permit measures that interfere with the right to the guarantee of the confidentiality and integrity of information technology systems, such as the manipulation of such systems for observation purposes. The provision is not to be measured against Art. 13 sec. 1 GG either. It only authorises surveillance outside of private homes (cf. BTDrucks 16/9588, p. 23) and thus operates on the premise that the surveillance measures undertaken

pursuant to it will, as must be ensured by technical means if need be, end at the doorstep. The powers of § 20g sec. 4 BKAG that reach beyond this are not subject-matter of these proceedings. **[148]**

b) With regard to the weight of its interference, § 20g secs. 1 and 2 BKAG covers a wide spectrum, also encompassing serious interferences. **[149]**

The provision permits surveillance outside of private homes using the means listed in section 2. Among these, in particular, are surveillance for extended periods, the covert creation of visual records, the covert monitoring of non-public speech, the application of tracking devices, or the use of police informants and undercover investigators. **[150]**

The weight of interference of these measures can vary greatly. It extends from rather small to medium interferences, such as the taking of individual photographs or simple observation for a limited time, all the way to serious interferences such as the long-term on-going covert audio and visual recording of a person. Particularly when these measures are carried out together and thereby aim, with the help of modern technology, to register and audio-visually record as many utterances and movements as possible, they can constitute a particularly serious interference with privacy. **[151]**

Similarly to the prevention of other weighty violations of legal interests or to the prosecution of significant criminal offences, the public interest in the effective prevention of terrorism can justify such interferences (see above, C II 3 a), provided that they are designed in a proportionate manner. This is, however, only partially the case here. **[152]**

c) Deriving from general security law, the conditions for interference set out in in § 20g sec. 1 no. 1, sec. 2 BKAG are not objectionable. **[153]**

aa) The provision limits the surveillance measures to the protection of sufficiently weighty legal interests. **[154]**

Firstly, this applies insofar as it allows measures for the purpose of protecting the existence or the security of the state or the life, limb, or freedom of persons. In addition, the same applies to the extent that the provision allows measures aiming at the protection of property of substantial value the preservation of which is in the public interest. A reasonable interpretation of this will not include the preservation merely of significant material assets. Rather, in the regulatory context of the protection against terrorism, this will be taken to mean significant infrastructure facilities or other sites of direct importance for society (vgl. BVerfGE 133, 277 <365 para. 203>). **[155]**

Pursuant to § 20g sec. 1 no. 1 BKAG, the powers to interfere are also further restricted in that measures for the protection of the legal interests mentioned above are only permitted when these are threatened by one of the criminal offences listed in § 4a sec. 1 sentence 2 BKAG. This is evident in function provision of § 4a BKAG itself into which the powers of §§ 20a et seq. BKAG are integrated. The

powers to interfere are thus restricted to the protection against threats from international terrorism. Here, the legislature does not merely refer to the unspecific term "terrorism", nor to §129 StGB in general, but rather it specifies that the threat to legal interests must emanate from specific criminal offences that are individually defined and particularly qualified in § 129a StGB. The provision is thus restricted to the protection of particularly weighty legal interests against particularly threatening attacks. Leaving aside the question of where the constitutional limits generally lie in respect of such measures - for example, also in terms of the corresponding powers under the Police Acts of the *Laender* -, the proportionality requirements are met at any rate in the case at hand. **[156]**

In contrast, the reference in § 20g sec. 1 no. 1 BKAG to the legal definition of "threat" in § 20a sec. 2 BKAG cannot be understood to mean that § 20a sec. 2 BKAG overrides the limitation of the legal interests in § 20g sec. 1 no. 1 BKAG and assumes that any threat to public security arising in the context of criminal offences pursuant to § 4a sec. 1 sentence 2 BKAG is sufficient. § 20a sec. 2 BKAG does indeed specify the term "threat", as applying to all powers listed thereafter, and by highlighting the requirement that it must arise in an individual case. Yet, under a reasonable and constitutionally required interpretation, the function of this provision is not to override the specifically limited requirements pertaining to the protection of legal interests as they apply to individual powers. **[157]**

bb) § 20g sec. 1 no. 1 BKAG also requires sufficiently specified grounds for ordering the measures. The provision requires the presence of a threat. Pursuant to § 20g sec. 2 BKAG this is to be understood as an "existing threat in an individual case" and thus as "a specific threat" within the meaning of general security law. In light of the regular courts' jurisprudence shaping this term, there are no grounds for objections on the basis of specificity or proportionality considerations. **[158]**

cc) Furthermore, there are no constitutional objections to the fact that § 20g sec. 1 no. 1 BKAG determines the persons addressed by the measures by reference to §§ 17, 18 and 20 of the Act on the Federal Police (*Bundespolizeigesetz* - BPolG) and thus to principles of responsibility under police laws. The legislature is permitted to resort to the institutions of general security law. […] With regard to the powers of § 20g secs. 1 and 2 BKAG in question here, which neither interfere with Art. 10 sec. 1 GG, nor with the right to the guarantee of the confidentiality and integrity of information technology systems, nor with Art. 13 sec. 1 GG, there is also no objection to be made on the basis that surveillance pursuant to § 20 BPolG can also be ordered with regard to a person from whom the threat does not emanate, under the same conditions required for state of necessity duties. The provisions to this effect are narrowly defined and are to be interpreted strictly. […] **[159]**

dd) The means of surveillance defined in § 20g sec. 2 BKAG are also not too unspecific or disproportionate. However, these powers also include - irrespective of the different weight of the individual interferences - particularly serious

interferences, such as the possibility of long-term audio and visual recording of private conversations and situations, or the taking advantage of trust by undercover investigators and police informants. In order to protect against the particularly serious threats named in § 20g sec. 1 no. 1 BKAG, though, these serious interferences may also - in accordance with a test of proportionality carried out in the individual case - be constitutionally justified. **[160]**

The technologically open definition of the means of surveillance of § 20g sec. 2 nos. 2 and 3 BKAG does not meet with any objections either. The legislature is not obligated to limit the authorised means of surveillance to the technological state of the art at the point in time of the legislative process. As long as the type of surveillance that is permitted can be sufficiently made out, the legislature can provide that the authorisation shall also cover future technological developments. […] Furthermore, it falls upon the legislature to carefully observe technological developments and to take appropriate corrective action if the specific defining of openly phrased legal terms takes an undesirable turn (cf. BVerfGE 112, 304 <316 and 317>). **[161]**

d) § 20g sec. 1 no. 2 BKAG, however, is not compatible with the constitutional requirements. The conditions for interference neither satisfy the principle of specificity nor the principle of proportionality in the narrow sense. **[162]**

aa) § 20g sec. 1 no. 2 BKAG complements the basis for interference of § 20g sec. 1 no. 1 BKAG, which is limited to the protection against threats. It is intended by the legislature to set in earlier and serve to prevent criminal offences. **[163]**

According to the standards set out above, the legislature is not generally prevented nor constitutionally barred from limiting security measures to the protection against - according to established understanding - specific threats. However, even in respect of measures for preventing criminal offences, a prognosis is needed that is based on facts relating to a specific threat, rather than merely on general experience. In principle, this means that an occurrence that is specific at least with regard to its type, and temporally foreseeable, must be in evidence (cf. BVerfGE 110, 33 <56 and 57, 61>; 113, 348 <377 and 378>; 120, 274 <328 and 329>; 125, 260 <330>). In respect of terrorist offences, the legislature can alternatively also apply the standard of whether the individual behaviour of a person substantiates the specific probability that the person will commit a terrorist offence in the near future (see above, C IV 1 b). The requirements to this effect must be set out with legal clarity. **[164]**

bb) § 20g sec. 1 no. 2 BKAG does not satisfy these standards. The provision does indeed require the possible commission of a terrorist offence. Yet the prognosis requirements to this effect are not sufficiently substantive. The provision does not preclude the possibility that the prognosis is solely based on general experience. It neither contains the requirement that an occurrence that is specific at least with regard to its type and temporally foreseeable must be in evidence, nor the alternative that the individual behaviour of a person must substantiate the specific

probability that the person will commit a terrorist offence in the near future. Thus, the provision does not give the authorities and the courts sufficiently specific criteria to work with and provides for measures that can be disproportionately broad. **[165]**

e) If interpreted in conformity with the Constitution, there can, in contrast, be no constitutional objection to § 20g sec. 1 no. 3 in conjunction with § 20b sec. 2 no. 2 BK- AG. **[166]**

§ 20g sec. 1 no. 3 BKAG also allows measures affecting contacts or accompanying persons. The term "contacts or accompanying persons" is defined in greater detail in § 20b sec. 2 no. 2 BKAG and is to be understood, when construed appropriately, as an umbrella term solely for the groups of persons designated in it. **[167]**

With this proviso, § 20g sec. 1 no. 3 BKAG is constitutionally sound. The legislature does not indiscriminately open up the possibility of carrying out surveillance of all persons in the target person's sphere, in order to - based merely on the fact that there has been contact with that person - then find out whether this will uncover evidentiary bases for further investigations. Rather, for the ordering of measures targeting third parties, the provision requires that they have a particular proximity to the offence defined in greater detail in § 20b sec. 2 no. 2 BKAG. […] **[168]**

There are also no objections to be raised with regard to the individual criteria set out in § 20b sec. 2 no. 2 a to c BKAG. Certainly, for constitutional reasons, the criteria cannot be understood as being limitlessly broad so as to include persons who had economic relations with the target person long before any criminal offence. Rather, § 20b sec. 2 no. 2 b BKAG limits the obtained benefits to the exploitation of the offence and thus to the fruit that stems from its unjust nature, while § 20b sec. 2 no. 2 c BKAG also requires that the instrumentalisation of the person concerned must be closely connected to the offence itself. If these conditions are fulfilled, the relevant orders are constitutionally justified. This is not altered by the fact that these measures can thus also target third parties acting in good faith who are not responsible for any threat. While this does constitute a particularly serious interference, it is a constitutionally justified means in the context of exceptionally significant public interests, similar to obligations of witnesses or duties in a state of necessity. **[169]**

f) As far as the principle of proportionality is concerned, the procedural requirements of § 20g sec. 3 BKAG are not sound in all respects. **[170]**

aa) It is not objectionable that the surveillance measures under this provision, each of which may be ordered for a reasonably limited period of time only, can be extended without this being subject to any maximum limit. The legislature could assume that a specific risk situation, as is required for the ordering or extension of the measures, generally does not last over a long period of time, so that there is, generally, no risk that this will lead to disproportionate on-going surveillance. Furthermore, a limit can be imposed, based on the principle of proportionality in individual cases even if no maximum limit is expressly set down, since the longer

the surveillance measures, the more intensive the interference with the general right of personality, which may render a further renewal constitutionally unjustifiable (cf. BVerfGE 109, 279 <362>). **[171]**

bb) With regard to proportionality aspects, however, the rule on the requirement of a judicial order in § 20g sec. 3 BKAG is insufficient. **[172]**

§ 20g sec. 3 BKAG requires a direct judicial order for the initial ordering of a measure only if undercover investigators are to be employed (cf. § 20g sec. 3 sentence 1 BKAG). In other cases, it permits an initial order directly from the Federal Criminal Police Office itself and requires a judicial decision only for a potential extension (§ 20g sec. 3 sentence 8 BKAG). This applies, on the one hand, with respect to the monitoring and recording of non-public speech and the use of police informants or undercover investigators (§ 20g sec. 2 nos. 2 b, 4 and 5 BKAG), as well as, on the other hand, long-term observation (§ 20g sec. 2 no. 1 BKAG), which also includes those cases in which it is carried out by means of visual recordings or the use of technical means such as tracking devices (cf. § 20g sec. 2 nos. 2 a and 3 BKAG). **[173]**

This provision only partially satisfies the constitutional requirements. It is, however, not objectionable that image recording as well as merely short-term observations - even using visual recording or technical means such as tracking devices - are not subject to a judicial order. Should the surveillance measures remain limited in this manner, then the weight of their interference is not so significant as to constitutionally require a judicial order (cf. stricter with regard to observation by means of a GPS tracker, Supreme Court of the United States, United States v. Jones, 132 S. Ct. 945 [2012]; on the surveillance of a suspect by means of GPS, more reserved on the other hand, ECtHR, Uzun v. Germany, judgment of 2 September 2010, no. 35623/05, para. 70, NJW 2011, p. 1333 <1336 and 1337>, on Art. 8 ECHR). In contrast, an independent review is constitutionally indispensable if observations within the meaning of § 20g sec. 3 no. 1 BKAG are to be carried out over a longer period of time - particularly when this involves visual recording or the use of particular technical means such as tracking devices -, if non-public speech is to be monitored or if police informants are to be used. These measures constitute such a serious interference with privacy that their ordering must be reserved for an independent body, such as a court. In this respect, it is not sufficient to permit the security authority to initially order the measures itself but to provide for the disciplinary effect of a judicial decision - possibly on the basis of the information thus obtained - only at the renewal stage. To the extent that it is provided that the initial ordering of these measures may occur without a judicial decision, the procedural design of § 20g BKAG is not proportionate. **[174]**

g) § 20g BKAG is also insufficient with regard to the constitutional requirements insofar as it does not provide for any protection of the core area of private life. **[175]**

§ 20g BKAG authorises surveillance measures of varying quality and proximity to privacy. By also permitting long-term visual recording and long-term monitoring and recording of non-public speech, the provision authorises surveillance measures that typically constitute a serious interference with privacy. These measures all involve surveillance taking place outside of private homes. Yet this does not mean that - be it in the car, be it sitting separately in a restaurant, be it secluded on a stroll - highly confidential situations belonging to the core area of private life are not likely to be recorded […]. **[176]**

With regard to certain powers, the provision thus has a proximity to the core area that makes an express legal provision for the protection of the core area of private life necessary. The legislature must, in a clear manner, provide for protective provisions both with regard to data collection as well as with regard to data analysis and use (see above, C IV 3 c bb, d). Such provisions are lacking, so that § 20g secs. 1 and 2 BKAG are not compatible with the Constitution in that respect either. **[177]**

2. § 20h BKAG, too, only partially satisfies constitutional requirements. **[178]**

a) § 20h BKAG permits audio and visual surveillance in private homes. It thus constitutes an interference with Art. 13 sec. 1 GG. **[179]**

With the power to conduct surveillance within private homes, the provision authorises interferences with fundamental rights that are particularly serious. It permits the state to penetrate into spaces that are a person's private refuge and that are closely linked to human dignity (cf. BVerfGE 109, 279 <313 and 314>). This does not, as implied by Art. 13 secs. 3 and 4 GG, rule out surveillance measures. The protection against threats from international terrorism may justify such measures (see above, C II 3 a). These are, however, subject to particularly strict requirements, which § 20h BKAG does not fulfil in every respect. **[180]**

b) § 20h secs. 1 and 2 BKAG is not constitutionally objectionable insofar as it - comprehensively, with regard to all persons potentially addressed - governs the general conditions for the surveillance of private homes. **[181]**

aa) The provision does satisfy constitutional requirements insofar as it limits measures to the protection of particularly weighty legal interests, and at the same time requires the presence of imminent danger, and defines the persons addressed by it as those responsible for particular actions or circumstances. **[182]**

[…] **[183]**

bb) In accordance with Art. 13 sec. 4 GG, the provision also requires the presence of imminent danger. For this, both the extent as well as the probability of the damage to be expected must be considered (cf. BVerfGE 130, 1 <32>). Strict requirements, going beyond those needed in relation to a specific threat, must be laid down with regard to the presence of imminent danger (cf. BVerwGE 47, 31 <40>; Decisions of the Federal Court of Justice in Criminal Matters - *Entscheidungen des Bundesgerichtshofs in Strafsachen* - BGHSt 54, 69 <83 and 84>).

From a proportionality perspective, this does ensure sufficiently specific grounds for carrying out such measures (see above, C IV 1 b). **[184]**

cc) The provision is also not disproportionate for permitting audio as well as visual surveillance of private homes. The fact that the Constitution does not already fundamentally rule out visual surveillance of private homes for interferences serving to protect against threats pursuant to Art. 13 sec. 4 GG can be deduced *a contrario* from Art. 13 sec. 3 GG. However, interference combining audio and visual surveillance carries substantially more weight than, for example, audio surveillance only, and requires special justification. Accordingly, when ordering these measures, the suitability, necessity and appropriateness requirements for each form of surveillance must be examined individually, as well as with a view to their combination with one another, where applicable. It will normally not be sufficient for the additional ordering of visual surveillance to cite merely the increased ease at matching voices; rather, more significant grounds relevant to the success of the surveillance are needed. In the context of applying the law, these requirements can and must be taken into consideration. § 20h sec. 1 nos. 1 and 2 BKAG, which lays down audio and visual surveillance of private homes as separate surveillance measures which must therefore be examined separately, provides a sufficient basis for this. **[185]**

c) The definition of the persons potentially addressed by the surveillance measures, however, is partially disproportionate and incompatible with the Constitution. **[186]**

aa) There is nothing to object to with regard to § 20h sec. 1 no. 1 a BKAG, which provides for the authorisation to order the surveillance of private homes targeting persons responsible within the meaning of §§ 17, 18 BPolG (see above C IV 1 c). **[187]**

There is also no cause for objection in that § 20g sec. 2 BKAG thereby permits the surveillance of such persons not only in their own home but also in the home of third parties, if the target persons are present and measures in the home of the target person alone would not lead to protection against the danger. However, the Federal Constitutional Court has formulated restrictive standards of interpretation with regard to such surveillance measures in the homes of third parties […] (cf. BVerfGE 109, 279 <356 and 357>). **[188]**

bb) § 20h sec. 1 no. 1 b BKAG, which permits the surveillance of private homes with respect to persons whose involvement in specific preparations justify the assumption of the commission of terrorist offences, is constitutionally sound. **[189]**

Unlike § 20g sec. 1 no. 2 BKAG, the provision does not create separate grounds for interference applying particularly far ahead of the time of the danger. Instead, it requires - in accordance with Art. 13 sec. 4 GG - imminent danger to qualified legal interests for whose protection the surveillance must be necessary. Moreover, the class of persons addressed by these measures is sufficiently limited: By requiring knowledge of specific preparations of - more narrowly qualified - terrorist

offences, the provision stipulates the existence of an occurrence that is specific with regard to its type and temporally foreseeable. In doing so, it provides a basis for carrying out such measures that satisfies the constitutional requirements (see above, C IV 1 b). **[190]**

cc) The authorisation of the surveillance of private homes with regard to contacts or accompanying persons (§ 20h sec. 1 no. 1 c BKAG), however, is incompatible with Art. 13 secs. 1 and 4 GG. It is disproportionate. **[191]**

The surveillance of private homes is a particularly serious interference with privacy. By its nature, it has a more serious impact than surveillance measures outside of private homes or than telecommunications surveillance. The weight of its interference is paralleled only by interferences with information technology systems. For this reason, the appropriateness of such a measure can only be ensured if it is restricted from the outset to exclusively capturing conversations of the target person responsible for the threat (cf. BVerfGE 109, 279 <355>). Directly extending these measures to third parties is disproportionate and is to be ruled out with regard to such a serious interference (see above C IV 1 c). **[192]**

This does not affect the fact that it is permissible for the surveillance of the private home of the target person to also include non-involved third parties so long as this is inevitable (cf. § 20h sec. 2 sentence 3 BKAG). It is even permissible, as explained, to carry out surveillance of the private homes of third parties in order to carry out surveillance of the target person. **[193]**

d) There is no constitutional objection to be raised with regard to the surveillance of private homes in terms of its procedural design. In particular, it is to be ordered by a judge. The fact that the Act thereby requires an indication of the "material grounds" (§ 20h sec. 4 no. 4 BKAG) - as required in the other corresponding provisions of the Act, too (cf. § 20k sec. 6 no. 4 BKAG) - does not constitute a revocation of the constitutional duty to review and the duty to justify (cf. BVerfGE 109, 279 <359 and 360>), but rather emphasises that all legally relevant aspects must be substantiated in a sound manner. **[194]**

It is also constitutionally unobjectionable that there is no maximum limit for the number of times the order for the surveillance of private homes can be extended, since a temporal limit can, if needed in an individual case, arise on the basis of proportionality considerations (cf. BVerfGE 109, 279 <362>). **[195]**

e) The provisions on the protection of the core area of private life in § 20h sec. 5 BKAG are not constitutionally sufficient. They do not satisfy the requirements of Art. 13 sec. 1 in conjunction with Art. 1 sec. 1 GG. **[196]**

aa) Since the surveillance of private homes is a particularly serious interference with privacy and an intrusion into individuals' personal refuges which are particularly important for safeguarding human dignity, the related requirements for the protection of the core area are particularly strict (BVerfGE 109, 279 <313 et seq., 318 et seq., 328 et seq.>). **[197]**

(1) Firstly, particular requirements apply at the level of the collection of data. When weighing whether there is a probability that highly private situations will be recorded, presumptions shall apply in the interest of an effective protection of the core area (cf. BVerfGE 109, 279 <320>). Accordingly, conversations taking place in private spaces with persons enjoying the highest level of personal trust (see above, C IV 3 a) are presumed to fall within the core area of private life and cannot be subject to surveillance (cf. BVerfGE 109, 279 <321 ff.>). An automatic on-going surveillance of spaces in which such conversations are to be expected must thus be ruled out (cf. BVerfGE 109, 279 <324>). This presumption can be refuted when specific indications suggest that certain conversations are, within the meaning of the standards set out above, directly related to a criminal offence - a relation that exists even when the conversations are mixed with highly personal content, or if their overall character will not be highly confidential. The mere prognosis, however, that highly confidential and everyday matters will be combined in a conversation is not sufficient (cf. BVerfGE 109, 279 <330>, see above, C IV 3 a, d). **[198]**

If, considering the above, there is a probability that a surveillance measure will interfere with the core area of private life, the measure may not be carried out. If - also taking into account rules of presumption - there are no indications that there will be an intrusion into the core area of private life, the measures may be carried out. However, should highly confidential situations nevertheless be recorded, the measures must be discontinued immediately (cf. BVerfGE 109, 279 <320, 323 and 324>). If there are doubts - for linguistic reasons, for example - as to the highly confidential nature of a situation, or specific reasons to believe that together with the exchange of highly private thoughts criminal offences are also being discussed, then the surveillance may be continued in the form of automatic recording. **[199]**

(2) Specific constitutional requirements also arise at the level of data analysis and data use. It must be provided that the results of the surveillance will be screened by an independent body. This screening serves both as a review of legality as well as a filtering out of highly confidential data, so that - as far as possible - it is not disclosed to the security authorities. The independent body is to be provided with all the data resulting from the surveillance of private homes (cf. BVerfGE 109, 279 <333 and 334>; differently Chamber Decisions of the Federal Constitutional Court - *Kammerentscheidungen des Bundesverfassungsgerichts* - BVerfGK 11, 164 <178>). **[200]**

In the case that, despite all safeguards, information relevant to the core area is collected, both a prohibition of its use, as well as a deletion requirement, including the documentation of the deletion, must be put in place (see above, C IV 3 c bb, d, 7). **[201]**

bb) On this basis, § 20h sec. 5 BKAG satisfies the constitutional requirements at the data collection level, but not at the level of its use. **[202]**

(1) For the surveillance of private homes, § 20h sec. 5 sentences 1, 2, 3 and 5 BKAG requires an examination of whether information from the core area will be collected. By allowing surveillance only under the presumption, based on a prognosis, that any expression that is to be attributed to the core area of private life may not be collected and that the measures will be stopped if, contrary to the prognosis, the surveillance of private homes provides reasons to believe that highly private information is being collected, the provision satisfies constitutional requirements. This also applies to the authorisation to record automatically pursuant to sentence 3, which does not set aside the legality requirements of sentence 1, but rather ties in with the interruption of monitoring and observation of individual persons required by sentence 2. Where § 20h sec. 5 sentence 1 BKAG protects "expressions" relevant to the core area, this also includes, when construed appropriately, visual recordings of equivalent situations. **[203]**

(2) At the level of data use, however, the approach with regard to the protection of the core area does not satisfy the constitutional requirements in every respect. The Act provides for a screening of the recordings by a court, yet it limits this screening to automatic recordings in respect of which doubts have arisen (§ 20h sec. 5 sentence 4 BKAG). Insofar, the legislature is clearly guided by the consideration that further independent screening is not necessary, because the collection of highly personal information is ruled out at the collection level by § 20h sec. 5 sentences 1 and 2 when the Act is properly applied. This does not, however, justify such a limit to the independent screening of recordings from the surveillance of private homes. For the aim of such screening is not solely filtering cases of doubt but also to guarantee an independent review with regard to the requirements that serve to protect the core area in general. The courts' only limited power to review pursuant to § 20h sec. 5 sentence 4 BKAG, however, does not guarantee this.. Indeed, the Basic Law gives the legislature sufficient leeway to provide for special rules applicable exceptional cases in case of immediate danger when designing the review powers. **[204]**

In accordance with the constitutional requirements, for highly personal data that is nevertheless collected, the legislature has indeed provided for a prohibition of use and its immediate deletion, as well as a documentation of the deletion. What is unconstitutional, however, is the very short period of time in § 20h sec. 5 sentence 10 BKAG during which the deletion logs are to be deleted. This period is so brief that during the storage period of the deletion logs typically neither a review by the Federal Data Protection Commissioner nor by the party concerned is likely to occur and the documentation of the deletion thus becomes meaningless (cf. Bäcker, loc. cit., p. 88; cf. in this respect also BVerfGE 100, 313 <400>; 109, 279 <332

and 333>). Since the deletion logs themselves do not contain any data that might incriminate the person concerned, this brief period in particular cannot be justified on the grounds that it serves to protect this person. **[205]**

3. The conditions set out for electronic profile searching pursuant to § 20j BKAG are constitutionally unobjectionable. **[206]**

The provision provides the basis for an interference with the right to informational self-determination. Yet the conditions for interference are sufficiently specific and proportionate in their design, so that the interference is justified. In particular, electronic profile searching is permitted for the protection of sufficiently weighty legal interests (see above, C V 1 c aa) and requires a specific threat pursuant to § 20j sec. 1 sentence 1 in conjunction with § 20a sec. 2 BKAG. There can be no constitutional objection either to the example in the second half of § 20j sec. 1 sentence 1 BKAG, in which the legislature specifies the required risk situation exemplarily. The relevant requirements (cf. BVerfGE 115, 320 <363 et seq.>) remain unaffected by this. The provision is also proportionately designed in procedural respects; in particular, it requires a judicial order. **[207]**

4. § 20k BKAG, if interpreted in conformity with the Constitution, is constitutional with regard to the general conditions for interference. However, the rules with regard to the protection of the core area of private life do not satisfy the constitutional requirements. **[208]**

a) § 20k sec. 1 BKAG authorises access to information technology systems and permits covert remote searches of information technology systems, by means of which data saved or stored on the affected person's private computer or other computers linked thereto (for example in "the cloud") can be collected and the person's online behaviour can be tracked. The provision thus permits interference with the fundamental right to the guarantee of the confidentiality and integrity of information technology systems (Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG). **[209]**

With this stand-alone manifestation of the general right of personality, the Constitution takes account of the significance of the use of information technology systems, which nowadays reaches deep into privacy, for the development of personality (cf. BVerfGE 120, 274 <302 et seq.>). Today, diary-like written expressions, intimate statements, or other written manifestations of highly personal experience, film or audio recordings are increasingly generated, saved and in part exchanged in electronic form. A large part of highly personal communication takes place electronically by means of communications services over the internet or in the context of internet-based social networks. This data, whose confidentiality the persons concerned depend upon and trust in, is largely no longer to be found on personal information technology systems alone but rather on that of third parties. The fundamental right to the guarantee of the confidentiality and integrity of information technology systems therefore protects against covert access to this data, and thus in particular against remote searches whereby private computers as well as other information technology systems are manipulated and read, and whereby personal data stored on external servers with a reasonable expectation of confidentiality is accessed and movements on the web of the persons concerned are tracked. Given the often highly personal nature of this data, which arises in particular when it is taken

as a whole, this constitutes a particularly intense interference with this fundamental right. Its weight is commensurable with that of an interference with the inviolability of the home. **[210]**

b) The requirements of § 20k secs. 1 and 2 BKAG with regard to access to information technology systems, when interpreted in conformity with the Constitution, satisfy the constitutional requirements. **[211]**

aa) Interferences with the right to the guarantee of the confidentiality and integrity of information technology systems, however, are subject to strict conditions (cf. BVerfGE 120, 274 <322 et seq., 326 et seq.>). Specifically, the measures must be contingent on factual indications that a specific impending danger to an exceptionally significant legal interest is present in the individual case. § 20k sec. 1 BKAG satisfies this requirement. […] **[212]**

§ 20k sec. 1 sentence 2 BKAG, however, must be subject to a restrictive interpretation in conformity with the Constitution. The possibility presented in this provision of carrying out measures in advance of a specific danger if certain facts indicate that, in an individual case, an impending danger of a terrorist offence is present is to be interpreted in such a way that such measures are only permitted if the facts indicate an occurrence that is specific at least with regard to its type and that is temporally foreseeable, and if it is clear that specific persons will be involved and their identity is sufficiently determined for surveillance measures to be carried out with respect to and largely limited to them (BVerfGE 120, 274 <329>). It is also sufficient if an occurrence is not specific at least with regard to its type and not temporally foreseeable yet the individual behaviour of the person concerned substantiates the specific probability that the person will commit such offences in the near future (see above, C IV 1 b). **[213]**

Since § 20k sec. 1 sentence 2 BKAG is drafted in accordance with the case-law of the Federal Constitutional Court (BVerfGE 120, 274 <329>), it can be presumed that the legislature intended to refer to it. The provision can thus still be interpreted in a manner that is compatible with the Constitution. **[214]**

bb) Furthermore, in respect of the substantive conditions for interference, the provision satisfies the principle of proportionality. In particular, § 20k sec. 2 BKAG provides that changes to the information technology system caused by the access must be minimised, the use of the access by third parties must be prevented, and at termination it must be reversed to the greatest extent possible (cf. in this respect BVerfGE 120, 274 <325 and 326>). The fact that consequential damage cannot be ruled out entirely does not render the measure disproportionate from the outset. Respect for the principle of proportionality in individual cases also means that open access to a target person's data sets must generally be given priority over covert infiltration. **[215]**

c) Moreover, there are no objections to the procedural design of the provision (cf. § 20k secs. 5 and 6 BKAG). A measure may only be ordered by a judge and the order

requires substantive reasoning (cf. BVerfGE 120, 274 <331 et seq.>; see above, C IV 2). The measure can be ordered for a long period of up to three months. This is constitutionally sound only on condition that this be a maximum time limit for each order and the actual duration of the order be determined by a test of proportionality in the individual case. **[216]**

d) The provisions for the protection of the core area of private life, however, do not satisfy the constitutional requirements in every respect. **[217]**

aa) Given that covert access to information technology systems typically carries with it the risk of the collection of highly confidential data, and thus is in particular proximity to the core area, it requires express legislative safeguards for the protection of the core area of private life (cf. BVerfGE 120, 274 <335 et seq.>). The relevant requirements are not identical in every respect to those that apply to the surveillance of private homes, and shift the protection away from the collection level to the subsequent analysis and use level (cf. BVerfGE 120, 274 <337>). The reason for this lies in the specific nature of access to information technology systems. Here, protective measures to prevent violations of the core area do not aim primarily at preventing the collection and recording of a fleeting, highly confidential moment in a private space, but rather at preventing the reading of highly confidential information within a comprehensive data set of digital information that already exists, and that, taken as a whole, is typically not of a private nature the way behaviour or communication in a home would be. Here, the surveillance does not take place in the form of a chronologically ordered occurrence in different locations, but rather as access by means of a spy program which, as far as the access is concerned, presents only the alternatives of all or nothing. **[218]**

The requirements for the protection of the core area have thus to a certain extent been cut back. However, even here, it must be provided that the collection of information that can be considered to belong to the core area does not take place to the extent that this is possible from a technical and investigative standpoint. Available information technology safeguards in particular are to be used; if these can detect and isolate highly confidential information, access thereto is prohibited (cf. BVerfGE 120, 274 <338>). **[219]**

If, however, data relevant to the core area cannot be filtered out before or at the time of the data collection, access to the information technology system is nevertheless permissible even if it is probable that highly personal data too might incidentally be collected. In this respect, the legislature must take into account the need for protection of the person concerned by putting in place safeguards at the levels of analysis and use, and by minimising the effects of such access. Decisive significance attaches to the screening by an independent body that filters out information relevant to the core area prior to its availability to and use by the Federal Criminal Police Office (cf. BVerfGE 120, 274 <338 and 339>). **[220]**

bb) § 20k sec. 7 BKAG only partially satisfies these requirements. **[221]**

(1) The requirements applicable at the level of data collection, however, are unobjectionable if interpreted in conformity with the Constitution. The second sentence of the provision, in conformity with the aforementioned requirements, provides that all technically available means must be used to prevent the collection of information relevant to the core area. Furthermore, the provision prohibits access to information technology systems solely in cases where "only" information from the core area of private life is collected. According to the standards presented above, this is constitutionally sound. For constitutional reasons, the provision, however, must be interpreted in such a manner that communication on highly confidential matters is not excluded from the strict protection of the core area merely because it combines highly confidential with everyday matters (cf. BVerfGE 109, 279 <330>). In this respect, the provision is to be interpreted and applied in conformity with the constitutional requirements for the protection of the core area of private life and in light of the relevant understanding of the concept (see above, C IV 3 a, d). **[222]**

(2) In contrast, the measures in question lack constitutionally sufficient safeguards at the level of a subsequent protection of the core area. § 20k sec. 7, sentences 3 and 4 BKAG do not provide for sufficiently independent review. **[223]**

The constitutionally required screening by an independent body serves not only as a review of legality, but also significantly as a way of filtering out data relevant to the core area of private life so that, where possible, it remains undisclosed to the security authorities. This presupposes that the review is largely conducted by external persons not charged with security tasks. This does not rule out the involvement of an employee of the Federal Criminal Police Office - subject to a separate duty of confidentiality - in order to ensure expertise in a specific investigative matter. Moreover, in a similar manner, the Federal Criminal Police Office can offer technical support - including, for example, for language mediation purposes - for the screening. Yet the actual carrying out and decision-making responsibility must remain in the hands of persons who are independent with regard to the Federal Criminal Police Office. **[224]**

This is not ensured by the current statutory approach. It largely entrusts the Federal Criminal Police Office itself with the screening. The fact that one of the employees, such as the Federal Data Protection Commissioner within this specific public authority, is not subject to instruction does not mitigate this issue; nor does subjecting the screening to the general "expert oversight" of the ordering court. **[225]**

By contrast, § 20k sec. 7 sentences 5 to 7 BKAG ensures further safeguards at the level of use for an effective protection of the core area in a

constitutionally sound manner. What is unconstitutional here too, however, is the very short period of time in § 20k sec. 7 sentence 8 BKAG, during which the deletion logs must be retained (see above, C IV 3 d). **[226]**

5. § 20l BKAG is only partially compatible with the Constitution. **[227]**

a) § 20l BKAG governs telecommunications surveillance and thus provides a basis for interferences with Art. 10 sec. 1 GG. In that respect, Art. 10 sec. 1 GG is not only the relevant standard with regard to § 20l sec. 1 BKAG, which governs the conventional surveillance of telecommunications, but also with regard to § 20l sec. 2 BKAG, which allows telecommunications surveillance at the source insofar as technical measures ensure that the surveillance only covers on-going telecommunications. While this technically requires having access to the respective information technology system, § 20l sec. 2 BKAG only allows those surveillance measures that are limited to on-going telecommunications processes. Thus, the purpose of the provision is merely to track the technological developments in information technology and to allow - without accessing further content-related information provided by the information technology system - telecommunications surveillance also in those cases in which it is no longer possible by means of the old surveillance technology. As a result, this measure must not be evaluated in the light of the fundamental right to the guarantee of the confidentiality and integrity of information technology systems but rather with a view to the standards set out in Art. 10 sec. 1 GG (cf. BVerfGE 120, 274 <309>). **[228]**

Telecommunications surveillance entails interferences that are serious (cf. BVerfGE 113, 348 <382>; 129, 208 <240>). However, they are justified for the purpose of protecting against threats from international terrorism (see above, C II 3 a) insofar as the grounds for the interference are proportionately restricted in the individual case. § 20l BKAG, however, only partially ensures that this is the case. **[229]**

b) § 20l sec. 1 nos. 1 to 4 BKAG provides different grounds for interferences with regard to different addressees. Not all of them satisfy the constitutional requirements. **[230]**

The authorisation to carry out surveillance measures against those persons deemed to be responsible under police laws pursuant to § 20l sec. 1 no. 1 BKAG does not raise constitutional concerns as it in fact also aims to protect qualified legal interests and has the sole purpose of providing protection against imminent dangers. **[231]**

However, in contrast, the not specifically limited extension of telecommunications surveillance under § 20l sec. 1 no. 2 BKAG to also cover persons regarding whom certain facts justify the assumption that they are preparing terrorist crimes is not compatible with the Constitution. The provision, which shifts interference powers beyond the prevention of a specific threat to an earlier stage with the aim of preventing criminal offences, violates, given its ill-defined open phrasing, the principle of legal certainty and is disproportionately broad. In this respect, the same considerations as developed with regard to § 20g sec. 1 no. 2 BKAG (see above, C V 1 d) apply here, too. The marginally different formulations of the two provisions do not imply any difference in substance. This is also clarified by the Act's explanatory memorandum that

partially paraphrases the content of § 20l sec. 1 no. 2 BKAG by using those words that were also used by the legislature in § 20g sec. 1 no. 2 BKAG (cf. BTDrucks 16/10121, p. 31). The same applies insofar as § 20l sec. 2 BKAG contains a reference to that provision. **[232]**

In contrast, the possibility of extending telecommunications surveillance to also cover messengers pursuant to § 20l sec. 1 nos. 3 and 4 BKAG is, when interpreted in conformity with the Constitution, compatible with Art. 10 sec. 1 GG. The provision, formulated closely in line with § 100a sec. 3 Code of Criminal Procedure (*Strafprozessordnung* - StPO), is sufficiently open to interpretation and satisfies the requirements of the principle of legal certainty. Like the rules on contacts and accompanying persons set out in § 20b sec. 2 no. 2 BKAG, this provision does not allow indiscriminately extending surveillance measures to all persons that have exchanged messages with the target person, but rather requires that there be specific grounds - that are to be set forth in the order accordingly - indicating that the target person is involving the messenger in the realisation of a criminal offence and that the latter is thus particularly closely linked to a crime or threat. **[233]**

c) The additional further conditions under which § 20l sec. 2 BKAG allows, subsidiarily, telecommunications surveillance at the source do not raise effective constitutional concerns. […] **[234]**

d) Procedurally, and in accordance with the constitutional requirements, § 20l sec. 3 BKAG sets out the requirement of a judicial order (cf. BVerfGE 125, 260 <337 and 338>). However, it lacks a statutory rule that stipulates - as required under constitutional law (see above, C IV 2) - that the order for telecommunications surveillance informs of the grounds for this measure. This cannot be overcome by means of an interpretation in conformity with the Constitution. In light of the fact that the Act expressly sets out obligations to provide explanatory statements in other provisions (cf. § 20g sec. 3 sentence 6, § 20h sec. 4, § 20k sec. 6 BKAG), an interpretation here in the sense that the absence of a rule requiring that the reasons be communicated is based on an intentional decision to that end cannot be ruled out with sufficient certainty. **[235]**

e) The provisions on the protection of the core area of private life pursuant to § 20l Abs. 6 BKAG are for the most part compatible with the Constitution. **[236]**

aa) Telecommunications surveillance constitutes a serious interference that is in particularly close proximity to the core area. As a form of content-related surveillance of all kinds of telecommunications-based exchanges, it typically entails the risk of also collecting highly private communication that is subject to the protection of the core area of private life. Insofar, special legislative protective precautions are needed (cf. BVerfGE 113, 348 <390 and 391>; 129, 208 <245>). **[237]**

However, telecommunications surveillance is, considering its overall character, not defined by an intrusion into privacy to the same extent as the surveillance of private homes or remote searches might be (cf. BVerfGE 113, 348 <391>). It

covers any kind of communication in any situation, as long as it is transmitted by technical means. Highly confidential communication is indeed one small component that is under threat of being covered by the surveillance measures, too; however, it is not - unlike in the case of the surveillance of a person's private refuge in a private home - a distinctive feature. In that respect, it is also different from remote searches. […] Its proximity to the core area of private life lies mainly in the fact that it also covers highly personal communication between highly trusted persons (cf. BVerfGE 129, 208 <247>). **[238]**

The legislature can take this into account by stipulating less stringent requirements for the protection of the core area. However, this too requires an assessment - to be taken at the collection stage - as to whether it is likely that highly private conversa- tions will be covered, the surveillance of which must thus be prohibited if necessary. Provided such conversations cannot be identified with sufficient probability, the surveillance measure may be carried out - and, in accordance with a proportionality test, also by means of automatic on-going surveillance in the individual case (cf. BVerfGE 113, 348 <391 and 392>; 129, 208 <245>). **[239]**

As far as the protection of the core area at a subsequent level is concerned, prohibitions regarding the use of inadmissible evidence and data deletion requirements, including documentation requirements to this effect, must be provided for, while screening by an independent body is not always necessary (cf. BVerfGE 129, 208 <249>). Regarding telecommunications surveillance, the legislature can in fact determine that such screening is conditional upon whether and to what extent it is likely that the surveillance measure will also encompass highly private information. In that respect, there is an interrelation with the precautionary measures taken at the data collection level. **[240]**

To that end, the legislature is given considerable leeway to design. […] **[241]**

bb) § 20l sec. 6 BKAG satisfies these requirements for the most part. **[242]**

(1) Substantively, § 20l sec. 6 sentence 1 BKAG stipulates that an assessment with regard to the protection of the core area must be carried out before implementing telecommunications surveillance measures and that such measures may not be taken if there are factual indications suggesting that the measure will only generate insights from the core area of private life. Given that this provision is also subject to a constitutional understanding according to which conversations with highly trusted persons are not already removed from the strict scope of protection if these conversations combine highly personal with everyday matters (cf. BVerfGE 109, 279 <330>), this is not objectionable. In accordance with the Constitution, the Act also stipulates that the measure be discontinued if the surveying persons gain direct knowledge of highly confidential conversations; furthermore, if doubts arise, the Act limits the surveillance measure to automatic recordings, § 20l sec. 6 sentences 2 and 3 BKAG. **[243]**

However, beyond that, the Act also allows automatic recording measures in general, i.e. even in those cases in which such measures might also encompass, in addition to other conversations, conversations that are of relevance with regard to the core area (cf. first half of § 20l sec. 6 sentence 2 BKAG). As far telecommunications surveillance is concerned, this is, nonetheless, still constitutionally acceptable. In that respect, the more stringent requirements applying to the surveillance of private homes (cf. BVerfGE 109, 279 <324>), which are, given their nature, more closely linked to the core area, are not applicable here. Nonetheless, an order to carry out such automatic recording is subject to a strict proportionality test assessing the measure's temporal and factual scope in the individual case. Also, the fact that this provision accepts that measures might cover highly personal information requires effective protective precautions at the level of the analysis and use of the data. **[244]**

(2) Also in this respect, the provision meets the constitutional requirements for the most part. The provision not only provides for the required prohibitions regarding the use of inadmissible evidence and data deletion requirements, but, regarding automatic recordings, also requires prior screening by a court. The fact that this review is limited to automatic recordings and thus to covering cases of doubt does not raise constitutional concerns. Unlike in case of the surveillance of private homes, the independent screening of telecommunications surveillance may be limited to cases of doubt. **[245]**

In contrast, however, the safekeeping period for the deletion protocols set out in § 20l sec. 6 sentence 10 BKAG is too short and thus unconstitutional (see above, C IV 3 d). **[246]**

6. Insofar as it corresponds to § 20l BKAG, § 20m secs. 1 and 3 BKAG suffers from the same constitutional deficiencies and is itself also unconstitutional in this respect. As for the rest, the provision is compatible with the Constitution. **[247]**

a) § 20m secs. 1 and 3 BKAG, which allows the collection of telecommunications traffic data, provides the basis for an interference with the right to secrecy of telecommunications under Art. 10 sec. 1 GG. This right protects not only the actual contents of the communication but also the confidentiality of the specific circumstances of communication events which include in particular whether, when and how often telecommunications traffic occurred or was attempted between whom or between which telecommunications equipment (cf. BVerfGE 67, 157 <172>; 130, 151 <179>; established case-law). **[248]**

An interference with Art. 10 sec. 1 GG by means of the collection of telecommunications traffic data is serious - even if it does not directly cover the contents of the communication (cf. BVerfGE 107, 299 <318 et seq.>; regarding the precautionary storage of such telecommunications traffic data cf. also BVerfGE 125, 260 <318 et seq.>). However, if designed proportionately, it can be justified for the purpose of protecting against terrorism. As with § 20l BKAG, this is, however, not the case in all respects. **[249]**

b) Regarding the constitutional appraisal of the provision, whose conditions for interference essentially correspond to those set out in § 20l secs. 1 and 3 to 5 BKAG, the statements made in that context apply here accordingly. Given that the requirements for investigative and surveillance measures constituting a serious interference, stemming from the overarching principle of proportionality, are not met in this respect (see above, C IV 1 b, 2), the approach taken with regard to the collection of telecommunications traffic data does not differ from that applied in content-related surveillance of telecommunications. **[250]**

Accordingly, § 20m sec. 1 no. 2 BKAG is not compatible with the Constitution, while § 20m sec. 1 nos. 3 and 4 BKAG requires an interpretation in conformity with the Constitution; a statutory obligation to substantiate the reasons underlying the order of the measure is lacking, too (see above, C V 5 b, d). **[251]**

As for the rest, § 20m secs. 1 and 3 BKAG is compatible with the Constitution. […] Also § 20m sec. 3 sentence 2 BKAG, which, in view of ordering measures, provides for a facilitation of the description of the data to be collected, does not raise constitutional concerns; this does not have implications for the fact that § 20m sec. 1 BKAG allows the collection of data only with regard to individual persons. **[252]**

VI.

In several respects, the challenged investigative and surveillance powers are not compatible with the Constitution in terms of the further requirements that they too must meet (see above, C IV 4 to 7). They lack supplementary provisions without which the proportionality of the challenged investigative and surveillance powers is not satisfied. **[253]**

1. It is not objectionable, however, that the Act does not contain an express rule that specifies in detail the prohibition of comprehensive surveillance with a view to the interplay of the different powers (see above, C IV 4). Stemming from the principle of proportionality, the prohibition of comprehensive surveillance serves the purpose of safeguarding, for constitutional reasons, the inalienable core of personality that is rooted in human dignity; within their powers, security authorities must observe this prohibition upon their own initiative (cf. BVerfGE 109, 279 <323>; 112, 304 <319>; 130, 1 <24>; established case-law). Insofar, further statutory specifications are not required. […] **[254]**

2. However, the degree of protection of professional groups and other groups of persons whose activities require, for constitutional reasons, that their communication be treated as particularly confidential is not viably designed in all respects. **[255]**

a) Yet with § 20u BKAG, the legislature has created a provision that largely meets the relevant constitutional requirements. In particular it is not objectionable that § 20u sec. 2 BKAG - drafted closely in line with § 160a StPO - does not strictly rule out the surveillance of persons subject to professional confidentiality but rather rules out such surveillance only subject to a weighing of considerations in the individual case, and requires in § 20u sec. 1 BKAG a stricter prohibition of surveillance only with a view to a small group of persons whom the legislature has identified as being in particular need of protection (cf. BVerfGE 129, 208 <258 et seq.>). The weighing of

considerations required under § 20u sec. 2 BKAG needs to give appropriate weight to the affected persons' fundamental rights. The weighing is structured in line with the principle of proportionality. In accordance with the second half of § 160a sec. 2 sentence 1 StPO, the Constitution sets down the presumption that the interests of the Federal Criminal Police Office in collecting data generally will not prevail if the measure does not aim to provide protection against a significant danger. **[256]**

b) In that respect, however, the level of protection afforded to the relationship of trust between lawyers and their clients is not compatible with the Constitution. The legislative distinction between defence counsel and other lawyers acting within a lawyer-client relationship does not as such constitute a suitable criterion for differentiating the respective protection level, given that the surveillance measures in question do not pursue the aim of prosecuting criminal offences but of protecting against threats, meaning that criminal defence is in fact not of any relevance here. **[257]**

c) Beyond that, however, violations of fundamental rights resulting from § 20u BKAG are not discernible. In particular, Art. 5 sec. 1 sentence 2 GG does not result in media representatives being entitled to claim stricter protection (cf. BVerfGE 107, 299 <332 and 333.>). Further limits do not stem from Art. 3 sec. 1 GG either. The legislature is permitted to understand the recognition of stricter protection against surveillance measures as an exception for specific situations requiring protection and with regard to which the legislature's discretion is broad. In a judgment of 12 October 2011, the Second Senate ruled that the recognition that clergy or political representatives are in need of special protection compared to other professional groups is sound at least. However, an obligation to also extend this particular level of protection to other groups cannot be derived from that finding (cf. BVerfGE 129, 208 <258 et seq., 263 et seq.>). […] **[258]**

3. The provisions aiming to guarantee transparency, legal protection, and supervisory control do not satisfy the constitutional requirements in all respects either. **[259]**

a) When construed appropriately, the drafting of obligations to notify as set out in § 20w BKAG is not objectionable. The provision, which is drafted closely in line with § 101 secs. 4 to 6 StPO, satisfies the constitutional requirements (cf. BVerfGE 129, 208 <250 et seq.>). **[260]**

The same applies with regard to the second half of § 20w sec. 2 sentence 1 BKAG, which allows refraining from notification for the purpose of securing the further deployment of an undercover investigator. Unlike the case where the notification of the deployment of undercover investigators for the surveillance of private homes is deferred - for which this purpose is not sufficient (cf. BVerfGE 109, 279 <366 and 367>) -, this exception from the obligation to notify concerns the deployment of an undercover investigator as such. […] **[261]**

The permission to refrain definitely from a notification after a period of at least five years according to § 20w sec. 3 sentence 5 BKAG, is constitutional. In accordance with the current practice of definitively deciding to refrain from a notification as described

by Federal Criminal Police Office representatives in the oral hearing, such decisions, when interpreting the provision in conformity with the Basic Law, require that a further use of the data against the affected person be ruled out and the data deleted. **[262]**

b) With regard to the challenged investigative and surveillance powers, the rights to information as well as the possibility of a retrospective judicial review and, where appropriate, compensation are guaranteed in a manner that does not raise constitutional objections. **[263]**

[…] **[264-265]**

c) In contrast, supervisory control requirements are not designed in a constitutionally sufficient manner (see above, C IV 6 d). Indeed, the provisions of the Federal Data Protection Act demand a review by the Federal Data Protection Commissioner who has adequate powers in that respect (cf. BVerfGE 133, 277 <370 para. 215>). However, sufficient statutory requirements of regular mandatory reviews that must take place at certain minimum intervals of approximately two years are lacking (cf. BVerfGE 133, 277 <370 and 371, para. 217>). **[266]**

Comprehensive documentation requirements that allow the full and effective review of the surveillance measures in question are lacking, too (cf. BVerfGE 133, 277 <370, para. 215>). The Act does set out sporadic documentation requirements, such as in § 20k sec. 3 BKAG regarding the access to information technology systems or in § 20w sec. 2 sentence 3 BKAG regarding the deferral of a notification. However, even in those cases that require the documentation of the notification, it remains unclear whether this also includes the reasons for a deferral. In any event, the provisions remain sporadic and fail to adequately ensure a retrospective review of the surveillance measures. While important findings resulting from the data collection are at least documented on the basis of the general rules for file keeping, this is neither set out with sufficient clarity nor statutorily with regard to the data protection law requirements of effective review. This is particularly significant in the area of the protection against threats where the investigation of and protection against threats does not need to be directed at specific individual persons, unlike in the case of criminal investigations in criminal proceedings. Insofar, it is not apparent that there is a guarantee that the collection of data is documented in a transparent manner - also from the perspective of affected parties in potential subsequent criminal proceedings. The fact that the measure requires a judicial order does not alter this finding, given that such an order only gives the permission to carry out the measure but does not indicate whether and to what extent use was made of it. Furthermore, and unlike in the case of criminal proceedings pursuant to § 100b sec. 4 sentence 2 StPO, there is not even a requirement demanding that the ordering court be informed of the results of the investigations. **[267]**

d) Finally, reporting duties *vis-à-vis* Parliament and the public that are necessary for a proportionate design of the challenged surveillance powers are lacking, too (cf. BVerfGE 133, 277 <372 paras. 221 and 222>). The law neither requires reports indicating the degree in which the powers were made use of and on the grounds of which suspicious

circumstances, nor does it require reports providing information as to whether the affected parties were notified of the exercise of such powers and if so to what extent. However, given that the exercise of the powers in question occurs largely without the knowledge of the affected party and the public, such reports are constitutionally required at regular intervals in order to enable a public debate and democratic control (see above, C IV 6 e). **[268]**

4. The provision in § 20v sec. 6 BKAG governing the requirements to delete the collected data also does not satisfy the constitutional requirements in all respects. **[269]**

a) The overall structure of the provision is indeed not objectionable under constitutional law. Data must be deleted after the underlying reason for the data collection is fulfilled (sentence 1). This refers to the constitutional law principle of purpose limitation (see below, D I). Accordingly, with regard to a further use of the data pursuant to § 20v sec. 4 sentence 2 BKAG, refraining from deleting the collected data beyond the specific incident is, when interpreting the provision in conformity with the Constitution, only permissible insofar as the data provides a specific evidentiary basis for further investigations to protect against threats from international terrorism. The deletion must be documented (sentence 2). The deletion may be deferred so as to be available for a possible judicial review; in that case, the data in question needs to be blocked (sentence 4). Procedurally, the provision is to be read in conjunction with § 32 BKAG. In addition to requiring an individual handling of cases, that provision's section 3 also requires periodic reviews of the deletion requirements. **[270]**

Regarding electronic profile searching measures, § 20j sec. 3 BKAG sets out specific deletion requirements which the provision specifies in a manner that does not raise constitutional objections. **[271]**

b) In contrast, however, the very brief safekeeping period for the deletion of the "files" in § 20v sec. 6 sentence 3 BKAG, with which the Act governs the deletion of the deletion protocols, is not compatible with constitutional requirements. Deletion protocols serve the purpose of enabling the tracing back and review of the deletion. Thus, the safekeeping period must be calculated so as to ensure that the logs still exist after the persons concerned have been notified, and are still available for the next pending periodic review by the Federal Data Protection Commissioner (cf. in this respect also BVerfGE 100, 313 <400>). **[272]**

The same applies accordingly to the safekeeping period set out in § 20j sec. 3 sentence 3 BKAG. **[273]**

c) Furthermore, § 20v sec. 6 sentence 5 BKAG is unconstitutional. The provision gives permission to refrain from deleting the data once it has served its purpose on grounds that the data is needed for law enforcement purposes or - pursuant to the standards set out in § 8 BKAG - for the prevention of crimes or as a precaution for the future prosecution of a criminal offence of considerable significance. Thus the provision allows the storage of data with a view to using it for new purposes that are, however, only

circumscribed in general terms; the Act does not provide a legal authorisation to that end for such generally circumscribed purposes and in fact could not provide a legal authorisation in such broadness. **[274]**

D.

Insofar as the constitutional complaints are directed against the powers to further use the data and the powers to transfer data to domestic authorities and authorities in third countries, the complaints are also well-founded in several respects. **[275]**

I.

The requirements for the further use and transfer of data collected by the state follow the principles of purpose limitation and change in purpose (cf. BVerfGE 65, 1 <51, 62>; 100, 313 <360 and 361, 389 and 390>; 109, 279 <375 et seq.>; 110, 33 <73>; 120, 351 <368 and 369>; 125, 260 <333>; 130, 1 <33 and 34>; 133, 277 <372 et seq. paras. 225 and 226>; established case-law). **[276]**

If the legislature also permits the use of data beyond the specific incident and beyond the reason justifying the data collection it must establish a distinct legal basis to that end (cf. only BVerfGE 109, 279 <375 and 376>; 120, 351 <369>; 130, 1 <33>; established case-law). Insofar, the legislature may, on the one hand, provide for a further use of the data in the context of the purposes determining the data collection. Provided that the legislature ensures that the further use of data satisfies the specific constitutional requirements of the principle of purpose limitation, such an approach is generally constitutionally permissible (1.). On the other hand, the legislature may also allow a change in purpose. As an authorisation for the use of data for new purposes this is, however, subject to specific constitutional requirements (2.). **[277]**

1. The legislature may allow a use of the data beyond the specific procedure of the data collection as a further use in the context of the original purposes of the data. Insofar, the legislature may invoke the justification underlying the data collection and is thus not subject to the constitutional requirements applied to a change in purpose. **[278]**

a) The permissible scope of such uses depends on the authorisation for the data collection. The respective legal basis for interferences determines the competent authority as well as the purpose of and conditions for data collection and thus defines the permissible scope of use. Accordingly, the principle of purpose limitation that applies with regard to information obtained on the basis of the authorisation is not a restriction to certain abstractly defined functions of the authorities but is determined in accordance with the scope of the collection purpose stipulated in the relevant legal basis for the respective case of data collection. For that reason, further use of the data within the scope of the originally determined purpose is only permissible insofar as it involves the same authority acting within the same assignment of tasks and for the protection of the same legal interests as were determinant for the data collection. If this specific permission to collect data is restricted to collection for the purpose of protecting certain legal interests or preventing certain criminal offences, this limits both its immediate and its further use even by the same authority insofar as there is no other legal basis allowing a further use in the context of a permissible change in purpose. **[279]**

b) Generally, the relevant intervention thresholds required for the collection of data, such as the traditional thresholds requiring a sufficiently specific risk situation in the context of the protection against threats or a sufficiently strong suspicion in the context of criminal prosecution, do not belong to the purpose limitations that the same authority must reconsider for each and every further use of data. The requirement of there being a sufficiently specific risk situation or a qualified suspicion determines the grounds that may prompt the permission to collect data. Such requirements do not, however, determine the permissible purposes for which the authority may then use the data. **[280]**

For that reason, the principle that data must be used in accordance with its original collection purpose is not automatically contradicted if the further use of such data is permitted as a mere evidentiary basis for further investigations (*Spurenansatz*) when performing the same task, irrespective too of further legal requirements. Insofar, the authority may use the findings thus obtained - either alone or in combination with all other available information - as a simple starting point for further investigations to protect the same legal interests within the same assignment of tasks. This takes into account that it is not possible to reduce the generation of knowledge - and not least when aiming to understand terrorist structures - to a mere sum of separated and individual data which one could reveal or suppress in line with legal criteria. Within the described limits, this is recognised by the legal order. […] **[281]**

Observance of the principle of purpose limitation depends on whether the authority that is empowered to collect data uses it while acting within the same assignment of tasks for the protection of the same legal interests and the prosecution or prevention of the same criminal offences as is determined in the relevant data collection provision. These requirements are necessary but generally also sufficient to legitimise a further use of the data within the scope of the principle of purpose limitation. **[282]**

However, with regard to data obtained by means of the surveillance of private homes and remote searches, the principle of purpose limitation is broader in scope: here, any further use of the data only correlates with the purpose if it is also necessary in accordance with the collection requirements of a corresponding imminent danger (cf. BVerfGE 109, 279 <377, 379>) or a specific impending danger (cf. BVerfGE 120, 274 <326, 328 and 329>). The extraordinary weight of the interference resulting from such data collection is also reflected in a particularly narrow limitation of any further use of the obtained data to the requirements and thus to the purposes of the data collection. These findings may not be used as a mere evidentiary basis for further investigations irrespective of an imminent or specific impending danger. **[283]**

2. The legislature may also allow for a further use of data for other purposes than those determining the original data collection (change in purpose). In that case, however, the legislature must ensure that the weight of the interference resulting from the data collection is also taken into consideration with regard to the new use of data (cf. BVerfGE 100, 313 <389 and 390>; 109, 279 <377>; 120, 351 <369>; 130, 1 <33 and 34>; 133, 277 <372 and 373 para. 225>). **[284]**

a) The authorisation to use data for new purposes constitutes a new interference with the fundamental right with which the data collection interfered (cf. BVerfGE 100, 313 <360, 391>; 109, 279 <375>; 110, 33 <68 and 69>; 125, 260 <312 and 313, 333>; 133, 277 <372 para. 225>; cf. also ECtHR, Weber and Saravia v. Germany, judgment of 29 June 2006, no. 54934/00, para. 79, NJW 2007, p. 1433 <1434>, on Art. 8 ECHR). For that reason, changes in purpose need to be measured against those fundamental rights that were relevant for the data collection. This applies to any type of data use for purposes differing from those for which the data was originally collected, irrespective of whether the use pursues evidential purposes or constitutes a mere evidentiary basis for further investigations (cf. BVerfGE 109, 279 <377>). **[285]**

b) In that respect, an authorisation to change the purpose is subject to the principle of proportionality. The weight attached to such a provision when weighing considerations corresponds to the weight of the interference resulting from the data collection. Information obtained by measures constituting a serious interference may only be used for particularly weighty reasons (cf. BVerfGE 100, 313 <394>; 109, 279 <377>; 133, 277 <372 and 373 para. 225>, with further references). **[286]**

aa) Regarding the standards applied to the proportionality test, the former case-law of the Federal Constitutional Court reviewed whether the changed use was "incompatible" with the original purpose (cf. BVerfGE 65, 1, <62>; 100, 313 <360, 389>; 109, 279 <376 and 377>; 110, 33 <69>; 120, 351 <369>; 130, 1 <33>). Meanwhile, this approach has been specified and replaced by the criterion of a hypothetical recollection of data (*hypothetische Datenneuerhebung*). Accordingly, as far as data that results from particularly intrusive surveillance and investigative measures is concerned, such as the data at issue in these proceedings, it is necessary to determine whether it would be permissible, by constitutional standards, to also collect the relevant data for the changed purpose with comparably weighty means (cf. BVerfGE 125, 260 <333>; 133, 277 <373 and 374 paras. 225 and 226>; in substantive terms, this specification is not new cf. already BVerfGE 100, 313 <389 and 390> and is referred to as a "hypothetical substitute interference" in BVerfGE 130, 1 <34>). However, the criterion of a hypothetical re-collection of data is not applied in a rigid systematic manner and does not rule out the possibility that further aspects may be taken into consideration (cf. BVerfGE 133, 277 <374 para. 226>). Thus the fact that the authority receiving the data is not - unlike the authority that permissibly collected the data and from which the data emanates - empowered to collect certain data itself due to its assignment of tasks does not bar, as a matter of principle, the exchange of data between these authorities (cf. BVerfGE 100, 313 <390>). Furthermore, when establishing data transfer provisions, considerations such as simplification and practicability can justify the fact that not all individual requirements that must be met for the collection of data will also apply, with the same level of detail, to the transfer of data. This, however, does not affect the requirement that the new use must be of equal weight. **[287]**

bb) However, for that reason a requirement for a change in purpose is that the new use of the data must serve the protection of legal interests or aim to detect criminal offences of such a weight that would, by constitutional standards, justify collecting them again with comparably weighty means (cf. BVerfGE 100, 313 <389 and 390>; 109, 279 <377>; 110, 33 <73>; 120, 351 <369>; 130, 1 <34>). **[288]**

In contrast, the requirements for a change in purpose are not always identical to the requirements for a data collection with regard to the necessary degree of specificity of the risk situation or of the suspicion that a crime has been committed. With a view to proportionality considerations, the relevant requirements primarily only establish the direct grounds for the data collection as such but not also those for the further use of the collected data. An authorisation to use data for other purposes constitutes an interference that requires a new justification. For that reason, such an authorisation also requires its own, sufficiently specific grounds. Under constitutional standards, it is thus necessary but generally also sufficient that the data - either as such or in combination with the authority's additionally available information - results in a specific evidentiary basis for further investigations. **[289]**

With regard to the use of data by security authorities, the legislature may thus generally allow for a change in purpose of data if it concerns information that results, in individual cases, in a specific evidentiary basis for further investigations investigating comparably serious criminal offences or providing protection against threats that, at least in the medium term, threaten comparably weighty legal interests as those with regard to whose protection the respective data collection is permissible. **[290]**

The same, however, does not apply with regard to information obtained through the surveillance of private homes or access to information technology systems. Considering the significant weight of the interference reflected in these measures, each and every new use of data is subject to the same justification requirements as the data collection itself in that the new use also requires imminent danger (cf. BVerfGE 109, 279 <377, 379>) or a sufficiently specific impending danger (see above, C IV 1 b). **[291]**

cc) These requirements for the permissibility of a change in purpose reflect a specifying consolidation of a long line of jurisprudence developed by both Senates of the Federal Constitutional Court (cf. BVerfGE 65, 1 <45 and 46, 61 and 62>; 100, 313 <389 and 390>; 109, 279 <377>; 110, 33 <68 and 69, 73>; 120, 351 <369>; 125, 260 <333>; 130, 1 <33 and 34>; 133, 277 <372 and 373 para. 225>). It does not constitute an intensification of the standards but carefully delimits them in that it does not apply the criterion of a hypothetical re-collection of the data in a strict manner (cf. already BVerfGE 133, 277 <374 para. 226>) but instead partially revokes former requirements with regard to the interference thresholds that determine the required temporal proximity of the risk situation

(cf. in particular BVerfGE 100, 313 <394>; 109, 279 <377>). Also giving up the requirement of a protection of comparably weighty legal interests - as suggested in one of the separate opinions - would mean that the limits of the principle of purpose limitation as a core element of constitutional data protection (cf. BVerfGE 65, 1 <45 and 46, 61 and 62>) would practically be rendered obsolete with regard to security law - in particular if the requirement of a specific evidentiary basis for further investigations is at the same time held to be too strict (or at most these limits would be limited rudimentarily to data stemming from the surveillance of private homes or remote searches). **[292]**

II.

In light of the abovementioned standards, § 20v sec. 4 sentence 2 BKAG, which sets out how the Federal Criminal Police Office may use data it collected itself, does not satisfy constitutional requirements. The provision is unconstitutional. **[293]**

1. The use of data as set out in § 20v sec. 4 sentence 2 no. 1 BKAG solely with regard to carrying out tasks to protect against threats from international terrorism is generally compatible with constitutional requirements; however, the provision lacks a sufficient limitation for data obtained through the surveillance of private homes and remote searches. **[294]**

a) Generally, the provision does not give rise to effective constitutional concerns. **[295]**

aa) The provision gives the Federal Criminal Police Office the permission to use data it collected itself for the purpose of protecting against international terrorism in the performance of its duties pursuant to § 4a sec. 1 sentence 1 BKAG. With that, the provision first - as an inherent consequence of authorising the collection of data - enables the use of the data in accordance with the specific purpose for which it was collected. Furthermore, however, it also enables a use of the data that goes beyond the respective investigation procedure. Due to the reference to § 4a sec. 1 sentence 1 BKAG, this further use of the data is limited to the protection against international terrorism. When applying a factually appropriate understanding of this reference, it also determines that the data may only be used to prevent those qualified criminal offences mentioned in § 4a sec. 1 sentence 2 BKAG and thus only for the protection of those high-ranking legal interests regarding which the data collection powers of subsection 3a - including the particularly intrusive surveillance powers in §§ 20g et seq. BKAG - may be deployed for protection purposes. **[296]**

(1) The reference to § 4a sec. 1 sentence 1 BKAG, however, raises doubts as to its meaning. These can be overcome by way of interpretation so that the provision does not fail to meet specificity standards. It is not clear how § 4a sec. 1 sentence 1 and 2 BKAG are to be delimited: in assigning the task of providing protection against dangers, sentence 1 is aligned with the wording of Art. 73 sec. 1 no. 9a GG which also covers the prevention of criminal offences (see above, C I 1); sentence 2, however, explicitly distinguishes between the prevention of criminal offences and the protection against

dangers. However, due to its nature as a provision setting out duties for the protection against dangers, § 4a sec. 1 sentence 1 BKAG also includes investigations in advance of specific dangers, and the reference in § 20v sec. 4 sentence 2 no. 1 BKAG is thus, essentially, sufficiently open to interpretation after all; the provision aims to allow the use of data in general, and, if necessary, also as a mere evidentiary basis for further investigations, for the purpose of providing protection against threats from international terrorism. **[297]**

In addition, the provision is not too unspecific insofar as § 4a sec. 1 BKAG only generally refers to "threats from international terrorism". Even though § 20v sec. 4 sentence 2 no. 1 BKAG only refers to sentence 1 of the provision, the further specification of the dangers listed therein requires resorting to the detailed definition in sentence 2, which conclusively enumerates and further specifies certain criminal offences. The fact that the criminal offences enumerated there with regard to the prevention of criminal offences are also decisive for the protection against threats under sentence 1 also conforms to the systematics of the Act as such (cf. e.g. § 20a sec. 2 BKAG). **[298]**

(2) Given that § 20v sec. 4 sentence 2 no. 1 BKAG allows the use of data only to protect against threats from terrorist offences within the meaning of § 4a sec. 1 sentence 2 BKAG, this also ensures that this use is only permitted for the protection of those legal interests in regard to which the data collection powers may also be exercised. The same applies to data obtained by particularly intrusive surveillance measures, which are only justified for the protection of particularly high-ranking legal interests. **[299]**

Nearly all criminal offences enumerated in § 4a sec. 1 sentence 2 BKAG in conjunction with § 129a secs. 1 and 2 StGB concern crimes that are directly directed against life or limb or - for example, as crimes endangering the general public - that draw their wrongful nature from threats thereto, or concern property of substantial value of value the preservation of which as essential infrastructure is in the public interest. Insofar as this is not necessarily the case with some individual crimes enumerated in § 129a StGB, it needs to be taken into account that § 4a sec. 1 sentences 1 and 2 BKAG determines that the prevention of such criminal offences only falls within the Federal Criminal Police Office's remit if the offences have a terrorist dimension that is statutorily defined in greater detail. Thus, the factually appropriate understanding of the provision results in the finding that information obtained through individual investigative powers must, also when resorted to for a further use pursuant to § 20v sec. 4 sentence 2 no. 1 BKAG, always serve to protect those legal interests for whose protection the collection of data was already justified, even in the case of more intrusive measures. **[300]**

bb) Generally, it is not objectionable either that § 20v sec. 4 sentence 2 no. 1 BKAG allows the further use of data in general terms and thus also as a mere evidentiary basis for further investigations irrespective of specific threats or specific evidentiary bases. Insofar as the use does not concern data stemming from the surveillance of private homes or remote searches (see below, D II 1 b), it it still within the scope of the purpose limitation. [...] This, however, does not affect the requirement to delete the recorded data after achieving the purpose of the data collection (see above, C VI 4 a). **[301]**

b) § 20v sec. 4 sentence 2 no. 1 BKAG is, however, disproportionately broad insofar as it covers all data indiscriminately and thus also covers the further use of data stemming from the surveillance of private homes and remote searches. Accordingly, the provision allows the further use of data irrespective of whether there is an imminent danger (cf. BVerfGE 109, 279 <377, 379>) or a risk situation that is sufficiently specific in the individual case (see above, C IV 1 b; D I 2 b bb). This is incompatible with the constitutional prohibition of excessiveness. As far as information that stems from such particularly intrusive surveillance measures is concerned, any use that goes beyond the original investigations requires that all conditions for interference be met again each time and in the same way as would be necessary on constitutional grounds in case of a re-collection of data (see above, D I 1 b). **[302]**

2. § 20v sec. 4 sentence 2 no. 2 BKAG, on the use of data for the protection of witnesses and other persons, is also incompatible with constitutional requirements. Due to its lack of specificity alone, the unrestricted and general reference to the duties of the Federal Criminal Police Office under § 5 and § 6 BKAG does not satisfy the standards developed above. **[303]**

III.

Various rules within § 20v sec. 5 BKAG, which governs the transfer of data to other authorities, do not satisfy the constitutional requirements. **[304]**

1. § 20v sec. 5 BKAG provides various legal bases for the transfer of data, collected for the purpose of preventing terrorist threats, to other authorities. The relevant rules constitute authorisations with which the legislature allows a change in purpose of the use of data in individual cases and with regard to specific grounds. In that way, the legislature allows the use of data by other authorities, which - in accordance with the image of a double door - themselves must also be authorised to retrieve and use this data (cf. BVerfGE 130, 151 <184>). Thus, the provision provides for interferences with fundamental rights, each of which must be measured against those fundamental rights that were interfered with by the collection of the transferred data (cf. BVerfGE 100, 313 <360, 391>; 109, 279 <375>; 110, 33 <68 and 69>; 125, 260 <312 and 313, 333>; 133, 277 <372 para. 225>; cf. also ECtHR, Weber and Saravia v. Germany, judgment of 29 June 2006, no. 54934/00, § 79, NJW 2007, p. 1433 <1434>, on Art. 8 ECHR). **[305]**

2. § 20v sec. 5 BKAG does not violate the requirements of the principle of specificity. This also applies insofar as the provision comprehensively allows a transfer of data to "other public

entities". The specific understanding of this phrasing, i.e. identifying which entities are meant, depends on the respective transfer purposes which further specify the different transfer powers. It is thus possible to determine the potential addressees of a transfer with sufficient specificity on the basis of the competence provisions. **[306]**

3. Yet the transfer powers are unconstitutional insofar as their requirements fail to satisfy the standards developed above with regard to the criterion of a hypothetical re-collection of data (see above, D I 2 b). **[307]**

a) § 20v sec. 5 sentence 1 no. 1 BKAG, however, does not raise constitutional concerns. The transfer of data for the purpose of mutual understanding and coordination does not itself implicate a change in purpose. It aims to coordinate the protection against threats in a manner that § 4a sec. 2 BKAG always requires for the Federal Criminal Police Office to exercise its functions, and is thus necessarily included in the data collection provision. This also justifies the broadness of the provision that does not provide restrictions to the transfer of data. Coordination is only provided for with regard to measures that are based on a lawful use of data; for that reason, it need not be feared that the purpose limitation of information stemming from the surveillance of private homes or remote searches, and which may be used only if there is a sufficiently specific risk situation, is undermined. **[308]**

In functional terms, however, the provision is to be construed narrowly. It only allows the transfer of information for the purpose of coordinating the exercise of the tasks of federal and *Laender* authorities, respectively. Under this provision, the use of data is limited to such internal coordination. If, in contrast, the authority receiving the data should be allowed to also use also for operational purposes, the transfer is subject to § 20v sec. 5 sentence 1 nos. 2 et seq. BKAG. **[309]**

b) § 20v sec. 5 sentence 1 no. 2 BKAG governs the transfer of data for the purpose of protecting against threats. For the most part, it satisfies constitutional requirements. However, the provision is disproportionate insofar as it generally already allows a transfer of data for the prevention of certain criminal offences. **[310]**

aa) § 20v sec. 5 sentence 1 no. 2 BKAG allows a transfer of data stemming from measures taken pursuant to §§ 20h, 20k or 20l BKAG for the purpose of protecting against an imminent threat to public security. With this threshold, which is directly deduced from Art. 13 sec. 4 GG, the legislature, with regard to a change in purpose, conforms to the requirements for a hypothetical re-collection of data; also, a transfer of information from particularly intrusive measures, including the surveillance of private homes and remote searches, is justified. While it is generally the duty of the legislature to specify the legal interests to be protected in the context of conditions for interference and to thus also flesh out the concept of public security which, while being enshrined in Art. 13 sec. 4 GG, is described only in general terms (cf. accordingly for Art. 14 sec. 3 GG BVerfGE 134, 242 <294 para. 177>), here such specifications can be deduced from the regulatory context. Upon a reasonable interpretation, the concept of an imminent threat to public security must be held to mean a threat to the particularly high-ranking legal

interests enumerated in §§ 20h, 20k and 20l BKAG (cf. in this respect also BVerfGE 109, 279 <379>). **[311]**

bb) It is not objectionable either that the transfer of data collected by means of other measures only requires a significant danger to public security. It is, first, not objectionable with regard to data obtained by means of low-threshold interferences (cf. for example §§ 20c et seq. or §§ 20q et seq. BKAG). The transfer of such data is, to be permissible, generally subject to less restrictive requirements. Furthermore, the provision is also constitutional with regard to data from intrusive measures such as those adopted pursuant to §§ 20g, 20j or 20m BKAG. Also here, the public security concept is not to be interpreted as being as comprehensive as in the sense of the general clause of police law that relates to the inviolability of the legal order […]. Instead it is given shape by the term "significant" danger. In accordance with the respective interpretation under general security law, this requires that there be a danger to an important legal interest; this includes life, limb, freedom or the existence of the state in particular […]. An interpretation of the provision based on the Constitution must result in the conclusion that a precondition for the transfer of data from particularly intrusive measures is the protection of sufficiently weighty legal interests. **[312]**

cc) However, § 20v sec. 5 sentence 1 no. 2 BKAG is disproportionately broad and thus unconstitutional insofar as it generally also allows a transfer of data for the purpose of preventing criminal offences enumerated in § 129a secs. 1 and 2 StGB. Indeed, these all constitute particularly serious criminal offences. However, given that the Act allows the transfer in general terms for the purpose of preventing such criminal offences, it fails to provide for a restricting specification of the transfer in line with the particular grounds prompting the transfer; thus information can already be transferred as a mere evidentiary basis for further investigations even if it only has potential informative value - and even if it was obtained by means of intrusive measures. In light of the standards developed above, this does not satisfy constitutional requirements (see above, D I 2 b bb). A transfer of data from intrusive surveillance measures to other security authorities constitutes a change in purpose and is only permissible if it involves at least a specific evidentiary basis for further investigations for the detection of equivalent criminal offences. The provision, however, fails to ensure that this requirement is adhered to. **[313]**

c) § 20v sec. 5 sentence 1 no. 3 BKAG, which governs the transfer of data for criminal prosecution purposes, is not compatible with the Constitution either. **[314]**

aa) The provision is disproportionate insofar as its first case group for a transfer of data generally refers to the standards set out in the Code of Criminal Procedure regarding a request for information and thus also refers to data from surveillance measures that are not specifically mentioned in no. 3 sentence 2 but are, nonetheless, intrusive surveillance measures such as those taken pursuant to §§ 20g, 20j or 20m BKAG. With its reference to the Code of Criminal Procedure, the

provision refers to § 161 secs. 1 and 2 StPO in particular. This provision, however, does not ensure the constitutionally required limitation of the transfer of data. In particular, it does not follow from the provision that data may only be used to prosecute those criminal offences regarding which it would have been permissible to collect the data with the appropriate means (see above, D I 2 b). In fact, § 161 sec. 1 StPO provides an information obligation and thus an obligation to transfer data with respect to every type of criminal act. The restrictions contained in § 161 sec. 2 StPO only refer to the use of data in criminal proceedings for evidentiary purposes. Against that background, the stipulated restrictions do not rule out the possibility that the data be used as a mere evidentiary basis for further investigations for the investigation of any criminal offence, including minor crimes [...]. This, however, fails to ensure the constitutionally required restriction of a change in use of data to the protection of equally important legal interests. Moreover, the provision fails to guarantee that only data actually indicating that there is a specific evidentiary basis for further investigations in the crimes in question may be transferred. **[315]**

bb) The provision is also disproportionate insofar as its sentence 2 stipulates distinct requirements for the use of data from measures taken pursuant to §§ 20h, 20k and 20l BKAG. The legislature allows their transfer for the purpose of enforcing crimes that are subject to a maximum term of imprisonment of more than five years (§ 20v sec. 5 sentence 1 no. 3, 2nd sentence thereof BKAG). Regarding data obtained through measures carried out pursuant to §§ 20k and 20l BKAG, this constitutes a limitation of the general reference to provisions of the Code of Criminal Procedure and thus to § 161 sec. 1, sec. 2 sentence 1 StPO. In contrast, as far as data stemming from the surveillance of private homes is concerned, it constitutes an expansion, given that a change in use of this data is construed more narrowly in § 161 sec. 2 sentence 2, § 100d sec. 5 no. 3 StPO. Irrespectively, however, this threshold does not satisfy the standards developed with regard to the criterion of a hypothetical re-collection of data. Regarding the surveillance of private homes, the Federal Constitutional Court has explicitly held that a maximum term of imprisonment of more than five years does not constitute a sufficient threshold for ordering such a measure and this also applies to any further use of the data, including its use as a mere evidentiary basis for further investigations (cf. BVerfGE 109, 279 <347 and 348, 377>). The same applies to access to information technology systems, which is an equally significant interference and thus subject to the same requirements. While the requirements for the surveillance of telecommunications are indeed less strict, the collection of data and, accordingly, the power to transfer, which constitutes a change in purpose, at least require that there be a focus on serious criminal offences (cf. BVerfGE 125, 260 <328 and 329>; 129, 208 <243>). For that reason, it is disproportionate that § 20v sec. 5 sentence 1 no. 3, 2nd sentence thereof BKAG states that criminal offences subject to a maximum term of imprisonment of more than five years are sufficient as this also includes crimes of medium severity and possibly also volume crime offences such as simple theft, public slander or simple bodily harm. **[316]**

Furthermore, it is constitutionally objectionable that data stemming from the visual surveillance of private homes is not barred from being transferred to law enforcement authorities. With regard to law enforcement, Art. 13 sec. 3 GG only allows the acoustic surveillance of private homes. This may not be undermined by a transfer of data obtained through a preventatively ordered visual surveillance of private homes. **[317]**

cc) While the transfer of data from particularly intrusive surveillance measures is subject to qualified requirements, the transfer of data obtained by means of low-threshold interferences (cf. for example §§ 20b et seq., §§ 20q et seq. BKAG) is constitutionally permissible on a wider scale. To that end, the requirements set out in § 20v sec. 5 sentence 1 no. 3 BKAG can provide a viable basis. However, in this respect the legislature must distinguish between the different types of data. In its current version, the provision is too broad in that is does not distinguish between different data, and it is thus disproportionate. **[318]**

d) Also § 20v sec. 5 sentence 3 no. 1 BKAG, which allows the transfer of data to offices for the protection of the Constitution (*Verfassungsschutzbehörden*) and the Military Counter Intelligence Agency (*Militärischer Abschirmdienst*), is incompatible with constitutional requirements. **[319]**

The provision, which applies to all data except that obtained through the surveillance of private homes (cf. § 20v sec. 5 sentence 5 BKAG), allows the transfer of data to the abovementioned authorities provided that there are factual indications suggesting that the data is necessary for the gathering and analysis of information on endeavours falling within the remit of the offices for the protection of the Constitution or the Military Counter Intelligence Agency. For that reason, it does not satisfy the standards of a hypothetical re-collection of data, which is, however, decisive for the transfer of data for a changed purpose (see above, D I 2 b). Indeed, the transfer of data generally pursues the objective of protecting particularly weighty legal interests in that it references the duties of the offices for the protection of the Constitution and the Military Counter Intelligence Agency. Furthermore, with regard to § 8 of the Act Regulating the Cooperation between the Federation and the Federal States in Matters Relating to the Protection of the Constitution and on the Federal Office for the Protection of the Constitution (*Bundesverfassungsschutzgesetz* - BVerfSchG), which is decisive for a hypothetical re-collection of data, the transfer of certain data, such as that obtained through measures taken pursuant to § 20g BKAG […], can be justified to a relatively broad extent. Yet a provision that allows the transfer of essentially any data for the purpose of supporting the exercise of tasks without determining specific interference thresholds to that end is disproportionately broad. Indeed, the criterion of a hypothetical re-collection of data does not generally require that a specific risk situation, which is required for the collection of data - and which is generally also required for data collection by the offices for the protection of the Constitution, irrespective of the fact that their mandate is essentially limited to activities in the preliminary stages of a threat (cf. BVerfGE 100, 313 <383 and 384>; 120, 274 <329 and 330>; 130, 151 <205 and 206>) - also always be a precondition for each and every case of data transfer

(see above, D I 2 b bb). However, for constitutional reasons, it is imperative that the transfer of data be limited to data which, from the perspective of the Federal Criminal Police Office, not only constitutes a specific evidentiary basis for further investigations in criminal offences or dangers to high-ranking legal interests but also, at the same time, reveals specific insights on the endangerment of such legal interests (cf. on the transfer of data from intelligence services to the Federal Criminal Police Office BVerfGE 133, 277 <329 para. 123>) that are relevant for assessment of a situation in accordance with the duties of the offices for the protection of the Constitution. Regarding the transfer of data stemming from remote searches, it is furthermore necessary - like in the case of data stemming from the surveillance of private homes which the legislature has already made specific provision for in this respect - that the interference threshold for the data collection as such is reached, namely a specific impending danger (cf. BVerfGE 120, 274 <326, 328 and 329>). **[320]**

e) Accordingly, § 20v sec. 5 sentence 4 BKAG, too, does not satisfy the constitutional requirements. The provision allows a transfer of data to the Federal Intelligence Service (*Bundesnachrichtendienst*) subject to standards equivalent to those set out in § 20v sec. 5 sentence 3 no. 1 BKAG. The differences in wording do not - considering, too, the legislative reasons of the Act (cf. BTDrucks 16/9588, p. 34) - have an obvious substantive meaning and cannot, at any rate, alter the appraisal in terms of constitutional law. The constitutional deficiencies of § 20v sec. 5 sentence 3 no. 1 BKAG also arise with regard to this provision. **[321]**

4. Finally, all transfer powers lack overarching statutory provisions that ensure sufficient supervisory control. The data collection requirements calling for the substantive documentation and effective review by the Federal Data Protection Commissioner apply here, too (cf. above, C IV 6 d). **[322]**

IV.

In part, § 14 sec. 1 sentence 1 nos. 1 and 3, sentence 2 BKAG, which governs the transfer of data to public authorities of third countries - insofar as § 14a BKAG, which applies to transfers of data to Member States of the European Union, a rule that is not under scrutiny here, is not applicable -, also does not satisfy the constitutional requirements. **[323]**

1. The transfer of personal data to public authorities of third countries is, like the transfer of data to domestic authorities, a change in purpose. Insofar, in accordance with general standards, this change in purpose is to be assessed in light of the relevant fundamental rights with which the data collection interfered (see above, D I 2 a). However, with a view to the due respect owed to foreign legal orders, the transfer of data to third countries is subject to its own constitutional requirements. **[324]**

a) The result of a transfer of data to third countries is that, after the transfer, the guarantees of the Basic Law can no longer be applied as such and the standards prevailing in the respective receiving country apply instead. This does not, however, generally prevent a transfer to third countries. With its Preamble, Art. 1 sec. 2, Art. 9 sec. 2, Art. 16 sec. 2, Arts. 23 to 26 and Art. 59 sec. 2 GG, the Basic Law links the

Federal Republic of Germany to the international community and has programmatically aligned the German state authority towards international cooperation (cf. BVerfGE 63, 343 <370>; 111, 307 <318 and 319>; 112, 1 <25, 27>). This includes dealing with other countries even if their legal order and judicial conception does not fully conform to the German domestic conception (cf. BVerfGE 31, 58 <75 et seq.>; 63, 343 <366>; 91, 335 <340, 343 et seq.>; 108, 238 <247 and 248). Such an exchange of data also aims to maintain intergovernmental relations in mutual interests and the Federal Government's freedom of action in the area of foreign policy (cf. BVerfGE 108, 129 <137>). **[325]**

As a starting point, the German state authority, when deciding on the transfer of personal data to third countries, remains bound by the fundamental rights (Art. 1 sec. 3 GG); the foreign state authority is only committed to its own legal obligations. **[326]**

Insofar, limits to the transfer of data emerge, on the one hand, in view of the preservation of data protection guarantees. The limits in the Basic Law on the domestic collection and processing of data may not be undermined in their substance by an exchange of data between security authorities. The legislature must thus ensure that this protection of fundamental rights is not eroded through the transfer of data collected by German authorities to third countries and to international organisations, just as it must not be eroded by the receipt and use of data from foreign authorities that was obtained in violation of human rights. **[327]**

On the other hand, limits to the transfer of data arise with regard to the use of the data by the receiving state if violations of human rights are to be feared. In any event, the transfer of data to third countries is imperatively barred if violations of the fundamental rule-of-law principles are to be feared (cf. BVerfGE 108, 129 <136 and 137>). Under no circumstances may the state be complicit in violations of human dignity (cf. BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14 - para. 62, with further references). **[328]**

b) Accordingly, the transfer of data to third countries presupposes a restriction to sufficiently weighty purposes for which the data may be transferred and used (aa), as well as the ascertainment that the data will be handled in the third country in acceptable conformity with rule of law standards (bb). Apart from that, the guarantee of effective domestic oversight is required here, too (cc). The requirements are to be ensured through specific and clear foundations in German law (dd). **[329]**

aa) As far as the requirements for the purpose of the transfer and use of the data are concerned, the constitutional criteria for a change in purpose, being the relevant standards under the German legal order, apply (see above, D I 2). A transfer is thus permissible insofar as it would be permissible to collect the transferred data with comparably weighty means also for the purpose of the transfer (criterion of a hypothetical recollection of data). Thus, the transfer must pursue the aim of detecting comparably weighty criminal offences or the protection of comparably weighty legal interests as were relevant for the original data

collection. As a rule, however, the transfer is not subject to the requirement that there be a specific risk situation or suspicion of a criminal offence; it suffices that the transferred information or the request by the receiving state show that there is, in the specific case, an evidentiary basis for further investigations for the purpose of detecting such criminal offences or protecting against impending dangers to such legal interests and threatening these at least in the medium term. Insofar, the requirements for the transfer of data stemming from the surveillance of private homes and remote searches are stricter in that this requires that interference thresholds relevant for the data collection are fully complied with (see above, D I 2 b bb; cf. also BVerfGE 109, 279 <377, 379>; 120, 274 <329 et seq.>). **[330]**

With regard to the resulting necessity of appraising the use of data by the receiving country, which is necessary in particular in the case of a transfer request by a third country, sufficient weight must be attached to the autonomy of the respective other legal order. As far as the question of equal weight of the respective purpose of use is concerned, it needs to be considered in this respect that the German legal order faces another legal order whose parameters, categories and assessments are not identical to those reflected in the German legal order and Basic Law and do not have to be identical. The fact that purpose limitations of the German legal order are insofar not identically reflected in the foreign legal order in the same detail does not bar a data transfer from the outset. When transferring the data, the receiving authorities must be notified clearly and expressly of limitations of use. **[331]**

bb) Furthermore, the transfer of personal data to third countries presupposes that the data will be handled in the third country in acceptable conformity with human rights and data protection standards (1), and requires an according ascertainment by the German state to that end (2). **[332]**

(1) A transfer of data to third countries requires that the data will be handled in the third country in sufficient conformity with rule-of-law standards. **[333]**

(a) In terms of the requirements for the handling of the data in light of data protection standards it is, however, not necessary that the receiving country has enacted rules for the processing of personal data that are comparable to the rules applicable under the German legal order, or that the receiving country provide the same level of protection as the Basic Law. In fact, the Basic Law recognises the autonomy and diversity of legal orders and generally respects them, also in the context of the exchange of data. Parameters and assessments do not need to conform to those of the German legal order or the German Basic Law. **[334]**

However, the transfer of personal data to third countries is only permissible if the handling of the transferred data in these countries does not undermine the human rights protection of personal data. This is not to say that the third country's legal order must guarantee institutional and

procedural precautions in line with the German approach; in particular, it is not necessary that there be the same formal and institutional safeguards as required under data protection laws applicable to German authorities (see above, C IV 6). In this sense, it is necessary that an appropriate and substantive level of data protection be guaranteed with regard to the handling of the transferred data by the receiving state (cf. similarly ECJ, Judgment of 6 October 2015 - C-362/14 -, Schrems/Digital Rights Ireland, NJW 2015, p. 3151 <3155>, para. 73; cf. also Art. 8 ECHR; on this ECtHR, [GC], Roman Zakharov v. Russia, no. 47143/06, Judgment of 4.12.2015, §§ 227 et seq.; Art. 17 sec. 1 sentence 1 of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, BGBl. 1973 II p. 1534, UNTS 999, p. 171; Art. 12 of the Universal Declaration of Human Rights (UDHR) of 10 December 1948, General Assembly Res. 217 A III, GAOR III, Doc. A/810, p. 71; cf. in this respect The right to privacy in the digital age, UN General Assembly Resolution 68/167 of 18 December 2013, UN Doc. A/Res/ 68/167 (2014), no. 4). Insofar, it needs to be considered in particular whether limitations resulting from the principle of purpose limitation, the requirement to delete the recorded data as well as fundamental requirements regarding oversight and data security are at least observed in general terms. The relevant standards for this appraisal are the domestic laws and the international obligations of the receiving state as well as their actual day-to-day application (cf. similarly ECJ, Judgment of 6 October 2015 - C-362/14 -, Schrems/ Digital Rights Ireland, NJW 2015, p. 3151 <3157>, para. 75). **[335]**

(b) In view of the fear of potential human rights abuses through the use of the data in the receiving state, it must be guaranteed in particular that the data will neither be used for political persecution nor inhuman or degrading punishment or treatment (cf. Art. 16a sec. 3 GG). Overall, the legislature must ensure that the transfer of data collected by German authorities and transferred to third countries or international organisations does not undermine the protection of the European Convention on Human Rights and the other international human rights conventions (cf. Art. 1 sec. 2 GG). **[336]**

(2) Whether the required protection level is guaranteed in the receiving state need not be examined separately for each individual case and secured through individually assured commitments that are binding under international law. In this respect, the legislature may instead also rely on a generalising factual assessment rendered by the Federal Criminal Police Office regarding the legal and factual situation in the receiving states. This assessment may claim validity as long as it is not opposed by facts to the contrary in special circumstances (cf. BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14 - para. 69, with further references). **[337]**

If decisions with a view to a receiving state cannot be based on such assessments, it is necessary to conduct a facts-based case-by-case assessment that determines whether it is at least guaranteed that essential requirements for the handling of data are sufficiently met (see above, D IV 1 b bb (1)). If necessary, binding individual guarantees can and must be provided. As a rule, a binding assurance is a suitable means for removing concerns with regard to the permissibility of the transfer of data, so long as it is not to be expected that the assurance will not be adhered to in the individual case (cf. BVerfGE 63, 215 <224>; 109, 38 <62>; BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14 - para. 70). However, as far as the individually applicable requirements are concerned, the legislature may also choose to determine these on the basis of an appraisal of the individual case. **[338]**

Ascertaining that the required degree of protection is met - be it generalised, be it in the individual case - is not a decision at the German authorities' free political disposal. In fact, the decision must be based on substantial and realistic information and must be updated regularly. Its reasons must be documented in a comprehensible manner. Further requirements are that the Federal Data Protection Commissioner has the opportunity to review the decision and that it may be subjected to judicial review (cf. also ECJ, Judgment of 6 October 2015 - C-362/14 -, Schrems/Digital Rights Ireland, NJW 2015, p. 3151 <3156>, paras. 78, 81, 89). **[339]**

cc) Even so, requirements of effective supervisory control including the suitable documentation of the respective transfer activities as well as the requirement of reporting duties apply in Germany (see above, C IV 6 d, e). **[340]**

dd) The standards developed above must be statutorily enshrined in a manner that satisfies the principle of specificity and legal clarity. This also includes the fact that the legal bases which, insofar as permissible, are meant to authorise a transfer of data for the purpose of receiving information through a matching of data collected by authorities in third countries as well as a return of supplementary information are as such designed with legal clarity. **[341]**

2. The transfer requirements stipulated in § 14 sec. 1 sentence 1 nos. 1 and 3 and sentence 2 BKAG are incompatible with these requirements. **[342]**

a) Insofar as it is to be understood as constituting an own legal basis […], § 14 sec. 1 sentence 1 no. 1 BKAG does not satisfy the constitutional requirements for a change in purpose. By generally allowing a transfer of data by the Federal Criminal Police Office for the purpose of fulfilling the tasks incumbent upon it, it lacks standards ensuring that data stemming from particularly intrusive surveillance measures may only be transferred for purposes that conform to the criterion of a hypothetical re-collection of data (cf. above, D I 2 b). Thus the power is not sufficiently delimited and disproportionate **[343]**

b) With respect to data stemming from the surveillance of private homes, § 14 sec. 1 sentence 1 no. 3 BKAG, too, is too broad and thus incompatible with constitutional requirements. According to the standards developed above, it must be ensured that such data may only be transferred in the event of imminent danger (see above, D I 2 b bb; cf. also BVerfGE 109, 279 <377, 379>). The provision does not contain such a limitation. **[344]**

Yet as far as other data is concerned, the provision is not constitutionally objectionable when construed appropriately. […] **[345]**

c) Finally, the transfer requirements set down in § 14 sec. 1 sentence 2 BKAG are also not compatible with the requirements for a change in purpose. **[346]**

The provision fails to sufficiently ensure that the transfer of data, following the criterion of a hypothetical re-collection of data, is limited to the protection of sufficiently weighty legal interests (cf. above, D I 2 b). The provision generally allows a transfer of data to prevent criminal offences of particular seriousness, without distinguishing with respect to the respective means chosen for the collection of the data. This threshold, however, does not justify the transfer of data stemming from particularly intrusive measures. If the legislature, in the context of data transfers for the purpose of preventing threats - as it does here for the prevention of criminal offences - does not invoke legal interests to determine the new purposes but rather refers to the nature of the crimes it intends to prevent, the respective weightings that apply to data collection under criminal procedural law are relevant here, too. Accordingly, the transfer of data stemming from telecommunications surveillance measures is limited to the prevention of serious criminal offences, while the transfer of data stemming from the surveillance of private homes and remote searches is limited to the prevention of particularly serious criminal offences (cf. BVerfGE 109, 279, <343 et seq.>; 125, 260 <328 and 329>; 129, 208 <243>; see also above, C IV 1 a). The provision, however, does not stipulate such requirements with regard to the transfer of data. **[347]**

Furthermore, in terms of the necessary degree of specificity of the risk situation, the provision does not meet the constitutional requirements in all respects. By indiscriminately allowing a transfer of data as soon as there are "grounds for believing" that a criminal offence will be committed in the future, it also allows a transfer of data obtained through the surveillance of private homes and remote searches without requiring an imminent danger (cf. BVerfGE 109, 279 <377, 379> on the surveillance of private homes) or a sufficiently specific impending danger (cf. BVerfGE 120, 274 <326, 328 and 329> on remote searches). This is incompatible with the requirements set out above (cf. above, D I 2 b bb). However, insofar as other types of data are concerned this interference threshold is not objectionable. As the provision requires indications that a crime will be committed, the transfer of data is conditional on whether a specific evidentiary basis for further investigations arises from the data. This is compatible with constitutional requirements. **[348]**

d) In contrast, the overarching rule in § 14 sec. 7 BKAG does not raise effective constitutional concerns. **[349]**

aa) § 14 sec. 7 sentence 7 BKAG determines that the transfer of data is barred insofar as the person concerned has a prevailing and legitimate interest in halting the transfer; thus, the provision leaves sufficient room for the constitutionally required ascertainment as to whether the required human rights standards are adhered to. **[350]**

bb) § 14 sec. 7 BKAG takes account of the Basic Law's data protection requirements by setting out procedural law standards for the transfer and by requiring an ascertainment of an appropriate level of data protection in the receiving country. **[351]**

(1) The provision establishes the Federal Criminal Police Office's responsibility for the admissibility of the transfer of data and thus demands an examination in particular as to whether sufficiently plausible indications result from the transferred information itself or in the context of a transfer request according to which the transfer of data is permissible for the respective purposes. If construed appropriately, the provision ensures both that the transfer purpose is formally communicated and that it is clearly pointed out that the data may be used only for this indicated purpose. In this respect, it is not objectionable that the purpose limitation is secured only by means of a reference to it, rather than by means of a formal obligation; nor is it objectionable that with regard to the deletion period only an informational notice on the German legal situation must be provided. Generally it is sufficient that, with regard to the factual and legal situation in the receiving state, the authorities ascertain that the data protection level is in actual fact appropriate. **[352]**

(2) § 14 sec. 7 sentences 7 to 9 BKAG stipulates such ascertainment requirements. This provision, when interpreted in conformity with the Constitution, is compatible with the constitutional requirements. It prohibits the transfer of data if a balancing of interests in the individual case results in the finding that legitimate interests of the person concerned prevail and, to that end, notes that these include an appropriate level of data protection in the receiving state. When interpreted in the light of the Constitution, however, the adherence in the receiving state to the fundamental rights requirements requiring appropriate data protection when handling data is not merely a factor the authorities can discretionarily overcome on a case-by-case basis. Instead, minimum fundamental rights requirements must always be ensured. If it is not possible by other means to ascertain that the transferred data will be handled in acceptable conformity with fundamental rule-of-law principles in the third country, recourse must be taken in individual cases to obtaining assurances that meet the requirements set out in § 14 sec. 7 sentence 9 BKAG. Such an interpretation of the provision does not raise concerns as to its constitutionality. The general provision § 27 sec. 1 no. 1 BKAG is an additional backup for the provision. **[353]**

e) As for the rest, the transfer rules set out in § 14 sec. 1 BKAG do not meet the constitutional requirements insofar as, with regard to transfer practices, they lack sufficient rules on supervisory control and the ordering of reporting duties (see above, C VI 6 d, e). In contrast, documentation requirements are set out in § 14 sec. 7 sentence 3 BKAG as constitutionally required (cf. BVerfGE 133, 277 <370 para. 215>). In light of the fact that § 19 Federal Data Protection Act (*Bundesdatenschutzgesetz*) applies, the data subjects' rights to information are also provided for (cf. BVerfGE 120, 351 <364 and 365>; see above, C IV 6 b; C VI 3 b). **[354]**

E.

I.

1. The finding that certain provisions are unconstitutional generally results in their voidness. However, the Federal Constitutional Court may also - pursuant to § 31 sec. 2 sentences 2 and 3 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG) - confine itself to simply declaring that an unconstitutional provision is incompatible with the Constitution (BVerfGE 109, 190 <235>). This results in a mere contestation of the unconstitutionality of a provision without the declaration of its voidness. At the same time, the Federal Constitutional Court may combine the declaration that a provision is incompatible with the Constitution with an order according to which the unconstitutional provision shall nonetheless stay in effect on an interim basis until a date specified by the Court. This option is feasible if the immediate voidness of the contested provision would deprive common goods of paramount importance of their protection and if the outcome of a weighing of these interests with the fundamental rights at stake is that the interference can be tolerated during a transitional period (BVerfGE 33, 1 <13>; 33, 303 <347 and 348>; 40, 276 <283>; 41, 251 <266 et seq.>; 51, 268 <290 et seq.>; 109, 190 <235 and 236>). During the transitional period, the Federal Constitutional Court may, until the constitutional order is restored, take interim measures to reduce the authorities' powers, in line with what appears necessary in light of the weighing of interests (BVerfGE 40, 276 <283>; 41, 251 <267>). **[355]**

2. Accordingly, § 20h sec. 1 no. 1 c and § 20v sec. 6 sentence 5 BKAG are to be declared unconstitutional and void. The provisions do not satisfy the constitutional requirements and the legislature cannot remedy this by adopting a provision with comparable legislative content. **[356]**

In contrast, § 20g secs. 1 to 3, §§ 20h, 20j, 20k, 20l, § 20m secs. 1 and 3 - in this respect also § 20v sec. 6 sentence 3 (second half) - and § 20u secs. 1 and 2 as well as § 20v sec. 4 sentence 2, sec. 5 sentences 1 to 4 (without sentence 3 no. 2), § 14 sec. 1 sentence 1 nos. 1 and 3, sentence 2 BKAG are merely declared to be incompatible with the Constitution; the declaration that the provisions are incompatible with the Constitution is combined with the order that they shall nonetheless stay in effect on an interim basis until 30 June 2018 at the latest. The grounds for the unconstitutionality of the provisions do not affect the core of the powers granted through the provisions but merely touch upon individual aspects of their design in light of the rule of law; the fact that the overall assessment resulted in the finding of unconstitutionality is largely due to the fact that there is a lack of individual provisions capable of ensuring proportionality in a comprehensive manner, such as provisions guaranteeing effective

review. Under such circumstances, the legislature is given the opportunity to remedy the constitutional contestations and thereby achieve the core of the objectives pursued by the provisions. In light of the great importance of an effective fight against international terrorism for a free and democratic state based on the rule of law, the provisions' continued interim applicability is more tolerable than a declaration of their voidness; a declaration to that effect would deprive the Federal Criminal Police Office of pivotal investigative powers for fighting international terrorism until the adoption of new legislation. **[357]**

However, with regard to the fundamental rights at issue, the order that the provisions are subject to continued applicability, for an interim period, necessitates certain restrictive requirements. A necessary order is, first of all, that measures adopted pursuant to § 20g sec. 2 nos. 1, 2 b, 4 and 5 BKAG may only by ordered by a court; in case of immediate danger, § 20g sec. 3 sentences 2 to 4 BKAG applies accordingly. Furthermore, measures set out in § 20g sec. 1 no. 2, § 20l sec. 1 no. 2 and § 20m sec. 1 no. 2 BKAG may only be ordered if the conditions stipulated in § 20k sec. 1 sentence 2 BKAG are fulfilled in the sense of the interpretation in conformity with the Constitution laid out in the grounds of this decision. Finally, the further use of data pursuant to § 20v sec. 4 sentence 2 BKAG or the transfer of data pursuant to § 20v sec. 5 and § 14 sec. 1 BKAG is, with regard to data stemming from the surveillance of private homes (§ 20h BKAG), only permissible in cases of imminent danger and, with regard to data stemming from remote searches (§ 20k BKAG), only permissible if there is, a sufficiently specific impending danger to the relevant legal interests in that particular case. **[358]**

II.

In parts, the decision was not adopted unanimously. This is true in particular with regard to the finding that § 20g sec. 1 no. 2, § 20l sec. 1 no. 2 and § 20m sec. 1 no. 2 BKAG are unconstitutional (rather than ruling that they may be interpreted in conformity with the Constitution); the recognition that the investigative powers set out in § 20g BKAG typically affect the core area; the objections raised against insufficiently designed supervisory powers, reporting and sanctioning duties; and, in parts, also with regard to the lack of requirements of a judicial decision. These findings were handed down with 5:3 votes. **[359]**

XV. Protection of Property - Article 14 of the Basic Law

Some General Background

The history of the protection of property in constitutions and international treaties reveals difficulties. Some noteworthy instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) did not contain property protection clauses. In the case of the ECHR such a clause was added to the first Protocol to the Convention[158], which went into effect in 1954, one year after the original Convention. To this day Switzerland has not ratified this Protocol[159]. Property protection, as included in the Universal Declaration of Human Rights in Article 17 requires that "[e]veryone has the right to own property alone as well as in association with others" and "[n]o one shall be arbitrarily deprived of his property".[160] The reason for these difficulties mainly has to do with the potential impact a property protection clause was perceived to perhaps have on the economic order of a state. There was a certain reluctance to, in essence, set a free market economy as the only possible option for a state by introducing a property protection clause. The alternative, namely to limit property protection to personal property was also not very attractive. A second difficulty lies in the fact that the concept of property itself is an abstract legal concept. The term 'property' refers to a legal relationship of one or several - natural or legal - persons to chattel or immovable property, usually to the exclusion of others. Property is therefore the product of a legal order, notwithstanding the fact that core elements of property can be traced to trans-positivist notions of natural law or the like. The Basic Law has incorporated this inherent difficulty by guaranteeing property and the right of inheritance (property succession) in Article 14.1 but at the same time stipulating in Article 14.2 that property has a social function and the owner a social responsibility. Article 14.3 regulates the taking (expropriation) of property. Article 15, which specifically allows for the nationalization of "Land, natural resources and means of production", the embodiment of the conflict among the drafters of the Basic Law between free marketers on the one side and a more socialistically inclined opposition. Article 15 has never become relevant and probably will not become relevant in the foreseeable future, not only because the communist model for economic organization has not proven to be very successful, but also because Article 15 makes nationalization subject to the payment of compensation and hence prohibitively expensive.

158 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 9, available at http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm.

159 Neither has Monaco but the Principality only joined the Convention in 2005, see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures (last accessed on 20.10.2019).

160 The Universal Declaration of Human Rights of 10.12.1948, https://www.un.org/en/universal-declaration-human-rights/index.html (last accessed on 21.10.2019).

1. Groundwater, BVerfGE 58, 300

Explanatory Annotation

In this case a gravel pit operator sought authorization from the relevant water authorities to continue extracting gravel at sub-ground-water level in a water protection zone. This authorization was denied. The applicant did not seek legal remedies against the denial and instead demanded compensation for what he regarded as a taking of his land because the commercial exploitation of it had been made impossible.

The case is significant because of the Court's attempt to develop a clear structure of the protection in Article 14. The Court distinguished between a legal taking, i.e. a taking of property directly afforded by statute, an administrative taking, i.e. a taking afforded on the basis of an administrative act based on statute on the one hand and a "content definition", i.e. a legal definition of what is to be property - and thus protected - and what isn't. At issue here were several provisions of the Federal Water Act, which made any use of groundwater subject to authorization. The Court regarded these provisions as content definition provisions, i.e. it regarded these provisions as withdrawing the groundwater and its use from the ownership of the land. In other words insofar as the groundwater is concerned, there is no property and hence there cannot be any taking.

A further consequence of the decision was that those affected by such administrative acts do not have a choice to either accept the administrative restriction and demand compensation for it or challenge the administrative act. Either the act in question is an admissible expropriation, in which case the only option is to seek adequate compensation or it is not, in which case the administrative act and the restriction it contains must be challenged.

Translation of the Groundwater Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 58, 300*

Headnotes:

1. a) In the case of a dispute with respect to the legality of an expropriatory action, the administrative courts, which in principle have jurisdiction, must examine all aspects of the legality of the action. This includes determining whether the law on which the interference is based contains a provision governing the nature and extent of compensation to be awarded.

   b) In the case of a dispute with respect to the amount of compensation for expropriation, the ordinary courts are responsible for determining whether the party affected was awarded compensation as called for by (existing) legislation (see BVerfGE 46, 268 [285]).

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

2. If the party affected considers an action directed against him to constitute expropriation, that party may bring an action for compensation only if a legal basis exists for such a claim. In the absence of any such legal basis, the party affected must petition the courts of jurisdiction for reversal of the interventionary action.

3. Civil law and provisions of public law enjoy equal priority for the purposes of the definition of the legal interests of owners of landed property pursuant to Article 14 sentence 2 of the Basic Law (Grundgesetz - GG).

4. The fact that the Federal Water Act (Wasserhaushaltsgesetz - WHG) has subjected the use of subsurface water to regulations of public law that are independent of property in land for the purposes of ensuring viable water management - in particular as regards the public water supply - is consistent with the Basic Law.

Order of the First Senate of 15 July 1981, 1 BvR 77/78

Facts:

The claimant in the initial proceedings had been operating a wet gravel pit on his property in the Münsterland region since 1936. The extraction of gravel from the aquifer was allowed under the Prussian Water Act (Preußisches Wassergesetz) of 1913, which was in force at the time. An application for a permit to continue extraction of gravel filed after the Federal Water Act went into effect was denied by the public authority. The objection of the claimant was unsuccessful; the claimant did not bring any action to compel issuance of the permit applied for. Instead the petition submitted by the claimant for compensation due to an expropriatory action in respect of his established and operational commercial enterprise and his landed property as a result of the denial of the water use permit was dismissed by the Land of North Rhine-Westphalia. The subsequent action before the civil courts seeking appropriate compensation resulted in a stay of the proceedings by the Federal Court of Justice (Bundesgerichtshof). The Federal Court of Justice referred the question as to whether s. 1a.3, s. 2.1 and s. 6 of the Federal Water Act are compatible with Article 14.1 sentence 2 of the Basic Law to the Federal Constitutional Court. The Federal Court of Justice saw a violation of property rights in the fact that the provisions of the Federal Water Act made any use of groundwater that is relevant in terms of water management dependent upon a "loan" to which the property owner has no legal claim.

The Federal Constitutional Court found the provisions of the Federal Water Act on which the Federal Court of Justice based its decision to be consistent with the Basic Law.

Extract from the Grounds:

…

B.

The referral is admissible.

I.

The purpose of judicial review pursuant to Article 100.1 of the Basic Law is to ensure that decisions made in the case of concrete legal disputes are consistent with the Basic Law. Accordingly, these interlocutory proceedings are required and admissible if the validity of a provision submitted for review is relevant for the purposes of rendering a decision in initial proceedings; the provision must be relevant to the subject matter and outcome of the legal dispute. This will be the case only if the decision would have to be different if the provision is invalid from what it would have to be if the provision is valid (BVerfGE 46, 268 [283]).

The order for reference satisfies these conditions only if the question referred for review (s. 81 of the Federal Constitutional Court Act can be interpreted to be whether the provisions of the Federal Water Act under challenge are incompatible with the Basic Law because they involve expropriatory norms that contain no provision for appropriate compensation as called for by Article 14.3 sentence 2 of the Basic Law.

In addition, constitutional review of the facts underlying the initial legal dispute must also be expanded to cover s. 17 of the Federal Water Act.

1. The order for reference contained mention of the following alternative decisions at the level of the initial proceedings: If the provisions of the Federal Water Act that qualify as laws within the meaning of Article 14.1 sentence 2 of the Basic Law are valid, the action must be dismissed; if they are invalid, the Senate must stay the decision "until the legislature has provided a constitutionally unobjectionable definition of the substantive content of landed property in respect of groundwater."

This examination does not constitute a ground for considering the provisions under challenge relevant for the purposes of the decision. Proceeding on the basis of the legal opinion of the Court, the action would also have to be dismissed if the cited provisions are incompatible with the Basic Law. The initial proceedings involved a dispute over compensation within the meaning of Article 14.3 sentence 4 of the Basic Law; this provides the basis for the alternative decisions.

a) The Basic Law assigned adjudicatory authority over decisions regarding the area of law governing expropriation that is limited in terms of function and content to the ordinary courts. According to Article 14.3 sentence 4 of the Basic Law, they must rule if a dispute arises as to the amount of compensation. Since the judicial review proceedings pursuant to Article 100.1 of the Basic Law represent an integral part of the initial legal dispute - even if referred to the Federal Constitutional Court for decision, it follows from the provision of the Basic Law governing legal recourse that only such provisions of law may be referred for constitutional review and only such legal issues referred for decision (s. 81 of the Federal Constitutional Court Act) as are of legal importance in such proceedings. On the other hand, legal issues that arise outside the area of jurisdiction identified by Article 14.3 sentence 4 of the Basic Law may not constitute the subject matter of a reference. Otherwise, proceedings pursuant to Article 100.1 of the Basic Law would result in abstract judicial review pursuant to Article 93.1 no. 2 of the Basic Law, which the courts have no authority to initiate. The Federal Constitutional Court may in connection with concrete abstract judicial review proceedings also rule only on legal issues of importance for decisions in initial proceedings.

b) Article 14.3 sentence 4 of the Basic Law is the procedural complement to the principle formulated in Article 14.3 sentence 2 of the Basic Law to the effect that a legal basis for compensation must exist. The content and scope of claims for compensation that may be sought by the party affected must be determined by law (BVerfGE 46, 268 [285]).

The court must rule on whether the expropriated party has been awarded compensation in compliance with the provisions of law. This represents the limit to the jurisdictional competence of the ordinary courts. They may not award compensation for expropriation in the absence of a basis for such claims created by the legislature.

As regards judicial review, what is important is therefore whether the legal dispute is based on an expropriation law that satisfies the requirements of Article 14.3 sentence 2 of the Basic Law. This provision permits expropriation only on the basis of legislation that at the same time regulates the nature and extent of compensation; a law that does not satisfy these requirements is unconstitutional (BVerfGE 24, 367 [418]; 46, 268 [287]).

As a result, two legal questions are at issue in the reference proceedings: first of all, whether the law on which the administrative action is based and on the basis of which compensation is claimed is an expropriation law within the meaning of Article 14.3 sentence 2 of the Basic Law and secondly - if that is the case - whether the law at the same time makes provision for compensation.

In that regard, it must be initially noted that the provisions under challenge specify the conditions under which the use of water may be permitted. However, this is not for the ordinary courts to decide. In addition, the decision of a legal dispute pursuant to Article 14.3 sentence 4 of the Basic Law may not hinge upon whether a law that governs the content and limits of property pursuant to Article 14.1 sentence 2 of the Basic Law is compatible with the Basic Law. Such a question would be of no importance as regards the legality of an expropriation since it can in no case - neither if the provisions are valid, nor if they are invalid - result in confirmation of the existence of an expropriation that entails obligatory compensation. The opinion of the Court of Appeal cited in the order for reference to the effect that going beyond the bounds of "responsibility to society ... gives rise to a right to compensation" is not consistent with the Basic Law. A provision defining substantive content retains its legal character as a norm within the meaning of Article 14.1 sentence 2 of the Basic Law, even if it is in violation of the Basic Law and is not transformed into an expropriation law that is subject to the requirements of Article 14.3 of the Basic Law (BVerfGE 52, 1 [27 and 28]).

A provision of law cannot at one and the same time be both constitutional and unconstitutional. Accordingly, the application of such a provision by public authorities cannot be considered to constitute an instance of administrative expropriation that entails an obligation to provide compensation, but still represents in any case mere enforcement of a law, which, however, may be contested through legal channels. Whether a party affected by an invalid law has any grounds for remedial action may also not be decided in proceedings pursuant to Article 14.3 sentence 4 of the Basic Law.

2. The admissibility of the order for reference as regards the relevance of the provisions under challenge to the decision can accordingly be confirmed only on the basis of the question presented in respect of the legality of the expropriation. The question at issue is whether the cited provisions of the Federal Water Act involve expropriatory norms that must be complemented by provision for compensation on constitutional grounds.

However, although the Federal Court of Justice also views the provisions under challenge as laws within the meaning of Article 14.1 sentence 2 of the Basic Law, that it considers to be unconstitutional, analysis of the order for reference shows that the Court ultimately proceeds from the expropriatory character of the provisions under challenge, which would be incompatible with the Basic Law due to the absence of a compensation clause.

The fact that the legality of expropriation is at issue in the order for reference is reflected by, among other things, the fact that the Court several times characterizes the loss of the possibility of extracting gravel due to the denial of the water usage permit as encroachment on property rights protected by the Basic Law and deprivation of an ownership interest. The complainant is deprived of his legal interest as defined by ss. 903 and 905 of the Civil Code (Bürgerliches Gesetzbuch - BGB) and the "nature of the matter" by the provisions under challenge. Deprivation of a legal interest guaranteed by Article 14.1 sentence 1 of the Basic Law, which, accordingly, constitutes the substantive content of the provisions under challenge, is, however, the typical characteristic of expropriation (BVerfGE 52, 1 [27]).

The Federal Court of Justice also does not consider the fact that the complainant in the initial proceedings was prevented from carrying out plans to engage in wet extraction of gravel in the immediate vicinity of a water works to be in any way unconstitutional. In fact, it was emphasized, and to be sure repeatedly, that the Basic Law does not allow such measures without compensation.

In the final analysis, the Federal Court of Justice is prevented from deciding in favour of the claimant because the provisions under challenge do not at the same time contain the necessary provisions for compensation required by Article 14.3 sentence 2 of the Basic Law. It is therefore necessary to reinterpret the question posed in the order for reference accordingly in order to determine whether the provisions of the Federal Water Act are unconstitutional under this aspect.

Such reinterpretation is warranted in view of the function of judicial review, which is to create legal clarity in the case of provisions of law whose constitutional validity is disputed. The question as to whether the government is constitutionally required to provide compensation when applying the provisions of the Federal Water Act in cases such as that at hand - as the Federal Court of Justice has assumed in its previous case law - is one of far-reaching legal and economic importance. As is illustrated by the order of the Senate of 7 June 1977 (BVerfGE 45, 63), municipalities, which are primarily affected, have no possibility of clarifying this legal issue through constitutional proceedings. In addition, the Federal Administrative Court (Bundesverwaltungsgericht) takes a position that differs from that of the Federal Court of Justice.

3. The claimant in the initial proceedings did not contest denial of a water usage permit through an action that was available to him. The question that follows from this as to whether a legal dispute is even possible in respect of the amount of compensation pursuant to Article 14.3 sentence 4 of the Basic Law can be answered in the affirmative only by way of exception in view of the special nature of the facts involved in the matter.

a) A citizen affected by an expropriatory action has - except in the case of special situations that need not be considered here - pursuant to Article 19.4 sentence 1 of the Basic Law in conjunction with s. 40 of the Code of Administrative Court Procedure (Verwaltungsgericht-sordnung - VwGO) recourse to the administrative courts. The role of these courts is to review all factual and legal aspects of the administrative action to determine its legality (BVerfGE 32, 195 [197] with references).

In this context, their powers of review exceed those of the ordinary courts. Apart from determining whether the action satisfies the constitutionally mandated conditions of Article 14.3 sentence 1 of the Basic Law and the principle of proportionality, (BVerfGE 24, 367 [404 and 405] they must in particular establish whether the action was taken on a constitutional basis. This also includes a determination of whether the law on which the action is based contains a provision governing the nature and extent of compensation to be provided. Since a law that does not satisfy this requirement is unconstitutional, the administrative courts may not apply such a law; instead, they must obtain a decision as to the validity of the law from the Federal Constitutional Court pursuant to Article 100.1 of the Basic Law (See, for example, BVerfGE 25, 112 [114]; 51, 193 [210 and 211]; 52, 1 [14]).

If the law is declared unconstitutional, the administrative action based on that law must be voided since it violates the fundamental right of the party affected under Article 14.1 sentence 1 of the Basic Law.

The guarantee of property protects concrete holdings in the possession of the individual owner (BVerfGE 24, 367 [400]; 38, 175 [181, 184 and 185]).

He need accept deprivation of his constitutionally protected legal interest only if such action satisfies in every respect the requirements stipulated in Article 14.3 of the Basic Law. In such cases, the guarantee of an existing legal interest is replaced by a guarantee of its value, which is intended to ensure compensation whose details are determined by the legislature (Decisions of the Federal Administrative Court [*Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE] 24, 367 [397]; 46, 268 [285]).

On the other hand, voidance of the interventionary action is the consequence of an unconstitutional "expropriation" provided for by the Basic Law (BVerfGE 56, 249 [266]).

By opening the way to recourse to the administrative courts, the Basic Law has also given parties affected by such actions the possibility of defeating the administrative action themselves if the underlying law is invalid, either because it lacks provision for compensation, or for any other reason [see BVerfGE 45, 297 [342 et seq.]).

Such parties may as a final resort avail themselves of the possibility of a constitutional complaint if the administrative courts do not agree with their submission to the effect that an unconstitutional expropriation law is involved (See, for example, BVerfGE 45, 297 [346]; 53, 336 [349]).

b) The following consequences ensue as regards the adjudicatory authority of the ordinary courts over proceedings pursuant to Article 14.3 sentence 4 of the Basic Law: if a citizen considers the action directed against him to constitute expropriation, that citizen may bring an action for compensation only if a legal basis exists for such a claim. In the absence of any such legal basis, the party affected must seek voidance of the interventionary action through the administrative courts. The party may not, however, forego appeal and claim compensation to which the party is not entitled by law; in the absence of any legal basis, the courts also cannot award any such compensation.

Accordingly, the party affected does not have the option to choose whether to defend himself against an "expropriation" that is illegal because of the lack of legal provision for compensation or to demand compensation without doing so. If that party neglects to contest the interventionary action, the action for compensation must be dismissed. Individuals who fail to avail themselves of the possibilities afforded by the Basic Law to create a situation that is consistent with the Basic Law may not then turn around and demand pecuniary compensation from the government for a loss of legal rights that they themselves brought about.

Referral to the possibility of contesting the administrative action does not represent an unreasonable burden for the party affected. The decision to avail oneself of this legal remedy involves no greater difficulty than the decision to bring an action for compensation. It presupposes only that it be ascertained whether the law makes provision for compensation.

…

II.

The decision to be rendered in the initial proceedings therefore hinges upon whether the fact that the Federal Water Act does not entitle the claimant to compensation because of the denial of a water usage permit is compatible with the Basic Law. The question referred for review (s. 81 of the Federal Constitutional Court Act) is therefore whether Article 14.3 sentence 2 of the Basic Law has been violated.

…

C.

I.

It is not possible to concur with the opinion of the referring court in the assessment of the constitutional issue involved.

…

II.

1. In reviewing the provision against the standard of the Basic Law, it must be assumed that the legislature can enact three different types of laws relating to property rights under Article 14 of the Basic Law.

Taken in the sense of assignment of a legally protected interest to a legal entity, property necessarily requires legal definition in order to be viable in the legal sphere. Accordingly, the Basic Law assigns the legislature responsibility for determining the content and limits of property in Article 14.1 sentence 2. Such norms specify, generally and in the abstract, the rights and obligations of ownership and therefore determine the substantive "content" of property (BVerfGE 52, 1 [27]).

The legislature thereby creates at the legislative level those legal norms that establish and define the legal position of ownership; such norms may be of the nature of private law or public law.

Article 14.3 sentence 2 of the Basic Law also gives the legislature the possibility of depriving an identified or identifiable class of individuals of concrete property rights by law that were legally acquired on the basis of generally applicable laws within the meaning of Article 14.1 sentence 2 of the Basic Law (expropriation by operation of law - BVerfGE 24, 367 [395 and 396]; 45, 297 [325 and 326]; 52, 1 [27]).

Finally, the legislature may - also pursuant to Article 14.3 sentence 2 of the Basic Law - empower the executive to deprive individuals of concrete property. Expropriation on the basis of a law (administrative expropriation) requires an enforcement action by a public authority that - unlike expropriation by operation of law - may be contested through legal channels.

The various provisions of law pertaining to property rights that come into question here are subject to different requirements as regards their admissibility under the Basic Law. This applies not only in respect of the definition of substantive content and expropriation. The two forms of expropriation are not arbitrarily interchangeable as regards the guarantee of comprehensive and effective legal recourse under the Basic Law (BVerfGE 24, 367 [401]; 45, 297 [331, 333]).

In addition, their effects are not identical since the deprivation of rights occurs at different points in time (see BVerfGE 45, 297 [326]).

Contrary to the legal opinion advocated in the order for reference, expropriation by operation of law and administrative expropriation are mutually exclusive: a legal interest that has already been appropriated by the legislature cannot then be set aside again through administrative action. One and the same provision of law cannot effect expropriation by operation of law and at the same time empower the executive to undertake expropriation. That means that if the Federal Water Act appropriated the power inferred by the court from s. 905 of the Civil Code as soon as it went into force, application of s. 6 of the Federal Water Act cannot constitute expropriation of powers invested pursuant to that provision.

Definition of substantive content, expropriation by operation of law and administrative expropriation are all independent legal institutions that the Basic Law clearly distinguishes from one another. That does not, however, exclude the possibility that a new legislative provision within

the meaning of Article 14.1 sentence 2 of the Basic Law to be applied in the future will at the same time effect expropriation by operation of law because, and to the extent, it appropriates rights that an individual has exercised on the basis of previous law (BVerfGE 45, 297 [332]; 52, 1 [28]).

The provisions under challenge are not expropriation laws in the context of this system; they neither empower the executive to seize the land of the owner who plans to engage in the wet extraction of gravel, nor is expropriation by operation of law involved; instead, they regulate the content of and limits to property within the meaning of Article 14.1 sentence 2 of the Basic Law.

2. In order to determine whether a legal action qualifies as expropriation, it is necessary to establish whether the party affected has a claim to a legal interest amenable to expropriation at the time of the seizure (BVerfGE 25, 112 [121]; 29, 348 [360]).

a) In that regard, the referring court proceeds on the basis of the following opinion: landed property includes the groundwater, which is considered to belong to that part of the terrestrial body covered by the right of property owners pursuant to s. 905 of the Civil Code. The question as to whether groundwater is a physical object need not be addressed; in any case, the right to dispose of the groundwater found on the land is considered to inure to the landed property. The public law use regulations of the Federal Water Act restrict the "right inherent in landed property" to "free access to groundwater."

   It is not possible to concur with this legal opinion.

   …

b) The order for reference is also based on the legal opinion to the effect that ownership of landed property must be considered a comprehensive right that in principle encompasses any possible and economically reasonable use and is conditioned by civil law and in particular by s. 903 of the Civil Code. This is reflected by, among other things, the fact that the court speaks of property "within the meaning of Article 14.1 sentence 2 of the Basic Law and s. 903 of the Civil Code."

   Proceeding from this basis, the public law regulations of the Federal Water Act that restrict the owner's enjoyment of property under private law would seem to constitute restriction of his property rights, which are "per se" comprehensive and constitutionally guaranteed. The Federal Water Act leads - according to the order for reference - to an "encroachment upon the sphere of private law" and therefore potentially to expropriation. In that case, the decision as to the expropriatory character would hinge upon the intensity of the encroachment, i.e., upon its "nature and severity."

   It is also not possible to concur with these premises as regards the law governing expropriation.

   The legal opinion to the effect that the legal interest of individual property owners described by s. 903 of the Civil Code is restricted by the general provisions of the Federal Water Act in a manner tantamount to expropriation derives from the opinion

advocated in connection with the Imperial Constitution (Weimarer Reichsverfassung) to the effect that an expropriation can already be ascertained "if the right of the owner to dispose at will of his physical object pursuant to s. 903 of the Civil Code is impaired for the benefit of a third party." (Decisions of the Imperial Court in Civil Matters [*Reichsgericht in Zivilsachen* - RGZ] 116, 268 [272]; Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 6, 270 [276] - order for reference p. 14).

This legal opinion, which is based on the precedence of the provisions of civil law governing property rights over provisions of public law, is not consistent with the Basic Law.

The definition of property that is guaranteed by the Basic Law must be inferred from the Basic Law itself. The definition of the term property within the meaning of the Basic Law cannot be inferred from provisions of ordinary law, which is inferior to the Basic Law, nor can the scope of the guarantee of concrete property be derived from the legal position under private law.

The Basic Law has charged the legislature with the creation of a system of property rights that does justice to both the private interests of the individual and those of the general public (See BVerfGE 21, 73 [83]; 25, 112 [117 and 118]; 37, 132 [140 and 141]; 50, 290 [340]; 52, 1 [29]).

The legislature has in this regard a twofold task: On the one hand, it must create in the area of private law (BVerfGE 42, 20 [30 et seq.]), the provisions to be applied in connection with legal transactions and legal relationships among citizens (for example, for the transfer or encumbrance of property, law governing relations between neighbours and law governing restitution in the case of impairment of property by third parties); on the other hand, it must take into account the interests of the general public - which especially include every owner of landed property - in the provisions of (for the most part) public law. Although legal relationships under civil law are usually subsumed under the term private rights, both civil law and provisions of public law enjoy equal priority for the purposes of assessing the legal interests of property owners. The system of property rights under civil law does not conclusively regulate the content and limits of property. In the context of Article 14 of the Basic Law, the provisions of private law governing property also do not enjoy precedence over the provisions of public law that govern property rights.

In fact, the concrete rights that a property owner enjoys at a given time follow from the entirety of all provisions governing the ownership interests of property owners that are in force at that time. If it should happen in this connection that a property owner does not have a specific right, this right is then not part of his right of ownership. How the legislature achieves this exclusion is merely a legislative drafting issue. If the legislature initially defines the legal interest in a comprehensive manner only to exclude certain rights of domain in another provision, the party affected is from the outset afforded only a legal interest that is restricted in this manner (See BVerfGE 49, 382 [393]).

The nature and scope of the protection of an existing legal interest guaranteed by Article 14.1 sentence 1 of the Basic Law follow from the entire body of constitutional law that defines the content of property, and this also holds in the case of deprivation of property rights that entails mandatory compensation.

3. The following ensues from this legal situation:

   a) The provisions under challenge do not empower the executive to deprive owners of landed property of their constitutionally protected rights. Instead, they regulate in a general manner the relationship between landed property and groundwater and define the legal interest of individual owners of landed property within this area of law. According to the provisions of the Federal Water Act, an owner of landed property - apart from exceptions that are not involved here - has no right to affect the groundwater in connection with the use of the property. Such an owner is therefore not deprived of any right through application of the law. The denial of the permit to use the groundwater in connection with the wet extraction of gravel on the basis of s. 6 of the Federal Water Act cannot therefore constitute administrative expropriation. Application of this provision merely concretizes regulations adopted by the legislature pursuant to Article 14.1 sentence 2 of the Basic Law; the provision makes known the limits imposed upon the owner in the exercise of his property rights.

      The primary focus of the order for reference on the extraction of gravel, and not on the use of groundwater, does not in any way change this. The Federal Water Act excludes interference with the groundwater from the content of landed property in principle. It makes no difference in this context whether the purpose of such interference is to make use of the groundwater itself or the interference is only an undesirable side effect of measures taken for other purposes. Property in land does not include the right to use the terrestrial body, which is possible only in connection with the use of the groundwater and requires permission. Wet extraction of gravel cannot be broken down into extraction of gravel that is authorized under private law and the use of groundwater, which is pursuant to the Federal Water Act not authorized. To the extent that the gravel lies in the aquifer, the owner has the right to extract it only with permission under legislation governing the use of water. The denial of the permit under legislation governing the use of water therefore also does not represent a deprivation of property in that regard.

   b) As regards its temporal sphere of operation, the public law water use regulations apply to cases involving the use of water that are to occur after the Federal Water Act goes into force. This does not constitute expropriation by operation of law as compared with previous law (e.g., the Prussian Water Act) that afforded owners of landed property the right to use water. The law has merely redefined the content of landed property in respect of groundwater for the future for the entire Federal Republic at the legislative level. Such a change in the law does not result in the deprivation of a concrete legal interest protected by the guarantee of an existing legal interest under Article 14.1 sentence 1 of the Basic Law and therefore does not constitute expropriation.

The problem of expropriation by operation of law does, however, arise in the case of a change in the law when the right to use groundwater under previous law has already been exercised and the property owner is deprived of this right (see D below). In connection with the legal question this gives rise to (s. 81 of the Federal Constitutional Court Act) as to whether the Federal Water Act constitutes expropriation by operation of law in respect of the "old uses" under discussion here, it is first necessary to address the question as to whether the provisions of law are themselves consistent with the Basic Law (BVerfGE 31, 275 [285]; 51, 193 [207]). If the public law use regulations contained in the provisions cited were to be considered unconstitutional, the transitional law created for such cases would lose its importance.

III.

Further examination shows that the provisions under challenge properly define the content and limits of property in land.

1. In the exercise of its duty to define the content and limits of property imposed by Article 14.1 sentence 2 of the Basic Law, the legislature must respect recognition of private property under constitutional law pursuant to Article 14.1 sentence 1 of the Basic Law as well as the social imperative contained in Article 14.2 of the Basic Law (BVerfGE 37, 132 [140]; 52, 1 [29]).

As the Federal Constitutional Court has repeatedly ruled, certain limits are imposed upon the legislature when it comes to the restriction of rights of ownership. In the present case, at issue is whether the guarantee of property has been violated because the right to use groundwater is in principle divorced from property in land and subjected to regulation under public law.

a) First of all, it is not possible to infer from Article 14 of the Basic Law that groundwater must in principle be legally assigned to owners of property in land because of the existence of a natural relationship between groundwater and landed property. In creating a system of property rights that is consistent with the Basic Law, the legislature is not bound by a definition of property that derives from the "nature of the matter." (see BVerfGE 31, 229 [248]).

The guarantee of private property as a legal institution (BVerfGE 20, 351 [355]; 24, 367 [389]), does to be sure prohibit removal of such areas from the system of private law as it belongs to the elementary inventory of activities protected by the Basic Law, within the area of law governing property and consequently also elimination or significant restriction of the area of freedom protected by Article 14 of the Basic Law. It does not, however, follow from this that the Basic Law requires that every legally protected interest be subject to control under private law (BVerfGE 24, 367 [389]).

The guarantee provided by this legal institution is not infringed if interests that are of vital importance to the general public are subsumed not under the system of private law but rather under a system of public law for the purposes of securing interests of overriding importance to the common good and averting danger (BVerfGE 24, 367 [389]).

b) The provisions to be reviewed are intended to ensure "economical" management of water resources. The water supply itself is, however, a phenomenon (like air) and as such is not amenable to regulation by law. However, human interference with subsurface water may be subjected to regulation by generally binding provisions of law. Such interference may affect the quantity as well as the characteristics of the water. ...

The volumetric demands on the water supply and threats to its biological, physical and chemical characteristics due to human interference have, in addition to other considerations, caused the constituent legislature to place a theretofore unknown area, water management, under the jurisdiction of the federal government (Article 75.1 no. 4 of the Basic Law). In so doing, the legislature indicated that - in addition to existing legislation governing the use of water - it was necessary to enact laws that ensure ordered management of available water resources. When the legislature addressed this constitutional issue by enacting the Federal Water Act, it was faced with the task of creating a system of law for the "economical" use of water to take into account general needs while at the same time protecting the groundwater against harmful effects caused by property owners. The path chosen, which was to subject the use of groundwater to regulation under public law that is divorced from surface ownership, is to a great extent an extension of a legal development that had already been anticipated by the previous law governing water rights. This development was necessary to take into account modern technical and other possibilities that have an effect upon groundwater. The Civil Code, which governs legal relationships in the private sphere, did not address this issue, which arose after its enactment, in its ss. 903 and 905, nor could it have.

c) Water is one of the most important bases for all human, animal and plant life. It is needed not only for drinking and domestic use, but is also required as a means of production in industry and the trade sector. Due to the disparate and to some extent competing interests in the use of water, the Federal Constitutional Court had already in the past established that ordered water management was of vital importance not only for the population but also for the overall economy (BVerfGE 10, 89 [113]).

…

d) Since groundwater flows through the earth like a river, the effect of removing water or introducing substances cannot be limited to a specific piece of property. Groundwater that is removed from one piece of property is no longer available to the property downstream. Contamination that occurs on one piece of property can make the water over vast expanses unsuitable for other uses, in particular for use as drinking water. Interference with groundwater also has an intensive effect upon the surrounding areas.

…

e) The importance of groundwater for the general public, in particular for the public water supply, can therefore hardly be overestimated. At the same time, groundwater is especially susceptible to deleterious effects caused by property owners. The considerations presented above show that it would not be reasonable to leave the use of groundwater to the complete discretion of individuals or to limit its use exclusively

- which would have been sufficient under previous circumstances - on the basis of the legal principle of "general acceptability". The mastery of such a comprehensive task that serves the common good is typical of the issues addressed by public law that can hardly be accomplished with the means available under private law. There can therefore be no objection on constitutional grounds to the fact that the legislature has placed subsurface water under a system of public law that is divorced from surface ownership in order to ensure viable water management. What is involved here - despite the representations in the order for reference - is not the "unilateral interest of the state" but assertion of the public good by the state.

2. The objections to the legal regulation that have been advanced are based on the erroneous assumption that groundwater must be legally considered part of landed property on constitutional grounds.

a) First of all, the opinion to the effect that the provisions of the Federal Water Act resulted in an "erosion of the substance of landed property" because such property would be subject to "total subordination to the interests of society" is incorrect. Property in land is not deprived of the characteristics of private usufruct rights and the basic power of disposition (BVerfGE 37, 132 [140]; 50, 290 [339]; 52, 1 [31]) merely because the owner may dispose of groundwater only with regulatory approval. The usufruct rights of owners of landed property have always pertained primarily to the surface of the property, whereas the right to access materials lying below the surface has consistently been subject to far-reaching restrictions. Even the power to dispose of and make use of landed property is in many ways subject to constitutional restrictions (see, for example, BVerfGE 21, 73 [83.]; 25, 112 [117]).The possibility of making economically meaningful use of a piece of property does not as a rule hinge upon whether groundwater can be brought to the surface of the property or whether the owner must "resist" the groundwater. A right to precisely those possible uses that promise the owner maximum economic benefit cannot be inferred from the constitutional guarantee of landed property.

…

c) The provisions under challenge also do not violate the principle of proportionality.

The opinion to the effect that instead of a repressive ban with the possibility of exemption, a constitutional regulation must make provision for a procedure for obtaining a permit that gives owners of landed property a legal right for permission to use water if the reasons for denial contained in s. 6 of the Federal Water Act do not apply instead of a discretionary decision overlooks the following:

> A procedure for obtaining a permit that involves a legal right to issuance of a permit is constitutionally required if the procedure pertains to the exercise of rights that are guaranteed by the Basic Law. Preventive review with the possibility of a ban serves to determine whether the legal exercise of the fundamental right is intended (BVerfGE 20, 150 [154 and 155]).

But even these conditions do not exist because the access of owners of landed property to groundwater is in principle excluded by a law that is in compliance with the Basic Law.

Moreover, a preventive procedure for granting permission with the possibility of denial of permission would not suffice to ensure ordered water management. If permission to carry out plans to use water could be denied only when a project is expected to detract from the public good, it would - if all discretion on the part of the public authority were to be excluded - not be possible to achieve optimal use of available water resources. Such a regulatory system would inevitably fail to function, for example, when a concrete project is not in itself expected to detract from the public good but is, however, such as to trigger a development with unforeseeable effects at the level of water management (see Federal Administrative Court (*Bundesverwaltungsgericht* - BVerwG), ZfW, 1965, p. 98 [106]).

The results would be equally unacceptable in cases in which approval of a project would completely exhaust available capacity for the use of water so that no latitude would remain to accommodate any needs that might arise in the future.

These examples suffice to show that a preventive procedure for the issuance of permits with the possibility of denial would provide only minimal protection when the limits to water usage have been reached. It would make future-oriented, ordered management of the use of water impossible. In the case of a scarce resource that is of greater vital importance to the general public than virtually any other, such a system of regulation would be unacceptable.

…

D.

According to the findings in the initial proceedings, the claimant has been extracting gravel without restriction since 1936. The decision in this legal dispute may therefore also hinge upon whether the Federal Water Act was directly responsible for depriving the claimant of a constitutionally protected legal interest that inured to the benefit of the claimant before the Federal Water Act went into force. In that regard, both previous law and the regulatory transition pursuant to s. 17 of the Federal Water Act must be reviewed. ...

The constitutional review must therefore be based on the assumption to the effect that the owner was not prevented from extracting gravel by provisions of law while the Prussian Water Act was in force and that the usage rights afforded owners of landed property under the old law and exercised by the claimant were protected by the guarantee of property. It would be incompatible with the content of this fundamental right for the state to be afforded the power to prohibit, abruptly and without any transition, further use of landed property in cases in which commencement of such use required substantial investment. Such a system of regulation would render valueless the work invested and capital employed from one day to the next. It would undermine confidence in the stability of the legal order, without which it would be impossible for individuals to assume responsibility for their conduct of life in the area governed by property law (see BVerfGE 31, 229 [239]; 50, 290 [339]; 51, 193 [217 and 218]).

2. *Mandatory Deposit Copies, BVerfGE 58, 137*

Explanatory Annotation

In 1981, the same year as the groundwater decision, the Constitutional Court further developed the property clause. The case concerned a statutory obligation in the German Land Hesse to submit one copy of every book published there to a designated library without compensation. This statutory obligation was to be applied to several books published by the applicant. These books, however, were special art editions and published in very small editions at relatively high prices. The applicant claimed that this constituted a taking and hence required compensation.

The Constitutional Court did not regard this as an expropriation as it was not directed against a specific object. Rather the Court regarded this as a content definition norm because the whole edition of any book was already reduced by the obligation to submit one copy even before it was printed. Consequently the Court held that property had not been taken and hence there was no basis for the operation of the expropriation compensation norm of Article 14.3 of the Basic Law. However, the Court did not stop there. Whereas it regarded the statutory obligation to submit one copy as constitutional in principle the Court also held that the principle of proportionality demanded to take into account that in untypical cases such as this one - a very expensive but low volume special edition - the obligation to submit without compensation is tantamount to a disproportionate sacrifice of the publisher.

Translation of the Legal Deposit Copies Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 58, 137*

Headnote:

It is inconsistent with the fundamental right to property to require that publishers of printed works furnish specimen copies for deposit even in the case of works that are produced at considerable expense and in small printings (s. 9 of the Hessian Land Press Act (Hessisches Landespressegesetz - Hess. LPrG)).

Order of the First Senate of 14 July 1981 - 1 BvR 24/78 -

Facts:

The matter referred for review concerns the question as to the extent to which the duty of publishers to provide state libraries with specimen copies (legal deposit copies) is compatible with the Basic Law.

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

The Land of Hesse has regulated the mandatory submission of legal deposit copies in s. 9 of the Hessian Freedom and Rights of the Press Act (Gesetz über Freiheit und Recht der Presse - LPrG) in the version promulgated on 20 November 1958 (BVerfGE 58, 137 [144], BVerfGE 58, 137 [145]) as well as in the Deposit of Printed Works Regulation of 21 March 1977 (BVerfGE 58, 137 [144], BVerfGE 58, 137 [145]). (Verordnung über die Abgabe von Druckwerken - PflEVO) issued by the Hessian Minister of Culture.

S. 9 of the Freedom and Rights of the Press Act, which had already been included verbatim in the Hessian Press Act of 23 June 1949 (Bavarian Law Gazette [*Bayerisches Gesetz- und Verordnungsblatt* - GVBl.]. p. 75), reads as follows:

> "The Minister for Culture and Education may by way of executive order require that a specimen copy of every publication appearing within the sphere of operation of this law be deposited with the library designated by the latter free of charge."

The Deposit of Printed Works Regulation enacted on the basis of this power stipulates in s. 1.1 as follows:

> "The publisher of every printed work appearing in the Land of Hesse shall, unless exempted from doing so by s. 3, depending upon the place of publication, provide the following libraries with one copy (legal deposit copy) gratuitously and at his own expense: ..."

The claimant is a publisher in Offenbach. He publishes bibliophile books in small printings as well as original graphics. In the year 1976, he forwarded books identified with the number of copies printed and the sale price to the Hessian Landes- und Hochschulbibliothek in Darmstadt:

> Citing s. 9 of the Freedom and Rights of the Press Act and the Deposit of Printed Works Regulation, the library retained possession of the four works sent by the claimant and notified him accordingly. His objection was unsuccessful. The claimant was of the opinion that the books that were retained were not printed works within the meaning of the Press Act. In any case, he argued, a duty to furnish deposit copies without any compensation was in violation of Article 14 of the Basic Law.

The Administrative Court (Verwaltungsgericht) stayed the proceedings pursuant to Article 100.1 of the Basic Law and referred s. 9 of the Freedom and Rights of the Press Act for constitutional review. According to the Court, the provision is not consistent with Article 14 of the Basic Law to the extent that the Hessian Minister of Culture is empowered to require that a specimen copy of each printed work appearing within the sphere of operation of the law be submitted to a designated library for deposit.

Extract from the Grounds:

…

C.

S. 9 of the Freedom and Rights of the Press Act is not entirely consistent with the Basic Law.

I.

The standard of review for the referred provision is the fundamental right under Article 14.1 sentence 1 of the Basic Law.

The order requiring submission of copies for deposit without compensation pursuant to s. 9 of the Freedom and Rights of the Press Act encumbers the proprietary rights in the printed work produced by the publisher. The provision therefore falls into the area protected by Article 14 of the Basic Law; as regards its content, it permits statutory regulation pursuant to Article 14.1 sentence 2 of the Basic Law.

The duty to submit copies for deposit does to be sure relate to a single specimen copy; nevertheless, it does not involve expropriation within the meaning of Article 14.3 of the Basic Law. The provision does not empower the executive to seize a specific item of property that it requires through an individual action, but establishes, in general and in the abstract, a duty to make payment in kind in the form of a contribution. It affects those who - as a general rule in connection with the exercise of an occupation - market property as publishers and is based on the entirety of the copies constituting a printing that is the property of the publisher and is identified by statute as a printed work. The proprietary rights in a printed work are encumbered by a duty to furnish a copy for deposit upon its appearance. The act of selecting and depositing a random copy of the printed matter from the printing by the publisher constitutes concretization of a general duty of the publisher that already existed beforehand. The regulatory statute governing legal deposit copies is therefore a legal provision that defines in general the substantive content of property (BVerfGE 58, 137 [144], BVerfGE 58, 137 [145]) in a printed work as the entirety of all copies.

Contrary to the opinion of the referring court, this classification also retains its validity if the definition of substantive content - as will be shown - is not consistent with the Basic Law due to the degree of the burden imposed on the owner in certain cases. If the limits that follow from the Basic Law are exceeded when the duties of the owner are defined, the law is unconstitutional; this does not make it an expropriation. (see BVerfGE 52, 1 [27 and 28]).

Definition of substantive content and expropriation are fundamentally different in terms of the conditions and requirements for their substantive construction due to their disparate functions. Their classification and validity must therefore be assessed on the basis of the respective relevant provisions of the Basic Law. The duty that ensues from the regulatory statute governing legal deposit copies therefore falls into the area of Article 14.1 sentence 2 of the Basic Law regardless of the respective degree of burden affecting the publisher.

II.

S. 9 of the Freedom and Rights of the Press Act satisfies the formal requirements for an enabling law that ensue from the reservation of legislative power in Article 14.1 sentence 2 of the Basic Law.

1. The Hessian legislature did not exceed the legislative authority (see BVerfGE 34, 139 [144 et seq.]), to be respected under Article 14.1 sentence 2 of the Basic Law. The regulatory statute governing legal deposit copies does not fall into the category of copyright and publishing

law (Article 73 no. 9 of the Basic Law), which is exclusively under the jurisdiction of the federal government. s. 4.1 and s. 9 of the Freedom and Rights of the Press Act are to be sure based on the use of the term "printed work," which derives from copyright and publishing law. The question as to the jurisdiction of the legislature must, however, be decided not on the basis of the point of reference chosen but on the basis of the subject matter of the statute. In that regard, the statute referred for review does not fall into the area governed by copyright and publishing law (BVerfGE 58, 137 [145], BVerfGE 58, 137 [146]. According to s. 9 of the Freedom and Rights of the Press Act, mandatory deposit may be ordered only in the case of a printed work that "appears;" the right of the author to determine whether and how his work is published (s. 12 of the Copyright Act (Urhebergesetz - UrHG)) therefore remains intact. Mandatory submission of deposit copies also does not interfere with legal relationships between publishers and authors, which are regulated by publishing law (s. 1 of the Publishing Act (Verlagsgesetz - VerlG)), since it establishes a duty on the part of the publisher under public law that is independent of such legal relationships. Furthermore, the German Library Act (Deutsche Bibliothek - DBiblG), which was enacted with reference to Article 74 no. 13 of the Basic Law, explicitly does not affect the provisions of Land law governing legal deposit copies (s. 25). Legislation governing legal deposit copies therefore falls under the jurisdiction of the *Länder* pursuant to Article 70 of the Basic Law.

2. In s. 9 of the Freedom and Rights of the Press Act, the legislature limited itself to enactment of the power to adopt a statutory instrument in a manner to which there can be no objection.

a) According to Article 14.1 sentence 2 of the Basic Law, the substantive content and limits of property are to be sure defined "by the laws". Nevertheless, no general duty on the part of the legislature to itself regulate in detail the substantive content of the legal interest of owners of property ensues from this. In view of the elementary importance of Article 14.1 sentence 1 of the Basic Law (see BVerfGE 24, 367 [389]; 50, 290 [339]) for safeguarding freedom, the legislature is, however, bound to establish itself the conditions under which the use of property may be restricted by virtue of powers that are adequately defined in terms of content, purpose and degree.

b) S. 9 of the Freedom and Rights of the Press Act satisfies the corresponding requirements to be met when such legal powers are delegated:

   The content of the powers granted follows directly from the enabling provision itself. The matter to be regulated is the submission of specimen copies of printed works appearing in Hesse for deposit with specific libraries. The Minister of Culture may effect such regulation by virtue of the powers granted him.

   The purpose of these powers is to collect the entire body of publications appearing in the Land, to make it available to the public and to preserve it for posterity. This follows from the content of the powers in conjunction with the historical development of legislation governing legal deposit copies. The decisive reason behind the regulatory statute may therefore lie exclusively in the interest of cultural policy intended to offer and make available to all interested parties as complete an overview as possible of intellectual creativity in the Land of Hesse.

Adequate guidelines as regards the scope of and limits to the regulatory statute to be adopted by the maker of the statutory instrument are also not lacking. It follows from the enabling law that a duty to furnish legal deposit copies may be imposed with respect to publications appearing in Hesse and even in this case only in respect of a single specimen copy of each printed work, which is to be deposited with a library designated by the maker of the statutory instrument.

The powers are also adequately defined as regards the issue of compensation. s. 9 of the Freedom and Rights of the Press Act stipulates that the Minister may order that legal deposit copies be furnished without any reimbursement of costs.

III.

As regards substantive law, s. 9 of the Freedom and Rights of the Press Act is not consistent with Article 14.1 sentence 1 of the Basic Law in that the Minister of Culture is empowered to order that specimen copies be furnished without exception with no reimbursement of costs.

1. The Federal Constitutional Court has in numerous decisions ruled that the legislature must in the case of laws within the meaning of Article 14.1 sentence 2 of the Basic Law take into account in the same manner constitutional recognition of private property by Article 14.1 sentence 1 of the Basic Law as well as the social imperative of Article 14.2 of the Basic Law. In so doing, the legislature must achieve a just balance and equitable relationship between the legitimate interests of the parties involved. The extent and scope of the duty that may be expected of the owner under the Basic Law and effected by the legislature hinge accordingly, essentially upon whether and to what extent the property in question is relevant to society, and has a social function (for example, BVerfGE 37, 132 [140 and 141]; 42, 263 [294]; 50, 290 [340 and 341]; 52, 1 [32]).

This is the case when duties arising from the ownership of property must be consistently reasonable. They may not, in particular as regards the social relevance and social importance of the item of property and in view of the purpose of regulation, give rise to an excessive burden and unreasonably affect the owner's property rights (see BVerfGE 21, 150 [155]; 50, 290 [340 and 341, 351]; 52, 1 [29 and 30, 32]; 53 257 [292]).

In addition, the principle of equal treatment under the law must be respected as a general principle of the rule of law (for example, BVerfGE 52, 1 [29 and 30] with references).

These limits that the legislature must preserve when defining the substantive content of property rights also apply if the formal law permits enactment of statutes that define substantive content. The legislature may in granting powers to issue statutory instruments not extend such regulatory powers pertaining to the guarantee of property as it would be prevented from exercising itself.

2. In view of the standards described above, the duty to submit specimen copies without remuneration constitutes an admissible requirement under Article 14.1 sentence 2 of the Basic Law as long as the resultant financial burden imposed on the publisher does not carry significant weight in the individual case. In that regard, the power to enact such a requirement also presents no cause for concern.

Every printed work takes on a life of its own as soon as it is published. It does not remain a mere financial asset that results from publishing efforts, but has effects that permeate the life of society. That is what makes it an independent factor that helps to determine the cultural and intellectual activity of its time.[161] It constitutes, apart from the possibility of disposition under private law, common intellectual and cultural property.

In view of this importance to society, it is legitimate to want to make literary production available as completely as possible to those with an academic or cultural interest in such production and transmit to future generations a comprehensive impression of the intellectual creativity of previous epochs. This cultural need can be taken into account in an appropriate manner by requiring that specimen copies be deposited with public libraries. In assessing the constitutional issue involved, it is not possible to ignore the fact that the general public makes a significant contribution to the achievement of the cultural goal pursued through legal deposit copies by building and maintaining state libraries. The general public for its part takes into account the importance of printed works to and their function within society in an appropriate manner. Under these circumstances, the deposit of a specimen copy of each printed work without remuneration represents a reasonable burden that does not excessively and solely affect the publisher if the concomitant economic disadvantage does not carry significant weight. This can be assumed to be the case of the majority of all periodical and non-periodical publications if they are produced in larger printings.

3. However, the deficiency of the regulatory provision adopted lies in the fact that the general requirement to the effect that specimen copies be furnished for deposit without any reimbursement of costs in all cases also applies to those printed works that are produced at great expense and also only in small printings.

It is obvious that the duty to furnish specimen copies of such printed works at no cost represents a burden that is significant as compared with the case of cut-rate and mass-produced products. Article 14.2 of the Basic Law cannot be used to justify such a burden upon the publisher in the interest of the general public.

The special importance to society that inures to printed works that are of exceptional artistic, scientific or literary value, and therefore regularly very expensive to produce, in view of Article 14.2 of the Basic Law cannot be considered in isolation from their production.

Printed works of this kind will frequently have only a small circle of buyers, which already is reflected in the small printing. The number of potential purchasers is small and sales as a rule by no means certain. Publishers undertake a significantly greater economic risk with the production of such works as compared with that involved in normal publishing activities. Only through private initiative and the willingness to accept risks does it become possible to make exclusive artistic, scientific and literary creativity available to the public, albeit at a high price. To also burden publishers with the cost of the production of legal deposit copies that significantly

161 See for parallel in copyright law BVerfGE 31, 229 (242) - Schoolbook Decision.

exceeds the average, stands in contradiction to the constitutional requirement that the interests of the owner affected, be equitably balanced against those of the general public and one-sided burdens avoided.

It therefore follows from the balance of the degree of burden against the weight of the reasons advanced in justification of that burden that mandatory submission of deposit copies at no charge exceeds the limits of a reasonable and still acceptable definition of the substantive content of the property of publishers in the case of valuable publications with small printings.

The regulatory provision under challenge also conflicts with the principle of equal treatment under the law that must be respected in connection with Article 14.1 sentence 2 of the Basic Law (BVerfGE 52, 1 [29 and 30] with references).

In terms of ramifications in practice, a general obligation to furnish legal deposit copies coupled with a general exclusion of compensation leads, as has been shown, to burdens that vary significantly in degree within the class of publishers. Such unequal effects of a law that is *per se* uniform must also be taken into account in the area governed by Article 14.1 sentence 2 of the Basic Law. The principle of equal treatment under the law requires in this case that the elements of the regulatory provision that defines substantive content be ordered such that the differences in the burden imposed upon owners and as a result the differences in the weight of their interests as compared with the interests of the general public be taken into account with sufficient distinction and unequal burden avoided.

S. 9 of the Freedom and Rights of the Press Act on the other hand grants the power to enact a regulatory statute governing legal deposit copies, the content of which lacks the degree of distinction required in view of the very disparate issues it covers in respect of property rights.

4. In view of the guarantee of property as a fundamental right, the objection to the effect that publishers could also pass the costs incurred due to mandatory submission of deposit copies on to purchasers in the cases under discussion here or offset them with revenues from other publications cannot prevail. In the case of costly printed works with small printings, there is already reason for doubt of a factual nature.

Apart from that, assessment of the constitutionality of regulatory provisions pursuant to Article 14.1 sentence 2 of the Basic Law may not hinge exclusively upon whether the owner can recover expenses imposed upon him elsewhere or in some other manner. The guarantee of property is intended to enable its legal owner to manage his sphere of operation as he sees fit (for example, BVerfGE 24, 367 [389,396]; 50, 290 [339]).

This constitutional function would generally not be achieved if the state could establish duties to be fulfilled by owners of property and legitimize restrictions on the basis of more or less speculative economic considerations. The legitimacy of constitutional restrictions on property and burdens imposed on property is grounded in Article 14.2 of the Basic Law. The Federal Constitutional Court has in this context pointed out several times that the societal function of property and the importance of property to society justify restriction of the legal interests of owners. At the same time, however, the limits to the reasonable burdens that may be imposed by the legislature also follow from this (for example, BVerfGE 58, 137 [151]; BVerfGE 58, 137 [152]; 52, 1 [32]).

Reference to possible recuperation of losses by owners of property would in cases of the present nature exceed these limits that derive from the constitutional system of property rights and be incompatible with the guarantee of existing legal interests under Article 14.1 sentence 1 of the Basic Law.

IV.

The constitutional considerations presented above cannot suffice to declare the provision objected to by the referring court void either in its entirety or in part. s. 9 of the Freedom and Rights of the Press Act covers the broad class of cases in which a requirement to the effect that legal deposit copies must be provided without remuneration results in only slight burdens on publishers and for that reason gives no cause for concern. To the extent that the enabling powers exceed the bounds of what is constitutionally admissible, the Land legislature has - as follows from the introductory presentation of the regulatory statutes - a series of possibilities for either completely realigning the law governing legal deposit copies or adapting it to the interests involved to take into account hardship cases in light of the guarantee of property. The Federal Constitutional Court must therefore limit itself to ascertainment of a violation of the Basic Law by s. 9 of the Freedom and Rights of the Press Act to the extent described in the operative section.

3. BVerfG, 2.3.1999, 1 BvL 7/91, http://www.bverfg.de/e/ls19990302_1bvl000791.html "Monument Protection Act" (BVerfGE 100, 226)

Explanatory Annotation

Monument protection law is that area of the law concerned with preserving buildings of historic value. Many of these buildings are held by private owners and statutory protection of these monuments will invariably place substantial restrictions and significant financial obligations on these owners, for example to refrain from tearing the building down, changing its appearance or renovating the building. In this case the Court had to deal with such statutory provisions of one of the German *Länder* regarding monument protection. The Court went on to further develop its jurisprudence of the "library-copy"-decision mentioned above. It construed the monument protection statute as a "content definition norm" for property in concretisation of the social nexus between property and the public good as stipulated in Article 14.2 of the Basic Law. However, even though such norms do not constitute takings requiring compensation in the sense of Article 14.3 of the Basic Law, they can nonetheless go beyond what can be demanded as a reasonable sacrifice of the owner of the property. Whenever this is the case the relevant statutes must take this into account and provide protection in order to be considered proportional and hence in conformity with Article 14.1. However, the Constitutional Court went on to also hold that providing for monetary compensation cannot always provide the necessary level of protection. Property protection must primarily aim at protecting the property as such and monetary compensation can only become relevant when the actual property cannot be adequately protected.

Translation of the Monument Protection Act Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 100, 226*

Headnotes:

1. Statutes governing the protection of monuments that define the substantive content and limits of property are incompatible with Article 14.1 of the Basic Law (Grundge-setz - GG) if they do not preclude unreasonable burdens on the owner and contain no provision for measures to avoid such restrictions on property rights.

2. Statutes governing compensation that are intended to preserve the principle of proportionality in cases of unusual hardship are deficient if they are limited to affording the parties affected the right to claim financial compensation. The guarantee of an existing legal interest under Article 14.1 sentence 1 of the Basic Law requires first of all that measures be taken, that in fact avoid any unreasonable burden on the owner and preserve to the greatest extent possible private usufruct of property.

3. Just as the legislature must also regulate the prerequisites for, as well as the nature and scope of compensation for a burden that would otherwise be unreasonable when defining the content and limits of property at the statutory level, administrative authorities must at the same time make decisions, at least in principle, in respect of any compensation that might be required when concretizing restrictions on property rights. The legislature must create the prerequisites for this.

4. S. 13.1, sentence 2 of the Rhineland-Palatinate Monument Protection and Preservation Act (Denkmalschutz- und Pflegegesetz - DSchPflG) is incompatible with the guarantee of property under Article 14.1 of the Basic Law.

Order of the First Senate of 2 March 1999 - 1 BvL 7/91 -

Facts:

The claimant, in the initial proceedings, an industrial enterprise, is the owner of a large mansion property dating from the 19th century that was formally placed under the protection of the Rhineland-Palatinate Monument Protection Act of 1978. According to the provisions of that law, the owner was under an obligation to preserve and maintain the monument and could modify or raze it only with official permission. It was not necessary to take into account the interests of the owner in making decisions as regards such permission.

The claimant was unsuccessful in its application for permission to raze the mansion, on the grounds that there was no commercial use for it and efforts made over the years to find another meaningful use had been unsuccessful.

The appellate court found the statutory regulation unconstitutional and referred it to the Federal Constitutional Court, which declared it incompatible with Article 14.1 of the Basic Law.

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Extract from the Grounds:

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C.

The statute referred for review is incompatible with Article 14.1 of the Basic Law.

I.

1. S. 13.1 sentence 2 of the Monument Protection and Preservation Act involves a definition of the content and limits of property that must be measured against the standard of Article 14.1 and not Article 14.3 of the Basic Law.

Expropriation constitutes seizure of property of an individual by the state (BVerfGE 100, 226 [239], BVerfGE 100, 226 [240]). It is intended to deprive the owner of concrete legal interests, entirely or in part, that are protected by Article 14.1 sentence 1 of the Basic Law for the purposes of fulfilment of certain public duties (BVerfGE 56, 249 [270 et seq.] - dissenting opinion; 70, 191 [199 and 200] with further references; 71, 137 [143]; 72, 66 [76]).

This is achieved either through a law that deprives a specific class of persons of concrete property rights - expropriation by operation of law - or through an act of enforcement by a public authority on the basis of its legal power to effect such seizure - administrative expropriation (see BVerfGE 52, 1 [27]; 58, 300 [330 and 331]; established case law).

These prerequisites do not obtain here. Neither the statute referred for review on which the obligation to obtain permission to raze protected cultural monuments is based, nor denial of the permit itself, represents an expropriation within the meaning of Article 14.3 of the Basic Law. The statutory regulation does not deprive the owner of any concrete ownership interests for the purposes of fulfilment of specific public duties, but rather restricts, generally and in the abstract, the possible uses of a piece of land with a monument constructed on it; the action of denial concretizes this restriction. s. 13.1 sentence 2 of the Monument Protection and Preservation Act therefore defines the content and limits of property within the meaning of Article 14.1 sentence 2 of the Basic Law. This categorization of the statute is independent of the extent of the burden on the legal owner. It retains its validity even in cases in which the effects of the action approximate or are tantamount to expropriation as far as the party affected is concerned (see BVerfGE 83, 201 [211 et seq.]).

Since the constitutionality of the statutory regulation referred for review is therefore to be measured against the standard of Article 14 1 in conjunction with Article 14.2 of the Basic Law, the requirement contained in Article 14.3 sentence 2 of the Basic Law to the effect that expropriation laws must also regulate the nature and extent of compensation (reciprocity clause) is just as inapplicable as the provision governing legal recourse contained in Article 14.3 sentence 4 of the Basic Law.

2. In defining the content and limits of property within the meaning of Article 14.1 sentence 2 of the Basic Law, the legislature must achieve a just balance and equitable relationship between the legitimate interests of the owner and the needs of the public good. In so doing, the legislature must remain consistent with all other (BVerfGE 100, 226 [240], BVerfGE) 100, 226 [241]) constitutional norms; in particular, it is bound to the constitutional principle of proportionality and the principle of equal treatment under the law pursuant to Article 3.1 of the Basic Law. The public good is not only the reason for but also the limit to the burden that may be placed upon property. Restrictions on rights of ownership may not exceed that which suffices to achieve the purpose of protection intended by the statutory regulation. This may not be allowed to deplete the core area of the guarantee of property. This includes not only private usufruct, i.e., assignment of property to a legal entity whom it is intended to benefit by serving as the basis for private undertakings, as well as the basic power of disposition over the property (see BVerfGE 70, 191 [200]; 79, 174 [198]; 87, 114 [138 and 139]; 91, 294 [308]).

The regulatory power of the legislature is subject to various restrictions. To the extent that property rights secure the personal freedom of the individual in the area covered by the law governing property, the protection they enjoy is especially pronounced (see BVerfGE 42, 263 [294]; 50, 290 [340]; 70, 191 [201]; 95, 64 [84]).

On the other hand, the greater the importance of an item of property to society, the broader is the operating latitude of the legislature; its nature and function are of decisive importance in this regard (see BVerfGE 53, 257 [292]).

Restriction of rights of ownership must in principle be accepted without compensation in this context as a consequence of the importance of the property to society (Article 14.2 of the Basic Law). If the legislature exceeds the above limits when defining the content and limits of property, the statutory regulation is invalid (BVerfGE 52, 1 [27 and 28]) restrictions or burdens based on any such statute are illegal and may be contested through recourse to the courts of first instance. They do not give rise to a right to compensation on constitutional grounds (see BVerfGE 58, 300 [320]).

II.

Measured against these principles, s. 13.1 sentence 2 of the Monument Protection and Preservation Act is not consistent with Article 14.1 of the Basic Law (see BVerfGE 100, 226 [241], BVerfGE 100, 226 [242]).

1. The statutory regulation that makes no provision for taking into account the interests of owners - unlike the monument protection laws of other *Länder* - may unreasonably restrict the rights of owners affected by it under certain circumstances.

a) The protection of cultural monuments is a legitimate concern of the legislature and the maintenance of monuments is a public duty that enjoys high priority; restrictive statutes within the meaning of Article 14.1 sentence 2 of the Basic Law are warranted. Article 40.3 of the Constitution for Rhineland-Palatinate of 18 May 1947 (Ordinance Gazette [*Verordnungblatt* - VOBl] p. 209, most recently amended by the Act of 12 October 1995 [Law Gazette (*Gesetz- und Verordnungsblatt* - GVBl.) p. 405]) also imposes upon the Land the duty to take under its care and maintain monuments of art and history.

b) The conditions for issuance of a permit set forth in s. 13.1 sentence 2 of the Monument Protection and Preservation Act are appropriate and required to achieve the purpose of the law. Since the razing of a cultural monument may be approved only if other needs of the public good outweigh the interest in protection of that monument and it is necessary to establish whether the overriding needs of the public good cannot be taken into account in some other manner, the preservation of protected cultural monuments is safeguarded in all other cases. It is not possible to discern any other means that is equally effective but would constitute less of an encumbrance upon property rights.

c) Application of the statute will as a rule also not result in an unreasonable burden upon the owner in the narrower sense. The public interest in the preservation of a protected monument can be taken into account only by imposing a duty upon the owner of the property and building, whose property therefore becomes more subservient to the interests of society. This follows from the situational context, in this case the location and nature of the land (see Decisions of the Federal Administrative Court [*Entscheidungen des Bundeswaltungsgerichts* - BVerwGE] 94, 1 [4]; Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 105, 15 [18], each with further references; Supreme Court of the State of Bavaria (*Bayerisches Oberstes Landesgericht* - BayObLG), BayVBl 1999, p. 251 [252]).

The prohibition against razing an architectural monument does not restrict its current use. In view of the high priority of the protection of monuments and with an eye to Article 14.2 sentence 2 of the Basic Law, the owner must in principle accept that he may possibly be prevented from making more profitable use of the land (see BVerfGE 100, 226 [242], BVerfGE 100, 226 [243]). Article 14.1 of the Basic Law does not protect the most remunerative use of property (see BVerfGE 91, 294 [310]).

d) The situation is different, however, when a meaningful use for a protected architectural monument no longer exists. This may occur if the original use becomes obsolete due to changes in circumstances and another use that could reasonably be imputed to the owner cannot be realized. When even an owner who is amenable to protection of monuments can make no reasonable use of an architectural monument and for practical purposes cannot dispose of it, the possibility of private usufruct by that owner is virtually completely excluded. If the legal duty to maintain the property is also taken into account, the right becomes a burden that the owner must bear alone in the public interest without being able to enjoy the benefits of private use. The legal position of the party affected therefore comes close to being a situation in which it is no longer deserving of the term "property." Denial of a demolition permit is then no longer reasonable. If in the opinion of the legislature the public good nonetheless requires that the protected cultural monument be preserved, as is conceivable in the case of structures of great importance in terms of cultural history, this can be achieved only through expropriation (s. 30.1 no. 1 of the Monument Protection and Preservation Act).

The question as to where the limit of reasonableness lies in detail and the extent to which owners are affected to an unacceptable extent by the statute referred for review can be left open. s. 13.1 sentence 2 of the Monument Protection and Preservation

Act is in violation of the Basic Law, if for no other reason because the norm fails to exclude unreasonable burdens on owners and makes no provision for avoidance of such restrictions on property.

2. The unreasonableness of the prohibition of demolition in certain classes of cases is in no way changed by s. 31.1 sentence 2 of the Monument Protection and Preservation Act. According to this so-called severability clause, the Land must provide appropriate compensation if an action taken under the Monument Protection Act does not affect the previous use (sentence 1), but nevertheless ("otherwise") has an expropriatory effect. The legislature may to be sure in principle - albeit not to an unlimited extent - preclude unreasonable (see BVerfGE 100, 226 [243], see BVerfGE 100, 226 [244]) effects of a statutory regulation that defines the content of property through compensatory measures (a) s. 31.1 sentence 2 of the Monument Protection and Preservation Act cannot, however, fulfil this function since the requirements to be met (b) by such a provision are not satisfied (c) by the provision.

a) Provisions governing content and limits that would in, and of themselves, be unreasonable, but have been linked with compensatory measures by the legislature may in exceptional cases be consistent with Article 14.1 of the Basic Law.

aa) The legislature is even in cases of hardship not prevented in principle from enforcing measures restricting property rights that it considers warranted in the interest of the public if it avoids imposing burdens that are unreasonable or inequitable upon the owner and takes into account legitimate expectations (see BVerfGE 58, 137 [149 and 150]; 79, 174 [192]; 83, 201 [212 and 213]). Otherwise unreasonable or inequitable provisions that define content and limits within the meaning of Article 14.1 sentence 2 of the Basic Law can be made constitutionally admissible through such compensation in respect of specific classes of cases.

bb) Provisions that call for compensation do of course, not generally constitute a constitutionally acceptable way of achieving consistency of unreasonable restrictions on property with Article 14.1 of the Basic Law. Norms that define the content and limits of property must in principle also preserve the substance of property rights without provision for compensation and comply with the principle of equal treatment under the law (see BVerfGE 79, 174 [198] with further references).

When under exceptional circumstances the application of the law results in an unreasonable burden on the owner, provision for compensation may, however, be considered in order to comply with the principle of proportionality and alleviate especially inequitable hardship.

cc) Finally, compensatory measures do not provide further help in cases in which it is not possible with either technical or administrative or financial means to achieve a balance that is consistent with the principle of proportionality (see BVerfGE 100, 226 [244], BVerfGE 100, 226 [245]) and therefore withstands scrutiny against Article 14.1 of the Basic Law. Such a situation may occur in the area at issue here if, for example, the preservation of a monument in a given situation is of relative little importance and the interests of the owner are especially deserving of

protection and not of a purely financial nature. In cases of such hardship, the law must allow the demolition of the architectural monument pursuant to a provision for special exceptions in order to achieve complete consistency with the guarantee of property.

b) Norms that make provision for compensation in the area of application of Article 14.1 sentence 2 of the Basic Law must meet the following requirements:

aa) They must have a legal basis. It is in principle the affair of the legislature to define the content and limits of property. The legislature must preserve the constitutional limits of laws that define the content and may, if it imposes a mandatory prohibition not rely on the administrative authorities or the courts to avoid any violations of the guarantee of property through compensatory measures or financial payments. To the extent that claims for compensatory restitution are to be justified, this may in any case, even taking into account the budgetary powers of the parliament, be effected only through operation of law.

bb) Laws governing compensation that are meant to preserve the principle of proportionality in cases of unusual hardship are inadequate if they only entitle the parties affected to the right to claim financial compensation. The guarantee of an existing legal interest under Article 14.1 sentence 1 of the Basic Law requires first of all that measures be taken, that in fact avoid an unreasonable burden on the owner and preserve to the greatest extent possible the private usufruct of the property The instruments available to the legislature for this include transitional arrangements, provisions of law governing exceptions and exemption and the use of other administrative and technical measures. If such compensation is impossible or possible only at unreasonable expense in an individual case, financial compensation may be considered in this case or it may be expedient to give the owner the right to have the government acquire the property (see BVerfGE 100, 226 [245], BVerfGE 100, 226 [246]) at market value.

Just as the legislature must also regulate the prerequisites for as well as the nature and scope of compensation for a burden that would otherwise be unreasonable when defining the content and limits of property at the statutory level, administrative authorities must at the same time make decisions in respect of any compensation that might be required at least in principle when concretizing restrictions on property rights (likewise Hermes, NVwZ 1990, pp. 733 and 734).

A property owner who considers an administrative action that infringes his fundamental right under Article 4.1 sentence 1 of the Basic Law to be unreasonable, must contest it through recourse to the administrative courts. If he allows such an action to take effect, he may no longer demand compensation even as provided within the meaning of Article 14.1 sentence 2 of the Basic Law (see BVerfGE 58, 300 [324]).The party affected must therefore decide whether he wants to accept or contest the interventionary action concretizing the restriction on his property rights. He can make a meaningful decision only if he knows whether he is entitled to compensation. The party affected cannot be reasonably

expected to allow an administrative action that he considers incompatible with the guarantee of property under the Basic Law, to become final in the uncertain expectation of compensation to be awarded retroactively in separate proceedings. The administrative courts must also know whether and in what manner compensation will be provided for an otherwise unreasonable burden in order to be able to assess conclusively the legality of an administrative action that encroaches on property interests.

The legislature must therefore complement its substantive provisions for compensation, with provisions governing administrative procedure that ensure that the administrative actions that concretize restrictions on property are at the same time accompanied by a decision as regards the compensation that could be awarded the owners subjected to the burden; in the case of financial compensation, it is necessary to decide at least whether a claim exists.

c) The severability clause of s. 31.1 sentence 2 of the Monument Protection and Preservation Act does not satisfy these requirements (BVerfGE 100, 226 [246], BVerfGE 100, 226 [247]). It neither makes provision for avoidance of unconstitutional infringement of property rights, primarily in the form of statutes governing exceptions and exemption as well as other administrative and technical measures, nor does it make provision for administrative proceedings so that the possibility of legal recourse of parties affected is taken into account in the manner described above. For that reason alone, it provides no constitutionally adequate basis for compensation for unreasonable infringement on the basis of s. 13.1 sentence 2 of the Monument Protection and Preservation Act. It is the affair of the courts with jurisdiction to decide whether, in view of its wording, the legal logic behind it and the will of the legislature, any area of application even remains for this provision, which cannot be considered either a basis for compensation for expropriation within the meaning of Article 14.3 sentences 2 and 3 of the Basic Law or as a compensatory provision in connection with the legal definition of the content and limits of property within the meaning of Article 14.1 sentence 2 of the Basic Law.

III.

The incompatibility of s. 13.1 sentence 2 of the Monument Protection and Preservation Act with Article 14.1 of the Basic Law does not render the provision void. The Federal Constitutional Court may refrain from pronouncement of this legal consequence if the legislature has several possibilities for remedying the unconstitutional situation.

That is the case here. …

4. *BVerfG, 6.12.2016, 1 BvR 2821/11, http://www.bverfg.de/e/rs20161206_1bvr282111en.html "Nuclear Power - Termination"*

Explanatory Annotation

Fundamental rights, whether they be human rights or citizen rights, are often envisaged as a scenario of one person against the state with a massive power imbalance where the person is often perceived as a victim of sorts and, of course, too often is indeed a victim of the exercise of state power. That is true in the context of property rights as well. The image of expropriation will often be that of the individual landowner, the farmer or owner of a little property, who is subjected to state power, for example, to give up his land or parts of it to build a piece of infrastructure. However, it is not always thus. This case deals with property rights in the context of a political decision to terminate the use of nuclear power to generate electricity in the wake of the Fukushima reactor catastrophe in Japan.[162] However, in this case the property interests are presented by large multibillion-dollar multinational energy corporations.

That stands in contrast to the lignite strip-mining decision of 2013 concerning vast lignite mining operation around the municipality of Garzweiler in Germany, which divulged villages and turned whole landscapes into wastelands (to be recultivated and restored after the extraction of the lignite).[163] However, the lignite case also involved questions concerning the expropriation of property for mining purposes based on specific legislation created for such purposes. It also raised questions about the impact on property rights of planning decisions which were required for the continuation of the strip-mining operation. The people affected by the mining operation lost their homes in more than one way. They lost their houses, but they also lost their community because both had to be destroyed and whole communities had to be resettled. It is somewhat ironic that the big energy utility RWE[164] was involved in both cases. In the nuclear power case as the victim, i.e., as the operator of a nuclear power plant that stands to be decommissioned much earlier than envisaged and in the lignite case as the operator of the mine who profited from the expropriations and planning decisions at issue.

Germany had already decided to get out of nuclear energy in 2002 and passed the respective legislation. In this legislation, certain electricity volumes were allocated to the various power plants with the intention that more modern, younger reactors could run longer than older ones. In 2009, the government had second thoughts and amendments were made including the allocation of further electricity production volumes, essentially extending the run-time for the

162 BVerfG, 6.12.2016, 1 BvR 2821/11, http://www.bverfg.de/e/rs20161206_1bvr282111en.html.

163 BVerfG, 17.12.2013, 1 BvR 3139/08, http://www.bverfg.de/e/rs20131217_1bvr313908en.html („Garzweiler" Lignite Strip-Mining"), see also supra Chapter XII – Freedom of Movement, Article 11 of the Basic Law, where the case is presented with its implications for the free movement of people.

164 See https://www.group.rwe/en/ for more information on the RWE-Group (last accessed on 31.8.2019).

reactors for more than ten years. The Fukushima accident in the wake of the devastating tsunami in Japan, however, led to an about-face and legislation passed in July 2011.[165] Production volumes were cut again, and fixed dates were introduced for the decommissioning of the reactors. The last reactors (of seven still in operation in 2019) will be phased out by the end of 2022.[166]

The Constitutional Court held that the complaints were largely unfounded. It did not treat the impact of the legislation as measures with expropriating effect[167] but qualified them as "content and limitation" defining measures in the sense of Article 14.1(2) of the Basic Law. One consequence – and explanation – of this approach is that the increase in production volumes in the 2009 legislation did not create a property right[168] and hence could not be subject to expropriation or measures tantamount to expropriation. If the regulation of production volumes and run-times for reactors cannot be considered property then limiting measures must logically be considered as outside the scope of the expropriation compensation clause of Article 14.3 of the Basic Law. But that does not mean that such measures are legal. They must still comply with the general framework of proportionality.[169] In this case, the Court saw two violations of that general framework. One pertained to the fact that two applicants were affected in a particular way in that they could not shift electricity production volumes stipulated in the original 2002 legislation to other plants in their intra-corporate network. The second violation of this general proportionality framework was seen in the lack of any consideration in the legislation for investments made pursuant the increased allocation of production volumes in 2010 and the information by the relevant government minister concerning the about-face in the government's nuclear policy and the ensuing moratorium.

The Constitutional Court held that it is not warranted to declare the whole legislation unconstitutional but that the Parliament must undertake corrections and amendments to the legislation to accommodate the legitimate concerns in regard to intra-corporate use of electricity production volumes and investment protection for investments undertaken during the brief period of time after the extension of production volumes at the end of 2010 and the information about a "moratorium" of which the industry was informed in March of 2011 in the wake of Fukushima.[170] As a result, the 16th Act Amending the Atomic Energy Act was passed in 2018.[171]

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165 BVerfG, 6.12.2016, 1 BvR 2821/11, http://www.bverfg.de/e/rs20161206_1bvr282111en.html, para. 1 and excerpt from press release, para. 2-36.

166 International Atomic Energy Agency, Country Nuclear Power Profile, Germany, Updated 2018, https://cnpp.iaea.org/countryprofiles/Germany/Germany.htm (last accessed on 31.8.2019). See also Nuclear Safety, An information portal of the Federal government and the Länder, Decommissioning in Germany – The Current Situation: Overview, https://www.nuklearesicherheit.de/en/science/decommissioning-of-nuclear-facilities/decommissioningin-germany/ (last accessed 31.8.2019).

167 BVerfG, 6.12.2016, 1 BvR 2821/11, http://www.bverfg.de/e/rs20161206_1bvr282111en.html, paras. 242 et seq.

168 Cf. id.at paras. 299 et seq.

169 Id. at paras 257, 258 et seq. and 268 et seq.

170 Id. at paras. 403-06.

171 BGBl. I 2018, 1122, 1124. In particular the addition of new sections § 7e and 7f, https://www.gesetze-im-internet.de/atg/BJNR008140959.html (in German only; last accessed on 21.10.2019).

Translation of "Nuclear Power - Termination" judgment, BVerfG, 6.12.2016, 1 BvR 2821/11, http://www.bverfg.de/e/rs20161206_1bvr282111en.html

Headnotes:

1. The Thirteenth Act Amending the Atomic Energy Act (*Dreizehntes Gesetz zur Änderung des Atomgesetzes* - 13th AtG Amendment) which aims to realise the acceleration of the nuclear phase-out is for the most part compatible with the Basic Law.

2. A legal person governed by private law, which is operated domestically for profit and entirely owned by a Member State of the European Union, can, by reason of the Basic Law's openness toward European law, as an exception, invoke freedom of property and file a constitutional complaint.

3. a) The electricity volumes allocated by law to the nuclear power plants in 2002 and 2010 do not constitute, in and of themselves, stand-alone property rights enjoying protection of property; given that they are significant parameters for the use of the power plants, the electricity volumes do, however, benefit from protection of ownership of the power plants.

   b) A licence granted under public law does not generally constitute property.

4. An expropriation under Article 14 sec. 3 of the Basic Law (*Grundgesetz* - GG) presupposes the deprivation of property through a change in the assignment of ownership and always also presupposes a process for the acquisition of goods. Accordingly, the provisions of the Thirteenth Act Amending the Atomic Energy Act of 31 July 2011 that are set out to accelerate the nuclear phase-out do not amount to an expropriation of property.

5. Insofar as restrictions of the power of use and disposition over property qualifying as determinations of content and limits within the meaning of Art. 14 sec. 1 sentence 2 GG lead to a deprivation of specific property interests without contributing to the acquisition of goods, enhanced requirements must be applied with regard to their proportionality. They then also always raise the question of a settlement provision.

6. The revocation, without compensation, of the prolongation of the operational lifetimes of the nuclear power plants by an average of twelve years that had been set down statutorily at the end of 2010, brought about by the challenged Thirteenth Act Amending the Atomic Energy Act is constitutional, given the repeated limiting of expectations with regard to preserving the additional electricity output allowances. The legislature was also entitled to use the reactor accident in Fukushima, even without any new findings as to dangers, as an opportunity to accelerate the nuclear phase-out for the protection of the health of the people and the environment.

7. Due to the statutorily fixed operational lifetimes of the power plants and due to the specifically established protection of legitimate expectations in this case, the Thirteenth Act Amending the Atomic Energy Act contains a determination of the contents and limits of property that is unreasonable insofar as it hinders two of the complainants from using up substantial parts of the residual electricity volumes of 2002 within their corporations.

8. Under certain conditions, Article 14 sec. 1 of the Basic Law protects legitimate expectation in the stability of a legal situation as a basis for investments in property and its use.

Facts:

The constitutional complaints are directed against the Thirteenth Act Amending the Atomic Energy Act (*Dreizehntes Gesetz zur Änderung des Atomgesetzes*) of 31 July 2011 (BGBl I p. 1704; hereinafter: 13th AtG Amendment), which resolved to accelerate the phase-out of the peaceful use of nuclear energy. In the 13th AtG Amendment, the legislature tightened the fundamental decision made in 2002 in favour of what is known as the nuclear phase-out by legislating, for the first time, fixed dates by which the operation of nuclear power plants must end and at the same time revoking the prolongation of the operational lifetimes of nuclear power plants introduced in the autumn of 2010. The complainants are the nuclear energy subsidiaries of three of Germany's four largest energy suppliers, as well as one nuclear power plant operating company. **[1]**

I.

[…] **[2-36]**

[Excerpt from press release no. 88/2016 of 6 December 2016]

The constitutional complaints challenge the acceleration of the phase-out of the peaceful use of nuclear energy enacted in 2011. The fundamental decision in favour of a phase-out was already taken in the Phase-Out Amendment Act (*Ausstiegsnovelle*) in 2002. Individual nuclear power plants were allocated a residual electricity volume that could be transferred to other, newer nuclear power plants. Once these were used up, the power plants were to be shut down. The 2002 Act on the phase-out did not contain a fixed end date. Following the 2009 parliamentary election, the new Federal Government put forth a modified energy policy in which nuclear energy should be used for a longer period of time as a "bridging technology". Accordingly, by means of the 11th AtG Amendment, the legislature granted nuclear power plants additional residual electricity volumes, and thus pursued the aim of prolonging the operational lifetimes of German nuclear power plants by an average of 12 years. As a result of the tsunami of 11 March 2011 and of the meltdown of three reactor cores this brought about at the Fukushima nuclear power plant in Japan, the legislature, for the first time, statutorily set down fixed end dates for the operation of nuclear power plants in the 13th AtG Amendment, and at the same time struck the prolongation of the operational lifetimes of the nuclear power plants undertaken in the 11th AtG Amendment in the autumn of 2010. The nuclear energy subsidiaries of three of Germany's four largest energy suppliers, as well as one nuclear power plant operating company, challenge this in their constitutional complaints. The fundamental decision taken in the Phase-Out Amendment Act of 2002 to end the peaceful use of nuclear power in Germany, however, is not the object of the constitutional complaints. The constitutional review of the challenged 13th AtG Amendment is thus based on a legal situation in which the end of the nuclear power plants' power production, given their allocated volumes of electricity, was already set down. The complainants principally challenge a violation of the freedom of property (Art. 14 sec. 1 GG).

[End of excerpt]

[…]

II.

1. The complainant in proceeding 1 BvR 2821/11 is E.ON Kernkraft GmbH (hereinafter: E.ON). The complainant's sole shareholder is E.ON Energie AG. The sole shareholder of E.ON Energie AG, in turn, is E.ON SE, which is listed on the exchange. By the complainant's own account, the shares of E.ON SE are largely in free float. **[37]**

The complainant is the owner of the Unterweser, Isar 1 and Grafenrheinfeld nuclear power plants. For these plants it is likewise the holder of the nuclear power licence under § 7 sec. 1 AtG, the holder of the electricity volumes under Appendix 3 to the AtG, the holder of the rights of use and consumption for nuclear fuel, and the operator. […] **[38]**

2. The complainant directs its constitutional complaint against Art. 1 no. 1 letter a, letter b and letter c and against Art. 1 no. 3 of the 13th AtG Amendment. It complains of a violation of Art. 14 sec. 1, Art. 12 sec. 1 and Art. 3 sec. 1 in conjunction with Art. 19 sec. 1 sentence 1 GG. **[39]**

[…] **[40-77]**

III.

1. The complainant in proceeding 1 BvR 321/12 is RWE Power AG (hereinafter: RWE). The complainant's sole shareholder is RWE AG. The complainant is the owner of the Biblis A and B nuclear power plants and holds rights to the electricity volumes allocated to the Mülheim-Kärlich nuclear power plant. It furthermore holds the operating licences for blocks A and B at the Biblis nuclear power plant and is a shareholder of the operating companies of the Gundremmingen B and C nuclear power plants (holding 75%) and of the Emsland nuclear power plant (shares totalling 87.5%). **[78]**

2. The complainant directs its constitutional complaint against Art. 1 no. 1 letter a, letter b, and letter c and Art. 1 no. 3 of the 13th AtG Amendment. It complains of a violation of its fundamental rights under Art. 2 sec. 1, Art. 3 sec. 1, Art. 12 sec. 1 and Art. 14 sec. 1 and 3 GG, each in conjunction with Art. 19 sec. 3 GG. **[79]**

[…] **[80-100]**

IV.

1. The complainants in proceeding 1 BvR 1456/12 are Kernkraftwerk Krümmel GmbH & Co. oHG (hereinafter: Krümmel) and Vattenfall Europe Nuclear Energy GmbH (hereinafter: Vattenfall). **[101]**

The business object of Kernkraftwerk Krümmel GmbH & Co. oHG is operating the Krümmel nuclear power plant. It holds the operating licence, and as the holder of a leasehold for the land on which the nuclear power plant is built, is the owner of the plant situated there. **[102]**

Vattenfall Europe Nuclear Energy GmbH is a 50% owner of Kernkraftwerk Krümmel GmbH & Co. oHG; the other 50% is held by the complainant in proceeding 1 BvR 2821/11,

E.ON Kernkraft GmbH. The managing partner of Kernkraftwerk Krümmel GmbH & Co. oHG is Vattenfall Europe Nuclear Energy GmbH. The sole shareholder of Vattenfall Europe Nuclear Energy GmbH at the time when the constitutional complaint was lodged was Vattenfall Europe AG, which is operates as Vattenfall GmbH. Its sole shareholder was and is Vattenfall AB (Publikt Aktiebolag); the sole shareholder of Vattenfall AB is the Swedish state. Kernkraftwerk Krümmel GmbH & Co. oHG is the operator of the Krümmel nuclear power plant and holds the operating licence. **[103]**

2. The complainants direct their constitutional complaint solely against Art. 1 no. 1 letter a of the 13th AtG Amendment. They complain that it violates Art. 14 sec. 1 and sec. 3, Art. 19 sec. 1 sentence 1 and Art. 3 sec. 1 GG. **[104]**

3. The complainants' submission concerning admissibility primarily concerns their ability to lodge a complaint in light of the involvement of the Swedish state, which is indirect in both cases. As for the merits of the case, the complainants do not claim that there has been a violation of Art. 12 sec. 1 GG. Their submission concerning Art. 14 GG focuses on the property-specific review of equality with regard to the Krümmel nuclear power plant. **[105]**

a) […] **[106-108]**

b) They argue that the fact that the Swedish state holds indirect shares in each of them does not oppose their ability to lodge a complaint. First of all, they state, there can be no question that the Swedish State does exercise an influence over them that is relevant in constitutional law. Furthermore, they argue, the considerations on the basis of which entities predominantly held by German public bodies have generally been denied the ability to have legal personality with regard to fundamental rights do not apply to them. **[109]**

[…] **[110-161]**

[…] **[167-179]**

B.

The constitutional complaints are admissible. **[180]**

I. […] **[181-183]**

II.

Complainants Krümmel and Vattenfall in proceeding 1 BvR 1456/12 also have the ability to lodge a constitutional complaint based on Art. 14 GG, even though a foreign state ultimately holds all shares of complainant Vattenfall (1) and 50% of the shares of complainant Krümmel (2). **[184]**

1. The shares of complainant Vattenfall are indirectly held entirely by the Swedish state. Nevertheless, as an exception, it may lodge a constitutional complaint invoking Art. 14 GG against the 13th AtG Amendment. **[185]**

a) Via a chain of ownership interests, the Swedish state holds and controls all shares of complainant Vattenfall. At the time when the constitutional complaint was lodged, the complainant's sole shareholder was Vattenfall Europe AG, whose sole shareholder was Vattenfall Deutschland GmbH. Since that time, Vattenfall Europe AG has been merged with Vattenfall Deutschland GmbH, which now operates as Vattenfall GmbH. Its sole shareholder was and is Vattenfall AB, a corporation under Swedish law. The sole shareholder of Vattenfall AB is the Swedish state. **[186]**

b) aa) Domestic legal persons governed by public law cannot invoke substantive fundamental rights (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* - BVerfGE 4, 27 <30>; 15, 256 <262>; 21, 362 <368 et seq.>; 35, 263 <271>; 45, 63 <78>; 61, 82 <100 and 101>). Consequently, they cannot challenge a violation of substantive fundamental rights by lodging a constitutional complaint either (cf. BVerfGE 45, 63 <78>; 68, 193 <206> with further references). **[187]**

The Federal Constitutional Court (*Bundesverfassungsgericht*) has based this lack of legal personality with regard to fundamental rights on a number of different reasons, some of which are mutually complementary. In that respect, it has held that the state that is bound by the fundamental rights pursuant to Art. 1 sec. 3 of the Basic Law cannot be obliged by, as well as entitled to fundamental rights at the same time (cf. BVerfGE 15, 256 <262>; 21, 362 <369 and 370>). Even independent organisational units, when viewed from the perspective of humans and citizens as the original holders of fundamental rights, always only constitute a specific manifestation of a uniform state authority (cf. BVerfGE 4, 27 <30>; 21, 362 <370>). Legal persons can justifiably be viewed as holders of fundamental rights, and on that basis also included under the protection of certain substantive fundamental rights, only if the legal person's formation and operation are a manifestation of the free development of private, natural persons, and in particular only if this appears to be appear reasonable and necessary in consideration of the human beings acting behind the legal persons (cf. BVerfGE 21, 362 <369>; 61, 82 <101>; 68, 193 <206>). The Court has held that in performing their public duties, legal persons governed by public law, unlike individual holders of fundamental rights, do not face the state from the same characteristic situation of danger to fundamental rights (cf. BVerfGE 45, 63 <79>; 61, 82 <102>). **[188]**

However, this does not apply to those legal persons governed by public law that are directly categorised in a sphere of life protected by certain fundamental rights, or that inherently belong to that sphere because of their particular nature, such as broad- casters, universities and their faculties (cf. BVerfGE 31, 314 <321 and 322>; 74, 297 <317 and 318>; 93, 85 <93>; 107, 299 <309 and 310>) or churches and other ideological communities governed by public law (cf. BVerfGE 19, 129 <132>; 30, 112 <119 and 120>; 42, 312 <321 and 322>; 70, 138 <160 and 161>). **[189]**

bb) On substantially the same considerations, the Federal Constitutional Court has also denied that legal persons governed by private law but entirely controlled by the

state have legal personality with regard to substantive fundamental rights, in part because if this were not the case, the question of public bodies' legal personality with regard to such rights would depend to no small extent on their particular organisational form (cf. BVerfGE 45, 63 <79 and 80>; 68, 193 <212 and 213>). Equivalent considerations apply to what are commonly called "mixed-ownership" entities insofar as the state holds more than 50% of the shares of these legal persons governed by private law (cf. correspondingly, on the question of being bound by fundamental rights, BVerfGE 128, 226 <244, 246 and 247>). **[190]**

c) However, the same considerations that are relevant to the denial of the ability to have legal personality with regard to fundamental rights that apply to legal persons governed by public law or by private law and that are completely or for the most part held by the German state, do not apply unreservedly to those domestic legal persons governed by private law that are held by a foreign state - like Vattenfall in the present case. **[191]**

aa) Thus what is known as the "confusion argument", according to which the state cannot be both obliged by and entitled to fundamental rights, cannot be raised to argue that a legal person governed by private law and owned by a foreign state has no ability to have legal personality regarding fundamental rights. After all, a foreign state is inherently not obliged to guarantee the fundamental rights of people in Germany, nor to protect them accordingly. However, although the foreign state is not bound by fundamental rights, it does not necessarily follow that it is concomitantly entitled to assert those rights. Nor does anything to the contrary proceed from the Federal Constitutional Court's Fraport Judgment (BVerfGE 128, 226); there the Court concluded, solely for the converse case, that being bound by fundamental rights did not mean that there was an entitlement to assert fundamental rights (loc. cit., pp. 244, 246 and 247). **[192]**

The fact that opening up the protection of fundamental rights to state entities might generally weaken and endanger the protection of citizens exercising their nonderivative, original freedom (cf. BVerfGE 75, 192 <196>; 128, 226 <244 and 245>) does not preclude granting protection of fundamental rights in situations like those at issue. The state entity is not relieved of an inherent duty to protect fundamental rights, for as an entity owned by a foreign state, it is not bound by the Basic Law's fundamental rights in the first place. Furthermore, the situation at issue here does not concern a multipolar relationship of fundamental rights, in which granting protection of fundamental rights to the state entity would directly affect the position of a different holder of fundamental rights exercising an original freedom, and thus weaken the constitutional protection of original freedom. **[193]**

Legal persons governed by private law, held by a foreign state and acting entirely as a commercial subject, do not have domestic powers, whether direct or indirect, any more than any other purely private market participant does. Such legal persons, like complainant Vattenfall, furthermore are threatened with a specific situation of danger in that unlike all other market participants, if they are entirely denied the

ability to invoke fundamental rights, they have no legal protection against state interference and statutorily initiated economic control measures. Purely private market participants have the option of lodging constitutional complaints. Neither are legal persons governed by public law and held by the Federation, a *Land*, or a municipality without protection, even though they cannot lodge a constitutional complaint due to the lack of legal personality in regard to fundamental rights. The sovereign authorities behind them can defend themselves against alleged unconstitutional restrictions of their business activities by means of protective mechanisms provided to protect areas of competence within the state. This option is not available to legal persons governed by private law and held by foreign states. If they are denied the right to lodge a constitutional complaint, they would have no possibility of claiming legal protection against direct legislative interference with their rights. The protection of legal interests that regular courts provide under administrative law usually cannot be directed against statutory acts (see B III 2 below, paras. 208 et seq.). **[194]**

bb) However, in cases of foreign state entities, these organisational units also lack people behind them who are to be protected against sovereign encroachment and regarding whom the fundamental rights enshrined in the Basic Law ultimately intends to protect their ability to freely participate in and contribute to the community (cf. BVerfGE 61, 82 <100 and 101>). In any case, a "characteristic situation of danger to fundamental rights" does not result from the mere fact that property of a state entity is also configured under private law - i.e., as private property - and that the entities concerned are thus not entitled to rights that are farther-reaching than the rights private market participants are entitled to. After all, when property is owned by a state - even a foreign state - it does not serve the function for which it is protected by funda- mental rights, namely to serve its owner "as the basis for private initiative and to be useful in the owner's autonomous private interest". As a fundamental right, Art. 14 GG does not protect property governed by private law, but the property of private persons (BVerfGE 61, 82 <108 and 109>). **[195]**

d) Given the special circumstances of this case, the interpretation of Art. 19 sec. 3 GG, which is open in this regard, must also be undertaken in view of the freedom of establishment protected under EU law. In this way, inconsistencies between the German and EU legal systems can also be avoided. Here, considering the freedom of establishment, complainant Vattenfall can, as an exception, be provided with the means to lodge a constitutional complaint invoking Art. 14 GG (concerning the Basic Law's openness to European law cf. BVerfGE 123, 267 <354>; 126, 286 <303, 327>; 136, 69 <91 para. 43>). **[196]**

The freedom of establishment is affected here. Although complainant Vattenfall is a *Gesellschaft mit beschränkter Haftung* under German corporate law (i.e., a limited liability company), it is nonetheless held by Vattenfall AB, a Swedish parent company. Vattenfall AB exercised its freedom of establishment in founding its German subsidiary (Art. 54 sec. 1 in conjunction with Art. 49 sec. 1 sentence 2 Treaty on the Functioning of the

European Union (TFEU)). Complainant Vattenfall, as a subsidiary within the meaning of Art. 49 sec. 1 sentence 2 TFEU, can invoke the protection conferred on its parent company under the freedom of establishment (cf. European Court of Justice (ECJ), Judgment of 26 June 2008, Burda, C-284/06, EU:C:2008:365). It does not stand to oppose the applicability of freedom of establishment that the company is wholly owned by the Swedish state. The fundamental freedoms under EU law make no distinctions in this regard. Art. 54 sec. 2 TFEU expressly includes entities governed by public law within the protection of freedom of establishment, provided that they are operated for profit. **[197]**

Art. 49 TFEU precludes national measures or regulations that, even though they are applicable without discrimination on grounds of nationality, are liable to hamper or to render less attractive the exercise by the Union nationals, of fundamental freedoms guaranteed by the Treaty on the Functioning of the European Union (see, fundamentally, ECJ, Judgment of 31 March 1993, Kraus, C-19/92, EU:C:1993:125, para. 32; established case-law). **[198]**

Denying an entity the ability to invoke fundamental rights, and thus also the possibility of lodging a constitutional complaint under national constitutional procedural law, presumably does not in itself constitute a restriction of freedom of establishment. **[199]**

However, given the special circumstances of this case, the denial of the ability to lodge a constitutional complaint here would have to be justified in light of the freedom of establishment. First of all, without the possibility of lodging a constitutional complaint against legislation complainant Vattenfall, under applicable German procedural law, could not claim legal protection against impairments associated with the 13th AtG Amendment (B III 2 below, paras. 208 et seq.). Second, the impairments associated with the 13th AtG Amendment are particularly significant, because the amendment forces complainant Vattenfall to carry out an early shutdown of the nuclear power plant in which it also ownership shares, and which is operated by complainant Krümmel, and thus precludes insofar the further exercise of the freedom of establishment. Finally, complainant Vattenfall would have to accept a substantial competitive disadvantage. Its private competitors, in turn, have the possibility to claim legal protection against the impairments associated with the 13th AtG Amendment, through a constitutional complaint against legislation. Even a competitor held by the German state has ways of protecting its interests, at least within the organisation of the state (B II 1 c aa above, para. 194). **[200]**

The conditions justifying a mere restriction of freedom of establishment are lacking. According to the established case-law of the Court of Justice of the European Union, restrictions on freedom of establishment which are applicable without discrimination on grounds of nationality may be justified by overriding reasons relating to the general interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective (cf. ECJ, Judgment of 24 March 2011, Commission v. Spain, C-400/08, EU:C:2011:172, para. 73; established case-law). No such overriding reasons relating to

the general interest are evident here. In and of itself, the fact that the complainant is a state entity does not as such amount to an overriding reason relating to the general interest, because the fundamental freedoms precisely do not distinguish within their personal scope of protection between state and non-state entities (concerning freedom of establishment, Art. 54 sec. 2 TFEU). **[201]**

e) The European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR) likewise imply that complainant Vattenfall should have the possibility to claim effective legal protection against the 13th AtG Amendment. They must be taken into account in the form of interpretative guidance when interpreting the fundamental rights and the principles of the Basic Law under the rule of law, although they do not demand that parallels should be drawn schematically (cf. BVerfGE 131, 268 <295 and 296> with reference to BVerfGE 111, 307 <315 et seq.> and 128, 326 <366 et seq.>). There is no need to decide here how the decision of the European Court of Human Rights on the ability of state-controlled entities to have human rights (cf. ECtHR, Islamic Republic of Iran Shipping Lines v. Turkey, Judgment of 13. December 2007, no. 40998/98, para. 79 et seq.) can be included within the German legal system. In any case, complainant Vattenfall can arguably claim that its right to property under Art. 1 of the Additional Protocol to the European Convention of Human Rights has been violated, a case for which Art. 13 ECHR requires a right of effective remedy before a national authority (cf. ECtHR, Lithgow and others v. United Kingdom, Judgment of 8 July 1986, no. 9006/80, para. 205; ECtHR, Leander v. Sweden, Judgment of 26 March 1987, no. 9248/81, § 77). While this does not compel a state to provide a remedy to challenge legislation (cf. ECtHR, Lithgow and others v. United Kingdom, Judgment of 8 July 1986, no. 9006/80, para. 206), it does require the availability of an avenue for a complaint (cf. ECtHR, Leander v. Sweden, Judgment of 26 March 1987, no. 9248/81, para. 77). **[202]**

2. Ultimately, the other complainant in proceeding 1 BvR 1456/12 - Krümmel - is also entitled to invoke the fundamental rights under Art. 14 and Art. 3 GG that it claims have been violated. **[203]**

The complainant Krümmel is owned 50% by complainant Vattenfall and 50% by E.ON Kernkraft GmbH, whose sole shareholder is E.ON Energie AG. The question of whether Kernkraftwerk Krümmel GmbH & Co. oHG should ultimately be viewed as a private entity because Vattenfall holds only 50% of it, or rather as an entity that is state-controlled as a whole because of possible state interests held in E.ON Energie AG does not need to be settled here. In any case, complainant Krümmel has legal personality with regard to the fundamental rights that it claims have been violated. **[204]**

[…] **[205-206]**

III.

1. The complainants in all three proceedings may lodge their constitutional complaints directly against the 13th AtG Amendment. Because that amendment revokes the additional electricity output volumes allocated by the 11th AtG Amendment (*11. AtG-Novelle*), and introduces fixed

shut-down dates for all nuclear power plants, the complainants are individually, presently and directly affected in their fundamental rights (on these requirements, cf. BVerfGE 97, 157 <164>; 102, 197 <206>; 108, 370 <384>; established case-law). In particular, the challenged provisions do not require an administrative act of transposition. **[207]**

2. The complainants are not compelled for the sake of subsidiarity of constitutional complaints to seek legal protection in the regular courts beforehand. **[208]**

[…] **[209]**

There is no avenue through which the complainants can reasonably be expected to seek legal protection in the regular courts against the challenged provisions of the 13th AtG Amendment. An action seeking a declaratory judgment handed down by the administrative courts is the only potentially available option here; however, although this type of action is not automatically ruled out when it comes to challenges brought against legislation, it does presuppose at least the possibility of a finding that there is a specific legal relationship (cf. Federal Administrative Court, *Bundesverwaltungsgericht* - BVerwG, Judgment of 23 August 2007 - BVerwG 7 C 13.06 -, *Neue Zeitschrift für Verwaltungsrecht*, NVwZ 2007, p. 1311 <1312 and 1313>; Judgment of 28 January 2010 - BVerwG 8 C 19.09 -, Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE 136, 54 <58 et seq.>; each with further references; see also BVerfGE 115, 81 <91 et seq.> on the necessity of recognising legal protection by regular courts under Art. 19 sec. 4 GG for sub-statutory provisions). However, it is not evident here that there is a meaningful application for a declaratory judgment that would go beyond the finding that the challenged provisions are unconstitutional - a finding which administrative courts are, in any event, not competent to hand down - while still making the question of constitutionality the subject matter of the clarification of a specific legal relationship. **[210]**

C. […] **[211-212]**

The challenged provisions of the 13th AtG Amendment must be measured primarily against the fundamental right to property, with which they are essentially in line with yet not in all respects (I). Nor do any further consequences proceed from Art. 12 GG (II). There is no violation of the prohibition of laws that apply merely to a single case (Art. 19 sec. 1 sentence 1 GG) (III). **[213]**

I.

The challenged provisions of the 13th AtG Amendment must be measured against Art. 14 GG, because they interfere in several respects with interests of the complainants that are protected by property law (1). However, they do not involve an expropriation (2). The determination of the content and limits of the complainants' property under the 13th AtG Amendment is for the most part but not on all points compatible with the Constitution (3). **[214]**

1. The first standard against which the challenged provisions of the 13th AtG Amendment must be measured is Art. 14 GG. **[215]**

a) Property is an elementary fundamental right, and its protection is of particular importance for a social state governed by the rule of law (cf. BVerfGE 14, 263 <277>). Within the framework of the fundamental rights, the guarantee of the right to property has the task of ensuring in particular that the holder of that fundamental right has freedom to act within the sphere of property rights. The constitutional guarantee of property is characterised by its nature of being of private benefit, and by the owner's general power of disposition over an owned object (cf. BVerfGE 31, 229 <240>; 50, 290 <339>; 52, 1 <30>; 100, 226 <241>; 102, 1 <15>; established case-law). It is intended to be of use as a foundation for private initiative and to serve people's autonomous private interest (cf. BVerfGE 100, 226 <241>). Insofar as safeguarding individuals' personal freedom is concerned, it enjoys particularly pronounced protection (cf. BVerfGE 50, 290 <340>; established case-law). Yet at the same time, property is supposed to be used in a way that serves the public interest (Art. 14 sec. 2 GG; cf. BVerfGE 134, 242 <290 and 291 paras. 167 and 168>). **[216]**

The guarantee of the right to property protects the specific status quo of assets held by the individual owners (cf. BVerfGE 24, 367 <400>; 38, 175 <181, 184 and 185>; 56, 249 <260>) against measures taken by state authorities (cf. BVerfGE 72, 175 <195>; 83, 201 <208>). In the case of an expropriation that is compatible with the Constitution, the guarantee of the status quo of assets is replaced by a guarantee of value, which is oriented towards the granting of a compensation on a basis to be determined by the legislature (cf. BVerfGE 24, 367 <397>; 46, 268 <285>; 56, 249 <261>; 58, 300 <323>). However, this does not alter the fact that Art. 14 GG first and foremost protects the continued existence of property in terms of its function of protecting freedom, and not just its value (cf. BVerfGE 134, 242 <290 and 291 para. 168>). **[217]**

The specific scope of protection under the guarantee of the right to property only results once the content and limits of property are determined, which is a matter for the legislature under Art. 14 sec. 1 sentence 2 GG. The legislature is not entirely free in this regard: it must create a balanced relationship between the individual's sphere of freedom and the public good, which is not only a point of orientation, but also the limit to restrictions of the right to property (cf. BVerfGE 25, 112 <118>). At the same time, the permissible scope of the social responsibility of property must also be derived from the property itself (cf. BVerfGE 20, 351 <361>; 50, 290 <340>). The guaranteed continued existence of property under Art. 14 sec. 1 sentence 1 GG, the regulatory task under Art. 14 sec. 1 sentence 2 GG, and the fact that, pursuant to Art. 14 sec. 2 GG, property entails the obligation to serve also social ends are inseparably linked. In that regard, the legislature's power to determine content and limits is all the more broad, the stronger the social dimension of the property involved; in that respect, the property's specific nature and function are of crucial significance (cf. BVerfGE 21, 73 <83>; 31, 229 <242>; 36, 281 <292>; 37, 132 <140>; 42, 263 <294>; 50, 290 <339 and 340>; 53, 257 <292>; 100, 226 <241>). **[218]**

With regard to the nuclear power plants built by energy suppliers under the AtG, along with the various property interests related thereto, it must be taken into account that these constitute property with a particularly strong social dimension. On the one hand, in the Atomic Energy Act of 1959, the state deliberately decided in favour of the peaceful use of nuclear energy, and also gave rise to private investments through numerous support measures. On the other hand, the public has become increasingly aware over the past few decades that the peaceful use of nuclear energy is a high risk technology which is encumbered with extreme risks of harm, among other issues, as well as still-unclarified problems of final disposal (cf., e.g., BVerfGE 49, 89 <142 and 143, 146 and 147>; 53, 30 <55 et seq.>). For that reason, the legislature has particularly broad leeway to design atomic energy laws, even in respect of existing property interests, without, however, completely depriving them of protection (cf. BVerfGE 49, 89 <145 et seq.>). **[219]**

b) The terms of the 13th AtG Amendment impose burdens on the complainants in several respects (aa). They thereby affect the scope of protection under Art. 14 sec. 1 GG, which provides constitutional protection for property in various forms (bb). **[220]**

aa) The 13th AtG Amendment's staggering of shut-down dates and its revocation of the additional output allowances allocated in 2010 adversely affect the complainants, as the owners and operators of the nuclear power plants, in different ways under the decision to phase out nuclear power ((1) - (4)). However, the decision made in 2000/ 2002 to phase out the commercial use of nuclear energy, together with the limitation at that time to use up specific residual electricity volumes, determined the complainants' property interests thus affected and the remaining possible uses considerably. **[221]**

(1) With the new § 7 sec. 1a sentence 1 AtG, the 13th AtG Amendment establishes, for the first time, fixed dates for the expiry of the entitlement to produce power at the individual nuclear power plants. Upon the expiry of the entitlement to operate, the right, which proceeds from the ownership of the sites and installations, to use them for the purpose of producing electricity by means of atomic energy lapses. **[222]**

This impairment goes further than the pre-existing impacts resulting from the nuclear phase-out legislated in 2002. Given that the end dates for production are now fixed, it will, in all likelihood, neither be possible to use up the residual electricity volumes originally allocated in 2002 will at the nuclear power plant to which it "belongs", nor at the same corporations' other nuclear power plants to which such volumes may be transferred (C I 3 c cc (2) (a) below, paras. 313 et seq.); this finding is true even when taking into consideration that the new version of § 7 sec. 1b sentence 4 AtG extends the possibilities for transferring electricity output volumes to other plants. In fact, the new § 7 sec. 1a AtG can lead to substantial losses of existing possibilities for using, these residual electricity volumes. **[223]**

(2) Art. 1 no. 1 letter b aa, letter c aa and no. 3 letter a of the 13th AtG Amendment revoke the additional residual electricity volumes that had been allocated to the nuclear power plants only shortly before through the new column 4 of Appendix 3 to the Atomic Energy Act under the 11th AtG Amendment of 8 December 2010 (BGBl I p. 1814). Thus the legislature rescinds the prolongation of operational lifetimes of about 12 years per nuclear power plant that shortly after actually assigning this prolongation to the plants (*Bundestag* document, *Bundestag-Drucksache* - BTDrucks 17/3051, p. 6) and curtails their possible operating life accordingly. **[224]**

(3) The fixed end dates that the new § 7 sec. 1a AtG introduces for the power production do not only limit the potential use of nuclear power plants through an inflexible end point; at the same time, they also restrict the entrepreneurial leeway - which still existed despite the already decided nuclear phase-out - to determine how long which nuclear power plant should continue to operate, as well as the leeway to determine downtimes or phases of reduced production where applicable. **[225]**

(4) Finally, as the complainants have argued, the introduction of fixed shut-down dates, all by itself, but also in combination with the revocation of additional electricity volumes, can void investments undertaken on the basis of the expectation that the legal situation will not change. **[226]**

bb) This affects the guarantee of property in various ways. Property rights that the legislature must observe in accelerating the nuclear phase-out under the 13th AtG Amendment relate to the existing plants and their use (1), and also - linked to the plant ownership - to the residual electricity volumes from 2002 (3) and 2010 (4), but do not concern the licences under atomic energy law as such (2). In this respect, the right to an established and exercised business itself, however, is not of any additional relevance here (5). The right to use and consume nuclear fuels under EU law does not affect national protection of property either (6). **[227]**

(1) The protection of property under Art. 14 sec. 1 sentence 1 GG includes civil-law ownership of property, its possession, and the possibility of using it (cf. BVerfGE 97, 350 <370>; 101, 54 <75>; 105, 17 <30>; 110, 141 <173>). Accordingly, the complainants' property and possession enjoy constitutional protection of property for the plant sites and the power plant installations. The usability of these operating facilities is constitutionally protected, too. **[228]**

If property is already subject to a regime of use governed by public law at the time when it is established, the constitutional protection of the use of property against later interference and configurations is limited in principle to what is allowed by that regime, yet the protection of allowed uses may vary, depending on the respective field of law. **[229]**

[…] **[230]**

(2) A licence awarded under atomic energy law to construct and operate a nuclear power plant, or a licence to produce power (§ 7 secs. 1 and 1a AtG), is not in and of itself a protected property right under Art. 14 GG. Such licences to operate dangerous plants are state permits which, depending on their configuration, overcome either repressive or preventive prohibitions that reserve the option of granting the permission to carry out the activity sought. Thus they are not comparable with those subjective public rights on which established constitutional case-law confers protection of the type provided to property. According to this case-law, such property-type protection is granted due to the fact that those rights provide individuals with a legal interest which is tantamount to that of an owner and strong enough to assume that depriving it without compensation would contradict the Basic Law in terms of its rule-of-law content (BVerfGE 40, 65 <83>). Such rights are characterised by a power of disposal - at least a limited one - and by the fact that they are obtained, to a significant extent, through an acquisition measure that is based an act accomplished by the owner itself (BVerfGE 14, 288 <293 and 294>; 18, 392 <397>; 30, 292 <334>; 53, 257 <291 and 292>; 69, 272 <300>; 72, 9 <19 and 20>; 72, 175 <193>; 97, 67 <83>). Licences under atomic energy law lack both of these features. **[231]**

[…] **[232]**

(3) The residual electricity volumes allocated to the individual nuclear power plants by the Phase-Out Amendment Act under a new § 7 sec. 1a AtG Appendix 3 column 2 Atomic Energy Act do not enjoy stand-alone protection under Art. 14 sec. 1 GG. They do, however, share in the constitutional protection of property that Art. 14 GG confers on the use of property in a licenced nuclear technology installation. **[233]**

(a) The residual electricity volumes allocated to the nuclear power plants under the Phase-Out Amendment Act determine the use of the nuclear power plants covered by the protection provided by Art. 14 sec. 1 GG; however, they lack essential features of stand-alone property interests. **[234]**

The residual electricity volumes, on the one hand, hallmark the restriction of plant ownership resulting from the nuclear phase-out, because they established the expiry of the use of the power plants. At the same time, however, they are a significant factor in terms of power production, given that they are allocated to the individual nuclear power plants for the purpose of producing electricity and thus to generate profits, and therefore define the value of private benefits. **[235]**

Pursuant to § 7 sec. 1b AtG, residual electricity volumes may be transferred to other nuclear power plants to a limited extent. However, they cannot be disposed of as freely as other property interests. Instead, transferability of residual electricity volumes is limited from the outset to

the other German nuclear power plants, and is subject to further restrictions set out in § 7 sec. 1b AtG, particularly the principle of "old to new" in § 7 sec. 1b sentence 1 AtG. Besides, without a nuclear power plant at which residual electricity volumes can be produced, those residual electricity volumes are worthless. **[236]**

Finally, the granting of residual electricity volumes under the Phase-Out Amendment Act is not immediately based on a significant contribution accomplished by the complainants themselves. The residual electricity volumes are not conceived as direct compensation for the investments rendered worthless by the phase-out, but are a decisive feature of the time limit the operation is subject to. However, under the Phase-Out Amendment Act the residual electricity volumes were also granted in order to maintain the principle of proportionality in view of the interference with fundamental rights associated with the phase-out (cf. BTDrucks 14/6890, pp. 15 and 16.). **[237]**

(b) The residual electricity volumes allocated in Appendix 3 column 2 of the Atomic Energy Act to the Mülheim-Kärlich nuclear power plant, which had already been shut down at that time, are exceptional in that this allocation was made in the course of an amicable settlement, in return for the cessation of public liability proceedings initiated against the *Land* of Rhineland-Palatinate and for the withdrawal of an application for the issuing of a license under atomic energy law to operate that nuclear power plant. Thus there is no need to decide whether and to what extent these residual electricity volumes take on an autonomous position under property law in virtue of the fact that from the outset, they were not linked to the operation of a specific power plant, and thus were not the guarantee of a remaining operational lifetime, but rather a *quid pro quo* for waiving the assertion of a pecuniary claim. In any event, given their contractual basis, the Mülheim-Kärlich residual electricity volumes certainly do not enjoy any less protection as property than the other residual electricity volumes allocated in 2002. In fact, considering also their ability to be transferred to other nuclear power plants, they rather enjoy a more extensive degree of protection than the other residual electricity volumes. **[238]**

(4) In view of the possibilities of use they opened up, the additional output allowances allocated by the 11th AtG Amendment at the end of 2010 obtain property related protection tantamount to the protection accorded to residual electricity volumes of 2002. The fact that they do not reflect a form of consideration of the nuclear power plant operators' property in terms of its respective status quo, but are actually the result of a legislative energy, climate and economic policy decision (cf. BTDrucks 17/3051, p. 1), broadens the legislature's leeway in structuring property (for more details see C I 3 c cc (1) (b) below, paras. 295 et seq.). It does not, however, alter the fact that protection of property is generally also available to this type of guaranteed use by the nuclear power plants. **[239]**

(5) Protection of property provided with regard to the operating sites and nuclear power plants, as well as with regard to their use, particularly as concretised in the residual electricity volumes, covers all material property interests of the complainants. Farther-reaching constitutional property protection against the accelerated termination of nuclear power plant operations under the 13th AtG Amendment could not be conferred on them by way of the legal concept of an established and exercised business either. Such protection is definitively not broader than the protection the business's economic basis enjoys (BVerfGE 58, 300 <353>) and covers only the specific inventory of rights and goods (BVerfGE 123, 185 <259>); in contrast, mere revenue and profit prospects, or actual circumstances, are not covered by the guarantee of property relating to an established and exercised business (BVerfGE 105, 272 <278>). […] **[240]**

(6) Insofar as the nuclear fuels used at the nuclear power plants are property of the Community under Art. 86 of the Treaty establishing the European Atomic Energy Community (hereinafter: EAEC Treaty) and insofar as energy production companies have an unlimited right to use and consume those fuels pursuant to Art. 87 of the EAEC Treaty, this has no significant impact on the requirements of property law the German legislature must observe in the acceleration of the nuclear phase-out at issue here. Art. 194 sec. 2 subsec. 2 TFEU determines that a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources, and the general structure of its energy supply remains unaffected. In a given case, the right to use nuclear fuels under EU law therefore goes only so far as the use of those fuels is factually and legally possible under national law. In that sense, European ownership of and rights to use nuclear fuels are accessory to the national system governing use. In that respect, Arts. 86 and 87 of the EAEC Treaty do not affect the protection of property with regard to the owners and operators of nuclear power plants under Art. 14 GG. **[241]**

2. The challenged provisions of the 13th AtG Amendment do not result in an expropriation of the complainants' property. **[242]**

An expropriation under Art. 14 sec. 3 GG (a) presupposes the deprivation of property through a change in the assignment of ownership (a aa) and always also presupposes an acquisition of goods (a bb). In contrast, restrictions of the power of use and disposition over property qualify as determinations of content and limits within the meaning of Art. 14 sec. 1 sentence 2 GG; if they lead to a deprivation of specific property interests without contributing to the acquisition of goods, enhanced requirements must apply with regard to their proportionality. They then also raise the question of a settlement provision (a cc). The provisions of the 13th AtG Amendment neither change the assignment of ownership nor do they constitute a process for the acquisition of goods (b). **[243]**

a) Through an expropriation, the state seizes the property of individuals. It deprives them of their property and obtains it for itself or for third parties in the public interest. **[244]**

aa) Expropriation is directed at the complete or partial deprivation of specific subjective property interests guaranteed by Art. 14 sec. 1 sentence 1 GG, for the purpose of fulfilling certain public tasks (cf. BVerfGE 101, 239 <259>; 102, 1 <15 and 16>; 104, 1 <9>; 134, 242 <289 para. 161> established case-law). An indispensable feature of expropriation under Art. 14 sec. 3 GG, for which compensation is mandatory, in contrast to determinations of content and limits under Art. 14 sec. 1 sentence 2 GG, which are generally not subject to compensation, is the criterion of the complete or partial deprivation of property interests and the resulting loss of rights and assets (cf. BVerfGE 24, 367 <394>; 52, 1 <27>; 83, 201 <211>). Thus, restrictions of an owner's power to use and dispose of its property cannot amount to an expropriation (cf. BVerfGE 52, 1 <26 et seq.>; 58, 137 <144 and 145>; 70, 191 <200>; 72, 66 <78 and 79>), even if they entirely or almost entirely devalue the use of the property (cf. BVerfGE 100, 226 <240>; 102, 1 <16>). Nor does the concept of a "quantitative partial expropriation" (Ossenbühl, *Verfassungsrechtliche Fragen eines beschleunigten Ausstiegs aus der Kernenergie*, 2012, p. 45), which is put forward by the complainants, turn a restriction of use into an expropriation, unless it results in a change in the assignment of a property right or of a separable part thereof. **[245]**

bb) Expropriation within the meaning of Art. 14 sec. 3 GG further makes it a mandatory requirement that the sovereign seizure of a property right at the same time constitutes an acquisition of goods for the benefit of the public authorities or another beneficiary of the expropriation. **[246]**

(1) Thus far, the question of whether a the expropriation requirements under Art. 14 sec. 3 GG are only met in the case of an acquisition of goods has not been answered uniformly in the case-law of the Federal Constitutional Court. […] **[247]**

(2) Under the most recent case-law of the Federal Constitutional Court, acquisition of goods continues to be a constitutive element of expropriation under Art. 14 sec. 3 GG. **[248]**

(a) The wording and historical background of the fundamental right to property do not provide an unequivocal answer. […] **[249]**

[…] **[250]**

(b) Functional reasons of protecting property in particular argue for an adherence to the classic concept of expropriation, which requires an acquisition of goods. **[252]**

The expansion of the constitutional concept of property that began during the Weimar Republic already has continued under the Basic Law (cf. BVerfGE 25, 371 <407> shares; BVerfGE 31, 229 <239> copyrights; BVerfGE 36, 281 <290 and 291> patent rights; BVerfGE 53, 257 <288 et seq.> entitlements under social insurance law; BVerfGE 53, 336 <348 and 349> reimbursement claims under public law; BVerfGE 89, 1 <5 et seq.> tenant's right of possession; cf. in this respect Ossenbühl/ Cornils, *Staatshaftungsrecht*, 6th ed. 2013, pp. 157 et seq.). This extension of the guarantee of property to very different configurations of subjective legal interests is associated with multi-layered requirements for the statutory design of a fair property system, which must appropriately balance concerns of the public good and subjective legal interests (C I 3 below, paras. 267 et seq.). To that end, the legislature needs broad leeway, which the Basic Law confers for the determination of the content and limits of property, but not for expropriations, which are subject to strictly established prerequisites and legal consequences. Therefore, an expropriation is thus restricted to its classic scope of application, which is characterised by a specific deprivation of property and an acquisition of goods.

A particular argument in favour of limiting expropriation to procedures for the acquisition of goods is that the practical need for a mere dispossession of property that does not entail at the same time the transfer of its ownership to the state or a third beneficiary arises specifically in cases where the property right is flawed in a broad sense, or is otherwise perceived as a burden on the public interest. In such cases, the state thus has no inherent interest in acquiring the object in question for the public good (see, for example, the deprivation of wrongfully obtained property as an incidental consequence of a criminal conviction - BVerfGE 110, 1 <24 and 25>; the prohibition of importing and transporting certain breeds of dogs - BVerfGE 110, 141 <167>; the securing and confiscation of items for evidential purposes - Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* - BVerfGK 17, 550 <557>). It is consistent with the general social obligations that property entails (Art. 14 sec. 2 GG) that such cases of deprivation of property not be considered expropriations requiring compensation, but rather as a determination of the content and limits of property, which requires compensation only in exceptional cases, even when property is deprived. […] **[253]**

(b) Objections put forward against the narrow interpretation of expropriation fail to convince. […] **[254-255]**

[…] **[256-257]**

cc) If the state deprives an owner of property for reasons of the public good, but does not actually expropriate the act does not entail an acquisition of goods, the

legislature is always faced with the question of whether, in the light of Art. 14 GG, such a determination of content and limits can remain valid only if appropriate provisions are made for settlement. **[258]**

Even in cases of hardship, the legislature is not generally prohibited from asserting determinations of content and limits that restrict property and that it considers necessary in the public interest, provided it takes compensatory precautions to avert disproportionate burdens on the owner or burdens contrary to equality requirements, and provided it takes due account of legitimate expectations that are worthy of protection (cf. BVerfGE 58, 137 <149 and 150>; 79, 174 <192>; 83, 201 <212 and 213>; 100, 226 <244>). In certain groups of cases, such a settlement can ensure constitutionality within the meaning of Art. 14 sec. 1 sentence 2 GG of a determination of contents and limits that would otherwise be disproportionate or contrary to equality requirements (BVerfGE 100, 226 <244>). **[259]**

However, the possibility under Art. 14 sec. 1 sentence 2 GG of ensuring the constitutionality of an otherwise disproportionate determination of content and limits by way of a financial settlement to be set out by the legislature exists only for those cases in which the public interest ground pursued through the determination of limits generally justifies the interference as such, but additionally requires, for proportionality reasons, a settlement provision (cf. BVerfGE 100, 226 <244 et seq.>). Nevertheless, a determination of content and limits for which it is necessary to provide a financial settlement is an exceptional case. Within the limits of what is possible, the protection of property anchored in Art. 14 GG primarily requires that provisions that interfere with property should be designed proportionately, without recourse to compensatory settlement payments; such proportionate designs can be based on exceptions and exemptions, for example, or on transitional provisions (cf. BVerfGE 100, 226 <244, 246 and 247>). Conversely, and by the same token, the owner does not need to accept disproportionate interference with property, and consequently must seek legal protection against such interference by challenging the interfering measure and seeking its elimination or limitation. The Constitution does not give owners the right of opting to accept a disproportionate determination of content and limits and demanding an appropriate settlement instead. **[260]**

By limiting expropriation to cases where goods are acquired, however, burdens on property cannot be categorised as expropriations requiring compensation if they only consist of a deprivation by the state of specific property interests, and thereby give particular weight to the interference. In such cases, the legislature must examine particularly carefully whether such a deprivation is only compatible with Art. 14 sec. 1 GG if the owner is provided with an appropriate settlement. In the review of reasonable- ness that is required here, in each instance it will be of particular importance to what extent the owner is responsible for the reasons that legitimate the deprivation of property, or to what extent those reasons are at least attributable to the owner (cf. in this respect BVerfGE 102, 1 <17 and 18, 21>). **[261]**

b) The challenged provisions of the 13th AtG Amendment do interfere with the complainants' property, but do not establish an expropriation. They do not deprive the complainants of any specific stand-alone property rights, nor are they associated with an acquisition of goods. **[262]**

[…] **[263-266]**

3. The challenged provisions of the 13th AtG Amendment largely satisfy the requirements for the determination of content and limits of property under Art. 14 sec. 1 sentence 2 GG (a). The statute does not prove to be unconstitutional because of violations of formal requirements for legislation (b). The design of the content and limits is largely proportionate, albeit not in every point (c). It does not meet the requirements of the principle of equality in every respect either (Art. 3 sec. 1 GG) (d). **[267]**

a) The legislature that determines the content and limits of legal interests protected by the fundamental right to property must take due account of both the constitutional recognition of private property under Art. 14 sec. 1 sentence 1 GG and also the social obligations property entails (Art. 14 sec. 2 GG). The public good that must serve the legislature for orientation in this task represents not only the reason, but also the limit for restricting an owner's powers (cf. BVerfGE 25, 112 <118>; 50, 290 <340 and 341>; 100, 226 <241>). The legislature must find a fair equilibrium and a balanced relationship between owner's interests that are worthy of protection and the public good (cf. BVerfGE 100, 226 <240>), and in so doing, must maintain consistency with all other constitutional provisions. In particular, any determination of content and limits must comply with the principle of proportionality (cf. BVerfGE 75, 78 <97 and 98>; 110, 1 <28>; 126, 331 <359 and 360>). However, the limits of the legislature's powers of design are not the same for all matters. First of all the scope of protection of the property guarantee is measured according to what powers an owner specifically has at the time of the legislative measure. Insofar as the property safeguards an individual's personal freedom in the economic sphere, it enjoys particularly strong protection. Second, the legislature's power to determine content and limits becomes all the broader, the more the owned object has a social dimension and a social function (cf., e.g., BVerfGE 50, 290 <340 and 341>; 70, 191 <201>; 102, 1 <16 and 17>; each with further references from the case-law). The legislature's leeway is shaped in particular by the respective economic and social circumstances (cf. BVerfGE 24, 367 <389>; 52, 1 <30>; 70, 191 <201>; 112, 93 <110>; 126, 331 <360>). Furthermore, in the context of the constitutional guarantee of property, due account must be taken of the principle of legitimate expectation under the rule of law, a principle which is distinctly refined under Art. 14 sec. 1 GG with regard to financial assets (cf. BVerfGE 36, 281 <293>; 72, 9 <23>; 75, 78 <105>; 95, 64 <82>; 101, 239 <257>; 117, 272 <294>; 122, 374 <391>). Still more, the legislature is also bound by the principle of equality under Art. 3 sec. 1 GG in determining the content of an owner's powers and duties (cf. BVerfGE 21, 73 <84>; 34, 139 <146>; 37, 132 <143>; 49, 382 <395>; 87, 114 <139>; 102, 1 <16 and 17>; 126, 331 <360>). **[268]**

The legislature may not only assign a new content to property rights under Art. 14 sec. 1 sentence 2 GG. Just as it may introduce new rights, it may also prevent new

rights that were possible under former law from arising in the future. The guarantee of property does not require that once legal interests are established, their content must remain untouched forever after (cf. BVerfGE 31, 275 <284 et seq., 289 and 290>; 36, 281 <293>; 42, 263 <headnote 4 and p. 294>; 58, 300 <351>). Even the complete elimination of legal interests that formerly existed and were protected by the guarantee of property may be permissible under certain circumstances (cf. BVerfGE 78, 58 <75>). However, here the legislature is subject to special limits under constitutional law (cf. BVerfGE 83, 201 <212>; 102, 1 <16>). Interference with rights that existed under former law must be justified by reasons of public interest, taking due account of the principle of proportionality (cf. BVerfGE 31, 275 <290>; 70, 191 <201 and 202> with further references). The reasons of public interest that argue in favour of such an interference must be so serious that they take priority over citizens' legitimate expectation of the continuance of their right, which is safeguarded by the protection of the status quo inherent in Art. 14 sec. 1 sentence 1 GG (cf. BVerfGE 42, 263 <294 and 295>; 58, 300 <351>). The permissible scope of the interference also depends on the weight of the underlying public interest (cf. BVerfGE 83, 201 <212>). In any case, a complete elimination of a legal interest, without transition or replacement, may be considered only under special circumstances (cf. BVerfGE 83, 201 <213>; referring to the foregoing, BVerfGE 102, 1 <16>). **[269]**

With regard to the protection of corporate investments, Art. 14 GG provides no lesser guarantees for companies than it does for other owners. In general, the same limits from Art. 14 GG result here for the legislature as have been developed in the Federal Constitutional Court's case-law on the protection of property in general. If the legislature wishes to expropriate a company's property for sufficiently weighty reasons of the public good, it is bound by the requirements of Art. 14 sec. 3 GG. In contrast, if the legislature determines the content and limits of corporately held property by changing the legal situation, it must adhere to the principles of proportionality, legitimate expectation and equality. The legislature must respect in an appropriate manner company assets and the investments undertaken in reliance on the legal situation. For the rest, however, Art. 14 sec. 1 GG does not guarantee companies that a legal situation that ensures favourable market opportunities for them will be preserved; neither do any other fundamental right provide such a guarantee (cf. BVerfGE 105, 252 <277 and 278>; 110, 274 <290>; likewise on Art. 12 GG, BVerfGE 121, 317 <383>). **[270]**

b) The definition under the 13th AtG Amendment of the content and limits of property in nuclear power plants does not prove to be unconstitutional on grounds that the law purportedly suffers from radical procedural or formal defects. **[271]**

Requirements for investigating facts and stating reasons that the complainants claim to have been violated, considering the speed and the sources of information of the legislative procedure, in fact do not exist in this form as a matter of principle, nor do they apply to the 13th AtG Amendment as an exception. **[272]**

aa) The Basic Law does not give rise to an obligation to investigate facts in the sense that such a duty exists independently from the requirements for the substantive constitutionality of legislation. **[273]**

[…] **[274-277]**

bb) There is also no constitutionally-based special procedural obligation to state reasons for legislation here. **[278]**

[…] **[279-280]**

c) The challenged provisions of the 13th AtG Amendment largely - although not on all points - satisfy the requirements of constitutional law for the determination of content and limits under Art. 14 sec. 1 sentence 2 GG. The amendment pursues a legitimate objective (aa). Its provisions are suitable and necessary in order to achieve that objective (bb). Proportionality requirements, in the strict sense, including the requirements it must meet in terms of legitimate expectations and equality (cc), are satisfied as far as the deprivation of the additional electricity volumes allocated in 2010 are concerned (cc (1)). However, setting fixed shut-down dates proves to be unconstitutional insofar as it has the result that to different extents some of the companies concerned are unable to use up, at least for the most part, the residual electricity volumes allocated in 2002, within the same corporation (cc (2)). The 13th AtG Amendment is also deficient in that it contains no provisions for an appropriate settlement with regard to devalued investments made for the additional output allowances allocated in 2010 (cc (3)). Other than that, however, further burdens on the complainants associated with the shut-down dates, above and beyond the ability to use the residual electricity volumes, must be tolerated (cc (4)). **[281]**

aa) The 13th AtG Amendment pursues the objective of "terminating the use of nuclear energy at the earliest possible date" (BTDrucks 17/6070, p. 1) by setting fixed end dates for power production at the individual nuclear power plants and by revoking the additional output allowances allocated in 2010. The background for the decision to accelerate the nuclear phase-out that had already been introduced in the Atomic Consensus (*Atomkonsens*) of 2000/2001 was the legislature's "reassessment of the risks associated with the use of nuclear energy", prompted by the events in Japan (BTDrucks 17/6070, p. 5). **[282]**

The legislature is pursuing a legitimate regulatory objective in accelerating the nuclear phase-out with the underlying intent of thus minimising, in time and scope, the associated residual risk. This generally applies irrespective of varying assessments as to the size and probability of the danger that this residual risk might materialise, and thus also irrespective of the conclusions that may be derived from the reactor disaster in Japan concerning the safety situation at German nuclear power plants. The legislature's objective of eliminating, as quickly and to the greatest possible extent, the residual risk that must inevitably be accepted together with the use of nuclear energy is constitutionally unobjectionable - even if it were to be founded solely on a political reassessment of the willingness to accept this residual risk. On the contrary, the acceleration of the nuclear phase-out intended by the legislature within its broad leeway in choosing what objectives of the common good to pursue (cf. in this respect BVerfGE 121, 317 <350>; 134, 242 <292 and 293 para. 172>) serves to protect the life and health of the people

(Art. 2 sec. 2 sentence 1 GG) and to achieve the task imposed on the state under Art. 20a GG of protecting the natural foundations of life, in part as a responsibility towards future generations. **[283]**

bb) The provisions of the 13th AtG Amendment are suitable ((1)) and necessary ((2)) for achieving that objective. **[284]**

(1) The Federal Constitutional Court's review of a law's objective fitness to achieve its purpose is limited to determining whether the employed means are plainly or objectively unsuitable (cf. BVerfGE 126, 331 <361> with further references). To establish suitability, it is sufficient if the provision can further the desired results, and consequently there is simply a possibility of achieving the purpose (cf. BVerfGE 121, 317 <354> with further references). **[285]**

Measured by that standard, setting fixed shut-down dates and revoking the additional output allowances allocated in 2010 are undoubtedly suitable to bring about the final termination of the use of nuclear energy faster than under the previous legal situation. […] **[286]**

The fact that Germany remains exposed to a residual nuclear risk from the operation of nuclear power plants near the border in other countries does not affect the finding that shortening operational lifetimes is suitable to minimise risk domestically. The assessment of a law's suitability depends primarily on the furtherance of the achievement of an objective within the country's own territory. **[287]**

Equally, potential impacts of the accelerated nuclear phase-out on the security of the energy supply in Germany are of no relevance to suitability for achieving the legislative purpose, because - unlike the legislative energy package of 2011, of which the 13th AtG Amendment is a part (cf. BTDrucks 17/6070, p. 5) - it is not aimed at security of the energy supply, but aims to minimise risk associated with the use of nuclear energy. **[288]**

(2) A determination of the content and limits of property that interferes with property rights is necessary if no other means are available that are equally effective but less restrictive of property (cf. in general BVerfGE 121, 317 <354>; 126, 331 <362> with further references). **[289]**

[…] **[290]**

cc) The provisions of the 13th AtG Amendment prove to be largely, although not in all points, a reasonable determination of the content and limits of property, and therefore also one that satisfies the requirements of the protection of legitimate expectations and the principle of equal treatment. **[291]**

(1) The deprivation of the additional output allowances allocated to the nuclear power plants in Appendix 3 column 4 of the Atomic Energy Act under the 11th AtG Amendment in 2010 is consistent with Art. 14 secs. 1, 2 GG. The interference with Art. 14 GG is, to be sure, rather extensive from a

quantitative perspective ((a)); yet the property interests concerned are limited in several ways in their worthiness for protection ((b)), so that in the overall balance with the public good, which favours the interference ((c)), the interference is proportionate. **[292]**

[…] **[293]**

(a) By striking column 4 from Appendix 3 of the Atomic Energy Act in the 13th AtG Amendment, the legislature deprived the nuclear power plants of an electricity production capacity of more than 1,804 TWh. This is equivalent to an average of approximately 12 years' worth of electricity production per nuclear power plant (cf. statement of reasons for the legislative proposal of an Eleventh Act Amending the Atomic Energy Act, BTDrucks 17/3051, p. 1). This figure is just short of twice the amount of residual electricity that was still available to the nuclear power plants from the original allocation in the Phase-Out Amendment Act of 2002 when the 11th AtG Amendment entered into force on 14 December 2010 […]. The magnitude of the cancelled electricity production capacity, and thus the restriction on the possibility of using the nuclear power plants, is therefore very large. **[294]**

(b) However, the property interests concerned are limited in several ways in their worthiness for protection. **[295]**

Art. 14 sec. 1 GG protects not only the physical existence of property, but also the possibility of using it (C I 1 b bb (1) above, paras. 228 et seq.). Since the use of nuclear power plants has been rationed with electricity volumes that can still be produced, corporately held property in the nuclear power plants is embodied not only by the installations and land, but substantially by the power of use as represented in the electricity volumes. If they are uncoupled from the rights to produce electricity, the installations cannot be used in a way that is consistent with their actual purpose of generating profits. The constitutional protection of the electricity volumes allocated under the 11th AtG Amendment shares, in its origins, the special features of the protection of property in nuclear plants in general ((aa)), but in addition has other distinct features, resulting from the reason for the creation and the circumstances of these residual electricity volumes, which reduce the degree to which such property interests are worthy of protection ((bb)). **[296]**

(aa) In the case of nuclear plants, there are limits on how worthy of protection property, as an individual fundamental freedom, can be. Because of its particular nature and function, this type of property serves an individual's personal freedom only to a small degree. Rather, it is corporately held property, with a particularly strong social dimension. On the one hand, the peaceful use of nuclear energy has served, and still serves, to supply the population with

energy; on the other hand, it is a high-risk technology which is linked not only to extreme risks of harm, among other issues, but also to still-unresolved problems of final disposal (C I 1 a above, paras. 218 and 219). Both of these factors determine the strong social dimension of the ownership of nuclear power plants, and leave particularly broad leeway for the legislature in designing atomic energy law. **[297]**

In light of these special characteristics of the use of nuclear energy, the Federal Constitutional Court already emphasised in its Kalkar Decision that the normative decision of principle for or against the legal permissibility of the peaceful use of nuclear energy is a matter reserved for the parliamentary legislature (BVerfGE 49, 89 <127>) and that atomic energy law has an exceptional position that justifies diverging from constitutional principles that are recognised in other fields of law (loc. cit., p. 146). It follows that the legislature has great leeway in deciding on whether and how nuclear energy is to be used for peaceful purposes. Yet this does not entail a complete exemption from the settlement provisions that are otherwise required. **[298]**

(bb) Beyond the already strong social dimension of property in nuclear power plants (C I 3 c cc (1) (b) (aa) above, paras. 297 and 298), the protection of property with regard to the use of nuclear plants, insofar as it relates to the additional electricity output allowances allocated by the 11th AtG Amendment at the end of 2010, is further limited against state influence. **[299]**

The allocation of this very large volume of additional output allowances is not based on any act accomplished by the affected companies themselves. These additional output allowances, in contrast with the residual electricity volume allocated in 2002 (C I 3 c cc (2) (b) (bb) (c) below, paras. 344 and 345), do not constitute compensation for limitations imposed elsewhere on the complainants' property. Nor are they based in any other way on a specific act accomplished by the complainants; in particular, they are not granted in return for specific investments and expenditures that the complainants made out of their own resources, and regarding which the use now would have to be protected by a corresponding increase in the allowances. At the end of 2010, when the legislature decided to allocate the additional residual electricity volumes, it was not because it believed that the operational lifetimes remaining after the Phase-Out Amendment Act of 2002 would otherwise be incompatible with the property rights of the nuclear power plant operators. Rather, granting these additional volumes was the result of an energy, climate and economic policy decision by the Federal

Government and the legislature (cf. BTDrucks 17/3051, p. 1). Under the "Energy Concept 2010" of the new Federal Government backed by the CDU/CSU and FDP (Christian Democratic Union, Christian Social Union and Free Democratic Party) political parties, nuclear energy was temporarily to be reinforced further, as a bridging technology, by significantly prolonging the operational lifetimes with the additional output allocations (cf. BTDrucks 17/3049, pp. 8 and 9); the underlying intent was to realise, during a transitional period, the Federal Government's three energy-policy goals of climate protection, cost-effectiveness, and energy supply security in Germany (cf. BTDrucks 17/3051, p. 1). **[300]**

Therefore, although the additional output allowances allocated in 2010 directly structure the exercise of ownership of the nuclear power plants, they are a result of this plant ownership only to a very limited extent. As a politically motivated grant by the legislature, conferred independently of the operators' legal interests, they therefore participate only to a small degree in the protection of the continued existence of property under property law. […] **[301]**

Finally, the nuclear power plant operators were also unable to obtain a stronger interest in protection of property by claiming a special legitimate expectation, worthy of protection, of the continued existence of the additional output allowances. Leaving aside the question of whether the legislature enacting the 13th AtG Amendment should have included compensation provisions or transitional provisions for frustrated investments specifically made during, and in reliance on, the statutory applicability of the additional output allowances - a matter which must be examined separately (see C I 3 c cc (3) below, paras. 369 et seq.) - the nuclear power plant owners could not develop the general expectation that these additional output allowances would remain unaltered in terms of their status quo, and cannot claim that they relied on this status quo throughout a longer period and focused their business policy accordingly. The 11th AtG Amendment was promulgated in the Federal Law Gazette (*Bundesgesetzblatt*) on 13 December 2010; the so-called "Moratorium" was then declared as early as March 2011, and the 13th AtG Amendment entered into force on 6 August 2011. That period of time is too short to justify a general assumption that the nuclear power plant operators had already adjusted on a lasting basis to the average twelve-year prolongation of operational lifetimes, and had already invested to a corresponding extent. **[302]**

(c) The public interests pursued by the 13th AtG Amendment are of high value and, in the specific implementation of the 2010 revocation of the prolongation of the operational lifetimes, they carry great weight. In the

13th AtG Amendment, the legislature wished to accelerate the phase-out, decided in 2002, of the peaceful use of atomic energy by introducing fixed shut-down dates and by revoking the prolongation of operational lifetimes that had only been introduced late in 2010 with the 11th AtG Amendment (cf. C I 1 b aa (1)-(2) and 3 c aa above, paras. 222 et seq. and 282 et seq.). Accelerating the nuclear phase-out, with its intended purpose of protecting the life and health of the people (Art. 2 sec. 2 GG) and the natural foundations of life (Art. 20a GG), serves constitutional interests of high value. By revoking the prolongation of operational lifetimes from 2010, with the resulting shutdown of nuclear power plants an average of 12 years earlier, the legislature realises a very considerable risk reduction. **[303]**

This is the case irrespectively of whether it was not or is not possible, according to now largely unanimous opinion, to derive new findings from the reactor disaster at Fukushima about other risks to German nuclear power plants, or risks significantly increased when compared to earlier assumptions […]. Furthermore, the reasons for the legislative proposal for the 13th AtG Amendment as stated by the CDU/CSU and FDP parliamentary groups do not actually suggest that any such new findings exist, but refer in this respect only to a reassessment of the risks associated with the use of nuclear energy as a result of the events in Japan (cf. BTDrucks 17/6070, p. 1, 5). In any case, the existing residual risk, even though it was known previously, must accordingly be tolerated for 12 years less than planned, and the extent of the disposal problems necessarily associated with the peaceful use of nuclear energy is reduced accordingly. **[304]**

(d) In the overall balance with the public good pursued with the challenged provision, the interference with the complainants' property as a result of the revocation of the additional output allowances of 2010 proves to be proportionate. The public interest, which is substantial in both quality and quantity, in reducing the nuclear power plants' operational lifetime by an average of twelve years (C I 3 c cc (1) (c) above, paras. 303 and 304) clearly outweighs the associated burdens on property for the complainants (C I 3 c cc (1) (a) above, para. 294). **[305]**

This result is not opposed by the complainants' contention that the legislature acted self-contradictorily and irrationally. They argue that first of all, believing that the known residual risk associated with the peaceful use of nuclear energy was still acceptable over a rather extended period in light of the high safety standards of German nuclear power plants, the legislature extended their operational lifetime by an average of twelve years at the end of 2010. Yet it revoked this decision only a few months later, with no substantive new findings as to danger. In so arguing, the complainants fail to recognise the legislature's decision-making leeway and its permissible reasons for action. **[306]**

Given an adequate knowledge of the existing risks, whether and under what conditions the legislature may permit a high-risk technology such as the peaceful use of nuclear energy is first of all a political decision, which it may regulate in a manner linked significantly to and dependent on society's acceptance of this technology. To that extent, the legislature is not generally precluded from amending, for the future, a decision that originally favoured the use of nuclear energy, even if there are no substantively new findings about its dangers and manageability. Regarding constitutional organs like the Federal Government and the legislature, who under their democratic responsibility decide considerably on the basis of political aspects, there is no doubt that in such a situation - like those at issue here - they may also respond to events like the reactor disaster in Japan, and derive consequences from heightened fears amongst the population or a change in risk tolerance. **[307]**

However, it is not possible to define in general the extent to which a mere change in political values or increased public concerns or fears can also sustain measures that - like the acceleration of the nuclear phase-out - significantly interfere with the fundamental rights of the persons concerned, nor what weight is to be attributed to them. In any case, any substantial interference with fundamental rights must be justified by sufficiently weighty reasons relating to the public interest, based on an assessment of the dangers or risks that are realistically recognisable amongst such fears and values. At any event, if existing legally protected interests resulting from legitimate expectations - namely investments whose continued existence is protected - are thus devalued, the mere political desire to respond to changes in values amongst the population will often not sustain sudden changes of policy. But if, as here (C I 3 c cc (1) (c) above, paras. 303 and 304), there are weighty public interests substantiating the associated interference, and if the matter concerns the evaluation of a high-risk technology whose risks of causing damage, in light of an extremely low probability of occurrence, on the one hand, but an extremely extensive scope of possible damage, on the other hand, are particularly dependent on political assessment and specifically also on public acceptance (cf. previously BVerfGE 49, 89 <127>), this may also ascribe a weight to events that only change the public's awareness of such risks without bringing new dangers to light. Consequently it is not objectionable that the legislature was reacting to the events in Fukushima even though no new finding as to dangers could be derived from them. **[308]**

The additional output allowances granted in 2010 are worthy of protection to only a small degree, for lack of an act accomplished by the companies themselves and for lack of a legitimate expectation that those allowances would continue. This justifies their revocation even without compensation. […] **[309]**

(2) The determination of the content and limits of property under the 13th AtG Amendment cannot, however, reasonably be imposed insofar as it means that Vattenfall and RWE are unable to use up, within their corporations, substantial parts of the residual electricity volumes from 2002 (electricity volumes under Appendix 3 column 2 AtG) at their plants due to the statutorily fixed operational lifetimes, while E.ON and EnBW, in contrast, have more electricity production capacity than they need in order to use up their residual electricity volumes from 2002. **[310]**

Neither Vattenfall nor RWE will be able to use all - or almost all - of the residual electricity volumes allocated to them in 2002 by the time when they shut down all the power plants that belong in whole or in part to their corporations ((a)). The interference with property weighs heavily, especially in light of the legal background of the residual electricity volumes allocated in 2002 and the unequal treatment in comparison to competing enterprises ((b)). It is true that the interference faces weighty public interests ((c)). Ultimately, however, the interference with property is not reasonable ((d)). **[311]**

The prevention of the production of the residual electricity volumes from 2002 is the relevant point of reference in assessing whether the burdens imposed on the complainants by the 13th AtG Amendment are reasonable. However, the assessment here no longer depends solely on the figure of a 32-year operational lifetime that is important in amortising the plants and ensuring an adequate profit, as was assumed as a basis for the Atomic Consensus Agreement (*Atomkonsensvereinbarung*) and the Phase-Out Amendment Act implementing that agreement. The 32-year operational lifetime was already included as a conversion factor in calculating the reference volumes in the original phase-out decision, and has been reflected ever since in the residual electricity volume (see A I 2 a aa and b above, paras. 5 and 8 et seq.). Therefore, since this system was introduced, appropriate amortisation and reliable profit from a nuclear power plant no longer depends primarily on 32 years of operation, but instead on the possibility of generating electricity in the amount of the residual electricity volumes. **[312]**

(a) As a consequence of the introduction of the fixed shut-down dates for the nuclear power plants (§ 7 sec. 1a sentence 1 AtG), in combination with the limited possibilities of transfer (§ 7 sec. 1b AtG), two of the complainants will no longer be able to produce all of the residual electricity volumes allocated by the Phase-Out Amendment Act at their own corporations' nuclear power plants. **[313]**

(aa) […] **[314]**

(bb) The parties' arguments and the oral hearing showed that in all probability, all nuclear power plants that are allowed to operate beyond 6 August 2011 will be able to use up all the residual

electricity volumes allocated to them in 2002 before their respective binding shut-down dates under § 7 sec. 1a sentence 1 no. 2 - 6 AtG. **[315]**

However, this does not apply to the nuclear power plants in the group under § 7 sec. 1a sentence 1 no. 1 AtG, which lost their entitlement to produce electricity when the 13th AtG Amendment entered into force, nor to the residual electricity volumes allocated to the Mülheim-Kärlich nuclear power plant. […] The table below provides details of the residual electricity volumes allocated to the individual nuclear power plants belonging to the first group under § 7 sec. 1a sentence 1 no. 1 AtG and to the Mülheim-Kärlich nuclear power plant, and not yet used on 6 August 2011. […] **[316]**

Nuclear power plants under § 7 sec. 1a sentence 1 no. 1 AtG	**Residual electricity volume remaining at 6 August 2011 (in GWh)**
Biblis A	2.194,24
Biblis B	7.822,48
Brunsbüttel	10.999,67
Isar 1	2.024,12
Unterweser	11.202,86
Philippsburg 1	8.454,24
Krümmel	88.245,11
TOTAL	130.942,72
Mülheim-Kärlich	99.150,00
GRAND TOTAL	230.092,72

(cc) A projection of the extent to which these residual electricity volumes can be used up within the remaining operating periods after being transferred to still-operable nuclear power plants, on top of those plants' own volumes, must be based on the corporation's own and internal estimation ((a)). This Senate's respective inquiry was not answered uniformly by the parties to the constitutional complaint proceedings ((b)). **[317]**

(α) Projections of the possible consumption of residual electricity volumes depend on the corporations' own and internal estimations. **[318]**

As part of the review of their property's determination of content and limits in terms of proportionality, the complainants must note

that they may transfer electricity volumes that are no longer usable at one nuclear power plant, because that plant's shutoff date has been reached, to another nuclear power plant within their own corporation, or proportionally to one in which they hold at least a share of the ownership. It is reasonable to assume that the transferring nuclear power plant can obtain an adequate selling price, as all parts of the corporation ultimately have the same interests. Even if the selling power plant obtains only an inadequate price - measured in terms of the profit attainable by producing electricity itself - the normally equivalent increase in profit from producing electricity at the recipient nuclear power plant will still remain within the corporation, so that a uniform consideration is justified also in that respect. **[319]**

Other conditions, however, apply with regard to transfers beyond the corporation's sphere. According to the parties' largely coinciding projections, which substantially agree in this regard (C I 3 c cc (2) (a) (cc) (b) below, para. 327), there will be only two potential buyers (E.ON and EnBW) to take over the residual electricity volumes no longer usable within the corporation. Of these, E.ON holds two-thirds to three-quarters of the buyer power, depending on the projection. Here both buyers have only limited additional electricity production capacity, which does not fully cover the supply, and they will thus only take over residual electricity volumes if this pays off for them economically; they can therefore largely determine the price themselves. Under these circumstances, from the selling entities' viewpoint, a transfer of residual electricity volumes is not an entirely reasonable exploitation option. **[320]**

(β) The discrepancies in the parties' projections concerning the electricity volumes that can still be produced depend on their different assumptions as to the degree of utilisation that can realistically be expected from the individual nuclear power plants on which they based their calculations. All parties rightly assume that a 100% utilisation rate, over a longer period of time, has so far not yet materialised at a nuclear power plant, and therefore projections of future consumption cannot be based on such an assumption either, especially because in addition to the typical uncertainty factors, such as technically required downtime or the evolution of the electricity market, unpredictable shut-down-related factors such as the cost-effectiveness of nuclear fuel replacements or other measures to enhance fitness come increasingly into play in light of impending shut-down dates. **[321]**

[…] **[322-327]**

(dd) There is no need to decide here which of the different projection approaches should govern the review of the legislative decision. While the complainants, as well as Greenpeace, base their projections on an extrapolation of statistically calculated levels of utilisation, the Federal Government takes as a basis the annual reference volumes, which are statistically calculated as a starting point, with reference to the annual utilisation between 1990 and 1999, but are otherwise set by law; the government figure furthermore pursued the goal of establishing a rather generous calculation basis for the Atomic Consensus - at that time, in favour of the operators of nuclear power plants. Even if one adopts the Federal Government's relatively optimistic utilisation assumptions, this leads to the conclusion that the residual electricity volume which RWE and Vattenfall will lo longer be able to use up within their own nuclear power plants would be so substantial that the determination of content and limits proves to be unreasonable (C I 3 c cc (2) (d) below, paras. 364 et seq.) in light of the special legitimate expectation to which the nuclear power plant operators are entitled here (C I 3 c cc (2) (b) (bb) below, paras. 334 et seq.) and the detriment that results in comparison to the other companies (C I 3 c cc (2) (b) (cc) below, paras. 347 et seq.).

(b) The interference with the property of complainants Vattenfall and RWE because of the inability to use up the residual electricity volumes from 2002 that can no longer be produced within the corporation, owing to the fixed shut-down dates, is significant. It is substantial in quantity ((aa)) and because of the special circumstances of its creation, it affects an ownership interest that enjoys elevated protection against change ((bb)). Furthermore, it places these complainants at a disadvantage in relation to competing companies ((cc)). **[329]**

(aa) The volume of electricity allocations that cannot be used within the corporation is substantial in Vattenfall's and RWE's case. **[330]**

(α) Depending on the projection, complainant Vattenfall will not longer be able to produce either 46,651 GWh or 45,890 GWh of the residual electricity volumes allocated in 2002. Based on the information about electricity volumes generated at still-operating nuclear power plants for 2000 through 2014 in columns 3 and 4 of the notice of the Federal Radiation Protection Office of 31 October 2015 (A VI 1 above, para. 166), this is equivalent to an average of approximately four and a half years' worth of production at a nuclear power plant. Thus about 30% of the originally allocated residual electricity volume can presumably not be produced within the corporation. If one sets this production deficit in relation to the residual electricity volume of 70,273 GWh that

was still available to complainant Vattenfall at the end of 2010, the share of the electricity volume that can no longer be produced even amounts to about 66%. The interference caused by the 13th AtG Amendment in complainant Vattenfall's use authorisation for its nuclear power plants, as certificated with the residual electricity volumes from 2002, is therefore serious even in quantitative terms. **[331]**

It cannot ultimately be argued against this conclusion that the projected production deficit was caused by downtime at the Krümmel nuclear power plant for which complainants Krümmel and Vattenfall were responsible, and therefore should not have been taken into account when the legislature set the shut-down dates. This argumentation is not convincing with regard to the relevant period at issue here, i.e. the period prior to the entry into force of the 13th AtG Amendment in August 2011. After the nuclear phase-out under the 2002 legislation, the nuclear power plant operators were acting within a legal situation that set the end of the phase-out, barring further notice, by means of the residual electricity volumes, rather than with specific shutdown dates. It was permissible for the operators to orient their business operations to that situation and therefore they also did not have to carry out the production of the residual electricity volumes allocated to them under any particular time pressure. Within the limits thus established they could also allow for technically occasioned downtime. Ultimately, neither the oral hearing nor the parties' arguments suggest that complainants Krümmel and Vattenfall deliberately undermined the legislation's objective of terminating the peaceful use of nuclear energy as soon as possible. **[332]**

(β) For complainant RWE, the residual electricity volume that presumably cannot be produced within the corporation amounts to at least 35,821 GWh, and at most 42,079 GWh, depending on the projection. This too is equivalent to approximately four years' worth of production at a nuclear power plant. Measured against the residual electricity volume allocated to the corporation in 2002, however, this represents only between 5% and 6%, yet measured against RWE's residual electricity volume remaining at the end of 2010, it amounts to between 19% and 22%. Therefore the interference with property for complainant RWE is not inconsiderable either. **[333]**

(bb) The inability to use up the residual electricity volumes from 2002 that cannot be produced within the corporation because of the fixed shut-down dates affects property interests that are particularly protected against interference here because of special circumstances.

As a specific embodiment of the right to use the nuclear power plants, the residual electricity volumes allocated in 2002 do originally share the general character of property in nuclear plants, which in virtue of its particular nature and function does not primarily serve the personal freedom of the individual, but is characterised by a strong social dimension (C I 1 a and C I 3 c cc (1) (b) (aa) above, paras. 216 as well as 297 and 298). As far as the residual electricity volumes under the Phase-Out Amendment Act are concerned, the complainants' ownership for use, unlike the additional output allowances allocated in 2010 under the 11th AtG Amendment (C I 3 c cc (1) (b) (bb) above, paras. 299 et seq.), enjoys particular protection because these residual electricity volumes are the core matter of a transitional provision. **[334]**

In general, a transitional provision adopted by the legislature for reasons of protecting legitimate expectations can be amended only under special conditions ((a)). The residual electricity volumes are part of a transitional provision intended to provide a special degree of protection with regard to legitimate expectations ((b)). The expectation that the regulated residual electricity volumes will continue is also especially worthy of protection because those volumes have the function of compensating for restrictions of property elsewhere ((c)). This particularly applies to the electricity volumes at Mülheim-Kärlich ((d)). **[335]**

(α) If the legislature frustrates the legitimate expectation of the continuance of a limited transitional provision that it adopted to protect legitimate expectations, and eliminates that provision before its originally intended scope is exhausted, to the detriment of the entitled persons, it can in any case do so only subject to special requirements from the viewpoint of protecting legitimate expectation under the rule of law. Such a case is not a matter of protecting citizens' legitimate expectation of the continuation of applicable law in general. Here the citizen instead relies on the continuity of a provision according to which old law, or a particular transitional provision, continues to apply for a certain time to a limited group of persons upon the finding that such continuance is compatible with the public interest. By adopting such a provision, the legislature has established a special situation of legitimate expectation. To revoke it prematurely, or amend it to the detriment of the persons concerned, it does not suffice that a political assessment of the associated and tolerated dangers, risks or disadvantages to the general public has changed. Instead - provided the concerned persons' interest in the continuance of the provision is worthy of protection and is of sufficient weight - it is also necessary that keeping the applicable transitional provision in force must be

expected to cause serious detriment to important common interests (cf. BVerfGE 102, 68 <97 and 98>; likewise BVerfGE 116, 96 <131>). **[336]**

(β) The residual electricity volumes allocated in 2002 are part of a transitional provision which, according to the historical development, reasons and design of the Phase-Out Amendment Act of 2002, were intended to provide a special protection of legitimate expectations. The historical development, reasons and design of the residual electricity volume provision leave no doubt that both the Federal Government and the legislature intended to guarantee that energy suppliers in the sector of nuclear power plants would have a reliable basis for their economic activities during the period of use remaining after the phase-out decision, and this included the continuance of the residual electricity volumes granted in 2002. **[337]**

[…] **[338-339]**

In the Phase-Out Amendment Act of 2002, the legislature resolved on a phase-out of nuclear energy, and at the same time declaredly implemented the core points of the Consensus Agreement (cf. statement of reasons for the legislative proposal from the SPD and BÜNDNIS 90/DIE GRÜNEN parliamentary parties, BTDrucks 14/6890, p. 1; A I 2 b aa above, para. 9). The statement of reasons for the legislative proposal expressly reproduces the passage from the Consensus Agreement in which the Federal Government guarantees the undisturbed operation of the plants during the remaining term, subject to the conditions stated therein (BTDrucks 14/6890, p. 13). **[340]**

The statement of reasons for the legislative proposal views the design of the residual electricity volumes as a proportionate structuring of the concerned companies' property. It was said to ensure that the operators would be able to amortise their investments and furthermore obtain an adequate profit. All in all, together with certain other clarifications, the measures thus contributed "significantly towards protecting legitimate expectation" (cf. BTDrucks 14/6890, p. 16). **[341]**

The mention in the statement of reasons for the legislative proposal that "the exact date of expiry of the entitlement to produce power at a nuclear power plant (…)" did not need to be "rigidly set at the present time" (cf. BTDrucks 14/6890, p. 13) at most reveals a reservation of the option to set fixed end dates later, but cannot undermine the legitimate expectation of the guarantee of value of the residual electricity volumes, which according to the concept of

the legislative provision would also have to be taken into account if a time limit were set later. **[342]**

[…] **[343]**

(χ) The expectation of a temporally unlimited and generally undiminished possibility of using the residual electricity volumes from 2002 is also especially worthy of protection because of its compensatory nature. These residual electricity volumes were supposed to compensate for the loss that the Phase-Out Amendment Act caused to the hitherto non-time-limited possibility of using the nuclear power plants, to an extent that would ensure the amortisation of the plants and an adequate profit, and thus help preserve the proportionality of the phase-out decision (cf. BTDrucks 14/6890, pp. 15 and 16). **[344]**

Ownership of the plants and the possibility of their use that existed until that time were founded substantially on acts accomplished by the power plant owners themselves, who bore the investments and maintenance, and thus enjoyed protection of property. The fact that the peaceful use of nuclear agency was subsidised by large amounts of public funding for decades did not stand to prevent the development of ownership of the plants for private benefit, any more than it did with other technologies subsidised by the state. Such support can in many regards give the legislature greater leeway in structuring the content and limits of this property, but it does not devalue the property and the associated authority to use the plants for profitable ends. The residual electricity volumes are a form of compensation for the termination of the previously non-time-limited possibility of using this property, and therefore - unlike the politically motivated allocation of additional output allowances in the 11th AtG Amendment (C I 3 c cc (1) (b) (bb) above, paras. 299 et seq.) - enjoy the same quality of protection of property in the plants and of the possibility of use that existed until 2002. **[345]**

(δ) The residual electricity volumes allocated to the Mülheim-Kärlich nuclear power plant enjoy all the more a protection of trust in their continuation and protection of legitimate expectations. They too were allocated by the 2002 Phase-Out Amendment, even though the nuclear power plant had already been permanently shut down in 2001. The volumes were allocated in the course of an amicable settlement in return for the cessation of public liability proceedings against the *Land* of Rhineland-Palatinate and for the withdrawal of an application for the issuing of an authorisation under atomic energy law for that nuclear power plant (A I 2 a bb above, paras. 6 and 7). Unlike the other residual electricity volumes, this allocation could thus not be the subject matter of a guarantee of a

remaining operational lifetime for the Mülheim- Kärlich nuclear power plant, within which the power plant would be amortised. Instead, this residual electricity volume was granted - in a way not linked to the operation of a particular power plant - in return for a waiver of asserting a pecuniary claim. Therefore this residual electricity volume has a somewhat distinct nature (C I 1 b bb (b) above, para. 238). **[346]**

(cc) The fact that some of the residual electricity volume from 2002 can no longer be used within the corporation because of the fixed shut-down dates imposes an additional burden on complainants RWE and Vattenfall because without a sufficient justifying reason, they are thereby placed at a disadvantage against the competing firms E.ON and EnBW, which can use up all of their residual electricity volumes within the operational lifetime of their power plants. **[347]**

(α) In determining the content of owners' powers and obligations under Art. 14 sec. 1 GG, the legislature is also bound by the principle of equality under Art. 3 sec. 1 GG (cf. BVerfGE 21, 73 <84>; 34, 139 <146>; 37, 132 <143>; 49, 382 <395>; 87, 114 <139>; 102, 1 <16 and 17>). Therefore, burdens that structure ownership must be distributed equally if their circumstances are essentially the same, and differentiations are always in need of justification by objective reasons that are appropriate to the objective and scope of the unequal treatment (cf. BVerfGE 126, 400 <416>; 129, 49 <69>; 132, 179 <188 para. 30>). **[348]**

(β) The staggering of the residual operating times of the nuclear power plants places Vattenfall and RWE at a disadvantage in terms of the ability to produce the residual electricity volumes. The staggered timing of the end of the licence to produce power according to the six power plant groups in § 7 sec. 1a sentence 1 AtG, in conjunction with the provisions on the possibilities for transferring electricity volumes in § 7 sec. 1b AtG, has the result that in all probability, only Vattenfall and RWE will be unable, to any extent worth mentioning, to produce the residual electricity volumes allocated to their power plants in 2002. **[349]**

Accordingly it had to be assumed that E.ON, at its nuclear power plants still licenced to operate after 6 August 2011, would indisputably not only be able to use up all the residual electricity volumes allocated to those plants and left over from the nuclear power plants already shut down at 6 August 2011, but in addition would in any case have more than 35,000 GWh of further electricity production capacity available. Equivalent considerations apply to EnBW, with an expected capacity surplus of at least 9,000 GWh. **[350]**

Vattenfall, in contrast, according to concurring projections, will be unable to generate approximately 46,000 GWh of this electricity volume at power plants belonging to the corporation. This figure amounts to approximately 30% of the residual electricity volume allocated in 2002, or more than 60% of the volumes still remaining at the end of 2010. **[351]**

Complainant RWE is also to a significant extent placed in a poorer position than its competitors E.ON und EnBW with regard to the scope of the expected ability to produce the residual electricity volumes allocated to it. After the operational lifetimes of its nuclear power plants end, RWE will have residual electrical volume from 2002 that cannot be used within the corporation, in amounts that vary between nearly 36,000 GWh and more than 42,000 GWh, depending on the projection calculation. Although these figures represent only 5% to 6% of the residual electricity volume allocated in 2002 (C I 3 c cc (2) (a) (cc) (b) above, para. 327), in absolute figures the adverse position of RWE compared to E.ON and EnBW is considerable, equivalent to approximately four years' worth of production at a nuclear power plant, speaking only of the residual electricity volumes that can no longer be used. **[352]**

(χ) No adequate objective reason is evident for the unequal treatment of RWE ((αα)) and Vattenfall ((ββ)) in comparison to E.ON and EnBW with regard to the electric production deficits. These do not merely constitute acceptable forecasting inaccuracies either ((χχ)). Nor is the unequal treatment supported by legislative powers to categorise and consolidate ((δδ)). **[353]**

(αα) The electricity production deficit that can be expected for complainant RWE has its primary cause in the substantial Mülheim-Kärlich electricity volume allocated to RWE (C I 3 c cc (2) (a) (bb) above, para. 316). Even in 2000/2002, this electricity volume was not matched by any operable RWE-owned nuclear power plant to which the volume could originally have been allocated. The legislature enacting the 13th AtG Amendment should have taken this into account in allocating the respective volume of electric production capacity for each corporation, which was ultimately carried out by staggering the shut-down dates. It is true that when all nuclear power plants wholly or partially held by RWE are taken together, this staggering yields both an operational lifetime surplus well beyond the 32-year limit (Table C I 3 d below, para. 387), and also - if the Mülheim-Kärlich volumes are set aside - a surplus of electricity production capacity. However, these are able to absorb only about half of the Mülheim-Kärlich electricity volumes available at the time when the 13th AtG Amendment was enacted. In

contrast, there is no evident objective reason why E.ON and EnBW should ultimately be able to use up all their electricity volume and even have surplus capacity available. At any rate, the objective of accelerating the nuclear phase-out pursued by the legislature with the 13th AtG Amendment (C I 3 c aa above, paras. 282 and 283) does not justify this unequal treatment. Neither the legislative background materials nor the arguments put forward by the parties to the proceedings show that the intended acceleration objective was supposed to be achieved precisely through this placement of RWE at a disadvantage. Considering the extensive capacity surpluses identified in the case of E.ON and EnBW, respectively (C I 3 c cc (2) (a) above, paras. 313 et seq.), there is also nothing in this matter that argues that placing RWE at a disadvantage would have been the only way to accelerate the phase-out. **[354]**

(ββ) Equivalent considerations apply to Vattenfall. In absolute figures (approximately 45,000 GWh), its disadvantage against E.ON and EnBW in terms of the expected electricity production deficit is approximately the same as that of RWE. The principal reason for the residual electricity volumes that will presumably not be usable within the corporation is the categorisation of the Krümmel nuclear power plant under the first shut-down group as set out in § 7 sec. 1a sentence 1 no. 1 AtG. Vattenfall has no other nuclear power plants with noteworthy surplus capacity. **[355]**

As far as the Krümmel nuclear power plant is concerned, there is no reason to believe that assigning it to the first shut-down group, with the associated placement of Vattenfall at a disadvantage against E.ON and EnBW, was necessary in order to achieve the acceleration objective of the 13th AtG Amendment, or that the detriment could not have been avoided by grouping the nuclear power plants differently, or compensated in some other way, without reducing the acceleration effect (D II 2 below, paras. 403 et seq.). **[356]**

Assigning the Krümmel nuclear power plant to the first group under § 7 sec. 1a sentence 1 AtG terminated its licence to produce power as early as the end of the day on 6 August 2011, and therefore limits its operational lifetime to only 27.36 years. That is 4.5 years less than the 32 years that were promised to operators under the Atomic Compromise. The full term has largely been maintained otherwise under the legislative provisions for all other nuclear power plants, and according to the legislative intent of the 13th AtG Amendment was still supposed to be maintained even after the introduction of fixed shut-down times (cf. statement of reasons for the legislative proposal, BTDrucks 17/6070, p. 6). **[357]**

On the evidence of the statement of reasons for the legislative proposal, the staggering of operational lifetimes under § 7 sec. 1a sentence 1 AtG was intended not only to support the actual purpose of acceleration, but also to ensure that the companies concerned were not affected disproportionately in their fundamental right under Art. 14 sec.1 GG; the standard operational lifetime of 32 years was meant to ensure that this objective can be met (cf. BTDrucks 17/6070, p. 6). Furthermore, the staggering was supposed to guarantee security of energy supply (loc. cit., p. 7). Neither aspect can justify assigning the Krümmel nuclear power plant to the first group. This nuclear power plant is the only one that falls well short of the 32-year standard operational lifetime. It is not evident to what extent the idea of guaranteeing security of supply is supposed to require shutting down the Krümmel plant earlier. It is not evident, nor has it been argued, that the Krümmel power plant had to be included in the first group because this was the only way to ensure security of supply in certain regions of Germany through the longer operation of other nuclear power plants, while at the same time maintaining the general objective of accelerating the nuclear phase-out. **[358]**

Nor can the assignment to the first shut-down group be explained by reasons of op-erating safety at the Krümmel nuclear power plant, which were in fact not put forward by the Federal Government in particular before the constitutional complaint proceedings. Granted, recourse to reasons for differentiation that are adduced only later is not precluded by the fact that these reasons were not yet recognisable clearly enough from the legislation itself. Only for steering legislation has the Federal Constitutional Court required that the steering purpose must be supported by a recognisable decision of the legislature, especially in tax law (cf. BVerfGE 117, 1 <32> with referral to BVerfGE 93, 121 <147 and 148>; 99, 280 <296>; 105, 73 <112>; 110, 274 <293>) but also elsewhere (cf. BVerfGE 140, 65 <85 para. 45> with referral to BVerfGE 118, 79 <101>). Otherwise it is sufficient if a law ultimately proves to be constitutional (cf. BVerfGE 140, 65 <79 and 80 para. 33>). However, the 13th AtG Amendment is not a law with such a steering purpose. **[359]**

However, in point of fact, the safety aspect does not justify the unequal treatment. No specific, current safety shortcomings at the Krümmel nuclear power plant have been mentioned. It has not been contended in a substantiated form that specific security concerns would have conflicted with the resumption of operation at the Krümmel nuclear power plant that was planned, according to the arguments of complainants Krümmel and Vattenfall, to take place

at the end of 2011. Moreover, concerns of that nature should have been met using the instruments provided for such purposes in the Atomic Energy Act. The age of the nuclear power plant in and of itself also does not support inclusion in the first group, because the Krümmel nuclear power plant started operation on 28 March 1984, and therefore later than, for example, the Grafenrheinfeld nuclear power plant that appears in § 7 sec. 1a sentence 1 no. 2 AtG. Finally, the placement of Krümmel at a significant disadvantage cannot be explained by the fact that the Krümmel nuclear power plant still belongs to the 69 line of boiling water reactors, all other still-operating members of which also lost their entitlement to produce power in August 2011 by inclusion in the first group. Merely the statistically higher number of reportable events for this type of reactor, without specific findings of inadequacies in the particular reactor concerned, does not justify placing Krümmel at a disadvantage with such adverse consequences for its electric production capacity. **[360]**

(χχ) Neither do the complainants concerned have to accept unequal treatment in terms of the ability to produce electricity within the corporation as an inevitable projection inaccuracy of the legislature. […] **[361]**

(δδ) Nor are the electricity production deficits that are imposed only on complainants Vattenfall and Krümmel justified from the viewpoint of legislative powers to categorise and consolidate (cf. in this respect BVerfGE 84, 348 <359 and 360>; 126, 268 <278 and 279>; 133, 377 <412 and 413 paras. 86 et seq.> each with further references). […] **[362]**

(c) […] **[363]**

(d) In an overall balance with the public good, which favours the accelerated shutdown of the nuclear power plants, interferences with the property of complainants Krümmel/Vattenfall and RWE linked to the fixed shut-down dates and the expectable production deficit for the residual electricity volumes from 2002, proves to be untenable. **[364]**

The expected interferences in these complainants' property affect interests particularly worth protecting in terms of existing legitimate expectations; what is more, they were granted to the complainants even before the 13th AtG Amendment was adopted, not least so as to protect such legitimate expectations. Furthermore, the burdens, amounting to a combined total of between approximately 81,000 and 88,000 GWh of residual electricity volume from 2002 that can no longer be produced, are high both in absolute figures and in relation to the residual electricity volumes still available under the legislative decision on the 13th AtG

Amendment, and furthermore in proportion to the residual electricity volumes originally allocated to them by the Phase-Out Amendment Act (Table in C I 3 c cc (2) (a) (cc) (b) above, para. 327). Furthermore, the competing companies are not equally affected by these factors; only Krümmel/Vattenfall and RWE are encumbered with ultimately inadequate electricity production capacity, lacking adequate objective reasons. **[365]**

Then again, there are concerns relating to the fundamentally high-value protected interests of the life and health of the people (Art. 2 sec. 2 sentence 1 GG) and the natural foundations of life (Art. 20a GG), which the acceleration of the nuclear phase-out contributes to. Nonetheless, a provision that avoided the electricity production deficits would have had only a relatively minor adverse effect on these public interests - even if a solution had been sought by way of a corresponding prolongation of the operational lifetimes of individual nuclear power plants of the complainants concerned. The volume of electricity involved is approximately eight and a half years' worth of a nuclear power plant's production - a volume which will presumably go unproduced under the challenged legal situation. In contrast, the total residual electricity volumes of 2,623,310 GWh (Table in C I 3 c cc (2) (a) (cc) (b) above, para. 327) allocated to the nuclear power plants in 2002 under the Phase-Out Amendment Act were equivalent to […] about 262 years' worth of output, assuming a nuclear power plant's average annual production to be 10,000 GWh. Here it must also be borne in mind that according to the staggered remaining operational lifetimes set in the 13th AtG Amendment, plants of E.ON and EnBW can legally be operated longer than will presumably be the case in practice, given the remaining residual electricity volumes within their corporations. Measured against this framework that the legislature itself, in the 13th AtG Amendment, set for its intended public-interest objective by way of the total remaining operating lifetimes, the detriment to the public interest resulting from a provision that would allow the production of RWE and Vattenfall' residual volumes would therefore even be significantly less. Furthermore, the production deficits could also have been avoided by staggering the specific shutdown dates differently for the individual power plants, even without calling the intended overall phase-out date into question. **[366]**

Ultimately, however, the electricity production deficit likely to arise in the case of the complainants Vattenfall and Krümmel is especially high, both in absolute terms and in relation to the residual electricity volumes originally allocated, and particularly when measured by the residual electricity volume that was left at the end of 2010. It is therefore so substantial in quantity that in an overall balance between protection of property and particular protection of legitimate expectation, as well as between the disadvantaged position against competing companies, on the

one hand, caused by the deficit, and the reasons of public interest that argue in favour of the provision, on the other hand, it cannot reasonably be imposed on the owners. **[367]**

The electric production deficit for RWE is significantly lower in proportion to the original residual electricity volumes, but it is nevertheless considerable in absolute terms. […] **[368]**

(3) The 13th AtG Amendment violates Art. 14 sec. 1 GG insofar as it does not provide for any transitional periods, compensation clauses or other settlement provisions for cases in which investments in nuclear power plants were devalued through the revocation of the additional electricity output allowances allocated in 2010. **[369]**

However, the energy corporations' payments under the Development Fund Agreement (*Förderfondsvertrag*) (A I 3 b bb above, para. 21), adduced by the complainants in this context, are not expenditures frustrated by the 13th AtG Amendment for which a settlement provision should have been provided by that legislation. Whether, to what extent, and under what conditions the complainants' payments made in that connection must be refunded is a question that must be clarified first of all within the underlying contractual relationship. **[370]**

Subject to certain conditions, Art. 14 sec. 1 GG protects the legitimate expectation that the legal situation serving as a basis for investing in, and using, property will not change ((a)). Settlement provisions for frustrated investments ((b)) did not have to be provided in respect of the 2002 residual electricity volumes ((b) (aa)), but they should have been provided in respect of investments for the 2010 additional output allowances ((b) (bb)). **[371]**

(a) In Art. 14 sec. 1 GG, the principle under the rule of law of protecting legitimate expectations with regard to financial assets is distinctly refined (cf. BVerfGE 58, 81 <120>). It protects trust in the reliability and predictability of the legal system created under the applicability of the Basic Law, and of the rights acquired on the basis of that system (cf. BVerfGE 101, 239 <262>; 132, 302 <317>; 135, 1 <21 para. 60>). The fundamental right to property therefore also protects a legitimate expectation of the continuance of the legal situation as a foundation for investments in, and the use of, property. Whether and to what extent such an expectation is legitimate depends on the circumstances of the particular case. There is no guarantee that all investment expectations will be fulfilled. In particular, Art. 14 sec. 1 GG generally provides no protection against changes in the legal environment for commercial activity, or the effects of that environment on market opportunities. However, if the legislature directly suppresses or significantly restricts the further use of property, investments in such property made on the basis of the legitimate expectation that the legal situation will not change call

for appropriate consideration, under the principle of proportionality, with regard to both whether and how a settlement should be provided. In this regard, the legislature has broad leeway in designing transitions for existing legal situations, entitlements, and legal relationships. In particular, when changing systems and restructuring legal situations, the Constitution does not require the legislature to spare concerned persons from all burdens or to address every special burden with a transitional provision (cf. BVerfGE 131, 47 <57 and 58>). In any case, a compensating settlement for devalued investments in property is not necessary if the legislature compensates for the restriction of usability of the property in some other way; double compensation is not permissible. **[372]**

(b) Measured against this standard, the 13th AtG Amendment is unconstitutional insofar as it does not provide for any settlement with regard to frustrated investments. **[373]**

(aa) However, insofar as investments were made in reliance on the ability to produce essentially all of the 2002 residual electricity volumes, there is no need for a separate settlement provision. To that extent, in regard to the deficit in electricity production, the legislature must already provide adequate compensation, a prolongation of operational lifetimes, or some other form of settlement (C I 3 c cc (2) (a) above, paras. 313 et seq.) that also appears adequate, from the viewpoint of proportionality, as compensation also for frustrated investments. As there will be electricity production or a legal surrogate for these volumes, investments made cannot be regarded as frustrated. Double compensation for both residual electricity volumes that cannot be used up as well as for frustrated investments is constitutionally impermissible. **[374]**

(bb) The 13th AtG Amendment should have provided an appropriate settlement for investments that were made in the nuclear power plants with a view to producing the additional output allowances allocated at the end of 2010, and that were devalued by the revocation of these volumes at the beginning of August 2011. **[375]**

(α) In principle, the circumstances were such that legitimate expectations worthy of protection could arise. It is true that there was no constitutional impediment for the legislature to eliminate the additional residual volumes granted under the 11th AtG Amendment without at the same time providing compensation for the fact that the additional volumes cannot be used (C I 3 c cc (1) above, paras. 292 et seq.). All the same, the power plant operators' expectation of the benefits from power plant investments they made to produce these amounts of electricity deserves protection in

general. The declared basis for the 11th AtG Amendment was the legislature's political decision to continue using nuclear energy as a bridging technology for a longer period of time. The power plant operators were entitled to feel encouraged as a consequence to undertake investments in their plants, and did not have to expect that within the same legislative period, the legislature would again distance itself from its fundamental decision in energy policy matters under the 11th AtG Amendment. **[376]**

Legitimate expectations could arise, however, only within the short period between the *Bundestag* resolution on the 11th AtG Amendment on 28 October 2010 and the notice from the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (*Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit*) of 16 March 2011 on the Nuclear Energy Moratorium. Contrary to the opinion advanced by some of the complainants, legitimate expectations of the prolongation of operational lifetimes could not already arise upon the corresponding declaration of intent in the Coalition Agreement between the CDU/CSU and FDP parliamentary groups of 26 October 2009, nor at the time of the submission of the legislative proposal for the 11th AtG Amendment in the German *Bundestag* on 28 September 2010. While the formal submission of a legislative proposal for an amendment may indeed undermine trust in the existing legal situation (C I 3 c cc (2) (b) (bb) (α) above, para. 336 and BVerfGE 132, 302 <324 paras. 55 and 56>), legitimate expectations regarding a new legal situation whose subsequent frustration might have to be compensated with an entitlement to compensation cannot be established until the parliament resolves on the new legislation. Before that time, investors act at their own risk. Given the special circumstances of events at the time, once the notice from the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety of 16 March 2011 was released, the operators of nuclear power plants could no longer have had legitimate expectations in terms of investments made on the basis of the legal situation then in force. **[377]**

However, it is not prejudicial to the development of a legitimate expectation worthy of protection that the constitutionality of the 11th AtG has been in dispute for years with regard to the fact that it came about without the consent of the *Bundesrat*. Debate about the constitutionality of a law is not rare. Given that only the Federal Constitutional Court is empowered to decide on the constitutionality of legislation, such debates do not generally call into question a law's suitability to provide a basis of trust for acts of the legal community. **[378]**

(β) The public interest grounds that prompted the legislature to amend the extensive prolongations of operational lifetimes under the 11th AtG Amendment and to accelerate the nuclear phase-out are of particular weight (C I 3 c cc (1) (c) and (2) (c) above, paras. 303 and 304 as well as 363). Furthermore, the expectation that the additional output allowances allocated at the end of 2010 would be maintained is not highly worthy of protection (C I 3 c cc (1) (b) (bb) above, paras. 299 et seq.). All the same, the paramount public interest grounds for an accelerated nuclear phase-out cannot absolve the legislature of the consequences of those investments that were undertaken during the short period of validity of the 11th AtG Amendment and in the legitimate expectation that the legislature itself had brought about in view of the prolongation of operational lifetimes. **[379]**

(χ) The inclusion of such an entitlement in the 13th AtG Amendment was not dispensable simply because there were no apparent cases in which it would apply. For example, complainants E.ON and RWE have furnished substantiated arguments that in view of the prolongation of operational lifetimes under the 11th AtG Amendment, investments were made for the Isar 1 and Unterweser nuclear power plants, and that the Biblis A nuclear power plant would have been shut down as early as mid-2011, with no further retrofitting investments, if the 11th AtG Amendment had not entered into force. **[380]**

(δ) However, it is not the task of this constitutional complaint proceeding to investigate the details of whether and to what extent an adequate compensation is constitutionally required in the investment cases cited by the complainants. **[381]**

It falls within the legislature's decision-making discretion to define the further details of the requirements and the scope of such an entitlement to compensation. The possibility of granting individual prolongations of operational lifetimes as compensation for frustrated investments also falls within the legislature's decision-making discretion. Insofar as the legislature chose not to consider this latter possibility, in light of the paramount importance the legislature attached to the acceleration objective, it was nevertheless not allowed to refrain from providing at least an entitlement to adequate compensation for frustrated investments. The required compensation does not affect the legislative objective of an acceleration. **[382]**

(4) Insofar as the complainants claim further interference from the 13th AtG Amendment, including economically relevant impairments, these instances concern constitutionally acceptable determinations of the content and limits of

property, when measured against the weighty public interest grounds that favour an acceleration of the nuclear phase-out (C I 3 c aa and cc (1) (c) and (2) (c) above, paras. 282 and 283; also 303 and 304 as well as 363). **[383]**

[…] **[384-385]**

d) Because of the resulting electric production deficits, determinations of the content and limits of the complainants' property in the nuclear power plants defined by a staggering the shut-down dates in § 7 sec. 1a sentence 1 AtG violates, to the detriment of Krümmel and Vattenfall and to the detriment of RWE, the principle that legislative provisions governing property must be designed consistently with Art. 3 sec. 1 GG (C I 3 a, para. 268 above). Other than that, however, nothing suggests that further violations of equality have occurred. **[386]**

[…] **[387]**

The operational lifetimes of different lengths for the individual nuclear power plants, as a result of the staggering of expiry dates of the licence to produce power, violate equality standards with regard to the Krümmel nuclear power plant only. However, in terms of significance, the violation of equality in property law does not extend beyond the unreasonableness that has already been found with regard to the inability to produce the residual electricity volumes dating from 2002 (C I 3 c cc (2) (b) (cc) (c) (bb) above, paras. 355 et seq.). **[388]**

II. […] **[389]**

The terms of the 13th AtG Amendment not only structure and restrict property rights in the nuclear plants; they also indirectly interfere with the complainants' occupational freedom in that they accelerate the termination of their business activity in the field of the peaceful use of nuclear energy. Those terms must therefore also be measured against Art. 12 GG (on the joint applicability of freedom of property and occupational freedom cf. BVerfGE 50, 290 <361 and 362>; 110, 141 <166 and 167>; 128, 1 <36 et seq.>). **[390]**

However, there is no need here to review the challenged legislation more closely in light of Art. 12 GG, because this would yield no further constitutional consequences concerning these provisions than have already been found in addressing the parties' various positions in terms of property law. In this case, the protection of occupational freedom for business activity goes no further than the protection of property rights for the occupational exercise of those rights. **[391]**

III.

The 13th AtG Amendment, specifically § 7 sec. 1a sentence 1 AtG, is not a law that applies merely to a single case, which would be prohibited under Art. 19 sec. 1 sentence 1 GG. **[392]**

[…] **[393]**

Art. 19 sec. 1 sentence 1 GG provides that insofar as, under the Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. This does not exclude governing a single case if the matter is of such a nature that

there is only one case of its kind, and governing this singular matter is supported by objective reasons. Ultimately, Art. 19 sec. 1 sentence 1 GG specifies the general principle of equality, according to which the legislature may not select a single case from amongst a number of matters of the same nature, and subject it to a special rule (cf. BVerfGE 85, 360 <374>; 134, 33 <88 and 89>; 139, 148 <176 para. 53>). **[394]**

Measured against this standard, § 7 sec. 1a sentence 1 AtG does not violate the prohibition of laws that apply merely to a single case and limit fundamental rights. […] The act also does not select a single case or a specific group from amongst a plurality of cases of similar nature, but conclusively governs all remaining cases. The requirement of the arbitrary nature of a statutory provision on a single case, against which Art. 19 sec. 1 sentence 1 GG is intended to protect, is not met here. **[395]**

D.

I. […] **[396-398]**

II.

§ 7 sec. 1a sentence 1 AtG must be declared incompatible, to the extent found above, with Art. 14 sec. 1 GG. It must be ordered to remain in effect until the adoption of a new version of the Atomic Energy Act correcting the objected violations of the Constitution. The legislature must draw up new provisions no later than 30 June 2018. **[399]**

1. The violations of the Constitution identified do not result in a declaration that § 7 sec. 1a sentence 1 AtG is void, but merely in a finding that it is incompatible with the Basic Law, together with the order that it will continue to apply until new provisions are enacted. **[400]**

This is indicated because the legislature has various options for correcting the violations of the Constitution (on this group of cases cf., particularly for violations of equality, BVerfGE 99, 280 <298>; 105, 73 <133>; 107, 27 <57>; 117, 1 <69>; 122, 210 <245>; 126, 400 <431>; established case-law). Furthermore, declaring § 7 sec. 1a sentence 1 AtG void would result in a legal situation that would be even less consistent with the situation that the legislature intended, which as such is compatible with the Constitution, than would a time-limited continuation of the legal situation that is found to be unconstitutional (on this case group cf. BVerfGE 83, 130 <154>; 92, 53 <73>; 111, 191 <224>; 117, 163 <201>). **[401]**

The violations of the Constitution found here do not impinge on the core of the principal objective of the 13th AtG Amendment, the acceleration of the nuclear phaseout. The revocation of the additional output allowances extensively allocated at the end of 2010, the introduction of fixed end dates for the operation of the individual nuclear power plants, and the staggering of the shut-down dates have been found, in principle, to be compatible with the Basic Law. The constitutionally objectionable shortcomings may not be insignificant, yet measured against the overall regulatory scheme they affect only marginal aspects. Therefore to eliminate the entire regulatory scheme by voiding § 7 sec. 1a sentence 1 AtG would lack justification. **[402]**

2. The legislature has various options for correcting the violations of the Constitution found here. **[403]**

a) The primary reason why the electricity production capacities available to complainants Krümmel and Vattenfall and to complainant RWE are incompatible with Art. 14 sec. 1 GG is that it is entirely unlikely that essentially all the electricity from the residual electricity volumes allocated to them in 2002 can be produced, within the shut-down periods set by § 7 sec. 1a sentence 1 AtG, at nuclear power plants that are wholly or partially owned by the corporation concerned. This might, for example, be taken into account with a corresponding prolongation of the operational lifetimes of individual nuclear power plants that the corporations own. However, the Constitution confers no priority on this possibility; like other possibilities for a settlement, it lies within the political decision-making discretion of the legislature. A compensation for the electricity production deficits might also be provided by ensuring, statutorily, a possibility of transferring, on economically reasonable terms, electricity volumes that can no longer be produced to companies that have surplus electricity production capacity. In particular, however, the legislature is also free to provide an appropriate financial settlement for residual electricity volumes that cannot be produced anymore because of the legislative provision, especially because the legislative decision to support the nuclear phase-out specifies the abandonment of the inventory of nuclear power plants anyway. The settlement also need only achieve a size necessary to meet adequacy requirements; it does not necessarily have to correspond to the full equivalent value. **[404]**

A new provision that in essence completely remedies the electricity production deficits of complainants Krümmel and Vattenfall and of RWE also remedies their placement at a disadvantage in violation of equality. **[405]**

b) A legislative basis for settlement claims for frustrated investments is in need of more detailed definition by the legislature (C I 3 c cc (3) (b) above, paras. 373 et seq.). **[406]**

XVI. Citizenship and Extradition - Article 16 of the Basic Law

European Arrest Warrant Act, BVerfGE 113, 273

Explanatory Annotation

If an alleged criminal is arrested in one corner of a country there is usually little that bars his transfer to that part of the country where the alleged crime took place or to another location where the rules of jurisdiction provide for a competent criminal court. These jurisdictional rules are very important in order to secure a fair trial and ensure that the executive does not have an opportunity to interfere with the criminal proceedings, e.g. by bringing the case to trial at a favourable location. In federally organized states additional restrictions may apply. However, on the international plane matters become rather complicated. If an alleged criminal is prosecuted by one country but held in another, the only way to conduct criminal proceedings other than in absentia is to engage in extradition proceedings. This usually requires reciprocal extradition treaties between the countries involved and lengthy proceedings through diplomatic channels. When a country's own citizens are to be extradited the legal situation becomes more difficult yet again.

It is these complex complications that the European Arrest Warrant wants to overcome. The European Arrest Warrant is a European Union Framework Decision, i.e. a legislative act requiring legislative implementation in the Member States.[172] In Germany this was afforded by the European Arrest Warrant Act of 2004.[173] On the basis of this Act the applicant, a German and Syrian national, was to be transferred to Spain to face criminal charges for membership in and support of a terrorist organization (Al-Qaeda). The charges were based on travel to Spain and meetings and telephone conversations with other persons alleged to have relationships to terrorist organizations. The applicant fought extradition on the grounds that much of the activity took place before the European Arrest Warrant came into force and even before Article 16 of the Basic Law had been amended in 2000 to allow for the extradition of German nationals under certain circumstances.[174] In addition, the alleged acts were not, at least at the time of the relevant conduct, punishable under German law and the conduct had not exclusively taken place in Spain.

The Constitutional Court ruled in favour of the applicant and quashed the German implementation act. That was delicate in its own right, as a line had to be drawn between the supremacy of European Union law, which is not subject to review by German courts and the

172 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1 (2002), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML.

173 Of 21 July 2004 (European Arrest Warrant Act, Federal Law Gazette (BGBl.) I p. 1748.

174 The amendment had become necessary to comply with Security Council Resolutions 827 and 955, which established, on an ad hoc basis, the International Criminal Tribunals for the former Yugoslavia and Rwanda in The Hague and Arusha. The Statute of the International Criminal Court also requires that own nationals be extradited to face charges there, albeit only on a subsidiary basis if no adequate charges are to be brought at home. Until the amendment of Article 16 in the year 2000, the extradition of a German national to a foreign country had been absolutely impossible.

German Implementation Act. The Court stated that the European Framework Decision had left the national legislator with sufficient discretion and that the German legislator had not used the available discretion to implement the Arrest Warrant in line with the Basic Law. This was crucial in avoiding a constitutional showdown with the European Union. The Framework Decision on the Arrest Warrant stands on shaky democratic ground as it was passed under the third pillar of the European Union without participation - other than consultation - of the European Parliament. Without the necessary discretion in the EU Framework Decision and the resulting opportunity by national Parliaments - and Courts - to safeguard fundamental rights and guarantees, the European Union legislation would have been doomed. The Court explained that extraditions under the European Arrest Warrant must take into account the severe impact such extraditions into a foreign country, with a foreign legal order, a different language and a different legal culture will have for affected individuals. Extraditions of German nationals therefore cannot take place when the criminal activity took place in Germany as that will justify a legitimate expectation that the relevant criminal responsibility lies in Germany as well, unlike in situations in which the alleged acts took place mainly within another state and the accused must therefore have been aware of the fact that the legal order of the host country must be obeyed and sanctions be faced if that is not the case. The Court also held that extraditions cannot take place if the conduct, in cases with a substantial nexus to Germany, i.e. where the alleged criminal activity reaches beyond the territory of the state seeking extradition in significant way, is not punishable under German criminal law because the rule of law in a democratic state requires that every person must be in position to know, in an abstract manner, what is allowed and what is not prohibited by criminal law. Finally the Court also held that the implementation act violated Article 19.4 of the Basic Law because it did not provide for adequate access to the courts for independent review of the decision to extradite.

This decision is important because it sheds light on the difficulty of globalization, in this particular case regionalization in the context of the European Union and the interaction between largely national legal systems such as criminal law with these international institutions. In the context of the European Union the additional constitutional aspect of the supremacy of European Union law added to the complexity. These issues arise not only in Europe or in a European context. Legal protection against the acts of the Security Council of the United Nations is also a problem as evidenced for example by the Kadi-decision of the European Court of Justice.[175] Such actions by the Security Council increasingly affect individuals, for example because of the inclusion in lists with names of people whose assets are to be frozen in the wake of "the war on terror" or they are suffering economic loss through embargo resolutions.

175 CJ, Joined Cases C-402/05 P and C-415/05 P, 3.9.2008, 2008 ECR I-6351, Kadi; see also ECtHR, Appl. No. 45036/98, 30.6.2005, Bosphorus,

http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=777884&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

Translation of the European Arrest Warrant Act Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 113, 273*

Headnotes:

1. With its ban on expatriation and extradition, the fundamental right enshrined in Article 16 of the Basic Law guarantees the citizens' special association to the legal system that is established by them. It is commensurate with the citizen's relation to a free democratic polity that the citizen may, in principle, not be excluded from this association.

2. The cooperation that is put into practice in the "Third Pillar" of the European Union in the shape of limited mutual recognition is a way of preserving national identity and statehood in a single European judicial area, which is considerate in terms of subsidiarity (Article 23.1 of the Basic Law).

3. When adopting the Act implementing the Framework Decision on the European arrest warrant, the legislature was obliged to implement the objective of the Framework Decision in such a way that the restriction of the fundamental right to freedom from extradition is proportionate. In particular, the legislature, apart from respecting the essence of the fundamental right guaranteed by Article 16.2 of the Basic Law, has to see to it that the encroachment upon the scope of protection provided by it is considerate. In doing so, the legislature has to take into account that the ban on extradition is precisely supposed to protect, *inter alia*, the principles of legal certainty and protection of public confidence as regards Germans who are affected by extradition.

4. The confidence of the prosecuted person in his or her own legal system is protected in a particular manner by Article 16.2 of the Basic Law, precisely where the act on which the request for extradition is based shows a significant connecting factor to a foreign country.

Judgment of the Second Senate of 18 July 2005 on the basis of the oral hearing of 13 and 14 April 2005 - 2 BvR 2236/04 -

Facts:

The complainant has German and Syrian citizenship. He is supposed to be extradited to the Kingdom of Spain for prosecution and has been in custody pending extradition since 15 October 2004. A "European arrest warrant" was issued against the complainant by the Central Court of Investigation in Criminal Matters (Juzgado Central de Instrucción) no. 5 of the Audiencia Nacional in Madrid on 16 September 2004. The complainant is charged with participation in a criminal association and with terrorism. He is alleged to have supported the terrorist Al-Qaeda network in financial matters and as concerns the contact between its members as a key figure in the European part of the network. In the European arrest warrant, these

charges are based on detailed descriptions of visits to Spain that the complainant had made and of meetings and telephone calls with suspected criminals. On 15 October 2004, the Hamburg Hanseatic Higher Regional Court (Hanseatisches *Ober*landesgericht) issued an arrest warrant against the complainant and ordered his provisional arrest. The court stated that the complainant was charged of having been active in Spain, Germany and Great Britain since 1997 as one of the key figures of the Al-Qaeda terrorist network in the logistic and financial support of this organisation. The complainant was said to have, *inter alia*, taken part in the purchase of a ship for Osama bin Laden. According to the Court, he had also dealt with the management of the ship, in particular with the transmission of documents and the payment of invoices, and had been bin Laden's permanent interlocutor and assistant in Germany. Apart from this, he was alleged to have travelled to Kosovo at the end of the year 2000 on behalf of the network with the objective of taking an ambulance there to conceal other intentions.

The Higher Regional Court ordered the provisional arrest to continue as arrest, pending extradition.

By order of 23 November 2004, which is challenged here, the Higher Regional Court declared the complainant's extradition admissible.

The judicial authority of the Free and Hanseatic City of Hamburg granted extradition on 24 November 2004. The grant was made contingent on the condition that after the imposition of a final and unappealable prison sentence or other sanction, the complainant would be offered to be returned to Germany for the execution of the sentence.

By his constitutional complaint, the complainant challenges the order of the Higher Regional Court that declared his extradition admissible, and furthermore, the decision of the judicial authority of the Free and Hanseatic City of Hamburg on an application for a grant of extradition. He asserts the violation of his rights under Article 2.1, Article 3.1, Article 16.2 and Article 19.4 of the Basic Law and of Article 103.2 of the Basic Law.

B.

…

The admissible constitutional complaint is well-founded.

The European Arrest Warrant Act infringes fundamental rights and is unconstitutional as concerns substantive law (I.). The Act is void (II.). The legal basis of the challenged decisions is unconstitutional; they are therefore overturned (III.).

I.

The European Arrest Warrant Act infringes Article 16.2 sentence 1 of the Basic Law because the legislature has not complied with the prerequisites of the qualified provision of legality under Article 16.2 sentence 2 of the Basic Law when implementing the Framework Decision on the European arrest warrant. (1.). By excluding recourse to the courts against the grant of extradition to a Member State of the European Union, the European Arrest Warrant Act infringes Article 19.4 of the Basic Law (2.).

70 Years German Basic Law
The German Constitution and its Court

1. German citizens are protected from extradition by the fundamental right under Article 16.2 (a). Pursuant to the second sentence of this provision, the protection can, however, be restricted by law in specific cases (b). As regards the restriction, the legislature is subject to constitutional commitments. These commitments result from the fact that there is a proviso of legality and from the special extent of protection provided by the fundamental right and from the principle of proportionality. When pursuing public interests, the constitution-restricting legislature is obliged to preserve the extent of protection provided by the fundamental right as far as possible; the constitution-restricting legislature may therefore restrict it only in compliance with the principle of proportionality and is to observe other constitutional commitments, such as the guarantee of legal protection under Article 19.4 of the Basic Law (c). The European Arrest Warrant Act does not comply with these constitutional requirements also with a view to the Framework Decision on the European arrest warrant (d).

a) With the sentence "No German may be extradited to a foreign country" (Article 16.2 sentence 1 of the Basic Law), the Basic Law guaranteed, until its amendment by the Act of 29 November 2000, unrestricted protection for a German citizen from being transferred to a foreign state power. Extradition as a traditional institute of international cooperation of states in criminal matters is characterised as an encroachment upon fundamental rights by the fact that a person is removed by force from the sphere of the domestic jurisdiction and transferred to a foreign jurisdiction (see Decisions of the Federal Constitutional Court [Entscheidungen des Bundesverfassungsgerichts - BVerfGE] 10, 136 [139]) for criminal proceedings that have been instituted there to be brought to a close or a sentence imposed there to be executed (see BVerfGE 29, 183 [192]).

   Exactly like the ban on expatriation that is connected with it (Article 16.1 of the Basic Law), the ban on extradition (Article 16.2 sentence 1 of the Basic Law) is not only an expression of the responsibility that the state claims for its own citizens, but both bans are guaranteed as liberty rights. The purpose of the liberty rights to protection from extradition is not to remove the person affected from a just and lawful sentence (BVerfGE 29, 183 [193]). Instead, its purpose is to ensure that citizens are not removed against their will from the legal system with which they are familiar. To the extent that they reside in the state territory, all citizens are supposed to be protected from the insecurities connected with being sentenced in a legal system that is unknown to them under circumstances that are inscrutable to them (see BVerfGE 29, 183 [193]); see also von Martitz, Internationale Rechtshilfe in Strafsachen, vol. I p. 1888; Mettgenberg, Ein Deutscher darf nicht ausgeliefert werden!, 1925, pp. 6 et seq.; pp. 35 et seq.; Baier, Die Auslieferung von Bürgern der Europäischen Union an Staaten innerhalb und außerhalb der EU, Goltdammer's Archiv für Strafrecht - GA 2001, p. 427 [434 et seq.]).

   With its ban on expatriation and extradition, the fundamental right enshrined in Article 16 of the Basic Law guarantees the citizens' special association to the legal system that is established by them. The citizenship is the legal prerequisite for an equal civic status, which on the one hand establishes equal duties, but on the other hand, and above all, establishes the rights whose guarantee legitimises public authority in a democracy. The civic rights and duties that are connected with the possession of citizenship for every individual are at the same time constituent bases of the entire polity. It is

commensurate with the citizen's relation to a free democratic polity that the citizen may, in principle, not be excluded from this association. The citizens' confidence in their secured residence in the territory of the state to which they have a constitutionally guaranteed connection in the shape of the citizenship is also acknowledged by public international law. States are under an obligation under international law to receive their own citizens, i.e. to permit their entry into the state territory and their residence there (see Verdross/Simma, Universelles Völkerrecht, 3rd ed., 1984, s. 1202 with further references; detailed account by Hailbronner, in: id./Renner, Staatsangehörigkeitsrecht, 3rd ed., 2001, Introduction E, marginal nos. 113 et seq.). The right to enter the state territory correlates to the right of the states to extradite foreigners from their state territory.

The fundamental right that guarantees the citizenship and the right to remain in one's own legal system ranks highly. The manner in which it is drafted is based, *inter alia*, on experience from recent German history in which, immediately after the coup d'état in 1933, the National Socialist dictatorship gradually excluded and expelled, in accordance with the letter of the law, particularly the Germans of Jewish faith or Jewish origin from the protection provided by the German citizenship and by their being part of the German people by devaluing citizenship as an institution and replacing it by a new "national status" for citizens entitled to this status (see s. 2 of the Reich Act on Citizenship (Reichsbürgergesetz) of 15 September 1935, Reich Law Gazette (Reichsgesetzblatt - RGBl) I p. 1146; see Grawert, Staatsvolk und Staatsangehörigkeit, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, vol. II, 3rd ed., 2004, s. 16.1, marginal no. 44). However, behind the guarantee provided by Article 16 of the Basic Law there is also the conviction, shared all over Europe since the French Revolution, that citizens can enjoy their legal status in politics and under civil law only where their status is secured by law (see Randelzhofer, in: Maunz/Dürig, Grundgesetz Kommentar, Article 16.1, marginal no. 2).

To ensure that the ban on extradition does not give a state's own citizens *carte blanche* for criminal action abroad, and to live up to the state's responsibility for their actions which goes with the state's promise to protect them, the Federal Republic of Germany's punitive power extends, in principle, also to offences committed abroad (see ss. 5 et seq. of the Criminal Code and s. 1 of the Code of Crimes against International Law (Völkerstrafgesetzbuch - VStGB)), so that, as a general rule, it is possible to prosecute offences committed by Germans abroad.

b) The encroachment upon the scope of protection of Article 16.2 sentence 1 of the Basic Law is justified exclusively under the prerequisites set out in Article 16.2 sentence 2 of the Basic Law. Since the entry into force of Article 1 of the 47th Act to Amend the Basic Law (47. Gesetz zur Änderung des Grundgesetzes) of 29 November 2000 (Federal Law Gazette I p. 1633), the Basic Law permits, under certain conditions, the extradition of a German citizen to a Member State of the European Union or to an international court of justice. To this extent, it also opens the national legal system to European law and to public international law and to international cooperation in the shape of a controlled commitment in order to promote respect of international

organisations that preserve peace and liberty and respect of public international law, to promote the growing togetherness of the European peoples in a European Union (Article 23.1 of the Basic Law).

aa) The opening up of such permission to encroach upon the fundamental right to freedom from extradition, which had before been unrestrictedly guaranteed to Germans, has not established unconstitutional constitutional law. An amendment of the Basic Law would be inadmissible if it transgressed the bounds of Article 79.3 of the Basic Law. The extradition of Germans does not infringe the principles laid down in Article 1 und Article 20 of the Basic Law, in any case if the commitments to constitutional law are complied with. An extradition of Germans that abides by the principles of the rule of law neither violates their human dignity nor infringes the principles of state structure laid down in Article 20 of the Basic Law (see already BVerfGE 4, 299 [303-304]; 29, 183 [193]).

bb) The extradition also of a state's own citizens corresponds to a general development that takes place on the supranational level and in public international law, against which the Basic Law, with its respect for international law, does not establish insurmountable hurdles. As a member of the United Nations, the Federal Republic of Germany is, pursuant to chapter VII of its Charter, in principle obliged to comply with the resolutions of the United Nations Security Council and to implement them (see Frowein/Krisch, in: Simma (ed.), The Charter of the United Nations, 2nd ed., 2002, vol. 1, p. 701 [708-709], marginal nos. 21 et seq.). Security Council Resolutions 827 and 955, which established, on an ad hoc basis, the International Criminal Tribunals for the former Yugoslavia and Rwanda in The Hague and Arusha, provide for the extradition of a state's own citizens because as a general rule, only this makes the intended international prosecution of presumed war criminals possible (see the Act on Cooperation with the International Criminal Tribunal for the Former Yugoslavia (Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien) of 10 April 1995, Federal Law Gazette I p. 485, and the Act on Cooperation with the International Criminal Tribunal for Rwanda (Gesetz für die Zusammenarbeit mit dem Internationalen Strafgerichtshof für Ruanda) of 4 May 1998, Federal Law Gazette I p. 843; see in this context Uhle, Auslieferung und Grundgesetz - Anmerkungen zu Artikel 16 II GG, Neue Juristische Wochenschrift - NJW 2001, p. 1889 [1890]).

The statute of the permanent International Criminal Court in The Hague under the law of international agreements (see Act on the Rome Statute of the International Criminal Court (Gesetz zum Römischen Statut des Internationalen Strafgerichtshofs) of 17 July 1998 - ICC Statute Act, Federal Law Gazette 2000 II p. 1393, entered into force on 1 July 2002, in its version promulgated on 28 February 2003, Federal Law Gazette 2003 II p. 293) took recourse to these two models in this respect, with the important proviso, however, that international jurisdiction is only established on a subsidiary basis. The States Parties to the Statute have *ipso jure* the possibility to prevent extradition of their own citizens by adequate national prosecution (as regards the principle of complementary

jurisdiction, see Article 1 and Article 17 of the Statute and s. 1.1 of the Act of 21 June 2002 on the Implementation of the Rome Statute of the International Criminal Court of 17 July 1998 (Gesetz vom 21. Juni 2002 zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofs vom 17. Juli 1998), Federal Law Gazette I p. 2144). The responsibility for the punishment of certain offences is thus divided by a coordinated assignment of competences. Aware of its special responsibility, and also of the historical reasons for it, the Federal Republic of Germany, as a member of the international community of states, integrates in the process of evolution of an international system of criminal justice for crimes against humanity, which began with the trials of war criminals before the tribunals of Nuremberg and Tokyo after the Second World War (on the prosecution of genocide, see the Order of the Fourth Chamber of the First Senate of the Federal Constitutional Court of 12 December 2000 - 2 BvR 1290/99 -, Neue Juristische Wochenschrift 2001, pp. 1848 et seq.).

As a Member State of the European Union, Germany has entered into further obligations. By ratifying the treaties of Amsterdam and of Nice, the Federal Republic of Germany has undertaken to take part in establishing and developing the "area of freedom, security and justice". The Member States' cooperation takes place within the - intergovernmental - "Third Pillar" of the law of the European Union. In this context, Article 31.1 letter b of the Treaty on European Union also provides to facilitate extradition between Member States. In doing so, the European Union pursues the objective to combine the process of growing together and of opening the borders for persons, goods, services and capital with better cooperation of law enforcement services. This is supposed to be ensured by a further judiciarisation of the relations between the Member States, i.e., *inter alia*, by the Member State governments' waiver of their political discretion that is customary in the states' conventional legal relations, which exists in particular in the law on extradition - in Germany, precisely in the context of the decision on the application on a grant of extradition.

cc) The possibility of restricting the ban on the extradition of Germans, whose validity had been absolute to date, also does not result in the legal system that is established by the Basic Law losing the core elements of statehood (Entstaatlichung), a development that, due to the inalienable principles of Article 20 of the Basic Law, would be removed from the constitution amending legislature's freedom of disposition (see BVerfGE 89, 155 [182 et seq.]). In particular, the institute of citizenship is neither abandoned nor substantially devalued or replaced by citizenship of the European Union so that its importance for the principle of democracy does not have to be discussed here. Notwithstanding its importance in other respects (see BVerfGE 89, 155 [184]), the citizenship of the Union is a derived status which complements national citizenship (Article 17.1 sentence 2 of the Treaty establishing the European Community); this is upheld also in Article I-10.1 sentence 2 of the Treaty establishing a Constitution for Europe where it lays down that citizenship of the Union shall be additional to national citizenship and shall not replace it. Correspondingly, the ban under European

Community law on discrimination on grounds of citizenship is not laid down comprehensively but, in line with the principle of conferral, only for the objectives set out in the Treaty, in particular in the context of the fundamental liberties. This at the same time contributes to the Member States being able to preserve their own national identities (Article 6.3 of the Treaty on European Union), which find their expression in their respective fundamental political and constitutional structures (see Hilf/Schorkopf, in: Grabitz/Hilf (eds.), Recht der Europäischen Union, Article 6 EU, marginal nos. 78 et seq. and Article I-5.1 of the Treaty establishing a Constitution for Europe).

Due to the area-specific restriction of the European ban on discrimination on grounds of Member State citizenship, a loss of the core elements of statehood, which would be inadmissible pursuant to the regulations of the Basic Law, cannot be established in this context as concerns the extradition of German citizens to other Member States. Not only do tasks of substantial importance remain with the state; the restriction of the ban on extradition is also not tantamount to the waiver of a state task that is essential in its own right.

In particular with a view to the principle of subsidiarity, (Article 23.1 of the Basic Law), the cooperation that is put into practice in the "Third Pillar" of the European Union in the shape of limited mutual recognition, which does not provide for a general harmonisation of the Member States' systems of criminal law, is a way of preserving national identity and statehood in a single European judicial area.

c) The legislature cannot unrestrictedly depart from the ban on the extradition of Germans.

aa) As a qualified proviso of legality, Article 16.2 sentence 2 of the Basic Law permits the extradition of Germans only "as long as the rule of law is upheld". Such prerequisite for an extradition not merely repeats the validity of the principle of the rule of law, which is not open to restrictions of fundamental rights anyhow, and in particular of the principle of proportionality. It rather constitutes an expectation referring to the requesting Member State and to the international court in terms of structural correspondence, as has also been set out in Article 23.1 of the Basic Law. When permitting the extradition of Germans, the legislature must examine in this context whether the prerequisites of the rule of law are complied with by the requesting authorities.

In this context, the legislature must verify when restricting fundamental rights that the observance of rule-of-law principles by the authority that claims punitive power over a German is guaranteed. Here, it will have to be taken into account that every Member State of the European Union is to observe the principles set out in Article 6.1 of the Treaty on European Union, and thus also the principle of proportionality and that therefore, a basis for mutual confidence exists. This, however, does not release the legislature from reacting, in cases in which such confidence in the general conditions of procedure in a Member State has been profoundly shaken, and from doing so irrespective of proceedings pursuant to 7 of the Treaty on European Union.

The particular bar mentioned in Article 16.2 sentence 2 of the Basic Law does not, however, replace the limits of the constitution that exist for every law that restricts fundamental rights. In turn, the law that restricts fundamental rights must comply with all commitments to constitutional law, may not tolerate conflicts with other provisions of the constitution and must implement the encroachment in a considerate manner, complying with the precept of proportionality.

bb) The legislature was obliged in any case to use the latitude as concerns incorporation into national law that the Framework Decision leaves the Member States in a manner that is considerate with the fundamental rights. The fact that the responsibility for ensuring that incorporation is in conformity with the constitution is particularly high in comparison with the incorporation of European Community directives into national law also results from the circumstance that the measures in question are from the European Union's "Third Pillar". The Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States is an act of secondary Union legislation that legally implements the objective established by the Treaty on European Union. Pursuant to Article 34.2 letter b, the Treaty on European Union is binding as regards the "result to be achieved". It is true that as concerns its concept, the approach to action under European Union law is modelled after the directive under supranational Community law; in several aspects, however, it differs from this source of secondary law. A Framework Decision does not entail direct effect (Article 34.1 letter b of the Treaty on European Union); its national validity still depends on its being incorporated into national law by the Member States. By incorporating the exclusion of direct applicability into the Treaty on European Union, the Member States wanted to prevent in particular that the case-law of the Court of Justice of the European Communities on the direct applicability of directives is interpreted in such a way that it also covers Framework Decisions (on the so-called "vertical direct effect" of directives see Court of Justice of the European Communities, Joint Cases C-6/90 and C-9/90, European Court Reports 1991 page I-5357 marginal no. 11 - Francovich and others; Case C-62/00, European Court Reports 2002, I-6325 marginal no. 25 - Marks & Spencer; summary in Borchardt, Die rechtlichen Grundlagen der Europäischen Union, 2nd ed., 2002, marginal nos. 341 et seq.).

As a form of action of European Union law, the Framework Decision is situated outside the supranational decision-making structure of Community law (on the difference on European Union law and Community law, see BVerfGE 89, 155 [196]). In spite of the advanced state of integration, European Union law is still a partial legal system that is deliberately assigned to public international law. This means that a Framework Decision must be adopted unanimously by the Council, it requires incorporation into national law by the Member States, and incorporation is not enforceable before a court. The European Parliament, autonomous source of legitimisation of European law, is merely consulted during the lawmaking process (see Article 39.1 of the Treaty on European Union), which, in the area of the

"Third Pillar", meets the requirements of the principle of democracy because the Member States' legislative bodies retain the political power of drafting in the context of implementation, if necessary also by denying implementation.

cc) Pursuant to Article 4 no. 7 letters (a) and (b) of the Framework Decision on the European arrest warrant, the execution of the European arrest warrant can be refused where it relates to offences that are regarded by the law of the executing Member State as having been committed in whole or in part on the territory of the executing Member State or in a place treated as such or which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

These provisions reveal a need for a restriction of extradition by national law. When adopting the Act implementing the Framework Decision on the European arrest warrant, the legislature was obliged to implement the objective of the Framework Decision in such a way that the restriction of the fundamental rights to freedom from extradition is proportionate. In particular, the legislature, apart from respecting the essence of the fundamental right guaranteed by Article 16.2 of the Basic Law, has to see to it that the encroachment upon the scope of protection provided by it is considerate. In doing so, the legislature has to take into account that the ban on extradition is precisely supposed to protect, *inter alia*, the principles of legal certainty and protection of public confidence as regards German citizens who are affected by extradition. The reliability of the legal system is an essential prerequisite for freedom, i.e. for a person's self-determination over his or her own concept of life and its implementation. In this respect, already the principle of the rule of law requires that persons who are entitled to enjoy the fundamental right in question must be in a position to rely on their behaviour not being subsequently qualified as illegal where it complies with the law in force at the respective point in time (on the time aspect of the application of legal provisions, see BVerfGE 45, 142 [167-168]; 63, 343 [357]).

The prosecuted person's confidence in his or her own legal system is especially protected by Article 16.2 of the Basic Law in conjunction with the principle of the rule of law where the act on which the request for extradition is based has been committed in whole or in part on German territory, aboard German vessels or aircraft or in places that are under German sovereign power. Charges of criminal acts with such a significant domestic connecting factor are, in principle, to be investigated in the domestic territory by German investigation authorities if those suspected of the criminal act are German citizens.

A significant domestic connecting factor exists in any case if essential parts of the place where the criminal act was committed and of the place where the result of the act occurred are located on German state territory. In such a combination of circumstances, the state's responsibility for the integrity of its legal system and the prosecuted person's fundamental-rights claims come together in such a way that as a general rule, the result is a bar on extradition. Whoever, as a German, commits

a criminal offence in his or her own judicial area need, in principle, not fear extradition to another state power. If this were different, such a restriction of the protection from extradition would already come close to affecting the essence of the fundamental right. For the prosecuted person, transfer to another Member State's legal system, even though it has been brought closer by European integration, not only means discrimination under procedural law, which can consist in language obstacles, cultural differences and different procedural law and possibilities of defence. Such transfer ultimately ties the prosecuted person to a substantive criminal law in respect of which no democratic means had existed for him or her to participate in its creation, which he or she - unlike German criminal law - does not need to know and which in many cases due to a lack of familiarity with the respective national context, does not permit him or her as a layperson a sufficiently secure comparative evaluation.

The result of the assessment is different where a significant connecting factor to a foreign country exists as regards the alleged offence. Whoever acts within another legal system must reckon with his or her being held responsible there as well. As a general rule, this will be the case if the act constituting the offence has been committed entirely or in essential parts, in the territory of another European Union Member State and if the result has occurred there. The fact that after committing an offence, the prosecuted person will possibly succeed in fleeing to his or her home state is not of decisive importance in this context. A significant connecting factor to a foreign country must also, and especially, be assumed in cases where the offence has a typical cross-border dimension from the outset and shows a corresponding gravity, as is the case with international terrorism or organised trafficking in drugs or human beings; all those who become part of such criminal structures cannot fully rely on their citizenship providing them protection from extradition.

Whereas in cases such as the ones outlined here, the result of the examination of proportionality is as a general rule predictable, specific weighing of the individual case is required if the act has been committed entirely or partly in Germany but the result has occurred abroad. What must be weighed and correlated in such cases are the gravity of the alleged offence and the possibilities of effective prosecution on the one hand and the prosecuted person's interests that are protected by fundamental rights on the other hand, taking into account the objectives connected with the creation of a single European judicial area.

To the extent that the legislature does not make use of the latitude provided to it by Article 4 no. 7 letter (a) of the Framework Decision on the European arrest warrant by specifying constituent elements of offences, it has to ensure through its programme of legal examination that the authorities that implement the Act will engage in a specific weighing of the conflicting legal positions. The requirements placed on the constitution amending legislature by Article 20 and Article 1 of the Basic Law are not met already by Article 16.2 sentence 2 of the Basic Law demanding, in an abstract and general manner, that the requesting state's legal system adhere to the principles of the rule of law, and by the German

implementing act establishing a corresponding concordance of minimum rule-of-law standards. As regards the extradition of persons, in particular of a state's own citizens, the Basic Law demands in each individual case a specific examination of whether the prosecuted person's corresponding rights are guaranteed. Such examination is necessary precisely because other states' sovereign punitive power is not, in principle, bound by the principle of territoriality and, pursuant to classical concepts under international law, is limited, apart from the requirement of a minimum connection of the alleged offence to the punishing state, by the fact that it is left to all other states' discretion whether they provide judicial assistance in criminal matters (see Maierhöfer, Weltrechtsprinzip und Immunität: das Völkerstrafrecht vor den Haager Richtern: Besprechung des Urteils des IGH vom 14. Februar 2002 (Demokratische Republik Kongo gegen Belgien), Europäische Grundrechte-Zeitschrift - EuGRZ 2003, pp. 545 et seq.). In this respect, the Framework Decision has merely shifted the pattern of a political decision, which is not subject to judicial review, towards a judicial weighing-in where due account is to be taken of the Framework Decision's objectives of simplification.

d) The European Arrest Warrant Act does not meet these constitutional requirements. The manner of achieving the Framework Decision's objectives that the law has chosen encroaches upon the freedom from extradition under Article 16.2 of the Basic Law in a disproportionate manner.

aa) When implementing the Framework Decision, the legislature has failed to take sufficient account of the specially protected interests of German citizens. In this respect, s. 80 of the Law on International Judicial Assistance in Criminal Matters distinguishes between Germans who are supposed to be extradited to a Member State of the European Union and non-Germans only by making use of the possibility, provided in Article 5.3 of the Framework Decision on the European arrest warrant, of making extradition of a state's own citizens subject to conditions regarding the persons being returned to serve the sentence passed against them. Pursuant to s. 80 of the Law on International Judicial Assistance in Criminal Matters, extradition of a German for prosecution is only admissible where the requesting Member State offers to return the German after the imposition of the unappealable custodial sentence or other sanction at the person's request to the area of applicability of the Law on International Judicial Assistance in Criminal Matters.

Beyond this, protection from extradition is only granted to the extent that is applicable also to foreigners. Consequently, extradition is inadmissible in particular where serious grounds exist to suspect that in case of their extradition, the prosecuted persons will be persecuted or punished on account of their race, their religion, their citizenship, their forming part of a specific social group or their political creeds or that their situation would be rendered more difficult for one of these reasons, (s. 6.2 of the Law on International Judicial Assistance in Criminal Matters). This protective provision also applies in case of extradition on account of a European arrest warrant (s. 82 of the Law on International Judicial Assistance in Criminal Matters).

Moreover, s. 9 no. 1 of the Law on International Judicial Assistance in Criminal Matters prohibits extradition on account of offences for which German jurisdiction has been established if a court or a public authority in the area of application of this Act has, on account of the offence, passed a judgment or a decision against the prosecuted person or refuses to open main proceedings (s. 204 of the German Code of Criminal Procedure (Strafprozessordnung - StPO)), has dismissed an application to prefer public charges (s. 174 of the Code of Criminal Procedure), has halted proceedings upon the imposition of conditions and instructions (s. 153.a of the Code of Criminal Procedure) or, finally, has halted proceedings pursuant to s. 45, s. 47 of the Juvenile Court Act (Jugendgerichtsgesetz - JGG). As a result of this provision, the ban on double punishment, which, in principle, only applies in the domestic territory, also covers extradition for the purpose of further prosecution. At the same time, however, protection from extradition, which is prescribed by the constitution, is complied with for those cases in which a German had been answerable before a German court, with corresponding decisions that concluded the proceedings, already before the decision on extradition. Where, however, the request for extradition is made before such conclusion of proceedings, or where no corresponding proceedings are instituted in Germany at all, there is, pursuant to the Law on International Judicial Assistance in Criminal Matters, valid in the version of the European Arrest Warrant Act, nothing that stands in the way of extraditing a German who is charged with an offence that has a significant domestic connecting factor. From the perspective of persons entitled to enjoy the fundamental right in question, there is a gap in legal protection in this context.

bb) A particular effect of encroachment upon fundamental rights is created where the citizens are supposed to be held responsible by other Member States for remote effects of their action in Germany that they could not easily have expected, or where they are confronted with prosecution claims by individual Member States that are extensive both as concerns their subject matter and the prosecuted persons themselves. Such effect of encroachment is even increased where the act alleged by the state requesting extradition is not punishable pursuant to German law.

The legislature could have chosen an implementation that shows a higher consideration in respect of the fundamental right concerned without infringing the binding objectives of the Framework Decision because the Framework Decision contains possibilities for exceptions that permit the Federal Republic of Germany to take account of the fundamental rights requirements that follow from Article 16.2 of the Basic Law. Article 4 no. 7 of the Framework Decision on the European arrest warrant permits the executing judicial authorities of the Member States to refuse to execute the European arrest warrant where it relates, on the one hand, to offences which are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such (Article 4 no. 7 letter (a) of the Framework Decision on the European arrest warrant) or where, on the other hand, the arrest warrant relates to offences that have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its

territory (Article 4 no. 7 letter (b) of the Framework Decision on the European arrest warrant). In any case as regards offences with a significant domestic connecting factor within the meaning that has been set out, the legislature had to create the possibility, as regards the constituent elements of offences, and the legal obligation of refusing the extradition of Germans.

Moreover, the legislature was called upon to decide upon enhancing the legal position of Germans over and above the regulations in s. 9 of the Law on International Judicial Assistance in Criminal Matters. The Framework Decision permits to refuse extradition where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based (Article 4 no. 2 of the Framework Decision on the European arrest warrant) or where the judicial authorities have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings (Article 4 no. 3 of the Framework Decision on the European arrest warrant). In this respect, the preliminary investigation by the public prosecutor has an additional function, namely that of protecting individual rights, which would have had to be taken into account when the Framework Decision was incorporated into national law. In this context, the legislature should have examined the provisions of the Code of Criminal Procedure to verify whether decisions by the Public Prosecutor's Office to refrain from criminal prosecution must be subject to judicial review regarding a possible extradition. Also by doing so, it can be ensured already before a decision on extradition is issued that a German who has not left the territory of the Federal Republic of Germany and who, according to German law, has not committed a criminal offence is not extradited.

cc) The European Arrest Warrant Act's infringement of the fundamental right to protection from extradition and of the principles of the rule of law that are applicable in this context would have been avoided by exhausting the margins afforded by the framework legislation when incorporating it into national law. The legislature was not entitled to refrain in this context from exhausting the latitude afforded to it, not even taking into account the legislature's freedom of drafting. The legislature not correctly performed the weighing, which it is called upon to conduct by Article 16.2 of the Basic Law in connection with the principle of the rule of law, between the European interest in cross-border prosecution and the claim to protection that follows from the rights that stem from a person's status as a German. The legislature has already failed to see the mandate for weighing that follows from the special proviso of legality of Article 16.2 of the Basic Law; in any case, it factually has not carried it out by providing a sufficient extent of protection from extradition.

If the German legislature wants to restrict the protection of Germans from extradition in a constitutional manner on the basis of Article 16.2 sentence 2 of the Basic Law, it must, by providing constituent elements of offences that are determined in accordance with the rule of law, put the executing authority at least in a position to weigh the citizen's confidence in the German legal system, which

is protected in this respect, in the individual case according to these constitutional principles. The judge's general commitment to fundamental rights in conjunction with the principle of proportionality (Article 1.3 of the Basic Law) does not come up to these requirements placed on a law that restricts fundamental rights.

dd) If the distinction between an alleged offence with a domestic connecting factor and one with a significant connecting factor to a foreign country, which is necessary under constitutional law, were upheld, a conflict with the special ban on retroactivity pursuant to Article 103.2 of the Basic Law would be ruled out from the outset so that the importance of this Article to combinations of circumstances such as the one that exists here need not be finally determined. The principle according to which an offence may only be punished if punishability was legally determined before the offence was committed is a special guarantee under the rule of law of the confidence in the reliability of the legal system, which is to provide clear orientation on what is punishable and what is not. Without such reliable orientation, individual freedom cannot develop: Whoever must expect an unpredictable retroactive amendment of criminal law provisions will no longer be able to exercise his or her freedom of action with the necessary security and will lose his or her position as an autonomous individual in one of the areas that are most sensitive as concerns fundamental rights. Admittedly, the ban on retroactivity only applies to amendments of substantive criminal law and not to those of procedural law, of which the law on extradition is also regarded as a part (see Higher Regional Court (Oberlandesgericht) Braunschweig, Order of 3 November 2004 - Ausl. 5/04 -, Neue Zeitschrift für Strafrecht, *Rechtsprechungs-Report* - NStZ-RR 2005, p. 18 [19]; BVerfGE 109, 13 [37]). If however a German, who up to now enjoyed absolute protection from extradition, is answerable in a Member State of the European Union for acts that do not show a significant connecting factor to a foreign country and were not punishable in Germany when they were committed, this could be tantamount to a retroactive amendment of substantive law.

ee) The deficiencies of the legal regulation that have been shown are also not sufficiently compensated by the fact that pursuant to s. 80.1 of the Law on International Judicial Assistance in Criminal Matters, extradition of a German citizen for prosecution is only admissible when it is ensured that the Member State requesting extradition will offer to return the prosecuted person at his or her request to Germany for execution after the imposition of an unappealable custodial sentence or other sanction. It is true that the execution of a sentence in the domestic territory is, in principle, a protective measure for a state's own citizens, but it only concerns execution and not prosecution.

Apart from this, the legislature will have to examine whether the bar on admissibility that is constituted by the lack of a guarantee by the state requesting extradition to offer the requested state the prosecuted person's return for execution is an adequate measure. According to the legislature's intention, the requirement of the prosecuted person's return is supposed to comply with the principle of rehabilitation. The legislature, however, has admitted already in the legislative

process that there could be individual cases in which the return of a person to be extradited could fail due to a lack of criminal liability on the part of the prosecuted person in Germany (see Bundestag document [Bundestagsdrucksache - BTDrucks] 15/1718, p. 16). The mere promise of return is inadequate in this context because it does not tell anything about whether the possibility of serving the custodial sentence in Germany exists.

2. The lack of voidability of the decision on the application for a grant of extradition in proceedings concerning extradition to a Member State of the European Union pursuant to the eighth part of the Law on International Judicial Assistance in Criminal Matters (see ss. 78 et seq. of the Law on International Judicial Assistance in Criminal Matters) infringes Article 19.4 of the Basic Law. Admittedly, legal practice and legal literature have up to now rejected the possibility of recourse to the courts to void the decision on the application for a grant of extradition in extradition proceedings because its foreign-policy and general-policy aspects belong to the core area of executive power. This can, however, no longer apply if the decision on the application for a grant of extradition puts the legal restriction of a fundamental right in concrete terms.

a) Article 19.4 of the Basic Law guarantees a fundamental right to effective legal protection provided by the courts from acts of public authority (aa) to the extent that they encroach upon the rights of the person affected (bb).

aa) Article 19.4 of the Basic Law contains a fundamental right to effective judicial protection from acts of public authority that is as complete as possible (see BVerfGE 8, 274 [326]; 67, 43 [58]; 96, 27 [39]; 104, 220 [231]; established case-law). The guarantee provided by the Basic Law comprises access to the courts, the examination of the relief sought in formal proceedings and the binding decision of the court (see BVerfGE 107, 395 [401]). The citizen has a substantial claim to judicial review that is as effective as possible (see BVerfGE 40, 272 [275]; 93, 1 [13]; established case-law).

An integral part of the guarantee of effective legal protection is above all that the judge has sufficient authority to review as concerns the factual and legal aspects of a dispute so that he or she can remedy a violation of the law. The precept of effective legal protection does, however, not exclude that, depending on the type of measure that is to be examined, the concession of scope for drafting, discretion and assessment can result in differences regarding the completeness of judicial review (see BVerfGE 61, 82 [111]; 84, 34 [53 et seq.]).

bb) The prerequisite of the guarantee of recourse to the courts is that the person affected is entitled to a legal position; the violation of mere interests is not sufficient (see BVerfGE 31, 33 [39 et seq.]; 83, 182 [194]). Such legal position can be established by another fundamental right or from a guarantee that is equivalent to a fundamental right, but also by law, with the legislature determining the conditions under which a citizen is entitled to a right and the content that the right has (see BVerfGE 78, 214 [226]; 83, 182 [195]).

These principles also apply where an Act leaves a measure to the competent authority's discretion. Where the Act's regulations on decision-making enjoin the authority to take into account also legally protected interests of the person affected when exercising its discretion, the guarantee of legal protection under Article 19.4 of the Basic Law applies. Where, on the contrary, the legal provision does not protect any legal interests of the person affected, the discretionary decision need not be voidable by him or her in court proceedings; in the intermediate zone, an interpretation that gives prevalence to the fundamental rights merits preference (see BVerfGE 96, 100 [114-115] with further references).

As concerns the grant of extradition in the classical extradition proceedings, the Federal Constitutional Court has so far left it open in its case law whether the decision on the application for a grant of extradition can be challenged by a constitutional complaint; it has however, assumed that there is, in any case, only a limited possibility of review (see BVerfGE 63, 215 [226]; Order of the Second Senate of the Federal Constitutional Court (Preliminary Review Committee - Vorprüfungsausschuss) of 16 March 1983 - 2 BvR 429/83 -, Europäische GrundrechteZeitschrift 1983, pp. 262263; from the nonconstitutional courts' more recent case-law, see Berlin Higher Administrative Court (Oberverwaltungsgericht - OVG), Order of 26 March 2001 - 2 S 2/01 -, Decisions of the Higher Administrative Court (Entscheidungen des Oberverwaltungsgerichts - OVGE) 23, 232 - Neue Zeitschrift für Verwaltungsrecht - NVwZ 2002, p. 114 on the one hand and the Order of the Berlin Administrative Court (Verwaltungsgericht - VG) of 12 April 2005 - VG 34 A 98.04 - on the other hand). In a decision on the parallel problem of the transfer of prisoners, the Second Senate of the Federal Constitutional Court has regarded the non-voidability of the executive power's decision as compatible with Article 19.4 of the Basic Law because the decision had not affected legal interests of the person affected (see BVerfGE 96, 100 et seq.).

cc) The grant of extradition is the executive power's decision of granting a foreign state's request to extradite a wanted person. In the Federal Republic of Germany, the competence for granting extradition lies with the Federal Government and is exercised by the Federal Ministry of Justice in agreement with the German Foreign Office. The Federation has partly delegated the exercise of its competences regarding the decision on incoming requests to the *Länder* (states) on the basis of s. 74.2 of the Law on International Judicial Assistance in Criminal Matters; the Länder, in turn, can delegate their competences to the subordinate authorities (see the agreement of 28 April 2004, which entered into force on 1 May 2004, between the Federal Government and the Länder governments on the competences in the relations of mutual judicial assistance in criminal matters, Federal Bulletin (Bundesanzeiger) 2004, p. 1, 1494). This regulation expresses that extraditions are to be classified as part of relations with foreign states, for which the Federation has exclusive competence pursuant to Article 32.1 of the Basic Law (see BVerfGE 96, 100 [117]).

The division of German extradition proceedings into proceedings that review the admissibility of extradition and proceedings on the grant of extradition, which has historical reasons, has up to now resulted in a distinction concerning the functions of the two stages of proceedings and the prosecuted person's possibilities of legal protection that are connected with them. Under the conventional divided system, the admissibility proceedings have served, and still serve, the prosecuted person's preventive legal protection whereas the proceedings on the grant of extradition are intended to make it possible to take foreign-policy and general-policy aspects into account. In practice, it was therefore not possible to challenge the decision on the application on a grant of extradition before a court; moreover, this possibility was rejected in most of the legal literature (see Vogler, Auslieferungsrecht und Grundgesetz, 1970, pp. 306 et seq. with further references; id., in: Grützner/Pötz, Internationaler Rechtshilfeverkehr in Strafsachen, 2nd ed. 2004, s. 12, marginal nos. 20 et seq.; moreover BVerfGE 63, 215 [226]).

b) The European Arrest Warrant Act has extended the proceedings on the grant of extradition in case of extraditions to Member States of the European Union by elements of discretion, (refer (aa)), which serve the protection of the prosecuted person and which are therefore subject to the guarantee of legal protection refer (bb). Effective legal protection mandatorily requires that the extradition documents that are presented are complete (refer (cc)).

aa)

…

The European Arrest Warrant Act tries to take account of the citizen's interests that are protected by fundamental rights by partly incorporating the grounds for which the execution of the European arrest warrant may be refused that are provided in the Framework Decision (see Article 4 of the Framework Decision on the European arrest warrant). Here, the Framework Decision has afforded the Member States of the European Union a margin for incorporating the grounds for non-execution that are listed in Article 4 of the Framework Decision into national law as mandatory or optional bars to extradition and for putting them into concrete terms there.

…

bb) What the fact that the procedure for granting extradition is complemented by specified grounds for refusing the grant gives rise to is that, in the case of extraditions to a Member State of the European Union, the authority responsible for granting extradition no longer merely decides on unspecified foreign-policy and general-policy aspects of the request for extradition but has to enter into a process of weighing the subject of which is in particular criminal prosecution of the person affected in his or her home state. Consequently, the competent German authorities are, on the one hand, afforded a margin of assessment and discretion while, on the other hand, there is also an obligation, which is based on constitutional law, to protect German citizens.

…

The obligation to give reasons for the decision (see s. 79 sentence 2 of the Law on International Judicial Assistance in Criminal Matters) shows that the legislature has also recognised the importance of the decision on the application for the grant of extradition as regards the individual rights of the person affected. This provision, which had not been contained in the Law on International Judicial Assistance in Criminal Matters before the entry into force of the European Arrest Warrant Act, has only been drafted in the course of the legislative procedure in such a way that not only the requesting state - as had been originally intended - but also the prosecuted person is provided with a reasoning. The provision contains an obligation to notify the prosecuted person of the reasoned decision on the application for a grant of extradition, so that other criteria are fulfilled according to which the grant can be classified as a classical administrative act (see s. 41.1 of the Administrative Procedure Act (Verwaltungsverfahrensgesetz - VwVfG)), which is subject to review by the judiciary.

cc) Part of the required efficiency of legal protection is also that the extradition documents or a European arrest warrant, which is equivalent to these documents, permit judicial review that is appropriate for the fundamental rights affected. It is incompatible with this requirement that s. 83.a of the Law on International Judicial Assistance in Criminal Matters makes reference to the extradition documents and specifies minimum information that must be provided in the European arrest warrant but - unlike s. 10 of the Law on International Judicial Assistance in Criminal Matters with regard to the conventional extradition proceedings - does not make the completeness of such information a *conditio sine qua non* for the decision on the admissibility of the application for the grant of extradition. Already in the short period of time after the entry into force of the European Arrest Warrant Act, the result of the fact that s. 83.a.1 of the Law on International Judicial Assistance in Criminal Matters was drafted as a directory provision (Soll-Vorschrift) has been that in concrete extradition proceedings, the completeness of the extradition documents has been regarded as dispensable for the admissibility of a request, with reference being made to the wording of the Act (see Stuttgart Higher Regional Court, Order of 7 September 2004 - 3 Ausl. 80/04 -, Neue Juristische Wochenschrift 2004, p. 3437 [3438]; see also Seitz, loc. cit., p. 546 [548]). The deviation from the mandatory wording of s. 10 of the Law on International Judicial Assistance in Criminal Matters can also not be justified by arguing that the term *sollen* (should) as a general rule generates a legal commitment but does permit to deviate from such commitment under special circumstances. For an effective protection of the fundamental right enshrined in Article 16.2 of the Basic Law, the legislature would have to clarify in this case when such circumstances exist.

II.

The European Arrest Warrant Act is void (s. 95.3 sentence 2 of the Federal Constitutional Court Act); an interpretation in conformity with the constitution or a ruling that establishes the Act's partial voidness are excluded because the German legislature must be in a position to decide again, in normative freedom and taking into account the constitutional standards, about the exercise of the qualified legal proviso in Article 16.2 sentence 2 of the Basic Law (1.). As long as the legislature does not adopt a new Act implementing Article 16.2 sentence 2 of the Basic Law, the extradition of a German citizen to a Member State of the European Union is inadmissible (2.).

1. The constitutional prerequisites placed on the extradition of German citizens and the principles of legal clarity and legal certainty require that the Act implementing Article 16.2 sentence 2 of the Basic Law is understandable by itself and that it sufficiently predetermines the decisions on applications for the grant of extradition. The expression in concrete terms, which is called for by the constitution, must manifest itself in the text of the statute; this cannot be achieved by interpreting the European Arrest Warrant Act in conformity with the constitution or by establishing its partial voidness.

…

2. As long as the legislature does not adopt a new Act implementing Article 16.2 sentence 2 of the Basic Law, the extradition of a German citizen to a Member State of the European Union is not possible. Extraditions can, however, be performed on the basis of the Law on International Judicial Assistance in Criminal Matters in the version that was valid before the entry into force of the European Arrest Warrant Act.

III.

The order of the Higher Regional Court (1.) and the Free and Hanseatic City of Hamburg's decision on the application of a grant of extradition (2.) are based on an unconstitutional law and are therefore overturned (s. 95.3 sentence 2 of the Federal Constitutional Court Act).

1. The order of the Hanseatic Higher Regional Court of 23 November 2004 has been issued on the basis of an unconstitutional law and cannot be upheld for this reason alone.

2. Also the decision on the application of a grant of extradition is based on unconstitutional law and is overturned already for this reason.

Apart from this, the authority that granted extradition has exercised the discretion to which it is entitled in an erroneous manner. It has failed to recognise that a grant of extradition of a German citizen is subject to special constitutional standards that must be part of the process of weighing when the bars on extradition pursuant to s. 83.b of the Law on International Judicial Assistance in Criminal Matters and the question of return pursuant to s. 80.1 of the Law on International Judicial Assistance in Criminal Matters are examined. It has, admittedly, made the grant contingent on the condition that the Spanish authorities will offer the return of the person affected after the imposition of a sentence, it has, however, not dealt with the question whether such an aid to execution is admissible under German law at all. Apart from this, the grant states that the Public Prosecutor General has no objections against the complainant's extradition in view

of the German preliminary investigation by the public prosecutor. In his letter, the Public Prosecutor General merely summarised the state of the investigations against the complainant and pointed out that the investigations pursuant to s. 129.a of the Criminal Code had not been brought to a close yet.

The protection of German citizens requires that when a decision on the grant of an application for extradition is made, the fact that a national preliminary investigation by the public prosecutor has been instituted is taken into account in any case. Here, criminal investigations in Germany with a corresponding domestic connecting factor of the alleged act constituting the offence will as a general rule result in the existence of a bar to extradition; in this respect, the granting authority's discretion is significantly limited, and detailed reasons stating why a request for extradition is granted after all are required. The mere possibility of extradition to a Member State of the European Union is not an option of legal policy, the decision about which may only follow considerations of expediency or effectiveness of the administration of criminal justice.

C. …

Extracts from the dissenting opinion of Judge Broß:

I am only able to agree with the decision of the Senate majority to the extent that the European Arrest Warrant Act is declared void, but not as regards essential parts of the grounds, and above all, not in view of the fact that it regards extradition of German citizens as admissible, without any substantive restriction, in case of offences with a significant connecting factor to a foreign country.

The European Arrest Warrant Act is not only unconstitutional on account of the legislature's failure when incorporating the Framework Decision into national law; it is void already because it violates the limits on integration that are set out in Article 23.1 sentence 1 of the Basic Law. This is because the Basic Law opens up the national legal system to European Community law and European Union law only to the extent that the prerequisites established by Article 23.1 sentence 1 of the Basic Law, namely those of the principle of subsidiarity, have been complied with. The legislature must take this into account when incorporating the Framework Decision into national law. Already this is not the case.

1. …

2. The principle of subsidiarity, which is laid down as a rule in Article 23.1 sentence 1 of the Basic Law, directs the allocation of competences and tasks, with a principal preference for the lower level. The smaller social unit, which as such is closer to the citizens, is supposed to take precedence (see, as a fundamental source, Isensee, Subsidiaritätsprinzip und Verfassungsrecht, 2nd ed., 2001, pp. 223 et seq.; Rojahn, in: von Münch/Kunig [eds.], loc. cit., Article 23, marginal no. 30). The larger unit takes over only where the smaller one, which is closer to the citizens, is not, or less effectively, able to perform the respective task (see Pernice, in: Dreier (ed.), loc. cit., Article 23, marginal no. 71; Rojahn, in: von Münch/Kunig [eds.], loc. cit., Article 23, marginal no. 30).

…

3. On this basis, the extradition of German citizens for prosecution can actually only be a possibility where a realisation of the state's claim to prosecution fails for factual reasons that are plausible on the merits and that, apart from this, have been sufficiently substantiated in the particular case. Only to this extent may the legislature transform the Framework Decision on the European arrest warrant into national law.

…

6. The Federal Constitutional Court must examine already *ex officio* violations of the principle of subsidiarity by nonconstitutional law under the aspect of the infringement of higher ranking law (Article 20.3 of the Basic Law). Notwithstanding this, the principle of subsidiarity applies not only to laws but also to individual rights. In this context, the close factual connection with Article 38 of the Basic Law must be seen. This provision excludes for the area of application of Article 23 of the Basic Law that the legitimisation of public authority and the influence on the exercise of public authority that have been effected by elections are devalued or factually bound and predetermined, by shifting the tasks and competences of the German Bundestag in such a way that the principle of democracy is violated (see BVerfGE 89, 155 [172]).

…

7. At the same time, the principle of subsidiarity (Article 23.1 sentence 1 of the Basic Law) results in the legislature's obligation, which has however hardly been taken notice of so far, to plausibly substantiate a legislative project's "integration value added" in the area of the "Third Pillar" of the European Union. What requires justification is above all the following: the fact that, and if necessary to what extent, a task that has been made the subject of regulation - here, the extradition of Germans for prosecution to Member States of the European Union - exceeds the capability of the Federal and the Länder judiciary and can only be effectively dealt with on the level of the European Union - by means of extradition - (on this, see Pernice, in: Dreier [ed.], loc. cit., Article 23, marginal no. 73; Rojahn, in: von Münch/Kunig [eds.], loc. cit., Article 23, marginal no. 33).

…

8. By such an implementation of the Framework Decision, which takes the principle of subsidiarity into account, the legislature does not contradict requirements under European law. Article 4 nos. 2 and 3 of the Framework Decision explicitly permit to refuse extradition where prosecution by the "executing Member State" takes place for the same act on which the European arrest warrant is based (Article 4 no. 2 of the Framework Decision on the European arrest warrant) or where the investigating authorities have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings (Article 4 no. 3 of the Framework Decision on the European arrest warrant). This has also been established by the Senate majority (see B.I.1.d) bb)). Apart from this, it has rightly stressed the authorisation of the legislative bodies of the Member States to also refuse the incorporation of the Framework Decision into national law if necessary (see B.I.1.c) bb)).

9. It is all the more surprising that the Senate majority considers it admissible to provide, in case of offences with a significant connecting factor to a foreign country, in spite of the duties to protect that have been stipulated with reference to citizenship, and misjudging the meaning

and scope not only of the principle of subsidiarity (Article 23.1 sentence 1 of the Basic Law) but also of the principle of proportionality (Article 20.3 of the Basic Law), the possibility of extraditing German citizens without any substantive restriction. Such a procedure, which counteracts the presumption of innocence and, with that, a mainstay of the principle of the rule of law (Article 20.3 of the Basic Law), remains incomprehensible.

Nevertheless, the legislature is not prevented from not making use of the legal opinion criticised here and to use the room for manoeuvre that is at its disposal, in the interest of the citizens who are entrusted to it and who are to be deemed innocent, and with that, unrestrictedly worthy of protection, by the legislature unless the contrary is proved.

Extracts from the dissenting opinion of Judge Lübbe-Wolff:

I share the Senate majority's opinion that when enacting the European Arrest Warrant Act, the German legislature has not taken sufficient account of the fundamental rights of persons potentially affected by it, but I cannot agree with large parts of the grounds (1.5.) and with the dictum on the legal consequences (6.). The European Arrest Warrant Act's deficiencies under constitutional law do not justify the nullification of the entire Act.

1. The basis of the - restricted - ban on the extradition of Germans is Article 16.2 sentence 1 of the Basic Law. The attempt to anchor it in higher spheres (of natural law, as it were), deeper (historical) ones and broader ones (under natural law), leads astray.

a) The principle that a state does not extradite its own citizens can neither be derived from the nature of "the citizen's relation to a free democratic polity", nor is there a "conviction, shared all over Europe since the French Revolution" that supports it. This principle does not apply, *inter alia*, in states of the Anglo-Saxon legal sphere to which we owe freedom and democracy (on this, see BVerfGE 4, 299 [303-304]; for further comparative-law information see Masing, in: Dreier, GG, vol. 1, 2nd ed., 2004, marginal no. 37 on Article 16 of the Basic Law). Unlike the ban on the deprivation of German citizenship (Article 16.1 sentence 1 of the Basic Law), the principle of the non-extradition of Germans, which is enshrined in Article 16.2 of the Basic Law, is not based on the experience of National Socialist injustice. It can already be found in the Weimar Constitution (Article 112.3 of the Weimar Constitution (Weimarer Reichsverfassung - WRV)) and can be traced back to a tradition that is considerably older (see Masing, ibid., marginal no. 8, with further references). Finally, it also cannot be maintained that the citizens' confidence in their secured residence in their home state is protected by international law, in the respect that is of interest here. The states' obligation under international law to receive their own citizens to which the Senate references, does not have a trace of a content that would ban or restrict the extradition of a state's own citizens.

…

b) If one refrains from loading the ban on the extradition of a state's own citizens with a significance that is not stipulated in the constitution, the thought that the incorporation of Article 16.2 sentence 2 into the Basic Law could have exceeded the limits of a possible constitutional amendment that are embodied in Article 79.3 of the Basic Law

is remote. If one intends to seriously ascertain in this context whether the constitution amending legislature brings about "the legal system that is established by the Basic Law losing the core elements of statehood" or has created an inadmissible cause for that, such a statement can, in any case, not be substantiated by explanations about the significance of the citizenship of the Union and about the scope of the ban on discrimination on grounds of citizenship under Community law (Article 12.1 of the Treaty establishing the European Community).

…

2. The statement that "in particular with a view to the principle of subsidiarity (Article 23.1 of the Basic Law)", the "cooperation" that is put into practice in the "Third Pillar" of the European Union "in the shape of limited mutual recognition, which does not provide for a general harmonisation of the Member States' systems of criminal law, is a way of preserving national identity and statehood in a single European judicial area", is also a vague signal. To the extent that this signal intends to object a general harmonisation of the Member States' systems of criminal justice, it is superfluous if only because no one intends a general harmonisation of the Member States' systems of criminal justice; under applicable law, it is ruled out not only for reasons of subsidiarity but already because the Treaty on European Union (Articles 29, 34 of the Treaty on European Union) does not provide a basis of competence for that.

…

3. I cannot go along with part of the course and of the results of the examination of proportionality that the Senate has performed.

a) Whether the provisions of the European Arrest Warrant Act take sufficient account of the principle of proportionality as regards Article 16.2 of the Basic Law and other fundamental rights that are potentially affected in the case of extraditions is a constitutional question; the standard for the answer to this question is not provided by the Framework Decision on the European arrest warrant but by the Basic Law. The answer therefore does not depend on the latitude for refusing extraditions that the Framework Decision on the European arrest warrant leaves to the German legislature. Correspondingly, the German legislature is also not obliged to make use of the grounds for optional refusal to execute the European arrest warrant provided in the Framework Decision solely because encroachments upon fundamental rights that are caused by extradition can be avoided in this way. What is decisive instead is a weighing of the interests of effective prosecution, which are pursued by the Framework Decision and its incorporation into national law on the one hand and of the interests of possible witnesses and victims on the other hand.

…

b) I regard as incorrect the view that apart from this, the European Arrest Warrant Act shows a constitutionally problematic gap in protection also as regards the possibility of refusing extradition where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based (Article 4 no. 2 of the Framework Decision on

the European arrest warrant) or where the judicial authorities have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings (Article 4 no. 3 of the Framework Decision on the European arrest warrant). …

The Senate does not substantiate, however, why, apart from the legislative implementation of the grounds for refusal under Article 4 no. 7 of the Framework Decision on the European arrest warrant, which is unanimously regarded as necessary including the corresponding legal protection, separate claims to the use of the grounds for refusal under s. 83.b nos. 1 and 2 of the Law on International Judicial Assistance in Criminal Matters, which also enjoy legal protection, are supposed to be necessary at all in order to ensure the proportionality of extradition. …

c) The statement that the question of the return of the person affected for the execution of a possible custodial sentence "must be part of the process of weighing" and that the legislature is to examine whether "the bar on admissibility that is constituted by the lack of a guarantee by the state requesting extradition to offer the requested state the prosecuted person's return for execution is an adequate measure", the Senate evades answering the decisive constitutional question.

What is the issue here is the proportionality of the encroachment upon a fundamental right that extradition constitutes.

…

With regard to the groups of persons who enjoy particular protection (see 1.) it must thus be deemed a compulsory prerequisite of extradition that the possibility of the person's return for execution exists and that it will also be made use of later on.

…

4. The Senate regards the proviso of the rule of law being upheld (Article 16.2 sentence 2 of the Basic Law) as an assignment of tasks to the legislature in the sense that it is directly incumbent on the legislature itself to establish "that the observance of rule-of-law principles by the authority that claims punitive power over a German is guaranteed".

To the extent that thus, the legislature is supposed to be authorised to make general declarations, which are binding to public authorities and nonconstitutional courts when assessing individual cases, as concerns the question whether rule-of-law principles are upheld in the EC Member State, objection must be made. Pursuant to the principle of the separation of powers (Article 20.3 of the Basic Law), the binding subsumption of facts under legal concepts is, in principle, not incumbent upon the legislature but upon the executive and the legislative powers.

…

5. The complainant has argued that the legal basis of his extradition showed an unconstitutional democratic deficit. His fundamental rights could only be encroached upon on the basis of an Act adopted by Parliament. The German Parliament had not been in a position to freely decide

on the provisions of the European Arrest Warrant Act, which set out that extradition is possible irrespective of double criminality because it had been bound by the Framework Decision on the European arrest warrant, which had been enacted by government representatives alone.

As regards this argument, the Senate states that the fact that the European Parliament is merely consulted when European Framework Decisions are adopted is commensurate with the requirements of the principle of democracy because the Member States' legislative bodies retain the political power of drafting in the context of implementation, if necessary also by denying implementation. This is not an answer to the complainant's objection but a description of the problem, with the only particular feature that the problem is not regarded as being one. Where the belief is held that democratic legitimisation must be sought in the freedom of Parliament to infringe European Union law, something is going a bad way.

…

6. I cannot discern a justification for the declaration of nullity of the European Arrest Warrant Act. The Act is unconstitutional to the extent that it does not contain regulations that make it possible to safeguard the proportionality of extradition and to guarantee such safeguard through sufficient legal protection as regards special groups of persons and the groups of cases that concern them. In order to rule out infringements of the constitution that are based on such unconstitutionality, it is sufficient to state that until the entry into force of a regulation that is in conformity with the constitution, Germans, and non-Germans who are worthy of protection (see 1.), may not be extradited to the extent that the offences in question are among those with regard to which extradition can be refused pursuant to Article 4 no. 7.a or no. 7.b of the Framework Decision on the European arrest warrant (see 3.a) and to the extent that a return in order to serve a possible sentence fails under applicable law for lack of mutual criminality (see 3.c).

…

In contrast to this, the declaration of nullity of the European Arrest Warrant Act also eliminates the nonconstitutional bases of extradition on account of European arrest warrants also to the extent that they concern cases with regard to which the Senate itself has not in any way criticised the law as being constitutionally problematic.

…

Extracts from the dissenting opinion of Judge Gerhardt:

I cannot agree with the judgment. The constitutional complaint would have had to be rejected as unfounded. The declaration of nullity of the European Arrest Warrant Act is not in harmony with the precept under constitutional and European Union law of avoiding violations of the Treaty on European Union wherever possible. The Senate contradicts the case law of the Court of Justice of the European Communities.

I.

The ban on extradition, which is laid down in Article 16.2 of the Basic Law, is, on the one hand, supposed to prevent German public authority from enforcing other states' claims to punishment that do not have an equivalent in the valuations of the German legal system (1.).

On the other hand, the prosecuted person is supposed to be spared the added, possibly serious, difficulties that are connected with proceedings abroad (2.). Both objectives of protection are achieved by interpreting and applying the European Arrest Warrant Act in conformity with the constitution, with account being taken of European Union law. The same applies *mutatis mutandis* to compliance with the guarantee of legal protection (3.).

1. …

I very much regret that the Senate refuses to make a positive contribution to European solutions in this respect. In particular by alleging an intrinsic connection of the ban on extradition and citizenship as a status, and by using the topos of the confidence in the reliability of one's own legal system, which has remained undefined, it one-sidedly emphasises the national perspective instead of achieving a balance between the bonds of national law and that of European law. The fact that it deals with the Pupino judgment of the Court of Justice of the European Communities neither as far as concepts are concerned nor by discussing possible consequences, does not further the law.

2. The European Arrest Warrant Act provides sufficient possibilities of refusing surrender to the requesting state in cases in which the burden resulting from criminal proceedings abroad for the prosecuted person is out of all proportion to the advantages that can be put forward in favour of prosecution in the requesting state.

…

The instruction to the legislature to enact a new regulation is not only superfluous, incompatible with the principles of good lawmaking and an unnecessary burden on the legislative bodies. The declaration of nullity of the European Arrest Warrant Act also infringes the precept under European Union law to attain the objectives pursued by the Framework Decision as far as possible (ECJ, Judgment of 16 June 2005, loc. cit., marginal nos. 43, 47). This precept, however, manifests itself here as a precept of maintaining the statutory provision that runs parallel to the Federal Constitutional Court's domestic task of preserving the legislature's intent as far as possible in case of constitutional deficiencies.

3. Article 19.4 of the Basic Law requires that before extradition, a court examines compliance with the principle of proportionality. In the context of their decision on the admissibility of extradition, the Higher Regional Courts are obliged to do so. There is no gap in legal protection.

II.

Also from its own perspective, the Senate would not have been allowed to declare the European Arrest Warrant Act void in its entirety. It already does not ask itself the question to what extent it is at all justified to declare an Act that regulates government encroachment upon fundamental rights void in its entirety, following a constitutional complaint, due to the lack of certain regulations instead of merely stating its inapplicability under specific circumstances. If this question had been answered in the affirmative, the further question should have been asked, whether this also applies where it can be foreseen with certainty that the provisions which are regarded as missing will ultimately not play a role in the original case. If, apart from this, the Senate is of the opinion that partial voidness is out of the question it should have upheld the

European Arrest Warrant Act by means of a transitory regulation with provisos for its application in conformity with the constitution until the adoption of a new Act. The Federal Republic of Germany has undertaken to incorporate the Framework Decision on the European arrest warrant, which was adopted unanimously in the Council and which is binding as regards the objective to be attained, into national law until the end of the year 2003. Notwithstanding the fact that the Treaty on European Union does not provide infringement proceedings in this respect, continued non-incorporation infringes the obligations of the Federal Republic of Germany to the Union and the requirement of consideration and solidarity in its relation to the other Member States. This infringement is all the more serious because pursuant to national constitutional law, the unconstitutionality of an Act indeed does not forcibly result in its being declared void. The Basic Law's commitment to Germany's integration into a unified Europe, which the Senate has strongly emphasised several times recently, and the obligation under European Union law to interpret Framework Decisions in conformity with European Community law (ECJ, Judgment of 16 June 2005, loc. cit., marginal no. 43) compel to create at least a legal situation that is as close as possible to European Union law by means of the continued application, albeit reduced factually and modified in conformity with the constitution for a transitional period.

III.

When drafting the new regulation, the legislature will have to consider whether, in view of the fact that the participation of the Federal Republic of Germany in the Framework Decision on the European arrest warrant is constitutionally based on Article 23 of the Basic Law and that this Article has largely divested extradition proceedings within the European Union of their international law and foreign-policy elements, it is (still) justified in this context to assign the Federation administrative competence on the basis of Article 32 of the Basic Law (s. 74 of the Law on International Judicial Assistance in Criminal Matters). Here, the question at issue is not whether the European Arrest Warrant Act required approval by the Bundesrat but whether it is possible at all to deviate from Articles 83 et seq. of the Basic Law when drafting the executive competence. In the present proceedings, the question - which had not been discussed with the parties - does also in my view not require decision because an unconstitutionality of the European Arrest Warrant Act which would possibly have resulted from it would not have called its continued application for a transitional period into question.

XVII. Political Prosecution and Asylum - Article 16a of the Basic Law

Some General Background

The fundamental right to asylum was originally contained in Article 16 and was "moved" to the new Article 16a in 1993.[176] That explains why the first decision (BVerfGE 80, 315) of 1989 refers to Article 16 and not Article 16a. The right to asylum as part of the Basic Law's fundamental rights is one example of the Basic Law's reaction to the horror of the Nazi terror when so many in Germany (and elsewhere), especially Jewish Germans and other persecuted groups had to flee from Germany and seek refuge elsewhere.

The new Article 16a restricted the right to asylum considerably. Article 16a sentence 2 states that no asylum will be granted for those entering Germany from a secure third country.[177] Since Germany is surrounded by nine secure countries and the North Sea that leaves only air travel for potential asylum seekers[178], notwithstanding Article 16a.5, which prescribes a prevalence of international treaties and European Union legislation dealing with refugee matters. A respective European Union legislative act regulates which state has - exclusive - jurisdiction to deal with the asylum application.[179] According to Article 16a.3, federal legislation can determine other states where *prima facie* persecution does not take place, which effectively puts the onus of rebuttal on the refugee who must present evidence that the legislated list is wrong with regard to his or her claims on which country has been responsible for the persecution.

1. Tamils, BVerfGE 80, 315

Explanatory Annotation

The Constitutional Court interpreted the concept of political persecution, which is the prerequisite for the right to asylum. The Court made it clear that such persecution is not to be understood narrowly to only encompass political activism as such. Rather it extends to persecution for any characteristic, which objectively sets the applicant apart and makes him or her subject to persecution. Such criteria could be political beliefs, ethnicity or race, religion, nationality or sexual orientation, if these characteristics lead to persecution; mere discrimination is not sufficient.

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176 The new Article 16a is an impressive example for excessive verbosity. The original asylum right consisted of four words. Whereas that may have been just a bit short, the new Article 16a contains 5 subsections and a total of 286 words in the German version and many of those words have no place in a constitution and should have been left to a concretizing statute.

177 European Union members states and member states which have ratified both the 1951 Convention Relating to the Status of Refugees, http://www.unhcr.org/3b66c2aa10.html, and the European Convention on Human Rights and where observance of these legal instruments is ascertained.

178 Cf. BVerfGE 94, 49 (94-5).

179 See Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L50/1 (2003), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF.

The Constitutional Court also emphasized that safe refuge in another part of the refugee's home country also preempts the right to asylum. Asylum is not the only way for refugees to remain in Germany because of the recognition of "*de-facto*"-refugees from civil wars and other such catastrophes and because of Articles 14.1, 33 of the Refugee Convention and Article 3 of the European Convention on Human Rights, which prohibit the sending back of persons to their home state in case of danger for life, freedom or inhumane treatment.

Translation of the Tamils Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 80, 315*

Headnotes:

1. Political persecution within the meaning of Article 16.2 sentence 2 of the Basic Law (Grundgesetz - GG) is in principle, governmental persecution.

2. Persecution is political when it deliberately violates the legal rights of an individual on the basis of his political convictions, fundamental choice of religion or characteristics beyond his control that account for his being different, such that the individual is excluded from the overarching peaceful order of the governmental entity due to the intensity of such violation.

3. Governmental prosecution of acts that in and of themselves represent a manifestation of political conviction may in principle also constitute political persecution and even if the state acts thereby in defence of the legitimate interest of its own existence or political identity. Special justification is required to exclude such prosecution from the area of political persecution.

4. Effective territorial control by the state in the sense of effective sovereign superiority is a prerequisite for persecution by or attributable to a state. The possibility of political persecution therefore does not exist as long as the state assumes only the role of a party that is engaged militarily in an ongoing civil war in a disputed territory but no longer exists as the overarching effective peacekeeping power. The same applies in certain crisis situations involving guerilla warfare.

   In all of these cases, political persecution is, however, involved if governmental forces wage combat in a manner deliberately intended to achieve physical annihilation of persons on the opposing side or attributed to that side who are selected on the basis of criteria that are relevant for the purposes of asylum although such persons no longer want to or cannot offer resistance or no longer want to participate in military activities, especially if their acts mutate into deliberate physical annihilation or destruction of the ethnic, cultural or religious identity of a portion of the population selected on the basis of criteria that are relevant for the purposes of asylum.

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

5. a) A person who is affected only by regional political persecution is not to be considered a political persecutee within the meaning of Article 16.2 sentence 2 of the Basic Law, unless such regional persecution puts him in a hopeless situation throughout the country. This is the case if that person cannot find reasonable refuge in other parts of his home country (alternative domestic refuge).

   b) Alternative domestic refuge presupposes that the asylum seeker is sufficiently safe from political persecution in the areas that come into question and is in any case not threatened by any other disadvantages and dangers that are equivalent in terms of intensity and severity, to the impairment of legal rights for political reasons that is relevant for the purposes of asylum, if such existential endangerment did not exist at the place of origin.

Order of the Second Senate of 10 July 1989 - 2 BvR 502, 100, 961/86 -

Facts:

The complainants were Sri Lankan citizens of ethnic Ceylonese-Tamil origin. They directed their constitutional complaints against judgments of the administrative courts that denied their applications for asylum.

The constitutional complaints were successful since, among other things, the administrative courts did not in view of the civil war situation prevailing in Sri Lanka at the time in question consider the actions of the Sri Lankan security forces that were objected to as political persecution because of the motive of preservation of the state behind these actions; they therefore arrived at the assumption that the complainants were not threatened with persecution when they entered the country.

Extract from the Grounds:

…

B.

The admissible constitutional complaints are founded. The challenged judgments violate the fundamental right of the complainants under Article 16.2 sentence 2 of the Basic Law.

I.

1. a) According to Article 16.2 sentence 2 of the Basic Law, political persecutees have the right to asylum. The meaning of the term "political persecutee" cannot be narrowed down solely on the basis of the succinct wording of this provision. Instead, it is necessary to determine what was and is meant to be the overall intent and purpose of the legal definition that is expressed in the given formulation, taking into account in particular legislative tradition and the historical development of the fundamental right (see BVerfGE 74, 51 [57]).

In general, the fundamental right to asylum is based on a conviction predicated on respect for the inviolability of human dignity to the effect that no state has the right to threaten or violate the body, life or personal freedom of individuals for reasons that lie exclusively in their political convictions, fundamental choice of religion or characteristics beyond their control that account for their being different (criteria relevant for the purposes of asylum); the constitutional right to asylum is essentially defined by this legal doctrine (see BVerfGE 76, 143 [157 and 158]).

b) The descriptor "political" used in Article 16.2 sentence 2 of the Basic Law does not mean an objectively demarcated area of politics, but identifies a characteristic or quality that measures and can at any time assume in any area under certain circumstances (see BVerfGE 76, 143 [157]).

A necessary prerequisite for persecution to manifest itself as political is that it be related to disputes over the organization and nature of the general order of coexistence of people and groups of people, which is to say that - unlike, for example, private persecution - it must be of a public nature and proceed from a wielder of superior, as a rule sovereign, power to which the victim is subservient.

Political persecution is therefore in principle governmental persecution (established case law; see BVerfGE 9, 174 [180]; 54, 341 [356 and 357, 358]; 76, 143 [157 and 158, 169]).

This follows from the historical development and intent of the fundamental right. The historical development documents the fact that the Parliamentary Council (Parlamentarischer Rat) assumed that it was self-evident that asylum was to be granted from governmental persecution (see Parliamentary Council, Delegates Wagner and Renner at the 44th session of the Main Committee, 19 January 1949, Stenographic Record p. 581, 582).

International law also proceeded at the time without further question on the basis of countries as subjects under international law; international law governing refugees dealt and deals with special situations involved in the relationship between states and their respective citizens. The authors of the Basic Law found that this concept already existed; they incorporated it into German constitutional law (see Reichel, Das staatliche Asylrecht "im Rahmen des Völkerrechts," 1987, pp. 87 et seq.).

If political persecution is therefore in principle governmental persecution, this is not in contradiction with the fact that the case law of the administrative courts equates such state-like organizations with the state as having ousted the respective state or to whom the latter has abandoned the field and which in fact replaced it (see Federal Administrative Court, Judgment of 3 December 1985, Buchholz 402.25 s. 1 of the Asylum Procedure Act [*Asylverfahrensgesetz* - AsyVfG] no. 43).

c) States represent internally pacified entities that relativize all differences, conflicts and disputes internally through an overarching order in such a manner that they remain below the threshold of violence and do not call into question the possible existence of the individual, which is to say that they do not therefore suspend the peaceful order

(see BVerfGE 76, 143 [159 and 160]). Governmental power serves this purpose. The power to protect includes, however, the power to persecute. As a result, the logic behind the guarantee of asylum in the Basic Law proceeds entirely from those dangers that issue from a specific type of use of persecutional governmental power (see BVerfGE 9, 174 [180]).

d) Accordingly, persecution is political if it deliberately violates the rights of an individual on the basis of characteristics that are relevant for the purposes of asylum such that the individual is excluded from the peaceful order of the overarching governmental entity due to the intensity of such violation.

aa) The measure in question must deliberately violate the legal rights of the party affected. This is absent in the case of disadvantages that an individual must suffer due to general circumstances in his home country such as hunger and natural disasters but also in the case of the general ramifications of civil disorder, revolution and war. For example, the Federal Constitutional Court made it clear that the right to asylum is not intended to give everyone who must live in material need in his home country the possibility of leaving his home country to improve his situation in life in the Federal Republic of Germany (BVerfGE 54, 341 [357]).

bb) Not every deliberate violation of rights that is inadmissible, for example, under the constitutional order of the Federal Republic of Germany, constitutes political prosecution for the purposes of asylum. The measure must be intended to affect the party affected precisely on the basis of characteristics that are relevant for the purposes of asylum. Whether such a specific intent is present and the persecution therefore takes place "due to" an asylum criterion must be determined as a function of the recognizable thrust of the measure itself on the basis of its substantive character, not on the basis of subjective reasons or motives that guide the persecutor (see BVerfGE 76, 143 [157, 166 and 167]).

cc) Finally, a violation of rights that is deliberately inflicted in the present sense must be of an intensity that represents not only an impairment but - ostracizing - persecution. The degree of intensity is not prescribed in the abstract. Its must be deduced from the humanitarian intent that the right to asylum serves, which is to afford those who find themselves in a hopeless situation refuge and protection (see BVerfGE 74, 51 [64] and in general BVerfGE 54, 341 [357]; 76, 143 [158 et seq., 163 and 164]).

2. According to the case law of the Federal Constitutional Court, acts of persecution committed by third parties may also be considered political persecution within the meaning of Article 16.2 sentence 2 of the Basic Law. However, this presupposes that they can be attributed to the respective government (see BVerfGE 54, 341 [358]; 76, 143 [169]).

This depends upon whether the state affords the party affected protection with the means actually available to the state (see BVerwGE 74, 41 [43]).

Grounds for attributing acts of persecution to the state exist if the state is either not prepared or does not see itself in a position to afford protection by making (sufficient) use of available means in the concrete case to confront acts of persecution on the part of certain third parties, in particular, for example, on the part of the state clergy or the state party (see BVerfGE 54, 341 [358]).

The situation is different if affording protection would exceed the ability of a specific state; its responsibility for the purposes of law governing asylum does not extend beyond the means actually at its disposal. The basis for attribution of acts of persecution by third parties for the purposes of the law governing asylum does not lie solely in the mere claim of a state to a monopoly on the legitimate use of force but only in its - fundamental - realization. If the guarantee of asylum is to offer protection against a specific type of use of persecutional governmental power, (see BVerfGE 9, 174 [180] and 1.c above) this contains the converse conclusion to the effect that protection against the results of anarchic circumstances or the dissolution of government power is not promised by Article 16.2 sentence 2 of the Basic Law.

3. a) Acts of governmental self-defence may also provide grounds for a right to asylum. It is not compatible with the guarantee of asylum of the Basic Law to generally deny asylum to a person who has been involved in political activity against his state and is for that reason persecuted by that state. If the area protected by the fundamental right to asylum is defined with reference to the characteristics of refugees of the Geneva Convention, the characteristic "due to their political conviction" encompasses not only political views as such and the manifestation thereof but in principle also the corresponding activity.

   This follows from the legislative tradition of the right to asylum and the historical development of Article 16.2 sentence 2 of the Basic Law. Prohibitions of extradition have traditionally constituted the core of the right to asylum; but since the 19th century they have also applied in favour of "political criminals," i.e., in favour of foreigners who have engaged in activities based on their oppositional political convictions and in so doing violated criminal laws used by their home government to defend its fundamental political order and territorial integrity. According to the German Extradition Act (Deutsches Auslieferungsgesetz - DAG) of 23 December 1929, foreigners who are to be prosecuted for a political crime may not be extradited, except in cases where they were guilty of a premeditated crime against life that did not take place in open combat (s. 3 of the German Extradition Act [*Deutsches Auslieferungsgesetz* - DAG], Reich Law Gazette [*Reichsgesetzblatt* - RGBl.] 1929 I p. 239; see s. 6 Act on International Judicial Assistance in Criminal Matters [*Gesetz über die internationale Rechtshilfe in Strafsachen* - öö] of 23 December 1982, Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 2071).

   The Parliamentary Council discussed the fundamental right to asylum against the background of this prohibition of extradition, which reflected practice with respect to asylum as generally exercised since the 19th century. In this context, the Parliamentary Council of course assumed that political criminals also had in principle a right to asylum to the extent that they were to be afforded protection against extradition (JöR 1, 1951, pp.165 et seq.; Parliamentary Council, 18th and 44th sessions of the Main Committee, Stenographic Record pp. 217 and 218, 582 et seq).

The traditional prohibition of extradition of political criminals may differ in principle today from asylum for political persecutees in terms of purpose, prerequisites and legal consequences (see BVerfGE 60, 348 [359]; 64, 46 [62 and 63]), but the substantive connection between the right to asylum and non-extradition of political criminals remains intact.

b) If therefore political conviction manifested in the form of action lies within the area of protection of the fundamental right to asylum, governmental prosecution of acts that in and of themselves represent a manifestation of political conviction - in particular separatist and revolutionary political activities - may in principle constitute political persecution and to be sure even if the state acts thereby in defense of the legally protected interest of its own existence or political identity. Special justification based on specific criteria for demarcation is required to exclude such prosecution from the area of political persecution.

Protection of legal interests is initially such a criterion. Political persecution is accordingly not present in principle when a state prosecutes criminal offences - even if they are also politically motivated especially those that are directed against the legal interests of its citizens: the prosecution of criminal offences is in that sense not "political" persecution.

All further objective circumstances must also be considered. Thus the prosecution of acts that are directed against political legal interests nevertheless does not represent political persecution if it is possible to conclude from such circumstances that such prosecution is not aimed at the political conviction manifested by the offence as such, but at an additional criminal component that is expressed in such acts as is commonly punishable in governmental practice. This is the case, for example, when criminal offences are prosecuted in an especially critical state of tension that goes beyond a threat to the entity of the state or the existing political order and immediately threatens the security of the populace in order to protect - in an objectively comprehensible manner - the private legal interests of the citizenry, but not, however, to punish the expression or manifestation of a political conviction. This can be the case if the expression or manifestation of a political conviction occurs in a situation of extreme uncertainty due to terrorist activities in such a demonstrative manner - which is to say without appropriate clear and credible dissociation from such activities - that they must be understood by the public precisely to constitute support for terrorism. Accordingly, the expression or manifestation of critical - and subversive - political convictions as such remains within the area of protection of the right to asylum.

However, the prosecution of criminal offences that does not represent political persecution according to the above may mutate into political persecution, namely, if objective circumstances make it possible to conclude that the party affected is nevertheless being persecuted because of a characteristic that is relevant for the purposes of asylum. This is to be suspected in particular if he suffers from treatment that is harsher than is usual in the case of prosecution of similar - non-political - criminal offences of comparable severity in the prosecuting state.

c) There is another limit to the prospects of asylum for political criminals whenever - notwithstanding the neutrality of the right to asylum as regards political convictions - the actions of an asylum seeker are in principle disapproved of by the Federal Republic of Germany in agreement with the international legal order it supports. The Parliamentary Council had already agreed that certain severe breaches of the public peace are also not to be tolerated under the law governing the right to asylum; reference was made in this context to the "assassination clause" of established extradition law and s. 3.3 of the German Extradition Act of 1929 (see Parliamentary Council, Delegate Dr. Schmid at the 4th session of the meeting of the Committee on Basic Issues of 23 September 1948, Stenographic Record p. 37).

The above limit is exceeded if in manifesting his political convictions an asylum seeker has made use of terrorist means, in particular therefore if the asylum seeker has made use of weapons that constitute a danger to the public or made attacks on the life of innocent parties. Persecution of political enemies is a ground for asylum, but not a defense against terrorism. Repressive or preventive measures that the state takes to defend against terrorism do not constitute political persecution for the purposes of legislation governing asylum if they are directed against active terrorists, accessories within the meaning of criminal law or those who involve themselves in preparations for terrorist activities beforehand without themselves participating in such activities. If, however, other circumstances - such as, for example, the special intensity of the acts of prosecution - make it possible to conclude that the party affected is nevertheless being persecuted because of a characteristic that is relevant for the purposes of asylum or if the measures taken by the state extend beyond the designated class of persons who, for example, advocate separatist or other political goals but do not, or only under coercion, support terrorist activities, political persecution that is relevant for the purposes of asylum when measured against the standards elaborated above (under b) may be present. This applies in particular for actions taken in connection with mere counter-terrorism that may to be sure be meant to combat terrorism and the environment actively supporting it but are intended - in response to the acts of terrorism - to subject the civilian population that is not immediately involved in the ongoing conflict to the pressure of brute force.

4. a) If effective territorial control by the state in the sense of effective sovereign superiority is a prerequisite for persecution by or attributable to a state, the possibility of political persecution does not exist as long as the state assumes only the role of a party that is engaged militarily in an ongoing civil war in a disputed territory but no longer exists as an effective overarching peacekeeping power. Measures taken in that territory by a state that has become a party to a civil war do not therefore constitute political persecution for the purposes of the law governing asylum if and to the extent that they exhibit a typically military character and serve to regain territory over which, although to be sure *de jure* (still) part of that state's national territory, territorial control has been de facto lost to the other forces against which combat is waged. In such situations, combat against the opposing side in a civil war by governmental forces does not generally appear to constitute political persecution. The situation is of course different if the governmental forces wage combat in a manner intended to achieve physical annihilation

of persons on the opposing side or attributed to that side and selected on the basis of criteria relevant for the purposes of asylum although such persons no longer want to or cannot offer resistance or do not or no longer want to participate in military activities, especially if the acts of the governmental forces mutate into deliberate physical annihilation or destruction of the ethnic, cultural or religious identity of the entire insurgent portion of the population.

If, on the other hand, the state can assert its basic territorial control or - despite an ongoing civil war - regain it in specific areas, the possibility of political persecution for the purposes of asylum continues to obtain or occurs anew due to its position of superiority.

b) In addition to what is referred to as a situation of open civil war, guerilla warfare has become more common in recent decades. Its peculiarity lies in its asymmetry, in that insurgents remain in hiding in order to offer no exposure to attack but gradually erode the state's monopoly on the use of force. If this results in a sustained and not merely temporary challenge to the state's territorial control, an intermediate situation occurs in which the state's powers of protection and persecution remain to be sure partially intact, but have to compete with stronger or superior opposing forces. The state's peaceful order is thereby in principle suspended. Such a situation exists when terrorist attacks spread and are repeatedly directed against state security forces and, to compel support, against the perpetrators' own population group and these attacks overburden the state in such a manner that the conventional means of defense of police and criminal law no longer suffice such that the state must indeed react with military and martial means and will as a result not be able to provide reliable protection for the life, freedom and property of its citizens in the foreseeable future.

When such a crisis situation occurs, the state finds itself in a situation comparable to that of open civil war as long as such circumstances prevail: it increasingly loses the initiative as the overarching and effective peacekeeping power. Its actions therefore lose in that regard the character of persecution in terms of their relevance under legislation pertaining to asylum even if they are - which is not seldomly the case - in violation of international law and in particular contravene the Geneva Red Cross Conventions of 1949 and the Additional Protocols of 1977.

However, political persecution is also present in such special situations if the actions of state security forces in the sense indicated above (4.a) go beyond measures to combat the opposing side in the civil war for the purposes of restoring the peaceful order of the state.

5. A person who is affected only by regional political persecution is not to be considered to be persecuted for political reasons within the meaning of Article 16.2 sentence 2 of the Basic Law unless such regional persecution puts him in a hopeless situation throughout the country. This is the case if he cannot find reasonable refuge in other parts of his home country (domestic refuge alternative).

a) As has been shown, the right to asylum is based on the relationship between the persecutee and the state of which he is a citizen. Only this state can in principle come into question as the agent of persecution (see 1.b above). The home country of the persecutee is also decisive in terms of regional considerations: Only those who are defenceless throughout their home country as a result of political persecution and must therefore seek protection in another country have a right to asylum within the meaning of Article 16.2 sentence 2 of the Basic Law (see BVerwG, JZ 1984, p. 294; BVerwG, Buchholz 402.25 s. 1 of the Asylum Procedure Act no. 72).

It may, when considering states of European or North American character, the entire territory of which is subject to a single cultural and legal order, surely be difficult to imagine that the same state that is itself actively involved in persecution in one part of the country would not only not disturb those affected in another part of the country but would even protect them against persecution by others in that part of the country. In more than a few countries, the state presents two or multiple sides; it pursues different goals for different regions and establishes or tolerates various cultural or legal orders. This can be seen in the case of the present proceedings. When governmental leadership is of the opinion that its likely to be possible to successfully repel a separatist movement in one part of the country only through the use of means that can be considered to constitute political persecution, the use of these means is then naturally not required in other parts of the country in which such aspirations do not exist.

As regards the right to asylum, it follows from this phenomenon of the state with multiple facets that not necessarily everyone who is exposed, directly or indirectly, to prosecution by a state in one part of the country will require protection in another country and is therefore in a situation of need that would justify the granting of asylum. Those individuals can under such circumstances be referred to those parts of their country in which persecution is absent. However, it is necessary to take into account in this case that this state with multiple facets is also one and the same state. In examining the question as to whether a person can move to parts of the country in which persecution is absent, this circumstance may not be ignored.

b) The subsidiarity of asylum in another country to the guarantee of protection by one's own state is also reflected in international refugee law. According to Article 1.A no. 2 of the Geneva Refugee Convention, only persons who are unable to avail themselves of the protection of the country of their nationality or who because of a well-founded fear of prosecution are unwilling to avail themselves of that protection, are refugees. Persecutees must therefore first turn to the country of their nationality before seeking protection in another country (see Nehemiah Robinson, Convention Relating to the Status of Refugees - Its History, Contents and Interpretation, 1953, p. 46).

This idea is pursued in various bodies of international law: Article 1 no. 2 of the Convention of the Organisation for African Unity (OAU) establishes as a prerequisite for recognition of refugee status in the case of prosecution that is only regional, that such persecution be the compelling reason for leaving one's own country to seek refuge

in another country (Association for the Study of the World Refugee Problem Bulletin, 1970, p. 86 [87]; see Goodwin-Gill, The Refugee in International Law, 1983, pp. 26 et seq., 42).

The institution of granting asylum under international law also had no other content when the Basic Law came into being. If it is assumed, however, that Article 16.2 sentence 2 of the Basic Law was intended to elevate that which at the time was understood as asylum or the granting of asylum to a legal right, (see BVerfGE 74, 51 [57, 63]; 76, 143 [156 and 157]) the fundamental right to granting asylum under the Basic Law is not in any case, in the absence of special reasons for so doing, to be construed more generously than international refugee law under the Geneva Convention.

c) An alternative possibility within the country is considered to exist in other parts of a country if the party affected would not put himself in a hopeless situation there. This presupposes that asylum seekers are sufficiently safe from political persecution in the areas that come into question and are in any case not threatened by any disadvantages and dangers that are equivalent in terms of degree and severity to the impairment of legal rights for political reasons that is relevant for the purposes of asylum (see BVerfGE 54, 341 [357]) if such existential endangerment did not exist at the place of origin.

6. The right to asylum under Article 16.2 sentence 2 of the Basic Law is based, as the Senate emphasized, on the idea of refuge, that is to say on the causal relationship between persecution, flight and asylum (see BVerfGE 74, 51 [60]).

On the basis of the fundamental right's underlying legislative concept in which this is reflected, a person who due to political persecution is compelled to leave his country and seek protection and refuge in another country and for that reason comes to the Federal Republic of Germany will typically have the right to asylum. The case of persons who enter the country without being persecuted and nevertheless desire asylum here and justify this on the basis of circumstances that develop while in this country or the future development of which that person fears is atypical, albeit frequent (on what are referred to as circumstances occurring after flight, see op. cit., pp. 64 et seq.).

According to this legislative concept for the fundamental right to asylum, different standards apply for the purposes of assessment of whether an asylum seeker is a political persecutee within the meaning of Article 16.2 sentence 2 of the Basic Law, depending upon whether that person has left his home country to flee the actual occurrence or the immediate threat of political persecution or has come to the Federal Republic of Germany without being persecuted.

a) In the event retrospective examination shows that the asylum seeker fled country wide political persecution, recognition of the right to asylum will regularly come into consideration. In the event that the danger of persecution is found to be only regional, it will also be necessary to establish that the asylum seeker would have been in a hopeless situation throughout the entire country (see 5.c above). This is the case, as has been shown, if the asylum seeker would not have been sufficiently safe from political persecution in other parts of the country or would have been faced with the threat of finding himself in a hopeless situation for reasons other than those relevant

for the purposes of asylum by moving there. As regards safety from political persecution in other parts of the country, the "reduced" standard of probability is therefore to be applied - if one proceeds on the basis of the two standards of probability that have been established in practice by the administrative courts - for the purposes of retrospective evaluation. This also takes into account the considerations presented above (5.a) with respect to states presenting multiple facets. Relative improvement also as regards disadvantages and dangers that have nothing to do with persecution and would possibly have been associated with a move within the home country is not required. The party affected is accordingly considered to have left the country without being persecuted (see b below) if it can be established that he would have been safe from political persecution in other parts of the country and it cannot be established that he would have been threatened with the disadvantages and dangers mentioned in those parts of the country.

If, on the other hand, it is certain that the asylum seeker has left the country due to the occurrence or immediate threat of political persecution and that he cannot be reasonably expected to have moved within his home country as described above, he has a right to asylum pursuant to Article 16.2 sentence 2 of the Basic Law, unless he can again find protection in his own country. An application for asylum must therefore be successful if the circumstances that caused him to flee at the time of his decision persist without any significant change. If the danger of persecution has ceased to exist in the meantime, what is important is whether it can be expected to recur; recognition of the right to asylum is not required pursuant to Article 16.2 sentence 2 of the Basic Law if the asylum seeker can be sufficiently safe from recurrent persecution (see BVerfGE 54, 341 [360]). The same applies if - in the case of persistent, regionally limited political persecution - a reasonable domestic alternative possibility for the refuge presents itself after arrival in the sphere of operation of the Basic Law. This presupposes that the person having fled prosecution in these parts of the country is sufficiently safe not only from political persecution but also from those disadvantages and dangers that made it unreasonable to expect that person to change his location when he fled and that person is also not threatened by any other disadvantages and dangers that would put him in a hopeless situation.

b) However, if the asylum seeker has left his home country without being persecuted, his application for asylum pursuant to Article 16.2 sentence 2 of the Basic Law can be successful only if he is threatened with political persecution due to circumstances occurring after his flight that are, when measured against the standards of the decision of 26 November 1986 (BVerfGE 74, 51 [64 et seq.]), considerable. If this danger poses a threat in only part of the home country, the party affected may be referred to areas in which he would be sufficiently safe from political persecution unless there is a threat of other disadvantages and dangers that must be considered unreasonable on the basis of the principles presented in 5.c) above.

7. If a persecutee cannot claim asylum pursuant to Article 16.2 sentence 2 of the Basic Law, he need not be without protection. The Federal Republic of Germany, like other countries in Western Europe, allows refugees who are forced to flee because of civil war or severe domestic disorder to remain in the country (referred to as "*de-facto* refugees") for humanitarian reasons

although the conditions for recognition as political refugees are not present. In addition, s. 14.1 of the Aliens Act (Ausländergesetz - AuslG), Article 33 of the Geneva Refugee Convention and Article 3 of the European Human Rights Convention guarantee protection against expulsion and deportation if the life or freedom of a person is threatened due to characteristics that make that person different from others or if a concrete danger of inhuman treatment exists.

This humanitarian protection may be regulated through contractual agreements between host countries, including in particular those lying in the vicinity of the respective home countries; in this case, uniform use of the capacity for accommodation of all countries offering protection may be agreed. In addition, the Federal Republic of Germany may work to achieve desistance from acts that are in violation of human rights and inhumane in a foreign state and may adopt measures for the protection of human rights in connection with the human rights pacts of the United Nations and the European Convention on Human Rights.

II.

The judgments under challenge do not satisfy the requirements of Article 16.2 sentence 2 of the Basic Law on the basis of the standards presented.

…

2. Asylum (Third Country Rule), BVerfGE 94, 49

Explanatory Annotation

In this decision the Constitutional Court had to deal with amendments to Article 16a.2, the so-called 'secure third country'-provisions. Amended provisions of the Basic Law are, obviously, also part of the constitutional law. However, because of the somewhat peculiar provision of Article 79.3, which limits constitutional amendments and requires that any such amendment must adhere to the principles contained in Article 1 and 20 of the Basic Law, the German Constitutional Court is in effect in a position to test the constitutionality even of (amendments of) constitutional law. Article 1 contains a strong emphasis on the importance of human dignity and all the subsequent fundamental rights, which in essence means that at least the core of these rights is not amendable. However, that does not necessarily mean that the right to asylum could not be touched or even that it must remain constitutionally protected. It could only mean that the core of the right must remain. The new provisions in Article 16a of the Basic Law, with their reliance on safe third countries in conjunction with the European asylum framework[180], might be less favourable, especially procedurally, but still sufficiently guarantees safe refuge from persecution at home.

180 See supra footnote 72.

Translation of the Asylum - Third-Country Rule Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 94, 49*

Headnotes:

1. a) With the Act Amending the Basic Law (Gesetz zur Änderung des Grundgesetzes - GGÄndG) of 28 June 1993, the amending legislature created a basis for the achievement of an overall European system for the protection of the rights of refugees that would distribute the burden among the states participating in such a system.

   b) The amending legislature is also subject to no legal constraints as regards the formulation and modification of fundamental rights as long as the limits of Article 79.3 of the Basic Law are not infringed and prescribes the standard for the Federal Constitutional Court. The fundamental right to asylum is not included in the substantive content of the guarantee provided in Article 1.1 of the Basic Law (Grundgesetz - GG). What the substantive content of that guarantee is and the consequences to be drawn from that content as regards the powers of the German state must be determined independently.

2. Article 16a.2 of the Basic Law restricts the sphere of operation of the fundamental right to asylum, which is still guaranteed under Article 16a.1 of the Basic Law. A person arriving from a safe third country within the meaning of Article 16a.2 sentence 1 of the Basic Law is not in need of the protection of the fundamental right guaranteed under paragraph 1 in the Federal Republic of Germany since that person could have found protection from political persecution in that third country.

3. The respective Member States of the European Communities are by virtue of the Basic Law automatically considered safe third countries.

4. a) Guaranteed application of the Geneva Refugee Convention (GRC) and the European Convention on Human Rights (ECHR), which is required by law (Article 16a.2 sentence 2 of the Basic Law) for designation as a safe third country, presupposes in particular that the state has become a party to the two conventions and that its legal system does not permit deportation of foreigners to states that allegedly practice persecution without first establishing whether such persons are faced with the threat of persecution within the meaning of Article 33 of the GRC or torture or inhuman or degrading punishment within the meaning of Article 3 of the European Human Rights Convention in that country.

   b) The legislature has a certain latitude in the choice of the investigative means it employs to obtain a factual basis for the purposes of designating countries as safe third countries. The assessment of the legislature must be reasonable.

   …

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* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Judgment of the Second Senate of 14 May 1996 on the basis of the oral hearing of 21, 22 and 23 November and 5 December 1995 - 2 BvR 1938, 2315/93 -

Facts:

The constitutional complaints concern exclusion of the possibility of invoking the fundamental right under Article 16a.1 of the Basic Law upon entry from a safe third country, which is governed by Article 16a.2 sentences 1 and 2 of the Basic Law and s. 26a.1 of the Asylum Procedure Act (Asylverfahrensgesetz - AsyVfG) in the version promulgated on 27 July 1993 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 1361, and in that connection also the provision governing immediate enforcement of measures to terminate the stay in the country (Article 16a.2 sentence 3 of the Basic Law and s. 34a of the Asylum Procedure Act).

In response to the constitutional complaints of two persons whose applications for asylum were unsuccessful on the basis of these revisions of what is referred to as the "asylum compromise", the Federal Constitutional Court declared the provisions of the Basic Law and the Asylum Procedure Act cited above incompatible with the Basic Law.

Extract from the Grounds:

…

C.

The constitutional complaints are unfounded. s. 26a of the Asylum Procedure Act in conjunction with s. 18.2 no. 1, s. 31.4, s. 34a.1 and s. 34a.2 of the Asylum Procedure Act and the inclusion of Austria in Appendix I to s. 26a of the Asylum Procedure Act are compatible with the Basic Law. The decisions of the Federal Office (Bundesamt) and Border Protection Office (Grenzschutzamt) under challenge as well as the orders of the administrative courts ultimately provide no reason for objection on constitutional grounds.

I.

With the Act Amending the Basic Law of 28 June 1993, the amending legislature revised the fundamental right to asylum. This revision is, also to the extent that it is more restrictive as compared with the previous character of the fundamental right, to be viewed as a whole and to be taken as such as the basis for the construction and application of the details of the constitutional provision. The Basic Law also affords the amending legislature broad latitude as regards its power and responsibility in connection with the formulation and modification of fundamental rights. The legislature is also subject to no legal constraints as long as the limits of Article 79.3 of the Basic Law are not infringed and prescribes the standard for the Federal Constitutional Court.

With the reform of legislation governing asylum, the amending legislature created a basis for the achievement of an overall European agreement to guarantee refugees protection through an agreement under international law governing jurisdiction for examination of applications for asylum and mutual recognition of decisions regarding asylum in order to distribute the burden

among the states participating in such a system (Article 16a.5 of the Basic Law). Notwithstanding such regulations at the level of international law, the legislature has taken into account the situation resulting from flows of refugees and migrants throughout the world in Article 16a.2 of the Basic Law and as a result departed from the previous approach to solving the problems associated with the accommodation of political refugees exclusively through regulation by national law. The legislature continues to assume that there is a need to afford protection against political persecution, but refers foreigners desiring asylum to the protection they can receive elsewhere in a safe third country.

1. Accordingly, a person arriving from a Member State of the European Communities or another third country in which application of the Convention relating to the Status of Refugees, - GRC - of 28 July 1951 (BGBl. 1953 II p. 560) and the Convention for the Protection of Human Rights and Fundamental Freedoms - ECHR - of 4 November 1950 (BGBl. 1952 II p.953) is ensured, may not pursuant to Article 16a.2 sentence 1 of the Basic Law invoke the fundamental right to asylum guaranteed in paragraph 1 thereof. Third countries outside the European Communities are identified by federal law (Article 16a.2 sentence 2 of the Basic Law).

This clause is, where applicable, subordinate to agreements under international law within the meaning of Article 16a.5 of the Basic Law. ...

2. The concept of safe third countries adopted by the amending legislature restricts the sphere of operation of the fundamental right to asylum, which is still guaranteed under Article 16a.1 of the Basic Law. This approach involves drawing conclusions as regards a foreigner's need for protection from his itinerary: A person arriving from a safe third country within the meaning of Article 16a.2 sentence 1 of the Basic Law is not in need of the protection of the fundamental right guaranteed under paragraph 1 in the Federal Republic of Germany since that person could have found protection from political persecution in that third country. Exclusion from the fundamental right to asylum is not dependent upon whether the foreigner can or should be returned to the third country. No asylum proceedings have taken place. The right to temporary residency granted in anticipation of protection under the fundamental right also does not apply. According to Article 16a.2 sentence 3 of the Basic Law, measures to terminate residency may, by way of inference, be enforced independently of any legal remedy pursued against such measures in the cases covered by sentence 1.

3. The amending legislature considers that protection against political persecution (Article 16a.1 of the Basic Law) is ensured by the provision contained in Article 16a.2 sentence 1 of the Basic Law, if a foreigner desiring protection can find refuge in another country in which the Geneva Refugee Convention is applied and in particular the prohibition of refoulement contained in Article 33 of the GRC is observed. In addition, the European Convention on Human Rights, and in particular its Article 3, must also be applicable in that third country; the Basic Law thereby takes into account the fluid transitions between acts of persecution that are of relevance to the right to asylum and inhuman or degrading punishment or treatment when referring refugees to the possibilities of protection in other countries (see also Article 16a.3 sentence 1 of the Basic Law as well as today's judgment in the proceedings 2 BvR 1507 and 1508/93).

a) The amending legislature has itself defined the Member States of the European Communities as safe third countries in Article 16a.2 sentence 1 of the Basic Law. It follows from the historical development of the legislation as well as from the goal that the amending legislature pursued with the third-country rule that the Member States are automatically safe countries by virtue of the Basic Law.

…

b) Article 16a.2 sentence 2 of the Basic Law empowers the legislature to designate other countries that fulfil the conditions of sentence 1 by a federal law that requires ratification by the Bundesrat. Such designation presupposes that application of the Convention Relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms is ensured in such states.

aa) This can be the case only if the states have become party to the two conventions. Since pursuant to its Article 1 A.2 the Geneva Refugee Convention was originally applicable only to refugees from events occurring before 1 January 1951 and the provision containing this time limit was in effect upon entry into force of Article I.2 of the Protocol Relating to the Status of Refugees of 31 January 1967 (BGBl. 1969 II p. 1294), the states must also have become party to this protocol. Such states must also have accepted the control procedures that are provided for by the conventions and intended to ensure fulfilment of the obligations undertaken upon ratification of the conventions. This applies on the one hand in respect of the duty to cooperate with the Office of the United Nations High Commissioner for Refugees of the United Nations in Article 35 of the GRC. On the other hand, according to Article 25 of the European Human Rights Convention, anyone may address a petition regarding violation of the rights set forth in this convention to the European Commission of Human Rights.

bb) In addition, the institutions of the states must also be bound under the legal orders of such states to apply the conventions. This presupposes that the state may not under its legal system deport a foreigner to a state that allegedly practices persecution without establishing beforehand whether that foreigner is threatened with persecution within the meaning of Article 33 of the GRC or torture or inhuman or degrading punishment or treatment within the meaning of Article 3 of the European Human Rights Convention.

(1) In the context of substantive verification of refugee status, the states must be guided by the requirements of the prohibition of refoulement pursuant to Article 33 of the GFC in conjunction with the definition of the term refugee contained in Article 1 A.2 of the GFC. It is as a rule no longer possible to speak in terms of guaranteed application if groups of individuals are from the very outset not considered refugees on the basis of national law or on the basis of political orders, either because the Geneva Refugee Convention was signed only subject to regional qualification (see Article 1 B GRC and Article I.3 of the Protocol) or because - due to reasons of foreign policy deference, for example - refugees from certain countries are generally not granted refuge.

(2) Exclusion from the fundamental right to asylum that accompanies designation as a safe third country pursuant to Article 16a.2 of the Basic Law does not require that foreigners have access to a review procedure in that third country that essentially corresponds to the German asylum procedure. The legal and actual conditions in the third country must, however, be such that it is actually possible for foreigners seeking protection to petition for protection and thereby initiate an obligation on the part of a competent authority to make a decision in this regard after prior review (see also on this ss. 2.c) and d) of the Resolution of the Ministers of the Member States of the European Communities responsible for immigration on a harmonized approach to questions concerning host third countries of 30 November/1 December 1992, reprinted in ZDWF-Schriftenreihe no. 53 "Article 16a GG und seine Folgen," February 1993, pp. 152 and 153).

The Geneva Refugee Convention does not, however, prescribe a specific procedure for determining refugee status. It is also not possible to ascertain that a specific governmental practice has evolved in that regard that would have to be considered binding pursuant to Article 31.3.b of the Vienna Convention on the Law of Treaties of 23 May 1969 (BGBl. 1985 II p. 926).

For example, the minimum standards for the procedure to determine refugee status adopted in the year 1977 by the Executive Committee of the UNHCR in Conclusion No. 8 (XXVIII) did not become binding under international law. However, the parties to an agreement under international law must generally act in good faith to achieve the purpose of the agreement. They may therefore not evade their duties under the Geneva Refugee Convention through de facto omission of a procedure to verify refugee status, especially since it is possible to determine whether deportation infringes the prohibition of refoulement contained in Article 33 of the GRC only through a procedure that has been in some manner formalized (see Goodwin-Gill, The Refugee in International Law, 1984, p.165 and 166 and 167; Ibid., in: Yearbook of the International Institutions of Humanitarian Law, 1985, 56 [60]; Hannum, Guide to International Human Rights Practice, second edition 1992, p. 221 and 222; see also BVerwGE 7, 333 [334]).

The existence of deadlines for application that deny foreigners access to the procedure if not met do not as such stand in the way of designation of a state as a safe third country. When deadlines for recognition of refugee status have not been met, a duty must in any case exist to determine whether the prohibition of refoulement contained in Article 33 of the GRC precludes such a measure in the specific case prior to deportation, directly or indirectly, to a state that allegedly practices persecution. The same applies if foreigners will no longer have access to a formal procedure in the third country after being returned to that country - for example, in view of the fact that no petition for protection was submitted during the initial stay in the third country and the deadline for submitting the application for that purpose has for that reason elapsed. The purpose of the third-country rule is to refer the parties affected to states that offer protection (see Bundestag document [*Drucksache des Deutschen Bundestages* - BTDrucks] 12/4450, p. 20).

cc) A state that makes provision for a third-country rule (see on this Article 29.2 sentence 2 of the Schengen Implementation Agreement; Article 3.5 of the Dublin Agreement) may also be designated as a safe third country pursuant to Article 16a.2 sentence 2 of the Basic Law. However, the state's legal system must not empower that state to deport foreigners to a country in which they would face the threat of further deportation to the country that allegedly practices persecution without determination of whether the prerequisites pursuant to Article 33 of the GRC and Article 3 of the European Human Rights Convention obtain or corresponding protection is actually guaranteed in that country (i.e., in the "fourth country") by means of a formal procedure. If a state (third country) considers that it has the right to deport refugees to yet another country although these prerequisites are not satisfied in that country, the application of the Geneva Refugee Convention is then not ensured in that third country. Pursuant to Article 33.1 of the GRC, refugees may not be expelled or returned "in any manner whatsoever" across the borders of territories in which they are faced with the threat of persecution. The prohibition of refoulement therefore precludes not only transfer directly to a state that practices persecution but also deportation or return to any country in which a threat exists of further deportation to the state that practices persecution. The expert Kälin explicitly confirmed this at the oral hearing (see also Zimmermann, Das neue Grundrecht auf Asyl [1994], p.171 and 172 with further references).

dd) The legislature is given independent responsibility for designating states as safe third countries through legislation that lends content to the fundamental right in accordance with the criteria set forth for this purpose in Article 16a.2 sentence 1 of the Basic Law. As regards the actual determinations of fact required to answer the question as to whether the application of the two conventions is ensured, the legislature may regularly assume, in the case of a state that because of its legal system and general practice guarantees in principle compliance of its administration with the rule of law, that the institutions of that state will respect existing law and therefore also the two conventions. This is not the case only if regular failure to respect the two conventions - either in general or with respect to refugees from certain countries - must be obvious to the legislature.

The legislature is afforded a certain latitude in the choice of the investigative means it employs as regards its observations and closer investigation occasioned by justified reservations. The legislature remains within these bounds when it makes its decision on the basis of official information from national and - to the extent accessible - international institutions and takes into account investigative means otherwise at its disposal.

The legislature enjoys discretionary and decision-making latitude when evaluating the factual basis obtained in this manner against the standard presented immediately above for ensuring the application of the two conventions. The decision of the legislature must be reasonable.

…

5. Persons who enter the country from a safe third country within the meaning of Article 16a.2 of the Basic Law may not invoke paragraph 1 thereof. Such foreigners are therefore excluded from the sphere of operation of the fundamental right to asylum (see 2. above).

Article 16a.2 sentence 1 of the Basic Law excludes, by virtue of its wording, invocation of the fundamental right to asylum under Article 16a.1 of the Basic Law. If a foreigner is to be sent back or returned to a safe third country, the substantive rights upon which a foreigner can otherwise rely to contest deportation (in particular ss. 51.1 and 53 of the Aliens Act (Ausländergesetz - AuslG)) do not come into consideration for that person due to the substantive reach of Article 16a.2 of the Basic Law unless the concrete situations of danger described below (see e below) exist in the third country. On the other hand, the humanitarian and personal reasons that speak against enforcement of a deportation order and may lead to issuance of a toleration permit pursuant to s. 55 of the Aliens Act, are not affected.

a) The legislative content of Article 16a.2 of the Basic Law derives from the notion of legislative confirmation of safety in the third country that is intended by this provision of the Basic Law. The Member States of the European Communities are considered safe by virtue of the decision embodied in the Basic Law. Other countries may be designated as safe third countries by the legislature (Article 16a.2 sentence 2 of the Basic Law) on the basis of findings to the effect that application of the Geneva Refugee Convention and the European Convention on Human Rights is ensured.

…

II.

The revision of the fundamental right to asylum in Article 16a of the Basic Law does not violate the limits of Article 79.3 of the Basic Law. The amending legislature has also complied with the requirements of Article 79.1 sentence 1 of the Basic Law.

1. a) Article 79.3 of the Basic Law prohibits amendments to the Basic Law that affect the principles laid down in Articles 1 and 20 of the Basic Law. This includes not only the principle of respect for and protection of human dignity anchored in Article 1.1 of the Basic Law. The acknowledgement of inviolable and inalienable human rights as the basis of the human community, peace and justice contained in Article 1.2 of the Basic Law also becomes important in that regard; in conjunction with the reference to the following fundamental rights contained in Article 1.3 of the Basic Law, the guarantees of these rights are in principle immune to restriction since they are indispensable to the maintenance of an order in compliance with Articles 1.1 and 1.2 of the Basic Law. The fundamental elements of the principles of the rule of law and the social state expressed in Articles 20.1 and 20.3 of the Basic Law must also be respected. For all that, Article 79.3 of the Basic Law requires, however, only that the principles mentioned not be affected. It does not, on the other hand, prevent the legislature from adopting amendments to modify those aspects of these principles embodied in positive law for appropriate reasons (see BVerfGE 84, 90 [120 and 121]).

b) Like every provision of the Basic Law, the fundamental right to asylum lies in principle at the disposal of the legislature, which may amend the Basic Law (Article 79.1 sentence 1 and 79.2 of the Basic Law). The limit imposed upon the amending legislature by Article 79.3 of the Basic Law, according to which amendment of the principles laid down in Articles 1 and 20 of the Basic Law is inadmissible, is not violated by the fact that foreigners are not afforded protection against political persecution by a guarantee in the form of a fundamental right. The Federal Constitutional Court, has, however, stated in connection with the definition of the term "persons persecuted on political grounds" in Article 16.2 sentence 2 of the Basic Law (old version) that the fundamental right to asylum is based on the conviction, defined by respect for the inviolability of human dignity, to the effect that no state has the right to threaten or violate the body, life or personal freedom of an individual for reasons that lie exclusively in that individual's political convictions, fundamental choice of religion or characteristics beyond that individual's control (see BVerfGE 80, 315 [333]; see also BVerfGE 54, 341 [357]; 76, 143 [157 and 158]).

It cannot, however, be inferred from this that the fundamental right to asylum is included in the substantive content of the guarantee of Article 1.1 of the Basic Law. What the substantive content of that guarantee is and the consequences to be drawn from its content for the powers of the German state must be determined independently.

If therefore the amending legislature is not prevented from suspending the fundamental right to asylum as such, it follows implicitly that Article 16a.2 of the Basic Law, sentences 1 and 2 which retracts the sphere of operation of the fundamental right from the level of the individual, paragraph 3 which restricts the substantive content of the guarantee in respect of procedure, paragraph 2 sentence 3 and paragraph 4 which reformulates the guarantee of legal recourse of Article 19.4 of the Basic Law and finally paragraph 5 which creates a basis for pan-European regulation of protection of refugees through agreements under international law, remain within the limits of a permissible constitutional amendment.

c) Article 16a.2 sentence 3 of the Basic Law contains a special clause pertaining to the procedure for termination of the stay in the country in cases of entry from a safe third country. This clause modifies Article 19.4 of the Basic Law. The question as to whether the principles set forth in Article 20 of the Basic Law make the principle of personal recourse to the courts under the rule of law, which is concretely formulated in Article 19.4 of the Basic Law, inviolate (see BVerfGE 30, 1 [157 et seq.]) and can remain open. Article 16a.2 sentence 3 of the Basic Law does not in any case infringe such a principle. This applies in particular since foreigners are to be sure returned immediately to the safe third country without prior review by a further controlling instance, but this measure is preceded by legal confirmation of the guarantee of application of the Geneva Refugee Convention and the European Convention on Human Rights in the third country.

2. The requirement of Article 79.1 sentence 1 of the Basic Law to the effect that a constitutional amendment - in this case modification of Article 19.4 of the Basic Law by Article 16a.2 sentence 3 of the Basic Law - must be reflected in the text of the Basic Law itself, is satisfied through insertion of Article 16a.2 sentence 3 of the Basic Law into the text of the Basic Law.

…

XVIII. The Right to Vote – Article 38 of the Basic Law

Some General Comments

Article 38 of the Basic Law covers the right to vote by stipulating how the Federal Parliament is to be elected, namely in general, direct, free, equal, and secret elections. Article 38 is not part of the catalog of rights listed in Articles 1 to 19 and in that sense not part of, to use the analogy to the USA, the German bill of rights. However, Article 93.1(4a), which deals with the adjudicatory powers of the German Constitutional Court and specifically its power to hear constitutional complaints from individuals, includes certain other rights stipulated in the Basic Law as also being rights pursuable by a constitutional complaint and hence equal to the rights as contained in the first 19 articles of the Basic Law. The right to vote in Article 38 of the Basic Law is one of these rights. The others are the right to resistance in Article 20.4, rights pertaining to citizenship and access to the civil service in Article 33, the judicial rights to one's lawful judge (Article 101.1), fair trial and *nulla poena sine lege* (Article 103) and *habeas corpus* (Article 104).

Article 38 has also played a pivotal role as a segue for constitutional complaints regarding the reach of the powers of the European Union. The right to vote in Article 38 of the Basic Law is elevated by Article 93.1(4a) of the Basic Law to the same status that the fundamental rights listed in the catalog of Articles 1-19 of the Basic Law possess because all of these rights are subjective rights, i.e. they are procedurally secured by the constitutional complaint procedure to the Constitutional Court. The Constitutional Court has consistently held that the right to vote in Article 38 of the Basic Law not only protects the voting act in the narrow sense, e.g. the secrecy of the ballot, the generality of voting eligibility and the equality of the vote, but that the right to vote also protects the role of the institution whose constitution is determined by the elections. As the Constitutional Court has consistently held, that means that the right to vote in Article 38 of the Basic Law can be violated if the Parliament loses core powers. This interpretation of Article 38 of the Basic Law opened the pathway for citizens to challenge the amendment to the European Union Treaties and European Union acts using the constitutional complaint procedure and thus allowed the Constitutional Court to play a major role in determining the role Germany can play in European integration and in shaping the European Union.[181]

181 See also supra Chapter XXIV.2 Identity Review.

"Exclusion from Voting Rights under Law Governing Custodianship and Care for Adults"
BVerfG, 29.1.2019, 2 BvC 62/14, http://www.bverfg.de/e/cs20190129_2bvc006214en.html

Explanatory Annotation

The case dealt with the statutory exclusion under the Federal Electoral Act from the right to vote for two groups of people. The first group are people who are under permanent full guardianship as stipulated in § 1896 of the German Civil Code (GCC) because, for reason of a mental illness or a physical, mental, or psychological handicap, such a person cannot take care of his or her affairs. Under this heading, more than 81,000 persons were affected by the exclusion from voting in the 2013 federal elections.[182] The second group are people confined to a psychiatric hospital after having been found to be incapable of criminal responsibility under the relevant provisions of the Federal Criminal Code (§§ 20, 63).

For the first group, the Constitutional Court considered the exclusion unconstitutional because logical defects demonstrated that the exclusion of this group of people is discriminatory. The group of people excluded under § 1896 German Civil Code (GCC) includes only those for who a custodian has been appointed. It does not include people whose condition is exactly the same but who, while they were still able to, provided sufficient power of attorney to a family member or third party to effectively take on the same tasks for them. In other words, the issue was not that persons incapable of taking care of their affairs are excluded from voting but that the discriminatory effect with which that result was achieved.[183] Also, and for the same reason, the Court regarded the exclusion from voting as a discrimination based on disability prohibited by Article 3.3(2) of the Basic Law.[184]

The Constitutional Court took a similar approach with the same result concerning the exclusion from the right to vote for the second group of people. For this group, the Court pointed to the fact that the defects required at the time of the perpetration of a crime to escape culpability have nothing to do with the ability or not to take part in elections now and that the same is true for the various psychiatric pathologies that justify being confined to a mental institution.[185] The Court also pointed to the logical and therefore discriminatory contradiction that under the challenged law those found to be incapable of criminal culpability for defects at the time of the commission of the crime who were not confined to a mental institution would not lose their vote.[186]

It is also interesting to note that the Constitutional Court gave significant regard to scientific studies that had been conducted in Germany.[187] One interesting aspect brought to light by this study was that the number of people under permanent guardianship in Germany varies greatly

182 BVerfG, 29.1.2019, 2 BvC 62/14, http://www.bverfg.de/e/cs20190129_2bvc006214en.html, para. 106.

183 Id. at para. 102 et seq.

184 Id. at para. 111.

185 Id. at para. 116 et seq.

186 Id. at para. 131.

187 Bundesministerium für Arbeit und Soziales (Federal Ministry for Labour and Social Affairs), Studie zum aktiven und passiven Wahlrecht von Menschen mit Behinderung (Research Report on the active and passive right to vote), Forschungsbericht 470, Juli 2016, available at https://www.bmas.de/DE/Service/Medien/Publikationen/Forschungsberichte/Forschungsberichte-Teilhabe/fb470-wahlrecht.html (last accessed 18.8.2019).

between states, with Bavaria placing 26 times more people per 100,000 of the population into permanent guardianship than the city-state of Bremen.[188] Secondly, the Court also took into account the international legal situation under various international treaties applicable to the right to vote[189], namely the International Covenant on Civil and Political Rights (Article 25), the European Convention on Human Rights (Article 3 of Protocol No. 1) and the Convention on the Rights of Persons with Disabilities (Article 29). The Constitutional Court took issue and disagreed with previous determinations of the Committee on the Rights of Persons with Disabilities according to which all exclusions of disabled persons violate that Convention.[190] This discussion is a further example of the importance attributed by the Constitutional Court to international law covering human rights protection but it also shows that the Court is not willing to follow findings made by institutions created under those treaties just because such findings exist if they are regarded as unpersuasive and if the institution created to interpret the provisions of the treaty, here the CRDP-Commission, is regarded as not having been granted the power to make determinative findings.

Translation of the decision "Exclusion from Voting Rights", BVerfG, 29.1.2019, 2 BvC 62/14, http://www.bverfg.de/e/cs20190129_2bvc006214en.html

Headnotes:

1. The exclusion from voting rights does not rule out the ability to initiate electoral complaint proceedings (*Wahlprüfungsverfahren*) pursuant to § 48(1) of the Federal Constitutional Court Act if the complaint concerns this exclusion.

2. Where the complainant only asserts a violation of subjective rights in electoral complaint proceedings, it is not necessary to also demonstrate that electoral irregularities impacted the allocation of seats in Parliament (*Mandatsrelevanz*).

3. The exclusion from the right to vote may be justified under constitutional law if a certain group of persons must be considered not sufficiently capable of participating in the communication process between the people and state organs.

4. § 13 no. 2 of the Federal Elections Act fails to satisfy the constitutional requirements regarding statutory categorisation, since the group of persons affected by the exclusion from voting rights is determined in a manner that runs counter to the right to equality without sufficient factual reasons.

5. § 13 no. 3 of the Federal Elections Act is not suitable for identifying persons who are generally incapable of participating in the democratic communication process.

188 See Research Report 470, p. 39 and 40 (with a detailed table of numbers per federal state).

189 BVerfG, 29.1.2019, 2 BvC 62/14, http://www.bverfg.de/e/cs20190129_2bvc006214en.html, paras. 61 et seq. (last accessed 6.9.2019)

190 Id at paras. 75-77 with further references to the jurisprudence of the CRPD-Committee.

Facts:

A.

I.

[Excerpt from Press Release no. 13/2019 of 21 February 2019]

§ 13 no. 2 of the Federal Elections Act (*Bundeswahlgesetz* - BWahlG) provides for the exclusion from voting rights of persons who are placed under full guardianship in cases where guardianship is not merely temporary following a preliminary injunction.

§ 13 no. 3 BWahlG excludes persons from exercising the right to vote who are confined in a psychiatric hospital pursuant to § 63 of the Criminal Code (*Strafgesetzbuch* - StGB), after having committed an offence in a state in which they were exempt from criminal responsibility within the meaning of § 20 StGB. Complainants nos. 1, 2 and 4 to 8 partly belong to the group of persons affected by § 13 no. 2 BWahlG, and partly to the group affected by § 13 no. 3 BWahlG, and, based on this fact, were not allowed to participate in the elections to the 18th German *Bundestag* on 22 September 2013. Following an unsuccessful complaint against the validity of the election lodged with the German *Bundestag*, they challenge their exclusion from voting rights in the electoral complaint (*Wahlprüfungsbeschwerde*) under review here, claiming a violation of the principle of universal suffrage (*Grundsatz der Allgemeinheit der Wahl*) under Art. 38(1) first sentence of the Basic Law (*Grundgesetz* - GG) and the prohibition of disadvantaging under Art. 3(3) second sentence GG.

[End of excerpt]

B.

In respect of complainants nos. 1, 2 and 4 to 8, the electoral complaint is admissible. In respect of complainant no. 3, however, it is inadmissible. **[24]**

I.

The Federal Constitutional Court's competence for complaints against decisions of the *Bundestag* in electoral complaint proceedings follows from Art. 93(1) no. 5 in conjunction with Art. 41(2) and (3) GG, § 18 of the Law on the Scrutiny of Elections (*Wahlprüfungsgesetz* - WahlPrüfG) and § 48 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG). […] **[25]**

In this respect, the Federal Constitutional Court is also competent to decide on the complainants' application to declare § 13 nos. 2 and 3 BWahlG void. In the context of electoral complaints, the Court not only reviews whether the competent electoral organs and the German *Bundestag* observed federal election law but also whether federal election law is compatible with the Constitution (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* - BVerfGE 16, 130 <135 and 136>; 121, 266 <295>; 123, 39 <68>; 132, 39 <47 para. 22>). **[26]**

II.

Complainants nos. 1, 2 and 4 to 8 have legal ability to lodge a complaint despite their exclusion from voting. According to the wording of § 48(1) BVerfGG, only "individuals who are entitled to vote" may lodge an electoral complaint. However, this does not rule out the ability to lodge a complaint if the complaint concerns precisely the entitlement to vote, given that a review of voting rights in terms of substantive law would otherwise not be possible at all. Therefore, it must be presumed that the complainants are entitled to vote when assessing the admissibility of such complaints (cf. BVerfGE 132, 39 <44 para. 12, 46 para. 20>). The ability of complainant no. 3 to lodge a complaint is not in doubt, given that he was entitled to vote in the elections to the 18th German *Bundestag*. **[27]**

IV.

The electoral complaint has not become moot on the grounds that the 18th parliamentary term has ended. **[35]**

[…] **[36-38]**

C.

To the extent that the electoral complaint is admissible, it is well-founded. The exclusion from voting rights pursuant to § 13 nos. 2 and 3 BWahlG violates the principle of universal suffrage under Art. 38(1) first sentence GG and the prohibition of disadvantaging on the basis of disability under Art. 3(3) second sentence GG. Since § 13 nos. 2 and 3 BWahlG are unconstitutional, the complainants' exclusion from voting based on these provisions violates their rights. **[39]**

I.

Specific constitutional requirements relating to the permissibility of statutory exclusions from voting rights follow from the principle of universal suffrage under Art. 38(1) first sentence GG (see 1.) and the prohibition of disadvantaging on the basis of disability under Art. 3(3) second sentence GG (see 2.). These requirements are in conformity with the obligations of the Federal Republic of Germany under international and European law (see 3.). **[40]**

1. The principle of universal suffrage guarantees all citizens the right to vote and to stand for elections (see a). The legislature can only exercise the mandate, conferred on it in Art. 38(3) GG, to shape [the electoral system] in a way that restricts the principle of universal suffrage if there are reasons that are recognised as legitimate under the Constitution and that have at least the same weight as the principle of universal suffrage. In this respect, it is entitled to simplify and categorise (see b). **[41]**

   a) Like the principle of equal suffrage (*Grundsatz der Gleichheit der Wahl*), the principle of universal suffrage guarantees equality of citizens, as required by the principle of democracy, with regard to political self-determination (cf. BVerfGE 99, 1 <13>; 132, 39 <47 para. 24>). Their equal treatment in respect of their ability to vote and to

stand for elections is an essential pillar of the state order (cf. BVerfGE 6, 84 <91>; 11, 351 <360>; 132, 39 <47 para. 24>). In its positive dimension, the principle of universal suffrage guarantees the entitlement of all citizens to vote and to stand for elections (cf. BVerfGE 36, 139 <141>; 58, 202 <205>; 132, 39 <47 para. 24>). It requires that anyone can generally exercise their right to vote in as equal a manner as possible (cf. BVerfGE 58, 202 <205>; 99, 69 <77 and 78>). In its negative dimension, it prohibits the unjustified exclusion from participating in elections of individual citizens (cf. BVerfGE 36, 139 <141>; 58, 202 <205>) as well as the exclusion of certain groups for political, economic or social reasons (cf. BVerfGE 15, 165 <166 and 167>; 36, 139 <141>; 58, 202 <205>). Like the principle of equal suffrage, the principle of universal suffrage must be understood as requiring strict and formal equality regarding eligibility for elections to the German *Bundestag* (cf. BVerfGE 28, 220 <225>; 36, 139 <141>; 129, 300 <319>; 132, 39 <47 para. 24>); within the scope of the principle of universal suffrage, which is a specific manifestation of the general guarantee of the right to equality, resorting to Art. 3(1) GG is ruled out (cf. BVerfGE 99, 1 <8 et seq.> […]). **[42]**

b) aa) The principle of universal suffrage is not subject to an absolute prohibition of differentiation. […] Differentiations regarding the right to vote or to stand for elections must always be justified by specific reasons that are recognised as legitimate under the Constitution and that have at least the same weight as the principle of universal suffrage (cf. BVerfGE 42, 312 <340 and 341>; 132, 39 <48 para. 25>; cf. regarding the principle of equal suffrage BVerfGE 95, 408 <418>; 120, 82 <107>; 129, 300 <320>; 130, 212 <227 and 228>), qualifying them as "compelling reasons" (cf. BVerfGE 1, 208 <248 and 249>; 95, 408 <418>; 121, 266 <297 and 298>). **[43]**

bb) Reasons that can justify restrictions of the principle of universal suffrage, and thus differentiations between voters, include in particular the objectives, pursued by way of democratic elections, of safeguarding the function of elections as integrative processes for the formation of the political will of the people (*Integrationsfunktion der Wahl*) and of guaranteeing the proper functioning of the parliament to be elected (cf. BVerfGE 95, 408 <418>; 120, 82 <107>; 129, 300 <320 and 321>; 132, 39 <50 para. 32>). The first objective encompasses the safeguarding of the function of elections as a communication process (cf. BVerfGE 132, 39 <50 para. 32>). **[44]**

Provided that democracy should not be limited to a mere formal link between those governing and those governed, it depends on free and open communication (cf. BVerfGE 132, 39 <50 para. 33> with further references). […] Otherwise, elections cannot develop the integrative effects assigned to them. Exclusions from the right to vote may thus be justified under constitutional law if a group of persons must be considered not sufficiently capable of participating in the communication process between the people and state organs (cf. BVerfGE 132, 39 <51 para. 34>). **[45]**

cc) It is generally incumbent upon the legislature to balance the principle of universal suffrage against conflicting constitutional interests (cf. BVerfGE 95, 408 <420>; 121, 266 <303>; 132, 39 <48 para. 26>). In this respect, the Federal Constitutional Court only assesses whether the limits of the narrow latitude of the legislature have been overstepped; it does not assess whether the legislature's solutions are expedient or legally and politically desirable (cf. BVerfGE 6, 84 <94>; 51, 222 <237 and 238>; 95, 408 <420>; 121, 266 <303 and 304>; 132, 39 <48 para. 27>). To justify restrictions of universal suffrage, differentiating arrangements must be suitable and necessary for pursuing their objectives (cf. BVerfGE 6, 84 <94>; 51, 222 <238>; 71, 81 <96>; 95, 408 <418>). The permissible extent of such restrictions also depends on how intense the interference with voting rights is (cf. BVerfGE 71, 81 <96>; 95, 408 <418>). The legislature must be guided by political reality, rather than abstract scenarios, regarding its assessments and evaluations (cf. BVerfGE 7, 63 <75>; 82, 322 <344>; 95, 408 <418>). A strict standard must be applied when assessing whether a restriction of voting rights is justified (cf. BVerfGE 120, 82 <106>; 129, 300 <317, 320>; 132, 39 <48 para. 25>). **[46]**

However, the legislature is entitled to simplify and categorise when setting out the entitlement to vote, in consideration of the limits to its latitude resulting from the significance of voting rights and the stringent notion of democratic equality (cf. BVerfGE 132, 39 <49 para. 28>). […] **[47]**

[…] In principle, the legislature can base [its legislation] on the typical case, and does not have to accommodate every particular constellation by enacting corresponding special provisions (cf. BVerfGE 82, 159 <185 and 186>; 96, 1 <6>; 145, 106 <146 para. 107>). However, statutory generalisations must have the broadest possible basis and include all groups concerned and matters to be regulated (cf. BVerfGE 122, 210 <232 and 233>; 126, 268 <279>; 133, 377 <412 para. 87>). In particular, the legislature must not opt for an atypical case as the model for statutory categorisations; rather, it must reflect reality by standardising the typical case (cf. BVerfGE 116, 164 <183>; 122, 210 <233>; 126, 268 <279>; 137, 350 <375 para. 66>; 145, 106 <146 para. 107>). Moreover, categorisations are only permissible if the hardship linked to them can only be avoided with difficulty (cf. BVerfGE 84, 348 <360>; 87, 234 <255 and 256>; 100, 59 <90>), merely affects a relatively small number of persons, and if the unequal treatment does not have great weight (cf. BVerfGE 63, 119 <128>; 84, 348 <360>; 100, 59 <90>; 143, 246 <379 para. 362>). Hardship clauses may be necessary to avoid intolerable burdens. Furthermore, the advantages arising from categorisation must be in adequate relation to the unequal treatment it necessarily entails (cf. BVerfGE 110, 274 <292>; 117, 1 <31>; 120, 1 <30>; 123, 1 <19>; 133, 377 <413 para. 88>; 145, 106 <146 para. 108>). **[48]**

2. In addition to the principle of universal suffrage, exclusions from voting rights must be measured against Art. 3(3) second sentence GG (see a), which prohibits disadvantaging of persons on the basis of disability (see b). Notably, this prohibition is not without limitations. Disadvantaging persons with disabilities, however, requires compelling reasons (see c). **[49]**

a) The principle of universal suffrage under Art. 38(1) first sentence GG and the prohibition of disadvantaging set out in Art. 3(3) second sentence GG, as a specific manifestation of the general guarantee of the right to equality, apply concurrently (see aa). This also applies to electoral complaint proceedings (see bb). **[50]**

[…] **[51-53]**

b) Art. 3(3) second sentence GG prohibits any disadvantaging on the basis of disability. The reasons for disability are irrelevant in this respect. Rather, it is decisive whether a person's ability to lead their lives individually and independently is impaired in the longer term. Persons with disabilities include mentally ill persons if they have a longer-term impairment affecting them in such a way that they are prevented from fully, effectively and equally participating in society (cf. BVerfGE 128, 282 <306 and 307> with reference to Art. 1(2) of the Convention on the Rights of Persons with Disabilities, CRPD). **[54]**

An exclusion by public authority of persons with disabilities from possibilities of development and participation amounts to disadvantaging within the meaning of Art. 3(3) second sentence GG if the exclusion is not adequately compensated by disability-specific support measures (cf. BVerfGE 96, 288 <303>; 99, 341 <357>; 128, 138 <156>). Accordingly, persons with disabilities are disadvantaged if state measures compound their situation compared to the situation of persons without disabilities. This is the case if they are denied possibilities of development and participation that are available to others (cf. BVerfGE 96, 288 <302 and 303>; 99, 341 <357>). Ultimately, any form of unequal treatment that places persons with disabilities at a disadvantage is prohibited (cf. Federal Constitutional Court, *Bundesverfassungsgericht* - BVerfG, Orders of the Second Chamber of the First Senate of 24 March 2016 - 1 BvR 2012/13 -, juris, para. 11 and of 10 June 2016 - 1 BvR 742/16 -, juris, para. 10; see also BVerfGE 99, 341 <357>). This also includes indirect disadvantaging where the exclusion of persons with disabilities from possibilities of participation is not intended, but a typical incidental consequence of a measure taken by public authority […]. **[55]**

In addition to the prohibition of disadvantaging, Art. 3(3) second sentence GG also includes a mandate to support persons with disabilities. It grants a claim to equal participation within the limits of the financial, staff, factual and organisational resources available (cf. BVerfGE 96, 288 <308>). **[56]**

c) However, Art. 3(3) second sentence GG, too, is not absolute (cf. BVerfGE 99, 341 <357>). Disadvantaging persons with disabilities by law is only permissible if it is justified by compelling reasons (cf. BVerfGE 85, 191 <206 and 207>; 99, 341 <357>; additionally BVerfG, Order of the Second Chamber of the First Senate of 10 June 2016 - 1 BvR 742/16 -, juris, para. 10 […]) **[57]**

There is a compelling reason within the meaning set out above if persons, precisely because of their disability, lack certain intellectual or physical abilities that are indispensable for exercising a right. If persons lack the necessary mental capacity due to their disability, and if this cannot be remedied by suitable assistance systems, the

exclusion of a person from a right requiring this capacity does not amount to discrimination on the basis of disability within the meaning of Art. 3(3) second sentence GG (cf. BVerfGE 99, 341 <357 […]). **[58]**

Other than that, unequal treatment on the basis of disability can only be justified by virtue of a balancing with conflicting constitutional law (cf. BVerfGE 92, 91 <109>; 114, 357 <364>) and on the basis of a strict proportionality test […]. In that regard, the unequal treatment must be suitable, necessary and appropriate for protecting another constitutional interest that is at least of equivalent weight. The legislature's latitude is narrow in this respect. Thus, in the present context, the requirements for justifying a restriction of the prohibition of disadvantaging persons with disabilities under Art. 3(3) second sentence GG correspond to the strict requirements for an interference with the principle of universal suffrage under Art. 38(1) first sentence GG. **[59]**

3. The standards set out above meet the obligations of the Federal Republic of Germany under international law. While the Basic Law must be interpreted in a manner that is open to international law (see a), the international law provisions that are relevant in relation to the challenged exclusions from voting rights do not give rise to requirements that go beyond the constitutional demands set out above (see b). **[60]**

a) Domestically, obligations arising from international treaties do not have constitutional rank (cf. BVerfGE 111, 307 <317>). The federal legislature approved the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of Persons with Disabilities (CRPD) and the European Convention on Human Rights (ECHR) including its Optional Protocols through acts of parliament pursuant to Art. 59(2) GG […]. They thus have the rank of federal law in the German legal order (cf. BVerfGE 74, 358 <370>; 111, 307 <316 and 317>; 128, 326 <367>; 141, 1 <19 para. 45>; 142, 313 <345 para. 88>; 148, 296 <127>). **[61]**

Nonetheless, these provisions have constitutional significance as guidelines for the interpretation of the content and scope of fundamental rights and rule-of-law principles of the Basic Law (cf. BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <316 and 317, 329>; 120, 180 <200 and 201>; 128, 326 <367 and 368>; 142, 313 <345 para. 88>; 148, 296 <128>). Their use as guidelines is a manifestation of the Basic Law's openness to international law - the Basic Law does not oppose the Federal Republic of Germany's involvement in international and supranational contexts and its further development, but rather requires and expects such involvement. As laid down in its preamble, the Basic Law seeks the Federal Republic of Germany's integration into the legal order of free and peaceful states as an equal partner (cf. BVerfGE 111, 307 <319>). Where possible, the Basic Law must be interpreted in such a way as to avoid a conflict with Germany's international law obligations (cf. BVerfGE 111, 307 <317 and 318>; 141, 1 <27 para. 65>). **[62]**

However, the reference to international law provisions as guidelines for interpretation does not aim to schematically align individual constitutional concepts in parallel to international law (cf. BVerfGE 137, 273 <320 and 321 para. 128>; 141, 1 <30

para. 72> with further references). Rather, also under an interpretation in a manner that is open to international law, similarities in the wording of legal provisions must not cover up differences that arise from the context of legal orders (cf. BVerfGE 148, 296 <131>). Furthermore, an interpretation of the Constitution in a manner that is open to international law may not exceed the recognised methods of interpretation of statutes and of the Constitution (cf. BVerfGE 111, 307 <329>; 128, 326 <371>; 141, 1 <30 para. 72>; BVerfGE 148, 296 <133>). To the extent that there is room for interpretation and assessments within the scope of recognised methods of interpretation, German courts are obliged to give precedence to an interpretation that is in accordance with international conventions and treaties. However, it is not contrary to the aim of openness to international law if international treaty law is not observed in exceptional cases, provided this is the only way to avert a violation of fundamental constitutional principles (cf. BVerfGE 111, 307 <319>; BVerfGE 148, 296 <133>). **[63]**

When invoking the ECHR as a guideline for interpretation, the Federal Constitutional Court takes into account decisions of the European Court of Human Rights (ECtHR) even if they do not concern the same subject matter. This follows from the function of the ECtHR's case-law, which - at least *de facto* - provides direction and guidance for interpreting the ECHR, also beyond the individual case at issue (cf. BVerfGE 111, 307 <320>; 128, 326 <368>; 148, 296 <129>). Therefore, the domestic impact of ECtHR decisions is not limited to the obligation to take them into account with regard to the specific circumstances they concern (cf. BVerfGE 111, 307 <328>; 112, 1 <25 and 26>; 148, 296 <129>). Invoking the ECtHR's case-law as a guideline for interpretation of constitutional law beyond individual cases serves to give effect to the guarantees of the ECHR in Germany as comprehensively as possible and may also help avoid violations of the Convention by the Federal Republic of Germany (cf. BVerfGE 128, 326 <369>; 148, 296 <130>). According to Art. 46 ECHR, the Contracting Parties have undertaken to abide by a final judgment of the ECtHR in any case to which they are parties (cf. BVerfGE 111, 307 <320>). However, beyond the scope of application of Art. 46 ECHR, the specific circumstances of the case must be given particular consideration to provide for contextualisation when invoking the ECtHR's case-law as a guideline (cf. BVerfGE 148, 296 <132>). **[64]**

While statements from committees or similar treaty bodies have significant weight, they are not binding on international or domestic courts (cf. BVerfGE 142, 313 <346 para. 90>; BVerfG, Judgment of the Second Senate of 24 July 2018 - 2 BvR 309/15 *inter alia* -, juris, para. 91). This also applies to the reports (Art. 39 CRPD), guidelines (Art. 35(3) CRPD) and recommendations (Art. 36(1) CRPD) concerning the interpretation of the provisions of the Convention and the legal situation in Germany issued by the Committee on the Rights of Persons with Disabilities pursuant to Art. 34 CRPD (cf. BVerfGE 142, 313 <345 and 346 para. 89>; BVerfG, Judgment of the Second Senate of 24 July 2018 - 2 BvR 309/15 *inter alia* -, juris, para. 91). The Committee has no mandate to issue binding interpretations of the text of the Convention. It is also not competent to further develop international conventions beyond the agreements and practices of the treaty parties (cf. Art. 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, Federal Law Gazette,

Bundesgesetzblatt - BGBl II 1985 p. 939). In the context of an interpretation of domestic law that is open to international law, domestic courts should address the view of such treaty bodies; they do not, however, have to endorse it (cf. BVerfGE 142, 313 <346 and 347 para. 90>; see also - regarding decisions of international tribunals - BVerfGE 111, 307 <317 and 318>; 128, 326 <366 et seq., 370>; established case-law). **[65]**

b) The provisions of Art. 25 letter b ICCPR (see aa), Art. 29 letter a CRPD (see bb) and Art. 3 of Protocol No. 1 to the Convention (see cc) do not require any modification of the constitutional standards for exclusions from voting rights set out above. **[66]**

aa) Art. 25 ICCPR does not go beyond the requirements for restricting the entitlement to vote under Art. 38(1) first sentence and Art. 3(3) second sentence GG, given that it does not contain an absolute prohibition of any exclusion from voting rights. The applicable parts of the provision read as follows: **[67]**

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions
>
> a) (…)
>
> b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> c) (…)

According to its wording, the provision thus protects voting rights against "unreasonable restrictions". The ICCPR's Human Rights Committee stated that it does not unreasonably restrict Art. 25 letter b ICCPR if the exercise of voting rights is restricted by a law on grounds that are objective and reasonable (cf. ICCPR Human Rights Committee, General Comment No. 25, 12 July 1996, UN Doc CCPR/C/21/Rev. 1/ Add. 7, paras. 4 and 10). At the same time, it expressly pointed out that Art. 29 letter a CRPD does not merit a different conclusion since this provision does not rule out exclusions from voting rights on grounds that are reasonable and objective either (cf. ICCPR Human Rights Committee, Concluding observations on the 3rd periodic report of Hong Kong, China, 29 April 2013, UN Doc CCPR/C/CHN-HKG/CO/3, para. 24; Concluding observations on the 3rd periodic report of Paraguay, 29 April 2013, UN Doc CCPR/C/PRY/CO/3, para. 11). This plausible interpretation of Art. 25 letter b ICCPR does not give rise to stricter standards than the standards laid down in Art. 38(1) first sentence GG and Art. 3(3) second sentence GG since the protection of constitutional interests of equal value always meets the requirement of an objective and reasonable ground. **[68]**

bb) Neither does Art. 29 letter a in conjunction with Art. 12(2) CRPD merit a modification of the constitutional standards set out above, in particular regarding Art. 3(3) second sentence GG. **[69]**

(1) Art. 29 letter a CRPD reads as follows: **[70]**

> States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:
>
> a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, *inter alia*, by:
>
> i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
>
> ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
>
> iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.

Neither a general prohibition of exclusions from voting rights nor a prohibition of exclusions specifically of persons with disabilities can be inferred from this provision. Exclusions from voting rights, which equally affect persons with disabilities and persons without disabilities, are not within the scope of application of the provision given that the provision guarantees persons with disabilities participation in public and political life, including the right to vote, "on an equal basis with others" **[71]**

Yet even if an exclusion from voting rights affects only or primarily persons with disabilities, an absolute prohibition of exclusions from voting rights cannot be inferred from Art. 29 letter a (iii) CRPD. According to the provision, States Parties to the CRPD shall guarantee the "free expression of the will" (French: libre expression de la volonté) of persons with disabilities as electors and, where necessary, allow assistance in voting by another person to this end. Accordingly, the provision is aimed at the non-discriminatory development of the free electoral will by persons with disabilities. However, this requires the ability to form and express an independent electoral will. Thus, the persons concerned must have the cognitive skills necessary to make a free and self-determined electoral decision […]. If, even when using all possible means of assistance, persons lack the ability to participate in the democratic communication process and to make a self-determined electoral decision on this basis, a corresponding exclusion from voting rights does not violate Art. 29 CRPD, even though the provision does not expressly address justifications for restricting voting rights of persons with disabilities […]. **[72]**

(2) Art. 12 CRPD does not merit a different conclusion. That provision reads as follows: **[73]**

> (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
>
> (4) Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Thus, voting rights are also within the provision's scope of protection. However, the recognition under Art. 12(2) CRPD of legal capacity of persons with disabilities on an equal basis with others is not absolute. This follows from the regulatory context of Art. 12(2) CRPD and Art. 12(4) CRPD, which specifically refers to measures restricting the exercise of legal capacity of the persons concerned. The Convention does not prohibit such measures in general; rather, it restricts their permissibility, including by obliging the States Parties to the Convention under Art. 12(4) CRPD to provide for appropriate safeguards protecting the persons concerned against conflicts of interests, abuse and disrespect of their rights, and to ensure proportionality (cf. BVerfGE 128, 282 <307>; 142, 313 <345 para. 88>; BVerfG, Judgment of the Second Senate of 24 July 2018 - 2 BvR 309/15 *inter alia* -, juris, para. 90). In light of the above, the Court has already decided that the provisions of the Convention, although they aim to safeguard and strengthen the autonomy of persons with disabilities, do not generally prohibit measures that are carried out against those persons' natural will and which relate to their limited capability for self-determination due to illness (cf. BVerfGE 128, 282 <307>; 142, 313 <345 para. 88>; BVerfG, Judgment of the Second Senate of 24 July 2018 - 2 BvR 309/15 *inter alia* -, juris, para. 90). The same must also apply to exclusions from voting rights specifically of persons with disabilities if such exclusions are tied to the inability to participate in the democratic discourse and the resulting inability to make a self-determined electoral decision. They do not violate Art. 12 CRPD if the requirements of Art. 12(4) are satisfied, that is if the respective arrangement is proportionate, tailored to the circumstances of the persons concerned, applies for the shortest time possible, is subject to regular review and if appropriate and effective safeguards to prevent abuse are in place. Within these limits, Art. 12 CRPD does not require an interpretation of Art. 29 letter a CRPD to the effect that it contains an absolute prohibition of any exclusion from voting rights of persons with disabilities […]. **[74]**

(3) Ultimately, the fact that the Committee on the Rights of Persons with Disabilities has a different legal view in this regard does not merit a different conclusion (see a). Neither is this view binding under constitutional law nor is it convincing in substance (see b). **[75]**

(a) In the Committee's opinion, full and effective participation of persons with disabilities requires the unlimited recognition of their legal capacity. According to the Committee, this is guaranteed by Art. 12(2) CRPD, which does not leave any scope for restrictions linked to a lack of decision-making ability. Accordingly, exclusions from voting rights cannot be justified by a lack of decision-making ability of persons with disabilities (cf. Committee on the Rights of Persons with Disabilities, General Comment No. 1, Article 12: Equal recognition before the law, 19 May 2014, UN Doc CRPD/C/GC/1, para. 12 et seq., 48). Given that, in the Committee's view, electoral rights of persons with disabilities can neither be restricted nor excluded (cf. Committee on the Rights of Persons with Disabilities, Communication No. 4/2011, 20 September 2013, UN Doc CRPD/C/10/D/4/2011, para. 9.4), it considers exclusions from voting rights pursuant to § 13 nos. 2 and 3 BWahlG to be in breach of the Convention (cf. Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Germany, 13 May 2015, UN Doc CRPD/C/DEU/CO/1, paras. 53 and 54). This is also the legal view taken in a study of 21 December 2011 published by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities (UN Doc A/HRC/19/36 […]). **[76]**

(b) However, the Committee on the Rights of Persons with Disabilities has no mandate to issue binding interpretations of the CRPD (cf. BVerfGE 142, 313 <346 and 347 para. 90>; BVerfG, Judgment of the Second Senate of 24 July 2018 - 2 BvR 309/15 *inter alia* -, juris, para. 91). Such a mandate could only be considered if the practice of the States Parties followed the Committee's view. Yet this is not the case, since only a clear minority of the States Parties to the CRPD has inclusive voting rights without any differentiations […]. Moreover, the view of the Committee on the Rights of Persons with Disabilities contradicts the position of the ICCPR Committee. Even though the ICCPR Committee expressly found that exclusions from voting rights can be justified by objective and reasonable grounds even in consideration of Art. 29 letter a CRPD (cf. ICCPR Human Rights Committee, Concluding observations on the 3rd periodic report of Hong Kong, China, 29 April 2013, UN Doc CCPR/C/ CHN-HKG/CO/3, para. 24; Concluding observations on the 3rd periodic report of Paraguay, 29 April 2013, UN Doc CCPR/C/PRY/ CO/3, para. 11), the Committee on the Rights of Persons with Disabilities did not address this finding. It also did not make any statement on the fact that France and Romania have issued declarations of interpretation

regarding the CRPD according to which exclusions from voting rights are permissible within the scope of Art. 29 CRPD if the conditions of Art. 12(4) CRPD are observed […]. Above all, the legal view of the Committee on the Rights of Persons with Disabilities does not sufficiently take into account Art. 12(4) CRPD. The Committee only infers from Art. 12 CRPD the obligation of States Parties to create effective safeguards to guarantee persons with disabilities the actual exercise of their legal capacity. According to the Committee, the provision does not provide a basis for restrictions of legal capacity. This, however, fails to sufficiently accommodate the regulatory content of Art. 12(4) CRPD. The provision requires "appropriate and effective safeguards for all measures that relate to the exercise of legal capacity" to prevent abuse. Art. 12(4) second and third sentences CRPD then describes the conditions of safeguards that are in conformity with the Convention, particularly requiring the observation of the principle of proportionality. Thus, the provision clearly assumes that there is a possibility of taking measures that restrict the exercise of legal capacity if these conditions are observed (cf. BVerfGE 128, 282 <307>; 142, 313 <345 para. 88>; BVerfG, Judgment of the Second Senate of 24 July 2018 - 2 BvR 309/15 *inter alia* -, juris, para. 90). **[77]**

(cc) Additional requirements for the permissibility of exclusions from voting rights under constitutional law also do not follow from Art. 3 of Protocol No. 1 to the Convention, which reads as follows: **[78]**

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

According to the case-law of the ECtHR, which is competent to interpret the ECHR and its Protocols pursuant to Art. 32 ECHR, the right to free elections at reasonable intervals by secret ballot guaranteed by Art. 3 of Protocol No. 1 is not guaranteed without limitations. Rather, the Contracting States must be granted a wide margin of appreciation when shaping electoral law. However, restrictions of voting rights must serve a legitimate aim and observe the principle of proportionality (cf. ECtHR, Mathieu-Mohin and Clerfayt v. Belgium, Judgment of 2 March 1987, No. 9267/81, § 52; ECtHR <GC>, Hirst v. The United Kingdom <No. 2>, Judgment of 6 October 2005, No. 74025/01, § 62). **[79]**

If all prisoners are indiscriminately stripped of their voting rights, this amounts to a general, automatic and blanket restriction of voting rights, which exceeds the margin of appreciation of the Contracting States and is thus incompatible with Art. 3 of Protocol

No. 1 (cf. ECtHR <GC>, Hirst v. The United Kingdom <No. 2>, Judgment of 6 October 2005, No. 74025/01, § 82; see also ECtHR, Anchugov and Gladkov v. Russia, Judgment of 4 July 2013, No. 11157/04 and 15162/05, §§ 93 *et seq.*). According to the ECtHR, an individual judicial decision is generally suitable to guarantee the proportionality of voting rights restrictions. However, it cannot be assumed that a restriction of voting rights is disproportionate merely because it was not ordered by a judge (cf. ECtHR <GC>, Scoppola v. Italy <No. 3>, Judgment of 22 May 2012, No. 126/05, § 99). **[80]**

The ECtHR recognised that restricting participation in elections to persons capable of assessing the consequences of their decisions is a legitimate aim that can generally justify exclusions from voting rights (cf. ECtHR, Alajos Kiss v. Hungary, Judgment of 20 May 2010, No. 38832/06, § 38). Nonetheless, in a case in which the order of partial guardianship already led to an exclusion from voting rights, the ECtHR considered this arrangement a violation of the principle of proportionality. In this regard, the court referred to the CRPD, pointing out that the Contracting States' margin of appreciation for shaping electoral law was narrower in respect of groups of persons that had faced considerable discrimination in the past (cf. ECtHR, Alajos Kiss v. Hungary, Judgment of 20 May 2010, No. 38832/06, § 44). **[81]**

Overall, an absolute prohibition of exclusions from voting rights for persons with disabilities cannot be inferred from the ECtHR's case-law. The ECtHR's recognition of exclusions from voting rights that serve a legitimate aim and observe the principle of proportionality as well as the emphasis on the Contracting States' margin of appreciation in the context of Art. 3 of Protocol No. 1 do not entail stricter requirements than those applying to restrictions of voting rights under Art. 38(1) first sentence GG and Art. 3(3) second sentence GG. **[83]**

II.

Exclusions from voting rights of persons placed under full guardianship pursuant to § 13 no. 2 BWahlG (see 1.) and of criminal offenders confined in a psychiatric hospital for lack of criminal responsibility pursuant to § 13 no. 3 BWahlG (see 2.) are unconstitutional. **[83]**

1. The exclusion from voting rights of persons who have an appointed guardian to attend to all their affairs where this is not merely a temporary situation following a preliminary injunction (§ 13 no. 2 BWahlG) violates both the principle of universal suffrage under Art. 38(1) first sentence GG (see a) and the prohibition of disadvantaging on the basis of disability under Art. 3(3) second sentence GG (see b). **[84]**

a) § 13 no. 2 BWahlG restricts the principle of universal suffrage (see aa); yet this interference does not protect constitutional interests of equal value in a manner that sufficiently satisfies the constitutional requirements for statutory categorisations (see bb). **[85]**

aa) § 13 no. 2 BWahlG provides for the exclusion from voting rights of persons who have an appointed guardian to attend to all their affairs, thus affecting the guarantee that all citizens can equally exercise their right to vote (cf. BVerfGE 28, 220 <225>; 36, 139 <141>; 58, 202 <205>; 59, 119 <125>; 99, 69 <77 and 78>; 132, 39 <47 para. 24>). **[86]**

bb) This interference with the principle of universal suffrage is not justified. § 13 no. 2 BWahlG aims to protect a constitutional interest that is of the same value as universal suffrage (see 1).It is already doubtful whether the provision is at all suitable for achieving this aim (see 2). In any case, it violates the constitutional requirements regarding statutory criteria for categorisations given that it is designed in such a way that it is incompatible with the right to equality (see 3). **[87]**

(0) (a) By way of § 13 no. 2 BWahlG as amended on 12 September 1990, the legislature seeks to exclude persons from voting rights who lack the mental capacity to understand the nature and significance of elections; it thus seeks to safeguard the function of elections as integrative processes for the formation of the political will of the people. **[88]**

[…] **[89-90]**

(b) Other grounds that are recognised as legitimate under the Constitution and which could justify the interference with the principle of universal suffrage are not ascertainable. **[91]**

(aa) This applies in particular to the constitutional interest of protecting the integrity of elections against manipulation and abuse. […] **[92]**

(bb) Nor can the interference with the regulatory content of Art. 38(1) first sentence GG that is linked to exclusions from voting rights be legitimated by the submission that such exclusions on the basis of "mental ailments" were a "traditional restriction" of universal suffrage (see, however, BVerfGE 36, 139 <141 and 142>; 67, 146 <147>; see also Bavarian Constitutional Court, *Bayerischer Verfassungsgerichtshof* - BayVerfGH, Decision of 9 July 2002 - Vf. 9-VII-01 -, juris, para. 43 […]). Under the Constitution, tradition is not recognised as a legitimate ground […]. **[93]**

(2) § 13 no. 2 BWahlG is only suitable for achieving the aim of safeguarding the function of the election as an integrative process if the provision concerns a group of persons that is not sufficiently able to participate in the democratic communication process. Yet this is not the case here. **[94]**

(bb) Concerns in this regard arise from the fact that mental capacity and capacity for communication required to make a self-determined electoral decision are not assessed in the procedure to appoint a guardian pursuant to § 1896(1) first sentence of the Civil Code (*Bürgerliches Gesetzbuch* - BGB). […] The right to vote is a highly personal right; its exercise by a guardian is impermissible under constitutional law […], and appointment of a guardian thus cannot pertain to this right from the outset […]. Therefore, the ability to participate in the democratic formation of the political will is irrelevant for the assessment and the outcome of the procedure to appoint a guardian. […] **[95]**

In addition, the considerable regional differences in respect of exclusions from voting rights on the basis of guardianship must be considered when determining whether § 13 no. 2 BWahlG is suitable for identifying persons unable to participate in elections. […] **[96]**

(cc) The appointment of a guardian for all affairs is subject to strict statutory requirements. To appoint such a guardian, it is required to establish a need for full guardianship as well as the specific need that a guardian take care of all affairs of the person concerned [because their needs cannot be met by other means] […]. Appointing a guardian for all affairs can only be considered if an adult cannot attend to any of their own affairs due to illness or disability […]. **[97]**

[…] The total share of persons excluded from voting rights under § 13 no. 2 BWahlG is 1.3‰ of those who were entitled to vote in the 2013 *Bundestag* elections […]. **[98]**

The legislature's assumption that the appointment of a guardian for all affairs typically relates to cases in which persons lack the mental capacity required to participate in the democratic communication process is at least not implausible. **[99]**

(3) Ultimately, however, it is irrelevant whether § 13 no. 2 BWahlG is suitable for identifying persons who lack the mental capacity required to exercise their voting rights. This is because the provision fails to satisfy the constitutional requirements regarding statutory categorisation since the group of persons affected by the exclusion from voting rights pursuant to § 13 no. 2 BWahlG is determined in a manner that violates the right to equality without sufficient factual reasons. **[100]**

(a) § 13 no. 2 BWahlG provides for the exclusion from voting rights of persons who are not only unable to attend to their own affairs because of illness or disability, but who have also been placed under full guardianship for this reason. Yet the principle of necessity

(*Erforderlichkeitsgrundsatz*) that applies universally to guardianship law prohibits the appointment of a guardian if the need for guardianship of the person concerned can be met by other means […]. This is the case in particular if the person concerned has completed a lasting power of attorney or an advance directive or is still capable of completing them and if there is a person who is willing and suitable to perform this task and enjoys the trust of the person concerned […]. The same applies if the person concerned gets sufficient care from their family […] or otherwise […]. **[101]**

(b) If no guardian is actually appointed despite the need for full guardianship, § 13 no. 2 BWahlG is not applicable. […] **[102]**

(c) […] Thus, whether or not persons are deprived of their voting rights ultimately depends on whether a guardian is appointed based on the specific need for guardianship, or whether no such appointment is necessary. This circumstance, which is coincidental in practice, does not constitute a reason inherent in the matter which could justify the unequal treatment under electoral law of persons who are equally in need of guardianship (see also Constitutional Court of Austria, *Österreichischer Verfassungsgerichtshof*, Decision of 7 October 1987 - G 109/87 - para. 2.2.1, regarding the 1971 Regulations for National Council Elections). **[103]**

(d) In light of this, it cannot be asserted that the legislature ties its decision to a strictly formal criterion that is clear, simple to determine and particularly practical for organising elections (cf. on this BayVerfGH, Decision of 9 July 2002 - Vf. 9-VII-01 -, juris, para. 47). **[104]**

[…] The legislature must realistically base generalising provisions on the typical case (cf. BVerfGE 116, 164 <182 and 183>; 122, 210 <233>; 126, 268 <278>; 132, 39 <49 para. 29>; established case-law). Furthermore, the advantages arising from categorisation must be in adequate proportion to the unequal treatment linked to it (cf. BVerfGE 110, 274 <292>; 117, 1 <31>; 120, 1 <30>; 123, 1 <19>; 133, 377 <413 para. 88>; 137, 350 <375 para. 66>; 145, 106 <146 para. 108>). This requirement is only met if the hardship and injustices resulting from categorisation can only be avoided with difficulty, merely affect a relatively small number of persons and if the extent of unequal treatment is limited (cf. BVerfGE 63, 119 <128>; 84, 348 <360>; 133, 377 <413 para. 88>; 145, 106 <146 and 147 para. 108>). **[105]**

This is not the case here. In the 2013 *Bundestag* elections, a total of 81,220 persons under full guardianship was excluded from voting pursuant to § 13 no. 2 BWahlG […]. The share of persons under full guardianship in relation to the total number of persons who are incapable of attending to all their affairs cannot be established. The legislature did not address this issue (cf. *Bundestag* document, *Bundestagsdrucksache*

- BTDrucks 11/4528, pp. 188 and 189). It cannot be ruled out that the group of those in need of full guardianship who do not have an appointed guardian as this is not deemed necessary given their circumstances is not significantly smaller, or is even larger, than the group of those actually placed under full guardianship, who are excluded from exercising the right to vote. The interference with the right to equality is not minor, given that, due to their exclusion from voting rights, the persons concerned are permanently deprived of the most noble right conferred on citizens in a democratic state (cf. BVerfGE 1, 14 <33>). In light of this, claiming that there are no practical alternatives to § 13 no. 2 BWahlG is not sufficient for legitimising the disadvantaging of persons under full guardianship in relation to persons with a comparable need for guardianship [who do not have an appointed guardian]. **[106]**

b) In addition to violating the principle of universal suffrage, § 13 no. 2 BWahlG also violates the prohibition of disadvantaging on the basis of disability pursuant to Art. 3(3) second sentence GG given that the provision results in unfavourable treatment of persons with disabilities (see aa) which is not justified by compelling reasons (see bb). **[107]**

aa) The persons concerned are disadvantaged within the meaning of Art. 3(3) second sentence GG because the exclusion from voting rights pursuant to § 13 no. 2 BWahlG entails a restriction by public authority of the possibilities of development and participation of those affected by the provision (cf. BVerfGE 96, 288 <303>; 99, 341 <357>; 128, 138 <156>). **[108]**

This disadvantaging also occurs because of disability. According to its wording, § 13 no. 2 BWahlG is tied to the appointment of a guardian for all affairs. However, pursuant to § 1896(1) first sentence BGB, such an appointment requires a "mental illness or physical, mental or psychological disabilities". […] As these are impairments that do not only temporarily hinder the full and effective participation in society of the persons concerned on an equal basis with others (Art. 1(2) CRPD), "mental illnesses" as referred to in § 1896(1) first sentence BGB are covered by the concept of disability within the meaning of Art. 3(3) second sentence GG (cf. in this respect BVerfGE 96, 288 <301>; 99, 341 <356 and 357> […]). The exclusion from voting rights pursuant to § 13 no. 2 BWahlG thus only targets persons with disabilities. **[109]**

The objection that the exclusion from voting rights is not based on disability or illness, but on the resulting inability to decide one's own affairs […] does not merit a different assessment. Art. 3(3) second sentence GG also protects against indirect impairments. Ultimately, any form of unequal treatment that places persons with disabilities at a disadvantage is prohibited (cf. BVerfG, Orders of the Second Chamber of the First Senate of 24 March 2016 - 1 BvR 2012/13 -, juris, para. 11, and of 10 June 2016 - 1 BvR 742/16 -, juris, para. 10). **[110]**

bb) The interference with the prohibition of disadvantaging persons with disabilities under Art. 3(3) second sentence GG is not justified. To be justified, this interference would require a compelling reason; the specific design of the provision would have to take into consideration the constitutional requirements for statutory categorisation and would have to be imperative for accommodating the particular situation resulting from disability (cf. BVerfGE 99, 341 <357>), and for excluding persons from voting rights who are not sufficiently capable of participating in the democratic communication process due to their disability in order to safeguard the function of the election as an integrative process. These requirements are not satisfied: the provision determines the group of persons who are excluded from voting rights on the basis of lack of mental capacity resulting from their disability in a fragmentary manner and without sufficient factual reasons; this violates the right to equality. The fact that persons who do not have an appointed guardian merely because it is not necessary [due to their personal situation] retain their voting rights leads to a disadvantaging of those affected by § 13 no. 2 BWahlG that cannot be justified by reasons relating to the nature of voting rights. In that respect, the considerations set out with regard to Art. 38(1) first sentence GG apply accordingly to Art. 3(3) second sentence GG. **[111]**

2. § 13 no. 3 BWahlG also violates the constitutional requirements regarding the exclusion from voting rights. The exclusion from voting rights of persons who are confined in a psychiatric hospital based on an order issued pursuant to § 63 in conjunction with § 20 StGB is neither compatible with the principle of universal suffrage under Art. 38(1) first sentence GG (see a) nor with the prohibition of disadvantaging on the basis of disability under Art. 3(3) second sentence GG (see b). **[112]**

a) § 13 no. 3 BWahlG interferes with the regulatory content of the principle of universal suffrage (see aa), and this interference is not justified by compelling reasons (see bb). **[113]**

aa) The principle of universal suffrage guarantees that all citizens can equally exercise their right to vote (cf. BVerfGE 28, 220 <225>; 36, 139 <141>; 58, 202 <205>; 59, 119 <125>; 99, 69 <77 and 78>; 132, 39 <47 para. 24>). This guarantee is restricted when persons who are confined in a psychiatric hospital based on an order issued pursuant to § 63 in conjunction with § 20 StGB are excluded from voting rights pursuant to § 13 no. 3 BWahlG. **[114]**

bb) This interference with the principle of universal suffrage is not justified. § 13 no. 3 BWahlG is not suitable for identifying persons who are generally incapable of participating in the democratic communication process (see 1). Moreover, the provision arbitrarily disadvantages persons affected by the provision (see 2). **[115]**

(1) Regarding § 13 no. 3 BWahlG, too, the only compelling reason that might justify the interference with the scope of protection of Art. 38(1) first sentence GG is the aim of safeguarding the function of elections as

integrative processes for the formation of the political will of the people. Thus, it would be necessary that the provision, by way of permissible statutory categorisation, concerns a group of persons that is not sufficiently capable of participating in the communication process between the people and state organs. This, however, is not the case. A relevant lack of the mental capacity required to exercise voting rights can neither be generally inferred from an exemption from criminal responsibility established for the time a crime was committed and from the illnesses underlying it pursuant to § 20 StGB (a), nor from the fact that the other requirements for ordering confinement in a psychiatric hospital pursuant to § 63 StGB are met (b). […]. **[116]**

(a) Under § 20 StGB, persons are exempt from criminal responsibility if they are incapable of appreciating the unlawfulness of their actions or of acting accordingly due to a pathological mental disorder, a profound consciousness disorder, mental deficiency or any other serious mental disorder. It is, however, not evident that the mental capacity required for exercising voting rights is typically lacking under these circumstances. **[117]**

[…] **[118-122]**

(aa) In addition, "exemption from criminal responsibility" within the meaning of § 20 StGB is not a permanent condition independent of a criminal offence, but only describes the mental condition of a person at the time they committed the offence […]. It is sufficient that mental capacity, or even just the capacity of control, which means the ability to act according to one's appreciation of the unlawfulness of a crime, are impaired at the time the crime is committed. § 20 StGB does not require a permanent impairment; the finding that a person is exempt from criminal responsibility only refers to the time of the actions relevant under criminal law. **[123]**

For instance, psychotic episodes or withdrawal syndrome with or without delirium are temporary phenomena which go into remission when treated adequately, and which thus cannot affect a lack of ability to make electoral decisions […]. This shows that it is not possible to infer from the finding that a person was exempt from criminal responsibility at the time a crime was committed that mental capacity to appreciate the nature and significance of elections is typically lacking. **[124]**

(b) To the extent that reference is made to the other constituent elements for ordering confinement in a psychiatric hospital pursuant to § 63 StGB for justification under constitutional law […], this does not lead to a different conclusion. **[125]**

(aa) [For ordering confinement,] § 63 StGB requires that persons exempt from criminal responsibility at the time they committed a crime can be expected to "commit serious unlawful acts in the future" as a consequence of their condition and that they therefore present a danger to the general public. Accordingly, these persons' mental or psychological health must be impaired for a longer time period also affecting the future. However, that does not alter the finding, set out above in relation to § 20 StGB, which also applies to this case, that the determination of illnesses underlying such impairments cannot justify the assumption that the person concerned generally lacks the ability to make electoral decisions. **[126]**

(bb) In addition, it follows from the case-law of the Federal Court of Justice (*Bundesgerichtshof* - BGH) that, for finding that a disorder persists after a crime was committed, it is material whether a person's professional or social ability to act has been restricted in everyday life, aside from the offences they have been charged with. However, it is sufficient for ordering confinement in a psychiatric hospital that the longer-term condition is such that even everyday events can trigger the acute and considerable impairment of criminal responsibility (cf. BGH, Judgment of 10 August 2005 - 2 StR 209/05 -, juris, para. 17; Judgment of 17 February 1999 - 2 StR 483/ 98 -, juris, para. 32). Yet if confinement can also be ordered in cases where criminal responsibility is not acutely impaired, but where it is merely possible that the impairment may be triggered by everyday events, it is even less possible to conclude on this basis that a person confined pursuant to § 63 in conjunction with § 20 StGB is incapable of participating in the political communication process and of making a self-determined electoral decision. **[127]**

(cc) Likewise, the reference to the danger confined persons pose to the general public […] does not merit a different assessment. […] This aspect is irrelevant for the ability of confined persons to make (electoral) decisions. According to the legislature's assessment, too, the danger posed by confined persons to the general public does not generally allow the conclusion that they lack the ability to make electoral decisions. This already follows from the fact that persons confined pursuant to § 63 in conjunction with § 21 StGB are excluded from the scope of application of § 13 no. 3 BWahlG […]. Also in cases of diminished criminal responsibility, in which confining persons in a psychiatric hospital pursuant to § 63 StGB requires that they pose a danger to the general public, this confinement does not impact their voting rights. **[128]**

(c) […] **[129]**

(2) In addition, § 13 no. 3 BWahlG violates the principle of universal suffrage because the provision leads to unequal treatment for which factual reasons are not discernible. Ultimately, the group of persons affected by the provision is determined arbitrarily, without sufficiently taking into consideration their ability to participate in the democratic communication process […]. **[130]**

Persons exempt from criminal responsibility retain their voting rights if confinement in a psychiatric hospital is not ordered merely because there is no risk that they will commit considerable criminal offences. Yet in those cases, it cannot be ruled out that mental capacity and ability to make electoral decisions are limited to an equivalent degree or even to a higher degree than the capacity of persons excluded from voting rights pursuant to § 13 no. 3 BWahlG. The same applies to persons who have no criminal record and are confined pursuant to the respective *Land* law provisions because they endanger themselves or others. In those cases, too, voting rights remain unaffected, even though the diagnosis may be comparable. In cases in which the competent court orders both confinement in a psychiatric hospital and imprisonment, and determines pursuant to § 67(2) StGB that all or part of the prison sentence be served before the confinement measure, the persons concerned in fact retain their voting rights during the prison sentence; they are only deprived of these rights as soon as their confinement in a psychiatric hospital begins although their mental capacity has not changed; a sound justification under electoral law in that regard is not discernible. If confinement in a psychiatric hospital is suspended pursuant to § 67b or § 67d(2) StGB, § 13 no. 3 BWahlG does not apply (anymore), given that the provision requires that the person concerned "is in" a psychiatric hospital. However, if the suspension is revoked pursuant to § 67g StGB, the persons concerned forfeit their voting rights once again. In this regard, the ability to vote is irrelevant for the decision on suspending confinement and revoking the suspension. Voting rights of persons exempt from criminal responsibility who are confined in a psychiatric hospital are also restored if these persons are subsequently transferred to an addiction treatment facility pursuant to § 67a StGB. If they are retransferred to a psychiatric hospital afterwards, however, they are deprived of their voting rights yet again. **[131]**

All this shows that the group of delinquent persons lacking the mental capacity required to exercise voting rights cannot be adequately determined by linking their exclusion from voting rights to confinement in a psychiatric hospital for lack of criminal responsibility; thus, the constitutional requirements regarding statutory criteria for categorisation are not satisfied. **[132]**

b) § 13 no. 3 BWahlG also violates the prohibition of disadvantaging on the basis of disability under Art. 3(3) second sentence GG. **[133]**

aa) The exclusion from voting rights pursuant to § 13 no. 3 BWahlG disadvantages the persons affected by the provision given that it deprives them of their essential democratic participation right. This disadvantaging also occurs because of disability

within the meaning of Art. 3(3) second sentence GG given that exemption from criminal responsibility requires a physical, mental, psychological or sensory impairment, and the order of confinement in a psychiatric hospital additionally requires that the impairment persist for a longer time period […]. Therefore, only persons with disabilities are affected by the provision. **[134]**

bb) Given the insufficient justification of this interference, the above assessments regarding the interference with the principle of universal suffrage apply to this interference as well. There is no compelling reason for the disadvantaging by law of persons exempt from criminal responsibility who are confined in a psychiatric hospital. Such a reason is already ruled out because the provision is not suitable for identifying persons who typically lack the mental capacity required to participate in the democratic communication process. Moreover, the determination of the group of persons excluded from voting rights leads to arbitrary unequal treatment of persons whose mental or psychological health is equally impaired. **[135]**

III.

§ 13 no. 2 BWahlG is incompatible with Art. 38(1) first sentence GG and Art. 3(3) second sentence GG; § 13 no. 3 BWahlG is void. **[136]**

1. Incompatibility with the Basic Law generally renders the relevant provision void (cf. BVerfGE 128, 326 <404>). This also applies to electoral complaint proceedings, to which § 78 first sentence, § 95(3) second sentence BVerfGG apply accordingly (cf. BVerfGE 129, 300 <343>). **[137]**

The situation is different if declaring a provision void resulted in a situation which was even farther from the constitutional order than the situation prevailing until that point (cf. BVerfGE 99, 216 <243 and 244>; 119, 331 <382 and 383>; 125, 175 <256>; 132, 372 <394>). In addition, a law is generally not to be declared void if the violation of the Constitution results from a violation of the general guarantee of the right to equality. This is because it is for the legislature to decide how to remedy the violation of the right to equality. In those cases, the Federal Constitutional Court limits itself to declaring the provision that violates the right to equality incompatible with the Basic Law in order not to predetermine the legislature's decision (cf. BVerfGE 99, 280 <298>; 105, 73 <133>; 117, 1 <69>; 122, 210 <245>; 126, 400 <431>; 135, 238 <245 para. 24>). To the extent that it was found to be incompatible with the Basic Law, the provision may then no longer be applied by courts and administrative authorities (cf. BVerfGE 126, 400 <431>; 135, 238 <245 para. 24>). **[138]**

2. a) Based on these considerations, § 13 no. 2 BWahlG is declared incompatible with Art. 38(1) first sentence and Art. 3(3) second sentence GG. It is for the legislature to decide how to remedy the unconstitutional unequal treatment under electoral law of persons with an equal need for guardianship, while balancing the principle of universal suffrage and the aim of safeguarding the function of the election as an integrative process for the formation of the political will of the people. Reasons based on which it would be permissible to exceptionally declare that § 13 no. 2 BWahlG shall continue to apply (cf. in this regard BVerfGE 93, 121 <148>; 105, 73 <134>; 117, 1 <70>; 126, 400 <431 and 432>) are not ascertainable. **[139]**

b) § 13 no. 3 BWahlG is void because it violates Art. 38(1) first sentence and Art. 3(3) second sentence GG. The complete abolition of the exclusion from voting rights of persons exempt from criminal responsibility who are confined in a psychiatric hospital does not lead to a situation that is farther from the constitutional order than the current situation. Nor does the declaration of voidness curtail the legislature's latitude. In order to satisfy the principle of universal suffrage and the prohibition of discrimination under Art. 3(3) second sentence GG, new legislation regarding the exclusion from voting rights must not exclude persons who are confined in a psychiatric hospital based on an order issued pursuant to § 63 in conjunction with § 20 StGB given that a relevant lack of the mental capacity required to exercise voting rights cannot generally be inferred from this constituent element. **[140]**

IV.

Since complainants nos. 1, 2 and 4 to 8 were excluded from the 2013 *Bundestag* elections on the basis of § 13 nos. 2 and 3 BWahlG, their rights under Art. 38(1) first sentence GG, which are equivalent to fundamental rights, and their fundamental right under Art. 3(3) second sentence GG were violated. **[141]**

XIX. Germany and the European Union

1. Fundamental Rights Protection by the Federal Republic of Germany and the European Union

Explanatory Annotation

Fundamental rights protection in federal systems can be a complicated matter and the European Union (EU) has developed in many ways into a federal system even if it cannot be qualified as a federal state.[191] One way to conceive fundamental rights protection in a multi-level system of government is to segregate the various levels and ensure rights protection separately within the various levels of government. The consequence would be rights' protection on the federal level with regard to the exercise of federal authority and rights protection on the lower (regional, state or member state) level against government action attributable to authorities of this level. Such a system of "dual federalism" would ideally require a separation of jurisdiction and powers in such a way that all potential governmental action is attributable to one or the other level in order to indicate which rights' protection regime is applicable.[192]

This is in principle the approach to fundamental rights protection in the USA. Governmental action by state authorities, e.g. the police in California or the school administration in Kansas, is attributable to that state only and fundamental rights issues that might arise can in principle only arise under the respective bill of rights of California or Kansas. However, the US example also reveals the difficulties of this approach. If the respective state constitution or other legal order allows for egregious human rights violations it is very unsatisfactory if there are no remedies available at the federal level. In the USA this has led to important amendments to the US constitution.[193] The 13th amendment prohibits slavery in section 1 and extends that prohibition to "any place subject to the jurisdiction" of the United States. The 14th amendment to the Constitution expressly requires that the various states must not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[194]

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191 For a recent study on European Union federalism see Schütze, Robert, From Dual to Cooperative Federalism: The Changing Structure of European Law, 2009; see also Ward/Ward (eds.), The Ashgate Research Companion to Federalism, Part 4, p. 279 et seq. containing a number of contributions on European Union federalism.

192 For this notion, respectively the notion of separate but equal spheres of power in a federal system, see Corwin, Edward S., The Passing of Dual Federalism, 36 Virginia Law Review (1950) 1.

193 Text of the US-Constitution available from the National Archives at http://www.archives.gov/exhibits/charters/constitution.html.

194 Hence the debate whether "dual federalism" is at all possible and a good case can be made that it is not, at least not without modification. One can even make a good case that even the relationship between states and their law on the one hand and international law on the other, even if structured dualistically by the national constitution, is difficult to maintain in its pure form in today's complex, intertwined and globalized world. In the context of this study, the term is only used to describe a possible principle approach.

The other approach is more integrative and would extend the scope of the federal fundamental rights beyond just the actions of federal organs to cover the federal entity as a whole, i.e. the central level and the sub-entities. That is, for example, the approach taken in Germany under the Basic Law. Article 31 of the Basic Law states in simple words that federal law breaches the law of the *Länder*, i.e. the law of the lower entities. This means that whenever there is a conflict between federal law and the law of a lower entity, a *Land*, federal law will not only prevail, but the legal provision of the respective Land will be null and void.[195] Any and all legal provisions of the *Länder* must consequently be in conformity with the Basic Law in general and the fundamental rights provisions in particular.

The European Union, on the other hand, is not a federal state and whereas its law is also supreme and prevails over the law of its member states in case of conflict, the prevalence of the Union is only one of application and not one of validity. This means that when a member legal provision law, if applied in a given situation, would lead to an infringement of European Union law, Union law must prevail and the member state norm must not be applied. It would, however, remain valid for all other - purely domestic - situations where a conflict between the two norm sets would not arise. In the area of fundamental rights such conflicts of norms are easily perceivable. European Union legislation could, for example, on the national level be perceived to be in violation of domestic fundamental rights. Under the doctrine of the supremacy of European Union Law, this would not matter because Union law would have to prevail against all national law. However, this notion almost inherently requires that some form of fundamental rights protection exists on the European Union level so that Union action can at least be vetted accordingly on that level.

The problem was that the European Union, i.e. the European Economic Community as it was called from 1957 to 1993 or the European Community as it was called from 1993 to 2009, did not have a catalog of fundamental rights as part of its founding treaties. That is largely due to the fact that the member states when founding the European Economic Community in 1957 could simply not imagine that the process of integration would be so dynamic that the notion of the Community violating fundamental rights might actually arise.

However, the issue of the protection of fundamental rights arose nonetheless. It began with the question whether a person had to disclose his identity when intending to buy subsidized butter made available for the poor[196], and has since touched upon many fundamental rights ranging from human dignity to free speech and property rights.[197] In the light of the complete lack of

195 This prevalence of federal law is so entrenched that despite a number of amendments the state constitution of the Land Hesse of 1946 (preceding the Basic Law by three years) in Article 21 still provides for the possibility of sentencing someone to death for especially heinous crimes and nobody takes it seriously enough to engage in a revision because Article 102 of the Basic Law provides for the absolute abolishment of capital punishment and Article 21 is therefore null and void - as if it were not on the books at all.

196 ECJ, Case 29/69, 12.11.1969, ECR 1969, 419, Stauder, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61969CJ0029 (last accessed on 20.10.2019).

197 It is beyond this study to trace the development of fundamental rights protection in the European Union in details. For more details see Ehlers, Dirk, Europäische Grundrechte und Grundfreiheiten, 2009 and Ehlers, Dirk (ed.), European Fundamental Rights and Freedoms, 2007. In the Ehlers collection, see Walter, Christian, History and Development of European Fundamental Rights and Fundamental Freedoms, p. 1 et seq. for an account of the historical development.

fundamental rights in the founding treaties, the European Court of Justice could only achieve the requisite protection by adapting the international law doctrine of the so-called general principles of law. General principles of international law are those inherent in all legal orders of the states comprising the international community and which can, therefore, be presumed to be relevant in interstate relationships as well. General principles of European Union law are those inherent in the legal orders of all member states of the European Union, which can therefore be presumed to be part of the European Union legal order as well. As all member states of the European Union protect fundamental rights in their domestic legal order, and are also member states of the European Convention on Human Rights, the European Court of Justice held that this creates an abstract catalog of fundamental rights that is relevant as primary European Union law, i.e. on the same level as treaty law. The fundamental rights so found then needed to be developed in the case-law of the Court much in the same fashion as written rights gain their concrete scope and significance not so much by the language in which they were drafted but by the interpretation of the courts applying them over the years.

This development at the European Union level came in conjunction with increasing pressure at the national level demanding fundamental rights protection at the European Union level as a prerequisite for acknowledging the supremacy of European Union law. The European Court of Justice had dogmatically construed the supremacy and prevalence of European Union law as independent from any domestic law, including constitutionally protected fundamental rights, but the German Constitutional Court had rather practically responded by maintaining that they will exercise jurisdiction of last resort to protect their fundamental rights standard should it become necessary.

This was the content of the famous "As long As" decision of the Constitutional Court. At issue in this case was a provision in a Regulation of European Community law, which constitutes a directly applicable legislative act. The Constitutional Court had already made it clear that constitutional complaints can only be lodged against acts of the German state and not acts of the European Community. However, the implementation or execution of such acts of the European Community by German officials, as was the case here with regard to the Regulation in question, constitutes such a national act. The Constitutional Court held that it would continue to exercise its power to assess such national acts in the light of the fundamental rights of the Basic Law. The consequence of such an assessment could, of course, be that the execution of the European Community's legal obligation is unconstitutional because the underlying European Community legal act is unconstitutional. In the case at issue the Constitutional Court found this not to be the case and hence the ultimate conflict between European Community law and the German Basic Law was avoided.

12 years later, the Court revisited the question again in the context of European Community regulations. In the meantime, the European Court of Justice had time to develop its approach to fundamental rights as part of the Community's general principles of law. The Court consequently held that it would no longer regard as admissible proceedings brought before it challenging the application of European Community law in Germany. However, this "moratorium" was to apply only "as long as" the European Court of Justice provided effective fundamental rights protection on a quality level comparable to that of the Basic Law. This was obviously a recognition of the European Court of Justice's work in the area of fundamental rights protection

but it still fell short of unequivocally accepting the supremacy of European Union law reserving the right to "step in" if the Court ever came to the conclusion that the European Union level of fundamental rights protection was inadequate.

In the decision concerning the constitutionality of the Maastricht Treaty, the Court, by and large, confirmed this approach. However, it no longer restricted its approach to just supervise the acts of German authorities and stipulated that it continues to assert the power to protect fundamental rights in Germany against any act of supranational organizations regardless of whether such acts require implementation or execution. However, the Court also said that it would exercise fundamental rights protection cooperatively with the European Court of Justice and that could only mean that the principal relationship between the two legal orders has remained unchanged and that the Court continues to assert the right of last control in the fundamental rights area.[198]

In a later decision concerning the European Union's banana market and a new regulation concerning import quotas for so-called dollar-bananas from mainly Central American countries the Constitutional Court specified the requirements for exercising this reserved right.[199] Any applicant would have to show "in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured in the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level […].[200] It is evident that it will be almost impossible for any applicant or submitting regular court to make such a claim as long as the European Court of Justice remains a credible and functioning judicial body.

The Treaty of Lisbon, which entered into force on 1 December 2009, impacted fundamental rights protection in the European Union by making the Charter of Fundamental Rights of the European Union part of the Union's primary body of law by way of referring to it in Article 6 of the new European Union Treaty. Article 6.3 makes it clear that the general principles of European Union law as developed by the European Court of Justice retain their relevance so that a continuation of the European Court's jurisprudence can be expected, probably with an increasing shift away from the general principles to the provisions of the Charter. The new Treaty also empowered the European Union in Article 6.2 to accede to the European Convention on Human Rights and the coming into force of the 14th Protocol to the European Convention of Human Rights on 1 June 2010[201] has opened up the possibility of accession from the Convention's side as well. The complainants in the Lisbon case alleged, *inter alia*, violations of several fundamental rights. However the Court disagreed and confirmed its position as

198 The Court also added a second potential challenge to the supremacy of constitutional law in this Maastricht decision by stating that it will not recognize European Union ultra vires acts, i.e., European Union legal acts passed in excess of the powers transferred to the Union by way of the founding treaties even if the European Court of Justice should have determined that the alleged ultra vires act is soundly based on a relevant treaty norm. So far the Court has refrained from declaring any European Union act to be ultra vires.

199 Decision available in English at http://www.bverfg.de/entscheidungen/ls20000607_2bvl000197en.html.

200 See http://www.bverfg.de/entscheidungen/ls20000607_2bvl000197en.html at para. 39.

201 http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm.

summarized in the Banana market regulation case.[202] The German Court continues to assert the power of last resort but will not exercise this power as long as the European Court of Justice will effectively guarantee fundamental rights against European Union acts on a comparable level of quality.

a) Translation of the Solange I Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 37, 271*

Headnotes:

As long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a Parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights of the Basic Law.

Order of the Second Senate of 29 May 1974 - 2 BvL 52/71 -

Facts:

A German import/export undertaking is making an application to the Administrative Court (Verwaltungsgericht) of Frankfurt/Main for annulment of a decision of the Einfuhr- und Vorratsstelle für Getreide und Futtermittel (EVSt), in which an export deposit of DM 17,026.47 was declared to be forfeited after the firm had only partially used an export licence granted to it for 20,000 tons of ground maize.

The decision is based on Article 12.1 of EEC Council Regulation 120/67, of 13 June 1967, and on Article 9 of EEC Commission Regulation 473/67, of 21 August 1967.

Article 12.1 of EEC Regulation 120/67 reads:

> '1. Imports into the Community or exports therefrom of any of the products listed in Article 1 shall be subject to the submission of an import or export licence which may be issued by member states to any applicant irrespective of the place of his establishment in the Community....

202 BVerfG, 2 BvE 2/08 of 30.6.2009, para. 189, http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

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The issue of such licences shall be conditional on the lodging of a deposit guaranteeing that importation or exportation is effected during the period of validity of the licence; the deposit shall be forfeited in whole or in part if the transaction is not effected, or is only partially effected, within that period.'

Article 8 (2) of EEC Regulation 473/67 reads:

> '(2) Subject to Article 9 hereof, if the obligation to import or export has not been fulfilled during the period of validity of the licence, the deposit is forfeited ...'

Article 9 of EEC Regulation 473/67 reads:

> '(1) If the import or export is prevented within the period of validity of the licence by a circumstance which is to be regarded as force majeure, and if application is made for these circumstances to be taken into account, then: (a) in the cases listed in paragraph (2) (a)-(d) hereof, the obligation to import or export is extinguished, and the deposit is not forfeited.
>
> …
>
> (b) in the cases listed in paragraph (2) (e)-(h) hereof, the period of validity of the licence is extended by the period of time which the competent authority deems necessary in consequence of this circumstance. On application, however, the competent authority may order that the obligation to import or export be extinguished and that the deposit be not forfeited.

2. The Administrative Court first obtained a preliminary ruling from the European Court of Justice under Article 177 of the Treaty establishing the European Economic Community (here inafter referred to for short as 'the Treaty') as to whether the rules cited from these regulations are lawful under the law of the European Economic Community. In the judgment of the European Court dated 17 December 1970 -- in Case 11/70 -- the legality of the disputed regulations is confirmed (likewise in the judgment of 10 March 1971 in Case 37/70).

The Administrative Court then stayed the proceedings by a decision of 24 November 1971 and requested the ruling of the Federal Constitutional Court under Article 100.1 of the Basic Law as to whether the obligation to export existing under European Community law and the associated duty to make an export deposit are compatible with the Basic Law and, if so, whether the rule that the deposit is to be released only in a case of *force majeure* is compatible with the Basic Law.

Extract from the Grounds:

…

B. I.

The reference is admissible

1. An essential preliminary for this ruling is the closer, though not yet conclusive, determination of the relationship between the constitutional law of the Federal Republic of Germany and European Community law, which has come into being on the basis of the Treaty establishing the European Economic Community (hereinafter referred to as Community law). The present case demands only the clarification of the relationship between the guarantees of fundamental rights in the Basic Law and the rules of secondary Community law of the EEC, the execution of which is in the hands of administrative authorities in the Federal Republic of Germany. There is at the moment nothing to support the view that rules of the Treaty establishing the EEC that is, primary Community law, could be in conflict with provisions of the Basic Law of the Federal Republic of Germany. It can equally remain open whether the same considerations apply to the relationship between the law of the Basic Law outside its catalogue of fundamental rights and Community law as applied according to the following reasoning, to the relationship between the guarantees of fundamental rights in the Basic Law and secondary Community law.

2. This Court in this respect in agreement with the law developed by the European Court of Justice adheres to its settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source (BVerfGE 22, 293 [296]; 31, 145 [173 seq.]); for the Community is not a state, in particular not a federal state, but 'a sui generis community in the process of progressive integration', an 'interstate institution' within the meaning of Article 24 (1) of the Basic Law.

It follows from this that, in principle, the two legal spheres stand independent of and side by side one another in their validity, and that, in particular, the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community law, and the competent national organs on the binding force, construction and observance of the constitutional law of the Federal Republic of Germany. The European Court of Justice cannot with binding effect rule on whether a rule of Community law is compatible with the Basic Law, nor can the Federal Constitutional Court rule on whether, and with what implications, a rule of secondary Community law is compatible with primary Community law. This does not lead to any difficulties as long as the two systems of law do not come into conflict with one another in their substance. Therefore there grows forth from the special relationship which has arisen between the Community and its members by the establishment of the Community, first and foremost, the duty for the competent organs, in particular for the two courts charged with reviewing law the European Court of Justice and the Federal Constitutional Court to concern themselves in their decisions with the concordance of the two systems of law. Only in so far as this is unsuccessful can there arise the conflict which demands the drawing of conclusions from the relationship of principle between the two legal spheres set out above.

For, in this case, it is not enough simply to speak of the 'precedence' of Community law over national constitutional law in order to justify the conclusion that Community law must always prevail over national constitutional law because, otherwise, the Community would be put in question. Community law is just as little put in question when, exceptionally, Community law is not permitted to prevail over cogent (zwingendes) constitutional law, as international law is put in question by Article 25 of the Basic Law when it provides that the general rules of international law only take precedence over simple federal law, and as another (foreign) system of law is put in question when it is ousted by the public policy of the Federal Republic of Germany. The binding of the Federal Republic of Germany (and of all member states) by the Treaty is not, according to the meaning and spirit of the Treaties, one-sided, but also binds the Community which they establish to carry out its part in order to resolve the conflict here assumed, that is, to seek a system which is compatible with an entrenched precept of the constitutional law of the Federal Republic of Germany. Invoking such a conflict is, therefore, not in itself a violation of the Treaty, but sets in motion inside the European organs the Treaty mechanism which resolves the conflict on a political level.

3. Article 24 of the Basic Law deals with the transfer of sovereign rights to interstate institutions. This cannot be taken literally. Like every constitutional provision of a similar fundamental nature, Article 24 of the Basic Law must be-understood and construed in the overall context of the whole Basic Law. That is, it does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity, without a formal amendment to the Basic Law, that is it does not open any such way through the legislation of the interstate institution. Certainly, the competent Community organs can make law which the competent German constitutional organs could not make under the law of the Basic Law and which is nonetheless valid and is to be applied directly in the Federal Republic of Germany.

4. The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law. Article 24 of the Basic Law does not, without reservation, allow it to be subjected to qualifications. In this, the present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimate Parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks, in particular, a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Basic Law and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long-term, measured by the standard of the Basic Law with regard to fundamental rights (without prejudice to possible amendments) in such a way that there is no exceeding the limitation indicated, set by Article 24 of the Basic Law. As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the Community, the reservation derived from Article 24 of the Basic Law applies. What is involved is, therefore, a legal difficulty arising exclusively from the Community's continuing integration process, which is still in flux and which will end with the present transitional phase.

Provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Basic Law, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Basic Law prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.

5. From the relationship between Basic Law and Community law outlined above, the following conclusions emerge with regard to the jurisdiction of the European Court of Justice and of the Federal Constitutional Court.

a) In accordance with the Treaty rules on jurisdiction, the European Court of Justice has jurisdiction to rule on the legal validity of the norms of Community law (including the unwritten norms of Community law which it considers exist) and on their construction. It does not, however, decide incidental questions of national law of the Federal Republic of Germany (or in any other member state) with binding force for this State. Statements in the reasoning of its judgments that a particular aspect of a Community norm accords or is compatible in its substance with a constitutional rule of national law at this place, with a guarantee of fundamental rights in the Basic Law constitute non-binding *obiter dicta*.

   In the framework of this jurisdiction, the European Court determines the content of Community law with binding effect for all the member states. Accordingly, under the terms of Article 177 of the Treaty, the courts of the Federal Republic of Germany have to obtain the ruling of the European Court before they raise the question of the compatibility of the norm of Community law which is relevant to their decision with guarantees of fundamental rights in the Basic Law.

b) As emerges from the foregoing outline, the Federal Constitutional Court never rules on the validity or invalidity of a rule of Community law. At most, it can come to the conclusion that such a rule cannot be applied by the authorities or courts of the Federal Republic of Germany in so far as it conflicts with a rule of the Basic Law relating to fundamental rights. It can (just like, vice versa, the European Court) itself decide incidental questions of Community law in so far as the requirements of Article177 of the Treaty, which are also binding on the Federal Constitutional Court, are not present or a ruling of the European Court, binding under Community law on the Federal Constitutional Court, does not supervene.

6. Fundamental rights can be guaranteed by law in numerous ways and may accordingly enjoy numerous types of judicial protection. As its previous decisions show, the European Court also considers that it has jurisdiction by its decisions to protect fundamental rights in accordance with Community law. On the other hand, only the Federal Constitutional Court is entitled, within the framework of the powers granted to it in the Basic Law, to protect the fundamental rights guaranteed in the Basic Law. No other court can deprive it of this duty imposed by constitutional law. Thus, accordingly, in so far as citizens of the Federal Republic of Germany have a claim to judicial protection of their fundamental rights guaranteed in the Basic Law, their status cannot suffer any impairment merely because they are directly affected by legal acts of authorities or

courts of the Federal Republic of Germany which are based on Community law. Otherwise, a perceptible gap in judicial protection might arise precisely for the most elementary status rights of the citizen. Moreover, no different considerations apply to the constitution of a community of states with a constitution based on freedom and democracy which is called into question than apply to a federal state with a constitution based on freedom and democracy: it does not harm the Community and its constitution based on freedom (and democracy), if and in so far as its members in their constitutions give stronger guarantees of the liberties of their citizens than does the Community.

7. In detail, judicial protection by the Federal Constitutional Court is measured exclusively according to the constitutional law of the Federal Republic of Germany and according to the more precise rules laid down in the Federal Constitutional Court Act.

a) In proceedings for judicial review on a reference by a court, it is always a question of examining a provision of a statute. Since the traditional distinction in national law between provisions of a formal statute and provisions of a regulation based on a formal statute is unknown to Community law, every provision of a Community regulation is a provision of a statute within the meaning of the rules of procedure for the Federal Constitutional Court.

b) An initial barrier to the jurisdiction of the Federal Constitutional Court emerges from the fact that it can only make the subject of its review acts of German State power, that is, decisions of the courts, administrative acts of the authorities and measures of the constitutional organs of the Federal Republic of Germany. For this reason, the Federal Constitutional Court regards as inadmissible a constitutional complaint by a citizen of the Federal Republic of Germany directly against a Community regulation (BVerfGE 22, 293 [297]).

c) If a Community regulation is implemented by an administrative authority of the Federal Republic of Germany or dealt with by a court in the Federal Republic of Germany, this is an exercise of German State power; and, in this process, the administrative authority and the courts are also bound to the constitutional law of the Federal Republic of Germany. According to the procedural law of the Federal Constitutional Court, if one disregards the constitutional complaint, which is only admissible after all other legal remedies are exhausted, the exception in s. 90.2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG) hardly comes into consideration in a case involving the challenging of an administrative act based on a rule of Community law, the protection of fundamental rights is carried out by way of reference by the court concerned in so-called proceedings for judicial review of constitutionality before the Federal Constitutional Court. In view of the special features, outlined above, of the relationship between national constitutional law and Community law, these proceedings require some modifications, of the kind that have also been considered necessary in the past by the Federal Constitutional Court in other decided cases. Thus, for example, it has held in the framework of judicial review proceedings, that the existing legal position with regard to a constitutional application is not in keeping with the Basic Law; it has contented itself with holding that a particular set of regulations is incompatible with the provision on equality, without declaring the regulations void; it

has declared a set of regulations brought into being by the Occupying Powers to be in conflict with the Basic Law and put the Federal Government under an obligation to make efforts to have them brought by the German legislator into harmony with the Basic Law; it has developed preventive judicial review in respect of ratification statutes. It lies in the nature of these previous decisions for the Federal Constitutional Court to restrict itself in cases like the present one to determining the inapplicability of a rule of Community law by the administrative authorities or courts of the Federal Republic of Germany in so far as it conflicts with a guarantee of fundamental rights in the Basic Law.

The concentration of this power of decision in the hands of the Federal Constitutional Court is not only necessary, from the point of view of constitutional law, for the same reason which has led to the Court's so called monopoly of rejection, but is also in the interests of the Community and of Community law. According to the underlying idea of Article 100.1 of the Basic Law, the Federal Constitutional Court's task is to prevent any German court from disregarding the intention of the legislature by failing to apply the statutes decided on by the legislature on the grounds that the court considers they violate the Basic Law (BVerfGE 1, 184 (197); 2, 124 [129]). National statutory law thereby received protection of its validity *vis-a-vis* courts which would deny it validity on constitutional grounds. The position is similar with the rule contained in Article 100.2 of the Basic Law, under which the advice of the Federal Constitutional Court must be sought in cases of doubt as to whether a general rule of international law creates rights and duties for the individual. Therefore the underlying idea of Article 100 requires that the validity of Community law should be protected from impairment in the Federal Republic of Germany in the same way as that of national law.

The result is: as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a Parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights in the Basic Law.

II.

The First Senate has previously held that a measure taken by a foreign state is not subject to review by the Federal Constitutional Court, and that even a measure based on a military government statute and issued by a German authority 'by order of the military government' is not a measure taken by German public power and is therefore likewise removed from the jurisdiction of the Federal Constitutional Court (BVerfGE 1, 10). For the same reason, it has held inadmissible a constitutional action aimed directly or indirectly at decisions of a supreme appellate court (BVerfGE 6, 15; 22, 91), and rejected as inadmissible, a constitutional action

against a purely internal ecclesiastical measure (BVerfGE 18, 385). It has, moreover, held that the Federal Constitutional Court has no jurisdiction to examine German law (namely, an implementation statute in connection with the Kontrollratsgesetz (Control Council Act) for its compatibility with occupation law (BVerfGE 3, 368). Its judgment on this matter reads literally: 'The Basic Law and the Gesetz über das Federal Constitutional Court (Federal Constitutional Court Act) contain no general constitutional clause dealing with the jurisdiction of the Federal Constitutional Court. ... No particular jurisdiction to examine German law for its compatibility with occupation law is assigned to the Federal Constitutional Court. Federal constitutional law and the federal law applying in the framework of the Basic Law are the Federal Constitutional Court's only criteria for its examination. Its jurisdiction cannot be extended beyond the positive rules on its jurisdiction for reasons of legal policy' (BVerfGE 3, 368 [376]). In judicial review proceedings which concerned a provision of the 42nd Implementation Regulation to the Umstellungsgesetz (Currency Changeover Act), the First Senate has further held that the provision challenged is occupation law and occupation law cannot be examined for its compatibility with the Basic Law (BVerfGE 4, 45). This decision, however, is followed, after the coming into force of the Paris Treaty system, by the decisions in which occupational law is examined for its compatibility with the Basic Law, and the competent constitutional organs of the Federal Republic of Germany are charged with the duty of harmonising the content of the statute with the Basic Law after appropriate consultation with the Three Powers (BVerfGE 15, 337; 36, 146 (14 November 1973 1 BvR 719/69 Ehegesetz). Finally, in the decision of 18 October 1967 (BVerfGE 22, 293), as already mentioned, a constitutional action brought directly against regulations of the Council or Commission of the EEC is rejected as inadmissible because it is not directed against an act of the German public power bound by the Basic Law. In this context, it is stated: jurisdiction cannot be founded by the consideration that there is an urgent need for legal protection by a constitutional court because the possibilities offered in Community law are insufficient to guarantee adequate protection of the basic rights of the nationals of member states. Nor can the jurisdiction of the Federal Constitutional Court be extended, it says, by a necessity of legal policy, however urgent. After this follows the sentence: 'This is not a conclusive decision as to whether and to what extent the Federal Constitutional Court can measure Community law against the norms on fundamental rights in the Basic Law in the framework of proceedings admissibly brought to its cognizance. ...' This, it says, depends *inter alia* on 'whether and to what extent the Federal Republic of Germany was capable, in transferring sovereign rights under Article 24.1) of the Basic Law, of exempting the Community organs from being so bound (by fundamental rights)'.

III.

The challenged rule of Community law in the interpretation given by the European Court of Justice does not conflict with a guarantee of fundamental rights in the Basic Law, neither with Article 12 nor with Article 2.1 of the Basic Law.

1. It must right away be observed that the forfeiture of the export deposit provided for in the system of licensing, coupled with security deposits for export and import of certain products and goods, cannot be regarded as an evil imposed by order of the state for reprehensible unlawful conduct, akin to a penalty or fine. Rather, this system has built into it a legal device known to the system of private law, which makes allowance for the character of risk transactions

(e.g., forward transactions, instalment transactions, transactions for recurrent delivery of goods, etc.). The making of an export deposit and the forfeiture of the security under the conditions agreed upon in the contract is not alien to such transactions. Even in the case of import and export of goods which fall under the system set up by the challenged rules, the businessman concerned knows what risk he is taking and is free to decide whether he wishes to enter into the contract or not on the terms in this case not agreed, but laid down by statute. All misgivings derived from the comparison with a sanction of criminal law or a sanction akin to one of criminal law therefore fail from the outset (see BVerfGE 9, 137 [144]).

2. The system contained in the challenged rules is not only appropriate in the present stage of development of the European Community, in which economic relations cannot function without planning and effective control, but is (still) indispensable and not replaceable by a different, similarly effective and simple and, on the other hand, market geared system.

3. So far as the basic freedom of trade and occupation (Article 12 of the Basic Law) is concerned, the principles developed in the judgment of 11 June 1958 (BVerfGE 7, 377 [397]) are also crucial here. The system of licensing of export and import transactions coupled with security deposits and forfeiture of the deposit affects the exercise of occupation, the limitation of which can be provided for by the legislator. But the legislator does not have a free hand to do this. What the legislator has introduced in this case is a 'pure system of rules on exercise of occupation or trade, which does not affect the freedom of choice of trade or occupation, but rather only determines in what manner members of a trade or occupation must in detail carry out their occupational activities'. Here, to a large extent, viewpoints of expediency can assert themselves; and it is to be assessed according to these viewpoints what impositions must be placed on the members of the trade or occupation in order to avert disadvantages and dangers for the general republic. In this respect, the protection of basic rights is restricted to averting statutory impositions which are in themselves unconstitutional because they are excessively burdensome and not exactable; apart from these exceptions, the impairment of occupational freedom in question does not affect the person entitled to the fundamental right too perceptibly since he is already engaged in the trade or occupation and his authorization to practise it is not affected' (BVerfGE 7, 377 [405 seq.]).

When this criterion is applied, the challenged system of rules does not conflict with Article 12 of the Basic Law. For, as the European Court of Justice has already stated in its decisions, there are carefully considered reasons in favour of this system, with a view to averting perceptible disadvantages for the EEC. In this case, what is involved is just as little an 'imposition in itself unconstitutional because it is excessively burdensome and not exactable' as in the - on this point comparable - case which was decided with the so called penalty payments judgment of 3 February 1959 (BVerfGE 9, 137); in that judgment, the Court did not even consider the question that Article 12 of the Basic Law might be violated (BVerfGE 9, 137 [146]).

4. In so far as making allowance for the principle of proportionality is required in the use of the formulations 'excessively burdensome' and not exactable, the following is to be noted in the case of the rules on the conditions for a forfeiture of the deposit: it is in keeping with the purpose of a security deposit that it is forfeited if the obligations laid down by the contract or by statute are not fulfilled, regardless of whether this is culpable or not culpable. The

non-forfeiture of a security bond must accordingly remain an exception which does not cover all cases in which the person making the security deposit has acted without culpability, that is, has acted with the due caution of a businessman. The challenged rules classify the exception under the legal concept of *force majeure*, and the European Court has interpreted this concept, with binding effect, as meaning that, apart from the cases expressly referred to in the rules, it must be taken to include not only all cases of absolute impossibility of import or export, but also cases in which the import or export did not take place because of circumstances beyond the control of the importer or exporter, the consequences of which would, despite all reasonable precautions, only be avoidable at the cost of disproportionate losses. In particular, since the European Court adds that the elements of the concept formulated as 'precautions which would have had to be taken' and 'heaviness of the loss which ... he would have had to take on himself' are flexible, all this is another way of expressing the legal notion current in German law and contained within the constitutional principle of proportionality, that the person subjected to the obligation in cases of this kind can free himself from his obligation where there is a 'burden over and above the obligation entered into'.

5. Accordingly, Article 12 of the Basic Law does not pose any obstacle to the application of the challenged rules by the German authorities and courts in the present case. Apart from Article 12 of the Basic Law, Article 2.1 of the Basic Law does not, according to the settled case law of the Federal Constitutional Court, enter into consideration as a further independent criterion for examination (BVerfGE 9, 63 [73]; 9, 73 [77]; 9, 338 [343]; 10, 185 [199]; 21, 227 [234]; 23, 50 [55seq.]).

b) Translation of the Solange II Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 73, 339*

Headnotes:

1. a) The European Court of Justice is a 'statutory court' within the meaning of Article 101.1 of the Basic Law. It is a sovereign organ of judicature established by the Community Treaties, which, on the basis of and within the framework of a legally established jurisdiction and procedures, in principle, makes final decisions in a state of judicial independence on legal questions in accordance with legal rules and legal standards.

   b) The procedural law of the Federal Supreme Court meets the legal requirement of a free hearing, a procedure that affords an appropriate means of defence and a right to counsel of choice.

2. As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they

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generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100.1 of the Basic Law for those purpose are therefore inadmissible.

Order of the Second Senate of 22 October 1986 - 2 BvR 197/83 -

Facts:

The appellant's business includes the importing of preserved mushrooms from non-European Community States into the Federal Republic; such imports are subject to Community regulations.

It applied in writing to the competent Federal Office for Food and Licence to import 1,000 tons of preserved mushrooms from Taiwan. The application was refused with reference to the provisions of Regulation 2107/74.

After unsuccessful review proceedings the appellant brought an action before the Frankfurt Administrative Court (Verwaltungsgericht) arguing that the continuation in force of Regulation 2107/74 beyond 1 July 1976, was not justified.

By its judgment of 25 July 1978, the Frankfurt Administrative Court dismissed the application as unfounded on the ground that the refusal of the licence had not been unlawful. In the court's view Regulation 2107/74 corresponded to the objectives specified in Article 39 of the EEC Treaty.

The appellant entered an interlocutory appeal against that judgment. In its decision of 25 March 1981 the Federal Supreme Administrative Court (Bundesverwaltungsgericht) in response to the appellant's application suspended the proceedings and referred the question to the European Court whether Regulation 2107/74 of the Commission of 8 August 1974, laying down protective measures applicable to imports of preserved mushrooms, infringes the combined provisions of Article 7.1 of Regulation 1927/75 of the Council of 22 July 1975 concerning the system of trade with third countries in the market in products processed from fruit and vegetables and Article 2.2 of Council Regulation 1928/75 of 22 July 1975, laying down detailed rules for applying measures in the market in products processed from fruit and vegetables in so far as it was retained in force after 30 June 1976.

In answer to the question the Court ruled that: consideration of Commission Regulations Nos 1412/76 of 18 June 1976 and 2284/76 of 21 September 1976 has disclosed nothing which affects their validity.

…

d) In further proceedings before the Supreme Administrative Court, the appellant objected that there had been a breach of various constitutional rules and requested that the proceedings be suspended and that either the question whether Regulations 1412/76 and 2284/76 as interpreted by the Eurepean Court in its judgment of 6 May 1982 in Case

126/81 could be applied in the Federal Republic should be referred to the Federal Constitutional Court under Article 100.1 of the Basic Law or whether a fresh reference should be made to the European Court under Article 177.3 EEC.

In its judgment of 1 December 1982 (7 C 87.78), the Federal Supreme Administrative Court dismissed the appeal as unfounded. In its appeal on constitutional grounds the appellant claims that the judgment of the Federal Supreme Administrative Court disregarded its procedural and substantial rights under the Basic Law.

…

Extract from the Grounds:

B.

The appeal on constitutional grounds is admissible but is not well founded.

I.

1. A finding of a breach of Article 100.1 sentence 2 of the Basic Law in conjunction with Article 177.3 ECC by the judgment at issue, presupposes that the Federal Administrative Court was obliged to make a fresh reference to the European Court in spite of the latter Court's preliminary ruling of 6 May 1982 made as a result of the order for a reference by the former court. The refusal of a reference based on such an obligation would conflict with Article 101.1 sentence 2 of the Basic Law if the European Court was a statutory court within the limits of that provision and the refusal was based on arbitrary considerations.

a) The European Court is a statutory court in the meaning of Article 101.1 sentence 2 of the Basic Law; this question, not hitherto decided by the Federal Constitutional Court (see BVerfGE 29, 198 [207]) must be answered in the affirmative.

aa) In view of the extensive institutional guarantees which are present (see Articles 165, 168 and 188 EEC, Articles 2 et seq. and 17 et seq. of the Protocol on the Statute of the Court of Justice of the European Economic Community of 17 April 1957 [II BGBl.1146] and the Rules of Procedure of the Court of Justice of the European Communities of 4 December 1974 in the codified version of 15 February [1982] O.J. C 39/91), there can be no doubt of the European Court's character as a court within the meaning of Article 101.1 sentence 2 of the Basic Law. The Court is a sovereign organ of judicature established by the Community Treaties which, on the basis and within the framework of a legally established jurisdiction and procedures, in principle, makes final decisions in a state of judicial independence on legal questions in accordance with legal rules and legal standards. Its members are subject to obligations of independence and impartiality; their legal status is so constituted by law as to offer guarantee of personal independence. The Court's procedural rules satisfy the due process requirement of a state subject to the rule of law; in particular they guarantee the right to be heard, opportunities for initiating and defending litigation which are appropriate to the subject matter of the proceedings, and freely chosen expert assistance (see also BVerfGE 59,63 [91 et seq.]).

bb) The European Court is not an institution of the Federal Republic of Germany but a common institution of the European Communities. The functional interlocking of the jurisdiction of the European Communities with those of the member states, together with the fact that the Community Treaties, by virtue of the instructions on the application of law given by the ratification legislation under Articles 24.1 and 59.2 sentence 1 of the Basic Law, and the subordinate law passed on the basis of the Treaties are part of the legal order which applies in the Federal Republic and have to be adhered to, interpreted and applied by its courts, give the European Court the character of a statutory court within the meaning of Article 101.1 sentence 2 of the Basic Law, in so far as the legislation ratifying the Community Treaties confers on the Court judicial functions contained therein. Those functions include in particular the Court's jurisdiction to give preliminary rulings under Article 177 ECC.

Article 177 ECC accords the Court of Justice the conclusive authority in relation to the courts of member states to make decisions on the interpretation of the Treaty and on the validity and interpretation of instruments of Community law derived therefrom, (BVerfGE 52, 187 [200]). That judicial monopoly for the European Court as regards the treaty (embodied for the purposes of Community law in Article 177 ECC) gives it the character, to the extent, of a statutory court within the limits of Article 101.1 sentence 2 of the Basic Law.

This partly functional incorporation of the European Court into the jurisdictions of member states expresses the fact that the legal orders of member states and the legal order of the Community are not abruptly juxtaposed in a state of mutual insulation but are in numerous ways related to each other, interconnected and open to reciprocal effects (see e.g. Article 215.2 ECC and the reference therein to 'general principles common to the laws of the member states'). This becomes particularly clear in the allocation of jurisdiction under Article 177 oriented towards cooperation between the courts of member states and the European Court. In the interests of the Treaty objectives of integration, legal security and uniformity of application, it serves to bring about the most uniformly possible interpretation and application of Community law by all courts within the sphere of application of the ECC Treaty (see the European Court judgments in Hoffmann La Roche AG v. Centrafarm [107/76]).

cc) This conclusion is in harmony with the international law obligation on the Federal Republic of Germany arising under Article 5.1 EEC to take all appropriate measures to fulfil the obligations arising out of the EEC Treaty: in so far as they follow from Article 177 they are to be implemented by the courts and it is for the member states themselves to guarantee adherence to them. This objective is served in an especially apt way by the inclusion of the European Court, within the framework of its jurisdiction under Article 177 EEC, in the sphere of application of Article 101.1 sentence 2 of the Basic Law.

dd) Classification of the European Court as a statutory court according to Article 101.1 sentence 2 of the Basic Law in the matter of preliminary rulings under Article 177 ECC is not prevented by the fact that a reference under Article 177 constitutes an objective interim procedure in which the parties to the main action have no right of application of their own and which primarily serves the purpose of interpreting, implementing and reviewing the validity of Community law. An application to the European Court under Article 177 for a ruling forms part of uniform legal dispute, for the outcome of which the answering of the question referred to (in so far as relevant) is decisive. The right of an individual involved in the main action to demand implementation of the guarantees contained in Article 101.1 sentence 2 of the Basic Law also extends to the observation of the duty, established by Article 177 EEC, to institute proceedings for a ruling regardless of the legal nature of the proceedings and the rules which constitute its substance.

b) The Federal Administrative Court did not act arbitrarily in refusing in this case to make a fresh reference to the European Court.

aa) The European Court had already given a preliminary ruling in the same originating action following a reference by the Federal Administrative Court. The subject matter of its decision concerned the same legal issues, namely the validity of Commission Regulations 1412/76 of 18 June 1976 and 2284/76 of 21 September 1976, in respect of which the appellant demanded a fresh reference. The Federal Administrative Court was not obliged to refer the question a second time. Judgments made by the European Court in accordance with Article 177 EEC are binding on all courts of member states dealing with the same main action (European Court judgment in Milch, Fett und Eierkontor v. Hauptzollamt Saarbrücken [29/68]); in so far as they are relevant to the decisions of those courts they are to be used as a basis for deciding the main action. That follows from the meaning and purpose of Article 177 and 164 EEC (see BVerfGE 45, 142 [162]; 52, 187 [201]).

bb) There is an exception to such a binding effect according to the above mentioned judgment of the European Court in cases where its judgment lacks clarity. With regard to the European Court's preliminary ruling in the present action the Federal Supreme Administrative Court considered whether it was dealing which such a case. It answered the question in the negative. The view it took is in no way arbitrary.

cc) We are not concerned with deciding in the present case whether the basic binding effect of preliminary rulings of the European Court also ceases to apply if, after the ruling is given, new facts become known which might possibly lead to a different decision by the Court, or whether only the procedure for reapplication under Article 41 of the Statute of the Court would be relevant; the appellant has not alleged any such facts.

dd) It is not necessary for present purposes to decide whether under the provisions of Community law the possibility was open to the Supreme Administrative Court, having regard to any possible failure on the part of the European Court to take

account of or adequately to appraise the submissions of the appellant in the Article 177 proceedings, to commence fresh reference proceedings from the viewpoint of the right to a legal hearing. In the judgment of the Supreme Administrative Court, which was in no way arbitrary, there were no factors which could give rise to the supposition that the European Court failed to direct its attention to the appellant's submission or to give it due consideration. The requisite conditions therefore do not exist for a fresh reference under Article 177, the refusal of which, in so far as it was permissible, or possibly even required, under the provisions of Community law, could constitute a breach of Article 101.1 sentence 2 of the Basic Law.

c) On those grounds, at any rate, there is no question in the present proceedings, which involve an appeal on constitutional grounds, of a reference of the questions by the Federal Supreme Administrative Court to the European Court.

d) Furthermore, the Supreme Administrative Court did not contravene Article 101.1 sentence 2 of the Basic Law, by reason of its refusal to make a reference to the Constitutional Court under that Article in order to occasion the European Court to change its preliminary ruling by way of a reference by the Constitutional Court under Article 177. A reference to the Constitutional Court with that end in mind would have been inadmissible; the subject matter of proceedings under Article 100.1 of the Basic Law is the constitutionality of legislation and not of court judgments.

2. There was no contravention of Article 103.1 of the Basic Law.

a) The appellant's objection, that the European Court denied it the right to a legal hearing in the proceedings for a preliminary ruling and that for constitutional reasons it therefore could not bind the Supreme Administrative Court by its ruling, is inadmissible. The appellant is not alleging circumstances which would show that in its method of procedure in giving the preliminary ruling under Article 177 EEC, the European Court refused in general to accord the parties to the original proceedings a measure of legal hearing sufficient to satisfy the minimum rule of law requirements of due legal process and that it simply and generally disregarded or failed to take into account the guarantees in its statute and rules of procedure corresponding to those requirements. The infringement alleged by the appellant in this case, even if it should be true, does not allow that general conclusion to be drawn.

Only if there were that sort of general denial of a legal hearing on the part of the European Court could consideration be given, in view of the requirements of principle imposed by the Basic Law as a condition for the transfer of sovereign rights under Article 24.1 of the Basic Law (see BVerfGE 37, 271 [296]; 58, 1[28, 40]), to questioning the continued validity under the Basic Law of the Acts of Accession to the Community Treaties, and therefore the binding effect of preliminary rulings of the European Court, from the standpoint of infringement of the right to a legal hearing (see also II. 1 and 2 below).

b) The Supreme Administrative Court itself clearly took notice of the appellant's submissions and took them into account in reaching its decision; there is therefore no question of a contravention of Article 103.1 of the Basic Law. Nor was the court obliged for constitutional reasons, as explained, to provide the appellant with the legal hearing before the European Court which it was allegedly denied by making a fresh reference to the Court.

3. Article 19.4 of the Basic Law was not infringed by the judgment of the Federal Supreme Administrative Court:

a) Instruments incorporating judicial decisions of the kind here at issue do not fall within the term 'public powers' for the purposes of that Article (see BVerfGE 49, 329 [340 et seq.]).

b) Nor is the appeal on constitutional grounds well founded if it is understood in the sense that the appellant regards it as an infringement of Article 19.4 sentence 1 of the Basic Law, that remedies are not available from the German courts against judgments of the European Court in proceedings for a preliminary ruling under Article 177.

This Court has already held on several occasions that Article 19.4 of the Basic Law does not confer subsidiary jurisdiction on German courts or give them international competence to intervene against decisions of international courts (BVerfGE 58, 1 [28 et seq.] with further references); the same applies to decisions of the European Court.

c) Nor was there a breach of Article 19.4 sentence 1 of the Basic Law by reason of the Supreme Administrative Court considering itself bound by the preliminary ruling of the European Court.

aa) It is true that Article 19.4 sentence 1 of the Basic Law requires the provision of a legal system of recourse to the courts, which guarantees a comprehensive consideration of the factual and legal aspects of the subject matter of the proceedings, as well as a form of decision and means of implementing it appropriate to the particular demand for protection of rights, by an independent and impartial organ of judicature (BVerfGE 60, 253 [296 seq.]); disregarding possible circumstantial effects and the scope for appraisal, formulation or discretion on the part of the legislative or executive authority, this in principle, excludes any binding obligation on courts to adhere to factual or legal judgments of a particular case by other bodies. But this does not exclude an obligation provided for by legal rules to adhere to the decisions of other courts (see BVerfGE 65, 132 [137 et seq.]); because of its functional jurisdiction under Article 177 EEC, in respect of which there are no constitutional doubts, the same also applies to the binding effect of preliminary rulings of the European Court.

bb) The question whether there is sufficient provision for the protection of legal rights before the European Court could only be significant in relation to a possible infringement of Article 24.1 of the Basic Law by the Act of Accession to the EEC

Treaty if the constitutional principle of the rule of law, which has to be respected in the event of transfer of sovereign rights under Article 24.1, required a right of appeal to be given against preliminary rulings of the European Court.

This Court has consistently held that neither Article 19.4 nor Article 103.1 of the Basic Law nor the general principle of the rule of law requires there to be an additional recourse to domestic (German) courts of further instance (see BVerfGE 34, 1 [6]; 42, 243 [248]; 42, 252 [254]; 49, 329[343]; 54, 277 [291l]). From that viewpoint the present organization of the procedure for a preliminary ruling from the European Court does not fail to adhere to the restrictions laid down in the Basic Law on the transfer of sovereign rights.

II.

It cannot be held that the judgment of the Federal Administrative Court at issue infringed the appellant's fundamental rights under Articles 12.1 and 2.1 in conjunction with Article 20.3 of the Basic Law (principles of proportionality and legal certainty).

1. The appellant's complaints, that the European Court's ruling and Commission Regulations 1412/76 and 2284/76 as interpreted by that Court infringed the fundamental rights under the Basic Law and therefore ought not to have been applied by German authorities or courts during the period in question within the sphere to which the Basic Law applies, are inadmissible; a reference of the regulations to this Court by the Supreme Administrative Court under Article 100.1 of the Basic Law would have been inadmissible.

a) Article 24.1 of the Basic Law makes it possible to open up the legal system of the Federal Republic of Germany in such a way that the Federal Republic's exclusive claim to control in its sphere of sovereignty can be withdrawn and room can be given for the direct validity and application of a law from another source within that sphere of the sovereignty (see BVerfGE 37, 271 [280]; 58, 1 [28]; 59, 63 [90]). It is true that Article 24.1 of the Basic Law does not itself provide for the direct validity and application of the law established by the international institution, nor does it directly regulate the relationship between such law and domestic law (for example, the question of the priority of their respective application). Internal validity and application, as well as the possible internal priority of validity or application of international treaties (including those of the sort at issue here), do not follow directly from general international law. Current international law does not contain any general rule arising out of the agreed practice of states or undoubted legal acceptance to the effect that states are obliged to incorporate their treaties into their domestic law and to accord them thereunder priority of validity or application as against the national law. Internal priority of validity or application only arises by virtue of an application of law instruction to that effect under the national law, and that applies, too in the case of treaties, the content of which obliges the parties to provide for internal priority of validity or application. Article 24.1, however, makes it possible constitutionally for treaties which transfer sovereign rights to international institutions and the law established by such institutions to be accorded priority of validity and application as against the national law of the Federal Republic by the appropriate internal application of law instruction.

That is what took place in the case of the European Community Treaties and the law established on their basis by the Community organs by the passing of the Acts of Accession to the Treaties under Articles 24.1 and 59.2 sentence 1 of the Basic Law. From the application of law instruction of the Act of Accession to the EEC Treaty, which extends to Article 189.2 EEC, arises the immediate validity of the regulations of the Community for the Federal Republic and the precedence of their application over national law.

b) The power conferred by Article 24.1 of the Basic Law, however, is not without limits under constitutional law. The provision does not confer a power to surrender by way of ceding sovereign rights to international institutions the identity of the prevailing constitutional order of the Federal Republic by breaking into its basic framework, that is, into its very structure. That applies in particular to legislative instruments of the international institution which, perhaps as a result of a corresponding interpretation or development of the underlying treaty law, would undermine essential, structural parts of the Basic Law. An essential part which cannot be dispensed with and belongs to the basic framework of the constitutional order in force is constituted in any event by the legal principles underlying the provisions of the Basic Law on fundamental rights (see BVerfGE 37, 271 [279]; 58, 1 [30 seq.]). Article 24.1 of the Basic Law, subject to conditions, allows these legal principles to be treated according to context. In so far as sovereign power is accorded to an international institution within the meaning of Article 24.1 which is in a position within the sovereign sphere of the Federal Republic to encroach on the essential content of the fundamental rights recognized by the Basic Law, it is necessary, if that entails the removal of legal protection existing under the terms of the Basic Law, that instead, there should be a guarantee of the application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law. As a general rule this will require a system of protection of individual rights by independent courts which are given adequate jurisdiction and, in particular, power to review and decide on factual and legal questions appropriate to the relevant claim to protection of rights, and by courts which reach their decisions on the basis of a proper procedure allowing the right to a legal hearing and providing for means of attack or defence appropriate to the subject matter of the dispute and for the availability of freely chosen expert assistance, and the decisions of which, if necessary, contain adequate and effective sanctions for the infringement of a fundamental right.

c) This Court explained in its judgment of 29 May 1974 (see BVerfGE 37, 271 [280 et seq.]) that, having regard to the state of integration which had been reached at that time, the standard of fundamental rights under Community law, generally binding within the European Communities, did not yet show the level of legal certainty for the Court to conclude that standard would permanently satisfy the fundamental rights standards of the Basic Law, without prejudice to possible modifications, in such a way that the limits imposed by Article 24.1 of the Basic Law on the application of derived Community law within the sovereign area of the Federal Republic would not be transgressed. It said that the Community still lacked a Parliament legitimized by direct democratic means and established by general suffrage, which possessed legislative powers

and to which the Community institutions competent to issue legislation were politically fully responsible; in particular, the Community still lacked a codified catalogue of fundamental rights; European Court case law, as it then stood, did not by itself guarantee necessary legal certainty. So far as that legal certainty remained unachieved in the course of subsequent integration, the reservation derived from Article 24 remained in force. This Court accordingly held in the above mentioned judgment: as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings after obtaining a ruling of the European Court under Article 177 of the Treaty is admissible and necessary if the German court regards that rule of Community law which is relevant to its decision in the interpretation given by the European Court to be inapplicable in the interpretation given by the European Court because and in so far as it conflicts with one of the fundamental rights in the Basic Law (BVerfGE 37, 271 [285]). In the case in question it held the reference under Article 100.1 of the Basic Law to be admissible but, in the circumstances, not to be well founded.

In its decision of 25 July 1979 (BVerfGE 52, 187 [202 seq.]), this Chamber expressly left open the question whether, or to what extent (having regard to political and legal developments which might take place in the meantime in European Community matters), the principles laid down in the judgment of 29 May 1974 could continue to claim unrestricted validity in relation to future reference of rules of derived Community law.

d) In the judgment of this Chamber a measure of protection of fundamental rights has been established in the meantime within the sovereign jurisdiction of the European Communities which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided for in the Basic Law. All the main institutions of the Community have since acknowledged in a legally significant manner that in the exercise of their powers and the pursuit of the objectives of the Community they will be guided as a legal duty by respect for fundamental rights, in particular as established by the constitutions of member states and by the European Convention on Human Rights. There are no decisive factors to lead one to conclude that the standard of fundamental rights which has been achieved under Community law is not adequately consolidated and is only of a transitory nature.

aa) This standard of fundamental rights has in the meantime, particularly through the decisions of the European Court, been formulated in content, consolidated and adequately guaranteed.

In the early years the European Court refused to investigate accusations by parties that decisions of the High Authority had infringed principles of German constitutional law and, in particular, Articles 2 and 12 of the Basic Law (Stork v. High Authority [1/58]); it stated that it had no authority to ensure respect for rules of domestic law in force in one or other member state, even if they involved

principles of constitutional law, and explained that 'Community law as it arises under the European Coal and Steel Community Treaty does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights (President etc. v. High Authority [36-38/59 and 40/59]). In the following period the European Court made it clear that the general principles of Community law, the maintenance of which it was bound to protect, included the fundamental rights of the individual (see Stauder v. City of Ulm [29/69]). It is true that in the Internationale Handelsgesellschaft case (Internationale Handelsgesellschaft [11/70]) it held that the validity of a Community measure or its effect within a particular member state could not be affected by an allegation that it ran counter to fundamental rights as formulated by the constitution of the member state or to the principles of its constitutional structure; it would still have to consider, however, whether an analogous guarantee under Community law had been disregarded, for the safeguarding of fundamental rights formed part of the general principles of law which the Court had to protect. Whilst the protection of such rights must be supported by the constitutional traditions of the member states, they must also operate within the structure and objectives of the Community.

The European Court took the essential step (from the viewpoint of the Basic Law) in its judgment in the Nold case (J. Nold KG v. E.C. Commission [4/73]), where it stated that in relation to the safeguarding of fundamental rights it had to start from the common constitutional tradition of the member states: 'it cannot therefore allow measures which are incompatible with fundamental rights recognized and guaranteed by the constitutions of those states'.

On the legal basis of the general principles of Community law thus defined and given that content, the European Court in the period that followed cited fundamental rights, as recognised in the constitutions of member states, as obligatory standards for reviewing measures of Community organs taken within their spheres of jurisdiction. Side by side with the express guarantees of liberties contained in the Community Treaties themselves (see e.g. Articles 7, 48 et seq., 59 et seq. and 67 et seq. EEC) the foreground was occupied naturally by the fundamental rights and freedom relating to economic activities, such as the right to property and freedom to pursue economic activities (see Nold [above]; Hauer v. Land Rheinland-Pfalz [44/79]). In addition to that it cited other basic rights, such as freedom of association, the general principle of equal treatment and the prohibition of arbitrary acts, religious freedom or the protection of the family, as standards of assessment (see Union Sydicale v. E.C. Council [175/73]; Ruckdeschel [117/76 and 16/77]).

The European Court has generally recognized and consistently applied in its decisions the principles, which follow from the rule of law, of the prohibition of excessive action and of proportionality as general legal principles in reaching a balance between the common interest objectives of the Community legal system and the safeguarding of the essential content of fundamental rights (More recent examples are the judgments in: Internationale Handelsgesellschaft [above]; Hauer

[above]; Testa v. Bundesanstalt für Arbeit [41, 121 and 796/79]; Heijn [94/83]; Fearon v. Irish Land Commission [182/83]; Altole [240/83]; compare M. Hilf in EuGRZ 1985, 647 at 649). It has recognized the prohibition of retrospection as an emanation of the basic principle of legal certainty and has recognized the rule against double penalties (see Racke [98/78]; Regina v. Kent Kirk [63/83]; Boehringer [7/72]) and likewise the obligation under the rule of law to state reasons for individual decisions (see Intermills v. E:C: Commission [323/82]; Netherlands v. E:C: Commission [296 and 318/82]; M. Hilf, loc. cit on p. 650). In Johnston v. The Chief Constable of the Royalulster Constabulary (Case 222/84) the Court, having recourse to the constitutional traditions common to all member states and to Article 13 of the European Human Rights Convention, categorized the claim to effective judicial protection for the safeguarding of personal rights as a constituent part of the guarantees for fundamental rights under Community law. It regarded the duty to grant a legal hearing as an essential requirement of a fair procedural system (see Pecastaing v. Belgian State [98/79]).

For the purposes of defining under Community law the content and extent of fundamental rights, the Court has also referred to the European Human Rights Convention and its additional protocol (see Rutili (36/75)).

bb) The European Parliament, the Council and the Commission of the Community adopted the following joint declaration on 5 April 1977 (O.J. 1977, C 103/1):

The European Parliament, the Council and the Commission, Whereas the Treaties establishing the European Communities are based on the principle of respect for the law;

Whereas, as the Court of Justice has recognized, that law comprises, over and above the rules embodied in the Treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the member states is based; Whereas, in particular, all the member states are Contracting Parties to the European Convention for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, have adopted the following declaration:

1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the member states and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2. In the exercise of their powers and in pursuance of the aims of the European Communities, they respect and will continue to respect these rights. The European council adopted a declaration on democracy on 7/8 April 1978; it reads as follows:

> The election of the Members of the Assembly by direct universal suffrage is an event of out-standing importance for the future of the European Communities and a vivid demonstration of the ideals of democracy shared by the people within them.

> The creation of the Communities, which is the foundation of ever closer union among the peoples of Europe called for in the Treaty of Rome, marked the determination of their founders to strengthen the protection of peace and freedom.
>
> The Heads of State and of Government confirm their will, as expressed in the Copenhagen Declaration the European identity, to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.
>
> The application of these principles implies a political system of pluralist democracy which guarantees both free expression of opinions within the constitutional organization of powers and the procedures necessary for the protection of human rights.
>
> The Heads of State and of Government associate themselves with the Joint Declaration by the Assembly, the Council and the Commission whereby these institutions expressed their determination to respect fundamental rights in pursuing the aims of the Communities.
>
> They solemnly declare that respect for and maintenance of representative democracy and human rights in each member state are essential elements of membership of the European Communities.

e) Compared with the standard of fundamental rights under the Basic Law it may be that the guarantees for the protection of such rights established thus far by the decisions of the European Court, since they have naturally been developed case by case, still contain gaps in so far as specific legal principles recognized by the Basic Law or the nature, content or extent of a fundamental right have not individually been the object of a judgment delivered by the Court. What is decisive, nevertheless, is the attitude of principle which the Court maintains at this stage towards the Community's obligations in respect of fundamental rights, to the incorporation of fundamental rights in Community law under legal rules and the legal connection of that law (to that extent) with the constitutions of member states and with the European Human Rights Convention, as is also the practical significance which has been achieved by the protection of fundamental rights in the meantime in the Court's application of Community law. Although the above mentioned declarations of the institutions of the European Community and of the European Council may lack the formal character of Treaty law and though the Community as such is not a party to the European Human Rights Convention, those instruments are both internal to the Community and of legal significance as regards the relationship of the Community with its member states: they testify formally to the agreed legal view of the states party to the Treaty and of the Community institutions with regard to the Community's obligation to guarantee fundamental rights as they result from the constitutions of the member states and, by virtue of being general legal principles, attain validity as primary Community law; by their unanimous testimony to an intention as regards the application of the Community

Treaties in practice, they are also of legal significance under international law for the definition of the content of the Treaties. The declarations also reinforce the European Court's jurisdiction and obligation to ensure the protection under Community law of these fundamental rights and the legal principles which they entail in accordance with its rules of procedure. Those rules of procedure, in relation to access to the Court, the given types of procedures, the powers of the Court to review and make decisions, the procedural principles and the effect of its decisions, are organized in a way which, in general, guarantees effective protection of fundamental rights which is to be regarded as substantially similar to the unconditional protection of fundamental rights under the Basic Law.

By virtue of the connection, through legal rules as explained above of the guarantees of fundamental rights contained in the constitutions of member states and in the European Human Rights Convention, with the general principles of Community law, the requirement of a catalogue of fundamental rights decreed by a Parliament, which was regarded as necessary by this Chamber in its judgment of 29 May, has also been satisfied in all, the circumstances. In the first place, since 1974 all the original member states of the Community (like those which acceded later) have acceded to the European Human Rights Convention, and their respective parliaments have approved their accession; in the second place, the common declaration of 5 April 1977, which was also adopted by the European Parliament, can be judged from the viewpoint of the requirement to be a sufficient parliamentary recognition of a formulated catalogue of effectively operating fundamental rights. Whilst this Chamber in its judgment of 29 May 1974, observed that the Community lacked a parliament legitimized by direct and democratic means and established by general suffrage which possessed legislative powers and to which the institutions competent to issue legislation were politically fully responsible, that was an element in the description of the state of integration as it appeared at that time; the basis for that finding was clearly the consideration that protection of fundamental rights has to begin as early as the stage of lawmaking and parliamentary responsibility provides a suitable protective arrangement for that purpose. There was no intention, however, of laying down a constitutional requirement that such a position must have prevailed before there could be any possibility of the withdrawal of the Federal Constitutional Court's jurisdiction over derived Community law in proceedings by way of review of legislation under Article 100.1 of the Basic Law.

Nor is it to be expected in view of the state of European Court case law achieved at the present stage that a decline in the standards of fundamental rights under Community law might result through the legal connection of Community law with the constitutions of member states to an extent that makes it impossible on constitutional grounds to regard a reasonable protection of fundamental rights as being generally available. In the first place, the Court is not obliged to determine the general principles of Community law according to the lowest common denominator derived from a comparison of the constitutions of member states, even if such deep differences between their Basic Laws exist at all or do arise in the future. It is to be expected rather that the European Court will strive to ensure the best possible development of any particular principle of fundamental rights in Community law. In the second place,

the taking into account for legal purposes of the European Human Rights Convention, together with the now extensive case law of the European Court in favour of human rights, guarantees a minimum standard of substantive protection of fundamental rights which, in principle, satisfies the legal requirements of the Basic Law as such. That position is not altered by the fact that the Community as such is not a party to the European Human Rights Convention.

The fact that at Community level questions of a different nature arise in certain circumstances in connection with the regulation of fundamental rights or the practical definition of the extent to which they are protected does not, in general, impair the adequacy of the protection of fundamental rights provided by Community law from the point of view of the Basic Law. In regard especially to the objectives laid down in the Community treaties, which for their part are compatible with the Basic Law, questions of balance will arise in this connection involving Treaty and common interest objectives of the Community which will not arise, at least directly, in the same way at member state level. Furthermore, the fundamental rights safeguarded by the Basic Law take their place in a constitutional framework as a body of rules representing a unified purpose and are accordingly to be interpreted and applied in harmony and coordination with other legal interests conferred or recognized thereby. They include the belief, expressed in the preamble forms, of supranational cooperation made possible under Article 24.1. Under the Basic Law, therefore it is also possible to have legal provisions at Community level which protect fundamental rights in accordance with the objectives and special structures of the Community; the substantive content of the fundamental rights and, indeed, of human rights on the other hand is unconditional and must continue in existence in face of the sovereign powers of the Community as well. This Chamber holds that requirement to be adequately guaranteed in general at the present stage at Community level.

f) In view of those developments it must be held that, so long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100.1 for that purpose are therefore inadmissible.

g) The question must, therefore, remain unanswered whether the appellant is correct in its accusation that the disputed Commission regulations in the interpretation given by the European Court infringe its fundamental rights as recognized in Articles 12.1 and 2.1 in conjunction with Article 20.3 of the Basic Law. It does not appear either from the appellant's submissions or from the preliminary ruling of the European Court that

the Court under its interpretation of the law is in general simply not prepared or not in a position to recognize or protect the fundamental rights claimed by the appellant and that, therefore, the degree of protection of such rights required by the Basic Law has in general clearly not been reached at the level of Community law. For those reasons the present case does not give any occasion to consider a review of the disputed Commission regulations in respect of their compatibility with fundamental rights under the Basic Law. A reference of the Commission regulations under Article 100.1 by the Federal Supreme Administrative Court in the main action would, therefore, have been inadmissible.

2. The appellant has not alleged, nor is there any evidence of any independent contravention by the judgment of the Federal Supreme Administrative Court of the constitutional rights which it claims would not be covered by the binding effects on that court of the European Court's preliminary ruling.

c) (Part) Translation of the Maastricht Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 89, 155*

Headnotes:

…

7. Sovereign acts of the European Communities also affect the holders of fundamental rights in Germany, and thereby touch on the guarantees of the Constitution and the role of the Federal Constitutional Court, which is responsible for the protection of fundamental rights in Germany, not only against German state organs (contrary to BVerfGE 58, 1 [27]). Nevertheless the Federal Constitutional Court exercises its jurisdiction over the applicability of secondary Community Law in Germany in a "relationship of cooperation" with the European Court of Justice.

…

Judgment of the Second Senate of 12 October 1993 - 2 BvR 2134/92 and 2159/92 -

…

Facts:

The recourse to the Federal Constitutional Court opposes Parliament's approval of the Treaty of Maastricht and the constitutional amendment to legalize Germany's membership in the European Union (Article 23 of the Basic Law) as well as to install a European Monetary Union

* Translation by Miriam Söhne; © Konrad-Adenauer-Stiftung.

(Article 88 of the Basic Law). The main interrelated but distinct issues of the claim are the expansion of the European Union competences and the potential existence of "absolute" limits to European integration.

German members of the European Parliament, belonging to the political party "Die Grünen" (The Green Party), and Manfred Brunner, a former high ranking official of the European Commission, lodged complaints of unconstitutionality with the Federal Constitutional Court.

The complainants claim that the amendments to the Basic Law and the law transforming the Treaty of Maastricht into national law violated the following: (1) the right to human dignity; (2) the right to free development of personality; (3) the right to form associations and societies; (4) the right to freely establish political parties; (5) the right to freely choose a trade, occupation or profession; (6) the right to property; (7) the right to elect deputies of the German Bundestag; (8) the right to constrain any person seeking to abolish the constitutional order of Germany.

…

Extract from the Grounds:

…

B. I.

2. b) The complainant argues that his fundamental rights were infringed because they are no longer guaranteed for Germany alone and by German state organs and therefore changed their content as they became European fundamental rights. This complaint is inadmissible, too. The openness of the Basic Law towards European Integration, which is already established in the preamble of the Basic Law and further regulated in Articles 23 and 24 of the Basic Law, has an impact on the possibility of encroachments upon fundamental rights. Those encroachments upon fundamental rights can also result from measures taken by the European organs. Thus, the protection of fundamental rights must be guaranteed throughout the territory where these measures apply; this especially widens the territorial scope of application of the fundamental liberties and the comparative perspective as regards the application of the rule of equality.

   This does not result in a substantial decrease in the standard of fundamental rights protection. The Federal Constitutional Court by its jurisdiction (see BVerfGE 37, 271 [280 seq.]; 73, 339 [376 seq.]) generally guarantees an effective protection of basic rights for the inhabitants of Germany, also against the sovereign powers of the Communities. It guarantees that this protection of basic rights will be accorded the same respect as the protection of indispensable basic right guarantees under the constitution. In particular the court provides a general safeguard of the essential content of the basic rights. The court thus guarantees this essential content as against the sovereign powers of the Community as well (see BVerfGE 73, 339 [386]).

Sovereign acts of the European Communities also affect the holders of fundamental rights in Germany, and thereby touch on the guarantees of the Constitution and the role of the Federal Constitutional Court, which is responsible for the protection of fundamental rights in Germany, not only against German state organs (contrary to BVerfGE 58, 1 [27]). Nevertheless the Federal Constitutional Court exercises its jurisdiction over the applicability of secondary Community Law in Germany in a "relationship of cooperation" with the European Court of Justice. In this relationship, the European Court of Justice guarantees the fundamental rights protection in each individual case for the whole area of the European Community, and the Federal Constitutional Court can therefore limit itself to the general guarantee of the indispensable fundamental rights standard (see BVerfGE 73, 339 [387]).

…

d) Translation of the Banana Market Organization Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 102, 147*

Headnotes:

1. Constitutional complaints and submissions by courts which assert that fundamental rights guaranteed in the Basic Law have been infringed by secondary European Community Law are inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has declined below the standard of fundamental rights required after the "Solange II" decision (BVerfGE 73, 339 [378 - 381]).

2. Therefore, the grounds for a submission or a constitutional complaint must state in detail that the protection of the fundamental rights unconditionally required by the Basic Law is not generally ensured in the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in the "Solange II" decision (BVerfGE 73, 339 [378 - 381]).

Order of the Second Senate of 7 June 2000 - 2 BvL 1/97 -

Facts:

The judicial referral concerns the question whether the application of the common organisation of the market in bananas of the European Community in the Federal Republic of Germany is constitutional. On 1 July 1993, the common organisation of the market in bananas (hereinafter: banana market organisation) entered into force pursuant to Article 33, sentence 2 of Council Regulation (EEC) No 404/93 of 13 February 1993 (OJ L 47, 25/02/1993, p. 1 - 11; hereinafter: Regulation 404/93), which, *inter alia*, discontinued the tariff quota granted in the Banana Protocol (Regulation 404/93, Article 21 [2]).

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The regulation differentiates bananas according to their origin: First, "Community bananas" are produced within the European Community. Second, "ACP bananas" come from certain African, Caribbean and Pacific countries, which, as the so-called ACP countries, have for a long time been linked to the European Community by special multilateral agreements. In this context, a quota of bananas of a total weight of up to 857,000 tonnes is referred to as "traditional" ACP bananas (cf. Annex of Regulation 404/93), this quantity corresponding to the customary import quantity from ACP countries. Imports that exceed this quantity are referred to as "non-traditional" ACP bananas. Finally, "third country bananas" are neither from the Community nor from ACP countries. As regards price and quality, neither Community bananas nor ACP bananas can compete with third country bananas. The aim of the banana market organisation is to support the banana production within the Community and to ensure the duty-free sale of traditional ACP bananas without hindering the import of third country bananas and non-traditional ACP bananas (Regulation 404/93, recitals 2 et seq.).

To achieve this, compensatory aid arrangements for Community bananas were created (Regulation 404/93, Art 10 et seq.). Traditional ACP bananas - as all bananas produced outside the European Community - require an import licence (Regulation 404/93, Article 17), but are duty-free (Regulation 404/93, recital 12). Non-traditional ACP bananas and third country bananas may be imported, in the framework of a specified tariff quota, at low customs duty rates or duty-free. Beyond this quota, however, they are subject to high levies.

The plaintiffs of both original proceedings are 19 companies of the so-called Atlanta group. As banana importers, they engage in all steps of transport, ripening and marketing. 30 per cent of their sales are obtained from the marketing of bananas. After the entry into force of the banana market organisation, the plaintiffs were allotted a provisional quota quantity for the third quarter of 1993. Objections raised against the limitation this allotment placed on the quantities of imports were dismissed. In the legal action they brought against this limitation, the plaintiffs put forward, at first, that Regulation 404/93 infringes Community law. The Administrative Court submitted the question to the Court of Justice of the European Communities. At the same time, it granted the plaintiffs, by means of temporary relief, further import licences for the months of November and December 1993, at a customs duty rate of 100 ECU per tonne, which were, in case of the plaintiffs losing the case on the merits, to be offset against the reference quantities to which the plaintiffs were entitled according to Community law.

The submission is inadmissible.

Extract from the Grounds:

…

B.

…

II.

In its decision of 29 May 1974 - 2 BvL 52/71 (BVerfGE 37, 271 - "As long as ... Decision" [*Solange I*]), the competent Senate of the Federal Constitutional Court had, with reference to actual jurisdiction, come to the result that the integration process of the Community

had not progressed so far that Community law also contained a codified catalogue of fundamental rights decided on by a Parliament and of settled validity, which was adequate in comparison with the catalogue of fundamental rights contained in the Basic Law. For this reason, the Senate regarded the reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in constitutional review proceedings, following the obtaining of a ruling of the Court of Justice of the European Communities under Article 177 of the EEC Treaty, which was required at that time, as admissible and necessary if the German court regards the rule of Community law that is relevant to its decision as inapplicable in the interpretation given by the Court of Justice of the European Communities because and in so far as it conflicts with one of the fundamental rights of the Basic Law (BVerfGE 37, 271 [285]).

…

2 a) In its decision of 22 October 1986 - 2 BvR 197/83 (BVerfGE 73, 339 - [*Solange II*]), the Senate holds that a measure of protection of fundamental rights has been established in the meantime within the sovereign jurisdiction of the European Community which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided in the Basic Law, and that there are no decisive factors to lead one to conclude that the standard of fundamental rights which has been achieved under Community law is not adequately consolidated and only of a transitory nature (BVerfGE 73, 339 [378]).

On the basis of individual decisions of the Court of Justice of the European Communities, the Senate made statements concerning the standard of fundamental rights, and holds that this standard, particularly through the decisions of the Court of Justice of the European Communities, has been formulated in content, consolidated and adequately guaranteed (BVerfGE 73, 339 [378 - 381]). In this context, the Senate commented on the decisions of the Court of Justice of the European Communities concerning the fundamental rights and freedoms relating to economic activities, such as the right to property and the freedom to pursue economic activities (above, p. 380), but also on the freedom of association, on the general principle of equal treatment and the prohibition of arbitrary acts, religious freedom and the protection of the family, as well as on the principles, which follow from the rule of law, of the prohibition of excessive action and of proportionality as general legal principles in achieving a balance between the common interest objectives of the Community legal system, and on the safeguarding of the essential content of fundamental rights (above, p. 380).

In summary, the Senate made the following statement: As long as the European Communities, in particular European case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such

legislation by the standard of fundamental rights contained in the Basic Law. References (of rules of secondary Community law to the Federal Constitutional Court) under Article 100.1 of the Basic Law are therefore inadmissible (BVerfGE 73, 339 [387]).

b) In its Maastricht Decision (BVerfGE 89, 155), the Senate maintained this view. In this decision, the Senate stressed that the Federal Constitutional Court, through its jurisdiction, guarantees, in cooperation with the Court of Justice of the European Communities, that effective protection of fundamental rights for the residents of Germany will also be secured against the sovereign powers of the Communities and is generally to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and that in particular the Court provides a general safeguard of the essential contents of the fundamental rights. The Federal Constitutional Court thus guarantees this essential content against the sovereign powers of the Community as well (BVerfGE 89, 155 [174 - 175], with reference to BVerfGE 37, 271 [280 et seq.] and 73, 339 [376 - 377, 386]). Under the preconditions the Senate has formulated in BVerfGE 73, 339 - "Solange II" -, the Court of Justice of the European Communities is also competent for the protection of the fundamental rights of the citizens of the Federal Republic of Germany against acts done by the national (German) public authority on account of secondary Community law. The Federal Constitutional Court will only become active again in the framework of its jurisdiction should the Court of Justice of the European Communities depart from the standard of fundamental rights stated by the Senate in BVerfGE 73, 339 (378 - 381).

c) Article 23.1 sentence 1 of the Basic Law (inserted pursuant to the Law amending the Basic Law of 21 December 1992 - BGBl I, p. 2086 -) confirms this ruling. Pursuant to this law, the Federal Republic of Germany shall participate, with a view to establishing a united Europe, in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of fundamental rights essentially comparable to that afforded by the Basic Law. An identical protection in the different areas of fundamental rights afforded by European Community law and by the rulings of the Court of Justice of the European Communities, which are based on Community law, is not called for. The constitutional requirements are satisfied in accordance with the preconditions mentioned in BVerfGE 73, 339 (340, 387) if the rulings of the Court of Justice of the European Communities generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights.

d) Thus, constitutional complaints and submissions by courts are, also pursuant to the Senate decision in BVerfG 89, 155, inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has resulted in a decline below the required standard of fundamental rights after the "Solange II" decision (BVerfGE 73, 339 [378 - 381]). Therefore, the grounds for a submission by a national court of justice or of a constitutional complaint which puts forward an infringement by secondary European

Community Law of the fundamental rights guaranteed in the Basic Law must state in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured in the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in BVerfGE 73, 339 (378 - 381).

…

2. Identity Review

Explanatory Annotation

As mentioned above, the right to vote in Article 38 of the Basic Law is elevated by Article 93.1(4a) of the Basic Law to the same status that the fundamental rights listed in the catalog of Articles 1-19 of the Basic Law possess because all of these rights are subjective rights, i.e. they are procedurally secured by the constitutional complaint procedure to the Constitutional Court. The Constitutional Court has consistently held that the right to vote not only protects the voting act in the narrow sense, e.g. the secrecy of the ballot, the generality of voting eligibility and the equality of the vote, but that the right to vote also protects the role of the institution whose constitution is determined by the elections. That means that the right to vote in Article 38 of the Basic Law can be violated if the Parliament loses core powers.

In the Lisbon decision on the constitutionality of the Treaty of Lisbon, the Constitutional Court added a further layer of protection from the perceived threat of encroachment of the EU into the constitutional space of its member state Germany, the so-called identity review.[203]

The "European Arrest Warrant" decision of the Constitutional Court provided the first opportunity to speak to the "identity review" in more detail. The case concerned the extradition to Italy of a US citizen arrested in Germany based on a European Arrest Warrant.[204] The person in question had been sentenced *in absentia* to a long prison term and claimed that extradition would violate the foundational principle of "*nulla poena sine culpa*", which includes the ability of a defendant to put forward his perspective of what happened before the deciding court because

203 BVerfG, 2 BvE 2/08, 30/6/2009, http://www.bverfg.de/e/es20090630_2bve000208en.html (last accessed 6.9.2019), para. 240.

204 BVerfG, 2 BvR 2735/14, 15/12/2015, http://www.bverfg.de/e/rs20151215_2bvr273514en.html (last accessed 23/2/2019).

Italian law would have prevented him from appealing the sentence on factual grounds. The GFCC concurred and held that his inability to do so would indeed have to be regarded as a violation of the Basic Law's foundational dignity clause in Article 1 and, hence Germany could not extradite.[205] The underlying EU legislation governing the European Arrest Warrant (the Framework Decision) limits the reasons the enforcing state can invoke against extradition requests and contains specific language concerning trials and convictions *in absentia*.[206] Article 4a(1)(c) of the Framework Decision requires that after a conviction *in absentia* a merit review of the original conviction must be possible and the Italian authorities had submitted information to show that this possibility existed. However, the Constitutional Court, unlike the "lower" courts[207], did not regard these assurances as sufficient to overcome its concerns regarding the principle of guilt and human dignity.[208] The guilt principle is deemed to be part of Germany's constitutional identity so that the *de facto* inability to apply for a review of the facts in the requesting state after conviction in absentia would be a violation of that principle and hence the European legislative act must not be applied. However, the Constitutional Court avoided an open challenge to the doctrine of EU supremacy by explaining that this result was not exclusively the consequence of applying German constitutional law. Instead, the proper construction of the EU legislation in question, i.e., the Framework decision, read together with the judicial guarantees of the EU-Charter of Fundamental Rights, would "obviously" yield the same result.[209] In other words, the Constitutional Court turned a possible conflict of EU law with German constitutional norms of the most distinguished kind (as part of the suite of norms shaping the German constitutional identity) into a celebration of the harmonious co-existence of norms built on the same values.[210]

205 BVerfG, 2 BvR 2735/14, 15/12/2015, http://www.bverfg.de/e/rs20151215_2bvr273514en.html (last accessed 6.9.2019).

206 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) as amended by the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, http://data.europa.eu/eli/dec_framw/2002/584/2009-03-28 (last accessed 6.9.2019).

207 The GFCC is not a court of appeal and hence does not sit "above" other courts. However, its judgments, decisions, and orders have in essence the same effect as overruling or remanding appellate court decisions.

208 BVerfG, 2 BvR 2735/14, 15/12/2015, paras 111-123, http://www.bverfg.de/e/rs20151215_2bvr273514en.html (last accessed 6.9.2019).

209 Id. at para. 125. The obviousness of this application of EU law was important because it allowed the GFCC to circumvent having to submit the EU law part of the case to the ECJ under the preliminary ruling procedure. The ECJ's jurisdiction with regard to the interpretation of EU law does not have to be invoked if the meaning of the EU norms in question is clear and obvious ("acte clair").

210 See Bröhmer, Jürgen, Economic Constitutionalism in the EU and Germany – The German Constitutional Court, the European Court of Justice and the European Central Bank between Law and Politics, 12(3) Law and Development Review 2019, 761-795, doi:10.1515/ldr-2019-0043.

a) Lisbon Treaty, BVerfG, 30.6.2009, 2 BvE 2/08, http://www.bverfg.de/e/es20090630_2bve000208en.html (BVerfGE 123, 267)

Headnotes:

1. Article 23 of the Basic Law grants powers to take part in and develop a European Union designed as an association of sovereign states (*Staatenverbund*). The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States remain the subjects of democratic legitimation.

2. a) In so far as the Member States elaborate treaty law in such a way as to allow treaty amendment without a ratification procedure, whilst preserving the application of the principle of conferral, a special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, within the context of participation which in Germany has to comply internally with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and which may be invoked in any proceedings before the Federal Constitutional Court.

3. b) A law within the meaning of Article 23.1 second sentence of the Basic Law is not required, in so far as special bridging clauses are limited to subject areas which are already sufficiently defined by the Treaty of Lisbon. However, in such cases it is incumbent on the *Bundestag* and, in so far as legislative competences of the *Länder* are affected, the *Bundesrat*, to assert its responsibility for integration in another appropriate manner.

4. European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics.

5. The Federal Constitutional Court examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (see BVerfGE 58, 1 <30-31>; 75, 223 <235, 242>; 89, 155 <188>: see the latter two concerning legal instruments transgressing the limits), whilst adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 second sentence and 5.3 of the Treaty on European Union in the version of the Treaty of Lisbon < Lisbon TEU >). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law

pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>). The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area.

Facts:

The subject of the *Organstreit* proceedings and constitutional complaints, which have been consolidated for joint adjudication, is the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ no. C 306/1). The proceedings relate to the German Act Approving the Treaty of Lisbon and - partly - the accompanying laws to the Act Approving the Treaty of Lisbon: The Act Amending the Basic Law (Articles 23, 45 and 93), which has already been promulgated, but not yet entered into force, and the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters, which has been adopted, but not yet signed and promulgated. **[1]**

II.

1. The complainants in the constitutional complaint proceedings challenge the Act Approving the Treaty of Lisbon. In addition, the constitutional complaints of the complainants re III. and VI. concern the Act Amending the Basic Law (Articles 23, 45 and 93) as well as the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters. **[99]**

a) The complainants concur in submitting that their right under Article 38 of the Basic Law is violated. They argue as follows: Article 38 of the Basic Law grants them, as Germans entitled to vote, the individual right to participate in the election to the German *Bundestag*, and thereby to take part in the legitimation of state authority on the federal level and to influence its exercise. The transfer of sovereign powers to the European Union that is effected in the Act Approving the Treaty of Lisbon encroaches upon this right because the legitimation and the exercise of state authority is withdrawn from their influence. The encroachment transgresses the boundaries of the powers granted with a view to European integration pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law and is therefore not justified. To the extent that it is inviolable pursuant to Article 79.3 of the Basic Law in conjunction with Article 20.1 and 20.2 of the Basic Law, the principle of democracy is infringed in two different respects: by the competences of the German *Bundestag* being undermined on the one hand and by a lack of democratic legitimation of the European Union on the other hand. **[100]**

B.

The constitutional complaints lodged against the Act Approving the Treaty of Lisbon are admissible to the extent that they challenge a violation of the principle of democracy, the loss of statehood of the Federal Republic of Germany and a violation of the principle of the social state on the basis of Article 38.1 first sentence of the Basic Law. The constitutional complaints re III. and VI. lodged against the accompanying laws are admissible to the extent that they are based on Article 38.1 first sentence of the Basic Law (I.). The application made in the *Organstreit* proceedings re II. is admissible to the extent that the applicant asserts a violation of the competences of the German *Bundestag* to decide on the deployment of the German armed forces (II.). In other respects, the constitutional complaints and the applications made in *Organstreit* proceedings are inadmissible. **[167]**

C.

I.

In so far as they are admissible, the constitutional complaints re III. and VI. are wellfounded in part. The Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters (*Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*) does not contain the required provisions and is to that extent unconstitutional. In other respects, the constitutional complaints lodged and the application made in *Organstreit* proceedings by the applicant re II. are, to the extent that they are admissible, unfounded. Taking into account the provisos specified in the grounds, there are no decisive constitutional objections to the Act Approving the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*) and the Act Amending the Basic Law (Articles 23, 45 and 93) (*Gesetz zur Änderung des Grundgesetzes <Artikel 23, 45 und 93>*). **[207]**

1. The standard of review of the Act Approving the Treaty of Lisbon is determined by the right to vote as a right that is equal to a fundamental right (Article 38.1 first sentence in conjunction with Article 93.1 no. 4a of the Basic Law). The right to vote establishes a right to democratic self-determination, to free and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the constituent power of the people. In the present combination of procedural circumstances, the review of a violation of the right to vote also comprises encroachments on the principles which are codified in Article 79.3 of the Basic Law as the identity of the constitution (see BVerfGE 37, 271 <279>; 73, 339 <375>). **[208]**

a) Article 38.1 of the Basic Law guarantees every citizen entitled to vote the right to elect the Members of the German *Bundestag*. In general, free and equal elections of the Members of the German *Bundestag* the people of the Federation directly exercises its political will. As a general rule, it governs itself via a majority (Article 42.2 of the Basic Law) in the representative assembly which has come into being in this manner. From within the assembly, the Chancellor - and thus the Federal Government - is appointed; this is where the Chancellor is accountable. At the federal level of the state founded

on the Basic Law as its constitution, the election of the Members of the German *Bundestag* is the source of state authority - which time and again newly emanates from the people in periodically repeated elections (Article 20.2 of the Basic Law). **[209]**

The right to vote is the citizens' most important individual right to democratic participation guaranteed by the Basic Law. In the state system that is shaped by the Basic Law, the election of the Members of the German *Bundestag* is of major importance. Without the free and equal election of the body that has a decisive influence on the government and the legislation of the Federation, the constitutive principle of personal freedom remains incomplete. Invoking the right to vote, the citizen can therefore claim the violation of democratic principles by means of a constitutional complaint (Article 38.1 first sentence, Article 20.1 and 20.2 of the Basic Law). The right to equal participation in democratic self-determination (democratic right of participation), to which every citizen is entitled, can also be violated by the organisation of state authority being changed in such a way that the will of the people can no longer effectively be shaped within the meaning of Article 20.2 of the Basic Law and citizens cannot rule according to the will of a majority. The principle of the representative rule of the people may be violated if in the structure of bodies established by the Basic Law, the rights of the *Bundestag* are considerably curtailed and thus a loss of substance occurs of the democratic freedom of action of the constitutional body which has directly come into being according to the principles of free and equal elections (see BVerfGE 89, 155 <171-172>). **[210]**

b) The citizens' right to determine in respect of persons and subjects, in freedom and equality by means of elections and other votes, public authority is the fundamental element of the principle of democracy. The right to free and equal participation in public authority is enshrined in human dignity (Article 1.1 of the Basic Law). It forms part of the principles of German constitutional law established as inviolable by Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law. **[211]**

aa) In so far as in the public sphere binding decisions, in particular as regards encroachments on fundamental rights, are taken for the citizen, these decisions must be founded on a freely formed majority will of the people. The order constituted by the Basic Law rests on the self-esteem and dignity of the individual in free determination. This order is power under the rule of law founded on the self-determination of the people in freedom and equality according to the will of the respective majority (see BVerfGE 2, 1 <12>). Consequently, citizens are not subject to an inescapable political power which they are fundamentally incapable of freely determining, with equal regard to persons and subject-matter. **[212]**

bb) Self-determination of the people according to the majority principle, achieved through elections and other votes, is constitutive of the state order as constituted by the Basic Law. It acts in the sphere of public, free opinion-forming and in the organised competition between political forces of accountable government and

parliamentary opposition. The exercise of public authority is subject to the majority principle of regularly forming accountable government and an unhindered opposition, which has an opportunity to come into power. In particular, in electing the representative assembly of the people, or in the election of highest-ranking offices at government level, a generalised will of the majority with regard to persons or subjects must have an opportunity to express itself and decisions on political direction resulting from the elections must be possible. **[213]**

This central requirement of democracy may be achieved according to different models. According to German electoral law, constitutionally required representative parliamentary rule is achieved by reflecting the will of the electorate as proportionally as possible in the allocation of seats. A majority decision in Parliament represents at the same time the majority decision of the people. Every Member of Parliament is a representative of all the people and thus a member of an assembly of equals (Article 38.1 of the Basic Law) who have gained their mandate under conditions governed by equality. The Basic Law requires that every citizen be free and equal within the legal sense (i.e. equal before the law). For the requirement of democracy this means that every citizen with the right to vote based on age and who has not lost this active right is entitled to an equal part in the exercise of state authority (see BVerfGE 112, 118 <133-134>). The equality of the citizens entitled to vote must then continue to apply at further levels of the development of democratic opinion-forming, in particular as regards the status of a Member of Parliament. The status of a Member of Parliament therefore includes the right to equal participation in the process of parliamentary opinion-forming as guaranteed in Article 38.1 second sentence of the Basic Law (see BVerfGE 43, 142 <149>; 70, 324 <354>; 80, 188 <218>; 96, 264 <278>; 112, 118 <133>). **[214]**

In presidential systems or under a first-past-the-post electoral system, the concrete elaboration of the central requirement of democracy may well be different. However, all systems of representative democracy have this in common: a will of the majority that has come about freely and taking due account of equality is formed, either in the constituency or in the assembly which has come into being proportionally, by the act of voting. The decision on political direction which is taken by the majority of voters is to be reflected in Parliament and in the government; the losing part remains visible as a political alternative and active in the sphere of free opinion-forming as well as in formal decision-making procedures, as an opposition that will, in subsequent elections, have an opportunity to become the majority. **[215]**

c) The principle of democracy may not be balanced against other legal interests; it is inviolable (see BVerfGE 89, 155 <182>). The constituent power of the Germans which gave itself the Basic Law wanted to set an insurmountable boundary to any future political development. Amendments to the Basic Law affecting the principles laid down in Article 1 and Article 20 of the Basic Law shall be inadmissible (Article 79.3 of the Basic Law). The so-called eternity guarantee even prevents a constitution

amending legislature from disposing of the identity of the free constitutional order. The Basic Law thus not only presumes sovereign statehood for Germany but guarantees it. **[216]**

It may remain open whether, due to the universal nature of dignity, freedom and equality alone, this commitment even applies to the constituent power, i.e. to the case that the German people, in free self-determination, but in a continuity of legality to the rule of the Basic Law, gives itself a new constitution (see Isensee, in: Isensee/ Kirchhof, HStR VII, 1992, § 166, paras 61 et seq.; Moelle, Der Verfassungsbeschluss nach Art. 146 GG, 1996, pp. 73 et seq.; Stückrath, Art. 146 GG: Verfassungsablösung zwischen Legalität und Legitimität, 1997, pp. 240 et seq.; see also BVerfGE 89, 155 <180>). Within the order of the Basic Law, the structural principles of the state laid down in Article 20 of the Basic Law, i.e. democracy, the rule of law, the principle of the social state, the republic, the federal state, as well as the substance of elementary fundamental rights indispensable for the respect of human dignity are, in any case, not amenable to any amendment because of their fundamental quality. **[217]**

From the perspective of the principle of democracy, the violation of the constitutional identity codified in Article 79.3 of the Basic Law is at the same time an encroachment upon the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been granted the power to amend the constitutional principles which are essential pursuant to Article 79.3 of the Basic Law. The Federal Constitutional Court monitors this. Through what is known as the eternity guarantee, the Basic Law reacts on the one hand to the historical experience of a creeping or abrupt erosion of the free substance of a democratic fundamental order. However, it makes clear on the other hand that the Constitution of the Germans, in accordance with the international development which has taken place in particular since the existence of the United Nations, has a universal foundation which cannot be amended by positive law. **[218]**

2. The elaboration of the principle of democracy by the Basic Law allows for the objective of integrating Germany into an international and European peace order. The new shape of political rule thereby made possible is not schematically subject to the requirements of a constitutional state applicable at national level and may therefore not be measured automatically against the concrete manifestations of the principle of democracy in a Contracting State or Member State. The empowerment to embark on European integration permits a different shaping of political opinion-forming than the one determined by the Basic Law for the German constitutional order. This applies as far as the limit of the inviolable constitutional identity (Article 79.3 of the Basic Law). The principle of democratic self-determination and of participation in public authority with due account being taken of equality remains unaffected also by the Basic Law's mandate of peace and integration and the constitutional principle of the openness towards international law (*Völkerrechtsfreundlichkeit*) (see BVerfGE 31, 58 <75-76>; 111, 307 <317>, 112, 1 <26>; Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* - BVerfGK 9, 174 <186>). **[219]**

a) The German constitution is directed towards opening the sovereign state order to peaceful cooperation of the nations and towards European integration. Neither *pari passu* integration into the European Union nor integration into peacekeeping systems such as the United Nations is tantamount to submission to alien powers. Instead, it is a voluntary, mutual *pari passu* commitment which secures peace and strengthens the possibilities of shaping policy by joint coordinated action. The Basic Law does not protect individual freedom, as the self-determination of the individual, with the objective of promoting uncommitted high-handedness and the ruthless enforcement of interests. The same applies to the sovereign right of self-determination of the political community. **[220]**

The constitutional state commits itself to other states with the same foundation of values of freedom and equal rights and which, like itself, make human dignity and the principles of equal entitlement to personal freedom the focal point of their legal order. Democratic constitutional states can only gain a formative influence on an increasingly mobile society, which is increasingly linked across borders, through sensible cooperation which takes account of their own interest as well as of their common interest. Only those who commit themselves because they realise the need for a peaceful balancing of interests and the possibilities provided by joint concepts gain the measure of possibilities of action required for any future ability to responsibly shape the conditions for a free society. The Basic Law takes account of this with its openness to European integration and to commitments under international law. **[221]**

b) After the experience of devastating wars, in particular between the European peoples, the Preamble of the Basic Law emphasises not only the moral basis of responsible self-determination but also the willingness to serve world peace as an equal partner in a united Europe. This willingness is lent concrete shape by the empowerments to integrate into the European Union (Article 23.1 of the Basic Law), to participate in intergovernmental institutions (Article 24.1 of the Basic Law) and to join systems of mutual collective security (Article 24.2 of the Basic Law) as well as by the ban on wars of aggression (Article 26 of the Basic Law). The Basic Law calls for the participation of Germany in international organisations, an order of mutual peaceful balancing of interests established between the states and organised co-existence in Europe. **[222]**

This understanding of sovereignty becomes visible in the objectives laid down in the Preamble. The Basic Law abandons a self-serving and self-glorifying concept of sovereign statehood and returns to a view of the state authority of the individual state which regards sovereignty as "freedom that is organised by international law and committed to it" (von Martitz, Internationale Rechtshilfe in Strafsachen, vol. I, 1888, p. 416). It breaks with all forms of political Machiavellianism and with a rigid concept of sovereignty which until the beginning of the 20th century regarded the right to wage war - even a war of aggression - as a right due to a sovereign state as a matter of course (see Starck, Der demokratische Verfassungsstaat, 1995, pp. 356-357; Randelzhofer, Use of Force, in: Bernhardt, Encyclopedia of Public International Law, vol. IV, 2000, pp. 1246 et seq.), even though the Conventions signed at the Hague

Peace Conference on 29 July 1899 initiated a gradual proscription of the use of force between states, whilst still preserving the *ius ad bellum*. **[223]**

In contrast, the Basic Law codifies the maintenance of peace and the overcoming of destructive antagonism between European states as outstanding political objectives of the Federal Republic of Germany. This means that sovereign statehood stands for a pacified area and the order guaranteed therein on the basis of individual freedom and collective self-determination. The state is neither a myth nor an end in itself but the historically grown and globally recognised form of organisation of a viable political community. **[224]**

The constitutional mandate to realise a united Europe, which follows from Article 23.1 of the Basic Law and its Preamble (see Schorkopf, Grundgesetz und Überstaatlichkeit, 2007, p. 247) means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration. The Basic Law calls for European integration and an international peaceful order. Therefore, not only the principle of openness towards international law, but also the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies. **[225]**

c) It is true that the Basic Law grants the legislature powers to engage in a farreaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape living conditions on their own responsibility. **[226]**

aa) The objective of integration laid down for the German people by the Preamble and by Article 23.1 of the Basic Law does not say anything about the final character of the political organisation of Europe. In its Article 23, the Basic Law grants powers to participate in a supranational system of cooperation that promotes peace. This does not include the obligation to realise democratic self-determination on the supranational level in the exact forms prescribed by the Basic Law for the Federation and, via Article 28.1 first sentence of the Basic Law, also for the *Länder* (states); instead, it permits derogations from the organisational principles of democracy applying at national level which arise from the requirements of a European Union based on the principle of the equality of states and negotiated under the law of international treaties. **[227]**

Integration requires the willingness to joint action and the acceptance of autonomous common opinion-forming. However, integration into a free community neither requires submission removed from constitutional limitation and control nor the forgoing one's own identity. The Basic Law does not grant powers to bodies acting on behalf of Germany to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone. **[228]**

bb) The current constitution shows a different way: it aims for Germany's integration *pari passu* into state systems of mutual security such as that of the United Nations or that of the North Atlantic Treaty Organisation (NATO) and for Germany's participation in the European unification. Article 23.1 of the Basic Law like Article 24.1 of the Basic Law underlines that the Federal Republic of Germany takes part in the development of a European Union designed as an association of sovereign states (*Staatenverbund*) to which sovereign powers are transferred. The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States, remain the subjects of democratic legitimation. **[229]**

This connection is made clear by Article 23.1 first sentence of the Basic Law, which lays down a binding structure for Germany's participation in the development of the European Union. Pursuant to Article 23.1 third sentence of the Basic Law, the Basic Law can be adapted to the development of the European Union; at the same time, this possibility is set an ultimate limit by Article 79.3 of the Basic Law, to which the provision makes reference. The minimum standard protected by Article 79.3 of the Basic Law must not fail to be achieved even by Germany's integration into supranational structures. **[230]**

cc) The empowerment to transfer sovereign powers to the European Union or other intergovernmental institution permits a shift of political rule to international organisations. The empowerment to exercise supranational powers, however, comes from the Member States of such an institution. They therefore permanently remain the masters of the Treaties. In a functional sense, the source of Community authority, and of the European constitution that constitutes it, are the peoples of Europe with democratic constitutions in their states. The "Constitution of Europe", international treaty law or primary law, remains a derived fundamental order. It establishes a supranational autonomy which undoubtedly makes considerable inroads into everyday political life but is always limited factually. Here, autonomy can only be understood - as is usual regarding the law of self-government - as an autonomy to rule which is independent but derived, i.e. is granted by other legal entities. In contrast, sovereignty under international law and public law requires independence from an external will precisely for its constitutional foundations (see Carlo Schmid, *Generalbericht in der Zweiten Sitzung des Plenums des Parlamentarischen Rates am 8 September 1948*, in: *Deutscher Bundestag/ Bundesarchiv, Der Parlamentarische Rat 1948-1949, Akten und Protokolle*, vol. 9, 1996, p. 20-21). It is not decisive here whether an international organisation has legal personality, i.e. whether it for its part can enter into binding acts as a subject in international legal relations. What is decisive is how the fundamental legal relationship between the international organisation and the Member States and Contracting States which have created it and have vested it with legal personality is elaborated. **[231]**

In accordance with the powers granted with a view to European integration under Article 23.1 in conjunction with the Preamble, Article 20, Article 79.3 and Article 146 of the Basic Law, there can be no independent subject of legitimation for the authority of the European Union which would constitute itself, so to speak, on a higher level, without being derived from an external will, and thus of its own right. **[232]**

d) The Basic Law does not authorise the German state bodies to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*) (see BVerfGE 89, 155 <187-188, 192, 199>; see also BVerfGE 58, 1 <37>; 104, 151 <210>). Even a far-reaching process of independence of political rule for the European Union brought about by granting it steadily increased competences and by gradually overcoming existing unanimity requirements or so far prevailing rules of state equality can, from the perspective of German constitutional law, only occur as a result of the freedom of action of the self-determined people. According to the constitution, such integrational steps must be factually limited by the act of transfer and must, in principle, be revocable. For this reason, withdrawal from the European union of integration (*Integrationsverband*) may, regardless of a commitment for an unlimited period under an agreement, not be prevented by other Member States or by the autonomous authority of the Union. This is not a secession from a state union (*Staatsverband*), which is problematical under international law (Tomuschat, Secession and Self-Determination, in: Kohen, Secession - International Law Perspectives, 2006, pp. 23 et seq.), but merely the withdrawal from an association of sovereign states (*Staatenverbund*) which is founded on the principle of the reversible self-commitment. **[233]**

The principle of conferral is therefore not only a principle of European law (Article 5.1 ECT; Article 5.1 first sentence and 5.2 Lisbon TEU; see Kraußer, *Das Prinzip begrenzter Ermächtigung im Gemeinschaftsrecht als Strukturprinzip des EWGVertrages*, 1991); just like the European Union's obligation to respect the Member States' national identity (Article 6.3 TEU; Article 4.2 first sentence Lisbon TEU), it includes constitutional principles from the Member States. In this respect, the principle of conferral under European law and the duty, under European law, to respect identity, are the expression of the foundation of Union authority in the constitutional law of the Member States. **[234]**

The obligation under European law to respect the constituent power of the Member States as the masters of the Treaties corresponds to the non-transferable identity of the constitution (Article 79.3 of the Basic Law), which is not open to integration in this respect. Within the boundaries of its competences, the Federal Constitutional Court must review, where necessary, whether these principles are adhered to. **[235]**

e) The integration programme of the European Union must be sufficiently precise. In so far as the people itself is not directly called upon to decide, democratic legitimation can only be achieved by means of parliamentary responsibility (see BVerfGE 89, 155 <212>). A blanket empowerment for the exercise of public authority, in particular one

which has a direct binding effect on the national legal system, may not be granted by the German constitutional bodies (see BVerfGE 58, 1 <37>; 89, 155 <183-184, 187>). In so far as the Member States elaborate treaty law in such a way as to allow treaty amendment without a ratification procedure solely or mainly by the institutions of the Union, albeit under the requirement of unanimity, whilst preserving the principle of conferral, a special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, within the context of participation which in Germany, has to comply internally with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and which may be invoked in any proceedings before the Federal Constitutional Court. **[236]**

aa) Any integration into peacekeeping systems, in international or supranational organisations opens up the possibility for the institutions thus created to develop independently, and in doing so, to show a tendency of political self-enhancement, even, and particularly if, their bodies act according to their mandate. An Act that grants powers of integration, like the Act Approving the Treaty of Lisbon, can therefore, despite the principle of conferral, only outline a programme in whose boundaries a political development occurs which cannot be determined in advance in every respect. When striving for integration one must expect the institutions of the Union to form independent opinions. Therefore a tendency towards maintaining the *acquis communautaire* and to effectively interpreting powers along the lines of the US doctrine of implied powers (see also International Court of Justice, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174 <182 et seq.>) or the principle of *effet utile* under the law of international treaties (see on the good sense of this principle Gill, The League of Nations from 1929 to 1946, 1996; Rouyer-Hameray, *Les compétences implicites des organisations internationales*, 1962, p. 90 et seq.; especially as regards European law Pescatore, *Monisme, dualisme et "effet utile" dans la jurisprudence de la Cour de justice de la Communauté européenne*, in: *Festschrift für Rodríguez Iglesias*, 2003, pp. 329 et seq.; see on the corresponding development of the case law of the Court of Justice of the European Communities Höreth, *Die Selbstautorisierung des Agenten, Der Europäische Gerichtshof im Vergleich zum US Supreme Court*, 2008, pp. 320 et seq.) must be tolerated. This is part of the mandate of integration called for by the Basic Law. **[237]**

bb) Under the constitution, however, faith in the constructive force of the mechanism of integration cannot be unlimited. If in the process of European integration primary law is amended, or expansively interpreted by institutions, a constitutionally important tension will arise with the principle of conferral and with the individual Member State's constitutional responsibility for integration. If legislative or administrative competences are only transferred in an unspecified manner or with a view to further dynamic development, or if the institutions are permitted to re-define expansively, fill lacunae or factually extend competences, they risk transgressing the predetermined integration programme and acting beyond the powers granted to them. They are moving on a road at the end of which there is

the power of disposition of their foundations laid down in the treaties, i.e. the competence of freely disposing of their competences. There is a risk of transgression of the constitutive principle of conferral and of the conceptual responsibility for integration incumbent upon Member States if institutions of the European Union can decide without restriction, without any outside control, however restrained and exceptional, how treaty law is to be interpreted. **[238]**

It is therefore constitutionally required not to agree dynamic treaty provisions with a blanket character or if they can still be interpreted in a manner that respects the national responsibility for integration, to establish, at any rate, suitable national safeguards for the effective exercise of such responsibility. Accordingly, the Act approving an international agreement and the national accompanying laws must therefore be capable of permitting European integration continuing to take place according to the principle of conferral without the possibility for the European Union of taking possession of *Kompetenz-Kompetenz* or to violate the Member States' constitutional identity, which is not open to integration, in this case, that of the Basic Law. For borderline cases of what is still constitutionally admissible, the German legislature must, where necessary, take precautions in its legislation accompanying approval to ensure that the responsibility for integration of the legislative bodies can sufficiently develop. **[239]**

Apart from this, it must be possible within the German jurisdiction to assert the responsibility for integration if obvious transgressions of the boundaries occur when the European Union claims competences - this has also been emphasised by the agents of the German *Bundestag* and of the Federal Government in the oral hearing - and to preserve the inviolable core content of the Basic Law's constitutional identity by means of a identity review (see BVerfGE 75, 223 <235, 242>; 89, 155 <188>; 113, 273 <296>). The Federal Constitutional Court has already opened up the way of the *ultra vires* review for this, which applies where Community and Union institutions transgress the boundaries of their competences. If legal protection cannot be obtained at the Union level, the Federal Constitutional Court examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (see BVerfGE 58, 1 <30-31>; 75, 223 <235, 242>; 89, 155 <188>: see the latter concerning legal instruments transgressing the limits) whilst adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 second sentence and 5.3 Lisbon TEU). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>). The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States,

which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area. The identity review makes it possible to examine whether due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated. This ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect. **[240]**

The *ultra vires* review as well as the identity review may result in Community law or, in future, Union law being declared inapplicable in Germany. To preserve the viability of the legal order of the Community, taking into account the legal concept expressed in Article 100.1 of the Basic Law, an application of constitutional law that is open to European law requires that the *ultra vires* review as well as the finding of a violation of constitutional identity is incumbent on the Federal Constitutional Court alone. It need not be decided here in which specific types of proceedings the Federal Constitutional Court's jurisdiction may be invoked for such review. Availing oneself to types of proceedings that already exist, i.e. the abstract review of statutes (Article 93.1 no. 2 of the Basic Law) and the concrete review of statutes (Article 100.1 of the Basic Law), *Organstreit* proceedings (Article 93.1 no. 1 of the Basic Law), disputes between the Federation and the *Länder* (Article 93.1 no. 3 of the Basic Law) and the constitutional complaint (Article 93.1 no. 4a of the Basic Law) may be considered. Also conceivable, however, is the creation by the legislature of an additional type of proceedings before the Federal Constitutional Court that is especially tailored to *ultra vires* review and identity review to safeguard the obligation of German bodies not to apply in individual cases in Germany legal instruments of the European Union that transgress competences or that violate constitutional identity. **[241]**

If the treaty law determines the competences of the European Union in a manner that is fundamentally open to consent but if these competences may be further developed beyond the possibilities offered by an interpretation of the principle of *effet utile* or by an implicit filling of the lacunae in the competences which have been transferred, i.e. if heads of competence are only provided with a clear content by special legal instruments at Union level and if decision-making procedures can be autonomously changed there, Germany may only participate in this if it is ensured at national level that the constitutional requirements are complied with. The ratification of international treaties which regulate the political relations of the Federation (Article 59.2 of the Basic Law) generally guarantees the participation of the legislative bodies in sovereign decisions relating to foreign affairs (see BVerfGE 104, 151 <194>) and orders to apply at national level the international treaty law agreed by the executive (see BVerfGE 99, 145 <158>; Decisions of the Federal Administrative Court <*Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE> 110, 363 <366>). **[242]**

As regards European integration, the special constitutional requirement of the enactment of a statute under Article 23.1 second sentence of the Basic Law applies, pursuant to which sovereign powers may only be transferred by a law and with the approval of the *Bundesrat*. To respect the responsibility for integration and to protect the constitutional structure, this constitutional requirement of the specific enactment of a statute is to be interpreted in such a way that it covers any amendment of the texts that form the basis of European primary law. The legislative bodies of the Federation thus exercise their political responsibility, which is comparable to the ratification procedure, also in case of simplified revision procedures or lacunae-filling in the treaties, in the case of competence changes whose bases already exist but which require concretisation by further legal instruments, and in case of a change in provisions that concern decision-making procedures. Thus, legal protection that corresponds to the situation of ratification is ensured. **[243]**

3. The shape of the European Union must comply with democratic principles as regards the nature and the extent of the transfer of sovereign powers as well as with regard to the organisational and procedural elaboration of the Union authority acting autonomously (Article 23.1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law). European integration may neither result in the system of democratic rule in Germany being undermined (a) nor may the supranational public authority as such fail to comply with fundamental democratic requirements (b). **[244]**

a) A permanent responsibility for integration is incumbent upon the German constitutional bodies. In the transfer of sovereign powers and the elaboration of the European decision-making procedures, it is aimed at ensuring that, seen overall, the political system of the Federal Republic of Germany as well as that of the European Union comply with democratic principles within the meaning of Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law. **[245]**

The election of the Members of the German *Bundestag* by the people fulfils its central role in the system of the federal and supranational intertwining of power only if the German *Bundestag*, which represents the people, and the Federal Government sustained by it, retain a formative influence on the political development in Germany. This is the case if the German *Bundestag* retains own responsibilities and competences of substantial political importance or if the Federal Government, which is answerable to it politically, is in a position to exert a decisive influence on European decision-making procedures (see BVerfGE 89, 155 <207>). **[246]**

aa) Inward federalisation and outward supranationalisation can open up new possibilities of civic participation. An increased cohesion of smaller or larger units and better opportunities for a peaceful balancing of interests between regions and states grow from them. Federal or supranational intertwining creates possibilities of action which otherwise would encounter practical or territorial limits, and facilitates the peaceful balancing of interests. At the same time, it makes it more difficult to create a will of the majority that can be asserted and that directly derives from

the people (Article 20.2 first sentence of the Basic Law). The assignment of decisions to specific responsible actors becomes less transparent, with the result that citizens have difficulty in having their vote guided by tangible contexts of responsibility. The principle of democracy therefore sets content-related limits to the transfer of sovereign powers, limits which do not already result from the inalienability of the constituent power and of state sovereignty. **[247]**

bb) The safeguarding of sovereignty, demanded by the principle of democracy in the valid constitutional system prescribed by the Basic Law in a manner that is open to integration and to international law, does not mean that a pre-determined number or certain types of sovereign rights should remain in the hands of the state. The participation of Germany in the development of the European Union, which is permitted by Article 23.1 first sentence of the Basic Law, also comprises a political union, in addition to the creation of an economic and monetary union. Political union means the joint exercise of public authority, including legislative authority, even reaching into the traditional core areas of the state's area of competence. This is rooted in the European idea of peace and unification especially when dealing with the coordination of cross-border aspects of life and when guaranteeing a single economic area and area of justice in which citizens of the Union can freely develop (Article 3.2 Lisbon TEU). **[248]**

cc) European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics. Essential areas of democratic formative action comprise, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology. **[249]**

dd) Democracy not only means respecting formal principles of organisation (see BVerfGE 89, 155 <185>) and not just a cooperative involvement of interest groups. Democracy first and foremost lives on, and in, a viable public opinion that concentrates on central acts of determination of political direction and the periodic allocation of highest-ranking political offices in the competition of government and

opposition. Only this public opinion shows the alternatives for elections and other votes and continually calls them to mind also in decisions relating to individual issues in order that they may remain continuously present and effective in the political opinion-formation of the people via the parties, which are open to participation for all citizens, and in the public information area. To this extent, Article 38 and Article 20.1 and 20.2 of the Basic Law also protect the connection between political decisions on facts and the will of the majority constituted by elections, and the resulting dualism between government and opposition in a system of a multiplicity of competing parties and of observing and controlling formation of public opinion. **[250]**

Even if due to the great successes of European integration, a common European polity that engages in issue-related cooperation in the relevant areas of their respective states is visibly growing (see on this already BVerfGE 89, 155 <185>; Trenz, *Europa in den Medien, Die europäische Integration im Spiegel nationaler Öffentlichkeit*, 2005), it cannot be overlooked, however, that the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification related to the nation-state, language, history and culture. The principle of democracy as well as the principle of subsidiarity, which is also structurally required by Article 23.1 first sentence of the Basic Law, therefore require factually to restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner, particularly in central political areas of the space of personal development and the shaping of living conditions by social policy. In these areas, it is particularly necessary to draw the limit where the coordination of cross-border situations is factually required. **[251]**

Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5). **[252]**

(1) As regards the preconditions for criminal liability as well as the concepts of a fair and appropriate trial, the administration of criminal law depends on cultural processes of previous understanding that are historically grown and also determined by language, and on the alternatives which emerge in the process of deliberation which moves the respective public opinion (see on this Weigend, *Strafrecht durch internationale Vereinbarungen - Verlust an nationaler Strafrechtskultur?*, ZStW 1993, p. 774 <785>). The common characteristics in this regard, but also the differences, between the European nations is shown by the relevant case law of the European Court of Human Rights concerning procedural guarantees in criminal proceedings (see the contributions by Bank <chapter 11>; Grabenwarter/Pabel <chapter 14> and Kadelbach <chapter

15> in: Grote/Marauhn, EMRK/GG, 2006; Gollwitzer, *Menschenrechte im Strafverfahren: MRK und IPBPR*, 2005). The penalisation of social behaviour can, however, only partially be normatively derived from values and moral premises that are shared Europe-wide. Instead, the decision on punishable behaviour, on the ranking of legal interests and the meaning and the measure of the threat of punishment, is much more particularly left to the democratic decision-making process (see BVerfGE 120, 224 <241-242>). In this important area for fundamental rights any transfer of sovereign rights beyond intergovernmental cooperation may only lead to harmonisation for specific cross-border situations on restrictive conditions; in principle, substantial freedom of action must remain reserved to the Member States here (see BVerfGE 113, 273 <298-299>). **[253]**

(2) A similarly determined limit is drawn by the Basic Law as regards decisions on the deployment of the German *Bundeswehr*. Except in case of defence, the deployment of the *Bundeswehr* abroad is only permitted in systems of mutual collective security (Article 24.2 of the Basic Law), with specific deployment mandatorily depending on the approval of the German *Bundestag* (see BVerfGE 90, 286 <381-382>; 100, 266 <269>; 104, 151 <208>; 108, 34 <43>; 121, 135 <153-154>; established case law). The *Bundeswehr* is a "parliamentary army" (BVerfGE 90, 286 <382>), on whose deployment the representative body of the people must decide (see BVerfGE 90, 286 <383 et seq.>). The deployment of armed forces is of paramount importance for the individual legal standing of soldiers and of others affected by military action and involves danger of far-reaching implications. **[254]**

Even if the European Union were to be further developed into a peacekeeping regional system of mutual collective security within the meaning of Article 24.2 of the Basic Law, supranationalisation involving primacy of application with a view to the specific deployment of German armed forces would be inadmissible here because of the precept of peace and democracy, which precedes the integration authorisation of Article 23.1 of the Basic Law in this respect. The constitutive requirement of parliamentary approval for the deployment of the *Bundeswehr* abroad is not open to integration. This, however, does not raise an insurmountable obstacle under constitutional law to a technical integration of a European deployment of armed forces via joint general staffs, nor to the formation of joint forces or to agreement on and coordination of joint European weapons procurement. Only the decision on any specific deployment depends on the constitutive approval of the German *Bundestag*. **[255]**

(3) A transfer of the right of the *Bundestag* to adopt the budget and control its implementation by the government which would violate the principle of democracy and the right to elect the German *Bundestag* in its essential content would occur if the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent. The

German *Bundestag* must decide, in an accountable manner *vis-à-vis* the people, on the total amount of the burdens placed on citizens. The same applies correspondingly to essential state expenditure. In this area, the responsibility concerning social policy in particular is subject to the democratic decision-making process, which citizens want to influence through free and equal elections. Budget sovereignty is where political decisions are planned to combine economic burdens with benefits granted by the state. Therefore the parliamentary debate on the budget, including the extent of public debt, is regarded as a general debate on policy. Not every European or international obligation that has an effect on the budget endangers the viability of the *Bundestag* as the legislature responsible for approving the budget. The openness to legal and social order and to European integration which the Basic Law calls for, include an adaptation to parameters laid down and commitments made, which the legislature responsible for approving the budget must include in its own planning as factors which it cannot itself directly influence. What is decisive, however, is that the overall responsibility, with sufficient political discretion regarding revenue and expenditure, can still rest with the German *Bundestag*. **[256]**

(4) The principle of the social state establishes a duty on the part of the state to ensure a just social order (see BVerfGE 59, 231 <263>; 100, 271 <284>). The state must carry out this obligation on the basis of a broad discretion; for this reason, concrete constitutional obligations to act have only been derived from this principle in very few cases. The state must merely create the minimum conditions for its citizens to live in human dignity (see BVerfGE 82, 60 <80>; 110, 412 <445>). The principle of the social state sets the state a task, but it does not say anything about the means with which the task is to be accomplished in individual cases. **[257]**

The requirements under constitutional law as regards social integration or a "social union" are clearly limited. It is true that pursuant to Article 23.1 first sentence of the Basic Law, Germany's participation in the process of integration depends, *inter alia*, on the European Union's commitment to social principles. Accordingly the Basic Law not only defensively safeguards social tasks for the German state union against supranational demands but aims at committing the European public authority to social responsibility in the spectrum of tasks transferred to it (see Heinig, *Der Sozialstaat im Dienst der Freiheit*, 2008, pp. 531 et seq.). The institutions of the European Union, however, are subject to the principle that the social state necessarily requires political and legal concretisation in order for it to have an effect. **[258]**

Accordingly, the essential decisions in social policy must be made by the German legislative bodies on their own responsibility. In particular the securing of the individual's livelihood, which is a responsibility of the state that is based not only on the principle of the social state but also on Article 1.1 of the Basic Law, must remain a primary task of the Member

States, even if coordination which goes as far as gradual approximation is not ruled out. This corresponds to the legally and factually limited possibilities of the European Union to shape the structures of a social state. **[259]**

(5) Finally, democratic self-determination relies on the possibility to assert oneself in one's own cultural area, especially relevant in decisions made concerning the school and education system, family law, language, certain areas of media regulation, and the status of churches and religious and ideological communities. Those activities of the European Union that may be already observed in these areas intervene in society on a level that is the primary responsibility of the Member States and their component parts. The manner in which curricula and the content of education and, for example, the structure of a multi-track school system are organised, are fundamental policy decisions closely connected to the cultural roots and values of every state. Like the law on family relations and decisions on issues of language and the integration of the transcendental into public life, the manner in which school and education are organised particularly affects established rules and values rooted in specific historical traditions and experience. Here, democratic self-determination requires that a political community bound by such traditions and convictions remains the subject of democratic legitimation. **[260]**

b) The structure-securing clause of Article 23.1 first sentence of the Basic Law restricts the objective of participation addressed in the determination of the objective of the state to a European Union which in its elementary structures complies with the core principles protected also from amendment by the constitution-amending legislature by Article 79.3 of the Basic Law. The development of the European Union in respect of a transfer of sovereign powers, institutions and decision-making procedures must correspond to democratic principles (Article 23.1 first sentence of the Basic Law). The specific requirements placed on the democratic principles depend on the extent of the sovereign powers that have been transferred and on the degree of independence achieved by European decision-making procedures. **[261]**

aa) The constitutional requirements placed by the principle of democracy on the organisational structure and the decision-making procedures of the European Union depend on the extent to which sovereign responsibilities are transferred to the Union and the degree of political independence in the exercise of the sovereign powers transferred. Increased integration may be unconstitutional if the level of democratic legitimation is not commensurate with the extent and the importance of supranational power. As long as, and in so far as, the principle of conferral is adhered to in an association of sovereign states with clear elements of executive and governmental cooperation, the legitimation provided by national parliaments and governments complemented and sustained by the directly elected European Parliament is sufficient in principle (see BVerfGE 89, 155 <184>). **[262]**

If however, the threshold were crossed to a federal state and to the giving up of national sovereignty, this would require a free decision of the people in Germany

beyond the present applicability of the Basic Law and the democratic requirements to be complied with would have to be fully consistent with the requirements for the democratic legitimation of a union of rule organised by a state. This level of legitimation could no longer be prescribed by national constitutional orders. **[263]**

A structural democratic deficit that would be unacceptable pursuant to Article 23 in conjunction with Article 79.3 of the Basic Law would exist if the extent of competences, the political freedom of action and the degree of independent opinionformation on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state, because for example the legislative competences, essential for democratic self-determination, were exercised mainly at Union level. If an imbalance between type and extent of the sovereign powers exercised and the degree of democratic legitimation arises in the course of the development of the European integration, it is for the Federal Republic of Germany because of its responsibility for integration, to endeavour to effect a change, and in the worst case, even to refuse further participation in the European Union. **[264]**

bb) To safeguard democratic principles, it may be necessary to clearly emphasise the principle of conferral in the treaties and in their application and interpretation, in order to maintain the balance of political forces of Europe between the Member States and the level of the Union as the precondition for the allocation of sovereign powers in the association. **[265]**

In order to comply with democratic principles on the part of the European Union, Article 23.1 first sentence of the Basic Law, however does not demand "structural congruence" (see on this concept Kruse, *Strukturelle Kongruenz und Homogenität*, in: *Mensch und Staat in Recht und Geschichte, Festschrift für Herbert Kraus*, 1954, p. 112 <123>) or even the accordance of the institutional order of the European Union to the order prescribed by the principle of democracy of the Basic Law for the national level. What is required, however, is a democratic elaboration commensurate with the status and the function of the Union (see Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz*, 1998, p. 153; Pernice, in: Dreier, GG, vol. II, 2nd ed. 2006, Art. 23, para. 48; Rojahn, in: von Münch/Kunig, GG, vol. 2, 5th ed. 2001, Art. 23, para. 21; Röben, *Außenverfassungsrecht*, 2007, p. 321: "*strukturelle Kompatibilität*"). It follows from the sense and purpose of the structure-securing clause that the Basic Law's principle of democracy need not be realised at European level in the same way, something still called for in the 1950s and early 1960s for intergovernmental institutions within the meaning of Article 24.1 of the Basic Law (see for instance Kruse, loc cit., p. 112 <123>; Friauf, *Zur Problematik rechtsstaatlicher und demokratischer Strukturelemente in zwischenstaatlichen Gemeinschaften*, DVBl. 1964, p. 781 <786>). **[266]**

In principle, the principle of democracy is open to the requirements of a supranational organisation, not in order to adapt the normative content of its provisions to the respective factual situation of the organisation of political rule

but to preserve the same effectiveness under changed circumstances (see BVerfGE 107, 59 <91>). Consequently, Article 23.1 first sentence of the Basic Law assumes that in the European Union, democratic principles cannot be realised in the same manner as in the Basic Law (see *Bundestag* printed paper 12/3338, p. 6). **[267]**

cc) In modern territorial states, the self-determination of a people is mainly realised in the election of bodies of a union of rule, which exercise public authority. The bodies must be created by the majority decision of the citizens, who can periodically influence the fundamental direction of policy in respect of persons and subjects. A free public opinion and a political opposition must be able to critically observe the major elements of the decision-making process and ascribe it correctly to those responsible, i.e. usually to a government (see Article 20.2 second sentence of the Basic Law; BVerfGE 89, 155 <185>; 97, 350 <369>; with a comparative law approach Cruz Villalón, *Grundlagen und Grundzüge staatlichen Verfassungsrechts: Vergleich*, in: von Bogdandy/Cruz Villalón/Huber, *Handbuch Ius Publicum Europaeum*, vol. I, 2007, § 13, paras 102 et seq., with further references). **[268]**

The practical manifestations of democracy lend concrete shape to these guidelines, account being taken of the principles of freedom and electoral equality either in a single parliamentary representative body which undertakes the task of forming a government like for example the United Kingdom, Germany, Belgium, Austria and Spain - or in a presidential system with the highest level of the executive power being directly elected in addition - like, for example in the United States, France, Poland and Bulgaria. The direct will of the people may be expressed by electing a (parliamentary) representation of the people or by electing the highest-ranking representative of the executive (President) as well as by majority decisions in referenda about factual issues. Presidential systems like the ones in the United States or in France are dualistically constituted representative democracies, while the United Kingdom or Germany have systems of monistic parliamentary representation. In Switzerland, on the other hand, parliamentary monism is complemented by strong plebiscitary elements, which also fulfil part of the functions of a parliamentary opposition (see Loewenstein, *Verfassungslehre*, 2nd ed. 1959, provided with a supplement 1969, pp. 67 et seq.; Sommermann, *Demokratiekonzepte im Vergleich*, in: Bauer/Huber/Sommermann, Demokratie in Europa, 2005, pp. 191 et seq.; Mastronardi, *Verfassungslehre, Allgemeines Staatsrecht als Lehre vom guten und gerechten Staat*, 2007, pp. 268-269). **[269]**

In a democracy, the people must be able to determine government and legislation in free and equal elections. This core content may be complemented by plebiscitary voting on factual issues; such voting could be made possible also in Germany by an amendment of the Basic Law. In a democracy, the decision of the people is the focal point of the formation and retention of political power: Every democratic government knows the fear of losing power by being voted out of office. In its judgment banning the Communist Party of Germany, the Federal Constitutional Court in 1956 described democracy as the procedurally regulated "battle for

political power" that is waged to gain the majority. According to the Federal Constitutional Court, this battle is about the will of the actual majority of the people ascertained in carefully regulated procedures and preceded by a free discussion. It was regarded as constitutive of the democratic organisation of state authority that a majority "can always change", that a multiparty system and the right to "organised political opposition" exist (see BVerfGE 5, 85 <198-199>). **[270]**

The European Union itself acknowledges this democratic core concept as a general European constitutional tradition (see Article 3.1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952 <First Protocol to the ECHR> <Federal Law Gazette 2002 II p. 1072>; CSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, EuGRZ 1990, pp. 239 et seq., para. 7) by placing corresponding structural requirements on the Member States and declaring their factual continued existence to be a precondition for participating in the European integration (Article 6.1 TEU; Article 2 Lisbon TEU; see already Presidency Conclusions of the Copenhagen European Council <21/22 June 1993>, Bulletin EU 6-1993, I.13; Agenda 2000, COM(97) 2000 final, vol. I, p. 52). Because and in so far as the European Union itself only exercises derived public authority, it need not fully comply with the requirements. At European level, the Council is not a second chamber as it would be in a federal state but the representative body of masters of the Treaties and accordingly, it is not constituted by proportional representation but according to the idea of the equality of states. As a representative body of the peoples directly elected by the citizens of the Union, the European Parliament is an additional independent source of democratic legitimation (see BVerfGE 89, 155 <184-185>). As a representative body of the peoples in a supranational community, characterised as such by a limited willingness to unite, it cannot, and need not, as regards its composition, comply with the requirements that arise at state level from the equal political right to vote of all citizens. The Commission also as a supranational, special body, also the Commission need not extensively fulfil the conditions of a government that is fully accountable either to Parliament or to the majority decision of the electorate because the Commission itself is not bound by the will of the electorate in a comparable manner. **[271]**

As long as European competences are ordered according to the principle of conferral in cooperatively shaped decision-making procedures, and taking into account state responsibility for integration, and as long as an equal balance between the competences of the Union and the competences of the states is retained, the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state. Instead, the European Union is free to look for its own ways of reducing the democratic deficit by means of additional, novel forms of transparent or participative political decision-making procedures. It is true that the merely

> deliberative participation of the citizens and of their societal organisations in the political rule - their direct involvement in the deliberations of the institutions with the power to take binding political decisions - cannot replace the legitimising connection based on elections and other votes. Such elements of participative democracy can, however, complement the legitimation of European public authority. This encompasses in particular forms of legitimation to which civic commitment can contribute in a more direct, more specialised and more profoundly issue-related manner, for example by providing the citizens of the Union and the societally relevant associations (Article 11.2 Lisbon TEU: "representative associations") with the possibility of expressing their views in an appropriate manner. Such forms of decentralised participation based on the division of labour and has a potential to increasing legitimacy for their part contribute to making the primary representative and democratic connection of legitimation more effective. **[272]**

II.

As specified in the grounds, the Treaty of Lisbon and the Act Approving the Treaty of Lisbon comply with the constitutional requirements as stated (1.). There are also no constitutional objections to the Act Amending the Basic Law (Articles 23, 45 and 93) (2.). The Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters does not comply with the requirements under Article 38.1 in conjunction with Article 23.1 of the Basic Law and must be re-drafted in accordance with constitutional requirements before the ratification of the treaty (3.). **[273]**

D.

Considering that the Act Approving the Treaty of Lisbon is compatible with the Basic Law only by taking into account the provisos specified in this decision and that the accompanying laws are unconstitutional in part, the complainants and applicants are to be reimbursed their necessary expenses in proportion to their success pursuant to § 34a.2 and 34a.3 of the Federal Constitutional Court Act. Accordingly, the complainant re III. is to be reimbursed one half, the complainants re IV. and VI., respectively, one fourth, and the complainants re V. and the applicant re II., respectively, one third of their necessary expenses of these proceedings. **[420]**

E.

The decision was reached unanimously as regards the result, by seven votes to one as regards the reasoning. **[421]**

b) Identity Review - European Arrest Warrent, BVerfG, 15 December 2015 - 2 BvR 2735/14, http://www.bverfg.de/e/rs20151215_2bvr273514en.html

Headnotes:

1. The Federal Constitutional Court, by means of the identity review, guarantees without reservations and in every individual case the protection of fundamental rights indispensable according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 and Art. 1 sec. 1 GG.

2. The strict requirements for activating the identity review are paralleled by stricter admissibility requirements for constitutional complaints that raise such an issue.

3. The principle of individual guilt is part of the constitutional identity. It must therefore be ensured that it is complied with in extraditions for the purpose of executing sentences that were rendered in the absence of the requested person during the trial.

4. German public authority must not assist other states in violating human dignity. The extent and the scope of the investigations, which German courts must conduct in order to ensure the respect of the principle of individual guilt, depend on the nature and the significance of the points submitted by the requested person that indicate that the proceedings in the requesting state fall below the minimum standards required by Art. 1 sec. 1 GG.

Facts:

A.

The constitutional complaint relates to the extradition[211] of the complainant to Italy on the basis of a European arrest warrant, which was issued for the purpose of executing a criminal sentence rendered against the complainant in his absence. **[1]**

I.

1. The complainant is a national of the United States of America. In 1992, by final judgment of the Florence *Corte di Appello*, he was sentenced in absence to a custodial sentence of 30 years for participating in a criminal organisation as well as importing and possessing cocaine. In 2014, he was arrested in Germany on the basis of an extradition request by the Italian Republic, which was based on a European arrest warrant issued in the same year by the Prosecutor General's Office of the Florence *Corte di Appello*. **[2]**

211 Translator's note: The term "*extradition*" is used in the translation of the *Gesetz für die Internationale Rechtshilfe in Strafsachen*, Act on International Cooperation in Criminal Matters - available in English at http://www.gesetze-im-internet.de/englisch_irg/index.html, translation provided by Prof. Dr. Michael Bohlander and Prof. Wolfgang Schomburg, - that transposes the Framework Decision on the European arrest warrant into German law. The German term used in that Act is indeed "*Auslieferung*". The English-language version of the Framework Decision on the European arrest warrant uses the term "surrender", the German version the term "*Übergabe*". Therefore, in this order, in most cases the term "extradition" is used. However, this usually does not apply in cases where the Framework Decision on the European arrest warrant is referred to.

a) By means of the European arrest warrant, the extradition of the complainant is requested to facilitate the execution of the custodial sentence imposed on him. The European arrest warrant indicates that the complainant was not personally served with the 1992 decision on which the judgment is based. In this regard, […] **[3]**

III.

In his constitutional complaint, the complainant claims a violation of his fundamental rights under Art. 1, Art. 2 sec. 1 and sec. 2 sentence 2, Art. 3 and Art. 103 sec. 1 GG, of his fundamental right to a fair trial (Art. 2 sec. 1 in conjunction with Art. 20 sec. 3 GG, Art. 6 sec. 3 ECHR), a violation of the minimum standards under international law, which are binding pursuant to Art. 25 GG, as well as a violation of Art. 6 sec. 3 ECHR. He claims that at no point in time was he aware of investigation proceedings or criminal proceedings being conducted against him in Italy. He further argues that there is no guarantee that after his extradition to Italy, he will be afforded the right to a trial in which the charges against him will be re-examined on fact and in law in his presence. **[25]**

According to the complainant, the Italian government did not provide a sufficient assurance[212] in this respect. He claims that the letter by the Florence Public Prosecutor General of 7 October 2014 does not have the necessary binding effect under international law. In his opinion, the Higher Regional Court was not entitled to replace the missing explicit assurance with its own assessment of the Florence Public Prosecutor General's letter of 7 October 2014; instead, it ought to have examined whether this assurance could be trusted with absolute certainty. According to the complainant, the court failed to avail itself of existing opportunities to obtain information, such as obtaining an expert opinion from the Max Planck Institute for Foreign and International Criminal Law. **[26]**

He further argues that the Florence Public Prosecutor General's letter does neither indicate the manner in which nor the court before which the proceedings will be conducted. He reasons that since Art. 175 CPP only affords reinstatement of the time limit for appeal, new taking of evidence is not guaranteed under the Italian Code of Criminal Procedure (Arts. 593 et seq. CPP). According to him, appellate proceedings are conducted solely on the basis of the case file; new evidence is only heard in exceptional cases, which would depend on the complainant being able to prove that he was not aware of the proceedings conducted against him in absence. Furthermore, in his opinion, it would be at the discretion of the judge whether to take new evidence. According to the complainant, the letter of the Italian Public Prosecutor General does not indicate that "retrial" is intended to mean a trial at first instance. **[27]**

212 Translator's note: diplomatic.

C.

The constitutional complaint is also well-founded. The challenged decision violates the complainant's right under Art. 1 sec. 1 in conjunction with Art. 23 sec. 1 sentence 3 and Art. 79 sec. 3 GG. **[35]**

I.

In general, sovereign acts of the European Union and acts of German public authority - to the extent that they are determined by Union law - are, due to the precedence of application of European Union Law (*Anwendungsvorrang des Unionsrechts*[213]), not to be measured against the standard of the fundamental rights enshrined in the Basic Law (1.). However, the precedence of application of European Union Law is limited by the constitutional principles that are beyond the reach of European integration (*integrationsfest*) pursuant to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG (2.). This in particular encompasses the principles contained in Art. 1 GG, including the principle of individual guilt in criminal law, which is rooted in the guarantee of human dignity (3.). It has to be ensured that, also in applying the law of the European Union or legal provisions that originate from German public authority but that are determined by Union law, these principles are guaranteed in every individual case (4.). However, one can only claim a violation of this inalienable core of fundamental rights protection before the Federal Constitutional Court if one submits in a substantiated manner that the dignity of the person is in fact interfered with (5.). **[36]**

1. Pursuant to Art. 23 sec. 1 sentence 1 GG, the Federal Republic of Germany participates in establishing and developing the European Union. Uniform application of its law is of central importance for the success of the European Union (cf. BVerfGE 73, 339 <368>; 123, 267 <399>; 126, 286 <301 and 302>). Without ensuring uniform application and effectiveness of its law, it would not be able to continue to exist as a legal community of currently 28 Member States (see, fundamentally, ECJ, Judgment of 15 July 1964, Costa/ENEL, 6/64, ECR 1964, p. 1251 <1269 et seq.>). In this respect, Art. 23 sec. 1 GG also assures that Union law is effective and will be enforced (cf. BVerfGE 126, 286 <302>). **[37]**

Therefore, through the authorisation to transfer sovereign powers to the European Union - an authorisation provided under Art. 23 sec. 1 sentence 2 GG -, the Basic Law endorses the precedence of application accorded to Union law by the Acts of Assent to the Treaties. As a rule, the precedence of application of European Union Law also applies with regard to national constitutional law (cf. BVerfGE 129, 78 <100>), and, in conflict, as a rule, it results in national law being inapplicable in the specific case (cf. BVerfGE 126, 286 <301>). **[38]**

Based on Art. 23 sec. 1 GG, the legislature deciding on European integration matters not only may, generally and in all matters, exempt European Union institutions and agencies from being bound by the fundamental rights and other guarantees under the Basic Law, to the extent

213 Translator's note: in the German legal system, this signifies that, within the scope of application of Union law, as a rule, German law is not applied; however, it remains in force and continues to apply in cases that are not within the scope of application of Union law.

that they exercise public authority in Germany, but also German entities that execute law of the European Union (cf. Streinz, Bundesverfassungsgerichtlicher Grundrechtsschutz und Europäisches Gemeinschaftsrecht, 1989, pp. 247 et seq.). This in particular applies to the legislature at federal and at state level if they transpose secondary or tertiary law without possessing a leeway to design (*Gestaltungsspielraum*)[214] (cf. BVerfGE 118, 79 <95>; 122, 1 <20>). In contrast, the legal acts that are issued in using an existing leeway to design are amenable to scrutiny by the Federal Constitutional Court (cf. BVerfGE 122, 1 <20 and 21>; 129, 78 <90 and 91>). **[39]**

2. However, the precedence of application of European Union Law only applies insofar as the Basic Law and the Act of Assent permit or provide for the transfer of sovereign powers (cf. BVerfGE 73, 339 <375 and 376>; 89, 155 <190>; 123, 267 <348 et seq.>; 126, 286 <302>; 129, 78 <99>; 134, 366 <384 para. 26>). The national order giving effect to Union law at national level (*Rechtsanwendungsbefehl*), contained in the Act of Assent, may only be given within the framework of the applicable constitutional order (cf. BVerfGE 123, 267 <402>). Limits to opening German statehood - limits that apply beyond the specific design of the European integration agenda laid down in the Act of Assent - follow from the Basic Law's constitutional identity as stipulated in Art. 79 sec. 3 GG (a). This is compatible with the principle of sincere cooperation (Art. 4 sec. 3 TEU) (b) and is corroborated by the fact that the constitutional law of most Member States of the European Union contains similar limits (c). **[40]**

a) The scope of precedence of application of European Union Law is mainly limited by the Basic Law's constitutional identity that, according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG, is beyond the reach of both constitutional amendment and European integration (*verfassungsänderungs-und integrationsfest*) (aa). The constitutional identity is safeguarded by the identity review conducted by the Federal Constitutional Court. (bb). **[41]**

aa) To the extent that acts of an institution or an agency of the European Union have an effect that affects the constitutional identity protected by Art. 79 sec. 3 GG in conjunction with the principles laid down in Arts. 1 and 20 GG, they transgress the limits of open statehood set by the Basic Law. Such an act cannot be based on an authorisation under primary law, because the legislature deciding on European integration matters, despite acting with the majority required by Art. 23 sec. 1 sentence 3 GG in conjunction with Art. 79 sec. 2 GG, cannot transfer sovereign powers to the European Union which, if exercised, would affect the constitutional identity protected by Art. 79 sec. 3 GG (cf. BVerfGE 113, 273 <296>; 123, 267 <348>; 134, 366 <384 para. 27>). Nor can it be based on initially constitutional conferrals that have supposedly evolved through a development of the law, because the institution or the agency of the European Union would thereby act *ultra vires* (cf. BVerfGE 134, 366 <384 para. 27>). **[42]**

214 Translator's note: In the case-law of the European Court of Human Rights, such leeway is often referred to as "margin of appreciation".

bb) Within the framework of the identity review, one has to review whether the principles laid down as inalienable by Art. 79 sec. 3 GG are affected by an act of the European Union (cf. BVerfGE 123, 267 <344, 353 and 354>; 126, 286 <302>; 129, 78 <100>; 134, 366 <384 and 385 para. 27>). The result of such a review may be that in exceptional cases - as is the case with the "*Solange*" reservation ("as long as" reservation) (cf. BVerfGE 37, 271 <277 et seq.>; 73, 339 <387>; 102, 147 <161 et seq.>) or with the *ultra vires* review (BVerfGE 58, 1 <30 and 31>; 75, 223 <235, 242>; 89, 155 <188>; 123, 267 <353 et seq.>; 126, 286 <302 et seq.>; 134, 366 <382 et seq., paras. 23 et seq.>) -, Union law must be declared inapplicable in Germany. However, to prevent German authorities and courts from simply disregarding the Union law's claim to validity, the application of Art. 79 sec. 3 GG in a manner that is open to European law in order to protect the effectiveness of the Union legal order and that takes into account the legal concept expressed in Art. 100 sec. 1 GG require that finding a violation of the constitutional identity is reserved for the Federal Constitutional Court (cf. BVerfGE 123, 267 <354>). This is underlined by Art. 100 sec. 2 GG according to which in case of doubts whether a general rule of international law creates rights and duties for the individual, the court must refer the question to the Federal Constitutional Court (cf. BVerfGE 37, 271 <285>). An identity review may also be triggered by a constitutional complaint (Art. 93 sec. 1 no. 4a GG) (cf. BVerfGE 123, 267 <354 and 355). **[43]**

b) The identity review does not violate the principle of sincere cooperation within the meaning of Art. 4 sec. 3 TEU. It is rather inherent in the concept of Art. 4 sec. 2 sentence 1 TEU (cf., on taking into consideration the national identity, ECJ, Judgment of 2 July 1996, Commission v Luxembourg, C-473/93, ECR 1996, I-3207, para. 35; Judgment of 14 October 2004, Omega, C-36/02, ECR 2004, I-9609, paras. 31 et seq.; Judgment of 12 June 2014, Digibet and Albers, C-156/13, EU:C:2014:1756, para. 34) and corresponds to the special nature of the European Union. The European Union is an association of sovereign states (*Staatenverbund*), of constitutions (*Verfassungsverbund*[215]), of administrations (*Verwaltungsverbund*) and of courts (*Rechtsprechungsverbund*[216]). This structure is ultimately based on international treaties concluded between the Member States. As "masters of the treaties" (*Herren der Verträge*), Member States decide through national legal arrangements if and to what extent Union law is applicable and is accorded precedence in the respective national legal order (cf. BVerfGE 75, 223 <242>; 89, 155 <190>; 123, 267 <348 and 349, 381 et seq.>; 126, 286 <302 and 303>; 134, 366 <384 para. 26>). It is not decisive whether this rule - as in France (Art. 55 of the French Constitution), Austria (Federal Constitutional Act on the Accession of Austria to the European Union - *Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union*, Federal Law Gazette of the Republic of Austria - *BGBl für die Republik Österreich* no. 744/ 1994) or Spain (Art. 96 sec. 1 of the Spanish

215 Translator's note: sometimes referred to as multilevel constitutionalism.

216 Translator's note: sometimes referred to as multilevel cooperation of courts.

Constitution) - is expressly provided for in national constitutional law or - as in the United Kingdom - in the Act of Assent (European Communities Act 1972; cf. Court of Appeal, Macarthys v. Smith, <1981> 1 All ER 111 <120>; Macarthys v. Smith, <1979> 3 All ER 325 <329>; House of Lords, Garland v. British Rail Engineering, <1983> 2 All ER 402 <415>) or whether it is deduced from the Act of Assent by way of a systematic, a teleological, and a historical interpretation - as in Germany - or whether the precedence of European Union Law over national law is achieved by a case-by-case application of national law to individual cases - as in Italy (cf. *Corte Costituzionale*, Decision no. 170/1984, Granital, Europäische Grundrechte-Zeitschrift - EuGRZ 1985, p. 98). **[44]**

Therefore, if the Federal Constitutional Court, in exceptional cases and under narrowly defined conditions, declares an act of an institution or an agency of the European Union to be inapplicable in Germany, this does not contradict the Basic Law's openness to European law (Preamble, Art. 23 sec. 1 sentence 1 GG) (cf. BVerfGE 37, 271 <280 et seq.>; 73, 339 <374 et seq.>; 75, 223 <235, 242>; 89, 155 <174 and 175>; 102, 147 <162 et seq.>; 123, 267 <354, 401>). **[45]**

This approach does not entail a substantial risk for the uniform application of Union law. On the one hand, violations of the principles of Art. 1 GG in particular, which are at issue here, will only occur rarely - for the reason alone that Art. 6 TEU, the Charter of Fundamental Rights and the case-law of the Court of Justice of the European Union generally ensure an effective protection of fundamental rights *vis-à-vis* acts of institutions, bodies and agencies of the European Union (cf., e.g., ECJ, Judgment of 9 November 2010, Schecke und Eifert, C-92/09 and C-93/09, ECR 2010, I-11063, paras. 43 et seq.; Judgment of 8 April 2014, Digital Rights Ireland and Seitlinger, C-293/12 and C-594/12, EU:C:2014:238, paras. 23 et seq.; Judgment of 13 May 2014, Google Spain and Google, C-131/12, EU:C:2014:317, paras. 42 et seq., 62 et seq., 89 et seq.; Judgment of 6 October 2015, Schrems, C-362/14, EU:C:2015:650, paras. 91 et seq.). On the other hand, the powers of review reserved to the Federal Constitutional Court are to be exercised with restraint and in a manner open to European law (cf. BVerfGE 126, 286 <303>). To the extent required, it will base its review of the European act in question on the interpretation of that act provided by the Court of Justice of the European Union in a preliminary ruling pursuant to Art. 267 sec. 3 TFEU (Treaty on the Functioning of the European Union). This does not only apply in the context of the *ultra vires* review, but also applies to declaring inapplicable an act of an institution, body or agency of the European Union in Germany, because it affects the constitutional identity protected by Art. 79 sec. 3 in conjunction with Art. 1 and 20 GG (cf. BVerfGE 123, 267 <353>; 126, 286 <304>; 134, 366 <385 para. 27>). **[46]**

c) The fact that the identity review conducted by the Federal Constitutional Court is compatible with Union law is in addition corroborated by the fact that, notwithstanding varieties in the details, the constitutional law of many other Member States of the European Union also contains provisions to protect the constitutional identity and to limit the transfer of sovereign powers to the European Union (cf. in this respect

BVerfGE 134, 366 <387 para. 30>). The vast majority of Constitutional Courts and Supreme Courts of the other Member States, within their respective jurisdiction, share the Federal Constitutional Court's view that the precedence (of application) of European Union law does not apply unrestrictedly, but that it is restricted by national (constitutional) law (cf. for the Kingdom of Denmark: Højesteret, Judgment of 6 April 1998 - I 361/1997 -, para. 9.8; for the Republic of Estonia: Riigikohus, Judgment of 12 July 2012 - 3-4-1-6-12 -, paras. 128, 223; for the French Republic: Conseil constitutionnel, Decision no. 2006-540 DC of 27 July 2006, 19th recital; Decision no. 2011-631 DC of 9 June 2011, 45th recital; Conseil d'État, Judgment of 8 February 2007, no. 287110 <Ass.>, Société Arcelor Atlantique et Lorraine, Europarecht - EuR 2008, p. 57 <60 and 61>; for Ireland: Supreme Court of Ireland, Crotty v. An Taoiseach, <1987>, I.R. 713 <783>; S.P.U.C. <Ireland> Ltd. v. Grogan, <1989>, I.R. 753 <765>; for the Italian Republic: Corte Costituzionale, Decision no. 98/1965, Acciaierie San Michele, EuR 1966, p. 146; Decision no. 183/1973, Frontini, EuR 1974, p. 255; Decision no. 170/1984, Granital, EuGRZ 1985, p. 98; Decision no. 232/1989, Fragd; Decision no. 168/1991; Decision no. 117/1994, Zerini; for the Republic of Latvia: Satversmes tiesa, Judgment of 7 April 2009 - 2008-35-01 -, para. 17; for the Republic of Poland: Trybunal Konstytucyjny, Judgments of 11 May 2005 - K 18/04 -, paras. 4.1., 10.2.; of 24 November 2010-- K 32/09 -, paras. 2.1. et seq.; of 16 November 2011 -- SK 45/09 --, paras. 2.4., 2.5.; for the Kingdom of Spain: Tribunal Constitucional, Declaration of 13 December 2004, DTC 1/2004, Ground 2, EuR 2005, S. 339 <343> and Decision of 13 February 2014, STC 26/2014, no. 3 of the recitals, Human Rights Law Journal - HRLJ 2014, p. 475 <477 and 478>; for the Czech Republic: Ústavni Soud, Judgment of 8 March 2006, Pl. ÚS 50/04, para. VI.B.; Judgment of 3 May 2006, Pl. ÚS 66/04, para. 53; Judgment of 26 November 2008, Pl. ÚS 19/08, paras. 97, 113, 196; Judgment of 3 November 2009, Pl. ÚS 29/09, paras. 110 et seq.; Judgment of 31 January 2012, Pl. ÚS 5/12, para. VII.; for the United Kingdom: High Court, Judgment of 18 February 2002, Thoburn v. Sunderland City Council, <2002> EWHC 195 <Ad-min>, para. 69; UK Supreme Court, Judgment of 22 January 2014, R <on the application of HS2 Action Alliance Limited> v. The Secretary of State for Transport, <2014> UKSC 3, paras. 79, 207; Judgment of 25 March 2015, Pham v. Secretary of State for the Home Department, <2015> UKSC 19, paras. 54, 58, 72 to 92). **[47]**

3. The interests that are protected by the constitutional identity laid down in Art. 79 sec. 3 GG, interests that are also protected against interferences by public authority exercised supranationally, include the principles of Art. 1 GG, and thereby include the duty of all state authority to respect and protect human dignity (Art. 1 sec. 1 sentence 2 GG), but they also include the principle, enshrined in the guarantee of human dignity, that any punishment presupposes individual guilt (cf. BVerfGE 123, 267 <413>). **[48]**

4. The protected interests that, according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG, are beyond the reach of European integration must not be touched in individual cases (cf. BVerfGE 113, 273 <295 et seq.>; 123, 267 <344>; 126, 286 <302 and 303>; 129, 78 <100>; 129, 124 <177 et seq.>; 132, 195 <239 et seq. paras. 106 et seq.>; 134, 366 <384 et seq. paras. 27 et seq.>). This holds especially true with regard to Art. 1

sec. 1 GG. Human dignity constitutes the highest legal value within the constitutional order (cf. BVerfGE 27, 1 <6>; 30, 173 <193>; 32, 9 <108>; 117, 71 <89>). To respect and protect human dignity forms part of the foundational principles of the Basic Law (cf. BVerfGE 45, 187 <227>; 131, 268 <286>; established jurisprudence of the Federal Constitutional Court), principles which the Basic Law's "mandate to integrate" (*Integrationsauftrag*) and its openness to European law - characteristics of the Basic Law that have found their expression in the Preamble and in Art. 23 sec. 1 sentence 1 GG - must also take into account (cf. BVerfGE 123, 267 <354>; 126, 286 <303>; 129, 124 <172>; 132, 287 <292 para. 11>). Against this backdrop, the Federal Constitutional Court, by means of the identity review, guarantees without reservations and in every individual case the protection of fundamental rights that is indispensable according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 and Art. 1 sec. 1 GG. **[49]**

5. The strict requirements for activating the identity review are paralleled by stricter admissibility requirements for constitutional complaints that raise such an issue. The complainant must substantiate in detail to what extent the guarantee of human dignity that is protected by Article 1 GG is violated in the individual case. **[50]**

II.

The challenged decision rendered by the Higher Regional Court transgresses the limits set by Art. 1 sec. 1 in conjunction with Art. 23 sec. 1 sentence 3 and Art. 79 sec. 3 GG. Executing the Framework Decision on the European arrest warrant affects the principle of individual guilt, a principle that is rooted in the guarantee of human dignity (Art. 1 sec. 1 GG) and in the principle of the rule of law (Art. 20 sec. 3 GG) and that forms part of the inalienable constitutional identity under the Basic Law (1.). This fact justifies and mandates a review of the Higher Regional Court's decision, a review according to the standards of the Basic Law, but limited to this protected interest, although the Higher Regional Court's decision is determined by Union law (2.). On the one hand, the requirements set by Union law, and by German law transposing it, on which the decision is based, comply with the requirements set by Art. 1 sec. 1 GG, as they guarantee the mandatory rights of the requested person in the context of extraditions for the purpose of executing sentences rendered in absence of the person concerned and as they do not only allow the courts that deal with the extradition to investigate appropriately, but they demand it (3.). On the other hand, however, in applying those provisions, the Higher Regional Court violated the principle of individual guilt and thereby violated the complainant's right under Art. 1 sec. 1 GG, because with regard to the interpretation of the dispositions of the Framework Decision and the Act on International Cooperation in Criminal Matters, its application of the law did not adequately take into account the significance and the scope of human dignity (4.). **[51]**

1. Art. 1 sec. 1 GG can be violated by executing the Framework Decision on the European arrest warrant, because, in extraditing a person with the purpose of executing a sentence rendered in the absence of the requested person, one enforces, through criminal law, a reaction to socio-ethical misconduct, a reaction that is incompatible with the guarantee of human dignity and the rule of law (*Rechtstaatsprinzip*) unless the individual blameworthiness (*individuelle Vorwerfbarkeit*) of the person concerned has been determined by the competent court (a). Therefore, one must also ensure compliance with the minimum procedural rights of the accused guaranteed under the

rule of law and aimed at establishing the true facts of the case, rights that are necessary to ensure the effectiveness of the substantive component of the principle of individual guilt, in the extradition procedure determined by Union law that is triggered by a European arrest warrant (b). **[52]**

a) Criminal law is based on the principle of individual guilt (BVerfGE 123, 267 <413>; 133, 168 <197 para. 53>). This principle governing the entire field of punitive action by the state is enshrined in the guarantee of dignity and responsibility for oneself (*Eigenverantwortlichkeit*) and in the rule of law (cf. BVerfGE 45, 187 <259 and 260>; 86, 288 <313>; 95, 96 <140>; 120, 224 <253 and 254>; 130, 1 <26>; 133, 168 <197 para. 53>). As the principle of individual guilt is founded on the guarantee of human dignity under Art. 1 sec. 1 GG, it forms part of the constitutional identity that is inalienable pursuant to Art. 79 sec. 3 GG, and that is also protected against interferences by public authority exercised supranationally (cf. BVerfGE 123, 267 <413>). Therefore, one must also ensure that it is complied with in extraditions for the purpose of executing sentences that were rendered in the absence of the requested person during the trial. **[53]**

aa) The principle of "No criminal sanction without guilt" ("Keine Strafe ohne Schuld" - "*nulla poena sine culpa*") presupposes the responsibility of the person, who can decide on his or her actions him or herself, and who, by virtue of his or her free will, can distinguish between right and wrong and act accordingly. The protection of human dignity is based on the idea of the human being as a spiritual and moral being who is predisposed to freely define and to develop him- or herself (cf. BVerfGE 45, 187 <227>; 123, 267 <413>; 133, 168 <197 para. 54>). Therefore, in the area of the administration of criminal justice, Art. 1 sec. 1 GG determines the concept of the nature of criminal sanctions and the relationship between guilt and atonement (cf. BVerfGE 95, 96 <140>) as well as the principle that any criminal sanction presupposes guilt (cf. BVerfGE 57, 250 <275>; 80, 367 <378>; 90, 145 <173>; 123, 267 <413>; 133, 168 <197 and 198 para. 54>). By way of criminal sanction, the offender is reproached of a socio-ethical misconduct (cf. BVerfGE 20, 323 <331>; 95, 96 <140>; 110, 1 <13>; 133, 168 <198 para. 54>). The judgment that a person's behaviour has been unworthy (*Unwerturteil*), which ensues from the criminal sanction, affects the person concerned with regard to his or her right to being valued and respected, a right that is rooted in human dignity (cf. BVerfGE 96, 245 <249>; 101, 275 <287>). Such a reaction by the state is incompatible with the guarantee of human dignity and the rule of law unless the individual blameworthiness of the person is determined (cf. BVerfGE 20, 323 <331>; 95, 96 <140>; 133, 168 <198 para. 54>). **[54]**

bb) As a consequence, the principle of individual guilt is at the same time a mandatory requirement under the principle of the rule of law. The rule of law is one of the fundamental principles under the Basic Law (BVerfGE 20, 323 <331>; 133, 168 <198 para. 55>). It ensures that freedoms can be exercised by affording legal certainty, by binding state authority to the law, and by protecting legitimate expectations (BVerfGE 95, 96 <130>). The principle of the rule of law also

encompasses the claim for substantive justice as one of the guiding principles of the Basic Law (cf. BVerfGE 7, 89 <92>; 7, 194 <196>; 45, 187 <246>; 74, 129 <152>; 122, 248 <272>) and comprises the principle of equality before the law as one of the fundamental postulates of justice (cf. BVerfGE 84, 90 <121>). In the field of criminal law, these objectives laid down by the principle of the rule of law are incorporated through the principle that there must not be punishment without guilt (BVerfGE 95, 96 <130 and 131>; 133, 168 <198 para. 55>). According to the idea of justice, the constituent elements of a criminal offence have to correspond adequately to the legal consequences envisaged (cf. BVerfGE 20, 323 <331>; 25, 269 <286>; 27, 18 <29>; 50, 205 <214 and 215>; 120, 224 <241>; established jurisprudence of the Federal Constitutional Court). There has to be a just proportion between the punishment on the one hand and the gravity of the offence, and the guilt of the offender, on the other hand (cf. BVerfGE 20, 323 <331>; 45, 187 <228>; 50, 5 <12>; 73, 206 <253>; 86, 288 <313>; 96, 245 <249>; 109, 133 <171>; 110, 1 <13>; 120, 224 <254>; 133, 168 <198 para. 55>). In this sense, the criminal sanction is aimed at justly compensating guilt (cf. BVerfGE 45, 187 <253 and 254>; 109, 133 <173>; 120, 224 <253 and 254>; 133, 168 <198 para. 55>). **[55]**

b) The effectiveness of the principle of individual guilt is at risk if one does not ensure that the true facts of the case are established (aa). Meting out an appropriate criminal sanction, which also constitutes a socio-ethical reproach, presupposes that the court concerned takes into account the personality of the accused, and therefore, as a rule, that the accused is present at the trial. As a consequence, the principle of individual guilt mandates that minimum rights of the accused are guaranteed in criminal trials to ensure that the accused can present circumstances to the court, and have them reviewed, that might be exonerating or relevant for sentencing (bb). These guarantees must be complied with in extradition proceedings for the purpose of executing sentences rendered in the absence of the requested person in the trial (cc). **[56]**

aa) Establishing the true facts of the case, which is indispensable for realising the substantive component of the principle of individual guilt, is the central objective of criminal proceedings (cf. BVerfGE 57, 250 <275>; 118, 212 <231>; 122, 248 <270>; 130, 1 <26>; 133, 168 <199 para. 56>). It is the function of criminal proceedings to enforce the right of the state to inflict punishment (*Strafanspruch des Staates*) in a procedure provided for and governed by law (*justizförmig*) in order to protect legal interests of individuals and of the general public and to ensure that the fundamental rights of the person at risk of punishment are effectively protected. In criminal proceedings, one has to ensure that the dignity of the human being as a person acting on his or her own responsibility is complied with, as well as the principle derived from the rule of law that one may not impose a criminal sanction without guilt, and that corresponding measures under procedural law are provided (cf. BVerfGE 122, 248 <270>; 133, 168 <199 para. 56>). One has to establish, in accordance with the relevant procedural rules, that the offence was committed and that the offender was guilty (cf. BVerfGE 9, 167 <169>; 74, 358 <371>; 133, 168 <199 para. 56>). The offender is presumed innocent until his

or her guilt is proven (cf. BVerfGE 35, 311 <320>; 74, 358 <371>; established jurisprudence of the Federal Constitutional Court). **[57]**

bb) Criminal proceedings have the aim and the function of meting out a criminal sanction that is appropriate with regard to the offender and the offence. In the German legal sphere, a criminal sanction is much more than an interference with rights (*Rechtseingriff*) or harm (*Übel*) that bears upon the offender. One of the characteristic features of a criminal sanction, besides such interference or harm, is the blame (*Tadel*) or reproach that is expressed via the sentence. This is meant as a socioethical reproach or a specific moral disapproval. Under the Basic Law, a criminal sanction does not merely imply the reproach of a violation of the law, but the violation of the part of the law that has a more fundamental foundation, that is to say a socioethical one (cf. BVerfGE 25, 269 <286>; 90, 145 <200 - separate opinion>; 95, 96 <140>; 96, 10 <25>; 96, 245 <249>; 109, 133 <167>; 109, 190 <217>; 120, 224 <240>; 123, 267 <408>; cf., in comparison to a criminal sanction, the assessment of administrative sanctions in BVerfGE 42, 261 <263>; e.g., for just some examples from legal doctrine Weigend, in: Leipziger Kommentar, vol. 1, 12th edition 2007, Introduction para. 1; Radtke, in: MüKo, StGB, Preliminary remark concerning §§ 38 et seq., para. 14; idem, Goltdammer's Archiv für Strafrecht - GA 2011, pp. 636 <646>; Roxin, Strafrecht AT, vol. 1, 4th ed. 2006, § 3 para. 46, p. 89). This implies, however, that a criminal sanction that does not comprehensively take into account the personality of the offender cannot be a criminal sanction that is appropriate with regard to the dignity of the accused. As a consequence, this presupposes, as a rule, that a court, in an oral hearing in the presence of the accused, gains an insight into the accused's personality, his motifs, his perspective on the offence, on the victim and the circumstances of the offence. It has to be ensured that the accused at least has the right to personally present circumstances to the court, in particular such of a justifying, excusing, or mitigating nature, the judge and the accused being face to face. This follows from the fact that if one reproaches someone of socio-ethical misconduct, this constitutes a reproach that bears upon the personality of the sentenced person (cf. BVerfGE 96, 245 <249>; 101, 275 <287>), a reproach affecting the person concerned with regard to his or her right to be valued and respected, a right that is rooted in human dignity. **[58]**

cc) The minimum guarantees of rights of the accused in criminal proceedings, guarantees that are mandated by the principle of individual guilt, must also be observed in decisions on the extradition of persons requested for the purpose of executing sentences rendered in the absence of the requested person at the trial (1). In this respect, German courts are under a responsibility to ensure that those guarantees will be observed ("*Gewährleistungsverantwortung*") by the requesting state (2). **[59]**

(1) In its established jurisprudence, the Federal Constitutional Court has taken the view that, in extraditing requested persons for the purpose of executing sentences rendered in their absence, one has to respect the inalienable

constitutional principles (cf. BVerfGE 59, 280 <282 et seq.>; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* - BVerfGK 3, 27 <32>; 3, 314 <317>; 6, 13 <18>; 6, 334 <341 and 342>; German Federal Constitutional Court, *Bundesverfassungsgericht* (BVerfG), Order of the First Chamber of the Second Senate of 17 November 1986 - 2 BvR 1255/86 -, Neue Juristische Wochenschrift - NJW 1987, p. 830 <830>; Order of the Third Chamber of the Second Senate of 24 January 1991 - 2 BvR 1704/90 -, NJW 1991, pp. 1411 <1411>) or the indispensable constituents of the German public order (BVerfGE 63, 332 <338>) respectively. This is the reason why the Senate in the past had declared extraditions for the purpose of executing foreign sentences that were rendered in the absence of the requested person to be impermissible if the requested person had neither been informed about the proceedings, nor about their conclusion nor, after gaining knowledge of those facts, had had an actually effective possibility to use his or her right to be heard and to defend him- or herself effectively (cf. BVerfGE 63, 332 <338>; BVerfGK 3, 27 <32 and 33>; 3, 314 <318>; 6, 13 <18>; BVerfG, Order of the Third Chamber of the Second Senate of 24 January 1991 - 2 BvR 1704/90 -, NJW 1991, pp. 1411 <1411>). **[60]**

To achieve that the requesting state does not treat a requested person as a mere object of proceedings […] conducted by that state, the requested person must have the possibility to influence proceedings, to submit a statement with regard to the charges brought against him or her, to present exonerating circumstances and to have them reviewed and, if this is warranted, taken into account. **[61]**

(2) In this respect, the courts competent for extraditions also bear responsibility for the treatment of the requested person in the requesting state. While, as the rule, the German public authority's responsibility under fundamental rights ends where a foreign sovereign state determines the essential features of a course of events according to its own free will that is independent of the Federal Republic of Germany's, (cf. BVerfGE 66, 39 <56 et seq., 63 and 64>), German public authority must not assist other states in violating human dignity (cf. BVerfGE 59, 280 <282 and 283>; 60, 348 <355 et seq.>; 63, 332 <337 and 338>; 75, 1 <19>; 108, 129 <136 and 137>; 113, 154 <162 and 163>). **[62]**

Therefore, the court that decides on an extradition is under the obligation to investigate and establish the facts of the case, an obligation that also falls within the scope of Art. 1 sec. 1 GG. This applies notwithstanding the fact that the principle of mutual trust governs extraditions within Europe (b). **[63]**

(a) It is not possible to determine the content and the extent of the procedural obligation to investigate in judicial extradition proceedings in an abstract and general manner; they depend on the circumstances of the individual case. **[64]**

The facts that must be established by German courts in particular include what kind of treatment the requested person will have to expect in the requesting state. In assessing whether an extradition is permissible, as a rule, they must, *ex officio*, use those means of investigation available to them to establish whether constitutional law principles are violated as had been asserted by the requested persons; the person concerned is not under a burden of proof (cf. BVerfGE 8, 81 <84 and 85>; 52, 391 <406 and 407>; 63, 215 <225>; 64, 46 <59>; Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 29 May 1996 - 2 BvR 66/96 -, EuGRZ 1996, pp. 324 <326>; Order of the Third Chamber of the Second Senate of 15 December 1996 - 2 BvR 2407/96 -, juris, para. 6; Order of the First Chamber of the Second Senate of 9 September 2000 - 2 BvR 1560/00 -, NJW 2001, pp. 3111 <3112>). **[65]**

The extent and the scope of the investigations, which the courts must conduct in order to ensure the respect of the principle of individual guilt, depend on the nature and the significance of the points submitted by the requested person that indicate that the proceedings in the requesting state fall below the minimum standards required by Art. 1 sec. 1 GG. The courts may use as evidence any means that, according to the rules of logic, to general or to scientific knowledge, are, or might be, suitable to convince themselves that facts that are essential for the decision exist and that the assessment or evaluation of facts is correct (cf. W.-R. Schenke, in: Kopp/Schenke, VwGO, 21th ed. 2015, § 98 para. 3; Lagodny, in: Schomburg/Lagodny/Hackner, Internationale Rechtshilfe in Strafsachen, 5th ed. 2012, § 30 para. 22). Furthermore, asking the requesting state to submit additional documents is another possibility (cf. § 30 sec. 1, § 78 sec. 1 IRG). It might also become necessary to request an expert legal opinion or official information (*amtliche Auskunft*). **[66]**

(b) This does not signify that German courts always have to review the reasons of an extradition request in detail. In particular within Europe, the principle of mutual trust applies in extradition proceedings. However, this trust can be shaken. The principles that govern extraditions based on international agreements (aa) can be applied by analogy to extraditions executing the Framework Decision on the European arrest warrant to the extent at issue in this case (bb). **[67]**

(aa) With regard to extraditions between Germany and other states, as a rule, the requesting state deserves trust that it will comply with the principles of the rule of law and the protection of human rights. This principle of mutual trust is to be applied as long as trust is not shaken due to pertinent facts (cf. BVerfGE 109, 13 <35 and 36>; 109, 38 <61>). Exceptions can only be justified in atypical cases (cf. BVerfGE 60, 348 <355 and 356>; 63, 197 <206>; 109, 13 <33>; 109, 38 <59>). **[68]**

The requested person is - as in asylum proceedings - under a burden of producing evidence that provide sufficient indications for the entities participating in the decision on the permissibility of the extradition to conduct further investigations (cf. BVerfGK 6, 334 <342>; Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 29 May 1996 - 2 BvR 66/96 -, EuGRZ 1996, pp. 324 <326>). In particular, there may be cause for a review of whether the extradition and the case file it is based on meet the minimum standard of fundamental rights protection required under the Basic Law if an extradition has the purpose of executing a foreign sentence that was rendered in the absence of the requested person (cf. BVerfGE 59, 280 <282 et seq.>; 63, 332 <337>; BVerfGK 3, 27 <31 and 32>; 6, 13 <17>; Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 24 January 1991 - 2 BvR 1704/90 -, NJW 1991, pp. 1411 <1411>). **[69]**

As a rule, an assurance [to the effect that this minimum standard will be guaranteed] that is given in extradition proceedings and that is binding under public international law is suitable to overcome potential concerns with regard to the permissibility of the extradition; this holds true unless it is to be expected that the assurance will not be complied with in the individual case (cf. BVerfGE 63, 215 <224>; 109, 38 <62>; BVerfGK 2, 165 <172 and 173>; 3, 159 <165>; 6, 13 <19>; 6, 334 <343>; 13, 128 <136>; 13, 557 <561>; 14, 372 <377>; Federal Constitutional Court, Order of the Second Chamber of the Second Senate of 9 December 2008 - 2 BvR 2386/08 -, juris, para. 16). **[70]**

The risk of a treatment contrary to human rights that is alleged by the requested person is not as such an obstacle to the extradition if its existence merely cannot be completely ruled out due to an incident that has become known and that happened in the past. Rather, there have to be reasonable grounds to believe that there is a risk of a treatment contrary to human rights (cf. BVerfGE 108, 129 <138>; BVerfG, Orders of the Third Chamber of the Second Senate of 22 June 1992 - 2 BvR 1901/91 -, juris, para. 4; of 31 May 1994 - 2 BvR 1193/93 -, NJW 1994, pp. 2883 <2884>; of 29 May 1996 - 2 BvR 66/96 -, EuGRZ 1996, pp. 324 <326>). There have to be convincing reasons to believe that there is a considerable probability that the requesting state will not observe the minimum standards required by public international law in the specific case. As a rule, the obligation to produce specific factual prima facie evidence can only be dispensed with if there is a continuous practice of gross, obvious or systematic violations of human rights in the requesting state. Extradition to states that have

a continuous practice of widespread and systematic violations of human rights will usually result in a violation of fundamental principles of the German constitutional order being probable (cf. BVerfGE 108, 129 <138 and 139>; Federal Constitutional Court, Order of the First Chamber of the Second Senate of 15 October 2007 - 2 BvR 1680/ 07 -, Neue Zeitschrift für Verwaltungsrecht - NVwZ 2008, pp. 71 <72>). **[71]**

(bb) As far as the protection of the principle of individual guilt is concerned, this also applies to extraditions that take place on the basis of the Framework Decision on the European arrest warrant. **[72]**

On the one hand, as a rule, one has to place particular trust in a Member State of the European Union with regard to its compliance with the principles of the rule of law and of human rights protection. The European Union professes respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (cf. Art. 2 TEU). Its Member States are all bound by the European Convention on Human Rights. Furthermore, they are bound by the guarantees under the Charter of Fundamental Rights when they are implementing Union law (cf. Art. 51 sec. 1 of the Charter of Fundamental Rights of the European Union - CFR). Trust in the compliance with the principles of the rule of law and of human rights protection encompasses in particular the details given by the requesting Member State in the European arrest warrant. Therefore, in general, the court that is competent to decide on whether the extradition is permissible is not under an obligation to use all possibilities available to investigate whether, or to establish as a fact that, one can trust the requesting Member State to observe the principle of individual guilt. **[73]**

On the other hand, however, the principle of mutual trust is shaken if there are indications based on facts that the requirements indispensable for the protection of human dignity would not be complied with in the case of an extradition. In this respect, the court that decides on whether the extradition is permissible is under an obligation to investigate both the legal situation and legal practice of the requesting Member State if the person concerned has submitted sufficient indications that such investigations are warranted. The fact that the sentence that is to be executed by way of extradition was rendered in the absence of the requested person cannot be the sole reason for reviewing whether the extradition complies with the constitutional identity of the Basic Law. This is due to the fact that a Member State that requests an extradition for the purpose of executing a judicial decision that had been

rendered in the absence of the requested person according to Art. 4a sec. 1of the Framework Decision, by duly completing the relevant form, at the same time states that the requested person either was actually aware of the scheduled trial and was informed that a decision might be handed down if he or she did not appear for the trial (cf. Art. 4a sec. 1 letter a of the Framework Decision), or that the requested person, being aware of the scheduled trial, was defended by a counsellor at the trial (cf. Art. 4a sec. 1 letter b of the Framework Decision), or that the requested person has the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; (cf. Art. 4a sec. 1 letters c and d of the Framework Decision). **[74]**

If, after conclusion of the investigations, the court becomes aware that the minimum standards mandated by the Basic Law will not be complied with by the requesting state, the court must not permit the extradition. **[75]**

2. To ensure compliance with the principle of individual guilt, which is beyond the reach of European integration, the Court is justified in conducting, and under an obligation to conduct, a review of the Higher Regional Court's decision, although that decision is determined by Union law, a review according to the standards of the Basic Law and that is limited to ensuring observance of the procedural minimum guarantees. As a rule, the Framework Decision is accorded precedence of application within the German legal order (a). According to the case-law of the Court of Justice of the European Union, the Framework Decision exhaustively deals with extraditions of persons who were sentenced in absence (b). However, this does not relieve the Higher Regional Court of its obligation to ensure that the principles of Art. 1 sec. 1 GG, in its manifestation as principle of individual guilt, are also complied with in the context of extraditions based on a European arrest warrant (c.). **[76]**

a) The precedence of application of European Union Law also extends to Framework Decisions. In this regard, the principle that national law must be interpreted in conformity with Union law (*Prinzip der unionsrechtskonformen Auslegung*) requires the national courts, having regard to the entire national legal order and by applying the methods of interpretation that are recognised there, to do anything within their competence to ensure the full effectiveness of Union law and to achieve a result that is in conformity with the objective pursued with the Framework Decision (cf. ECJ, Judgment of 5 October 2004, Pfeiffer, C-397/01 to C-403/01, ECR 2004, I-8835, paras. 115 and 116; Judgment of 5 September 2012, Lopes Da Silva Jorge, C-42/11, EU:C:2012:517, para. 56). **[77]**

In substance, the Court of Justice has already held several times that national judicial authorities may only refuse to execute a European arrest warrant in the cases provided for by the Framework Decision (cf. ECJ, Judgment of 1 December 2008, Leymann and Pustovarov, C-388/08 PPU, ECR 2008, I-8993, para. 51; Judgment of 30 May

2013, F., C-168/13 PPU, EU:C:2013:358, para. 36 with further references). In the case Melloni, it emphasised that the effectiveness of the Framework Decision cannot be allowed to be undermined by a state invoking rules of national law; the same holds true even for law of constitutional status (cf. ECJ, Judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, para. 59). Until now, the Court [of Justice of the European Union] has not dealt with limits to interpreting national law in conformity with a Framework Decision (*rahmenbeschlusskonforme Auslegung*), although the Spanish *Tribunal Constitucional* had based its request for a preliminary ruling on the argument that extraditions for the purpose of executing sentences rendered in the absence of the requested person potentially violated the core content of a fair trial within the meaning of the Spanish Constitution, a violation that might affect human dignity (cf. ECJ, loc. cit., para. 20; subsequently, the Spanish *Tribunal Constitucional*, however, emphasised that if it were no longer possible to reconcile the law of the European Union in its further development with the Spanish Constitution, preserving the sovereignty of the Spanish people and the supremacy of the Constitution […] could lead[217] the Court, in a final instance, to solve the problems through the constitutional procedures envisaged; such was the content of its decision of 13 February 2014, STC 26/2014, Ground 3, HRLJ 2014, pp. 475 <478>). **[78]**

b) According to the case-law of the Court of Justice, Art. 4a of the Framework Decision exhaustively regulates which conditions may be set for an extradition to execute sentences rendered in absence of the requested person at the trial. **[79]**

Pursuant to Art. 1 sec. 2 of the Framework Decision, the Member States execute a European arrest warrant according to the principle of mutual recognition and according to the provisions of the Framework Decision. As a rule, they are under an obligation to execute a European arrest warrant, and they may only attach preconditions to its execution in those cases that are mentioned in Art. 3 to 5 of the Framework Decision (cf. ECJ, Judgment of 1 December 2008, Leymann and Pustovarov, C-388/08 PPU, ECR 2008, I-8993, para. 51; Judgment of 30 May 2013, F., C-168/13 PPU, EU:C:2013:358, para. 36 with further references). **[80]**

According to the Court of Justice, the execution of a European arrest warrant may - as envisaged in the 10th recital of the preamble to the Framework Decision - be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Art. 6 sec. 1 TEU, determined by the Council pursuant to Art. 7 sec. 1 TEU with the consequences set out in Art. 7 sec. 2 TEU (cf. ECJ, Judgment of 30 May 2013, F., C-168/13 PPU, EU:C:2013:358, para. 49). It further held that the principle of mutual recognition [of judgments handed down in another Member State] was based on mutual trust between Member States, in the fact that their respective national legal orders[218] are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights. It concluded that, therefore, the

217 Translator's note: literal translation of the German wording would be "require".

218 Translator's note: referred to as "national legal systems" in the judgment cited below.

parties against which a European arrest warrant have been issued had to pursue legal remedies within the legal system of the Member State of origin if they wanted to challenge the lawfulness of prosecution, of the execution of the sentence, of imposing a custodial measure of prevention[219], or of the criminal trial that has led to imposing a custodial sentence or a custodial measure of prevention, (cf. ECJ, Judgment of 22 December 2010, Aguirre Zarraga, C-491/10 PPU, ECR 2010, I-14247, paras. 70 and 71). **[81]**

In the Melloni case, the Court of Justice decided specifically with regard to Art. 4a of the Framework Decision that the execution of an arrest warrant must not be made dependent on the condition that a sentence rendered in the issuing state in the absence of the accused is open to review (cf. ECJ, Judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, para. 46) if the person concerned is in one of the four situations provided for in that provision (cf. ECJ, loc. cit., para. 61). Furthermore, Art. 53 CFR does not allow Member States to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State (cf. ECJ, loc. cit., para. 64). **[82]**

c) These stipulations, however, do not relieve German authorities or courts of their obligation to ensure that the principles of Art. 1 sec. 1 GG are complied with in the context of extraditions executing a European arrest warrant (Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG). Rather, they must ensure that in executing the Framework Decision on the European arrest warrant and the Act on International Cooperation in Criminal Matters, the minimum guarantees of the rights of the accused required by Art. 1 sec. 1 GG will also be observed in the requesting Member State, or - where this is impossible - refrain from extraditing the person concerned. To this extent, the principle of mutual trust that governs extraditions within Europe is limited by human dignity guaranteed under Art. 1 sec. 1 GG. It is to this extent, as well, that the court is under a constitutional obligation to conduct the investigations mentioned above. **[83]**

3. In the present context, however, there is no need for limiting the precedence of application of the Framework Decision by having recourse to Art. 79 sec. 3 GG in conjunction with Art. 1 sec. 1 GG because both the Framework Decision (a) and the Act on International Cooperation in Criminal Matters transposing it (b) require an interpretation that takes into account the minimum guarantees of the rights of the accused that are required by Art. 1 sec 1 GG in the context of an extradition. In this regard, the relevant standards of Union law satisfy the minimum guarantees of the rights of the accused that are mandated by the Basic Law to uphold the principle of individual guilt, which is beyond the reach of European integration. **[84]**

219 Translator's note: referred to as "detention order" in the Framework Decision; referred to as "custodial measure" in the translation of the German Criminal Code provided at https://www.gesetze-im-internet.de/englisch_stgb/index.html.

a) The obligation to execute a European arrest warrant is already limited under Union law (cf. Vogel, in: Grabitz/Hilf/Nettesheim, Das Recht der EU, vol. I, Art. 82 AEUV, para. 37 <March 2011>; Gaede, NJW 2013, pp. 1279 <1280>). The confidence between Member States, which, pursuant to recital 10 of the Preamble to the Framework Decision, is the basis of the mechanism of the European arrest warrant, can be shaken; in individual cases, considerable violations of fundamental rights can occur even if the respective national legal systems are, in principle, capable of providing an effective protection of fundamental rights that is equivalent to the protection provided under the Basic Law. Even according to Union law standards, a European arrest warrant is not to be executed if it does not meet the requirements stipulated by the Framework Decision (aa) or if the extradition would entail a violation of Union fundamental rights (bb). Also under a Union law perspective, the principle of mutual trust does not apply without limitations in this regard (cc), with the result that the denial of extradition on the basis of a European arrest warrant for the execution of a sentence rendered in the absence of the requested person can be justified under certain preconditions (dd). **[85]**

aa) Pursuant to Art. 4a sec. 1 of the Framework Decision, the executing judicial authority may refuse to execute a European arrest warrant issued for the purpose of executing a custodial sentence if certain preconditions are not met. **[86]**

Art. 4a sec. 1 letters a and b of the Framework Decision provides for an obligation to extradite a person for the execution of a decision rendered following a trial at which the person did not appear in person if the person actually received official information of the trial and was informed that a decision might be handed down if he or she did not appear for the trial, or if the person, being aware of the trial, was indeed represented by a defence counsel. These are cases in which the person, of his or her own free will, and unequivocally, waived his or her right to be personally present at the trial. **[87]**

In contrast, Art. 4a sec. 1 letters c and d of the Framework Decision covers scenarios in which the person concerned has the right to challenge the sentence via a legal remedy that allows the merits of the case[220], including fresh evidence, to be re-examined, and which may lead to the original decision being reversed. Thus, in these cases, the accused is offered the opportunity to have a court review the facts pertaining to the charges brought against him or her. This requires that the court competent for potential appeal or retrial proceedings also hear the accused; procedural law must enable this court to examine not only the law but also the facts pertaining to the charges brought against the accused. To the extent that Art. 4a sec. 1 letter d (i) of the Framework Decision prescribes a procedure that allows for[221] the merits of the case, including fresh evidence, to be re-examined, and which "may"[222] lead to the original decision being reversed, this

220 Translator's note: This order employs the German term "Sachverhalt", which refers to the facts of the case.

221 Translator's note: The German version of the Framework Decision uses the word "kann".

222 Translator's note: The German version of the Framework Decision uses the word "kann".

provision does not provide for discretion of the courts dealing with such a case; rather, the term "may" used in Art. 4a sec. 1 letter d (i) of the Framework Decision serves to describe the powers of the court and signifies more or less "to be able to"[223]. More aptly, the English version mentions a "retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined", and the French version mentions a "nouvelle procédure de jugement ou (…) une procédure d'appel, à laquelle l'intéressé a le droit de participer et qui permet de réexaminer l'affaire sur le fond, en tenant compte des nouveaux éléments de preuve". **[88]**

This interpretation of Art. 4a sec. 1 letter d (i) of the Framework Decision corresponds to the intent of the European legislature as well. The provision was inserted in the Framework Decision on the European arrest warrant by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/ JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ EU no. L 81 of 27 March 2009, p. 24 - Framework Decision on decisions rendered in the absence of the person concerned). Pursuant to Art. 1 sec. 1 of the Framework Decision, its objective was to enhance the procedural rights of persons subject to criminal proceedings, to facilitate judicial cooperation in criminal matters and, in particular, to improve mutual recognition of judicial decisions between Member States. Recital 11 of the Framework Decision on decisions rendered in the absence of the person concerned at the trial reads: **[89]**

> Common solutions concerning grounds for non-recognition in the relevant existing Framework Decisions should take into account the diversity of situations with regard to the right of the person concerned to a retrial or an appeal. Such a retrial, or appeal, is aimed at guaranteeing the rights of the defence and is characterised by the following elements: the person concerned has the right to be present, the merits of the case, including fresh evidence are re-examined, and the proceedings can lead to the original decision being reversed.

The wording "the merits of the case, including fresh evidence are re-examined" shows that the Council obviously did not assume that the judge competent for the appeal or retrial had discretion, but rather that the person concerned had a right to the evidence presented by him or her for his or her exoneration to be examined or re-examined.

Teleological considerations corroborate this finding. If a court were allowed to refrain from re-examining the facts of the case against the will of the person sentenced in his or her absence, the court could frustrate a re-examination of the charges brought against that person. The defence would be deprived of the possibility to request the admission of new evidence in the retrial (cf. European

223 Translator's note: quotation marks also used in the German version.

Court of Human Rights - ECtHR, Jones v. The United Kingdom, decision of 9 September 2003, no. 30900/02; ECtHR <GC>, Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/ 00, para. 85). The procedural possibility to challenge the judgment rendered in the absence of the person concerned would prove ineffective in this case (see also ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 30; Medenica v. Switzerland, judgment of 14 June 2001, no. 20491/92, para. 55). **[90]**

bb) The fact that the Member States of the European Union are bound by the fundamental rights (1), that the Charter of Fundamental Rights guides the interpretation of secondary law (*Ausstrahlungswirkung*) (2), and the case-law of the European Court of Human Rights, which is relevant for determining the factual scope of Art. 4a sec. 1 of the Framework Decision, also argue in favour of this interpretation of Art. 4a sec. 1 letter d (i) of the Framework Decision (3). **[91]**

(1) Notwithstanding Art. 7 TEU, the Member States of the European Union may not assist each other in committing violations of human rights (Art. 6 sec. 1 TEU; cf. Munich Higher Regional Court, Order of 15 May 2013 - OLG Ausl 31 Ausl A 442/13 119/ 13> -, Der Strafverteidiger - StV 2013, pp. 710 <711>). When implementing Union law, they must respect the fundamental rights of the European Union (cf. Art. 51 sec. 1 CFR; ECJ, Judgment of 12 November 1969, Stauder, 29/69, ECR 1969, p. 419, para. 7; Judgment of 13 July 1989, Wachauf, 5/88, ECR 1989, p. 2609, para. 19; Judgment of 16 June 2005, Pupino, C-105/03, ECR 2005, I-5285, paras. 58 and 59). These are therefore also decisive for the interpretation (cf. ECJ, Judgment of 13 December 1983, Commission/Council, 218/82, ECR 1983, p. 4063, para. 15; Judgment of 16 June 2005, Pupino, C-105/ 03, ECR 2005, I-5285, paras. 58 et seq.) and the lawfulness (cf. Arts. 263, 267 sec. 1 letter b TFEU; Art. 51 sec. 1 CFR; ECJ, Judgment of 3 May 2007, Advocaten voor de Wereld, C-303/05, ECR 2007, I-3633, para. 45; Judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, paras. 48 et seq.) of the Framework Decision on the European arrest warrant. **[92]**

In this vein, Art. 1 sec. 3 of the Framework Decision explicitly states that the Framework Decision should not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU. Pursuant to recital 12, the Framework Decision respects fundamental rights and observes the principles recognised by Article 6 TEU and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof (sentence 1). Therefore, nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons (sentence 2).

Pursuant to recital 13, no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. **[93]**

Against this backdrop, a European arrest warrant is not to be executed if this would conflict with the Charter of Fundamental Rights, which takes precedence over the Framework Decision on the European arrest warrant (cf. Commission Document COM <2006> 8 final of 24 January 2006, p. 7 and COM <2011> 175 final of 11 April 2011, p. 7; *Bundestag* document, *Bundestagsdrucksache* - BTDrucks 15/1718, p. 14; *Bundesrat* document, *Bundesratsdrucksache* - BRDrucks 70/06, p. 31; Opinions of: Advocate General Bot, delivered on 24 March 2009, Case C-123/08 - Wolzenburg, ECR 2009, I-9621, paras. 147 et seq,. and, delivered on 7 September 2010, Case C-261/09 - Mantello, ECR 2010, I-11477, paras. 87 and 88; of Advocate General Cruz Villalón, delivered on 6 July 2010, C-306/09 - I.B., ECR 2010, I-10341, paras. 43 and 44; of Advocate General Mengozzi, delivered on 20 March 2012, Case C-42/11 - Lopes da Silva Jorge, EU:C:2012:151, para. 28; of Advocate General Sharpston, delivered on 18 October 2012, Case C-396/11 - Radu, EU:C:2012:648, paras. 69 et seq.). **[94]**

This is confirmed by the legislative history of the Framework Decision. It is true that incompatibility of an extradition request with the fundamental principles of the Member State of execution or of the *ordre public*, which had been suggested as an additional ground for refusal, was not included in the text of the Framework Decision. However, the only reason why this proposal was not taken up was that Art. 1 sec. 3 of the Framework Decision as well as recitals 10, 12, 13 and 14 set out that the strict respect of the fundamental rights and individual freedoms as guaranteed by the European Convention for the Protection of Human Rights and resulting from the constitutional traditions common to the Member States as general principles of the Union's law (Art. 6 sec. 2 TEU) must be ensured (cf. Council Document 14867/01 of 4 December 2001, p. 3). **[95]**

(2) With regard to extraditions for the execution of sentences rendered in the absence of the accused, the Charter of Fundamental Rights of the European Union mandates that also the court competent for potential appeal or retrial proceedings hear the accused; procedural law must enable that court to examine not only the law but also the facts pertaining to the charges brought against the accused. **[96]**

The right to an effective remedy is a general principle of Union law (cf. ECJ, Judgment of 15 May 1986, Johnston, 222/84, ECR 1986, p. 1651, para. 19; Explanations Relating to the Charter of Fundamental Rights, OJ EU no. C 303 of 14 December 2007, pp. 17 <29>). This also includes, as part of that guarantee, the right to be heard in the context of judicial proceedings under Art. 47 of the Charter of Fundamental Rights (cf. Mayer, in: Grabitz/Hilf/

Nettesheim, Das Recht der Europäischen Union, vol. I, following Art. 6 TEU, para. 369 <July 2010>). This right guarantees that the court decides about the application only after listening to the parties and assessing the evidence, and that it must give reasons for its decision (cf. ECJ, Judgment of 10 December 1998, Schröder and Thamann/Commission, C-221/97 P, ECR 1998, I-8255, para. 24). **[97]**

(3) Pursuant to Art. 52 sec. 3 sentence 1 CFR, in so far as the rights in the Charter correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, they shall have the same meaning and scope as those laid down by the said Convention. Union law can provide more extensive protection (cf. Art. 52 sec. 3 sentence 2 of the Charter of Fundamental Rights); the level of protection provided by the Charter of Fundamental Rights may, however, not fall below that of the Convention. According to the Explanations Relating to the Charter of Fundamental Rights, Art. 47 sec. 2 of the Charter of Fundamental Rights corresponds to Art. 6 sec. 1 of the Convention and Art. 48 of the Charter to Art. 6 secs. 2 and 3 of the Convention (cf. Explanations Relating to the Charter of Fundamental Rights, OJ EU no. C 303 of 14 December 2007, p. 17 <30>). Against this backdrop, the guarantees of Article 6 ECHR, as interpreted by the European Court of Human Rights, establish minimum guarantees also with regard to the Framework Decision, which may not fall below them. **[98]**

According to the European Convention on Human Rights, extradition is impermissible where "substantial grounds"[224] have been shown for believing that the person concerned, if extradited, faces a real risk[225] of being subjected to torture or to inhuman or degrading treatment (cf. ECtHR <Plenary>, Soering v. The United Kingdom, judgment of 7 July 1989, no. 14038/88, para. 91) or "risks suffering a flagrant denial of a fair trial"[226] (cf. ECtHR <Plenary>, Soering v. The United Kingdom, judgment of 7 July 1989, no. 14038/88, para. 113). **[99]**

In this regard, Art. 6 ECHR imposes on every national court an obligation to check whether the accused has had the opportunity to apprise himself of the proceedings against him (cf. ECtHR, Somogyi v. Italy, judgment of 18 May 2004, no. 67972/01, para. 72). Moreover, Art. 6 sec. 1 ECHR grants a right to a fair hearing and, in substance, the right to adversarial proceedings. Each party must in principle have the opportunity to adduce evidence and to comment on all evidence adduced or observations filed with

224 Translator's note: The German version of this order uses both the German term "begründete Tatsachen" as well as the English term.

225 Translator's note: The German version of this order uses both a German translation as well as the English term.

226 Translator's note: The German version of this order uses both the German term "eklatante Verweigerung eines fairen Verfahrens droht" and the English equivalent.

a view to influencing the court's decision (cf. ECtHR, Mantovanelli v. France, judgment of 18 March 1997, no. 21497/93, para. 33). The court is under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties (cf. ECtHR, Van de Hurk v. The Netherlands, judgment of 19 April 1994, no. 16034/90, para. 59). With regard to criminal proceedings, this means that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (cf. ECtHR, Lietzow v. Germany, judgment of 13 February 2001, no. 24479/94, para. 44). **[100]**

For a fair trial, it is of capital importance that an accused should appear [at the trial] (cf. ECtHR, Poitrimol v. France, judgment of 23 November 1993, no. 14032/88, para. 35). This not only generally serves the purpose of ensuring the accused's right to a hearing but also gives the court the opportunity to verify the accuracy of his statements and to compare them with those of the victim and of the witnesses (cf. ECtHR, loc. cit., para. 35). Although not expressly mentioned in Art. 6 sec. 1 ECHR, the object and purpose of this right show that a person charged with a criminal offence is entitled to take part in the hearing (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 27). Proceedings conducted in the absence of the accused can, however, be compatible with the Convention if the accused has waived both his or her right to be personally present at the trial and the right of defence, or if a court, after having heard the accused, re-examines both the facts and the law pertaining to the charges brought against the accused (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, paras. 29 and 30; Medenica v. Switzerland, judgment of 14 June 2001, no. 20491/92, para. 55). **[101]**

The presence of the defence - be it in the initial proceedings or upon retrial - is one of the essential requirements of Art. 6 ECHR. If in retrial proceedings the defence is allowed to participate in the proceedings before the court (of appeal) and to request the admission of new evidence, this entails the possibility of a fresh factual and legal determination of the criminal charge, so that the proceedings as a whole can be regarded as fair (cf. ECtHR, Jones v. The United Kingdom, decision of 9 September 2003, no. 30900/02; ECtHR <GC>, Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/00, para. 85). Conversely, a court's refusal to reopen criminal proceedings which have been held *in absentia* will - notwithstanding the exceptions mentioned - as a rule, constitute an infringement of Article 6 or the principles embodied therein (cf. ECtHR, Stoichkov v. Bulgaria, judgment of 24 March 2005, no. 9808/02, para. 56). **[102]**

A remedy must be effective in this regard. A person charged with a criminal offence must therefore not be left with the burden of proving that he or she was not seeking to evade justice or that his or her absence was due to *force majeure* (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985,

no. 9024/80, para. 30). At the same time, the national authorities are at liberty to assess whether the accused showed good cause for his or her absence or whether there was anything in the case file to support a finding that the accused had been absent for reasons beyond his or her control (cf. ECtHR, Medenica v. Switzerland, judgment of 14 June 2001, no. 20491/92, para 57; ECtHR <GC>, Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/00, para. 88). **[103]**

Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his or her own free will, either expressly or tacitly, his or her right to a fair trial (cf. ECtHR, Kwiatkowska v. Italy, decision of 30 November 2000, no. 52868/99; Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/00, para. 86). The waiver must, however, be unequivocal and satisfy certain minimum requirements (cf. ECtHR, Jones v. The United Kingdom, decision of 9 September 2003, no. 30900/02). Where a person charged with a criminal offence[227] who has not been notified[228] in person is, on an insufficient factual basis, considered to be a fugitive ("*latitante*"), this does not in any event justify the presumption that the person has of his or her own free will waived his or her right to appear at the trial and defend him- or herself (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 28; ECtHR <GC>, Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/00, para. 87). **[104]**

cc) The fact that the principle of mutual trust does not apply without limits even according to Union law at the same time signifies that the national judicial authorities, upon relevant indications, are authorised, and under an obligation under Union law, to review whether the requirements under the rule of law have been complied with, even if the European arrest warrant formally meets the requirements of the Framework Decision (cf. Böse, in: Grützner/Pötz/Kreß, Internationaler Rechtshilfeverkehr in Strafsachen, 3rd ed., before § 78 paras. 26, 35 <June 2012>). Thus, not only does Union law not stand in the way of investigating whether the national judicial authorities comply with the requirements under the rule of law guaranteed by the Charter of Fundamental Rights; Union law indeed demands such investigations. The European Commission is right in its view that the obligation to execute a European arrest warrant no longer applies where the executing judicial authority, taking into account all the circumstances of the case, is convinced that surrender would result in a breach of a requested person's fundamental rights (cf. Commission document COM <2011> 175 final of 11 April 2011, p. 7). Ensuing delays in the extradition procedures must be tolerated even if this runs counter to the objective of the Framework Decision on the European arrest warrant to speed up extradition (cf. recitals 1 and 5 of the Preamble to the Framework Decision). Correspondingly, the Framework Decision does not lay down

227 Translator's note: A literal translation of the German-language version of this order would be "the accused".

228 Translator's note: A literal translation from German would read "informed".

rigid time limits for the execution of a European arrest warrant (cf. Art. 17 sec. 2 <"should">, sec. 3 <"should">, sec. 4 <"specific cases">, sec. 7 <"in exceptional circumstances"> of the Framework Decision). **[105]**

According to recital 12, the Framework Decision allows Member States to apply their constitutional rules aimed at ensuring a lawful and fair trial (cf. ECJ, Judgment of 30 May 2013, F., C-168/13 PPU, EU:C:2013:358, para. 53). Apart from this, decisions on the execution of the European arrest warrant must be subject to adequate judicial review by the courts of the Member States (recital 8; cf. ECJ, Judgment of 30 May 2013, F., C-168/13 PPU, EU:C:2013:358, para. 46). Also from a Union law perspective, however, an effective judicial review within the meaning of Arts. 47, 52 sec. 3 CFR, Arts. 6, 13 ECHR presupposes that the court that decides about the extradition is able to conduct the relevant investigations as long as the extradition system established by the Framework Decision remains effective in practice (cf. ECJ, loc. cit., para. 53; with regard to the similar problem existing in asylum law: ECJ, Judgment of 21 December 2011, N. S., C-411/10 and C-493/10, ECJ 2011, I-13905, para. 94). **[106]**

dd) As a consequence, the requirements under Union law with regard to the execution of a European arrest warrant are not lower than those that are required by Art. 1 sec. 1 GG as minimum guarantees of the rights of the accused. It can therefore remain undecided whether and to what extent, in interpreting the Framework Decision on the European arrest warrant, one must have recourse to Art. 4 sec. 2 sentence 1 TEU, pursuant to which the European Union shall respect the national identities of its Member States, and the Framework Decision therefore must be interpreted taking into account the legal situation in the respective Member State (cf. v. Bogdandy/Schill, in: Grabitz/Hilf/Nettesheim, Das Recht der EU, vol. I, Art. 4 TEU para. 13 <Sept. 2013>). **[107]**

b) In this respect, the Act on International Cooperation in Criminal Matters that transposes the Framework Decision into German law also does not raise concerns with regard to the principle of individual guilt and its contents that are enshrined in the guarantee of human dignity. § 73 sentence 2 IRG provides that requests under Part VIII (Extradition and Transit between Member States of the European Union) shall not be permissible if compliance would violate the principles in Art. 6 TEU. Regardless of how this reference may be understood in detail, it does not, in any event, prevent the authorities and courts, when interpreting §§ 78 et seq. IRG, from taking into account the directives of Art. 1 sec. 1 GG (cf., for a general explanation, BVerfGE 7, 198 <205 et seq.>; 115, 320 <367>; established jurisprudence of the Federal Constitutional Court). **[108]**

4. The challenged decision rendered by the Higher Regional Court does not entirely meet these requirements. The Higher Regional Court's assessment that the complainant's extradition is only permissible if he is provided with an effective legal remedy after his surrender is correct. However, the court failed to recognise the extent of its obligation to investigate and to establish the facts and thereby failed to recognise the significance and the scope of Art. 1 sec. 1 GG (a). The complainant asserted in a substantiated manner that the Italian procedural law did not provide him with the opportunity to have a new hearing of evidence at the appeals stage. The

Higher Regional Court failed to sufficiently follow up on that issue. It contented itself with finding that a hearing of evidence in Italy was "in any case not impossible" ("*jedenfalls nicht ausgeschlossen*"). Its decision therefore violates the complainant's rights under Art. 1 sec. 1 GG (b). **[109]**

a) In executing the Framework Decision on the European arrest warrant and the Act on International Cooperation in Criminal Matters, the courts have to ensure in every individual case that the rights of the requested person are safeguarded at least to the extent that the content of the rights is protected by Art. 1 sec. 1 GG. With regard to the principle of individual guilt enshrined in Art. 1 sec. 1 GG, this includes that a requested person who has been sentenced in his or her absence and who has not been informed about the trial and its conclusion will at least be provided with the real opportunity to defend himor herself effectively after having learned of the trial, in particular by presenting circumstances to the court that may exonerate him or her and by having them reviewed. The court that decides whether it is permissible to extradite the requested person is in this respect under an obligation to investigate the legal situation and the legal practice of the requesting state if the person concerned has submitted sufficient indications to warrant such investigations. The content and the extent of the investigations have to be determined in accordance with the indications submitted by the requested person that the procedure falls below the minimum standards guaranteed by human dignity. If, after completion of the investigation, it is established that the requesting state fails to comply with this minimum standard, the competent court must not declare the extradition to be permissible. **[110]**

b) The Italian Republic - as all other Member States of the European Union - is generally to be trusted to comply with the principles of the rule of law and the protection of human rights in extradition proceedings also. However, in the case at hand, questions have arisen that would have required further investigation of the facts. **[111]**

   As can be inferred from the European arrest warrant, the Florence Public Prosecutor General stated that the complainant was not personally served with the decision imposing the custodial sentence, but will be served with the decision without delay after his surrender. It further stated that the complainant is entitled to a retrial or appeal, in which he is allowed to participate and which allows the facts of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed. It hereby stated implicitly that the complainant will be provided the opportunity of a review of the facts and the law pertaining to the charges against him after having been heard by a court. Furthermore, the Florence Public Prosecutor General stated in its letter of 7 October 2014 that the complainant has the right, within 30 days, to apply for reinstatement into the time limit for appeal, and, without reservations, the right to defend himself. **[112]**

   However, in the case at hand, this was not sufficient to ensure compliance with the minimum standard of the rights of the accused prescribed by Art. 1 sec. 1 GG and thereby, with the complainant's status as a holder of rights in the criminal proceedings to be conducted in Italy. The complainant has submitted substantial indications that, notwithstanding the assurance provided by the Florence Public Prosecutor General, he is not afforded the real opportunity to defend himself effectively, in particular to

submit and have examined circumstances that may exonerate him (aa). The Higher Regional Court's argument that it is sufficient that taking of new evidence in appellate proceedings is "in any case not impossible" is not suitable to overcome the concerns raised by the complainant (bb). Also with regard to other circumstances, there would have been reason for the Higher Regional Court to examine more closely whether the complainant, in a trial, will be granted the minimum rights of defence to which he is entitled (cc). **[113]**

aa) In his brief of 21 October 2014 to the Higher Regional Court, the complainant stated that he had been convicted in absence and without being aware of the conviction, and that he had not of his own free will and unequivocally waived his right to be present. He plausibly argued that reinstatement into the former procedural position afforded to him under Italian law would only result in his reinstatement into the time limit for appeal. Citing sources on Italian criminal procedural law in German, he further stated that due to the appellate court's limited competence for review, the late appeal possible under Italian law did not meet the requirements applicable if the right to be heard was granted at a later stage, because, as a rule, no new evidence would be heard in the appellate proceedings. In order to prove this, the complainant communicated the contents of Art. 603 CPP, as amended by the Act of 28 April 2014 and in the version governing the legal situation prior to the entry into force of that Act to the Higher Regional Court in Italian and German. **[114]**

It seems to follow from the wording of Art. 603 CPP that in appellate proceedings, there is generally no new hearing of evidence. According to section 3 of that Article, the court only orders a new hearing of evidence on its own accord if it considers this to be indispensable. If a party requests a hearing of evidence, the court orders such a hearing of evidence if it cannot decide on the basis of the case file (sec. 1), or if the new evidence did not come into existence or was discovered only after the first instance proceedings (sec. 2). Pursuant to a former version of Art. 603 sec. 4 CPP (1988), which, according to the complainant, was repealed only by the Act of 28 April 2014, the judge only orders a new hearing of evidence if the accused who was not present during the first-instance proceedings so requests and proves that he or she was not able to appear before the court either due to events of a coincidental nature, or *force majeure*, or because he or she was not aware of the summons, provided that this was not caused by his or her own fault, or he or she has not of his or her own free will refused to take cognisance of the trial. The complainant plausibly argued that sec. 4 CPP 1988 might apply to him. To support this he also referred to a decision ("*Sentenza*") of the Italian *Corte di Cassazione* of 17 July 2014 pursuant to which the old legal situation applied to appeals of convictions in absence of the person concerned rendered prior to the entry into force of the Act of 28 April 2014. He submitted the text of this decision to the Higher Regional Court. It is also not improbable that the old legal situation could in fact be applicable to the present case, because in his letter of 7 October 2014, the Florence Public Prosecutor General sent the text of Art. 175 CPP in the version applicable prior

to the reform of criminal procedure that took place in 2014. The complainant also pointed this out to the Higher Regional Court. **[115]**

Based on the submissions made by the complainant, it is therefore to be feared that Italian law does not afford him the opportunity of a new hearing of evidence in appellate proceedings. If Art. 603 sec. 4 CPP 1988 applies, he would have to produce negative evidence that he was not able to appear before the court because of events of a coincidental nature, or *force majeure*, or because he was not aware of the summons, provided that this was not caused by his own fault or - if the summons was served by the court of first instance by delivery to the defence counsel - that he has not of his own free will refused to take cognisance of the trial. This wording corresponds to the one in Art. 175 CCP in the version in force until 2005. According to that Article, the accused could request reinstatement into the former procedural position in order to file an appeal if he or she proved that he or she had in fact not been aware of the summons, provided that this fact was not caused by his or her own fault, or, in case the default judgment had been served upon the defence counsel by hand delivery, the accused did not deliberately refuse to take cognisance of the trial (cf. Italienische Strafprozessordnung, Zweisprachige Ausgabe, Bauer/König/Kreuzer/Riz/Zanon, 1991). Since it is almost impossible to prove negative facts, the higher regional courts (cf. Berlin Court of Appeal, *Kammergericht Berlin* - KG, Order of 19 December 1991 - Ausl A 413/91 -, StV 1993, p. 207; Nuremberg Higher Regional Court, *Oberlandesgericht* - OLG, Order of 31 July 1997 - Ausl. 9/97 -, StV 1997, pp. 648 <649>; OLG Thuringia, Order of 2 February 1998 - Ausl 2/97 -, StV 1999, pp. 265 <267 and 268>; OLG Düsseldorf, Order of 27 August 1998 - 4 Ausl (A) 201/98 - 259 - 250/98 III -, StV 1999, pp. 270 <272>; OLG Karlsruhe, Order of 28 August 1998 - 1 AK 14/ 98 -, StV 1999, pp. 268 <270>; OLG Cologne, Order of 15 January 2003 - Ausl 913/ 01 -, juris, para. 38; OLG Karlsruhe, Order of 14 September 2004 - 1 AK 0/04 -, juris, para. 10; OLG Karlsruhe, Order of 14 September 2004 - 1 AK 6/04 -, StV 2004, pp. 547 <548>), the Federal Court of Justice (cf. Decisions of the Federal Court of Justice in Criminal Matters, *Entscheidungen des Bundesgerichtshofes in Strafsachen* - BGHSt 47, 120 <126>) as well as the First Section and the Grand Chamber of the European Court of Human Rights (cf. ECtHR <First Section>, Sejdovic v. Italy, judgment of 10 November 2004, no. 56581/00, para. 40; ECtHR < GC>, Sejdovic v. Italy, judgment of 1 March 2006, no. 56581/00, paras. 103 et seq.) objected to the old version of Art. 175 CPP with regard to the protected interests at issue here. Already in 1985, in the case Colozza v. Italy, the European Court of Human Rights criticised that the legal remedy of "late appeal" under Italian law was not effective, because the appellate court could only decide on the merits of the case, as regards the factual and legal issues, if the person concerned was able to prove that he or she had not been seeking to evade justice (cf. ECtHR Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 31) **[116]**

Even if Art. 603 CPP were applied as amended by the Act of 28 April 2014, is it likely that the complainant is not afforded the effective opportunity to defend himself. Pursuant to Art. 603 CPP, a hearing of evidence only takes place if the

evidence has come into existence or was discovered after the first instance judgment (sec. 2), if the judge cannot decide on the basis of the case file (sec. 1), or if the judge considers hearing of evidence indispensable (sec. 3). The wording of Art. 603 CPP in the version on which the Higher Regional Court based its decision suggests that the court hearing the appeal has a wide margin of assessment (*Beurteilungsspielraum*) regarding the decision to have a new evidentiary hearing. It does, however, not impose an obligation on the appellate court to generally hear evidence upon request of the accused. In view of the unspecific wording of Art. 603 secs. 1 to 3 CPP, it is therefore unclear whether the obligation to establish the truth in criminal proceedings has been duly taken into account. **[117]**

The complainant's concerns regarding Italian appellate proceedings are corroborated by the fact that, in the past, several Higher Regional Courts refused to permit extraditions to Italy in cases in which the requested persons had been sentenced in their absence, arguing that under Italian law, there was, at the appeals stage, no new comprehensive judicial review of the decision on the merits (cf. OLG Frankfurt, 2 Ausl. 54/ 82, 2 September 1983, no. U 75, in: Eser/Lagodny/ Wilkitzki, Internationale Rechtshilfe in Strafsachen, Rechtsprechungssammlung 1949-1992, 2nd ed.1993, pp. 285 <288 and 289>; OLG Munich, OLG Ausl. 77/ 85, 26 June 1985, no. U 112, in: Eser/ Lagodny/Wilkitzki, Internationale Rechtshilfe in Strafsachen, Rechtsprechungssammlung 1949-1992, 2nd ed. 1993, pp. 412 <416>; KG Berlin, (4) Ausl. A. 277/85 (143/85), 24 March 1986, no. U 123, in: Eser/Lagodny/Wilkitzki, Internationale Rechtshilfe in Strafsachen, Rechtsprechungssammlung 1949-1992, 2nd ed. 1993, pp. 435 <438>; OLG Schleswig-Holstein, Order of 14 January 1994 - 1 Ausl 8/ 93 -, StV 1996, p. 102 <103>). These concerns are also shared in legal doctrine (cf. Schomburg/Hackner and Lagodny, both in: Schomburg/Lagodny/Gleß/Hackner, Internationale Rechtshilfe in Strafsachen, 5th ed. 2012, § 15 IRG para. 33e and § 73 IRG para. 86, respectively). **[118]**

bb) The Higher Regional Court was under an obligation to follow up on the substantiated and plausible objections made by the complainant. Its investigations have proven to be insufficient. **[119]**

The Higher Regional Court attempts to overcome the concerns raised by the complainant by arguing that a comprehensive review pertaining to the facts and the law of the conviction in absence in appellate proceedings in Italy where a new hearing of evidence is "in any case not impossible", is sufficient to safeguard the complainant's rights. However, this does not guarantee that the complainant, after becoming aware of the sentence rendered in his absence, is afforded the opportunity to defend himself effectively, in particular to present evidence exonerating him and have it extensively and exhaustively reviewed and, if necessary, taken into account. **[120]**

Nor is the argument very convincing that even if in Italian appellate proceedings, as a rule, there were no new hearing of evidence, such proceedings still constituted a legal remedy by which both the facts and the law are re-examined. It remains

unclear how the issues of fact can be thoroughly examined without a hearing of evidence. Furthermore, the Higher Regional Court bases its view on a single source (Maiwald, Einführung in das italienische Strafrecht und Strafprozessrecht, 2009, p. 237). This source does not provide a detailed presentation of appeal proceedings under Italian criminal law. Rather, also this source points out that second-instance proceedings as a rule are decided based on the case file and no new hearing of evidence is conducted. How this fact can be reconciled with the fact that the issues of fact are [supposedly] re-examined is left uncommented. It does not follow from the source referred to that the merits of the decision rendered in absence will be thoroughly re-examined and that an unrestricted opportunity to newly hear evidence already heard in the firstinstance proceedings will be provided, as the Higher Regional Court assumes. **[121]**

Nor can the decision of the Higher Regional Court be based on the argument stated in its order of 27 November 2014 that in case of first-instance sentences rendered in absence there is no right to a retrial at a trial court, and that a new hearing before an appellate court is sufficient. The case-law of the European Court of Human Rights, which must also be taken into account for the interpretation of the fundamental rights of the Basic Law (cf. BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <317>; 120, 180 <200 and 201>; 128, 326 <367 and 368>), clearly states that the court must re-examine the merits[229] of the charges against the convicted person after having heard that person (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 29; Einhorn v. France, judgment of 16 October 2001 no. 71555/01, para. 33). Furthermore, the procedural resources of the Contracting State available in law and in practice must prove to be effective (cf. ECtHR, Colozza v. Italy, judgment of 12 February 1985, no. 9024/80, para. 30; Medenica v. Switzerland, judgment of 14 June 2001, no. 20491/92, para. 55). As the Higher Regional Court correctly states, it follows from the judgment in the case Colozza v. Italy that in case of a judgment in absence rendered by a first-instance court there is no entitlement to a new first-instance trial. However, it cannot be inferred from the judgment that the person convicted *in absentia* who was not aware of the first-instance proceedings is, from the outset, not granted the right to a hearing of evidence. Rather, the European Court of Human Rights emphasises in its established case-law the right emanating from Art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) to adduce evidence and to comment on all evidence or statements presented which are aimed at influencing the decision of the court (cf. ECtHR, Mantovanelli v. France, judgment of 18 March 1997, no. 21497/93, para. 33; Lietzow v. Germany, judgment of 13 February 2001, no. 24479/94, para. 44). **[122]**

229 Translator's note: The German-language version of this order emphasises that this refers to both the law and the facts.

In view of the above, in this respect, the opinion of the Higher Regional Court that it is sufficient if in Italian appellate proceedings on the merits the factual and legal issues of the conviction rendered in absence are thoroughly examined while a new hearing of evidence is "in any case not impossible", falls short of the relevant standards. **[123]**

cc) Considering the Higher Regional Court's obligation to investigate and establish the facts of the case, it must also be taken into account that in light of the objections by the European Court of Human Rights in the past and the large number of amendments to the Italian *Codice Penale*, for a German judge, it is difficult to have an overview of the legal situation in Italy. Nor did the statement of 7 October 2014 provided by the Florence Public Prosecutor General contribute substantially to clarify the situation. The Higher Regional Court requested the Italian judicial authorities to provide additional information on whether the complainant was in fact aware of the trial date and on his representation by counsel, or to give an assurance that, after his surrender, the complainant would, without reservation, be granted the right to a retrial in his presence in which the charge against him would be fully examined. Although he had not indicated in the European arrest warrant whether the complainant had personally appeared at the trial leading to his conviction, the Florence Public Prosecutor General did not provide additional information regarding the complainant's knowledge of the trial date and his representation by counsel. Nor did the Public Prosecutor General give an assurance that, after his surrender, the complainant would, without reservation, be granted the right to a retrial in his presence with full review of the charges against him. Despite the Higher Regional Court's specific request for information and assurance, the Public Prosecutor General merely indicated in abstract terms that, provided "the request were granted", a new trial against the convicted person would be held. The complainant was assured that his right of defence would be honoured without reservation; however, the extent of this right of defence remained unclear. **[124]**

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EXPLANATION OF ABBREVIATIONS

AFG	Arbeitsförderungsgesetz - Employment Promotion Act
AöR	Archiv des öffentlichen Rechts - Public Law Archive
AsylVfG/AsylVG	Gesetz über das Asylverfahren (Asylverfahrensgesetz - Asylum Procedure Act
AuslG	Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Ausländergesetz) - Aliens Act
AZO	Arbeitszeitordnung - Working Time Ordinance
BAG	Bundesarbeitsgericht - Federal Labour Court
Bay VfGH	Bayerischer Verfassungsgerichtshof - Bavarian Constitutional Court
BayApothekenG	Bayerisches Apothekengesetz - Bavarian Pharmacy Act
BayObLG	Bayerisches Oberstes Landesgericht - Bavarian Higher Regional Court
BGB	Bürgerliches Gesetzbuch - German Civil Code
BGBl.	Bundesgesetzblätter - Federal Law Gazette
BGH	Bundesgerichtshof - Federal Court of Justice
BGH NJW	Case Law of the Federal Court of Justice published in NJW
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen - Decisions of the Federal Court of Justice in Criminal Matters
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen - Decisions of the Federal Court of Justice in Civil Matters
BNatSchG	Gesetz über Naturschutz und Landschaftspflege (Bundesnatur-schutzgesetz) - Federal Nature Conservation Act

Explanation of Abbreviations

BRDrucks.	Bundesratdrucksachen - Bundesrat Printed Papers
BstatG	Gesetz über die Statistik für Bundeszwecke (Bundesstatistikgesetz) - Federal Statistics Act
BTDrucks.	Bundestagsdrucksachen - Bundestag Printed Papers
BVerfG	Bundesverfassungsgericht - Federal Constitutional Court
BVerfGE	Entscheidungen des Bundesverfassungsgerichts - Decisions of the Federal Constitutional Court
BVerwG	Bundesverwaltungsgericht - Federal Administrative Court
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts - Decisions of the Federal Administrative Court
BWaldG	Bundeswaldgesetz - Federal Forests Act
CDU	Christlich Demokratische Union - Christian Democratic Union
cf.	confer
CSU	Christlich Soziale Union - Christian Social Union
DSchPflG	Denkmalschutzpflegegesetz - Monument Protection Act
DVBl.	Deutsches Verwaltungsblatt - German Administrative Paper
e.V.	eingetragener Verein - Incorporated Society
ECHR	European Convention on Human Rights
EMRK	Europäische Menschenrechtskonvention - European Convention on Human Rights (ECHR)
EStG	Einkommensteuergesetz - Income Tax Act
FDP	Freie Demokratische Partei - Free Democratic Party
G 10	Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses

Explanation of Abbreviations

GDR	Deutsche Demokratische Republik (DDR) - German Democratic Republic
GFK	Genfer Flüchtlingskonvention - Geneva Convention on Refugees
GG	Grundgesetz - German Basic Law
GVBl	Gesetz- und Verordnungsblatt - Law and Ordinance Gazette
GVG	Gerichtsverfassungsgesetz - Judicature Act
IRG	Gesetz über internationale Rechtshilfe in Strafsachen - Law on International Judicial Assistance in Criminal Matters
JöR	Jahrbuch des öffentlichen Rechts der Gegenwart - Yearbook of the Present Public Law
JZ	Juristenzeitung - Journal for Lawyers
KDVNG	Gesetz zur Neuordnung des Rechts der Kriegsdienstverweigerung und des Zivildienstes - Act on the Reform of the Right to Conscientious Objection and Civil Service
LPartDisBGGesetz	zur Beendigung der Diskriminierung gleichgeschlechtlicher Lebenspartnerschaften - Act to End Discrimination Against Same-Sex Life Partnerships
LRG NW	Rundfunkgesetz für das Land Nordrhein Westfalen - Broadcasting Act for the Land of North Rhine Westfalia
LTDrucks.	Drucksachen des Landtages - Land parliament documents
MVVerfG	Verfassungsgerichtshof Mecklenburg-Vorpommern - Constitutional Court of Mecklenburg-West Pomerania
NJW	Neue Juristische Wochenschrift - New Legal Weekly Journal
NStZ	Neue Zeitschrift für Strafrecht - New Journal for Criminal Law
NVwZ	Neue Zeitschrift für Verwaltungsrecht - New Journal for Administrative Law
op. cit.	opera citato

OVG	Oberverwaltungsgericht - Higher Administrative Court
p.	page
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen - Decisions of the High Court of the German Empire in Civil Matters
RVO	Rechtsverordnung - Executive Order Law
SPD	Sozialdemokratische Partei Deutschlands - Social Democratic Party of Germany
StGB	Strafgesetzbuch - German Criminal Code
StPO	Strafprozessordnung - Code of Criminal Procedure
StVG	Straßenverkehrsgesetz - Road Traffic Act
StVollZG	Strafvollzugsgesetz - Penal Law
UrhG	Gesetz über Urheberrecht und verwandte Schutzrechte - Law on Copyright and Related Rights
VersammlG	Versammlungsgesetz - Assembly Act
VersR	Versicherungsrecht - Insurance Law
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechts-lehrer - Publications of the Association of German Public Law Teachers
VwGO	Verwaltungsgerichtsordnung - Administrative Court Procedures Code
WHG	Wasserhaushaltsgesetz - Water Resources Act
ZPO	Zivilprozessordnung - Code of Civil Procedure
ZRP	Zeitschrift für Rechtspolitik - Journal on Legal Policy

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