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2024
VOL. 1(1)

Heine
Law
Review

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Noah Gehrke

Editorial

A More International Approach

Can Degistirici[*]

Germany has a long history of influence on the legal systems of many different countries.[1] For example, a scholar with significant international influence in the 19th century is Friedrich Carl von Savigny.[2] His work on the declaration of intent ("*Willenserklärung*") and act of legal significance ("*Rechtsgeschäft*") has had an impact on the law of contracts around the world.[3] Germany's international impact on legal systems not only stems from individual figures but also from legislation. As an example, the German Code of Civil Procedure ("*Zivilprozessordnung*"), which entered into force more than 140 years ago,[4] has served as a model for a system for dispute resolution in various legal systems,[5] in particular Japan and Greece.[6] Additionally, German criminal law has been influential in South America. For more than a century, countless publications of German professors have been translated into Portuguese and Spanish.[7]

It is all the more surprising that access to the German legal system is particularly difficult for non-German speakers. One could think that Germany has rather chosen to stay within its borders in this respect. This manifests itself in various ways:

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* The author is editor-in-chief and founder of the Heine Law Review.

1 It is important to emphasize that Germany's impact has not been exclusively positive: one example is its role in (post)colonialism. This has been discussed in detail in Philipp Dann, Isabel Feichtner and Jochen von Bernstorff (eds), *(Post)Koloniale Rechtswissenschaft* (Mohr Siebeck 2022).

2 Friedrich Carl von Savigny served as a law professor and as Minister of Justice of Prussia between 1842 and 1848.

3 Herbert Roth, 'Entwicklung und Reformen der ZPO' [2018] JR 159; Nick Oberheiden, 'Der Geltungsanspruch deutschen Rechts im Ausland' [2010] ZRP 17, 18.

4 RGBl 1877, p 83.

5 Countries like Austria, Switzerland and Italy as well as the regions of East Asia, Scandinavia, Northern and Eastern Europe, have also been influenced.

6 Herbert Roth, 'Entwicklung und Reformen der ZPO' [2018] JR 159; Nick Oberheiden, 'Der Geltungsanspruch deutschen Rechts im Ausland' [2010] ZRP 17, 18.

7 At least since 1898, publications on criminal law have been translated for Brazilian readers. An overview can be found in Wolf Paul, 'Strafrecht und Rechtsstaat in Brasilien. Ein kriminologisches Portrait' in Sèrgio Costa and others (eds), *Brasilien heute* (Vervuert Verlag 2010) 232.

The last time that the German Code of Civil Procedure was “officially”[8] translated into English was ten years ago. Furthermore, a translation into other languages is completely missing. In general, German legislation at large has not been translated to English.[9] The question arises how an article on German law can be published, when there is no clarity on how a certain legal term in German should be translated into another language. In addition to that, there are hardly any judgements in a language other than German. As a matter of fact, the judgements of Germany’s highest court for the ordinary jurisdiction (“*Bundesgerichtshof*”) are only available in German.[10] At least, decisions of the Federal Constitutional Court (“*Bundesverfassungsgericht*”) that are particularly important are occasionally published in English.

So why is there, contrary to the current state of Germany’s legal system, a need for a journal, which publishes articles on German law in English? The German legal system is nearly inaccessible for non-German speakers and its approach has shown to follow the principle of staying within its borders. However, Germany would greatly benefit from an international audience reading its legislation and publications, commenting on it and thereby enhancing the academic discourse. As a start, German legislation should be translated into English more broadly and frequently. Furthermore, German lawyers should orient themselves in the future towards publishing more in English. The Heine Law Review is committed to contribute to achieving this goal.

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8 The translation was initiated by the Federal Ministry of Justice, but provided by a private entity.

9 Thomas Riehm and Quirin Thomas, ‘Deutschlands „Commercial Courts“ auf dem Prüfstand’ [2022] NJW 1725, 1729; a full list of translations can be found under <https://www.gesetze-im-internet.de/Teilliste_translations.html> accessed 19 January 2024. The translation was provided most of the time by the Federal Ministry that was responsible for the legislation. However, private entities have also translated entire legislations.

10 <https://www.bundesgerichtshof.de/EN/Home/homeBGH_node.html> accessed 18 January 2024.

Articles

Symbiosis of Freedom and Equality - Why Private Autonomy Benefits from Anti-Discrimination Law

Gesa Schlömer[*]

The enduring existence of discrimination prompts the consideration of state intervention through the enactment of anti-discrimination legislation, which serves, in part, to uphold human dignity. The German Basic Law and the General Equal Treatment Act seek to guarantee protection against discrimination by instituting prohibitions on discriminatory conduct. Its enforcement necessitates private individuals undergoing a laborious judicial process. Nonetheless, the realization of equal freedom mandates the legislator to proactively address prevailing disparities. This can be achieved through the implementation of affirmative legal provisions aimed at bolstering marginalized groups.

This article takes a reasoned position on the effects of curtailing private autonomy through legislative measures in anti-discrimination law. At present, efforts are being made to resolve the supposed contradiction between freedom and equality, which is based on an overly formal conception of freedom, at the expense of equality. Instead, achieving equilibrium between freedom and equality necessitates the pursuit of substantive equality in anti-discrimination law. By reinforcing the self-determination of the individual, private autonomy is consequently strengthened.

While the reversal of the burden of proof outlined in § 22 of the General Equal Treatment Act alleviates the evidentiary challenges faced by the plaintiff, it is not in itself sufficient to ensure the efficacious enforcement of substantive equality. This necessitates legislative intervention on the part of both European and German legislators.

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I. Introduction

"Liberty, equality and fraternity", under this quote democratic ideas developed in Europe during the French Revolution, some of which are still enshrined in the Constitution today as fundamental building blocks of our idea of democracy.[1] Article 3 of the Basic Law, whose prohibition of discrimination in paragraph 3, according to the then Federal Constitutional Court judge Helmut Simon, "leads a strange shadowy existence"[2],was for a long time an article of little practical relevance; its existence did not change the fact that until 1958 the husband's guardianship of the wife existed[3] and only since 1977 have women been allowed to sign employment contracts themselves[4]. What might be the reason for this? Possibly the word fraternity, from the quoted saying of the French Revolution, tells us that equality should not be about all people, but about the equality of a specific group among themselves. Today we would call them white cis men. This may have been a significant step for the time as status equality, but it only forms a new, larger, privileged group. That is not equality.[5] Nor is it freedom.

Nevertheless, this idea of equality has a meaning for today as well. The concept of equality

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1 So also Jörg-Detlef Kühne, '150 Jahre Revolution von 1848–49 – ihre Bedeutung für den deutschen Verfassungsstaat' (1998) 21 NJW 1513, 1515; See also UDHR art 1.

2 BVerfG, 08.03.1983, 1 BvR 1078/80, BVerfGE 63, 266, 303, dissenting opinion Simon.

3 Senta Gekeler, 'Diese Rechte haben Frauen in den letzten 100 Jahren errungen' (*Human Resources*, 5 March 2019) <https://www.humanresourcesmanager.de/arbeitsrecht/diese-rechte-haben-frauen-in-den-letzten-100-jahren-errungen/> accessed 24 July 2023.

4 ibid; Anke Dembowski, 'Kommentar: Frauen im deutschen Recht – Keine 50 Jahre ist es her…' (*Fonds Frauen*, March 2018) <https://fondsfrauen.de/frauen-im-deutschen-recht-keine-50-jahre-ist-es-her/> accessed 24 July 2023.

5 Explaining further what this "equality" means: Anna Katharina Mangold, *Demokratische Inklusion durch Recht* (Mohr Siebeck 2021) 182 ff.

was formulated in a general and indeterminate way. When equality becomes a principle, inequality requires legal justification.[6] This means as soon as discriminated groups invoke the principle of equality, reasons must be given as to why they are not equal. In those days, this was a forward-looking promise.[7] Today it is a promise based on the rule of law.[8] However it must be permanently claimed, because otherwise equality only applies to a certain group.

The two regulations above on matrimonial guardianship and women's employment contracts have in common that their effect had unfolded in private law. No doubt everyone is relieved that these discriminatory norms have been removed. That the state may not discriminate is indisputable. However, the socially established discriminatory structures lead to discrimination by private individuals.[9] Whether and in what way the state should interfere in this relationship is highly controversial. This article, intends to take a reasoned position on this question. This will be done taking into account the current legal situation, especially with regard to § 22 of the General Equal Treatment Act (German abbreviation: AGG), the reversal of the burden of proof.

In order to establish why the state should regulate anti-discrimination more strongly, an introductory consideration is taken at why an anti-discrimination law is necessary. It then reviews at the relationship between freedom and equality and examines whether anti-discrimination legislation can have a positive effect on society. For this purpose, the thesis that freedom and equality do not have to be in constitutional contradiction to each other, but can strengthen each other, is first examined. Subsequently, the relationship between freedom and equality is transferred to private law. On the basis of an analysis of freedom of contract, it is assessed whether freedom of contract and equality in the sense of anti-discrimination law can also complement each other. Finally, it is evaluated how concretely the current design of anti-discrimination law, especially with regard to the burden of proof, in contract law does justice to this relationship and a conclusion is drawn as to whether there is a need for change.

II. The necessity of anti-discrimination law

First, the necessity of anti-discrimination law will be justified. This will be done on a factual and on a legal level.

In view of the previously mentioned examples of discrimination against women on the

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6 ibid 184.

7 ibid 184; similar Mathias Hong, 'Grundwerte des Antidiskriminierungsrechts: Würde, Freiheit, Gleichheit und Demokratie' in Anna Katharina Mangold and Mehrdad Payandeh (eds), *Handbuch Antidiskriminierungsrecht* (Mohr Siebeck 2022) 86.

8 See also GG art 3 para 3.

9 Mangold (n 5) 186.

basis of matrimonial guardianship and the impossibility of concluding employment contracts, it may seem obvious to claim that discrimination is a thing of the past, that today such laws no longer exist and that individuals are not subject to discrimination. Unfortunately, this is not the case.[10] Discrimination affects different parts of life. Examples of private law would be worse chances and conditions in job applications, housing or credit contracts, examples of criminal law motives behind a crime, such as anti-Semitism or racist motives. At this point it is important to mention that none of this should be an accusation against individuals. Discrimination is not always ill will, but the product of a social habit that must be overcome.[11] In particular, it is important to first raise awareness in order to question habits.

Now, the state could simply accept the discrimination. However, the compatibility of this with the state-binding constitution must be questioned. In principle, there are three possible grounds for anti-discrimination law: equality, freedom and human dignity. Anti-discrimination law is essentially a right to equality that can be based on Article 3 (3) of the Basic Law.[12] It is intended to combat the discrimination that exists in our society in order to enable the equal treatment of all people. Through the equal treatment of all people, equal participation in social life can also develop. Participation includes, for example, signing contracts to meet one's needs. If one has more participation possibilities, the possibilities to conclude different contracts increase. That means the actual exercise of participation promotes freedom.[13]

Therefore, equal treatment of people also leads to equal freedom. In this sense, anti-discrimination law is also tangential to freedom. Mangold speaks of a freedom-enabling function.[14]

That human dignity is violated can even be discussed. As the first Article of the Basic Law, Human dignity is the most important fundamental right. That is why a violation of human dignity cannot be justified. Consequently, it is a particularly important legal asset. If a person is classified in a group merely because of an unchangeable or unreasonably

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[10] Steffen Beigang and others, 'Diskriminierungserfahrungen in Deutschland – Ergebnisse einer Repräsentativ- und einer Betroffenenbefragung' (*Antidiskriminierungsstelle des Bundes*, 2017) <https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Expertisen/expertise_diskriminierungserfahrungen_in_deutschland.pdf?__blob=publicationFile&v=6>; Sachverständigenrat deutscher Stiftungen für Integration und Migration, 'Diskriminierung am Ausbildungsmarkt – Ausmaß, Ursachen und Handlungsperspektiven' (*Robert Bosch Stiftung*, 2014) <https://www.bosch-stiftung.de/sites/default/files/publications/pdf_import/SVR-FB_Diskriminierung-am-Ausbildungsmarkt.pdf> accessed 18 July 2023; Ulrike Wieland and Ulrich Kober, 'Diskriminierung in der Einwanderungsgesellschaft – Wahrnehmungen und Einstellungen in der Bevölkerung' (*Bertelsmann* Stiftung, 25 April 2023) <https://www.bertelsmann-stiftung.de/de/publikationen/publikation/did/diskriminierung-in-der-einwanderungsgesellschaft> accessed 18 July 2023.

[11] Mangold (n 5) 186.

[12] ibid 354; more detail on the context at193.

[13] ibid 352; similar Hong (n 7) 107.

[14] Mangold (n 5) 353.

changeable[15] characteristic, they are not regarded as an individual but as part of this group.[16] If particularly positive or negative characteristics are associated with this group, this leads to a stigmatisation of the person concerned, which they cannot influence themselves.[17] This circumstance contradicts precisely the human dignity guarantee, which recognizes the human being as a self-responsible personality.[18] Human dignity can hence be violated, depending on the severity of the discrimination.[19] And if human dignity is violated, the discrimination cannot be justified. The very absoluteness of human dignity, however, jeopardises the supporting function of the legitimacy of anti-discrimination law by placing high demands on the violation.[20] However, the close connection between human dignity and stigmatisation on the basis of the discrimination criteria of Article 3 (3) of the Basic Law means that a violation of human dignity is potentially possible in every case of discrimination.[21] This circumstance requires the state to pay more attention to preventing discrimination on the part of private individuals as well. In addition to the indirect third-party effect of Article 3 (3) of the Basic Law, the state also has a duty to protect under Article 1 (1) sentence 2 of the Basic Law in the case that human dignity is affected. The effect of fundamental rights vis-à-vis private individuals normally only arises from the fact that the judge, as part of the state apparatus, is obliged to abide by fundamental rights in accordance with Article 1(3) of the Basic Law. However, Article 1 (1) sentence 2 of the Basic Law specifically regulates an obligation to protect human dignity. For this reason, human dignity is particularly strongly protected.

Anti-discrimination law can therefore be constitutionally based not only on equality rights, but also in part on freedom rights and human dignity. It cannot hence simply be denigrated as idealistic wishful thinking or a political demand. Moreover, anti-discrimination law has also been strengthened by EU law, especially the European Directives that lead to the German General Treatment Act.

It can thus be stated that there is a need to implement anti-discrimination law. The need not to be discriminated against is a right that can be claimed in principle.

III. The relationship between freedom and equality

Article 2 (1) of the Basic Law and the other fundamental rights to freedom in the Basic

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15 Robert Uerpmann-Wittzack, 'Gleiche Freiheit im Verhältnis zwischen Privaten: Artikel 3 Abs. 3 GG als unterschätzte Verfassungsnorm' (2008) 68 ZaöRV 359, 365.

16 Mangold (n 5) 349.

17 Mangold (n 5) 349-50; Uerpmann-Wittzack (n 15) 365.

18 BVerfG, 05.02.2004, 2 BvR 2029/01, BVerfGE 109, 133, 171; BVerfG, 21.06.1977, 1 BvL 14/76, BVerfGE 45, 187, 228.

19 Uerpmann-Wittzack (n 15) 361-62.

20 Mangold (n 5) 350; Uerpmann-Wittzack (n 15) 367-68.

21 Mangold (n 5) 349; also noting the connection: Hong (n 7) 89.

Law allow us to do almost anything we want. But who are we? Freedom in a constitutional state means egalitarian freedom.[22] In contrast to an illiberal state, a state based on the rule of law is characterised by the fact that as many people as possible are equally entitled to freedom and not just an elite group. Membership of such a group can be constructed on the basis of many visible or invisible characteristics. There are examples in the past and present of illiberal states that have actively pursued this grouping and such evaluation of people on the basis of characteristics.[23] Instead of freedom for limited groups of people, freedom under the rule of law must consequently be understood as equal freedom.[24] This means freedom for all equally.

This raises the question of the relationship between freedom and equality as fundamental values of democracy[25]. As Hong has noted, there is a tendency to place oneself in one of two sides, either as an advocate of the most limitless freedom possible or the most limitless equality possible.[26] However, freedom and equality, as fundamental values of democracy, both have a legitimate claim to validity. This is also accepted a certain extent for equality by the existence of Article 3 (3) of the basic law; there is consent that freedom cannot be the preserve of just one section of the population.[27] So everyone has freedom within the framework of the law, and in this respect, people are equal to each other.

The absolute claim to freedom of the individual, however, reaches its limit where it encounters the justified claim to freedom of another. At the point where the claim to freedom collides, it is limited because the other person is also entitled to freedom, i.e. because they are treated equally. Depending on how far this equality is understood, the extent to which the freedom of the individual may go until it collides with the freedom of the other also changes. In this principle, equality is absolutely necessary to define freedom. Freedom and equality must consequently be thought of, weighed and applied together, instead of each claiming absolute validity as competing principles.

Thus, in order to define the freedom of the individual, the extent of equality must first be established. In order to seemingly maximise freedom, the solution was, and in some cases

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[22] ibid 105.

[23] In particular, of course, reference should be made here to National Socialist Germany. There, people were extremely discriminated against because of their religion, disabilities or for any racist reasons. A contemporary example is Iran's theocracy, where there is strong discrimination based on gender and religion.

[24] Hong (n 7) 73; this is also required by Arthur Ripstein, *Force and Freedom* (Harvard University Press 2009) 238; Florian Rödl, *Gerechtigkeit unter freien Gleichen* (Nomos 2015) 434 ff; Susanne Baer, '„Ende der Privatautonomie“ oder grundrechtlich fundierte Rechtsetzung? Die deutsche Debatte um das Antidiskriminierungsrecht' (2002) 7 ZRP 290, 292.

[25] Christian von Coelln, '§ 46' in Bruno Schmidt-Bleibtreu, Franz Klein and Herbert Bethge (eds), *Bundesverfassungsgerichtsgesetz Kommentar. Band 1* (62nd edn, C.H. Beck January 2022) paras 20 and 22.

[26] Hong (n 7) 73.

[27] Martin Gebauer and Stefan Huber, 'Freiheit und Gleichheit im Privatrecht: eine Einführung' in Martin Gebauer and Stefan Huber (eds), *Freiheit und Gleichheit im Privatrecht* (Mohr Siebeck 2022) 1.

still is, to minimise the restrictive claim to equality as much as possible.[28] This was done by reducing equality to a formally equal permission to make use of freedom rights. The word permission was deliberately chosen here instead of the word enabling. A person who does not have the preconditions to negotiate in the market will therefore only be able to use the permission to exercise their liberty rights in a very limited way.[29] These preconditions are particularly about financial possibilities, but other factors also play a role. Such factors are unfortunately often discriminatory characteristics. If, for example, a person is classified as unreliable by a potential contract partner because of their gender, they cannot conclude the desired contract or can only do so under more difficult conditions. This in turn potentially leads to fewer financial opportunities, especially if, for example, an employment or loan contract is affected. This restricts the freedom of the discriminated person beyond the concrete contract with regard to their participation possibilities. In contrast, the contractual partner of the discriminated person is free to decide whether and how the contract is to be concluded. This is particularly the case since the person concerned often lacks alternatives in a discriminatory structure. If the contract is positive for the

contractual partner, they benefit from the discrimination. If a potentially profitable contract is rejected, the contractual partner acts as a prisoner of their own prejudices. The minimised claim to equality can thus strengthen the freedom of individuals in the sense of unjust enrichment. In contrast, a broader understanding of equality, i.e. material equality[30], can strengthen the freedom of a large mass in a fundamental way. The minimised, formal equality consequently does not maximise the freedom of all.

If one pursues the goal of the most comprehensive actual freedom possible, it is therefore not enough to understand freedom as equal in a formal respect. In order to enable actual free participation in life, material equality must for this reason also be created instead of formal equality, which enables equal participation in life as actual equality, as provided for in anti-discrimination law.[31] Freedom that is only formally understood as equal leads to the claim to equality being reduced to an absolute minimum under the rule of law. Already existing societal discrimination structures and merely formally non-discriminatory laws,

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[28] Reducing equality to a formal minimum: Horst Dreier, 'Vorbesprechung zu Art. 1 GG' in Horst Dreier (ed), *Grundgesetz Kommentar. Band 1* (Mohr Siebeck 2013) para 76; seeing no place for equality in private law: Werner Heun, '§ 34' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa* (C.F. Müller 2006) 470-71; critical to this problem: Jörg Neuner, 'Pro libertate? – Zur Freiheitsbegünstigung durch Recht und Methodik' (2022) 3 ZfPW 257, 272-73, 284.

[29] In terms of monetary assets: Florian Rödl, 'Gleiche Freiheit und Austauschgerechtigkeit' in Michael Grünberger and Nils Jansen (eds), *Privatrechtstheorie heute* (Mohr Siebeck 2017) 180; similarly: Stefan Arnold, *Vertrag und Verteilung* (Mohr Siebeck 2014) 239.

[30] Alex Baumgärtner, 'AGG § 1' in Dirk Looschelders (ed), *BeckOKG AGG* (C.H. Beck 2023) paras 17-18.

[31] Hong (n 7) 105-06; at least there is a fundamental right to a decent minimum subsistence in order to ensure such participation, see: BVerfG, 27.07.2016, 1 BvR 371/11, BVerfGE 142, 353-388; 23.07.2014, 1 BvL 10/12, BVerfGE 137, 34-103; 09.02.2010, 1 BvL 1/09, BVerfGE 125, 175-260.

such as the marital splitting[32], lead, with a formal understanding of equality, to groups continuing to be discriminated against, which is why a substantive understanding of equality is necessary.[33] Beyond the limited equality, the freedom of the persons concerned is also restricted to a considerable extent.

That is why, both principles are not satisfied and their democratic potential is not maximized.

It should be noted that in the mutually dependent relationship between freedom and equality, an imbalance to the disadvantage of equality also restricts freedom. That is why, in order to fully utilise the democratic potential, there is a responsibility to constantly optimise this relationship.[34]

IV. Private autonomy and the need for exceptions

Anti-discrimination law was initially treated as a threat to the principle of private autonomy in civil law.[35] But if private autonomy were really incompatible with anti-discrimination law, this would not be an argument against anti-discrimination law, but a sign that private autonomy was not an expression of equal freedom. However, this paper aims precisely to show that this is not the case. In order to determine a balanced relationship, private autonomy must allow itself to be questioned. Here, private autonomy is understood in particular as freedom of contract.[36]

An absolute understanding of contractual freedom in the sense that contractual partners, content, circumstances and conditions can be chosen completely freely must be rejected. It would lead to an enormous preferential treatment of the "powerful", the rich, the owners of essential goods, adults, etc.[37] For this reason, exceptions, i.e. mandatory law, are urgently needed.[38] Nevertheless, as Neuner aptly points out, the need to create a law that restricts freedom first of all leads to the powerful in society having an advantage in enforcing their interests, while those affected have to actively campaign or wait for a law to protect them.[39] The exact form of freedom of contract is hence based on the rule-exception relationship. These exceptions have very different objectives, but essentially

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[32] Ute Sacksofsky, 'Steuerung der Familie durch Steuern' (2000) 27 NJW 1896, 1896-97; Margarete Schuler-Hams, 'Ehegattensplitting und (k)ein Ende?' (2012) 7 FPR 297, 300.

[33] Mangold (n 5) 186.

[34] So also Michael Grünberger, *Personale Gleichheit* (Nomos 2013) 57.

[35] Tilman Repgen, 'Antidiskriminierung; die Totenglocke des Privatrechts läutet' in Josef Isensee (ed), *Ver tragsfreiheit und Diskriminierung* (Duncker & Humblot 2007) 11, 14-15; Franz-Jürgen Säcker, ' „Vernunft statt Freiheit!" — Die Tugendrepublik der neuen Jakobiner"' (2002) 7 ZRP 286.

[36] According to Jan Busche, *Privatautonomie und Kontrahierungszwang* (Mohr Siebeck 1999) 63, this is the most important manifestation.

[37] So also Arnold (n 29) 236; Gebauer and Huber (n 27) 2.

[38] So also Arnold (n 29) 239; Mangold (n 5) 202; Baer (n 24) 291.

[39] Neuner (n 28) 267-68.

aim to protect the contracting parties. This protection often serves to compensate for the superiority of one party, which gives it an equal rights character. It is therefore also evident in civil law that the equality rules define freedom.

In this context, the question arises as to the purpose of freedom of contract. The goal should be the self-determination of the person instead of the greatest possible individual capacity to act.[40] Rödl justifies this correctly by saying that the individual capacity to act between the contracting parties would lead to a zero-sum game of freedom and could hence not be the goal.[41] There would thus be no possibility of actually maximising freedom if the freedom of one only meant the unfreedom of the other. Moreover, the increased freedom of individuals could compensate for the lack of freedom of a large group without conflicting with the goal. Self-determination, on the other hand, is a desirable goal for two reasons. Firstly, it is related to the general right of personality and human dignity[42] and therefore fits well into the constitutional understanding of fundamental rights. Secondly, in contrast to individual agency, it can be maximised. By limiting individual agency somewhat, the self-determination of many can be strengthened. In this way, imbalances between the contracting parties can be evened out, allowing the weaker party a much greater degree of self-determination than the stronger party lacks in individual capacity to act.

In limiting contractual freedom through exceptions, it is therefore important that these exceptions create a relationship in which there are approximately equal conditions between the legal subjects, so that everyone can make equal use of contractual freedom. Of particular importance here are, for example, the consumer rights created by the EU, which adjust the relationship between the consumer and the entrepreneur in order to protect consumers from the de facto superiority of businesses.[43]

Restrictions on private autonomy can consequently not simply be dismissed with the argument that they would endanger private autonomy.[44]

When it comes to the protection of certain groups, legislative intervention is required in order to achieve actual, i.e. equal, freedom. Adaptation should therefore also be

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40 Anna Verena Lauber, *Paritätische Vertragsfreiheit durch reflexiven Grundrechtsschutz* (Nomos 2010) 42; Rödl (n 29) 180-81; Rödl (n 24) 296.

41 Rödl (n 29) 181.

42 On the relationship with general personal rights: Mario Martini, 'Das allgemeine Persönlichkeitsrecht im Spiegel der neueren Judikatur des Bundesverfassungsgerichts' (2009) 12 JA 839, 840-41; on the relationship with human dignity: Matthias Herdegen, 'Art. 1 Abs. 1' in Günter Dürig, Roman Herzog and Rupert Scholz (eds) *Grundgesetz Kommentar* (100th edn, C.H. Beck January 2023) para 28; Tobias Linke, 'Die Menschenwürde im Überblick: Konstitutionsprinzip, Grundrecht, Schutzpflicht' (2016) 10 JuS 888, 890; Henning von Olshausen, 'Menschenwürde im Grundgesetz: Wertabsolutismus oder Selbstbestimmung?' (1982) 40 NJW 2221, 2222 f.

43 Baer (n 24) 293; further information: Liu Qingwen, 'Die Vertragsfreiheit und ihre Grenzen bei Verbraucherverträgen' in Marco Haase (ed), *Privatautonomie* (Nomos 2015) 205-216.

44 Also Mangold (n 5) 202-03.

understood as an opportunity to enable private autonomy for more people in more situations. Equality is expressed here particularly in anti-discrimination law, which as an exception to private autonomy, i.e. freedom of contract, limits it in theory, but actually expands and protects it for many people,[45] in the sense of not only formal, equal freedom. This means freedom as participation in society and fundamental freedom.[46] The regulation of private autonomy thus benefits it itself. And taking into account the principle that the freedom of one ends where the freedom of the other begins, private autonomy must be restricted in order to strengthen the content of the freedom of all.

In summary, it can be stated that a restriction of private autonomy by no means leads to its end, but rather shapes it and has the potential to expand it.

V. The General Equal Treatment Act and the reversal of the burden of proof

What is the current regulatory situation regarding anti-discrimination law in private law? For a long time, only Article 3 (3) of the Basic Law existed as a protection against discrimination, but today there are further regulations in German and EU law. Particularly important is the General Equal Treatment Act, which came into force on 18 August 2006. It is based on the European Directives 2000/43/EC and 2000/78/EC.

Is the General Equal Treatment Act suitable for creating a balance between freedom and equality? A comprehensive assessment would go beyond the scope of this paper. Therefore, the focus will be on analysing a specific part of the current regulatory situation, namely the reversal of the burden of proof in section 22 AGG. Because discrimination is so widespread and difficult to prove, "members" of non-privileged groups, society and its prejudices, often find themselves powerless. Discriminatory experiences are so pervasive that they often become part of their lives. The effect is not only that others deal with them in a discriminatory way, but also that the discriminated persons become accustomed to it and even attribute any negative characteristics to themselves. This does not only have an effect in civil law. However, there is the pattern, that social prejudices in the mind of the potential contract partner lead to unequal treatment in individual cases. Many individual cases lead to a clear restriction of the freedom of the discriminated group; this does not mean equal freedom, which is why individual case inequality must not be tolerated. Rules are needed to prevent individual case inequality; these rules form further exceptions to private autonomy. This is particularly difficult because discrimination is an internal motivation which, until it is revealed, is difficult to identify.[47] The discriminating person can always claim that the competitor was more convincing in a personal interview. The

[45] Lauber (n 40) 89-90.
[46] Similarly Mangold (n 5) 352.
[47] Mangold (n 5) 211.

person could even say that they are not interested in concluding a contract with the specific person for private reasons. In this way, discrimination can be practised largely unhindered. At least this was the case as long as only Article 3 of the Basic Law with the indirect third-party effect would prohibit discrimination. The reversal of the burden of proof under Section 22 AGG is intended to solve this problem. The extent to which it succeeds and how it influences the relationship between freedom and equality will be analysed in the following.

That is why, for a long time, one problem discriminated people had in enforcing their rights was to prove in court that prohibited discrimination had occurred. After the AGG was introduced to implement the European Directives, this changed, at least in theory. In order to understand the effects of the reversal of the burden of proof, this article first explains the principle of the reversal of the burden of proof. In a second step, it incorporates the much-discussed ruling of the Federal Labour Court, which was decided in February this year, and discusses its implications. It was decided that the statement that a better negotiation had been conducted was not in itself sufficient to defuse the suspicion of discrimination in the form of a lower salary. Lastly, an assessment of the reversal of the burden of proof is made against the background of the relationship between freedom and equality and considers whether it is sufficient to strike a balance between these two principles.

1. Design of the reversal of the burden of proof

If something existing is impossible to prove, the burden of proof has to be changed. And discrimination is almost always impossible to prove.[48] According to section 22 AGG, the party alleging a prohibited discrimination under section 1 AGG must prove circumstantial evidence and the other party must thereupon prove that no such discrimination exists.

At first, this reversal of the burden of proof may give the impression of placing too great a burden on the opposing party by requiring it to convincingly defend itself against all allegations. However, this is deceptive. The conditions that must exist for the opposing party to be in a position to defend itself are high. First, differential treatment must be proven.[49] Then there must be circumstantial evidence to show that prohibited discrimination is a probable reason for the difference in treatment.[50] For this reason,

[48] Thorsten Beck in Wolfgang Däubler and Thorsten Beck (eds), *Allgemeines Gleichbehandlungsgesetz* (Nomos 2022) 957; Christian Wörl, *Die Beweislast nach dem Allgemeinen Gleichbehandlungsgesetz* (Nomos 2009) 17-18, with reference to the following ECJ judgment: Case C-127/92 *Enderby v Frenchay Health Authority and Secretary of State for Health* [2003] ECR I-05535, para 4.

[49] Olaf Muthorst, 'Beweisrecht' in Anna Katharina Mangold and Mehrdad Payandeh (eds), *Handbuch Anti diskriminierungsrecht* (Mohr Siebeck 2022) 817; Stephan Serr, 'AGG § 22' in Julius von Staudinger (ed), *Kommentar BGB* (De Gruyter 2020) para 8.

[50] Muthorst (n 49) 817, 825; Sebastian Overkamp, 'AGG § 22' in Maximilian Herberger and others (eds), *jurisPK-BGB* (juris 1 February 2023) para 3.

precisely because the opposing party must prove the bona fide reason for the unequal treatment, there are first requirements for the applicant. Not only do they have the full burden of proof for the circumstantial evidence, but they also have to provide evidence for a different treatment. Only the requirements for the standard of proof of the circumstantial evidence are lowered.[51] Of course, the opponent has the possibility to present facts before the court that make the court doubt the different treatment or the circumstantial effect.[52] If this is not successful, the opposing party only has to explain and prove the (non-discriminatory) reason for this different treatment.[53] One cannot actually speak of a reversal of the burden of proof, but rather of a shift of part of the burden of proof.

In the event that the opposing party should nevertheless have problems proving this, this could be facilitated in part with comprehensive documentation of, for example, the hiring process, including the reasons. Of course, this does not change the fact that the shifting of the burden of proof is a certain burden for the defending party. However, as Baer described it, a burden of proof on the side of the complaining party would be possible in a society where discrimination is the exception, not in ours.[54] Moreover, a shift in the burden of proof is not uncommon. When a fact favourable to one party is considered by the legislator to be the normal case, the burden of proof is regularly shifted.[55] We must therefore assume that some differential treatment arises from (unconscious) discrimination. If there is additional circumstantial evidence, this is the legislative normal case.

Due to characteristics that the person concerned cannot change, or which they cannot reasonably be expected to change[56], contractual partners show them more or less sympathy and trust. This has a decisive influence on whether and how the contract is concluded. Precisely for this reason, if the unequal treatment and the indications of suspected discrimination have been proven, a high requirement in the form of full proof must be placed on the justification of the contractual partner.[57]

2. The ruling of the Federal Labour Court

If instead unequal treatment could already be justified by the fact that it is an individual

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51 Overkamp (n 50) para 3; Serr (n 49) para 15.

52 Muthorst (n 49) 829; Overkamp (n 50) para 16.

53 Overkamp (n 50) paras 22, 23; Holger Wendtland, 'AGG § 22' in Wolfgang Hau and Roman Poseck (eds), *BeckOK BGB* (C.H. Beck 2023) para 4.

54 Baer (n 24) 294.

55 BGH, 21.02.1990, VIII ZR 216/89, para 25; Muthorst (n 49) 809.

56 Uerpmann-Wittzack (n 15) 365.

57 Opposing party must provide full proof, see: BAG, NJW 2020, 2289, 2292; BAG, NZA 2022, 638, 641; Muthorst (n 49) 830; Overkamp (n 50) para 23.

case of private negotiation, a large amount of discriminations would be excluded from registration.[58] The prohibition of discrimination as an exception to the principle of freedom of contract would be rendered meaningless by the discriminating persons invoking their freedom of contract; this would be circular.[59] This would allow contracts to continue to be freely concluded without taking discrimination into account. For this reason, the surprise[60] when the Federal Labour Court announced its judgement was not entirely understandable. It merely stated that a male employee's better negotiating skills were not the sole reason for the significantly higher salary for the completely same job compared to a female employee under section 22 of the AGG. If the employer is under great pressure to fill a position, this can be a reason in the context of individual negotiations.[61] However, if a significantly higher demand is granted without a justifiable reason, the presumption of discrimination is not invalidated.[62] Employers must be able to justify why different workers earn more or less and the better negotiation outcome cannot be used as a justification in the future.

So what are the concrete effects of this? How this will affect salary negotiations remains to be seen. One way for employers to protect themselves from lawsuits is to be more transparent about salaries and, for example, to signal in the negotiation process that they are willing to negotiate and disclose the salaries of other employees.[63] This would, of course, take away some of the employers' privileged position in terms of oversight and control over the salaries and value of workers. However, it would lead to workers being aware of the value placed on their work and what they can demand so that there are fair conditions in salary negotiations. This would help all workers, whether they belong to a discriminated group or not. Their private autonomy would not only be strengthened in terms of negotiating their work, but also in other contractual relations due to the potentially increased income. This is because more financial opportunities allow them to conclude more contracts or those with a larger financial volume, which improves their position in the market. On the one hand, the reversal of the burden of proof has the potential to curb discrimination. But it also has the potential to strengthen freedom. This is where it becomes apparent how freedom and equality benefit from each other.

3. Burden of proof as a solution to the discrimination problem?

The reversal of the burden of proof has thus simplified the realisation of anti-

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58 BAG, 16.02.2023, 8 AZR 450/21, paras 56 and 57.

59 Similarly ibid para 57.

60 Noted by Jens Günther, 'Anmerkung zu BAG, 8 AZR 450/21' (2023) 29 FD-ArbR 458529; regarded as unfounded by: Hans-Peter Löw, 'Gender Pay Gap - Paukenschlag aus Erfurt?' (2023) 11 DB M14, M15.

61 BAG, 16.02.2023, 8 AZR 450/21, para 51.

62 BAG, 16.02.2023, 8 AZR 450/21, para 56.

63 BAG, 16.02.2023, 8 AZR 450/21, para 58 indicates this as well.

discrimination law in private law. However, the expected rush to the courts has failed to materialise.[64] In addition to the fact that a heavy burden of proof still rests on the complaining party, there is also a high hurdle for going to court at all. The woman in the above-mentioned judgement had to fight her way through all instances until she got justice. The chances of success in lawsuits under the AGG are considered low.[65]

The question therefore arises as to whether the distribution of the burden of proof is sufficient as an instrument for the enforcement of anti-discrimination law. Apart from a duty to cooperate on the part of the opposing party, there is little scope to improve the plaintiff's position in court. However, the problem in the ruling discussed was not that the plaintiff could not prove the facts presented, but that the previous instances had accepted the justification. This social acceptance of private bargaining as a reason for unequal salaries that harms discriminated groups is one of many problems that discriminated groups face. The solution to these problems lies with its victims, the discriminated persons, who must painstakingly fight for their rights through lawsuits. Always with the risk of losing and having to bear the legal costs in addition to the unequal treatment. While contracting parties at best adapt to the latest state of the law in order not to risk sanctions. That is why, the relationship between freedom and equality in private law develops only slowly into a balance. Decisive are the decisions of the courts, which determine on the basis of the burden of proof which treatment is permitted and which is not. Thus, equality of all people, if secured by prohibitions of discrimination, continues to be a promise for the future.

This grievance argues for the need for anti-discrimination law in private law that goes beyond the prohibitions of discrimination. One possibility would be to enact laws that promote discriminated groups. For example, that people with disabilities are given preferential treatment when applying for the (limited) jobs where they can work. The so-called "positive discrimination", has the advantage that the legislator enacts binding regulations to combat discrimination. The structural disadvantages of certain population groups are compensated by artificial advantages in order to enable de facto equality.[66]

The constitution imposes a certain obligation on the relationship between men and women in Art. 3 (2) sentence 2 GG. Its design and the concept of positive discrimination are highly controversial. However, such a measure has the potential to create a level playing field where equal treatment would otherwise have to be laboriously fought for.

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[64] Christian Rolfs, 'AGG-Hopping' (2016) 10 NZA 586, 586.

[65] Sigrid Boysen, 'Art. 3 GG' in Ingo von Münch and Philip Kunig (eds), *Grundgesetz-Kommentar. Band 1* (C.H. Beck, 7th edn 2021) para 134; Rolfs (n 64) 586.

[66] Similar Christian Friedrich Majer and Arne Pautsch, '„Positive Diskriminierung" – Verfassungsrechtliche Zulässigkeit von „Migrantenquoten" und Bevorzugung wegen Migrationshintergrundes beim Zugang zum öffentlichen Dienst' (2020) 11-12 ZAR 414, 415.

From the perspectives of freedom, equality and human dignity discussed earlier, effective anti-discrimination law should be a high priority. For this reason, if possibilities for affirmative action exist, they should be exhausted. And such possibilities do exist. Article 3 (2) sentence 2 of the Basic Law enables the state to promote women with regard to actual equality. The legislature could shape this and also enact provisions for other discriminated groups. Although the majority of people consider promotion for other discriminated groups to be a violation of a discrimination prohibition itself, these violations can be justified in order to compensate for disadvantage and to secure freedom.

The AGG and especially the reversal of the burden of proof are important steps, but they are only based on European legislation. Both European and, in particular, German legislators should continue to work on the relationship between freedom and equality, which includes minimising discrimination.

IV. Conclusion/Outlook

Freedom and equality complement each other in constitutional terms and in their manifestations as freedom of contract and anti-discrimination law in civil law. The current legal situation takes anti-discrimination law into account. Thus, there is a legal situation that can be approximately described as a certain balance between freedom and equality. However, the aim must always be to further develop this balance so that the highest possible democratic potential can be achieved.

In the current situation, one cannot yet speak of a balance; too many people are discriminated against. Although the reversal of the burden of proof and the AGG itself have led to improvements, further changes must follow. Possibly a form of positive discrimination could change the situation. Of course, it would depend on how it was designed, but favouring discriminated groups to compensate for real inequalities has potential. Creating actual, i.e. material equality through equalisation would equalise opportunities for participation and thus also create equal freedom. This would bring us one step closer to a balanced relationship between freedom and equality.

Articles

Section 219a: A Eulogy

Michel Hoppe[*]

The article discusses whether the repeal of section 219a of the German Criminal Code - the infamous prohibition on advertising for abortion- was motivated and justified by virtue of the ban being unconstitutional. It is observed that the provision in its latest iteration did not criminalise medical professionals for publicising the very fact that they perform abortions at at all, but rather the manner in which they are performed. It is then examined whether the provision could have been interpreted and applied more restrictively, by reference to the concept of advertising.

Coming to a negative conclusion as regards the necessity for a restricted interpretation, it is tested if the provision was proportionate in relation to its goal of protecting unborn life. Due to a lack of concrete evidence, either for any information or supply crisis, or for any apparent unsuitability in reducing the number of abortions, the prohibition is held to be proportionate. Conversely, it is argued in light of the indeterminate success of the ban that the repeal did not infringe on the German state's duty to protect the unborn either. However, it is concluded that rehabilitating physicians that have been sentenced under the section 219a constitutes a violation of the principle of the separation of powers. Furthermore, the legislature might well find itself being obliged to reintroduce an advertising ban if abortion rates were to rise in the future. Lastly, it is warned that the rhetoric and arguments in favour of the repeal set a dangerous precedent contradicting settled constitutional jurisprudence.

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A. Introduction

Up until July of last year, the German criminal system punished the deed of advertising abortion services, means, objects or procedures by up to two years imprisonment, under section 219a of the German Criminal Code (*Strafgesetzbuch* – *StGB*).[1] Spectators, both foreign and domestic, were quick to point out that the repeal occurred on the same day of the Dobbs decision wherein the US Supreme Court overturned Roe v Wade.[2] Some also reproduced the usual criticisms of section 219a, among which the (supposed) criminalization of mere information provided by doctors to their patients,[3] its Nazi-era background and its utility for anti-abortion activists harassing abortionists,[4] or its obsession with protecting the unborn being founded on, or at least bordering on, religious fundamentalism.[5]

At first sight, depending on the reader's prejudice, one of two aspects of this scenario must seem rather strange. Some will undoubtedly be surprised to learn that merely advertising for abortion was deemed worthy of prosecution. Others will be confused by the German parliament's decision to scrap the advertising ban without also getting rid of the abortion

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1 Note on translation: In dealing with German legal terminology, I have elected to keep the original terms and abbreviations in cursive and in brackets, accompanied by English clarifications. On any further occurrence, I have paraphrased German vocabulary as far as possible. Wherever there is a somewhat commonly used English abbreviation, I have included it for the reader's information but have kept the German shorthand.

2 Christopher F Schuetze, 'Germany Ends Ban on Abortion Advertisement' (*New York Times*, 25 June 2022) <www.nytimes.com/2022/06/24/world/europe/germany-abortion-law.html> accessed 10 August 2022); Johann Justus Vasel, 'Liberalisierung und Deliberalisierung – Zeitenwenden im Abtreibungsrecht' (2022) 75 NJW 2378, 2381.

3 Associated Press, 'German lawmakers vote to end ban on 'advertising' abortions' (*ABC News*, 24 June 2022) <abcnews.go.com/Health/wireStory/german-lawmakers-vote-end-ban-advertising-abortions-85629124> accessed 10 August 2022.

4 Philip Oltermann, 'Germany scraps Nazi-era law that barred doctors' abortion ads' (*The Guardian*, 24 June 2022) <www.theguardian.com/world/2022/jun/24/germany-scraps-nazi-era-abortion-law-that-criminalises-doctors> accessed 10 August 2022.

5 Alexej Ulbricht, 'Who can talk about abortion? Information, offence, freedom of speech, and the advertising ban in Germany' (*Politics*, 7 May 2021) <journals.sagepub.com/doi/10.1177/02633957211024489> accessed 27 May 2023, 1.

ban itself. Abortion in Germany is, at least in principle, still considered criminal behaviour – yet it is not widely discussed in the context of crime and punishment. Naturally a very delicate matter, it is handled with great care by legal professionals and the legislature. The complexities it has generated in constitutional jurisprudence had to be implemented into the concerned provisions of the StGB. As it will turn out, section 219a is simultaneously a symptom of that problem, but also a very different animal on its own. Indeed, in addressing the relationship between sections 218, 218a and 219a quite a lot may be learned about the nature of statutory law, the limits of legal dogmatism, as well as the constitutional justification of criminal law in Germany.

The following evaluation is exclusively juridical. The author does not purport to discuss the morality of abortion or advertising for abortion in themselves in any way, shape, or form. He simply intends to examine the common criticisms of section 219a and discuss whether the abolition of section 219a was required or proper, or whether it was unwise or even unconstitutional. To that end, the article will

- (II.) briefly describe the history and the system of German abortion law, with special regards to the limits imposed on legislation by the jurisprudence of Germany's Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*/FCC)
- (III.) outline exactly what behaviour section 219a used to criminalise,
- (IV.) argue in favour of section 219a as a legitimate means to protect the unborn, as well as in favour of the compatibility of the rule with other fundamental rights,
- (V.) analyse to what extent abortion ads are still regulated by law.

B. The Legality of Abortion under German Law

The problematic nature of section 219a cannot be understood without reference to attempts at decriminalisation aimed at abortion in and of itself. To harken back to US-based debate, the Constitution of the United States does not allow for a comprehensive rights-based treatment but is really only concerned with limits to government power. Therefore, American constitutional law posits a negative right to have an abortion without the state intervening on behalf of the child. Accordingly, the American „pro-life“ side has to make recourse to the doctrine of states‘ rights. In stark contrast, German constitutional law is directly concerned with weighing the mother's negative self-determination and self-responsibility against the child's positive right to life.[6]

[6] cf Vasel (n 2) 2379-80.

I. The 1975 Decision

In 1974,[7] the ruling social democratic and liberal coalition attempted to introduce a rule according to which anyone who terminated a pregnancy within twelve weeks of conception would go unpunished – as the abortion would not be considered criminal (*nicht strafbar*).[8] The bill passed both chambers of parliament (*Bundestag* and *Bundesrat*, respectively) and came into force as statutory law,[9] but was struck down the next year by the BVerfG in its first landmark abortion ruling.[10] Unlike the US Supreme Court, the BVerfG did not deny the foetus' personhood.[11] Consequently, they argued that the German state was obliged to safeguard both the unborn child and its mother. In case of a conflict between these two constitutionally protected rights, the life of the child was awarded precedence over the mother's right to self-determination. If it could not be adequately protected by other means or varieties of means, the legislator would have to resort to making use of the criminal law. Exceptions could only be granted where the mother's life was endangered, where there was risk of severe bodily harm, or other similarly grave reasons.[12]

The legal order as a whole would then have to visibly condemn the concept of abortion, in order to avoid the impression that abortion was equivalent to a healing procedure, or even an alternative to contraception. The state was also prohibited from excusing himself of any intervention, by recognizing a legal vacuum where women were free to do as they pleased.[13] Although criminal justice could be employed if necessary, the state would first and foremost have to prevent the abortion from happening in the first place. It could do so by means of welfare and other alms. As long as the legislature created conditions favourable for the expecting woman to keep her child, the Court would not exercise strict control.[14] However, the Court decreed that the doctor who counselled the woman or attested to the necessity of the abortion could never be the same doctor as the one who actually terminated the pregnancy. They assumed that most doctors were averse to

[7] For an historical overview of German abortion law leading up to that point, as well as academic developments in legal policy from the 1960s onwards, see Albin Eser, 'Reform of German Abortion law: First Experiences' (1986) 34 Am J Comp Law 369, 369-73.

[8] Government legislative proposal: BT-Drs 7/375, 3.

[9] 5. Gesetz zur Reform des Strafrechts (5. StrRG), BGBl I 1974, 1297.

[10] BVerfGE 39, 1 – Schwangerschaftsabbruch I (1975). For an explanation how the proceedings were initiated see Donald P Kommers, 'Abortion and Constitution: United States and West Germany' (1977) 25 Am J Comp Law 1977, 255, 259-60.

[11] Donald P Kommers, 'The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?' (1994) 1 Contemp Health Law Policy 10, 1, 30.

[12] BVerfGE 39, 1 (headnotes 1 to 5).

[13] BVerfGE 39, 1, 44 (fn 127).

[14] BVerfGE 39, 1, 44-45 (fn 129).

performing any abortions at all, and therefore feared that the ones ending up performing them would have their own commercial or ideological stakes in them.[15]

II. The 1993 Decision

In 1992, in an attempt to compromise with the "liberal" abortion law of the former East Germany, the government once again attempted to introduce a time limit to the equation.[16] According to this version of the statute, an abortion performed after counselling and within twelve weeks after conception would expressly not be unlawful.[17] In its 1993 decision, the BVerfG mostly upheld their 1975 ruling. An abortion lacking necessity could never be viewed as justified or "legal". The ban would, notwithstanding exceptions in cases of unreasonable burdens, have to be maintained, not for any population policy but for the sake of the individual foetus' right to life, being rooted in its fundamental human dignity.[18] The Court reaffirmed that the state would have to keep the rights of the unborn alive in the public consciousness.[19]

However, the Court still somewhat loosened their fixation on enumerative indications. While section 218c reserved punishment for an abortion performed without proper counselling, the Court essentially inverted this approach. In what became known as the Counselling Scheme (*Beratungslösung*), they conceded that an abortion performed within the initial stages of pregnancy would be allowed to go unpunished, if such counsel had taken place. The Court recognized that, in the end, the mother would have to bear the final responsibility for her decision. The goal of fighting abortion as a social phenomenon could, to an extent, be more efficiently realised if the authorities opened up the prospect of procuring a legitimate abortion – provided certain procedural requirements were met. In a welcoming atmosphere, the women affected would be confronted with the prospects of motherhood in a way that would be open-ended in its ultimate outcome, yet life-affirming throughout.[20] Thus, the counselling scheme is concerned with winning the expectant mother as an ally.[21] It has been rightfully criticised that this bargain effectively negates the foetus' right to life, contradicting the Court's earlier dicta that the state may create no legal vacuum.[22] On the other hand, the Court made sure to make it perfectly clear

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[15] BVerfGE 39, 1, 62 (fn 166).

[16] More Details: Kommers (n 11).

[17] Gesetz zum Schutz des vorgeburtlichen/werdenden Lebens, zur Förderung einer kinderfreundlicheren Gesellschaft, für Hilfen im Schwangerschaftskonflikt und zur Regelung des Schwangerschaftsabbruchs (Schwangeren– und Familienhilfegesetz), BGBl I 1992, 1398, 1402.

[18] BVerfGE 88, 203 – Schwangerschaftsabbruch II (1993).

[19] BVerfGE 88, 203 (headnote 10).

[20] BVerfGE 88, 203, 270 (fn 197); 306 (fn 292).

[21] Walter Gropp and Liane Wörner, 'Vorbemerkung zu § 218' in Günther M Sander (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 4* (4th edn, C.H. Beck 2021) fn 11.

[22] Reinhard Merkel, '§ 218a' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (5th edn, Nomos 2017) fn 63a.

that abortions performed solely on the basis of counselling could never be deemed legal.[23] More generally, they could only be treated equal to abortions performed with indication insofar as is necessary to implement the counselling scheme.[24]

Treatment contracts with doctors and hospitals would be valid,[25] but they could not be paid for by mandatory insurance.[26]

III. Implementation

The rulings have been dutifully implemented into sections 218 and following, under the chapter heading "offences against life".[27] Both the performing doctor and the pregnant women are, in principle, liable to a fine or up to three years imprisonment (section 218 paragraph 1 sentence 1) or up to one year imprisonment, respectively (paragraph 3). An attempted abortion is punishable to the same extent, except as far as the woman is concerned (paragraph 4). If the abortion is performed within twelve weeks after conception and after at least three days have passed since the woman has been counselled in accordance with criteria specified in section 219, the elements (*Tatbestand*) of section 218 are deemed not to have been fulfilled (section 218a paragraph 1). This elaborate feat of legal engineering does nothing more than clarify that abortions under paragraph 1 are decriminalised but still illegal, although the implications will be reviewed further below. Simply put, it acts as a legal fiction.[28]

In addition, the abortion is "not unlawful" (*nicht rechtswidrig*) in cases of medical or psychological necessity or if there is suspicion that the pregnancy is the result of a sex crime, as long as it is still performed by a physician with the woman's consent (section 218a paragraphs 2 and 3). Dogmatically speaking, these exceptions are manifestations of the principle of necessity in the face of a state of emergency. [29] The principle is codified into sections 34 and 35 of the StGB, granting, under different conditions, justification (*rechtfertigender Notstand*) or exculpation (*entschuldigender Notstand)*. Originally, the Reich Court (*Reichsgericht)* – the supreme German court in the period between 1879 and 1945 – had, in 1927, invented a "supra-legal state of necessity" (*übergesetzlicher*

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[23] BVerfGE 88, 203 (headnote 15).

[24] BVerfGE 88, 203, 280 (fn 219).

[25] BVerfGE 88, 203, 295 (fn 263).

[26] BVerfGE 88, 203 (headnote 16).

[27] For an English-language overview, see Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 179-82, 185-187. There is also a semi-official English translation of the StGB, provided by Bohlander and published by the Federal Ministry of Justice, accessible under https://www.gesetze-im-internet.de/englisch_stgb.

[28] On the difference between *Tatbestand* and *Rechtswidrigkeit* see *Bohlander* (n 27) 16.

[29] Albin Eser and Bettina Weißer, '§ 218a' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 22; Perdita Kröger, 'Vor §§ 218 ff' in Gabriele Cirener and others (eds), *Leipziger Kommentar StGB Online* (De Gruyter 2019) fn 37; BGHSt 38, 158 = NJW 1992, 763, 768.

Notstand) for extreme cases where a pregnancy had to be terminated.[30] Similarly to section 34, paragraphs 2 and 3 of section 218a render the abortion as fully justified.[31]

Section 218a paragraph 4 exempts the woman from punishment[32] if she has been counselled and more than twelve but no more than twenty-four weeks have passed, or in situations of exceptional distress (*nicht strafbar)*. Sections 218b and 218c criminalise certain breaches of duty on the doctors' part. The rather notorious sections 219a and 219b both deal with "upstream" actions, namely advertising abortion and providing the means or objects for an abortion, the former of which being the focus of this article.

The counselling scheme has been statutorily organised into section 219 of the StGB and into the 1992 Act on Pregnancies in Conflict Situations (*Schwangerschaftskonfliktgesetz* – SchKG),[33] last augmented in 2022.[34] The counsel in question is not supposed to lecture or talk down but is nevertheless obliged to protect the unborn (section 5 paragraph 1). The German states (*Bundesländer*) are required to institute a sufficient and pluralist supply of counselling centres in close range to anyone who might need them. Doctors may also function as counsellors (section 8). Any centre that is to be recognized has to provide enough qualified personnel, including at least one person that has been specially medically, psychologically, socio-pedagogically, socially or legally trained. They may not be connected by organization or economic interest to a terminating institution in a way that would call their neutrality into question (section 9). There is no legal obligation to participate in the ensuing abortion, unless necessary to save the pregnant woman from death or severe injury to her health (section 12).[35] Even if never discussed under that aspect in Parliament,[36] the doctors' right of refusal partially serves to promote their freedom of conscience.[37] This is proved by its immunity to contractual abrogation.[38] Abortions performed without indication are subject to proper medical advice, but are not paid for by medical insurance (section 24b paragraphs 4 and 5 of the German Social Code, Book 5 – *Sozialgesetzbuch/SGB V*).

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30 *Bohlander* (n 27) 13; RGSt 61, 252; 62, 137.

31 Gropp and Wörner, 'Vorbemerkung zu § 218' (n 21) fn 29; Eser and Weißer, '§ 218a' (n 29) fn 21; Thomas Fischer, *Strafgesetzbuch mit Nebengesetzen. Kommentar* (69th edn, C.H. Beck 2022) section 218a fn 14.

32 „*Strafausschließungsgrund*", Gropp and Wörner, 'Vorbemerkung zu § 218' (n 21) 35. Compare *Bohlander* (n 27) 17.

33 Gesetz zur Vermeidung und Bewältigung von Schwangerschaftskonflikten, BGBl I 1992, 1398.

34 BGBl I 2022, 1082.

35 Compare BVerfGE 88, 203, 294 (fn 260).

36 KC Horton, 'Abortion Law Reform in the German Federal Republic' (1979) 28 Int Com Law Q 288, 292.

37 Bernhard Maier, 'Mitwirkungsverweigerung beim Schwangerschaftsabbruch' (1974) 27 NJW 1404, 1405.

38 BVerfGE 88, 203, 294; Klaus Ulsenheimer, 'Der Schwangerschaftsabbruch' in Adolf Laufs, Bern-Rüdiger Kern and Martin Rehborn (eds), *Handbuch des Arztrechts* (5th edn, C.H. Beck 2019) fn 71; Mathias Nebendahl, 'Arbeitsrecht im Krankenhaus' in Heinrich Kiel, Stefan Lunk and Hartmut Oetker (eds), *Münchener Handbuch zum Arbeitsrecht. Band 2 – Individualarbeitsrecht II* (5th edn, C.H. Beck 2021) fn 67.

IV. Intermediary Conclusion

Leaving aside all issues of social engineering and judicial activism, the Court's rulings on abortion may safely be treated as settled case law. There is currently no future decision in sight that might overturn the currently existing jurisprudence. As far as this article is concerned, it therefore represents enforceable constitutional law and will be taken as absolute gospel in evaluating the constitutionality of statutes.

Readers may have already noticed that the idea of a prohibition on advertising did not yet come up during the summary of the BVerfG rulings. Indeed, section 219a was not mentioned in either of the BVerfG rulings.[39] The idea of section 219a predates the counselling scheme entirely.[40] However, the provision was not the subject matter of the proceedings and was not controversial at the time.[41] It will be the objective of the following few parts to shed a light on the exact role and meaning of section 219a.

C. The Interpretation of Section 219a

The following part will describe the technical problems in the application of section 219a.

I. Punishable Deeds (Section 1)

According to the prevailing views with regards to its different elements, section 219a criminalised a fairly wide array of actions, even when considering that they must have been performed with criminal intent (*Vorsatz*, see section 15).

1. Objects

One possible object of an advertisement within the meaning of section 219a were the perpetrator's own services, or the services of another, for performing terminations of pregnancy or for supporting them (*eigene oder fremde Dienste zur Vornahme oder Förderung eines Schwangerschaftsabbruch*) (number 1). A service in this sense may have been any positive contribution,[42] such as giving the addresses of willing physicians,

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[39] Benedict Pietsch, 'Verbot als Gebot? Zur geplanten Streichung des „Werbeverbots" für den Abbruch der Schwangerschaft (§ 219a StGB) aus verfassungsrechtlicher Perspektive' [2022] KriPoZ 74, 74; BT-Drs 20/1635, 1-2.

[40] Detlef Sasse, 'Anmerkung zu AG Gießen, Urteil vom 24. November 2017 – 507 Ds 501 Js 15031/15' (2018) 72 NJ 434, 434.

[41] Michael Kubiciel, 'Schriftfassung der Stellungnahme in der öffentlichen Anhörung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestages am 18.5.2022' (18 May 2022) <www.menschenrechte.online/wp-content/uploads/2022/05/stellungnahme-kubiciel-data.pdf> accessed 18 November 2023, 3.

[42] Walter Gropp and Liane Wörner, '§ 219a' in Günther M Sander (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 4* (4th edn, C.H. Beck 2021) fn 4; Reinhard Merkel, '§ 219a' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (5th edn, Nomos 2017) fn 6.

arranging contact, or organising a journey for the sake of procuring an abortion.[43] The scope of application also included any means, objects or procedures capable of terminating a pregnancy, as long as this capacity was referenced (*Mittel, Gegenstände oder Verfahren, die zum Abbruch der Schwangerschaft geeignet sind, unter Hinweis auf diese Eignung*) (number 2). What was meant by number 2 were lay abortions in the sense of section 219b, but not at all contraception.[44]

2. Acts

The "advertising act" within the meaning of section 219a included offers, announcements, commendations or "any such declaration" (*anbieten, ankündigen, anpreisen oder Erklärungen solchen Inhalts bekanntgeben*). The last variant served to criminalise the spread of statements that were not claimed by the perpetrator as his own.[45] The different variants of section 219a paragraph 1 corresponded to the phrasing of various provisions (at least in their version applicable at the time 219a was introduced) condemning the dissemination of materials inciting hatred (section 130), depictions of violence (section 131) or the distribution of pornography (section 184).[46] Their interpretation was very plain and simple. An offer would have been any one-sided declaration that one is willing to perform an abortion or provide the means to do so.[47] An offer in the generic sense, which may or may not lead to an offer in the sense of the law of obligations, was deemed sufficient by German lawyers, even for the purposes of section 219a.[48] An announcement was any communication directed towards a specific (and timely) opportunity of being supplied with means or objects, or being provided with procedures.[49] A commendation was, unsurprisingly, any positive mention or description.[50]

As the Reich Court put it back in 1904, concerning the spread of pornography, any "praising or recommendatory mention or description, any accentuation of merits, recognition of advantageous effects honourable depiction, or assignation of high value" is sufficient, regardless of how scientific the presentation turns out to be.[51]An element all

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[43] Ralf Eschelbach, '§ 219a' in Bernd von Heintschel-Heinegg (ed), *Beck'scher Online-Kommentar zum StGB* (53rd edn, C.H. Beck May 2022) fn 7; cf Perdita Kröger, '§ 219a' in Gabriele Cirener and others (eds), *Leipziger Kommentar StGB Online* (De Gruyter 2019) fn 3; cf Christoph Safferling, '§ 219a' in Holger Matt and Joachim Renzikowski (eds), *Strafgesetzbuch Kommentar* (2nd edn, Vahlen 2020) fn 2; cf Fischer (n 31) section 219a fn 8, 9.

[44] Eschelbach, '§ 219a' (n 43) fn 8; Albin Eser and Bettina Weißer, '§ 219a' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 4.

[45] Eschelbach, '§ 219a' (n 43) fn 12; Kröger, '§ 219a' (n 43) fn 5.

[46] Eschelbach, '§ 219a' (n 43) fn 11; Klaus Rogall, '§ 219a' in Jürgen Wolter (ed), Systematischer Kommentar zum Strafgesetzbuch (9th edn, Carl Heymanns Verlag 2015-17) fn 8; cf Merkel, '§ 219a' (n 42) fn 11.

[47] OLG Frankfurt aM, Beschluss vom 22.12.2020 – 1 Ss 96/20, NStZ-RR 2021, 106, 107 (22 December 2020 decision by the Higher Regional Court of Frankfurt, Hesse).

[48] Fischer (n 31) section 219a fn 11; cf Merkel, '§ 219a' (n 42) fn 12.

[49] Eschelbach, '§ 219a' (n 43) fn 12; Kröger, '§ 219a' (n 43) fn 4; Merkel, '§ 219a' (n 42) fn 12.

[50] ibid.

[51] RGSt 37, 142, 143.

variants had in common, even if not explicated in their common definitions, is that their object needed to be presented as accessible to their "consumer base", so to speak.[52] Said restriction was regarded as the distinguishing feature separating more concrete recommendations from mere praise.[53] Without any actual opportunity for termination, all that would be left for prosecutors to rely on were accusations of fraud (*Betrug* – section 263).[54] The same was said to apply to offers that are not meant to be taken seriously, but only because of the lack of objective suitability towards the abortive purpose.[55] On the other hand, any serious and effective offering was also seen as sufficient. The positive connotations associated with "recommending" products or services cannot be read into the other variants. As far as the fundamental question of punishment or no punishment is concerned, the addition of the recommendation was merely declarative, as it did not add any factual situations that would not already fall under offering or announcing opportunities for termination.[56]

3. Medium

An advertising act needed to be performed publicly, in a meeting or through dissemination of written materials (*öffentlich, in einer Versammlung oder durch Verbreiten eines Inhalts*). Public in this sense is any declaration made in the presence of, or witnessable by an undefined, no longer manageable group of people.[57] In accordance with section 11 paragraph 3, "written materials" were extended to include audio-visual media, data storage media, illustrations and other depictions. Non-public offerings, meaning ones targeted at specific women, do not fall under section 219a, and are therefore punishable exclusively in cases where an actual abortion which the offeror could aid or abet was at least attempted (sections 26, 27 and 30, see below).[58] Interestingly, due to the wide definition of where an offence is deemed to have "taken place", online ads hosted abroad or even exclusively targeted at a foreign audience might still have fallen under German criminal jurisdiction, due to the ubiquity of their presence on the internet.[59]

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[52] BT-Drs 7/1981 (neu), 18; Gropp and Wörner, '§ 219a' (n 42) fn 6; Rogall, '§ 219a' (n 46) fn 8; Eser and Weißer, '§ 219a' (n 44) fn 6; Kristian Kühl, '§ 219a' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (29th edn, C.H. Beck 2018) fn 3.

[53] *Anpreisen* vs *Preisen,* Merkel, '§ 219a' (n 42) fn 11.

[54] Merkel, '§ 219a' (n 42) fn 14; cf Eschelbach, '§ 219a' (n 43) fn 8.

[55] As per the Commission for the Criminal Justice Reform, BT-Drs. 7/1981, 18; See also Eser and Weißer, '§ 219a' (n 44) fn 6; Kröger, '§ 219a' (n 43) fn 4; Merkel, '§ 219a' (n 42) fn 14; Gropp and Wörner, '§ 219a' (n 42) fn 7.

[56] cf Eschelbach, '§ 219a' (n 43) fn 12.

[57] Eschelbach, '§ 219a' (n 43) fn 13; cf Merkel, '§ 219a' (n 42) fn 13.

[58] Eser and Weißer, '§ 219a' (n 44) fn 7.

[59] cf Eschelbach, '§ 219a' (n 43) fn 13.

4. Qualifying Circumstances

Even so, the offer was only punishable if it was given for the sake of personal enrichment (*um einen Vermögensvorteil willen)* or in a manner that was grossly inappropriate or offensive (*in grob anstößiger Weise*). Especially the latter variant had to be handled with care, so as not to be too uncertain to violate the principles of the rule of law. The offer had to be excessively distasteful, or unconscionable, with regards to the objective standards of a liberal but ordered society.[60] Primarily, these requirements were without a doubt met by offers for criminally sanctioned terminations of pregnancy.[61] In addition, it was assumed that sensational, glorifying, misleading offers or offers that were in other ways hostile to unborn life could be construed as offensive,[62] although this category was practically irrelevant.[63]

On the surface, it is then safe to say that no factual, objective and sober information (*sachliche Aufklärung)* was banned that was not connected to material gain.[64] Inwardly, the offeror had to actively desire being enriched. Mere knowledge that the offer would result in material gain of some sort did not suffice.[65] If the offeror was both materially and ideally motivated, the material gain had to be the decisive factor in his decision.[66] Offerings with the intent of enriching another person only fell under section 219a if the offender themselves were thereby enriched by proxy.[67]As regards the material gain itself, desiring a fee was seen as sufficient.[68]

II. Exceptions (paragraphs 2 to 4)

Section 219a paragraph 2 exempted from punishment by way of paragraph 1 any information provided by physicians or counselling agencies about who is performing abortions in accordance with section 218a paragraphs 1 to 3 (see above). Paragraph 3

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60 Kühl (n 52) fn 5; Merkel, '§ 219a' (n 42) fn 15.
61 Gropp and Wörner, '§ 219a' (n 42) fn 8; Eser and Weißer, '§ 219a' (n 44) 8; Merkel, '§ 219a' (n 42) fn 15; cf Kröger, '§ 219a' (n 43) fn 7.
62 Eser and Weißer, '§ 219a' (n 44) 8; Fischer (n 31) section 219a fn 14; Eschelbach, '§ 219a' (n 43) fn 18.
63 Eschelbach, '§ 219a' (n 43) fn 17.
64 BT-Drs. 7/1981, 18; Rogall, '§ 219a' (n 46) 12.
65 Gropp and Wörner, '§ 219a' (n 42) fn 12; Eschelbach, '§ 219a' (n 43) fn 15.
66 Kühl (n 52) fn 4; Gloria Berghäuser, 'Die Strafbarkeit des ärztlichen Anerbietens zum Schwanger schaftsabbruch im Internet nach § 219a StGB – eine Strafvorschrift im Kampf gegen die Normalität' (2018) 73 JZ 497, 498.
67 Fischer (n 31) section 219a fn 13; Eser and Weißer, '§ 219a' (n 44) 8; cf Eschelbach, '§ 219a' (n 43) fn 15.
68 LG Bayreuth, Urteil vom 13.01.2006 – 2 Ns 118 Js 12007/04, Zfl 2007, 16 (13 January 2006 judgement handed down by the Regional Court of Bayreuth, Bavaria; Fischer (n 31) section 219a fn 13; cf BT-Drs 19/7693, 7.

exempted other information within the professional sphere, such as publications in medical or pharmaceutical journals.

Most importantly for the purposes of this article, paragraph 4 declared that physicians, hospitals and other institutions authorised to legally perform abortions did not fulfil the provisions of section 219a paragraph 1 merely by stating that they do, in fact, provide services under the conditions of section 218a (section 219a paragraph 4 number 1). In addition, they were allowed to freely refer to authorised institutions when it came to questions concerning their methods (number 2). Paragraph 4 was introduced in 2019[69] expressly in order to address the lack of clarity with regards mere information under paragraph 1, and expressly only exempted from punishment as far as absolutely necessary for the sake of informing pregnant women in their time of strife.[70] In reverse conclusion, doctors could not inform about their methods themselves.[71] Instead, they could link to the online presence of an authorised institution, or copy information from such sources, as long as credit was given.[72] The same reform introduced just such an authorised source, in the form of a list of willing doctors hosted by the Federal Medical Association (*Bundesärztekammer)* (section 13 paragraph 3 SchKG).[73]

III. Attempts at Restriction: A Case Study

In what is most certainly the most prominent case ever prosecuted under section 219a, a physician in Gießen (Hesse) had been using a PDF on her website to describe the technical details, but also bringing forth arguments speaking in favour of or against the methods she was offering for abortions in her clinic. The PDF also included a summary of documents patients were required to take with them, among other the certificate that there had been counsel or that an indication had been ascertained. Finally, there had been notice that she accepted both private payment and insurance.

In November of 2017, the competent Local Court (*Amtsgericht)* held that she had thereby sufficiently connected information with tender, and sentenced her to a payment of forty times 150 euro. There was no further need for any special solicitation, as what was

[69] Gesetz zur Verbesserung der Information über einen Schwangerschaftsabbruch, BGBl I 2019, 350.
[70] BT-Drs 19/7693, 7.
[71] Eschelbach, '§ 219a' (n 43) fn 21; Wiebe Winter, 'Freispruch für Hänel? Die Novellierung des § 219a StGB' (2019) 20 HRRS 291, 292.
[72] BT-Drs 18/7693, 11; BT-Drs 19/7965, 9.
[73] Liste von Ärztinnen und Ärzten, Krankenhäusern und medizinischen Einrichtungen nach § 13 Abs. 3 SchKG (Bundesärztekammer, 5 July 2023) <www.bundesaerztekammer.de/themen/aerzte/schwangerschaftsabbruch> accessed 29 July 2023).

presented to the court already constituted a "classical form of acquiring patients" with which she had dared to procure for herself a competitive advantage over other doctors.[74]

On appeal, the Regional Court (*Landgericht*) applied all four classical methods of interpretation,[75] but still did not come down in her favour. The plain wording of section 219a not posing any restriction, the provisions could be interpreted so as to give effect to the constitutionally mandated protection of the unborn. Preventing competition between abortionists from arising was imperative. Parliament had mandated that abortion would have to remain an exception to the rule, and that any avoidable terminations of pregnancy should not be normalised nor commercialised. This was in line with the BVerfG's dictum that every abortion without indication would have to be deemed unjust. Doctors would still be able to participate in medical dialogue, and to offer their services by way of other doctors, and counselling centres. The particular doctor in question being motivated by her personal beliefs and not her commercial interest was considered but did not sway the court's overall opinion.[76]

Still, when the Higher Regional Court (*Oberlandesgericht*) in Frankfurt reviewed the case, they reversed the Regional Court's ruling on grounds that, in the meantime, section 219a paragraph 4 had been introduced and would have to be applied as the "milder law."[77] However, the Regional Court maintained that informing about the "how" of the abortion was not covered by paragraph 4, and that doctors could simply include this information by way of references.[78] Upon further review by the Higher Regional Court, it was again proposed that neutral statements made by physicians did not fall under section 219a.[79] In the meantime, in 2019, a different Local Court in Hesse had held that section 219a paragraph 4 had legalised just such information.[80] The Higher Regional Court did not pick up this argument. In their opinion, the addition of paragraph 4 had, in fact, made it logically necessary to include mere information.[81]

Having exhausted all national means of appeal or review, the doctor filed a constitutional complaint with the BVerfG, but was also disappointed. The Constitutional Court denied there was any legitimate interest left in evaluating section 219a's constitutionality, since

[74] AG Gießen, Urteil vom 24.11.2017, Az 507 Ds 501 Js 15031/15, NStZ 2018, 416.
[75] Compare *Bohlander* (n 27) 15.
[76] LG Gießen, Urteil vom 12.10.2018, Az. 3 Ns 406 Js 15031/15, medstra 2019, 119.
[77] OLG Frankfurt aM, Beschluss vom 26.06.2019, Az 1 Ss 15/19, medstra 2019, 309.
[78] LG Gießen, Urteil vom 12.12.2019, Az 4 Ns 406 Js 15031/15, medstra 2020, 315.
[79] Liane Wörner, 'Anmerkung zum Urteil des AG Gießen vom 24.11.2017 (507 Ds 501 Js 15031/15)' (2018) 38 NStZ 417, 418.
[80] Decision by the Local Court in Kassel, AG Kassel, Beschluss vom 05.07.2019 – 284 Ds 2660 Js 28990/17, medstra 2019, 383.
[81] OLG Frankfurt aM, Beschluss vom22.12.2020, Az. 1 Ss 96/20, medstra 2021, 118. Subsequently maintained by the Higher Regional Court in Hamm, North Rhine-Westphalia (OLG Hamm, 21.10.2021 – 4 RVs 102/21, medstra 2022, 133).

any sentences handed down under section 219a had been repealed by the same act which had repealed section 219a itself. The complainant had submitted that the constitutionality of section 219a would still have to be tested, as the constitutionality of her rehabilitation depended on it. In this regard, she was correct. According to constitutional precedent, the principles of legal certainty and the separation of powers demand that the legislature cannot just for any reason nullify judicial decisions.[82] Thus, rehabilitation requires that the underlying criminal law be unconstitutional, or at the very least that there are other grave and compelling interests involved.[83] The Court still refused any incidental test of the rehabilitation's constitutionality, supposedly because this would blur the line between an individual complaint and more abstract judicial review.[84]

IV. Criticism of the Application of Section 219a

We can thus summarize the problems inherent in the interpretation of section 219a prevailing in the dominant opinion and legal praxis. First, section 219a, although titled as a ban on advertising, did not require any extolment of the supposedly advertised service.[85] Secondly, not only was as any offer sufficient actus reus (*objektiver Tatbestand*), but the expectation of the usual doctor's fee was also sufficient mens rea (*subjektiver Tatbestand*). Advertisements for abortions performed without charge are, however, practically nonexistent.[86] Thirdly, after the introduction of paragraph 4, there was no longer any space left to reasonably interpret section 219a so as not to cover mere information. Last but not least, the aforementioned wide interpretation of the desire for material gain was in line with general principles insofar as direct intent (*Absicht*) generally does not require the motivation in question to be the sole motivator.[87] That said, all doctors realistically desire to make a profit out of their office. Consequently, section 219a inevitably criminalised any doctor who was making it known that he performs abortions.[88] Its application also did not take account of activist doctors for whom the belief in the right of

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[82] BVerfG, Beschluss vom 08.03.2006 – 2 BvR 486/05, BeckRS 2006, 22732.

[83] BVerfGE 2, 380, 405.

[84] see BVerfG, Beschluss vom 10.05.2023 – 2 BvR 390/21.

[85] Klaus Ferdinand Gärditz, 'Das strafrechtliche Verbot der Werbung für den Abbruch der Schwangerschaft (§ 219a StGB) – Anachronismus oder sinnvolle Schutzergänzung' (2018) 27 ZfL 18, 21; cf Klaus Rogall, '§ 218a StGB in neuer Gestalt. Anmerkungen zu einem Lehrstück zeitgenössischer Rechtspolitik' in Jan Christoph Bublitz and others (eds), *Recht – Philosophie – Literatur. Festschrift für Reinhard Merkel zum 70. Geburtstag* (Duncker & Humblot 2020) 1181, 1191; cf Tonio Walter, 'Was sollen und was dürfen Kriminalstrafen? Eine Antwort am Beispiel des § 219a StGB' (2018) 27 ZfL 26, 28.

[86] Eschelbach, '§ 219a' (n 43) fn 15.

[87] cf Hartmut Schneider, '§ 211' in Günther M Sander (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 4* (4th edn, C.H. Beck 2021) fn 83; cf Martin Heger, '§ 211' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (29th edn, C.H. Beck 2018) fn 4; Frank Saliger, '§ 211' in Urs Kindhäuser, Ulfrid Neumann, Hans-Ullrich Paeffgen and Frank Saliger (eds), *Strafgesetzbuch* (6h edn, Nomos 2023) fn 31.

[88] Walter (n 85) 28.

self-determination or the right to enjoy the correct medical procedure might actually be the dominant factor.[89]

V. Criticism of the Scope of Section 219a

Section 219a going way too far with its concept of what constitutes an "advertisement" is also a common complaint. In response, there have been frequent attempts to demonstrate how the objective elements of section 219a combined with the amount to something that could be called an ad.[90] This is completely in line with the law of the European Union, where advertising is defined as the "making of a representation in any form in connection with trade, business, craft or profession in order to promote the supply of goods or services."[91] Correspondingly, in German law, an action of commercial relevance for the purposes of private competition is any act with the intent to foster one's own or another's business by promoting the sale or procurement of commodities, or the performance or procurement of services (Law on Unfair Competition Practices – *Geschäft gegen den unlauteren Wettbewerb*/UWG, section 2 paragraph 1 number 2).[92] Mere information fulfilling the elements of section 219a is deemed „advertising masked as information."[93] Neither Merriam Webster nor the Encyclopaedia Britannica even make commercial intent a necessary element of an advertisement.[94] Consciously making a specific offer alone would then be enough to warrant the term.

There has even been the accusation that hinting at the opportunity for procuring an abortion without being allowed to inform about the methods as well "allows for something much closer to advertising while still limiting valuable information."[95] Of course, this is ridiculous, since no serious competition with other clinics is entered into simply by making it known that one performs abortions. Competition arises where more specific circumstances become known. A clinic would gain a competitive advantage with

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[89] cf Paula Fischer and Henrike von Scheliha, 'Anmerkung zu AG Gießen, Urt. v. 24.11.2017 – 507 Ds 501 Js 15031/15' (2019) 37 MedR 79, 79.

[90] Nino Goldbeck, 'Die Werbung für den Abbruch der Schwangerschaft. Eine Darstellung des § 219 a StGB unter besonderer Berücksichtigung des Lauterkeitsrechts' (2005) 14 Zfl 102, 106-07; cf Michael Rahe, 'Strafbare Werbung bei Hinweis auf legalen Schwangerschaftsabbruch' [2018] JR 232, 235.

[91] Directive 2006/114/EC of the European Parliament and the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) [2006] OJ L 376/21, art 2 lit a.

[92] Like the StGB, the UWG is accessible in an English translation under www.gesetze-im-internet.de/englisch_uwg/index.html.

[93] BT-Drs 7/1981, 17.

[94] Editors of Merriam Webster, 'Advertisement' (*Merriam-Webster*) <www.merriam-webster.com/dictionary/advertisement> accessed 1 August 2023; The Editors of Encyclopaedia Britannica, "advertising" (*Encyclopedia Britannica*, 17 July 2023) <www.britannica.com/money/topic/advertising> accessed 1 August 2023.

[95] Ulbricht (n 5) 7.

statements like "offering a safe atmosphere."[96] This is the very idea paragraph 4 is based on.

Even so, the judiciary may have been correct in neither limiting nor extending section 219a by referencing the faint terminological concept of advertising. Like any written law, section 219a has to be given proper effect with reference to its purpose – inhibited by respect to its plain meaning. Even constitutional requirements do not empower the judiciary to set aside the word of the law (*Wortlautgrenze*) or the intent of the legislature completely.[97] Proposals such as punishing exclusively offenders who acted both for material gain *and* in an objectively grossly offensive fashion, cannot seriously be considered.[98]

Conversely, it is possible to limit section 219a beyond its phrasing with reference to its purpose, as this would be advantageous for the offender.[99]

VI. Intermediary Conclusion

Section 219a cannot be understood properly on the basis of its text alone. In order to evaluate whether and how section 219a ought to have been interpreted, one must first inquire about its teleology. As mentioned, this might result in a narrower or broader application "from within." However, in any case, any application of section 219a is also subject to the limits imposed by the German constitution. First and foremost, its purposes will be held to the standard of whether or not they infringe upon the fundamental rights of the persons involved.

D. The Constitutionality of Section 219a

The matter of section 219a's constitutionality is essentially one of its compatibility with the fundamental rights guaranteed under the first few Articles of the German Fundamental Law (*Grundgesetz – GG*). Naturally, even the ends of protecting the life of the unborn do not justify all means. The fundamental condition for any restriction of fundamental rights under the German constitution is its proportionality

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[96] Judgement handed down by the Local Court in Tiergarten, Berlin, AG Tiergarten, Urteil vom 14.06.2019–253 Ds 143/18. Upheld by the Higher Regional Court for Berlin, KG-Berlin, Beschluss vom 19.11.2019, Az (3) 121 Ss 143/19 (80 and 81/19 – juris.

[97] Bernd von Heintschel-Heinegg, '§ 1' in Bernd von Heintschel-Heinegg (ed), *Beck'scher Online-Kommentar zum StGB* (57th edn, C.H. Beck May 2023) fn 30; Walter Kargl, '§ 1' in Urs Kindhäuser, Ulfrid Neumann, Hans-Ullrich Paeffgen and Frank Saliger (eds), *Strafgesetzbuch* (6h edn, Nomos 2023) fn 110a; Martin Heger, '§ 1' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (29th edn, C.H. Beck 2018) fn 6; Roland Schmitz, '§ 1' in Bernd von Heintschel-Heinegg (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 1* (4th edn, C.H. Beck 2020) fn 99.

[98] cf Theresa Schweiger, 'Werbeverbot für Schwangerschaftsabbrüche – Das nächste rechtspolitische Pulverfass' (2018) 51 ZRP 100.

[99] Bernd Hecker, '§ 1' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 7; Schmitz (n 97) fn 9; von Heintschel-Heinegg (n 97) fn 19.

(*Verhältnismäßigkeit),* meaning that it has to be suited and necessary to serve a legitimate purpose, and that the relation between the success of the measure and the severity of the restriction is appropriate.[100]

I. Fundamental Rights in Question

The exact standards that are to be applied depend on which of these rights were being affected by the advertising ban.

1. Occupational Freedom

The BVerfG has explicitly conceded that doctors' professional conduct in accordance with the counselling scheme is necessarily protected by his occupational freedom under Article 12 GG.[101] In other decisions, placing limits on representations of one's professional conduct, including doctors' advertising for their own services, was recognized to constitute restrictions on the right to exercise one's chosen profession.[102] Combined, it is safe to assume that section 219a is subject to justification by the standards of Article 12. However, being situated on the lowest level of protection as regards occupational freedom, restrictions on the mere exercise of a profession only need to pass the generic proportionality test outlined above.[103]

2. Freedom of Speech and Information

As far as the right to free speech under Article 5 GG is concerned, mere statements of fact are covered (only) insofar as they are necessary to form an opinion, meaning a value judgement.[104] If someone takes part in the public discussion on abortion and, for that purpose, names a certain abortionist, they are protected by Article 5.[105] The same has to apply to doctors stating their opinions on the topic and in that process making it known that they perform abortions, or even praising them.[106]

Likewise, any commercial speech preparing or itself posing an opinion falls under Article

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[100] BVerfGE 59, 231, 265; 71, 162, 181; 77, 308, 332; 93, 362, 369.
[101] BVerfGE 98, 265, 297 (1998) – fn 157, with reference to BVerfGE 88, 203, 295 Rn, 157.
[102] BVerfGE 71, 162, 172 f; 94, 372, 389; 105, 252, 266; 106, 181, 192; 111, 366, 373; 112, 255, 262.
[103] BVerfGE 7, 377; 30, 336, 351; 77, 308, 332; 85, 248, 259; 93, 362, 369.
[104] BVerfGE 61, 1, 8; 65, 1, 41; 85, 1, 15; 90, 1, 15; 90, 241, 247.
[105] Ralf Müller-Terpitz, 'Art 5 GG' in Andreas Spickhoff (ed), *Medizinrecht* (4th edn, C.H. Beck 2022) fn 5; BVerfG, Beschluss vom 08.06.2010 – 1 BvR 1745/06, NJW 2011, 47.
[106] cf Tamina Preuß, 'Strafbare Werbung für den Abbruch der Schwangerschaft, § 219a StGB – Unerlässlicher Schutz für das ungeborene Leben oder sachwidrige Kriminalisierung im Vorfeld eines erlaubten Verhaltens?' [2018] medstra 131, 132.

5.[107] What constitutes an opinion, is a certain element of commentary, consideration or deliberation, hence, subjectivity.[108] Merely calling attention to one's business is insufficient.[109] In cases of non-activist doctors, it is questionable whether the public offer of an abortion can be construed as expressing an opinion. In any case, section 219a certainly restricted affected women's right to inform themselves without hindrance from generally accessible sources.[110]

Both freedom of speech and freedom of information are limited by "the provisions of general laws, the laws for protection of the youth, and the right to personal honour." A law is general, abstract or universally applicable in this sense if the fact that it suppresses an opinion or multiple opinions is collateral to other goals.[111] Whenever said law is then applied to a singular case, it in turn needs to be interpreted so as to give effect to freedom of speech and information in a manner that is worthy of their fundamental value for liberal democracy (theory of reciprocity – *Wechselwirkungslehre*).[112] In effect, like Article 12, Article 5 GG requires that section 219a and its interpretation be proportional.[113]

3. Equality Before the Law

Article 3 paragraph 1 GG prohibits any unequal treatment of fundamentally equal situations, but also equal treatment of fundamentally unequal cases, unless there is a reasonable cause.[114] For the purposes of our inquiry, there therefore needs to be reasonable cause for (1) the unequal treatment of doctors and pro-life activists, (2) the

[107] Jürgen Kühling, 'Art 5 GG' in Hubertus Gersdorf and Boris P Paal, *Beck'scher Online-Kommentar Informations- und Medienrecht* (40th edn, C.H. Beck May 2023) fn 26; Anna-Bettina Kaiser, 'Art 5 I, II GG' in Horst Dreier (ed), *Grundgesetz-Kommentar. Band 1* (4th edn, Mohr Siebeck 2023) fn 60; Christoph Grabenwarter, 'Art 5 GG' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz Kommentar* (100th supp, C.H. Beck January 2023) fn 64; BVerfGE 30, 336, 352; 71, 162, 175; 95, 173, 182; 102, 347, 359; BVerfG, Beschluss vom 01.08.2001 – 1 BvR 1188/92, GRUR 2001, 1058, 1059; 05.03.2015 – 1 BvR 3362/14, GRUR 2015, 507, 508 (fn 16). With special respect to physicians: BVerfGE 71, 162, 175.

[108] Grabenwarter (n 107) fn 47; BVerfGE 61, 1, 8; 90, 241, 247; 124, 300, 320.

[109] cf BVerfGE 107, 275, 280 – Benetton II.

[110] Christoph Knauer and Johannes Brose, '§ 219b StGB' in Andreas Spickhoff (ed), *Medizinrecht* (4th edn C.H. Beck 2022) fn 2; Frauke Brosius-Gersdorf, 'Der Fall Kristina Hänel: Rechtsgutachten zur Verfassungswidrigkeit des § 219a StGB' (*Institut für Weltanschauungsrecht*, 29 October 2020) <weltanschauungsrecht.de/meldung/rechtsgutachten-verfassungswidrigkeit-219a> accessed 18 November 2023, 25-26.

[111] BVerfGE 7, 198, 209; 97, 125, 146; 113, 63, 79; 117, 244, 260; 120, 180, 200; 124, 300, 322.

[112] BVerfGE 7, 198, 208-09 – Lüth; 20, 162, 177 – Spiegel; 59, 231, 265 – freier Rundfunkmitarbeiter; 71, 206, 214 – Anklageschrift; 85, 248, 263; 102, 347, 362; 111, 147, 155.

[113] Grabenwarter (n 107) fn 139; Herbert Bethge, 'Art 5 GG' in Michael Sachs (ed), *Grundgesetz Kommentar* (9th edn, C.H. Beck 2021) fn 146; Hans Jarass and Martin Kment, *Grundgesetz für die Bundesrepublik Deutschland. Kommentar* (17th edn, C.H. Beck 2022) Article 5 fn 68; Rudolf Wendt, 'Art 5 GG' in Ingo von Münch and Philip Kunig (eds), *Grundgesetz Kommentar. Band 1* (7th edn, C.H. Beck 2021) fn 120.

[114] Uwe Kischel, 'Vor Art 3 GG' in Volker Epping and Christian Hillgruber (eds), *Beck'scher Online-Kommentar Grundgesetz* (55th edn, C.H. Beck May 2023); Alexander Thiele, 'Art 3 I GG' in Horst Dreier (ed), *Grundgesetz-Kommentar. Band 1* (4th edn, Mohr Siebeck 2023) fn 31; Ferdinand Wollenschläger,' Art 3 GG' in Hermann von Mangoldt, Friedrich Klein and Christian Starck (eds), *Grundgesetz Kommentar. Band 1* (7th edn, C.H. Beck 2018) fn 40; BVerfGE 1, 14, 52; 4, 144, 155; 67, 186, 195; 110, 141, 167.

unequal treatment of persons acting for material gain, and persons acting out of conviction, and (3) the equal treatment of advertising for abortions with and without indication. With time, the requirement to present a "reasonable cause" so as to exclude arbitrary decision-making has given way to a full test of proportionality.[115]

II. Legitimate Purpose

1. The History of Section 219a

Neither the Criminal Code of the Northern German Confederation[116] nor its successor, the Criminal Code of the German Empire (*Reichsstrafgesetzbuch – RStGB*)[117] contained a provision equivalent to section 219a. There was an initial proposal in 1913,[118] but the first ever implemented prohibition came into force in June of 1933 – at the dawn of the National Socialist dictatorship.[119] It seems to have been based on a 1927 draft aimed at countering an actual or perceived increase in the number of ads encountered during the more liberal times of the Weimar Republic.[120] In 1953, the 1933 version was transitioned over into the refurbished Criminal Code of the Federal Republic,[121] and all subsequent re-publications since then. The Allies had not ascribed any substantial National Socialist ideological background to it, and had therefore left it standing where it otherwise would have been nullified.[122] Ultimately, section 219a can be cleared of all charges levelled against it on an historical basis, by virtue of having been repeatedly appropriated by a democratically legitimate legislator acting within the parameters of the rule of law.[123] The version of section 219a that was reformed in 2019 and scrapped in 2022 corresponded to the version adopted in 1974.[124]

2. The Criminalization of Abstract Endangerment

The German Parliament intended for section 219a to counteract a normalisation of abortion in the public consciousness and protect women in precarious circumstances

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115 cf BVerfGE 129, 49, 68 f – Mediziner-BaföG (2011); 141, 1, 38 (fn 93); 145, 106, 142 (fn 98).
116 BGBl 1870, 197– 273.
117 RGBl 1871, 127-205.
118 Wissenschaftliche Dienste BT, Sachstand Entstehungsgeschichte des § 219a StGB, Az. WD 7 – 3000 – 159/17, 8.12.2017, 4 fn 7.
119 Gesetz zur Änderung strafrechtlicher Vorschriften vom 26. Mai 1933, RGBl I 1933, 295, 296.
120 Michael Kubiciel, 'Reform des Schwangerschaftsabbruchrechts?' (2018) 51 ZRP 13, 14; Fischer (n 31) section 219a fn 1.
121 BGBl I 1953, 1083, 1111.
122 Wissenschaftliche Dienste des Bundestags, Sachstand Entstehungsgeschichte des § 219a StGB, Az. WD 7 – 3000 – 159/17, 8.12.2017, p 7.
123 Rogall, '§ 218a StGB in neuer Gestalt' (n 85) 1186; Kubiciel, 'Reform des Schwangerschaftsabbruch-rechts?' (n 120) 14.
124 BGBl I 1974, 503; Rogall, '§ 219a' (n 46) fn 2.

from being commercially exploited.[125] According to the prevailing opinion, section 219a is an offence that seeks to punish advertisers for merely abstractly endangering unborn life (*abstraktes Gefährdungsdelikt*).[126] It is not disapplied simply because the danger in question is realised, i.e. because an abortion actually took place.[127] Accordingly, section 219a paragraphs 2, 3 and 4 are not justifications but exemptions on the elemental level (*Tatbestandsausschlüsse*) because they typify situations where the advert in question – supposedly – does not increase the level of danger facing the unborn.[128] Of course, this judgement fully applies to paragraph 3, which merely minimises the threat for the mother if the abortion is taking place anyhow, by ensuring that there is sufficient medical equipment and know-how. Paragraphs 2 and 4, on the other hand, are concerned only with directing women towards authorised institutions and personnel and thereby do not contribute towards commercialising or normalising abortion publicly. Therefore, they also do not interfere with the immediate teleology of section 219a.

Nevertheless, these references may still be suspected of (indirectly) causing any subsequent termination. Thus, it has been said that the legislator, in allowing any exemptions from section 219a paragraph 1 effectively "capitulated" to the moral imperative that abortions, even those enabled by the counselling scheme, should be performed safely and correctly.[129] Then again, the BVerfG obliged the legislature not to prevent every single abortion but to reduce the number of abortions in the abstract.[130] Thus, the nature of section 219a as an offence constituted by "abstract endangerment" perfectly complements sections 218 and following.

Within the Maternity Protection Act (*Mutterschutzgesetz* – MuSchG), only concrete or specific endangerment is criminalised (section 33), while abstract endangerment constitutes a mere civil offence (summary offence, violation of administrative matters – *Ordnungswidrigkeit*) (section 32). In this light, section 219a might unwittingly have created a blanket clause (*Generalklausel*) where the legislator actually intended for a self-contained provision. However, section 219a StGB is set apart from section 33 MuSchG twofold. For one, it is unclear whether section 33 of the MuSchG requires intent both towards the dangerous action in question and the ensuing danger (*Gefährdungsvorsatz*),

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[125] BT-Drs 7/1981, 17. Cited in many of the already referenced commentaries and decisions.

[126] Kröger, '§ 219a' (n 43) fn 1: Fischer (n 31) section 219a fn 2, 3; Gropp and Wörner, '§ 219a' (n 42) fn 2.

[127] cf Eschelbach, '§ 219a' (n 43) fn 25; Merkel, '§ 219a' (n 42) fn 19; Kühl (n 52) fn 7; Safferling (n 43) fn 10; Gropp and Wörner, '§ 219a' (n 42) fn 13; Eser and Weißer, '§ 219a' (n 44) fn 14. The only source which assumes the subsidiarity of section 219a in favour of section 218 which the author encountered is Helmut Satzger, 'Der Schwangerschaftsabbruch (§§ 218 ff. StGB)' (2008) 30 JURA 424, 433.

[128] Eser and Weißer, '§ 219a' (n 44) fn 9; Kröger, '§ 219a' (n 43) fn 8; Gropp and Wörner, '§ 219a' (n 42) fn 9; Reinhart Maurach and others, *Strafrecht Besonderer Teil. Teilband 1 – Straftaten gegen Persönlichkeits- und Vermögenswerte* (11th edn, C.F. Müller 2019) § 6 fn 63; Rogall, '§ 219a' (n 46) 15.

[129] Merkel, '§ 219a' (n 42) fn 17; Satzger, 'Der Schwangerschaftsabbruch (§§ 218 ff. StGB)' (n 127) 425.

[130] cf Helmut Satzger, '§ 219a StGB ist verfassungsrechtlich und strafrechtsdogmatisch nicht zu beanstanden, aber jedenfalls kriminalpolitisch zu überdenken' (2018) 27 ZfL 22, 23.

or whether the offender may act merely negligently in causing the danger.[131] Furthermore, advertisements can affect a multitude of women and children, not even limited to the ones immediately affected by any specific ad. Some commentators have likened the advertising ban to a sort of "social climate protection."[132]

III. Suitability

Section 219a needed to be suited to further one of its stated goals,[133] although it suffices if it was not absolutely impossible that it might have contributed to just one of them.[134]

1. Thwarting Risks of Commercialization or Normalisation

As mentioned above, it is thought that advertising for abortions of any kind would allow abortionists to enter into competition with each other, introducing an unwanted commercial element into the equation. It is also feared that the sheer presence of the "supply" would serve to normalise not just the public discussion but increase demand as well. Certainly, thwarting a productive public debate would infringe upon the very idea of freedom of speech

One may deny that the value of life is called into question by the mere offer for an abortion.[135] Even so, it has been demonstrated that this behaviour does not fall within the parameters of section 219a, at least following the introduction of paragraph 4 (see above). There is a certain threshold above which this trivialization becomes seriously problematic. In countries without an equivalent for section 219a, like the US, one can find slogans such as "10-week-after-pill. Fast. Private. $450" or "Abortion pill in less than 60 minutes", or, perhaps more nefarious, "competent and tender counsel." Even if one were to replace section 219a with a generic ban on advertising, competition would arise pertaining to whoever publishes the most attention-grabbing yet still permissible ad.[136]

Conversely, there is a certain symbolic force in criminal provisions, positively raising

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[131] In favour of the former: Katharina Dahm, '§ 33 MuSchG' in Christian Rolfs and others (eds), *Beck'scher Online Kommentar Arbeitsrecht* (66th edn, C.H. Beck December 2022) fn 7. In favour of the latter: Peter Häberle, '§ 33 MuSchG' in Georg Erbs and Max Kohlhaas (eds), *Strafrechtliche Nebengesetze Band 1* (246thsupp, C.H. Beck April 2023) Ergänzungslieferung) fn 4. Unclear: Angie Schneider, '§ 33 MuSchG' in Wiebke Brose, Stephan Weth and Annette Volk (eds), *Mutterschutzgesetz und Bundeselterngeld– und Elternzeitgesetz Kommentar* (9th edn, C.H. Beck 2020) fn 6.

[132] Merkel, '§ 219a' (n 42) fn 2; cf Günther Jakobs, 'Kriminalisierung im Vorfeld einer Rechtsgutsverletzung' (1985) ZStW 97, 751, 776.

[133] BVerfGE 30, 292, 316; 33, 171, 187; 63, 115; 96, 10, 23.

[134] BVerfGE 100, 313, 373 – TKÜ I (1998); cf BVerfGE 16, 147, 183; 67, 157, 175; 96, 10, 23.

[135] Kriminalpolitischer Kreis, 'Stellungnahme zum Straftatbestand der Werbung für den Abbruch der Schwangerschaft (§ 219a StGB)' (2018) 27 ZfL 31, 31.

[136] Wolfang Vorhoff, 'Stellungnahme zur Änderung des §219a StGB' (Bundestag, 19 February 2019) <www.bundestag.de/resource/blob/595558/69d6526a1e0681ea170a7e1ebbfc478f/vorhoff.pdf> accessed 25 August 2023, 5.

awareness for the value attributed to the protected good.[137] Admittedly, the public's conscience is not easily swayed by rules without sanctions. The approach taken by the BVerfG has been criticised since its inception[138] for its failure in informing people about the technical illegality of abortions. However, the proceedings summarised earlier in this article were controversial enough and of such public relevance that the Federal Government explicitly cited them as reason for repealing section 219a.[139] Evidently, some awareness is raised.

2. "Consumer Protection"

Section 219a may also have protected the women affected being misled on the internet.[140] People, especially those in precarious circumstances, place more trust in – sometimes anonymously posted – information online than they perhaps should. On the other hand, if anyone was allowed to post information but doctors, section 219a would indeed be counterproductive.[141] What has to be emphasised again and again is that section 219a required a specific offering. The distribution of general information about abortion was never criminal. On the other hand, if a specific opportunity to procure an abortion was presented, misleading information connected to said offering was covered under the prevailing interpretation (see above) as "grossly offensive" advertising – regardless of where it originated.

Consequently, section 219a could, ironically enough, only be criticised for not banning enough. Specifically, being presented by medical professionals might lend credence to abortion procedures and methods. That said, without a specific offer, all anyone could gather from such general statements is the knowledge that there are actual, trustworthy doctors providing abortion services in accordance with the law, and that one does not need to rely on quacks in back-alleys. From that realisation onward, a doctor need only be contacted who would then refer to the counselling centre.

3. Ensuring the Functioning of the Counselling Scheme

It has to be noted that, if section 219a were to reduce the number of abortions by simply blocking access to clinics, this would have to be taken as an illicit curtailment of the counselling scheme. Although the BVerfG never mentioned section 219a or any of its predecessors, they did declare that there would have to be a framework, or certain parameters, preparing and guiding troubled women in acting in the best interest of the

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[137] Gärditz (n 85) 19-20.
[138] cf BVerfGE 88, 338, 354 ff (dissenting opinion concerning BVerfGE 88, 203 – Abtreibung II).
[139] BT-Drs 20/1635, 1.
[140] cf Nino Goldbeck, 'Zur Verfassungskonformität des § 219 a StGB' (2007) 16 ZfL 14, 15.
[141] cf Ulsenheimer (n 38) fn 82.

child. Otherwise, an abortion without indication could not be permitted.[142] Therefore, section 219a may even have complimented the scheme.[143] If anyone could advertise for abortions in any way they saw fit, they could counteract the life-affirming purpose of the counsel.[144] In addition, it might contribute to the enforcement of the separation between the performing doctor and the counsellor.[145]

Of course, any situation in which a pregnant woman ends up in the doctor's office first carries the (insurmountable) risk that, behind closed doors, the doctor tries to circumvent the counselling, for whatever reason. At the very least, making it less known which doctors perform abortions under which circumstances and using which methods might direct more women to the counselling centres first, even in case they stumbled across the list provided by the Bundesärztekammer beforehand.

IV. Necessity

Section 219a was necessary if it was the mildest means among all available and equally effective means.[146] The legislature is limited in evaluating the necessity of a new piece of legislation only where it can be objectively disproven by facts or experience.[147] Critics of criminal justice are always quick to point out how the criminal law is meant to serve exclusively as a last resort if all other means the state could employ are exhausted. The criminal law as *ultima ratio* may only be used against behaviour that, by reason of its especially harmful effect and insufferableness for society, exceeds the need to be banned and is to be urgently restricted. These were the very words used by the BVerfG to describe the idea. However, they quickly returned to emphasising the legislature's prerogatives and the general criteria of proportionality, in the very next paragraph.[148] Hence, there are no special requirements that would need to be met.

Blindly trusting in the isolated functioning of the counselling scheme[149] would not be as effective as the (limited) monopolisation within the counselling centres. Demotion to a

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[142] BVerfG 88, 203, 270.

[143] Elisa Marie Hoven, 'Stellungnahme zur Öffentlichen Anhörung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestages zum Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Aufhebung des Verbots der Werbung für den Schwangerschaftsabbruch (§ 219a StGB), zur Änderung des Heilmittelwerbegesetzes und zur Änderung des Einführungsgesetzes zum Strafgesetzbuch (BT-Drs. 20/1635 und BR-Drucksache 161/22)' (*Bundestag*, 18 May 2022) <www.bundestag.de/resource/blob/594128/07edb4eba12ad59cf0df810e37f18fa9/hoven.pdf> accessed 25 November 2023, 3.

[144] Thomas Weigend, 'Autonomie als Grenze des strafrechtlichen Lebensschutzes' in Martin Böse, Kay H Schumann and Friedrich Toepel (eds), *Festschrift für Urs Kindhäuser* (Nomos 2019) 841, 853.

[145] Goldbeck, 'Zur Verfassungskonformität des § 219 a StGB' (n 140) 15.

[146] BVerfGE 30, 292, 316; 67, 157, 176; 126, 112, 144-45; 134, 204, 227 (fn 79).

[147] cf BVerfGE 25, 1, 20; 40, 196, 223; 77, 84, 106; 102, 197, 218; 125, 112, 145.

[148] BVerfGE 120, 224, 240.

[149] Schweiger (n 98) 101.

mere administrative offence[150] is a popular alternative to criminalization both as regards section 219a and elsewhere, but tearing section 219a out of the overall concept of sections 218 and following, removing it from the more „prestigious“ or much-noticed Criminal Code overall, and banishing it to the much less prominent *Ordnungswidrigkeitengesetz* (OWiG) seems improper.[151] One is tempted to accuse its proponents of suggesting that unborn life is about as important to the state as violations of traffic laws.[152] Of course, traffic laws do protect from death or bodily harm. The problem is highlighted more effectively by what actually happened concurrently with the repeal of section 219a. Namely, the scope of application of the Law on Advertising in the Health Care System (*Heilmittelwerbegesetz* – HWG) was extended by adding abortion to a list of procedures among which was plastic surgery.[153]

V. Objections Regarding Inconsistency

The most prominent objection to the adequacy of section 219a is that it is supposedly plainly contradictory to criminalise medical practitioners for merely advertising services which they are legally and individually required to provide, or even just services which are collectively required of them for the sake of the functioning of the counselling scheme. Its most noteworthy exponent has been the BVerfG themselves, in a case where a doctor was being targeted by a pamphlet describing his activities as “illegal.” The Court held that, in everyday speech, the pamphlets made it seem like the doctor was performing criminal abortions. Spreading them therefore constituted the dissemination either of an untrue statement of fact, which is not covered by freedom of speech, or of an opinion that inappropriately singled out the doctor affected, violating his persona. The Court also stated that a doctor should be able to advertise his services without negative consequences – not literally translated but, with the above-said, functionally identical. The injunction against the activist was therefore valid.[154]

The decision has been used to argue that, if a private party may not infringe on an abortionist’s personal honour for informing about his services, the state may– a fortiori – not criminally sanction them.[155] The ruling was even quoted in the Federal Government’s explanation of why section 219a was repealed.[156] One the other hand, the Court’s opinion

[150] Merkel, ‘§ 219a’ (n 42) fn 3a; cf Kriminalpolitischer Kreis (n 135) 32.
[151] cf Nora Kaiserl and Martin Eibach, ‘Aufhebung oder Änderung des § 219a StGB – Plädoyer für eine rationale Kriminalpolitik’ [2018] medstra 273, 277.
[152] Carina Dorneck, ‘Das Gesetz zur Verbesserung der Information über einen Schwangerschaftsabbruch – eine erste Analyse’ [2019] medstra 137, 141.
[153] cf Pietsch (n 39) 81.
[154] BVerfG, Beschluss vom 24.05.2006 – 1 BvR 1060/02, Zfl 2006, 135.
[155] Preuß (n 106) 133.
[156] BT-Drs 20/1635, 2.

in a civil matter need not necessarily imply the unconstitutionality of section 219a.[157] The regulation of the behaviour of private parties under specific circumstances may be considered a fundamentally different matter than the legislature's power to pass a general law imposing criminal sanctions. Moreover, even if the Court had addressed the legislator through the passage in question, the advertisement in question was likely one that would have met the requirements of section 219a paragraph 4. More important, however, the negative consequence in the case concerned was the accusation that illegal abortions were being performed. The devil in the details was, of course, the plain meaning of "illegal abortions."

1. Advertising Abortions Performed Under Section 218a Paragraph 1

Unlike paragraphs 2 and 3, the wording of paragraph 1 does not hint at any categorization within the legal-illegal-binary. It has been suggested that deeds covered by section 218a paragraph 1 belong to a third category couched in between "lawful" and "unlawful", namely "not unlawful" or "not illicit."[158] However, the 1975 decision absolutely precludes the state from capitulating and leaving behind such a legal vacuum (see above). Furthermore, the expression "not unlawful" is already used in paragraph 2, where (as described above) it is universally read as synonymous with "lawful." The legislator's intent to treat behaviour falling under paragraph 1 as generally unlawful (unless stated otherwise in other contexts, perhaps) cannot just be ignored for the sake of a rhetorical compromise that would please all the opposing parties.

The BVerfG was, of course, also very explicit in deeming all abortions without indication as "unlawful" even if they were not "criminal" if counsel was properly involved. Yet even if decriminalisation alone did not go hand in hand with legalisation, one is left to wonder whether the sum of the BVerfG's demands warrant that impression. In fact, the exclusion of insurance coverage seems to be the only negative consequence attributed to an abortion – and even that is undercut, since the abortion may be funded by welfare payments instead.[159] Third parties are not allowed to exercise their right to defence of another person for the sake of the unborn child.[160] While the Court set forth that this would be achieved simply by exempting the counselled abortion from the area of application of section 218, this is not strictly correct as far as the dogma of German criminal law is concerned. Section 32 paragraph 2, which defines the right to self-defence

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[157] Goldbeck, 'Zur Verfassungskonformität des § 219 a StGB' (n 140) 15; Scarlett Jansen, 'Anmerkung: Werbung für Schwangerschaftsabbruch auf ärztlicher Homepage, zu AG Gießen, Urteil vom 24.11.2017 – 507 Ds 501 Js 15031/15' [2018 issue 7] jurisPR-StrafR fn 2.

[158] „*unverboten*", see Arthur Kaufmann, 'Strafloser Schwangerschaftsabbruch: rechtswidrig, rechtmäßig, oder was?' (1992) 47 JZ 983.

[159] BVerfGE 88, 203, 321 – headnote 16; 316 (fn 321); 321 (fn 335);

[160] BVerfGE 88, 203, 278 (fn 216); BT-Drs 13/1850, 25.

(*Notwehr*) as well as the right to defend another person (*Nothilfe*), only requires an "imminent illegal attack" (*gegenwärtiger rechtswidriger Angriff*), not the commission of "an imminent illegal deed" (crime, felony or misdemeanour) that would fulfil a provision of the Criminal Code (*rechtswidrige Tat*). If the Court is to be taken at face value, an "imminent illegal attack" would actually be at hand. This has led commentators to search for another explanation. Convincingly they have posited that the right to defence was limited on grounds of its inadequacy in the particular case.[161] Whoever acts in contradiction to the counselling scheme would not be motivated by upholding the law and would therefore not be justified if he committed crimes against the physician, for instance.[162]

Even so, this was neither an oversight nor a contradiction on the Court's part. In the opinion of the BVerfG, the most effective way to serve the overarching goal of protecting the life of the unborn in the abstract did not lie in employing the verdict of illegality in a manner corresponding to the principle of the uniformity of the legal system. Instead, singular legal consequences otherwise protruding from the illegality of the abortion would be waived if necessary. In the end, the overall impression would be all that counts.

Admittedly, section 219b does not punish the distribution of means to perform non-criminal abortions but lay abortions that are deemed to be especially dangerous.[163] If the opposite were the case, and the layman were empowered as opposed to the medical professional, the counselling scheme would without question be hindered to an entirely inappropriate extent. It remains to be discerned whether section 219a had such an effect.

2. Advertising Abortions Performed under Section 218a Paragraphs 2 and 3

However, any law would fall short of that impression, if it led people to believe that abortions performed under an indication were just as bad as those performed without. Logically speaking, they would instead conclude that abortions falling under paragraph 1 were just as legitimate. Section 219a might therefore be unconstitutional not just on

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[161] Perdita Kröger, '§ 218' in Gabriele Cirener and others (eds), *Leipziger Kommentar StGB Online* (De Gruyter 2019) fn 44; Fischer (n 31) section 218a fn 4.

[162] Helmut Satzger, 'Der Schutz ungeborenen Lebens durch Rettungshandlungen Dritter' (1997) 37 JuS 800, 802-03.

[163] BT-Drs 7/1981 (neu) 18; Albin Eser and Bettina Weißer, '§ 219b' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 1; Ralf Eschelbach, '§ 219b' in Bernd von Heintschel-Heinegg (ed), *Beck'scher Online-Kommentar zum StGB* (53rd edn, C.H. Beck May 2022); Reinhard Merkel, '§ 219b' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (5th edn, Nomos 2017) fn 1; Walter Gropp and Liane Wörner, '219b' in Günther M Sander (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 4* (4th edn, C.H. Beck 2021) fn 1; Perdita Kröger, '219b' in Gabriele Cirener and others (eds), *Leipziger Kommentar StGB Online* (De Gruyter 2019) fn 5.

grounds of disproportionately limiting fundamental freedoms, but also on grounds of unwarranted equal treatment of these inherently unequal situations.[164]

More generally, the question has been raised, how advertising lawful services could suddenly be rendered as criminal.[165] In fact, before the wording of paragraph 2 explicitly categorised them as such, the fact that advertising for them was also a criminal act was utilised as an argument in favour of their illegality.[166] Treating legal abortions differently than illegal abortions is in principle also imperative, as demanded by the BVerfG in its second ruling.[167]

There are plenty of offences that are characterised by abstract endangerment where the event that is supposed to be prevented is not in turn also a criminal offence. For example, accepting or granting bribes or benefits to public officials is criminal behaviour even if the official act that it is aimed at turns out to be perfectly permissible otherwise.[168] It is quite common practice to ban ads for products whose use or consumption is perfectly legal. The state may try to prevent people from becoming addicted to nicotine, for example, by restricting tobacco ads, while the question whether smoking itself might be banned is much more difficult to answer. By analogy, actions that are constitutionally viewed much more negatively, such as abortion, may be banned from being advertised for.[169] This has to be doubly true in light of abortion not being mere self-harm. Indeed, advertising for legal abortions still signifies an inimical position towards a highly valuable, legally protected good belonging to another person, that should not be underestimated or understated.[170]Advertising for legal abortions might normalise the topic of abortion just as much as advertising for illegal ones.[171]

3. Intermediate Conclusion

The phrasing of paragraph 1 serves the practical purpose of decriminalising the termination of pregnancies in accordance with the counselling scheme, while simultaneously upholding their illegality and differentiating the situation from the mere exclusion of punishment in cases falling under paragraph 4. The lawgiver is free to treat the procedure as illegal in all contexts and all areas of law where this was not in turn precluded by the Court – hence the exceptions pertaining to the law of defence and the law

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164 BVerfGE 83, 273, 280 (fn 219).

165 Friedrich-Christian Schroeder, 'Unaufrichtigkeit des Gesetzes' (1992) 25 ZRP 409, 410; Eschelbach, '§ 219a' (n 43) fn 2.

166 cf Claus Belling, *Ist die Rechtfertigungsthese zu § 218a StGB haltbar?* (De Gruyter 1987) 106.

167 see n 24.

168 cf Ralf Krack, 'Sportwettbetrug und Manipulation von berufssportlichen Wettbewerben. Regierungsentwurf zu §§ 265c, 265d StGB' (2016) 11 ZIS 540, 543.

169 cf Rogall, '§ 218a StGB in neuer Gestalt' (n 85) 1196-97.

170 Berghäuser (n 66) 500.

171 Goldbeck, 'Die Werbung für den Abbruch der Schwangerschaft' (n 90) 102.

of insurance. Therefore, special forms of participation might still be criminalised, as is the case with sections 219b and – formerly– 219a. In the end, the question is whether the stated goal of reducing the number of abortions is achieved, in a manner that does not contradict the counselling scheme, and to an extent so that its success justifies its extremes.

VI. Measuring Severity and Success

1. Reduction in the Number of Abortions

Compared to other European countries, Germany has very low abortion rates.[172] After a steady decrease in the number of abortions from 106,815 in 2012 to 98,721 in 2016, the number increased to 101,209 in 2017. By 2021, it had once again fallen to 94,596. For the next year, it has to be noted that the repeal of section 219a correlates with an increase to 103,927 abortions in 2022 to 103,927. When sorted by their legal basis, abortions on the basis of section 218a paragraph are by far the most prevalent, with a relatively constant share around 96%, with 107,330 (97,19%) in 2012, 90,643 (95,82%) in 2021 and 99,968 (96,19%) in 2022.[173]

The number of abortions relative to the number of women has also been relatively stable, with about 50 around 2005, shrinking to 43 in 2021, with numbers for 2022 not yet available. The number of abortions relative to the number of live births, on the other hand, has decreased in disparate phases from 175 in 2000 to 128.5 in 2020.[174] Considering how the short-term trend of slowly decreasing abortion numbers from 2017 onward was interrupted in 2022 of all years, it is absolutely necessary to observe whether this phenomenon develops into a long-term upward trend in the future, and especially whether the relative shares mentioned follow suit.

2. Prosecutions and Sentences Carried Out Under Section 219a

As far as its relevance in criminal justice is concerned, section 219a has had next to no

[172] Franziska Prütz, Birte Hintzpeter and Laura Krause, 'Schwangerschaftsabbrüche in Deutschland – Aktuelle Daten aus der Schwangerschaftsabbruchstatistik' [2022] Journal of Health Monitoring 42, 42.

[173] Statistisches Bundesamt, 'Anzahl der Schwangerschaftsabbrüche in Deutschland nach rechtlicher Begründung, Dauer der Schwangerschaft und vorangegangenen Lebensgeborenen im Zeitvergleich ab 2012' (*Statistisches Bundesamt*, 27 March 2023) <www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Schwangerschaftsabbrueche/Tabellen/03-schwangerschaftsabbr-rechtliche-begruendung-schwangerschaftsdauer_zvab2012.html;jsessionid=57AE6AF852E493303510BF527EE5000A.live722> accessed 24 August 2023; Gesundheitsberichterstattung des Bundes, 'Tabelle (gestaltbar): Schwangerschaftsabbrüche, u.a. nach Merkmalen der Schwangerschaftsabbruchstatistik' (*GBE*, 24 August 2023) <www.gbe-bund.de/gbe/pkg_isgbe5.prc_menu_olap?p_uid=gast&p_aid=17119310&p_sprache=D&p_help=2&p_indnr=240&p_indsp=&p_ityp=H&p_fid=> accessed 24 August 2023.

[174] Prütz, Hintzpeter and Krause (n 172) 45-46.

actual impact.[175] 85 to 90 percent of investigations initiated were discontinued without indictment.[176] All in all, there had been no more than eight sentences for sections 219a and 219b put together between 2010 and 2020.[177] In the Federal Crime Statistic (*Bundeskriminalstatistik*), there had been exactly zero cases in 2021 and 2022, with one case each in 2019 and 2021.[178] Until 2019, when paragraph 1 was introduced, there had been significantly more, with 17 in 2018 and 21 and 2017.[179] If nothing else, that last statistic is evidence for the introduction of paragraph 4 being a powerful corrective force against the broad scope of paragraph 1. These exact legal insecurities for doctors had been cited by the Government as one reason for the repeal,[180] but their subsistence after the introduction of paragraph 4 is in turn highly uncertain.[181]

3. Ready Availability of Information and Services

It has been posited that opportunities for counselling have been severely limited by section 219a, leading to a narrower timeframe for the procedure to take place.[182] In the face of the importance of the protected good in question, the legislature is generally best advised, if not bound, to refrain from unwarranted experimentation.[183] Confronted with the hitherto determined lack of any substantial intrusion, it has to be carefully assessed

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[175] Kröger, '§ 219a' (n 43) fn 1

[176] Michael Kubiciel, 'Schriftliche Fassung der Stellungnahme in der Öffentlichen Anhörung des Ausschusses für Justiz und Verbraucherschutz des Deutschen Bundestages' (Bundestag) <www.bundestag.de/resource/blob/593464/222dab5c86e958a13b2115f3629d087b/kubiciel.pdf> accessed 25 November 2022, 1.

[177] Kubiciel, 'Schriftfassung der Stellungnahme in der öffentlichen Anhörung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestages am 18.5.2022' (n 41) 8.

[178] Bundeskriminalamt, 'Polizeiliche Kriminalstatistik 2022 Bund, T01 Grundtabelle – Fälle (V.10)' (*BKA* 2023) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2022/PKSTabellen/BundFalltabellen/bundfalltabellen.html?nn=211724>; 'Polizeiliche Kriminalstatistik 2021 Bund, T01 Grundtabelle – Fälle (V1.0)' (*BKA* 2022) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2021/PKSTabellen/BundFalltabellen/bundfalltabellen.html?nn=194190>; 'Polizeiliche Kriminalstatistik 2020 Bund, T01 Grundtabelle– Fälle (V1.0)' (*BKA* 2021) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2020/PKSTabellen/BundFalltabellen/bundfalltabellen.html?nn=145488>; Polizeiliche Kriminalstatistik 2019 Bund, T01 Grundtabelle – Fälle (V1.0)' (*BKA* 2020) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2019/PKSTabellen/BundFalltabellen/bundfalltabellen.html?nn=130872>; all accessed 24 August 2023.

[179] Bundeskriminalamt, 'Polizeiliche Kriminalstatistik 2018 Bund, T01 Grundtabelle – Fallentwicklung' (*BKA* 2019) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2018/BKATabellen/bkaTabellenFaelle.html?nn=108686>; 'Polizeiliche Kriminalstatistik 2017 Bund, T01 Grundtabelle – Fallentwicklung' (*BKA* 2018) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2017/BKATabellen/bkaTabellenFaelle.html?nn=96600>.

[180] BT-Drs 20/1635, 3.

[181] Pietsch (n 39) 79. Completely denied by Wolfgang Vorhoff, 'Leserbrief zum Artikel „LG Gießen zur Werbung für Schwangerschaftsabbruch: Berufung von Ärztin Hänel abgewiesen"' (*LTO Online*, 2 November 2018) <www.lto.de/recht/leserbriefe/k/leserbriefe-kw-43-44-2018-ruestungsexporte-palandt-umbenennung-examen-computer/4/> accessed 5 January 2023.

[182] BT-Drs 20/1635, 10.

[183] BVerfGE 39, 1, 159.

whether section 219a caused any actual lack of information among pregnant women.[184] The evidence seems to point in the opposite direction.[185] The aforementioned doctor from Gießen raised the concern that women in her experience were struggling to get an appointment with their regular gynaecologist, or that doctors who were unwilling to perform abortions themselves were clueless about the medical aspects of abortion or about the addresses of willing colleagues.[186] In her statement, she did not pose that there was any problem with performing the abortion in time, though. Neither did she prove any problems with section 219a that do not stem directly from the counselling scheme, or its lacklustre implementation and that have not already been disproven in this article.

On the contrary, another gynaecologist reported that all his patients get the procedure done within two weeks after noticing the pregnancy around its eighth week. Effectively, they would have six to eight weeks before running out of time for the purposes of section 218a paragraph 1.[187] They would procure an appointment with their gynaecologist, be informed medically and then be referred to both counselling authorities and abortion clinics.[188]

In his personal view, the eye-to-eye conversation would in any case be much more helpful in finding an abortionist one could personally trust.[189]

A third (tenured) gynaecologist likewise knew of no complaints, neither from her own patients, nor ones made to colleagues or patient associations. Her statement reads as essentially congruent to the second statement. However, she was able to give an estimate of about one counsellor for a population of 40,000.[190] In addition, she remarked that it was simply common for doctors (in all areas) to refrain from individual advertising in favour of being referred to from within professional circles.[191]

Section 219a has also been implied to cause a decrease in the number of doctors willing to perform abortions. In a timespan of twenty years, said number is said to have decreased by as much as 40 percent, resulting in a commute of up to 90 miles, or 150

[184] cf Kröger, '§ 219a' (n 43) fn 7.

[185] Gropp and Wörner, '§ 219a' (n 42) fn 2; Fischer (n 31) section 219a fn 5.

[186] Kristina Hänel, 'Stellungnahme zur Anhörung im Rechtsausschuss des Deutschen Bundestags am 18.5.2022' (*Bundestag*, 18 May 2022) <www.bundestag.de/resource/blob/895620/a0a3be16ec4ff1821c2651cd0217eae0/Stellungnahme-Haenel.pdf> accessed 25 November 2023, 1-2.

[187] Vorhoff (n 136).

[188] ibid p 1.

[189] ibid p 2.

[190] Angela Königer, 'Stellungnahme als Sachverständige zur öffentlichen Anhörung zum Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Aufhebung des Verbots der Werbung für den Schwangerschaftsabbruch (§ 219a StGB), zur Änderung des Heilmittelwerbegesetzes und zur Änderung des Einführungsgesetzes zum Strafgesetzbuch' (*Bundestag*, 18 May 2022) <www.bundestag.de/resource/blob/895868/dcd9669250e31fed8c7c70487bc2e03f/Stellungnahme-Koeninger-data.pdf> accessed 25 August 2023.

[191] ibid 4.

kilometres, to the nearest abortion clinic.[192] In the "last days" of section 219a, the previously mentioned list hosted by the Federal Medical Association contained and still contains, as counted by the author of this article, 365 entries, some of which are duplicates.[193] The list uniformly gives the name of the clinic, its address, its telephone number and e-mail, commanded foreign languages as well as methods and procedures. Therefore, the list would fall under section 219a if it were not for the express authorization by the SchKG (see above). The unequal treatment between the list and individual advertising, in this regard, is exactly the uniformity imposed on the portrayal, preventing competition. The website also allows for the depiction as a Street Map, observing which one can spot noticeable gaps in rural Bavaria and Lower Saxony, the southern Rhineland and Hesse. There are at least two cities in every German state that is not a city state, in which abortion clinics are visibly located.

All things considered, the evidence suggests that any "supply problems" related to abortion services are not owed to section 219a but to the necessary barriers erected in the form of paragraphs 218a and following, to naturally occurring specialisation, and the individual conscience of doctors.[194] The latter two may be interlinked, for many prenatal physicians would be confronted with the massive inequality between one group of children to whom they provide intensive prenatal care, and the other group of children they are hired to abort.[195] It was a conscious (and rectifiable) decision on the part of the legislature to extend the right to deny an abortion beyond reasons of conscience, and to corporate bodies.[196] Among 309 public, non-denominational clinics, only 60 percent were found to be willing to perform abortions at all, with 38 percent allowing for abortions without indication. The percentages are as low as 40% and 10%, respectively, in Bavaria,[197] indicating cultural and religious differences between regions, or also between cities and rural areas.[198] Beyond that, institutional shortcomings may be explained by, or post hoc justified by, the BVerfG's dictum that the illegality of abortion also has to be a guiding principle for medical training.[199]

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[192] cf Elizabeth Schumacher, 'Germany moves to reform abortion law' (*DW*, 24 June 2022) <www.dw.com/en/germany-moves-to-reform-abortion-law/a-62014740> accessed 3 August 2022.

[193] see n 73.

[194] ibid 3; Vorhoff (n 136) 4.

[195] Königer (n 190) 5.

[196] cf Eser and Weißer, '§ 218a' (n 29) fn 84.

[197] Antonia Groß and others, 'Welche öffentlichen Kliniken keine Abbrüche durchführen' (*Correctiv*, 3 March 2022)<https://correctiv.org/aktuelles/gesundheit/2022/03/03/keine-abtreibungen-in-vielen-oeffentlichen-kliniken> accessed 6 January 2022.

[198] Dinah Riese and Hanna Voß, 'Immer weniger Ärzt*innen. Der lange Weg zur Abtreibung' (*TAZ*, 8 March 2018) <https://taz.de/Immer-weniger-Aerztinnen/!5487589> accessed 6 January 2023.

[199] BVerfGE 88, 203, 280 (fn 219).

4. Harassment By Anti-Abortionists

Thirdly, it is thought that fear of falling victim to militant pro-lifers led to many doctors not applying to be listed by the Federal Medical Association.[200] It is reasonable to assume that the "urbanisation" of abortion has less to do with harassment and more to do with the broader desire for anonymity.[201] Even if approached by pro-lifers in the vicinity of the clinic, any behaviour covered by the protestor's freedom of speech has to be treated as licit. One may argue that the protester is not only exercising his freedom of speech but positively has the constitutionally warranted protection of the unborn on his side.[202] The latter would probably violate the principle of neutrality between different opinions. In any case, the women affected are free to interact, or not interact.[203]

Having said that, there is no discernible reason why any actual harassment would be avoided by allowing for individual advertising. With or without the Federal Medical Association's list, certain pro-lifers in Germany were able to compile an extensive list, including addresses, all by themselves. Again, this incident has led to criticism concerning an unequal treatment between making offers for financial benefit, and spreading multiple offers for idealistic reasons.[204] However, said private website, in its complete lack of taste, and in its absolutely primitive html-glory, does nothing to normalise abortion in the public consciousness, even if misused by individuals to procure abortions. The comparison is, therefore, inept.

VII. Intermediate Conclusion

For all of the reasons given, it seems highly unlikely that section 219a would ever have been declared unconstitutional. Between 2019 and 2022, doctors were subject to criminalization but could easily have avoided any prosecution. If there would have ever been a conflict with their freedom to express their opinion in connection to their profession, section 219a could have easily been bent or disapplied. In light of the broad prerogatives of the legislature, the relationship between this extent of section 219a's burden, and its success seems adequate. It did not run counter to the Counselling Scheme envisioned by the BVerfG, and may be assumed to indirectly add to that grand but

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[200] BT-Drs 20/1635, 10; cf Brosius-Gersdorf (n 110) 37.

[201] Vorhoff (n 136) 4.

[202] cf Bernward Büchner, 'Anmerkung zu BGH, Urteil des 6. Zivilsenats vom 7. Dezember 2004 – BGH VI ZR 308/03' (2005) 14 Zfl 16, 16-17 (referencing a decision handed down by the BGH on 1 April 2003 – VI ZR 366/02).

[203] ibid 17.

[204] Brosius-Gersdorf (n 110) 38; Ulbricht (n 5) 8.

controversial compromise. Conversely, the part of the Act that rehabilitated already sentenced offenders is likely unconstitutional.

On the other hand, the legislature also acted well within its prerogatives when it repealed section 219a and substituted sub-criminal mechanisms for it. Harkening back to the 1975 decision and other precedent, the lawgiver is relatively free in deciding when to resort to punishment, even with regards to the abortive act itself. In the next few years, though, this favourable verdict might be called into question by steadily rising abortion rates. At that point, the German state might be forced to enforce stronger measures once again, or might try to appeal to the BVerfG to change their view on the matter of abortion.

E. Whatever protection remains

Notwithstanding the repeal of section 219a, the deed of advertising abortions may still fall within the scope of other provisions of German law.

I. Criminal Law

Sections 26 and 27 StGB penalise anyone who induces another person to intentionally commit, or intentionally assists in the commission of another unlawful act (*Anstiftung* and *Beihilfe*). Aiding and abetting are collectively categorised as "participation" (*Teilnahme).* Section 111 ads to this by declaring that "whoever publicly, in a meeting, or by disseminating content incites the commission of an unlawful act incurs the same penalty as an abettor." Since abortions with indication are lawful, they cannot be participated in. Because any "unlawful act" is expressly required by section 11 paragraph 1 number 5 to fulfil all elements of some criminal offence, neither can one participate in abortions performed under section 218a paragraph 1.[205] Notwithstanding this large gap, any other abortion can still be aided or abetted in accordance with general principles.[206]

1. Public Incitement to Commit Offences (Section 111)

It must not be supposed that the government intended to legalise any advertisement for abortions not covered by the Counselling Scheme. Before the repeal of section 219a, it was widely assumed that sections 219a and 111 in combination with 218 would be competing in such cases.[207] Section 111 would have remained applicable if the ad was not offensive

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[205] Christoph Sowada, 'Die Werbung für den Schwangerschaftsabbruch (§ 219a StGB) zwischen strafloser Information und verbietbarer Anpreisung' (2018) 27 ZfL 24, 25.

[206] Ralf Eschelbach, '§ 218' in Bernd von Heintschel-Heinegg (ed), *Beck'scher Online-Kommentar zum StGB* (56th edn, C.H. Beck February 2023) fn 13; Kröger, '§ 218' (n 161) fn 32; Walter Gropp and Liane Wörner, '§ 218' in Günther M Sander (ed), Münchener *Kommentar zum Strafgesetzbuch. Band 4* (4th edn, C.H. Beck 2021) fn 42.

[207] Merkel, '§ 219a' (n 42) fn 19; Eser and Weißer, '§ 219a' (n 44) fn 14; Kühl (n 52) fn 6.

or made for the sake of material gain.[208] Inciting illegal abortions as a distinct type of crime is sufficiently specific for the purposes of section 111.[209] However, an incitement in the sense of telling someone that they should get an abortion is to be distinguished from merely endorsing abortions, on the basis of a genuine appeal.[210] Therefore, regular advertisements do not qualify.

2. Aiding and Abetting (Sections 26 and 27)

Section 111 paragraph 2 expressly clarifies that an unsuccessful incitement is still criminal, the inciter being liable for up to five years imprisonment. Meanwhile, participation is characterised by an unlawful act that actually took place or was actually attempted. Consummate participation has to be distinguished from mere attempted abetting. There is a certain gap in the criminal law insofar as mere attempts to abet are punishable according to section 30 only if the main offence was a serious criminal offence (*Verbrechen*), meaning one that is punishable by a minimum term of one year imprisonment (section 12 paragraph 1). In no situation under sections 218 and following, not even serious cases for the doctor, the minimum punishment exceeds one year. An abortion is therefore always a mere *Vergehen* (section 12 paragraph 1).[211]

An abetting requires that the will of another is influenced in a way as to cause their intent to commit the main unlawful act. It is no longer possible once that person is already firmly determined to do the deed.[212] However, it remains possible to give psychic aid by affirming the other person's plan, or by giving advice.[213] Accordingly, naming or otherwise mediating specific people or institutions willing to perform an abortion, constitutes (at least) providing aid to said abortion.[214] Due to the special trust placed in doctors, this

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[208] Gunther Arzt and others, *Strafrecht Besonderer Teil* (4th edn, Gieseking 2021) § 5 fn 39.

[209] cf Nikolaus Bosch, '§ 111' in Jürgen Schäfer (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 3* (4th edn, C.H. Beck 2021) fn 13, 27; Albin Eser, '§ 111' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 13; cf Hans-Ullrich Paeffgen, '§ 111' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (6th edn, Nomos 2023) fn 15.

[210] Bosch (n 209) fn 6-7; Paeffgen (n 209) fn 11, 13; Heger, '§ 111' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2023) fn 3.

[211] Eser and Weißer, '§ 219a' (n 44) fn 1; Rogall, '§ 219a' (n 46) fn 1.

[212] Wolfgang Joecks and Jörg Scheinfeld, '§ 26' in Bernd von Heintschel-Heinegg (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 1* (4th edn, C.H. Beck 2020) fn 10, 31; Hans Kudlich, '§ 26' in Bernd von Heintschel-Heinegg (ed), *Beck'scher Online Kommentar zum StGB* (57th edn, C.H. Beck May 2022) fn 20; Wolfgang Schild and Bernhard Kretschmer, '§ 26' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (6th edn, Nomos 2023) fn 8.

[213] Joecks and Scheinfeld, '§ 26' (n 212) fn 6-7; Martin Heger, '§ 27' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2023) fn 4; Volker Haas, '§ 27' in Holger Matt and Joachim Renzikowski (eds), *Strafgesetzbuch Kommentar* (2nd edn, Vahlen 2020) fn 23.

[214] Fischer (n 31) § 218 fn 10; Albin Eser and Bettina Weißer, '§ 218' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 52; Reinhard Merkel, '§ 218' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (5th edn, Nomos 2017) fn 151; BGHSt 1, 139.

generally applies even where information would already be available on the internet, even if placed there by the clinics themselves.[215]

However, it is doubtful whether an advertisement would represent aid or abetment to all abortions it ends up causing. In the end, it depends on how specific the participant's intent as regards the main offence needs to be. The abettor's intent (*Anstiftervorsatz*) is generally subjected to a higher standard. Sometimes, it is assumed that only the type of legally protected good that is to be violated needs to be specified, as long as the identity of the persons involved is irrelevant.[216] In any case, the prevailing opinion seems to be that cases falling under section 111, i.e. ones in which a non-select circle of persons is addressed, are insufficient for the purposes of section 26.[217] The intent to provide aid to an illegal act (*Gehilfenvorsatz*), on the other hand, requires that the assistant is aware of the circumstances essential to the main deed, not of any more specific details such as time, place or the identity of the main offender.[218] Therefore, advertising for illegal abortions does not constitute abetting but giving aid, if the likelihood of procuring an abortion is increased. Namely, the advertiser lends psychic aid to the patient, if abortions are not merely approved of but praised, and technical aid, if actual opportunities are provided.

II. Law on Advertising in the Health Care System

In his statement on the repeal, the Federal Minister of Justice had guaranteed that any praise for abortion (whether legal or illegal) would "obviously" stay banned.[219] Section 12, in conjunction with section 15 paragraph 1 number 9, of the Law on Advertising in the Health Care System (*Heilmittelwerbegesetz* – HWG) would serve as replacement for section 219a StGB.[220] Before the changes made in the 2022 Act, the HWG was only

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[215] Hans Kudlich, '"Das hätte doch wohl jeder auch so finden können …"' [2013] JA 791, 793; OLG Oldenburg, Urteil vom 18.02.2013 – 1 Ss 185/12, BeckRS 2013, 04777.

[216] Joecks and Scheinfeld, '§ 26' (n 212) fn 70.

[217] Günter Heine and Bettina Weißer, '§ 26' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 19; Kudlich, '§ 26' (n 212) fn 12.1; Martin Heger, '§ 26' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2023) fn 5; Volker Haas, '§ 26' in Holger Matt and Joachim Renzikowski (eds), *Strafgesetzbuch Kommentar* (2nd edn, Vahlen 2020) fn 13.

[218] Wolfgang Joecks and Jörg Scheinfeld, '§ 27' in Bernd von Heintschel-Heinegg (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 1* (4th edn, C.H. Beck 2020) fn 103-4; Kudlich, '§ 26' (n 212) fn 20; Wolfgang Schild and Bernhard Kretschmer, '§ 27' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (6th edn, Nomos 2023) fn 17.

[219] Statement made by *Bundesjustizminister* Marco Buschmann on 25 January 2022, <www.bmj.de/SharedDocs/Artikel/DE/2022/0124_Aufhebung_Vorschrift_Paragraph_219a_Strafgesetzbuch.html> accessed 3 August 2022.

[220] BT-Drs 20/1635, 3; see also: Statement made on behalf of the Federation of German Female Lawyers (*Deutscher Juristinnenbund* – djb) by Maria Wersig, Leonie Steinl and Inga Schuchmann, 'Stellungnahme zum Gesetzesentwurf zur Aufhebung des Verbots der Werbung für den Schwangerschaftsabbruch (§ 219a StGB)' (Bundestag, 16 May 2022) <www.bundestag.de/resource/blob/895656/b9cc4647401687206b5e0360a98db216/Stellungnahme-Schuchmann-UND-Steinl_djb.pdf> accessed 26 November 2023, 8; statement by statement by Anna Katharina Mangold (Bundestag, 18 May 2022) <www.bundestag.de/resource/blob/895972/60a356c1cc9ad1e8a76e13dd572850ba/Stellungnahme-Mangold.pdf> accessed 26 November 2023, 5.

applicable in cases of medical necessity, since it required either schemes against diseases or sickly afflictions, or for the restoration of normal bodily functions (compare section 1 HWG).[221] Means, procedures, treatments and objects relating to abortion were then added as section 1 number 1 number 2 letter b. Running contrary to what the Government has promised, abortions were awarded a special privilege for advertising outside of expert groups (section 12 paragraph 2 sentence 2 number 1), though this does not extend to illegal lay abortions.[222] The extensive list of illicit advertising outside of expert circles has not been updated to include examples more typical of abortion cases, such as the promise of refuge.

Section 3 puts a ban on misleading advertising. Intentional contraventions are punishable by up to one year of imprisonment, or with a fine (section 14).[223] However, section 3 does not prohibit praising one's products and services. It covers unprofessional conduct, such as exaggeration.[224] In line with the purpose of the HWG in general, not the unborn but the mother's freedom of decision is meant to be protected.[225] Adding further to the HWG's lack of efficiency when it comes to abortion, any breach of a rule under it requires that it (indirectly) cause some sort of health hazard.[226]

III. Law on Fair Trading Practices

Section 17 of the HWG clarifies that the more general Law on Fair Trading Practices *(Gesetz gegen den unlauteren Wettbewerb – UWG)* is not disapplied. The only hard sanctions imposed by that law are the criminalization of misleading advertising (section 16 paragraph 1) and pyramid schemes (paragraph 2) and the imposition of administrative penalties on widespread infringements with a European Union dimension (section 19). Threatened by injunctions (section 8), damages (section 9) and confiscation of profits (section 10) are any unfair commercial practices, among which misleading practices (section 5), unacceptable nuisances (section 7) and aggressive practices (section 4a).

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221 Ulf Doepner and Ulrich Resse, *Heilmittelwerbegesetz Kommentar* (5th edn, C.H. Beck 2023) Introduction fn 68b.

222 Doepner and Reese (n 221) section 12 fn 104a, 104b.

223 Markus Zimmermann, 'Anforderungen an Arzneimittelwerbung nach dem Heilmittelwerbegesetz (HWG) und dem Gesetz gegen den unlauteren Wettbewerb (UWG)' in Stefan Fuhrmann, Bodo Klein and Andreas Fleischfresser (eds), *Arzneimittelrecht. Handbuch für die Rechtspraxis* (3th edn, Nomos 2020) fn Rn 140; Klaus Ulsenheimer, 'Strafbare Werbung und gewerbliche Betätigung des Arztes' in Adolf Laufs, Bern-Rüdiger Kern and Martin Rehborn (eds), *Handbuch des Arztrechts* (5th edn, C.H. Beck 2019) fn 31.

224 Kubiciel, 'Schriftfassung der Stellungnahme in der öffentlichen Anhörung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestages am 18.5.2022' (n 41) 7.

225 Pietsch (n 39) 80.

226 Zimmermann (n 223) fn 17; Clemens Bold, 'Wettbewerbsrechtliche Fragen des Krankenhauswesens' in Stefan Huster and Markus Kaltenborn, *Krankenhausrecht. Praxishandbuch zum Recht des Krankenhauswesens* (2nd edn, C.H. Beck 2017) fn 96; BGH, Urteil vom 06.05.2004 – I ZR 265/01, NJW-RR 2004, 1267 – Lebertrankapseln; Urteil vom 01.03.2007 – I ZR 51/04, NJW-RR 2007, 1338, 1340 – Krankenhauswerbung.

1. Definition of Commercial Practices

A commercial practice (*geschäftliche Handlung*) is "any conduct by a person for the benefit of that person's or a third party's business before, during or after the conclusion of a business transaction, which conduct is directly and objectively connected with promoting the sale or the procurement of goods or services." (section 2 paragraph 1 number 2). Said business (*Unternehmen*) is not defined in the Act itself, but it is identical to the organisational unit of the entrepreneur, hence the organization of any trade, craft or profession (compare section 2 paragraph 1 number 8).[227] "Professions" in the sense of the UWG are all self-employed freelancers (*Freiberufler)* such as lawyers, pharmacists, architects, or – most relevant – physicians.[228]

2. Aggressive Commercial Practices (Section 4a)

Section 4a of the UWG prohibits any commercial practice that is capable of substantially impairing the consumer's freedom of choice, be it by harassment, duress or other undue influence (*aggressive geschäftliche Handlungen*; section 4a paragraph 1 sentence 2). While undue influence does not necessarily require market power, the pressure in question has to be of such a nature as to be, for economic, legal, sociological, religious, intellectual, psychological or structural reasons, inescapable.[229] Advertising using time pressure is undue if the advertiser uses an excessively temporary offer to motivate the consumer to make a rash and badly thought-out decision.[230] Therefore, advertising for abortion services while making reference to the impending expiration of the twelve-week limit would fall under section 4a. Advertising while utilising fear generally also qualifies for section 4a, as long as there is some weight behind it.[231] Section 4a protects consumers in any situation where they are being deliberately exploited in specific misfortunes or other circumstances of enough weight to impair their judgement (section 4a paragraph 2 sentence 1 number 3). Therefore, serious worries about the financial and economic prospects of life with a child, the difficulties of parenthood in general, social ostracism et

[227] Christian Alexander, '§ 2 UWG' in Jörg Fritzsche, Reiner Münker and Christoph Stollwerck (eds), *BeckOK UWG* (21st edn, C.H. Beck July 2023) fn 76; BGH GRUR 2021, 1400, 1405 (fn 35); Helmut Köhler, '§ 2' in Helmut Köhler and others (eds), *Gesetz gegen den unlauteren Wettbewerb* (41st edn, C.H. Beck 2023) fn 2.22.

[228] Patrick Pommerening, 'Unternehmer' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 12; Peter Bähr, '§ 2 UWG' in Peter W Heermann and Jochen Schlinghoff (eds), *Münchener Kommentar zum Lauterkeitsrecht. Band 1* (3rd edn, C.H. Beck 2020) fn 70, 95; Alexander (n 227) fn 360.

[229] Benjamin Raue, '§ 4a UWG' in Peter W Heermann and Jochen Schlinghoff (eds), *Münchener Kommentar zum Lauterkeitsrecht. Band 1* (3rd edn, C.H. Beck 2020) fn 165.

[230] cf Isolde Hannamann, 'Aggressive geschäftliche Handlungen (§ 4a UWG)' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 102.

[231] ibid fn 85.

cetera, should they ever be explicitly or implicitly utilised in an advertisement, are still prohibited. In contrast, emotionally charged advertising is, in principle, allowed.[232]

3. Non-Compliance With Professional Diligence Opposite Consumers (Section 3 Paragraph 2)

Section 3 paragraph 2 obliges the physician to follow the requirements of professional diligence, meaning decent market customs, as well as the principle of bona fide (section 2 paragraph 1 number 9). While relevant for evaluating what qualifies as a market custom, section 3 paragraph 2 does not flatly refer to sector-specific guidelines or policies.[233] However, the imperative to act in good faith has been interpreted, in line with the interpretation of other blanket clauses in private law, to give effect to the fundamental values of the German legal order, especially the fundamental rights laid down in the Constitution.[234] The Government explicitly assumed that the UWG would combat the worst excesses previously falling under section 219a StGB by way of enforcing the right to human dignity, though they attributed that protection to section 3 paragraph 1.[235] In any case, in view of the Government's intentions in repealing section 219a StGB, not every single advertisement for abortion is to be subsumed under the UWG. Neither does every tasteless advertisement violate human dignity.[236]

4. Breach of Law (Section 3a)

Section 3a declares any action as unfair that is in breach of a law intended to regulate market conduct in the interest of market participants in a way that is suited to harm consumer interests, other market participants or competitors. Section 219a StGB may have protected consumers simply out of pure reflex, without any – even secondary – such purpose.[237] However, it is general opinion that, via section 3a UWG, section 3 HWG is given effect for the purposes of the UWG's mechanisms and sanctions.[238] Furthermore, the

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[232] Peter W Heermann, '§ 3 UWG' in Peter W Heermann and Jochen Schlinghoff (eds), *Münchener Kommentar zum Lauterkeitsrecht. Band 1* (3rd edn, C.H. Beck 2020) fn 351; BGH GRUR 2006, 75 Rn. 18 – Artenschutz;2007, 247 Rn. 21 – Regenwaldprojekt I; 2007, 251 Rn. 18 – Regenwaldprojekt II.

[233] Andreas Lubberger, 'Unlauterkeit' im Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 10; Olaf Sosnitza, '§ 3 UWG' in Peter W Heermann and Jochen Schlinghoff (eds), *Münchener Kommentar zum Lauterkeitsrecht. Band 1* (3rd edn, C.H. Beck 2020) fn 63.

[234] Patrick Pommerening, 'Unternehmerische Sorgfalt' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 14; Sosnitza (n 233) fn 42.

[235] BT-Drs 20/1635, 11.

[236] Sosnitza (n 233) fn 44.

[237] Wolfgang Schaffert, '§ 3a UWG' in Peter W Heermann and Jochen Schlinghoff (eds), *Münchener Kommentar zum Lauterkeitsrecht. Band 1* (3rd edn, C.H. Beck 2020) fn 562; Goldbeck, 'Die Werbung für den Abbruch der Schwangerschaft' (n 90) 107-109; Kaiserl and Eibach (n 151) 276.

[238] Zimmermann (n 223) fn 145; Doepner and Reese (n 221) section 3 fn 48; Matthias Sonntag and Benedikt Burger, 'Heilmittelwerbung' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 26; Bold (n 226) fn 102.

"laws" incorporated via section 3a are not limited to statutory provisions. They also include the byelaws of the federal and state medical association, and thus the professional law of physicians.[239] Therefore, the prohibition of any praising, misleading or comparative advertising according to section 27 paragraph 3 of the Exemplary Code of Medical Professional Conduct (*Muster-Berufsordnung für die in Deutschland tätigen Ärztinnen und Ärzte* – MBÖ-A) is in full effect as regards statutory competition law. Although hospitals are not bound to these strict professional ethics, they are still required by BVerfG jurisprudence to keep their information sober, objective and factual.[240]

5. Unfair Commercial Practices in General (Section 3 Paragraph 1)

So far, it has been demonstrated that the special clauses of the UWG prohibit advertisement that would put undue stress on the women afflicted, and really any subjectively loaded advertisement. One has to wonder which other practices can be deemed as "unfair" under the general clause of section 3 paragraph 1. Up until 2004, the UWG prohibited any „immoral", „indecent" or „improper" commercial practices (*Sittenwidrigkeit*). After the phrasing was changed to „unfair practices", this grammatically and historically empty choice of words had to be filled with new meaning. Namely, any interpretation would have to orient itself mainly around the purpose of the Act, and around the specifications already mentioned.[241] Section 1 paragraph 1 states the purpose of the Act to be the "protection of competitors, consumers and other market participants against unfair commercial practices" – which should not ring any new bells for the reader of this article – but also, at the same time, the protection of "the interests of the public in undistorted competition." Whether consumers are to be protected from unfair commercial practices in their rights and interests unrelated to their market behaviour is highly controversial. Due to section 3 paragraph 2, in all probability, one cannot draw any original consequences from section 3 paragraph 1 outside of business-to-business interactions.[242] The Federal Court of Justice (*Bundesgerichtshof* – BGH) has, for example, decided that advertising for foreign events, products and services that are banned in Germany does not constitute an unfair commercial practice if the ban in question does not qualify for section 3a.[243]

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[239] Nikolas Gregor, 'Rechtsbruch (§ 3a UWG' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 22; Schaffert (n 237) fn 51; Michael Jänich, 'Wettbewerbsrecht der freien Berufe' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 13.

[240] Bold (n 226) fn 95; Schaffert (n 237) fn 247; BVerfG NJW 2000, 2734.

[241] Lubberger (n 233) fn 2; Helmut Köhler, '§ 1' in Helmut Köhler and others (eds), *Gesetz gegen den unlauteren Wettbewerb* (41st edn, C.H. Beck 2023) fn 8.

[242] Lubberger (n 233) fn 15-16; cf Köhler (n 241) fn 20.

[243] Sosnitza (n 233) fn 104 ff; Harro Wilde and Bettina Linder, 'Internationales Wettbewerbsprivatrecht' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 64; BGH GRUR 2016, 513 – Eizellspende.

IV. Intermediary Conclusion

Aside from the special matter of misleading adverts, undue influence and advertising for criminal abortions (that end up actually taking place), the repeal of section 219a StGB retroactively decriminalised any advertising for abortion. German competition law has been mildly adjusted but largely treats becoming mothers akin to any other consumer. While praise for abortion is banned, this is done in a quite secretive fashion.

F. Conclusion and Future Prospects

In life, section 219a of the German Criminal Code was tasked with lowering the number of abortions twofold: by ensuring that the proper procedure would be followed, and by holding symbolic value against the normalisation of abortion. Simultaneously, the law allowed for anything but the unnecessary publicization of abortion. Neither its efficiency nor its unsuitability can be proven from the data available. In the opinion of the author, section 219a is not subject to any serious constitutional concerns.

It follows then, that the repeal was really a political decision, although it was mistaken for – or masked, in any case framed as –an injustice of constitutional importance. In their manifesto, the ruling coalition gave justification for the repeal by associating it with the "opportunity to have abortions without cost", "security of supply" and "women's right to self-determination."[244] These are all parameters that are, in the end, foreign to the BVerfG's approach to adjudicating on abortion. In his individual statement, the Federal Minister of Justice also dubbed the circumstance of women not being able to be informed by their own doctors an "anachronism."[245]

At the same time, section 219a is delegitimized even further by relocating provisions protecting other goods such as environmental protection or, ironically, animal rights, into the Criminal Code.[246] These actions, in conjunction with the aforementioned rhetoric might signify a slippery slope that will end up in the repeal of sections 218 and following and the complete legalisation of abortion. When this course is followed, or if rising abortion rates do end up calling the repeal of section 219a into question, all will be set for a third confrontation with the Constitutional Court.

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[244] Mehr Fortschritt wagen: Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit – Koalitionsvertrag zwischen SPD, Bündnis 90/Die Grünen und FDP (*Bundesregierung*, 24 November 2021) <www.bundesregierung.de/resource/blob/974430/1990812/1f422c60505b6a88f8f3b3b5b8720bd4/2021-12-10-koav2021-data.pdf?download=1> accessed 26 November 2023, 116.

[245] see n 219.

[246] Anna Leisner-Egensperger, 'Tanz um das geborene Kind. Der Schutz des ungeborenen Lebens und das Selbstbestimmungsrecht der Frau' (*Verfassungsblog*, 24 June 2022) <verfassungsblog.de/tanz-um-das-geborene-kind> accessed 28 September 2022; Pietsch (n 39) 81-82.

Articles

The Legalisation of Egg Donation

Lina Wendland[*]

*The article evaluates whether Germany could and should legalise egg donation in order to enable infertile or same-sex couples to conceive. The current criminalisation as per section 1 of the Embryo Protection Law (*Embryonenschutzgesetz– *ESchG) is deemed to be an inappropriate and makeshift solution, as legislative powers have been redistributed and social values have changed.*

The author surveys the legal situations in Spain, Austria and the United Kingdom. It is observed that, in all these jurisdictions, there are additional safeguards in place that are supposed to prevent commercialisation and the exploitation of egg donors. Because similar regimes could be introduced in Germany, banishing patients to foreign jurisdictions where they might not enjoy the same medical security and legal protection is held to be inadequate.

*Turning to the constitutional liceity of such a reform, the author determines that there is no proof that egg donation poses any danger to children's well-being. Neither are there significant health risks to the donor that would not be healed by their informed consent. It is argued that reproductive freedom under German constitutional law and the ECHR entails that any restrictions are subject to justification. Maintaining the ban would also violate equality between the sexes, as sperm donation is not subjected to the same scrutiny. The author endorses the Augsburg-Munich draft for a Reproductive Medicine Act (*Fortpflanzungsmedizingesetz*) based on medical indication. It is recommended that descent law is adjusted by disallowing challenges to the birth mother's legal motherhood status, and by recognizing the motherhood of the birth mother's female partner.*

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I. Introduction

In about 3 to 4% of women under the age of 40, the cause of (unwanted) childlessness is the inability of the oocytes to function.[1] One possibility for affected couples to circumvent this is through egg donation. This method involves a heterologous fertilisation procedure[2] in which the patient is implanted with eggs from a donor, which have been fertilised in an IVF procedure either with the sperm of her own partner or with donor sperm.[3] Medical indications for egg donation include insufficient ovarian function due to factors such as cancer treatment, medical conditions like endometriosis, hormone disorders, premature menopause, or multiple failed artificial insemination procedures.[4] Additionally, reciprocal egg donation offers a possibility for homosexual female couples to realise their desire for offspring.[5]

The traditional process of egg donation commences with a comprehensive medical, and in some countries also psychological, anamnesis of the donor.[6] The donor is then given a

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1 Heribert Kentenich and Klaus Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' in Henning Rosenau (ed) *Ein zeitgemäßes Fortpflanzungsmedizingesetz für Deutschland* (Nomos 2013) 20; Heribert Kentenich and Georg Griesinger, 'Zum Verbot der Eizellspende in Deutschland: Medizinische, psychologische, juristische und ethische Aspekte' (2013) 10 JReproduktionsmed Endokrinol 273, 273-74.

2 cf Hans-Ludwig Günther, Jochen Taupitz and Peter Kaiser, *Embryonenschutzgesetz – Juristischer Kommentar mit medizinisch-naturwissenschaftlichen Grundlagen* (2nd edn, Verlag W. Kohlhammer 2014) A IV fn 215 tab 1.

3 cf Wolfram Eberbach, 'Eine kurze Geschichte der Fortpflanzungsmedizin' (2020) 38 MedR 167, 176; Nationale Akademie der Wissenschaften Leopoldina and Union der deutschen Akademien der Wissenschaften e.V., *Fortpflanzungsmedizin in Deutschland – für eine zeitgemäße Gesetzgebung* (2019) 65.

4 Marion Depenbusch and Askan Schultze-Mosgau, 'Eizell- und Embryonenspende' in Klaus Diedrich, Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (2nd edn, Springer 2020) 287, 288; Kentenich and Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' (n 1) 20; Leopoldina (n 3) 20, 65-66.

5 Christian Müller-Götzmann, *Artifizielle Reproduktion und gleichgeschlechtliche Elternschaft* (Springer 2009) 242.

6 Giselind Berg, 'Die Eizellspende – eine Chance für wen?' in Gisela Bockenheimer-Lucius, Petra Thorn and Christiane Wendehorst (eds), *Umwege zum eigenen Kind* (Universitätsverlag Göttingen 2008) 239, 240.

contraceptive, synchronising the cycles of the donor and the recipient, followed by hormone treatment to first suppress the menstrual cycle and subsequently stimulate ova production.[7] The final retrieval of the eggs for donation is conducted through a (minimally) invasive procedure.[8]

In some countries, an alternative method known as "egg-sharing" is practised. Therein, a woman undergoing IVF has some of the eggs stimulated by the treatment removed for donation.[9]

However, egg-sharing brings various uncertainties and risks, including an increased risk of ovarian hyperstimulation syndrome in the donor.[10]

While egg donation is prohibited in Germany, it is permitted in most other European countries. However, efforts to legalise egg donation in Germany are underway, with specific legislative proposals already in place.11 The current coalition in the Federal Government intends to initiate a reform in this area, and a reform commission has been established. In light of this context, this paper aims to examine the extent to which ethical or legal reasons may be opposed to the legalisation of egg donation in Germany and how a potential legal regulation could be structured.

II. Current legal situation in Germany

According to section 1 paragraph 1 number 1 of the Embryo Protection Law (*Embryonenschutzgesetz*– ESchG), it is prohibited to transfer a foreign unfertilised ovum to a woman. Classified as an offence of activity,[11] the wording of the provision does not penalise the occurrence of a pregnancy, but the performance of the procedure itself. Section 1 paragraph 1 number 1 ESchG criminalises the act of transfer; whereas section 1 paragraph 1 number 2 ESchG prohibits the fertilisation of an ova, unless the pregnancy is intended to occur within the donor. Section 1 paragraph 3 number 1 ESchG establishes a personal exemption from criminal liability, such that the women affected (donor and

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[7] Berg (n 6) 240; Depenbusch and Schultze-Mosgau (n 4) 288.

[8] cf Ralf Müller-Terpitz, '§ 1 ESchG' in Andreas Spickhoff (ed), *Medizinrecht* (4th edn, C.H. Beck 2022) fn 7; Berg (n 6) 240.

[9] Berg (n 6) 240; Sigrid Graumann, 'Eizellspende und Eizellhandel – Risiken und Belastungen für die betroffenen Frauen' in Gisela Bockenheimer-Lucius, Petra Thorn and Christiane Wendehorst (eds), *Umwege zum eigenen Kind* (Universitätsverlag Göttingen 2008) 175, 180; Kentenich and Griesinger (n 1) 275; Leopoldina (n 3) 67.

[10] Kentenich and Griesinger (n 1) 275; Leopoldina (n 3) 67.

[11] Günther, Taupitz and Kaiser (n 2) section 1 paragraph 1 number 1 fn 22; Rolf Keller, Hans-Ludwig Günther and Peter Kaiser, *Embryonenschutzgesetz* (Kohlhammer 1991) section 1 paragraph 1 number 1 fn 17; Leopoldina (n 3) 67.

recipient alike) are not subject to punishment, but solely the medical personnel (physicians and other reproductive medical practitioners).[12]

The strongly condemned[13] design of the ESchG as a criminal statute was motivated by opportunism more than principle. At the time of the ESchG's passing in 1990, the field of reproductive medicine was still in its nascent stages, thus lacking specific federal legislative authority.[14] Under the German constitution (Basic Law or *Grundgesetz* – GG), every legislative power not (expressly) granted to the federation, or the federation and the states collectively, remains with the states (article 70 section 1 GG). However, in order to regulate assisted reproduction, the federal government utilised its competence for criminal law in order to enact the ESchG. Since 1994, Article 74 section 1 number 26 GG expressly grants legislative authority to the federal government in the field of reproductive medicine, yet there has still been no reform of the ESchG or the introduction of some sort of Reproductive Medicine Act which would move away from the current criminal framework.

III. International references

1. Foreign regulations

Egg donation is permitted (under varying conditions) in most European countries[15] Notably, Norway legalised the practice in 2020.[16] The subsequent section concisely summarises the distinct legal situations in three selected European countries.

a. Spain

Spain operates under the "Law on Techniques of Human Assisted Reproduction" (LTRHA),[17] enacted in 2006, which allows both male and female gamete donation.

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[12] See a 2008 judgement handed down by the Regional Court of Berlin: LG Berlin, Urteil vom 25. November 2008 – 15 O 146/08, juris. See also Peter Häberle, '§ 1 ESchG' in Georg Erbs, Max Kohlhaas and Peter Häberle (eds), *Strafrechtliche Nebengesetze* (246th edn, C.H. Beck 2022) fn 12; Keller, Günther and Kaiser (n 11) before section 1 paragraph 2 fn 87; section 1 paragraph 3 fn 1.

[13] Hartmut Kreß, 'Grenzziehung für Ethikkommissionen' (2021) 39 MedR 1, 6; Josef Franz Lindner, 'Ein zeitgemäßes Fortpflanzungsmedizinrecht für Deutschland' (2019) 52 ZRP 171; Ralf Müller-Terpitz, '"ESchG 2.0" - Plädoyer für eine partielle Reform des Embryonenschutzgesetzes' (2016) 49 ZRP 51, 53.

[14] Sebastian Braun, 'Vorbemerkungen ESchG' in Dorothea Prütting (ed), *Medizinrecht Kommentar* (6th edn, Luchterhand 2022); Müller-Terpitz, '"ESchG 2.0" - Plädoyer für eine partielle Reform des Embryonenschutzgesetzes' (n 13) 53; Ralf Müller-Terpitz, 'Fortpflanzungsmedizinrecht – quo vadis?' (2022) 40 MedR 794, 796.

[15] Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7; Leopoldina (n 3) 68.

[16] By amending the "Act relating to the application of biotechnology in human medicine" (Act of 5 December 2003 No. 100).

[17] Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida, BOE Nr 126 (27 May 2006) 19947; see also Josep Ferrer Riba, 'Künstliche Fortpflanzung im spanischen Recht' in Anatol Dutter and others (eds), *Künstliche Fortpflanzung und europäisches Familienrecht* (Gieseking 2015) 229, 229-30.

According to Article 5.1, 5.3 LTRHA,[18] the underlying agreement has to be non-remunerative, and any financial compensation of the donor should not act as an incentive for the donation.[19] However, the level of compensation is not standardised or monitored, leading to average payments of €900. Given Spain's low minimum wage of €5.76,[20] such compensation can no longer be considered a mere expense allowance and inadvertently presents a financial incentive for egg donation.[21] Differing from most countries, egg donation in Spain is conducted anonymously as per Article 6.4 LTRHA.[22] Only non-identifiable genetic data about the donor may be disclosed to the intended parents or children.[23] Spain is a popular destination for foreign patients, which may be attributed to its liberal regulations in reproductive medicine and the widespread availability of oocytes.[24]

b. Austria

In Austria, egg donation has been permitted since 2015, following a period during which affected couples had filed complaints against the previous ban for violations of the European Convention of Human Rights (ECHR). According to section 3 paragraph 3 of the Austrian Reproductive Medicine Act (*Österreichisches Fortpflanzungsmedizingesetz* – Ö-FMedG),[25] egg donation may be carried out if the recipient is incapable of reproducing and has not yet reached the age of 45.[26] Similar to Spain, Austria also mandates non-remuneration for egg donation under section 16 paragraph 1 Ö-FMedG. Section 16 paragraph 1 sentence 2 Ö-FMedG specifies that genuine compensation for the donor's expenses is not to be regarded as payment and is therefore lawful. Unlike in Spain, however, egg donation is not conducted anonymously: according to section 20 paragraph 2 Ö-FMedG, the child may request the identity of the genetic mother after reaching the age of 14.

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[18] LTRHA, BOE Nr 126 (27 May 2006) 19947, 19949.
[19] cf Ferrer Riba (n 17) 237.
[20] beck-online Redaktion Fachdienst Arbeitsrecht, 'Mindestlöhne: Im EU-Mittel deutlich schwächere Zuwächse' (2021) FD-ArbR 436561.
[21] ibid.
[22] LTRHA, BOE Nr 126 (27 May 2006) 19947, 19950.
[23] Ferrer Riba (n 17) 238.
[24] Sven Bergmann, *Ausweichrouten der Reproduktion* (Springer 2014) 79.
[25] Bundesgesetz, mit dem Regelungen über die medizinisch unterstützte Fortpflanzung getroffen werden (Fortpflanzungsmedizingesetz – FMedG), BGBl Nr 275/1992, see www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10003046.
[26] For the situation in Austria, see Susanne Ferrari, 'Künstliche Fortpflanzung im österreichischen Recht' in Anatol Dutter and others (eds), *Künstliche Fortpflanzung und europäisches Familienrecht* (Gieseking 2015) 181, 195-96.

c. United Kingdom

Egg donation is also permitted in the United Kingdom.[27] The Human Fertilisation and Embryology Act 1990 (HFEA) established the current regulations, with some amendments made

in 2008.[28] In the UK, egg donation is also regulated as altruistic act: pursuant to sections 12 paragraph 1 letter e, 41 paragraphs 8 and 9 HFEA, payments outside approved limits (reimbursements) are prohibited, with the maximum compensation for egg donation capped at 750 pounds.[29] This limit might seem relatively high at first glance, but in relation to the UK's minimum wage, which stands at about €11.31 for employees aged 23 and above,[30] the financial significance of the payment to donors is not as pronounced as in Spain. Similar to Austria, the UK does not provide for anonymous donations. Section 31 and the following sections of the HFEA outline provisions for the so-called "donor register," though the right to knowledge of the child's parentage was only introduced through a 2004 amendment,[31] effective from April 1, 2005.[32]Ever since, akin to the situation in Austria, children of donors may apply for basic genetic information at the age of 16 and identifiable information at the age of 18.[33]

d. Interim conclusion

Evidently, the regulations in the countries permitting egg donation are tailored to the interests of the donor, the intended parents, and the child. The various bans on commercialisation are intended to counteract the exploitation of donors, necessitating oversight to monitor compensation levels. Spain deviates from the other nations in imposing anonymity requirements on egg donation. While the non-traceability of the donor could potentially be an additional incentive to donate, anonymity might prove challenging to justify in terms of the interests of the child.

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[27] There might be deviations as far as Scotland is concerned, see Jens M Scherpe, 'Künstliche Fortpflanzung im Recht von England und Wales' in Anatol Dutter and others (eds), *Künstliche Fortpflanzung und europäisches Familienrecht* (Gieseking 2015) 295, 296 fn 3.

[28] Human Fertilisation and Embryology Act 2008.

[29] Scherpe (n 27) 298.

[30] cf Arbeitsrechte.de, 'Gilt der Mindestlohn in Großbritannien?' (Arbeitsrechte.de, 11 September 2023) <www.arbeitsrechte.de/mindestlohn-grossbritannien/> last accessed 26 September 2023.

[31] Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511.

[32] cf Scherpe (n 27) 321-22.

[33] cf Scherpe (n 27) 322.

2. National impact

a. "Reproductive tourism"

Due to the prohibition of egg donation in Germany, many couples experiencing involuntary infertility seek treatment abroad. This affects several thousand treatment cycles of German women per year:[34] According to a study on reproductive medical procedures performed on foreign women in six examined countries, 44.6% of German women treated in 2010 travelled to the respective country solely for egg donation.[35] Accusations levelled against "reproductive tourism"[36] are mainly aimed at the circumvention of the law.[37] However, by maintaining the ban on egg donation, the German legislature inherently accepts the evasive migration abroad. The significance of infertility, a genuinely distressing and psychologically burdensome issue for affected couples,[38] is often overlooked. Seeking assistance abroad provides them with an alternative that is not available in Germany. Furthermore, German prohibition subjects patients entirely to the standards of the respective countries when undergoing donation there.[39] Thus, in the case of treatment abroad under the anonymity of the donor (namely in Spain), the child's moral or legal right to knowledge of genetic parentage cannot be asserted in Germany.[40] German insurance law does not entitle patients treated abroad to partial or full reimbursement even in dealings with private health insurers.[41] Furthermore, it can be assumed that the domestic medical care of aspiring mothers is negatively impacted by the fact that women might not disclose their donation due to fearing stigmatisation, and that gynaecologists, constrained by prohibitive norms, lack experience in pregnancies

[34] Heribert Kentenich and Klaus Pietzner, 'Überlegungen zur gesetzlichen Nachbesserung in der Reproduktionsmedizin' in Helmut Frister and Dirk Olzen (eds), *Reproduktionsmedizin – Rechtliche Fragestellungen* (Düsseldorf University Press 2009) 59, 68; Leopoldina (n 3) 69.

[35] F Shenfield and others, 'Cross border reproductive care in six European countries' (2010) 26 Human Reproduction 1361, 1365-66.

[36] Among others Eva-Maria Knoll, 'So weit gehen für ein Kind: Reproduktionstourismus als grenzüberschreitender Umweg' in Gisela Bockenheimer-Lucius, Petra Thorn and Christiane Wendehorst (eds), *Umwege zum eigenen Kind* (Universitätsverlag Göttingen 2008) 63 ff; Ulrich M Gassner,'Legalisierung der Eizellspende?' (2015) 48 ZRP 126; Ulrich Pecks, Nicolai Maass and Joseph Neulen,'Grenzüberschreitung in der reproduktiven Medizin' (2012) 45 Der Gynäkologe 476, 476.

[37] Knoll (n 36) 69 ff.

[38] A more detailed treatment of the psychosocial aspects of unwanted childlessness can be found in Alexandra Esser, *'Ist das Verbot der Leihmutterschaft in Deutschland noch haltbar?* (Nomos 2021) 47-48; Almut Dorn and Tewes Wischmann, 'Psychosomatik und psychosoziale Betreuung in der Reproduktionsmedizin' in Klaus Diedrich, Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (2nd edn, Springer 2020) 491, 494.

[39] Marina Wellenhofer, '1591 BGB' in Dieter Schwab (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10 – Familienrecht II* (8th edn, C.H. Beck 2020) fn 48; Kentenich and Pietzner, 'Überlegungen zur gesetzlichen Nachbesserung in der Reproduktionsmedizin' (n 34)68.

[40] Wellenhofer, '1591 BGB' (n 39) fn 32; Kentenich and Pietzner, 'Überlegungen zur gesetzlichen Nachbesserung in der Reproduktionsmedizin' (n 34) 68; Martin Löhnig, 'Auskunft über die eigene Abstammung' (2022) 75 NJW 1061, 1063; Leopoldina (n 3) 69.

[41] cf German Federal Court of Justice, BGH NJW 2017, 2348, 2349 ff (fn 16ff); Kyrill Makoski, 'Recht der Reproduktionsmedizin' in Tilman Clausen and Jörn Schröder-Printzen (eds), *Münchner Anwaltshandbuch Medizinrecht* (3rd edn, C.H. Beck 2020) fn 74.

resulting from egg donation.[42] Accordingly, patients undergoing treatments abroad find themselves inadequately protected, both medically and legally. Nonetheless, the legislator continues to maintain the ban on egg donation, despite even recognizing the issue of emigration, as demonstrated by the explanatory memorandum to the draft of the reform of the law of parentage.[43]

b. Criminal liability of German physicians for egg donation abroad

While women seeking egg donation abroad cannot be sanctioned in Germany (see above), medical professionals can be penalised not only for the procedure itself but also for aiding or preparatory acts. For these purposes, activities merely involving advice on options for lawful egg donation abroad come into consideration.[44]

Even where the act itself is not criminalised in the jurisdiction where it is performed, an act of participation performed in Germany results in punishment according to section 1 paragraph 1 number 1 ESchG in conjunction with section 9 paragraph 2 sentence 2 of the German Criminal Code (*Strafgesetzbuch* – StGB).[45] This ignores the principle of accessory liability for participation.[46] Whether an act qualifies as participation is dependent on the intensity of its influence on the patient. A neutral indication of foreign legal conditions would likely not suffice to qualify as a sufficient, whereas specific referrals to (partner) clinics might cross the line to incitement under section 27 paragraph 1 StGB.[47]

IV. Discussion of the legalisation of egg donation

The question of whether egg donation should be legalised in Germany touches upon various legal spheres as well as (medical) ethical considerations, resulting in a controversial debate encompassing numerous facets. The following sections dissect the topic into ethical and legal inquiries, recognizing that there is an inevitable overlap in certain respects.

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[42] *Depenbusch and Schultze-Mosgau* (n 4) 290; Pecks, Maass and Neulen (n 36) 476, 478.

[43] cf legislative proposal by the German Federal Government, BT-Drs 13/4899, 82.

[44] Christina Lang, 'Das Strafbarkeitsrisiko des deutschen Arztes bei grenzüberschreitenden Sachverhalten' (2018) 36 MedR 568, 569; Dorothea Magnus, 'Kinderwunschbehandlungen im Ausland: Strafbarkeit beteiligter deutscher Ärzte nach internationalem Strafrecht (§ 9 StGB)' (2015) 35 NStZ 57, 60.

[45] Lang (n 44) 570; Magnus (n 44) 60.

[46] Kai Ambos, '§ 9 StGB' in Bernd von Heintschel-Heinegg (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 1* (4th edn, C.H. Beck 2020) fn 39; Lang (n 44) 570; Magnus (n 44) 61.

[47] Rudolf Ratzel, 'Reproduktionsmedizin' in Rudolf Ratzel and Bernd Luxenburger (eds), *Handbuch Medizinrecht* (4th edn, C.F. Müller 2021) fn 5; Magnus (n 44) 60.

1. Ethical examination

The subsequent section addresses the three principal aspects predominantly invoked in the ethical discussion against the legalisation of egg donation.

a. Children's well-being

The German ban on egg donation is rooted in the goal of avoiding a so-called "split motherhood."[48] The prohibition seeks to safeguard the child's best interests by preventing a discrepancy between genetic and gestational or social motherhood.[49] Constitutionally, the child's best interests are indirectly protected both under Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 GG and by Article 6 paragraph 2 GG.[50]

The general right to one's personality anchored in Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 GG provides comprehensive fundamental rights protection, offering broad safeguards against encroachments upon the personal sphere of individuals. It encompasses fundamental rights such as the confidentiality of personal data, the right to one's own image, and the right to knowledge of one's personal ancestry.

Article 6 paragraph 2 GG delineates the parental right, such that parents possess the right to raise and care for their children pursuant to the paramount principle of the welfare of the child. The precise meaning of "child's well-being" and how it is measured both remain undefined.[51] This lack of precision renders its exact meaning dependent on the context in which it is used. While in the case of children who have already been born, the child's well-being pertains to its welfare in the family environment,[52] this concept cannot be conferred to the field of reproductive medicine. In the context of assisted reproductive techniques, the interests of a yet-to-be-conceived child are not directly at stake, as the child's existence has yet to be realised.[53] Even though some argue for a "pre-effect" of children's rights before the application of medical measures,[54] the argument of the child's welfare remains largely of an ethical nature. If one were to assume a violation of the rights of

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48 Federal Government draft for a law on embryonic protection, BT-Drs 11/5460, 6-7; cf BGH NJW 2017, 2348, 2350 (fn 22); Directive issued by the Federal Chamber of Physicians (Richtlinien zur Durchführung der assistierten Reproduktion, DÄBl 1998, 78, 82).

49 BT-Drs 11/5460, 7; DÄBl 1998, 78, 82.

50 Müller-Terpitz, '§ 1 ESchG' (n 8) fn 6.

51 AG Daun FamRZ 2008, 1897, 1879-80 (Local Court of Daun, Rhineland-Palatinate); Katharina Lugani, '§ 1696 BGB' in Dieter Schwab (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10 – Familienrecht II* (8th edn, C.H. Beck 2020) fn 26.

52 Concerning the critical intensity of endangerment, compare BGH NJW 2023, 56, 59 ff.

53 cf AG Augsburg medstra 2016, 383 (fn 14) (Local Court in Augsburg, Bavaria); Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7; Ralf Müller-Terpitz, 'Art 6 GG' in Andreas Spickhoff (ed), *Medizinrecht* (4th edn, C.H. Beck 2022) fn 13; Mathias Reinke, *Fortpflanzungsfreiheit und das Verbot der Fremdeizellspende* (Duncker & Humblot 2008) 155; Dagmar Coester-Waltjen, 'Anmerkung zu OLG München, Urt. v. 22.02.2017 - 3 U 4080/16' (2017) 63 FamRZ 904, 909.

54 Günther, Taupitz and Kaiser (n 2) section 1 paragraph 1 number 1 fn 8; Christian Hillgruber, 'Gibt es ein Recht auf ein Kind?' (2020) 75 JZ 12, 15.

children conceived through egg donation by that same method of conception, they would also essentially problematize their very existence.[55]

The argument to protect life by preventing the inception of life is inherently contradictory and therefore cannot be invoked against the implementation of reproductive medical measures. Rather, only the subsequent psychological development can be a suitable subject for the debate.

Again, the fundamental argument for banning egg donation in 1990 was the concern over developmental psychological disorders in the child arising from the divergence between the genetic and gestational mother.[56] According to this line of thought, the deep biological and consequently psychosocial connection to two different mother figures – one through genetic relation, the other through the bond formed during pregnancy (and afterwards)[57] – could potentially lead to issues in the child's identity formation.[58] However, the legislative justification – now over 30 years old – relies on assumptions and apprehensions regarding child welfare,[59] but is lacking any concrete data or psychological studies.[60]

While some voices, based on the absolute importance of child protection, assume that the necessity for substantiating these doubts is less imperative,[61] the prohibition of a medically feasible and successful[62] measure solely on the basis of doubts is not tenable. The premise that developmental disorders in the affected children "cannot be ruled out" cannot serve as a basis for presuming a threat to child welfare.[63] In fact, there is no scientific evidence scientifically substantiating an impairment of the child's well-being – quite the opposite: at least one examination revealed that the probability of psychological

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55 Müller-Terpitz, 'Art 6 GG' (n 53) fn 13; Reinke (n 53) 155.

56 BT-Drs 11/5460, 6-7; cf BGH NJW 2017, 2348, 2350 (fn 22); DÄBl 1998, 78, 82.

57 Ulrike Beitz, *Zur Reformbedürftigkeit des Embryonenschutzgesetzes* (Peter Lang 2009) 221; Ernst Benda, 'Humangenetik und Recht – eine Zwischenbilanz' (1985) 38 NJW 1730, 1733; Adolf Laufs, 'Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen: Zur zivilrechtlichen Abteilung' (1986) 41 JZ 769, 775.

58 Keller, Günther and Kaiser (n 11) section 1 paragraph 1 number 1 fn 7; Beitz (n 57) 221; Benda (n 57)1733.

59 cf BT-Drs 11/5460, 7; DÄBl 1998, 78, 82.

60 Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7; Janet Opper, *Das Verbot der präkonzeptionellen Geschlechtswahl* (Nomos 2020) 140-41.

61 cf Keller, Günther and Kaiser (n 11) section 1 paragraph 1 number 1 fn 8; Eberbach (n 3) 178.

62 Kentenich and Pietzner, 'Überlegungen zur gesetzlichen Nachbesserung in der Reproduktionsmedizin' (n 34) 67; Kentenich and Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' (n 1) 20.

63 Günther, Taupitz and Kaiser (n 2) section 1 paragraph 1 number 1 fn 7; Henning Rosenau, 'Strafrechtliche Risiken bei Fortpflanzungsmedizin und Gentechnologie' in Frank Saliger and Michael Tsambikakis, *Strafrecht der Medizin. Handbuch für Wissenschaft und Praxis* (C.H. Beck 2022) fn 84; Makoski (n 41) fn 135; Gassner (n 36) 126; Jens Kersten, 'Regulierungsauftrag für den Staat im Bereich der Fortpflanzungsmedizin' (2018) 37 NVwZ 1248, 1251.

or cognitive disorders in children conceived through gamete donation is no higher than in naturally conceived children.[64]

The parent-child relationship and familial bond, which are in principle pivotal for child well-being,[65] can indeed be positively characterised by the parent's strong desire for a child, resulting in an abundance of love and appreciation.[66]

Consequently, the avoidance of a split motherhood for the child's benefit alone is an insufficient rationale for a prohibition of egg donation.

b. Medical risks

There are also certain risks and dangers for the women involved when undergoing egg donation. As mentioned, the procedure for extracting eggs is an invasive procedure preceded by hormone therapy, and is therefore per se associated with health risks. The potential for ovarian hyperstimulation syndrome (OHSS) in the donor due to the egg retrieval procedure is particularly noteworthy.[67] There are also risks for the recipient concerning the pregnancy,[68] but these will not be delved into here. It should be noted that egg donation is not an intervention that is medically indicated for the donor. While it is not intrinsically contraindicated or impermissible,[69] the procedure, without sufficient justification, nevertheless violates the bioethical principle of non-maleficence, as formulated by Beauchamp and Childress.[70] According to this principle, the donation should not subject the donor to disproportionate risks, and "informed consent" must be obtained after a particularly conscientious risk disclosure.[71] However, prohibiting donation solely based on health risks would be too narrow-minded. Modern procedures minimise the risks and intensity of the intervention.[72] Moreover, there are generally no

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[64] S Golombok and others, 'Families created by gamete donation: follow-up at age 2' (2005) 20 Human Reproduction 286, 292.

[65] Philip Czech, *Fortpflanzungsfreiheit* (Jan Sramek 2015) 186; Reinke (n 53) 161-62; Leopoldina (n 3) 70.

[66] Rosenau (n 63) fn 84; Leopoldina (n 3) 70.

[67] Final Report by an Investigative Commission of the German Parlament on "law and ethics in modern medicine", BT- Drs 14/9020, 36; Leopoldina (n 3) 66-67; Kentenich and Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' (n 1) 21.

[68] cf Depenbusch and Schultze-Mosgau (n 4) 292; Berg (n 6) 246; Leopoldina (n 3) 66.

[69] cf Isabell Richter, *Indikation und nicht-indizierte Eingriffe als Gegenstand des Medizinrechts* (Duncker & Humblot 2018) 195 ff; Anja Schneider, *Body Integrity Identity Disorder* (Nomos 2016) 174.

[70] Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (OUP 2019) 106 ff; BT-Drs 14/9020; for further information on the concept of non-malfeasance see Schneider (n 69) 142 ff.

[71] cf OLG München BeckRS 2011, 16307 (fn 31) (Higher Regional Court of Munich, Bavaria); Kentenich and Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' (n 1) 22.

[72] Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7; Leopoldina (n 3) 70.

negative long-term effects to anticipate; in particular, according to scientific findings, egg donation does not impact the donor's fertility.[73]

Hence, medical aspects related to the donor's health protection are not sufficient grounds for justifying a ban on egg donation – instead, the focus should be on preventing harm to the donor through medical expertise and comprehensive information.

c. Protection of the donor against exploitation

The unindicated intervention in the physical integrity of the donor takes place solely for the benefit of third parties, those being the intended parents. There is an ongoing concern that compensation payments might not solely cover actual expenses but could also create a financial incentive for egg donation, as observed in Spain.[74] This situation could promote the commercialisation of egg donation and pregnancy, running counter to basic moral and ethical concepts, and potentially exploiting financially disadvantaged women by "selling" their eggs.[75] High remuneration poses a real risk that women might view the risks of egg donation as a way out of financial distress, despite their likely refusal under normal circumstances. However, a comprehensive ban on egg donation is not an appropriate solution. Instead, in the case of legalisation, clear regulations are necessary to ensure the absence of remuneration and establish oversight mechanisms to prevent commodification.[76]

2. Legal aspects

In the following, the ban on egg donation will be discussed in the light of the GG and the ECHR. Explicit EU-level directives for the legalisation of egg donation do not exist, as EU Directive 2004/23/EC[77] exclusively regulates quality and safety standards for the states conducting egg donation. Article 4 (3) of the Directive explicitly states that the question of "whether" to legalise egg donation falls within the discretionary power of national legislatures due to its ethically and morally controversial context.

a. Reproductive freedom of intended parents

There is agreement that the freedom to decide whether to reproduce or not is

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[73] Dominic Stoop and others, 'Effect of ovarian stimulation and oocyte retrieval on reproductive outcome in oocyte donors' (2012) 97 Fertility and Sterility 1328, 1329; Leopoldina (n 3) 70.

[74] Beitz (n 57) 224; cf Hubert Hüppe, 'Legalisierung der Eizellspende?' (2015) 48 ZRP 126.

[75] Beitz (n 57) 224; cf Hüppe (n 74) 126.

[76] Rosenau (n 63) 85; Gassner (n 36) 126; Barbara Klopstock,'"Drei-Eltern-Babys" - Besteht Reformbedarf in Deutschland?' (2017) 49 ZRP 165, 166; Müller-Terpitz, '"ESchG 2.0" - Plädoyer für eine partielle Reform des Embryonenschutzgesetzes' (n 13) 53-54.

[77] Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells [2004] OJ L 102/48.

constitutionally protected.[78] However, this protection does not grant an explicit right or entitlement to support in family formation, but a right of defence against state interference or hindrances in starting one's own family.[79] In Germany, the fundamental rights enshrined in the Constitution are generally understood as defensive rights against governmental interventions. The state is prohibited from encroaching upon the protected sphere of a citizen's fundamental right without sufficient justification. Whether this right of defence can be derived from the general right of freedom of action according to Article 2 paragraph 1 GG (being the freedom to undertake or refrain from any action and ensuring that one's personal sphere of life is not subject to governmental constraints)[80], the general right of personality according to Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 GG,[81] from the protection of marriage and family according to Article 6 paragraph 1 GG,[82] or a combination of any of those[83] is ultimately secondary[84] – the right to reproduction and the free decision on family foundation are immanently secured by one or more of these fundamental rights. Disagreement arises as regards the extent of the protection's scope, namely whether it also encompasses the utilisation of assisted reproduction measures, or "merely" the decision for or against the (natural) establishment of a family. While some argue in favour of the latter[85], the inclusion of reproductive medicine measures is warranted,[86] given the fundamentally broad interpretative scope of fundamental rights.[87] Furthermore, medical advancements in assisted reproductive medicine and the accompanying societal changes underscore the need for constitutional protection of utilising reproductive medical techniques, which illustrates the necessary adaptability of fundamental rights to social developments.[88] Concerns that the inclusion of assisted reproduction measures might blur the line to

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[78] cf Lindner, 'Ein zeitgemäßes Fortpflanzungsmedizinrecht für Deutschland' (n 13) 173; Leopoldina (n 3) 35; Nationaler Ethikrat, *Genetische Diagnostik vor und während der Schwangerschaft* (2009) 121.

[79] BVerfGE 117, 316, 329 (German Federal Constitutional Court); M Wellenhofer, '1591 BGB' (n 39) fn 48; Müller-Terpitz, 'Art 6 GG' (n 53) 3 f; Nationaler Ethikrat (n 78) 122 f; Esser (n 38) 240; Julia Schlüter, *Schutzkonzepte für menschliche Keimbahnzellen in der Fortpflanzungsmedizin* (LIT Verlag 2008) 177.

[80] Thilo Ramm, 'Die Fortpflanzung – ein Freiheitsrecht?' (1989) 44 JZ 861, 870, 874.

[81] Carina Dorneck, *Das Recht der Reproduktionsmedizin de lege lata und de lege ferenda – Eine Analyse zum AME-FMedG* (Nomos 2018) 69; Opper (n 60) 64 ff; Gassner (n 36) 126; Kersten (n 63) 1249.

[82] Frauke Brosius-Gersdorf, 'Art 6 GG' in Horst Dreier (ed), *Grundgesetz Kommentar. Band 1* (3rd edn, Mohr Siebeck 2013) fn 117; Joachim Gernhuber and Dagmar Coester-Waltjen, *Familienrecht* (7th edn, C.H. Beck 2020) section 6 fn 13; Müller-Terpitz, 'Art 6 GG' (n 53) fn 2; Ralf Müller-Terpitz, 'Art 2 GG' in Andreas Spickhoff (ed), *Medizinrecht* (4th edn, C.H. Beck 2022) fn 10.

[83] cf Schlüter (n 79) 174, 182; Werner Heun, 'Restriktionen assistierter Reproduktion aus verfassungsrechtlicher Sicht' in Gisela Bockenheimer-Lucius, Petra Thorn and Christiane Wendehorst (eds), *Umwege zum eigenen Kind* (Universitätsverlag Göttingen 2008) 49, 51-52.

[84] Lindner, 'Ein zeitgemäßes Fortpflanzungsmedizinrecht für Deutschland' (n 13) 173; Leopoldina (n 3) 35; Nationaler Ethikrat (n 78) 121-22.

[85] Christian von Coelln, 'Art 6 GG' in Michael Sachs (ed), *Grundgesetz Kommentar* (9th edn, C.H. Beck 2021) fn 30.

[86] Esser (n 38) 240; Opper (n 60) 76; Reinke (n 53) 136.

[87] cf BVerfGE 6, 55, 72; 32, 54, 70-71.

[88] Müller-Terpitz, 'Art 6 GG' (n 53) fn 5; Esser (n 38) 240; Reinke (n 53) 136-37.

morally questionable methods[89] can be addressed by understanding the basic right as expressing a principle-exception relationship:[90] morally indefensible measures would be explicitly prohibited, while all other assisted reproductive measures would be covered by the freedom to reproduce. Reproductive freedom does not absolutely preclude legislative restrictions on reproductive techniques.[91] However, if the decision to reproduce (naturally or with medical assistance) is constitutionally protected as a negative right, any prohibition of certain reproductive techniques would need to be constitutionally justified.[92] As discussed earlier, the child's well-being, while being one of the provision's purposes, is insufficient to justify a comprehensive prohibition. The rights of all parties involved will be described below and must be taken into account in the overall design of any potential legalisation framework in order to achieve a constitutionally valid balance of interests.

b. Right of the child to knowledge of descent

The right to know one's descent derives from the general right of personality according to Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 GG[93] and is also expressed in Article 7 paragraph 1 of the UN Convention on the Rights of the Child of 1989. In cases of anonymous egg donation abroad, the resulting child is initially denied this right. In Germany, a child conceived through permitted sperm donation possesses the right to know their genetic lineage, derives not only from Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 GG, but is also enshrined in Section 10 of the "Act to Establish a Register for Sperm Donors and to Regulate Access to Information about the Donor after Insemination with Donor Sperm" (*Samenspenderregistergesetz* – SaRegG).[94] Safeguarding this right is an important factor that would need to be considered in any egg donation regulations in order to legitimise them constitutionally.[95] After all, knowledge of one's own parentage is significant for personal and identity development[96], substantially impacting the child's psychological well- being. While the aforementioned right sets limits

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[89] Hüppe (n 74) 126.

[90] Josef Franz Lindner, 'Verfassungsrechtliche Aspekte eines Fortpflanzungsmedizingesetzes' in Henning Rosenau (ed), *Ein zeitgemäßes Fortpflanzungsmedizingesetz für Deutschland* (Nomos 2013) 127, 134; Lindner, 'Ein zeitgemäßes Fortpflanzungsmedizinrecht für Deutschland' (n 13) 173; Leopoldina (n 3) 35.

[91] Reinke (n 53) 137.

[92] Dorneck (n 81) 50-51; Esser (n 38) 240; Lindner, 'Verfassungsrechtliche Aspekte eines Fortpflanzungsmedizingesetzes' (n 90) 134; Nationaler Ethikrat (n 78) 122.

[93] BVerfGE 79, 256, 268-69; Wellenhofer (n 39) fn 32; Dieter Giesen, 'Genetische Abstammung und Recht - Zugleich Besprechung des Urteils des BVerfG vom 31.1.2989 - 1 BvL 17/87' (1989) 44 JZ 364, 367.

[94] cf VG Berlin BeckRS 2022, 32571 (fn 15) (Administrative Court of Berlin); Volker Lipp, 'Fortpflanzungs- und Genmedizin' in Adolf Laufs, Christian Katzenmeier and Volker Lipp (eds), *Arztrecht* (8th edn, C.H. Beck 2021) fn 35.

[95] cf Udo Di Fabio, 'Article 2 paragraph 1' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz Kommentar. Band 1* (90th edn, C.H. Beck 2022) fn 213; Leopoldina (n 3) 29, 63.

[96] BVerfGE 79, 256, 268-69; Di Fabio (n 95) fn 212.

on the potential anonymity of donation, it does not inherently preclude the procedure.[97] Adequate regulations in the realms of descent and family law could prevent the child from being disadvantaged, similar to sperm donation.

c. Equality aspects – comparison to sperm donation, Article 3 paragraphs 2, 3 GG

The question arises as to whether the different treatment of sperm donation, which is permitted in Germany, and egg donation, which is prohibited, constitutes a violation of the equality principle under Article 3 paragraphs 2 and 3 GG. From an objective-biological point of view, differentiation based on sex is undeniable: male gametes may be donated, whereas female gametes may not.[98] Such differentiation requires constitutional justification.[99] According to the prevailing case law, an encroachment on the equality principle under Article 3 paragraphs 2, 3 GG can be justified "to the extent that it is strictly necessary to resolve problems that can only arise due to the nature of the respective sex."[100] Accordingly, this exclusively concerns biological differences between sexes.[101] While the more intense interference of egg donation compared to sperm donation and the resulting increased risks to women[102] are based on biological distinctions, this medical difference in gamete retrieval isn't the rationale for the egg donation ban. The purpose of the prohibition is not rooted in biological differences between men and women but rather, as discussed earlier, in preventing split maternity. This normative purpose is not based on biological distinctions, but on a material disparity concerning the social role of parents: while a divided paternity due to legal sperm donation seems unobstructed, divided maternity is to be avoided.[103] Especially in the light of the necessary informed consent and voluntariness of the intervention, the differing intensity of the situations cannot in any case suffice as a justification for differentiation.[104]A sufficient justification for the present interference under Article 3 paragraphs 2 and 3 GG concerning the affected women is therefore not discernible, rendering the criminal prohibition of egg donation untenable.[105]

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[97] Heun (n 83) 54; see also Kersten (n 63) 1251; Leopoldina (n 3) 83.
[98] Esser (n 83) 60.
[99] Esser (n 83) 60; Leopoldina (n 3) 40.
[100] BVerfGE 85, 191, 207.
[101] Uwe Kischel, 'Art 3 GG' in Volker Epping and Christian Hillgruber (eds), *Beck'scher Online-Kommentar Grundgesetz* (54th edn, C.H. Beck 2023) fn 192.
[102] cf Braun (n 14) fn 9; Graumann (n 9) 177; Eberbach (n 3) 177-78.
[103] Monika Zumstein, 'Keimzellspende – Juristische Thesen' in Bundesministerium für Gesundheit (ed), *Fortpflanzungsmedizin in Deutschland* (2000) 134, 139.
[104] Rosenau (n 63) fn 85.
[105] Günther, Taupitz and Kaiser (n 2) fn 12; Ratzel (n 64) fn 8; Rosenau (n 63) fn 85; Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7; Esser (n 83) 61.

3. European aspects – the ECHR

In November 2011, the Grand Chamber of the ECHR ruled that Austria's ban on egg donation was compatible with the ECHR.[106] Notably, a year earlier, the ECHR's small chamber had stated that the ban exceeded the boundaries of necessity for justifying an interference under Article 14 in conjunction with Article 8 ECHR.[107] Couples reliant on egg donation as a reproductive measure to fulfil their wish to have a child were being discriminated against in their right to family and private life (Article 8 ECHR) compared to couples who could fulfil their wish through other, permitted measures of assisted reproduction (Article 14 ECHR).[108] In 2011, however, the ECHR upheld the admissibility of Austria's regulation (and by extension, that of other member states)[109] based on the national legislature's margin of appreciation in ethically and morally difficult areas and the fact that there was no uniform regulation for assisted reproduction across Europe, particularly for egg donation.[110] However, the ECHR emphasised in 2011 already that, as reproductive medicine continued to evolve,[111] a "European consensus seems to be emerging,"[112] narrowing the margin of appreciation for national legislatures as European states become increasingly unified. This holds even more true since even more states have legalised egg donation following the ECHR's judgement, reducing the number of countries prohibiting it. This demonstrates that, although the ECHR considered the ban "still" compatible with the ECHR in 2011, its stance is subject to medical and political developments. Given these considerations, a prohibition of egg donation appears incompatible with the principles of private and family freedom and the prohibition of discrimination from a European perspective, making it highly problematic in Germany as well.

4. Conclusion

The prohibition of egg donation cannot be ethically or legally justified either on the national or the international level for the reasons mentioned. Potential risks of legalisation can and must be addressed through appropriate regulatory means within the respective legislative framework.

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[106] *SH and others v Austria* App No 57813/00 (ECtHR, 3 November 2011).
[107] *SH and others v Austria* App No 57813/00 (ECtHR, 1 April 2010).
[108] ibid fn 85.
[109] Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7.
[110] *SH and others* (n 107) fn 94 ff, 115; see also *Evans v UK* App No 6339/05 (ECtHR, 10 April 2007) fn 77.
[111] cf *SH and others* (n 107) fn 117 f.
[112] *SH and others* (n 107) fn 96.

V. Design of legalisation in Germany

In the context of desirable legalisation, certain questions regarding the design of possible regulations and provisions need to be clarified and addressed to avoid the discussed problems and ensure the safety and interests of all parties involved.

1. Possibilities of legalisation

a. Amendment of the ESchG

One approach in implementing the legalisation of egg donation is to amend the relevant provisions of the ESchG. The FDP parliamentary group (Free Democratic Party – *Freie Demokratische Partei*) in the Bundestag has submitted a draft in this spirit.[113] Article 1 number 1 letter a (aa) of the amendment aims at repealing the fundamental prohibition provision of section 1 paragraph 1 number 1 ESchG. Article 1 number 1 letter b also addresses the amendment of the previous number 2 of section 1 paragraph ESchG, allowing for heterologous IVF using donated eggs. According to the draft law, the amendment to the ESchG is intended to have three main practical effects: increasing the number of egg donations performed in Germany while reducing treatments conducted abroad, as well as establishing legal certainty on a national level for those affected.[114] The challenges arising from the legalisation of egg donation, such as the risk of commercialisation or the traceability of the donor's identity are acknowledged. However, the specifics of such regulations are not explicitly defined in the proposal; instead, reference is made to the need for further provisions.[115] Consequently, although the amendment of the ESchG represents a necessary measure, it reveals additional gaps in regulation, necessitating further action.

b. Introduction of an FMedG: the Augsburg-Munich draft

aa. Principles

Another possibility to uniformly close the mentioned regulatory gaps, encompass additional aspects of reproductive medicine, and adequately regulate them appropriately is to introduce a Reproductive Medicine Act (*Fortpflanzungsmedizingesetz)*. A concrete draft law is already available for this purpose: the Augsburg- Munich draft for a Reproductive Medicine Act (AME-FMedG), developed collaboratively by various legal scholars in 2012. It comprehensively regulates all aspects of reproductive medicine under a single law, which would replace the criticised criminal law formulation of the ESchG and

[113] BT-Drs 19/17633, 3 ff.
[114] ibid 6.
[115] ibid 5.

utilise the federal legislative competence granted by Article 74 paragraph 1 number 26 GG.[116] The AME-FMedG covers both the specific measures of assisted reproduction and the general legal requirements and regulations. The law is structured according to the principle-exception model in order to accommodate the interests of all parties involved and sufficiently protect the fundamental freedoms of all affected individuals.[117] The fundamental freedom to utilise reproductive medical measures initially encompasses all medically feasible reproductive procedures (including those not yet regulated and those that may emerge in the future), in order to then utilise exceptional regulations to counteract abuse and dangers of certain impermissible procedures.[118]

bb. Regulation of egg donation

Under section 6 AME-FMedG, egg donation is explicitly permitted and structured parallel to sperm donation (section 5). For egg donation to be permissible, there must be an indication (section 6 paragraph 1 AME-FMedG). The intended mother must therefore be incapable of reproduction herself, or face a high risk of severe hereditary disease if her own oocytes are used. In addition, according to section 6 paragraphs 2 and 3, egg donation may only take place in an authorised centre following prior examination of the donor. A violation of section 6 paragraph 2 is considered an administrative offence according to section 28 paragraph 2 number 3 letter b, potentially resulting in a fine according to section 28 paragraph 3. Cross-breeding of oocytes from multiple donors for a single recipient is disallowed by section 6 paragraph 4. The donation must be non-commercial, as stated in section 6 paragraph 6. The decision on whether the eggs of a single donor can be used in only one centre for a maximum of three recipients is left to legislative discretion (section 6 paragraph 5).

cc. Conclusion

The introduction of an FMedG in conjunction with the repeal of Section 1 paragraph 1 number 1 ESchG provides a suitable foundation for appropriately regulating the issues of modern reproductive medicine.

2. Regulation and subsequent questions within legislative framework

The following sections discuss the necessary regulations within the scope of egg donation and address selected family and lineage law issues that are not included in the legislative proposal and would require further adjustment. Follow-up questions in the areas of

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[116] cf Ulrich M Gassner and others, *Fortpflanzungsmedizingesetz – Augsburg-Münchener Entwurf (AME-FMedG)* (Mohr Siebeck 2013) 22 f.

[117] ibid 29 f; cf Dorneck (n 81) 275.

[118] Gassner and others (n 116) 48 f; cf Dorneck (n 81) 261.

inheritance and social law, as well as the problem of possible age limits for egg donation, are not covered.[119]

a. Problems of equality and prohibition of commercialisation

The issues of unequal treatment between egg donations and sperm donations, as well as the risk of commercialisation of egg donation and the associated exploitation of female donors, are intended to be addressed in the AME-FMedG. Thus, the only deviation from a parallel arrangement to sperm donation (section 5) in the case of egg donation is the prohibition of commercialisation pursuant to section 6 number 6 in conjunction with the administrative offence contained in section 28 paragraph 2 number 4 letter a. The rationale behind this unequal treatment lies in the increased risk of adverse health effects associated with egg donation compared to sperm donation.[120] The essence of the provision is, therefore, exclusively to prevent financially motivated self-harm by potential donors.[121] Consequently, unlike the absolute prohibition of egg donation, the disparity in treatment between sexes is in this case justified under Article 3 paragraphs 2 and 3 GG. The prohibition of commercialisation does not entail social inequality of the sexes but is based solely on biological differences between males and females.[122] Compensation for the donor is to remain possible. The Reproductive Medicine Commission (*Fortpflanzungsmedizin-Kommission*), established under section 24, would draw up guidelines on its amount according to section 25 paragraph 1 number 3. This way, to the RMC would concretise the provisions of the AME-FMedG.[123] These determinations must be suitable to relieve the donors with respect to their actual expenses without providing a financial incentive for engaging in a donation.

b. Right of the child to knowledge of descent

Section 22 number 6 of the AME-FMedG establishes an obligation for the documentation of the identities of germ cell donors. Correlating to this, section 23 paragraph 3 regulates the right of information for children conceived through germ cell donations. They may inquire about the identities of their donors from the age of 14. However, the interests and rights of the donors are also protected: the data is generally treated as confidential under section 23 paragraph 1. An exception to this is provided under section 23 paragraph 2 and applies to cases of medically justified exceptional circumstance for the benefit of the child. As discussed, the right of the child to knowledge of their own genetic lineage, as a

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[119] see also Dorneck (n 81) 325 ff.
[120] Gassner and others (n 116) 58; Dorneck (n 81) 323 f.
[121] Gassner and others (n 116) 58; Dorneck (n 81) 324.
[122] Dorneck (n 81) 324.
[123] Gassner and others (n 116) 83; Dorneck (n 81) 294, 356.

manifestation of the general right of personality, is a significant factor in the personal development of a child conceived through assisted reproduction. On the other hand, in the event of the legalisation of egg donation, the donor's interest in the protection of informational self- determination, also derived from the general right of personality, is at stake.[124] However, the donor voluntarily decides to undergo the donation and is informed not only about matters concerning themselves (section 18 numbers 1 to 3), but also about the child's right to information (section 18 number 4). Thus, the right to informational self-determination of the informed and consenting donor cannot outweigh the child's right to knowledge of their own parentage to the extent that only a completely anonymous donation without the possibility of information would be justified.[125]

The AME-FMedG strives to establish the optimal balance of interests between the constitutionally protected rights of the children and the donors, ensuring the necessary right to information while at the same time safeguarding the data protection of the donors.

c. Consequences for German family law

The legalisation of egg cell donation inevitably gives rise to consequential questions, particularly in the realm of family and parentage law, which are not addressed within the framework of the AME-FMedG. These primarily result from the discrepancy between genetic and biological motherhood, thereby leading to inquiries concerning the allocation of legal parenthood.

aa. Legal maternity

According to section 1591 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB), the legal mother is the one who gives birth to the child. Consequently, in the case of egg donation, the legal mother is the recipient. This allocation of legal maternity to the carrying woman is also rooted in the consideration of the child's best interests and the prevention of a fragmented motherhood, which recognizes a strong "physical and psychosocial relationship" established through pregnancy and childbirth.[126] Given this context, legal maternity of the donor and hence the genetic mother is unequivocally excluded without the possibility of contestation.[127] The principle of "mater semper certa est" (motherhood is always certain) is thus fully applicable notwithstanding the egg donation.[128]

124 Gassner and others (n 116) 83; Dorneck (n 81) 294, 356.
125 BGH NJW 2015, 1098, 1103 (fn 54).
126 BT-Drs 13/4899, 82.
127 ibid 82; cf Klaus-Jürgen Grün, *Vaterschaftsfeststellung und -anfechtung: für die gerichtliche, anwaltliche und behördliche Praxis* (Erich Schmidt 2003) 25 f.
128 Müller-Terpitz, 'Art 6 GG' (n 53) 15; Czech (n 65) 186; Müller-Götzmann (n 128) 322; Gassner (n 36) 126.

Furthermore, the legislator justifies the provision of section 1591 BGB as a response to the regulatory gap arising from egg donations conducted abroad.[129] The legislator recognises that egg donations are carried out abroad and therefore regulates their legal implications in terms of descent. In relation to the certainty of maternal attribution, there is therefore no need for adjustment in the case of legalisation.

bb. Adjustment of descent law

In the domains of maternity determination and maternity appeal, however, an adjustment of descent law is necessary for the sake of legal certainty. It is possible to align the regulations with those of sperm donation.

(1) Contestation of maternity

Similar to the allowance of challenging paternity and the restriction of such a right for consensual sperm donation under section 1600 paragraph 4 BGB, this aspect could be similarly regulated for egg donation concerning maternity.[130] Section 1600 paragraph 4 BGB excludes both the legal father and the sperm donor from challenging paternity: although some forms of heterologous insemination fulfil the criterion of "sexual intercourse" in the sense of section 1600 paragraph 1 number 2 BGB, and thereby the right to challenge paternity of the genetic father (meaning the sperm donor) is not entirely excluded in such cases,[131] there is widespread consensus[132] that in the field of consensual sperm donation within the meaning of section 1600 paragraph 4 BGB, no right to challenge paternity of the donor may be recognized.[133] The donor's consent is to be interpreted as a "clear renunciation of legal paternity and consequently of a corresponding right to challenge it."[134] This analogy would also apply in the case of legalising egg donation: its regulation would similarly fall under consensual heterologous artificial fertilisation in the sense of Section 1600 paragraph 4 BGB. The donor, through voluntary and informed consent, would also willingly relinquish her legal status as a mother; thus, so the exclusion of the right of contestation would, in general, not raise constitutional issues concerning the egg donor's parent right, which is constitutionally

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[129] BT-Drs 13/4899, 82-83.

[130] Katharina Lugani, 'Warten auf die Abstammungsrechtsreform' (2021) 54 ZRP 176, 179.

[131] BGH NJW 2013, 2589, 2590 ff (fn 15 ff); see also BGH NJW 2021, 2801, 2803 (fn 23); Marina Wellenhofer, '1600 BGB' in Dieter Schwab (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10 – Familienrecht II* (8th edn, C.H. Beck 2020) fn 21 f; Andreas Spickhoff, '§ 1600 BGB' in Andreas Spickhoff (ed) *Medizinrecht* (4th edn, C.H. Beck 2022) fn 2.

[132] For a more critical perspective see Andreas Spickhoff, 'Vaterschaftsfeststellung, Vaterschaftsanfechtung und das Recht auf Kenntnis der Abstammung nach heterologer Insemination' (2017) 3 ZfPW 257, 269.

[133] Wellenhofer, '§ 1600 BGB' (n 131) fn 69; Magdalena Sophie Gayk, *Vaterschaft und weitere Rechtsprobleme bei heterologer Insemination* (Nomos 2020) 86; see also Arbeitskreis Abstammungsrecht, Abschlussbericht (Bundesministerium der Justiz und für Verbraucherschutz) 64.

[134] Report issued by the Law Commission (*Rechtsausschuss*), BT-Drs 15/2492, 9; BGH NJW 2013, 2589, 2590-91.

protected under Article 6 section 2 sentence 1 GG.[135] The predicament of assigning maternity through birth is essentially problematic for the construction of surrogacy, in which the intended mother and the gestating (and consequently, legal) mother diverge.[136] The exclusion of challenging the legal father's paternity is grounded in the legal-ethical consideration that, in cases of consensual artificial fertilisation, the parents bear the responsibility for this decision, and no detriment should arise for the child.[137] The well-being of a child conceived through gamete donation are to be secured by a stable legal position vis-à-vis the legal father – or in the case of egg donation: the legal mother.[138] The fundamental admissibility of a maternity challenge could also counter specific individual case issues in the context of egg donation, such as an implantation carried out without the consent of the legal mother.[139]

(2) Determination of maternity

The determination of maternity could be generally permitted and restricted once again for egg donation in the sense of section 1600 paragraph 4 BGB, as envisaged by section 1600d paragraph 4 BGB for sperm donation.[140] The donor could therefore not be deemed the legal mother. The introduction of section 1600d paragraph 4 BGB in 2018, much like Section 1600 paragraph 4 BGB, was aimed at safeguarding the child's well-being by attributing legal fatherhood to the intended father.[141] This regulation would also correspondingly address the interests of the egg donor who has willingly relinquished maternity through consent, thereby precluding any maintenance or inheritance claims from the child, just as in the case of sperm donors.[142] This could also potentially enhance the willingness to donate eggs.[143]

(3) Conclusion

Adopting provisions akin to those governing paternity offers a simple and effective means to adjust the descent law concerning maternity in the context of egg donation. This approach establishes legal certainty and safeguards the interests of the parties involved.

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[135] Brosius-Gersdorf (n 82) 108; Verena Weyrauch, *Zulässigkeitsfragen und abstammungsrechtliche Folgeprobleme bei künstlicher Fortpflanzung im deutschen und US- amerikanischen Recht* (Tenea 2003) 200.

[136] cf Dorneck (n 81) 265 f; Weyrauch (n 136) 200.

[137] Draft by the Federal Council (*Bundesrat*) for a law strengthening the rights of children, BT-Drs 14/2096, 7. Taking a different approach, Arbeitskreis Abstammungsrecht (n 133) 62 ff builds on actual consent.

[138] BT-Drs 14/2096, 7.

[139] cf Dagmar Coester-Waltjen, 'Reformüberlegungen unter besonderer Berücksichtigung familienrechtlicher und personenstandsrechtlicher Fragen' (2002) 18 Reproduktionsmedizin 183, 194.

[140] Lugani, 'Warten auf die Abstammungsrechtsreform' (n 130) 179.

[141] BT-Drs 18/11219, 35; Arbeitskreis Abstammungsrecht (n 133) 57-58.

[142] BT-Drs 18/11219, 35; Jochen Taupitz and Athina Theodoridis, 'Das Gesetz zur Regelung des Rechts auf Kenntnis der eigenen Abstammung bei heterologer Verwendung von Samen' (2018) 36 MedR 457, 460.

[143] BT-Drs 18/11219, 35.

cc. The second parent's position

Furthermore, reference should be made to an issue not limited to sperm donation but likely to arise in the event of legalising egg donation: the legal parentage of the partner of the legal mother. While the situation for married couples can be solved unproblematically via sections 1591, 1592 paragraph 1 number 1 BGB, significant disparities arise for homosexual women. According to section 1592 paragraph 1 BGB the father of a child is either the husband of the mother at the time of birth (number 1) or the man who has acknowledged paternity by way of recognition (number 2). Female same-sex partnerships lack the possibility for acknowledgement as per section 1592 paragraph 1 BGB.[144] This even applies where the genetic mother of a child conceived through egg donation is the partner of the biological mother, and therefore according to Section 1591 BGB the legal mother.[145] In such cases, the only available recourse used to be a stepchild adoption under section 9 paragraph 7 of the Act on Registered Life Partnerships (*Lebenspartnerschaftsgesetz* – LPartG), until the legal situation changed in 2017: with the legalisation of same-sex marriages ('Marriage for All'), no new civil partnerships, as defined by the Registered Partnership Act (LPartG), will be established. Additionally, for married same-sex couples, stepchild adoption has become obsolete. However, an adjustment to the law of descent is still pending.[146] These contradictions in descent law warrant reform – not only as far as the legalisation of egg donation is directly concerned, but for all forms of heterologous artificial fertilisation. The Working Group on Descent Law (*Arbeitskreis Abstammungsrecht*) also acknowledges the need for action in these cases and proposes an equalisation of legal parentage for the female life partner and the mother's husband.[147]

VI. Conclusion

In conclusion, there are no moral or legal impediments against legalising egg donation in Germany. The prohibition is highly problematic from the point of view of German constitutional law and the ECHR and consequently should be repealed. Alongside decriminalisation, a legislative solution for legalisation must encompass critical considerations regarding the rights and interests of all parties involved through appropriate regulations. Particular attention should be paid to the protection of donors through a ban on commercialisation, ensuring the children's right to knowledge of their

[144] OLG Köln BeckRS 2015, 14263 (fn 4 and 14 ff) (Higher Regional Court of Cologne, North Rhine-Westphalia); cf BGH NJW 2019, 153, 154 (fn 7 ff); Müller-Götzmann (n 128) 322.

[145] Dagmar Coester-Waltjen, 'Überlegungen zur Notwendigkeit einer Reform des Abstammungsrechts' (2021) 4 ZfPW 129, 132 f.

[146] cf OLG Köln BeckRS 2015, 14263 fn 16; Arbeitskreis Abstammungsrecht (n 133) 69; Müller-Götzmann (n 128) 322.

[147] Arbeitskreis Abstammungsrecht (n 133) 69 ff.

own genetic lineage, and the provision of medically secure and professional procedures within authorised institutions. In this regard, the already existing AME-FMedG provides an excellently suitable foundation that should be adopted. In order to prevent potential exploitation of donors due to commercialisation, there is still a need for further action in establishing regulations on the amount of compensation for expenses by the Reproductive Medicine Commission. Follow-up questions on maternity determination and contestation under the law of descent need to be adjusted to fit with current law.

Articles

Cloaked Identities and Forbidden Shields - Is Sec. 17 (1) VersG NRW Unconstitutional?

Noah Gehrke[*]

As of the 07th of January 2022 the Assembly law of North Rhine Westphalia ("VersG NRW") entered into force. Contrary to the ambitions of the legislator to overcome the deficiencies of the former Assembly law (the "VersG"), numerous constitutional doubts arose. Consequently, the VersG NRW has been challenged in front of the constitutional court of North Rhine Westphalia (the "VerfGH NRW"). The decision is pending.

Topic of this article are the punitive prohibitions set out in Sec. 17 VersG NRW. Based on Sec. 17 (1) Nr. 1 VersG NRW it is prohibited to wear or carry objects that can objectively be used to and are subjectively aimed at covering up one's identity to prevent identification by law enforcement for prosecution. Additionally, Sec. 17 (1) Nr. 2 VersG NRW prohibits wearing or carrying objects that can be used and are subjectively aimed at preventing enforcement measures by law enforcement. Evaluating the constitutionality of these regulations is of high practical relevance, not only because North Rhine Westphalia is the federal state with the highest population, but because other federal states are adopting their own assembly laws as well. These include prohibitions similar to Sec. 17 VersG NRW (for instance Sec. 18 of Hesse's Freedom of Assembly Act ("HVersFG") or Sec. 9 (1), (2) of the assembly law of lower saxony ("NVersG")).

To properly assess the constitutionality, the affected fundamental rights have to be compiled, after which it can be examined if they protect the now prohibited behaviours. However, just because the behaviours are protected, it does not mean that the regulations are unconstitutional. They can still be justified.

It has to be paid attention to the question of whether the regulations are proportionate. It also needs to be established if the regulations are phrased clearly enough. When coming to the result that Sec. 17 VersG NRW is either unproportionate or phrased too unclearly, it has to be asked whether these flaws can be overcome by interpreting the VersG NRW in such a way that it aligns with the constitution.

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A. Freedom of Assembly, Art. 8 (1) of the German Constitution (“GG”)

One of the affected fundamental rights is the freedom of assembly, Art. 8 (1) GG. It grants the right to assemble peacefully and unarmed to contribute to public opinion making.[1] Part of this freedom is the choice over the location, timing, contents and way of expression.[2] This includes the freedom to wear masks or protective equipment. However, it can be argued that Art. 8 (1) GG only protects assemblies that are peaceful and unarmed and that people who wear masking are unpeaceful or people who wear protective equipment are armed.

I. Peaceful and unarmed

An assembly is peaceful if it does not take a violent or incendiary course.[3] To be unpeaceful, aggressive behaviour of some dangerousness has to exist.[4]

Objects for covering up one’s identity are such that can objectively be used to cover one’s identity up and are subjectively aimed at covering up one’s identity to prevent law

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[1] cf BVerfGE 104, 92,104; Heinrich Amadeus Wolff and Dieter Hömig, *Grundgesetz für die Bundesrepublik Deutschland Handkommentar* (13th edn, Nomos 2022) Art. 8 para 2; Jörn Ipsen, *Staatsrecht II* (24th edn, Vahlen 2021) § 12 para 562.

[2] BVerfGE 69, 315, 343; Jens-Peter Schneider, ‘Art. 8’ in Volker Epping and Christian Hillgruber, *BeckOK GG* (54th edn, C.H. Beck Verlag 2023) para 17.

[3] BVerfGE 69, 315, 361; Hans Jarass and Martin Kment, *Grundgesetz für die Bundesrepublik Deutschland Kommentar* (17th edn, C.H. Beck Verlag 2022) art 8 para 8.

[4] BVerfGE 104, 92, 106.

enforcement from identifying oneself for the purpose of prosecution. This term aligns with the former regulation (Sec. 17a VersG).

Contrarily the term protective gear ("*Schutzausrüstung*") deviates from Sec. 17a VersG. There it was formulated as "*Schutzwaffe*", which means protective weapon. Instead it relies on the sample design for assembly law ("*ME-VersG*"). Still, most scholars use the definition set forth for Sec. 17a VersG, because there are no cases in which a protective weapon is not simultaneously protective equipment.[5]

Therefore, every object that is produced for the purpose of protecting the body in a violent encounter is protective equipment.[6] Additionally, objects that are not built for this purpose, but can be used as protective equipment, fall under the definition of Sec. 17 (1) Nr. 2 VersG NRW. As for Sec. 17 (1) Nr. 1 VersG NRW, a subjective component needs to be fulfilled. Namely, that the object is aimed at preventing enforcement measures by law enforcement.

Returning to the question if people who wear such objects are unpeaceful: wearing these objects is not itself an aggressive behaviour of some dangerousness. This can only result from following actions by the protestors. It can be argued that people who wear these objects show an aggressive attitude and increase the probability of the assembly becoming violent.[7] Nevertheless, this cannot justify exclusion from Art. 8 (1) GG.

Firstly, the Freedom of assembly is constitutive of any liberal and democratic order ofstate.[8] Without the freedom of assembly, there is no democracy. Given this high value, every regulation has to be viewed sceptically. Hence, it is not convincing to deny protestors the protection of Art. 8 (1) GG. The regulation can still be justified.
Secondly, it cannot be possible that the legislator is able to determine the reach of the Constitution by simple laws. Fundamental rights are meant to protect individual freedom from state intervention.[9] If the state could now determine the level of protection, it is completely up to him whether protection is granted at all.
Consequently, wearing the objects, is not unpeaceful. As for the notion to interpret protective equipment as weapons, it needs to be referred to the legislator's choice to

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[5] cf Tobias Herbst, '§ 17 VersG' in Markus Möstl and Dieter Kugelmann (eds), *BeckOK Polizei- und Ordnungsrecht Nordrhein-Westfalen* (24th edition, C.H. Beck Verlag 2023) para 18; Frank Braun and Peter Roitzheim, '§ 17' in Norbert Ullrich, Frank Braun and Peter Roitzheim (eds), *Versammlungsgesetz Nordrhein-Westfalen* (1st edn, Richard Boorberg Verlag, 2022) para 16f.; Klaus Schönenbroicher, *Versammlungsgesetz Nordrhein-Westfalen Kurzkommentar* (1st edn, Verlag Reckinger 2022) § 17 para 3.

[6] Braun and Roitzheim (n 5) para 17; Oliver Jitschin, *Handbuch Versammlungsrecht* (1st edn, Kohlhammer 2021) ch 5 para 1270.

[7] Otto Depenheuer, *Grundgesetz Kommentar Band 2* (99th edn, C.H. Beck Verlag 2022) art 8 para 44; Jarass and Kment (n 3) para 9.

[8] BVerfGE 69, 315, 344-45; BVerfGE 128, 226, 250.

[9] Friedhelm Hufen, *Staatsrecht II* Grundrechte (10th edn, C.H. Beck Verlag 2023) § 5 para 1; Gerrit Manssen, *Staatsrecht II* Grundrechte (19th edn, C.H. Beck Verlag 2022) § 3 para 52.

distance himself from the word weapon. Further, by definition of protective equipment, it cannot be used to harm other people or destroy objects. Therefore, protective equipment cannot be interpreted as a weapon. Both behaviours enjoy the protection of Art. 8 (1) GG.

II. Is Sec. 17 (1) VersG NRW proportionate?

Given that the behaviours are protected by the constitution and that Sec. 17 (1) VersG NRW affects protestors in their rights, it has to be asked whether the state intervention can be justified. Generally, Art. 8 GG sets different standards for restrictions based on the location of the assembly. Outdoor assemblies may be restricted by or pursuant to a law (see Art. 8 (2) GG). Indoor assemblies may only be restricted by colliding fundamental rights or constitutional goods.[10] Sec. 17 (1) VersG NRW explicitly focusses on outdoor assemblies. Therefore, the VersG NRW suffices formally to restrict the freedom of assembly.

Contentwise as a measure for justification, the principle of proportionality is applied frequently. It is rooted in the rule of law (Art. 20 (3) GG) and states that every state intervention has to be proportionate, which means that a legitimate cause has to exist and that the state measures have to be suitable, necessary and adequate to fulfil the cause.[11] If the state intervention is unproportionate, it is unconstitutional. For a precise analysis it has to be differentiated between Sec. 17 (1) Nr. 1 and Nr. 2 VersG NRW.

1. Sec. 17 (1) Nr. 1 VersG NRW

a. Legitimate cause

The cause of the prohibition is to enhance prosecution.[12] Additionally the legislator assessed that covering up one's identity is dangerous in the way that it makes violence much more probable. The same logic also underlid Sec. 17a VersG.[13] Both the prosecution and the prevention of violence are legitimate.

b. Is Sec. 17 (1) Nr. 1 VersG NRW suitable to fulfil the legitimate cause?

The regulation is suitable if it is not unfitting from the start to fulfil the cause. Any contribution is sufficient.[14] Concerns arise for the prevention of violence. It can be assumed that covering up one's identity creates a threatening appearance and

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[10] cf BVerfGE 28, 243, 261; BVerfGE 143, 161, 190.

[11] cf BVerfGE 19, 342, 348-49; Bernd Grzeszick (n 8) art 20 para 109; Lothar Michael and Martin Morlok, *Grundrechte* (8th edn, Nomos 2023) § 23 para 608; Hufen (n 9) § 9 para 14.

[12] LT-Drs 17/12423, p 76.

[13] BT-Drs 11/4359, p 14.

[14] Heinrich Lang and Heinrich Wilms, *Staatsrecht II Grundrechte* (2nd edn, Kohlhammer 2020) § 7 para 272; Hufen (n 9) § 9 para 20.

communicates a violent attitude.[15] But it can be questioned whether violent people abstain from violence just because they can't cover their identity or see other people whose identity is covered. This is viewed by some as more of an unsubstantiated speculation instead of a valid prognosis.[16]

Anyhow, the legislator has a wide margin of assessing the factual basis of the situation.[17] Ruling out any contribution extends the barriers to suitability. Sec. 17 (1) Nr. 1 VersG NRW is suitable to achieve the causes.

c. Is Sec. 17 (1) Nr. 1 VersG NRW necessary?

More problematic is the question if it is necessary. A measure is necessary if there is no less invasive method that is as suitable to achieve the causes.[18] A few options can be discussed: isolating troublemakers, video surveilling the assembly, using specific prohibitions, seizing the objects which are used to cover up the identity and finally linking the punishment to a prior administrative act.

aa. Isolation of troublemakers

Detaining protestors is generally inadmissible.[19] If the protestor is not detained, there is a principle called "*Polizeifestigkeit*" of the assembly law.[20] The police can only take measures against protestors if there are specific authorizations within the VersG NRW or if the VersG NRW offers no protective measures against current dangers, Sec. 9 VersG NRW. There is a blocking effect of the VersG NRW to the PolG NRW.[21] Looking into the VersG NRW, the police could make use of Sec. 14 VersG NRW to approach troublemakers or

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[15] cf Christian Baudewin, *Der Schutz der öffentlichen Ordnung im Versammlungsrecht* (2nd edn, PL Academic Research 2014) 294-95 paras 699-700.

[16] Michael Kniesel, '§ 27' in Alfred Diete, Kurt Gintzel and Michael Kniesel (eds), *Versammlungsgesetze - Kommentierung des Versammlungsgesetzes des Bundes und der Versammlungsgesetze der Länder* (18th edn, Carl Heymanns Verlag 2019) para 11.

[17] cf Hufen (n 9) § 9 para 20; Michael and Morlok (n 10) § 23 para 619.

[18] Lang and Wilms (n 13) § 8 para 274; Ipsen (n 1) § 3 para 191.

[19] Johannes Dietlein and Johannes Hellermann, *Öffentliches Recht in Nordrhein-Westfalen* (9th edition, C.H. Beck Verlag 2022) § 3 para 315.

[20] BVerwG, NVwZ 2007, 1439; para 30; Christoph Enders, 'Maßnahmen gegen Versammlungen [2020] JR 569, 570; Dietlein andHellermann, (n 18) § 3 para 314.

[21] cf Kathrin Bünnigmann, 'Polizeifestigkeit im Versammlungsrecht' [2016] JuS 695; Thomas Kingreen and Ralf Poscher, *Polizei- und Ordnungsrecht mit Versammlungsrecht* (12th edn, C.H. Beck Verlag 2022) § 19 para 17.

exclude them from the assembly.

Fulfilling Sec. 17 (1) Nr. 1 VersG NRW, the protestor also commits a crime punishable by up to two years in prison (Sec. 27 (7) Nr. 1 VersG NRW), so the police can use the measures of the code of criminal procedure (the "StPO"). They can for example arrest the protestor provisionally to identify him, Sec. 127 (1) in conjunction with Sec. 163b (1) S. 1 StPO. The ins and outs of the StPO will be examined in further detail later. For now, it suffices to note that even though the VersG NRW blocks the PolG NRW, the police has options to isolate troublemakers. Isolating troublemakers individually is less invasive than issuing a general prohibition.

However, if the police isolates troublemakers, two problems result. Firstly, the police has to be cooperative and assembly-friendly.[22] Taking measures against individuals can escalate the situation. Especially assemblies of the political edges have a high probability of escalation and violence.

Secondly, it may not be possible for the police to isolate individuals or the prohibited behaviour only becomes apparent after the assembly. Hence, the legislator does not overextend his margin of assessment relating to the necessity of the prohibition.

bb. Video surveillance of the assembly

According to Sec. 16 (5) Nr. 1 VersG NRW the police can monitor the assembly. But monitoring the whole assembly affects not only the individual who violates Sec. 17 (1) Nr. 1 VersG NRW, but simultaneously every other protestor. The mere possibility of area-wide video surveillance can cause anxiety over being registered by law enforcement and deter individuals from participating in the assembly.[23] Therefore video surveillance is not a less invasive measure.

cc. Seizing the objects

Seizing the objects is a less invasive measure. However, removing Sec. 17 (1) Nr. 1 VersG NRW and Sec. 27 (7) Nr. 1 VersG NRW meets technical difficulty. For every invasive measure the state needs a legal basis.[24] Typically for the seizure of objects, this is Sec. 111b (1) S. 1, 2 StPO in combination with Sec. 29 S. 1 VersG NRW. If the punitive character no longer exists, Sec. 111b (1) S. 1, 2 StPO can no longer be applied due to Sec. 3 (1) EGStPO (introductory law to the Code of Criminal procedure). Seizing the objects would then only be possible if covering up one's identity would constitute a misdemeanour

[22] BVerfGE 69, 315, 355; Hufen (n 9) § 30 para 4; Schneider (n 2) para 33.

[23] BVerfG, NVwZ 2007, 688; VG Berlin, NVwZ 2010, 1442.

[24] Steffen Detterbeck, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht* (21st edn, C.H. Beck Verlag 2021) § 7 para 259; Annette Guckelberger, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht und Staatshaftungsrecht* (11th edition, Nomos 2023) § 8 para 3.

(Sec. 22ff. OWiG in combination with Sec. 29 S. 1 VersG NRW). But the federal legislator viewed the former conception as a misdemeanour as insufficient.[25] This follows that a conception as a misdemeanour is not intended.

As a result, seizing objects highly depends upon Sec. 27 (7) Nr. 1 VersG NRW. Replacing Sec. 27 (7) Nr. 1 VersG NRW by seizing the objects is not possible. It cannot be as suitable.

dd. Specific prohibitions

Another possibility is to specify the prohibitions to certain individuals or assemblies. This shrinks the scope of application and is less invasive. Reducing the scope of application would also need to be as suitable to fulfil the causes.

There are assemblies and individuals where law enforcement cannot estimate whether they become violent. Identifying those who then violate the specific prohibitions is extremely difficult if not impossible. Following the rationale of the legislator, the protestors would also increase the probability of violence and an incendiary course, just by wearing the objects.

ee. Link to administrative act

(1) Basics

For a proper understanding of this concept, the modus operandi of Sec. 17 (1) Nr. 1 and Sec. 27 (7) S. 1 VersG NRW has to be illustrated. Triggering a punitive action depends upon the protestor wearing or carrying the objects.[26] It does not depend upon the protestor having full knowledge that the objects fall under Sec. 17 (1) Nr. 1 VersG NRW. There is no option for law enforcement to order him to remove the object prior to his prosecution. Instead the punishment could be linked to the violation of such an order by law enforcement.

(2) Interim injunction referring to the assembly law of Bavaria (“*BayVersG*”) – BVerfGE 122, 342

In this context the interim injunction by the Federal Constitutional Court (the “*BVerfG*”) – relating to the assembly law of Bavaria is especially noteworthy.

In this decision the court overruled certain fine regulations. This happened via an interim injunction and not at the end of the main proceedings. To overrule regulations via interim injunction is exceptionally rare because the court only makes use of this possibility with biggest reluctance and applies very strict benchmarks.[27] Mainly it laid out that penalising

[25] BT-Drs 11/4359, p 14.
[26] Norbert Ullrich, ‘§ 27’ in Ullrich, Braun and Roitzheim (n 5) para 38; Schönenbroicher (n 5) § 27 para 7.
[27] cf BVerfGE 122, 342, 361; 3, 41, 44.

protestors for violations against assembly laws shifts the responsibility for the knowledge of the rights and responsibilities onto them and punishes them if they miscalculate the scope of those.[28] Yet, the interpretation of unclear legal terms requires legal knowledge or adequate situational awareness.[29] This cannot be expected by the protestors.

Penalising them with a fine constitutes a state reprimand and insisting disapproval and a repressive sanction.[30] Additionally, imposed fines would be considered for danger forecasts of future assemblies.[31]

All in all, penalising the protestors would create an unpredictive risk of punishment, whose "chilling-effect", or in other words: effects of intimidation, can keep citizens from using their freedom of assembly.[32] It would be preferable to establish responsibilities and prohibitions via administrative law, because it can be determined what is mandatory for every individual.[33] That can be challenged in front of a court, creates certainty, without accusing the protestor and diminishes the risk of miscalculating the scope of the rights and responsibilities by a huge amount.[34]

(3) Applicability to Sec. 17 (1) Nr. 1 and Sec. 27 (7) S. 1 VersG NRW

The question at hand is whether these findings apply to Sec. 17 (1) Nr. 1 and Sec. 27 (7) S. 1 VersG NRW. One could argue that fining the prohibitions of covering up one's identity or wearing protective equipment was also part of the BayVersG and was not overruled (Art. 23 Nr. 16 BayVersG in combination with Art. 16 (2) Nr. 2 BayVersG).

Yet, any violation against Sec. 17 (1) Nr. 1 VersG NRW will not only be fined, but can lead to incarceration (Sec. 27 (7) S. 1 VersG NRW). The accusation that underlies jail-time is much greater than the accusation that comes with a misdemeanour and a fine.[35] The only case in which a fine is applied in the context of Sec. 17 (1) Nr. 1 VersG NRW is the carrying of the objects (Sec. 28 (1) Nr. 7 VersG NRW). Therefore, based upon the much greater accusation and legal consequences, the statements of BVerfGE 122, 342 can be applied to Sec. 17 (1) Nr. 1 VersG NRW.

(4) Conclusion: Are Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW necessary?

Applying the statements of the interim injunction, Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG

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[28] BVerfGE 122, 342, 363.
[29] ibid.
[30] ibid.
[31] ibid.
[32] ibid 365.
[33] ibid 364.
[34] ibid.
[35] ibid 363; BVerfGE 27, 18, 33.

NRW are unnecessary. The police can prevent violence just as well and the protestors are less restricted.

Arguing that law enforcement could not effectively meet the dynamics of the assembly if Sec. 17 (1), Sec. 27 (7) S. 1 VersG NRW is linked to Sec. 17 (2) VersG NRW, turns out to be incorrect. Law enforcement does not have to individually approach protestors and ask them to remove the object. They can achieve this approach by issuing a general order (Sec. 35 S. 2 of the administrative procedure act of North Rhine Westphalia – "*VwVfG NRW*"), for example by posting a sign with the prohibited items.

d. Would Sec. 17 (1) Nr. 1 VersG NRW be adequate?

If one does not follow this line of argument, it would have to be established how intensely the protestors are affected by Sec. 17 (1) Nr. 1 VersG NRW and set this in relation to how effectively the legislator can achieve his goals. Analysing the intensity a few markers have to be viewed in further detail. Namely the consequences that arise from the scope of Sec. 17 (1) Nr. 1 VersG NRW, the consequences of the applicability of Sec. 27 (7) S. 1 VersG NRW and the individually felt intensity by the protestors (see: chilling effect).

aa. How intensely are the protestors affected?

(1) Consequences from the scope of Sec. 17 (1) Nr. 1 VersG NRW

Objectively there is no limit for the number of items that can be interpreted as objects in the sense of Sec. 17 (1) Nr. 1 VersG NRW. Only the objective aptitude to be used as an item to cover up one's identity is required. But compared to Sec. 17a VersG the subjective component has changed. In applying Sec. 17a VersG it was not necessary to evaluate the intention of the protestors, the fact that their identity was covered up sufficed for punishing them.[36] This – as noted by some courts – normative imbalance[37], is not to be expected in the application of Sec. 17 (1) Nr. 1 VersG NRW. Not only artistic and illustrative covers[38], but every item is allowed that is not aimed at preventing the identification by law enforcement for the sake of prosecution.

To assess when an item is aimed at preventing this, the scientific literature has proposed the criteria if there are valid reasons for wearing these items.[39] If the weatheris bad there

[36] OLG Zweibrücken, NStZ 2022, 243; OLG Karlsruhe, NStZ 2022, 621; OLG Dresden, BeckRS 2015, 6938; KG Berlin, NStZ 2012, 455.
[37] LG Hannover, BeckRS 2009, 7119; AG Rotenburg (Wümme), NStZ 2006, 358.
[38] BVerfG, NVwZ 2008, 414, 415.
[39] Herbst (n 5) para 14.

is a valid reason for wearing coats, scarfs or jackets. If protestors fear repression by other states or political opponents, they have a valid reason to cover up their identity.

Still, the legal terms remain uncertain and it depends upon the interpretation of those terms by the courts. But even if the court decides that the protestor has not violated Sec. 17 (1) Nr. 1 VersG NRW, law enforcement still has taken measures against him and pulled him out of the assembly.

Adding to this is the legal character. The legislator underlines that such identity concealments should not be captured by Sec. 17 (1) Nr. 1 VersG NRW that are aimed at avoiding negative consequences (e.g. in their personal or professional life).[40] Actually covering up the identity is still not necessary for triggering punishment.[41]

From that, we can derive that the scope of Sec. 17 (1) Nr. 1 VersG NRW already creates a high intensity. It creates a situation where the citizen has to justify and potentially end up in front of a criminal court.

(2) Consequences of the applicability of Sec. 27 (7) S. 1 VersG NRW

The criminalisation has to be further examined. It can be punished without an actual danger for people or objects. It is a criminalisation of a preliminary stage. This is especially debatable given the *ultima-ratio-principle*. The *ultima-ratio-principle* states that criminal law is the sharpest and therefore always only the last mean of a state.[42] Hence, the legislator has to carefully evaluate the situation and consider if there are any other means to apply beforehand.

Besides the criminalisation of a preliminary stage, another consequence is the application of the StPO. This lowers the barrier for law enforcement to act. It is – for example – not permitted to detain protestors. If law enforcement now suspects a crime (e.g. Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW) they can arrest the suspect for the purpose of identification (Sec. 127 (1) S. 1, Sec.163b (1) S. 2 StPO). The suspicion of a crime in the sense of Sec. 27 VersG NRW practically imposes itself due to the openness and unclearness of the legal terms and the fact that the punishment is triggered without prior administrative law order (see above).

Supplementary, the legal consequences for policemen have to be considered. According to Sec. 163 (1) S. 1 StPO, the principle of legality applies. That means that they are obligated

[40] LT-Drs 17/12423, p 76.

[41] OLG Hamm, NStZ-RR 2017, 390, 391; cf Rudolf Rengier, *Strafrecht Allgemeiner Teil* (14th edn, C.H. Beck Verlag 2022) § 10 paras 11 and 16.

[42] Heribert Ostendorf and Janique Brüning, *Strafprozessrecht* (4th edn, Nomos 2021) § 2 para 1; Werner Beulke and Helmut Satzger, *Strafrecht Allgemeiner Teil - Die Straftat und ihr Aufbau* (52nd edn, C.F. Müller 2022) § 1 para 15.

to prosecute every suspect.[43] They have to take all measures which may not be deferred in order to prevent the concealment of facts (Sec. 163 (1) S. 1 StPO). It is not up to their discretion whether to act or not.[44] If they do not act, they may commit a crime themselves (see Sec. 258, 258a StGB).[45] They can also be liable to pay damages (Art. 34 S. 1 GG in combination with Sec. 839 (1) BGB – German Civil Code). The only choice of the policemen is when or in which order they are taking actions against the suspects.[46] But in the context of Sec. 17 (1) Nr. 1 VersG NRW, this freedom does not really exist. Given that a person's identity is covered up, the policemen can only take actions immediately and not in the aftermath of the assembly, where the person can no longer be approached to be identified.[47] This means that the policemen have to act, even though that increases the likelihood of violence and an incendiary course of the assembly.[48]

Critics might point out that this is not a particularity of Sec. 17 (1) Nr. 1 VersG NRW and that this applies to every punitive regulation concerning assemblies. What is particular about Sec. 17 (1) Nr. 1 VersG NRW is that it is very difficult to grasp and creates many practical problems where policemen simply do not know if Sec. 17 (1) Nr. 1 VersG NRW applies or not. In contrast it is very easy to apply Sec. 27 (1) VersG NRW – here a host of an assembly gets punished because he executes an assembly even though it was forbidden. Given that however it is only consequent to apply these ideas to every punitive regulation which concern assemblies and are unclearly phrased or provide law enforcement with extreme practical difficulty.

To conclude, the criminalisation of identity concealment allows the application of the StPO, which lowers the barrier of taking measures against protestors significantly. These measures are no options, but obligations for law enforcement if they suspect a violation of Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW. If they do not take these measures, the policemen commit a crime and can be liable to pay damages. This leads to the conclusion

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[43] BVerfG, NStZ 1982, 430; Bertram Schmitt, '§ 152' in Lutz Meyer-Goßner and Bertramn Schmitt (eds), *Strafprozessordnung mit GVG und Nebengesetzen* (65th edn, C.H. Beck Verlag 2022) para 2.

[44] Silke Noltensmeier von Osten, *Kommentar zur Strafprozessordnung Band 3: §§ 131-211* (108th edn, Carl Heymanns Verlag 2021) § 163 para 7; Rainer Griesbaum, *Karlsruher Kommentar Strafprozessordnung mit GVG, EGGVG und EMRK* (8th edn, C. H. Beck Verlag 2019) § 163 para 1.

[45] Marcus Köhler, '§ 163' in Meyer-Goßner and Schmitt (n 43) para 1a.

[46] Wolfgang Wohlers, *Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK: SK StPO, Band III* (4th edn, Carl Heymanns 2010) § 163 para 6.

[47] Karl Heinz Kunert and Klaus Bernsmann, 'Neue Sicherheitsgesetze – mehr Rechtssicherheit? Zu dem Gesetz zur Änderung des Strafgesetzbuchs, der Strafprozeßordnung und des Versammlungsgesetzes und zur Einführung einer Kronzeugenregelung bei terroristischen Straftaten vom 9.6.1989 (BGBl I, 1059)' [1989] NStZ 449, 454.

[48] ibid.

that policemen will practice an extensive interpretation and understanding of Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW.

(3) Subjective Intensity: The chilling effect of Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW

Despite the narrower scope of application of Sec. 17 (1) Nr. 1 VersG NRW in comparison to Sec. 17a VersG, there are practical problems. Most relevant for the subjective intensity is the unclearness of the legal terms. Using such is common in the area of administrative law to enable authorities to make quick decisions. The use of those is very uncommon in a criminal law setting, where it cannot be expected of the citizens to comprehend and interpret the legal terms in a proper way.[49] Taking this uncertainty of legal layman as well as the punishment for miscalculation into account, it is to be expected that Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW intimidates the citizens and can keep them away from using their freedom of assembly.[50]

(4) Conclusion: how intensely are the protestors affected by Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW?

These regulations create a necessity for justification for the protestor and will be followed by criminal prosecution in many cases. At the end of it, there can be a sentence of up to two years in prison. That invokes questions if the legislator lives up to the *ultima-ratio-principle*. Aside from this, the criminal procedure law has impressive consequences. By the architecture of the regulations, policemen are pushed to an extensive understanding and interpretation of Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW. Again, the uncertainty about the interpretation of the legal terms and the direct punishment without the option of orders in an administrative law sense, impose themselves. The protestors are affected very intensely by the regulations.

bb. How effectively can the legislator achieve his legitimate causes?

The prohibition of covering up one's identity and the video surveillance of the assembly work together. They give law enforcement a first reference point for identification. Police-known offenders could already be registered and can be prosecuted this way. If the people were masked, the video surveillance would not be of much help. In this regard the prohibition of covering one's identity is a very effective mean of enhancing prosecution.

Regarding the other cause of the legislator, the prevention of violence, it has to be recurred on the understanding of the legislator that people would be more peaceful if they cannot cover up their identity. If these psychological effects actually exist goes beyond the scope

[49] cf BVerfGE 122, 342, 364; Kunert and Bernsmann (n 47).
[50] BVerfGE 122, 342, 365.

of this article. It can however be referenced to some scientific literature that doubts this.[51] All in all, the legislator can achieve his legitimate causes moderately.

e. Overall assessment of the proportionality of Sec. 17 (1) Nr. 1 VersG NRW

Considering both the very high intensity for the protestors and the fact that the legislator can only achieve his goals moderately, Sec. 17 (1) Nr. 1 VersG NRW is unproportionate to enhance prosecution and to ensure public safety. Having taken all factors into account, the most crucial one is the punitive character as stipulated by Sec. 27 (7) S. 1 VersG NRW.

2. Sec. 17 (1) Nr. 2 VersG NRW

a. Legitimate cause

Similar to Sec. 17 (1) Nr. 1 VersG NRW, behind Nr. 2 is also the idea of preventing violence and ensuring public safety. Again, it could be asked if protestors are actually more peaceful when they cannot wear protective equipment. Again, it is to refer to the wide margin of assessment by the legislator.

b. Suitability

In terms of suitability the decision only underlies a plausibility check.[52] It is not entirely implausible that people who cannot protect themselves against policemen act more peacefully. Also similar to Sec. 17 (1) Nr. 1 VersG NRW the psychological effects cannot be quantified.

c. Necessity

As in the case of Sec. 17 (1) Nr. 1 VersG NRW the causes of the legislator can be achieved just as well if the punishment is linked to a prior order (Sec. 17 (2) VersG NRW). Sec. 17 (1) Nr. 2 VersG NRW is unnecessary. Again, if this line of argument is not followed, the adequateness has to be examined.

d. Adequateness

aa. How intensely are protestors affected by Sec. 17 (1) Nr. 2 VersG NRW?

At first glance it seems convincing to judge Sec. 17 (1) Nr. 2 VersG NRW inadequate,

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[51] Kniesel (n 16) para 11; Matthias Krauß, 'Übersicht § 125' in Gabriele Cirener and others (eds), *Leipziger Kommentar Strafgesetzbuch, Band 8: §§ 123 bis 145d* (13th edn, De Gruyter 2021).

[52] Ralf Poscher, *Handbuch des Verfassungsrechts, Darstellungen in transnationaler Perspektive* (1st edn, C.H. Beck Verlag 2021) § 3 para 62.

therefore unproportionate, hence unconstitutional out of the same reasons that apply to Sec. 17 (1) Nr. 1 VersG NRW.

(1) Consequences from the applicability of Sec. 27 (7) S. 2 VersG NRW

The only difference to Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW is that carrying protective equipment cannot constitute a misdemeanour, but is always a crime. This and the assessments from above lead to a very high intensity in which the protestors are affected.

(2) Worthiness of protection and subjective intensity

Contrary to the prohibition of covering one's identity, there are not many everyday items that can be interpreted as protective equipment in the sense of Sec. 17 (1) Nr. 2 VersG NRW. Likewise, it must be asked whether people who wear equipment to protect themselves against enforcement measures by law enforcement are worthy of protection.

By applying the same criteria as in Sec. 17 (1) Nr. 1 VersG NRW – the existence of a valid reason for wearing the object – it appears that there are little to no reasons for taking part in an assembly in such protective equipment. Protective shields, iron helmets or gas masks offer little room for interpretation other than they are intended for violent encounters.[53]

There can only be two arguments. Firstly, that these objects are carried to protect themselves against violent others (i.e. political opponents). Secondly, that police violence is expected.

Referring to the first argument it has to be stated that such objects do not fall under Sec. 17 (1) Nr. 2 VersG NRW. The only objects that fall under Sec. 17 (1) Nr. 2 VersG NRW are such that are intended to prevent enforcement measures by law enforcement. If they are however interpreted as such, it is a problem that we already discussed: the missing link of the punishment to a prior (administrative law) order.

Referring to the second argument: the pretence that one fears police violence cannot undermine Sec. 17 (1) Nr. 2 VersG NRW on a factual level. Against police violence there are own appeals (e.g. an internal affairs complaint or administrative court proceedings). There is also the possibility of charging the policemen with a criminal complaint (Sec. 340

[53] Braun and Roitzheim (n 5) para 18.

(1) StGB in combination with Sec. 158 (1) S. 1 StPO). In exceptional cases wearing the protective equipment can also be justified via necessity as a defence (Sec. 34 S. 1 StGB).

(3) Conclusion

All in all, there is no overwhelming intensity resulting from the prohibition of wearing/ carrying protective equipment. This follows a lock of worthiness in protection. However, the criminal law implications, as laid out for Sec. 17 (1) Nr. 1 VersG NRW, are the exact same. Therefore Sec. 17 (1) Nr. 2 VersG NRW also affects the protestors greatly.

bb. How effective is the prohibition to achieve the causes of the legislator?

Again, there is the main problem if people are more peaceful if they can't wear protective equipment. For the purposes of this article we assume that it cannot be clarified. What is left is the wide margin of assessment of the legislator. We remain with moderate effectiveness.

cc. Conclusion: Would Sec. 17 (1) Nr. 2 VersG NRW be adequate?

Contrarily to Sec. 17 (1) Nr. 1 VersG NRW, Sec. 17 (1) Nr. 2 VersG NRW in itself is not inadequate. What makes it inadequate is its punitive character, triggered by Sec. 27 VersG NRW.

e. Is Sec. 17 (1) Nr. 2 VersG NRW proportionate?

All in all, Sec. 17 (1) Nr. 2 VersG NRW is unnecessary and – due to its punitive character – inadequate, therefore unconstitutional.

III. Are Sec. 17 (1) Nr. 1 and Nr. 2 VersG NRW phrased clearly enough?

As already pointed out, the legal terms leave a lot of room for interpretation and are phrased unclearly. But according to Art. 103 (2) GG, an act may only be punished if it was defined by a law as a criminal offence before the act was committed (*nulla poena sine lege*). They are defined enough if the reach and scope of application can be understood by the wording or can be interpreted.[54] So, it has to be obvious for the individual which

[54] BVerfGE 117, 71, 112; Georg Nolte and Helmut Philipp Aust, 'Art. 103' in Hermann von Mangold, Friedrich Klein and Christian Starck (eds), *Grundgesetz Kommentar. Band 3* (7th edn, C.H. Beck Verlag 2018) para 139a.

behaviour violate Sec. 17 (1) Nr. 1, 2 VersG NRW and which consequences are linked to the violation.[55] The law becomes more defined if court decisions emerge.[56]

In analysing if Sec. 17 (1) Nr. 1, 2 VersG NRW are phrased clearly enough they have to be divided into their parts. Firstly, it has to be established if the objects for covering up one's identity and those that constitute protective equipment are denoted. It has to be analysed what role the subjective component plays in the sense of Art. 103 (2) GG and the spatial and factual applicability have to be considered.

1. Objects for covering up one's identity, Sec. 17 (1) Nr. 1 VersG NRW

As elaborated above it is difficult to establish which objects fall under Sec. 17 (1) Nr. 1 VersG NRW. One understanding is that it depends whether the items can be used to change or veil the face to make the person unrecognizable.[57] Motorcycle helmets, hooding or face masks come to mind. But this understanding does not really help to limit the scope or understand the reach of Sec. 17 (1) Nr. 1 VersG NRW. It would also mean that wigs and carnival articles, pullovers, scarfs, religious clothing, Theatre masks, medical masks or too much make-up fall under Sec. 17 (1) Nr. 1 VersG NRW.[58]

Another understanding is that it would depend upon how many sensory organs are still visible. If the chin was covered there should be three sensory organs visible. If it is not covered, there should be two sensory organs visible.[59]

Another understanding tries to differentiate between those objects that can cover up the identity and those that only complicate the identification.[60]

These completely different understandings of Sec. 17 (1) Nr. 1 VersG NRW show that the scope cannot be interpreted based on the wording only. One has to take the purpose of the prohibition into account.

The lack of clarity could be corrected by the subjective component. The objects have to be targeted at preventing the identification by law enforcement for prosecution. Otherwise the protestors cannot be punished.

But, as also mentioned earlier, how should a legal layman be able to properly assess the situation and interpret it under the lens of Sec. 17 (1) Nr. 1 VersG NRW? It is not obvious

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[55] cf Henning Radtke, 'Art. 103' in Epping and Hullgruber (n 2) para 26; Philipp Kunig and Frank Salinger, 'Art. 103' in Hermann von Mangold, Friedrich Klein and Christian Starck (eds), *Grundgesetz Kommentar. Band 2* (7th edn, C.H. Beck Verlag 2021) para 45

[56] Helmuth Schulze-Fielitz, 'Art. 103 Abs. 2' in Horst Dreier (ed), *Grundgesetz Kommentar Band III* (3rd edn, Mohr Siebeck 2018) para 40.

[57] Herbst (n 5) para 12; Michael Kniesel, '§ 17a' in Diete, Gintzel and Kniesel (n 16) para 30f.

[58] Herbst (n 5) para 12.

[59] Kniesel (n 57) para 31.

[60] Herbst (n 5) para 12.

which objects fall under Sec. 17 (1) Nr. 1 VersG NRW and when law enforcement will assume that these objects are being worn to prevent identification for the purpose of prosecution. The purpose of the principle *nulla poena sine lege*, giving the citizens a clear orientation, which behaviour is punishable and which is not, cannot be fulfilled by Sec. 17 (1) Nr. 1 VersG NRW. It is phrased too unclearly.

2. Spatial and factual applicability of Sec. 17 (1) Nr. 1, 2 VersG NRW

The second main deficiency of Sec. 17 (1) Nr. 1 and 2 VersG NRW lies in spatial and factual applicability. Sec. 17 (1) VersG NRW does not only apply to assemblies as defined earlier, but also in connection to the assembly or other public events.

As a consequence, the arrival phase (i.e. the way to the assembly or event) and the ending phase (i.e. the way from the assembly to another location) can fall under Sec. 17 (1) VersG NRW.[61]

Conversely, "in connection" can also mean that people in close proximity to the assembly fall under Sec. 17 (1) VersG NRW, even though they do not want to be a part of it.[62]

A different understanding is that the people who organize and prepare the protest can fall under Sec. 17 (1) VersG NRW.[63]

Given these different understandings which diverge in their reach a lot, it is not clear from the wording what is meant with "in connection". This cannot be interpreted by looking at Sec. 17a VersG NRW or Sec. 17 ME-VersG, because they either have a different wording (Sec. 17a VersG NRW) or do not explain how it should be understood (Sec. 17 ME VersG).

3. Conclusion: Are Sec. 17 (1) Nr. 1, 2, Sec. 27 (7) S. 1, 2 phrased too unclearly?

The scope of Sec. 17 VersG NRW is phrased too unclearly in three different regards. It is unclear when a person is on an assembly or event that falls under Sec. 17 (1) VersG NRW. And it is also unclear which objects fall under it and when law enforcement assumes that they are aimed at preventing identification. This does not suffice the requirements of Art. 103 (2) GG.

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[61] Herbst (n 5) paras 6-9.
[62] cf Braun and Roitzheim (n 5) paras 7-8.
[63] Herbst (n 5) para 6.

IV. Can Sec. 17 (1) VersG NRW be applied constitutionally?

Based on the drawn conclusions, Sec. 17 (1) VersG NRW is unproportionate and phrased too unclearly. However, it must not be ruled unconstitutional if it can be applied in a way that aligns with the constitution.[64] The limits of interpretation in this way lay in the wording and in the fundamental assessment of the legislator.[65]

To be interpreted in a constitutional way the spatial and factual applicability would have to be determined. Furthermore, law enforcement would need discretion in applying Sec. 17 (1) VersG NRW. Finally, the punishment would have to be linked to a primer (administrative law) order, for example Sec. 17 (2) VersG NRW.

Interpreting discretion and linking the punishment to a prior order meet technical concerns.

Sec. 27 (7) S. 1 VersG NRW is unequivocal in that sense that the punishment is linked to a violation of Sec. 17 (1) VersG NRW and not to a violation of Sec. 17 (2) VersG NRW. The violation of Sec. 17 (2) VersG NRW is governed by Sec. 28 (1) Nr. 6 VersG NRW. Any interpretation that links Sec. 27 (7) S. 1 VersG NRW to Sec. 17 (2) VersG NRW exceeds the wording of the regulations.

Concerning the principle of legality: it is the sharp contrast to the principle of opportunity and specifically offers no discretion. This is because criminal procedure law guarantees a fair trial on a simple-law basis. It should rule out arbitrariness. Therefore, interpreting discretion into Sec. 17 (1) VersG NRW is not in accordance with the fundamental assessment of the legislator.

In conclusion, the constitutional deficiencies of Sec. 17 (1) VersG NRW cannot be overcome by interpreting it in a way that aligns with the constitution. It cannot be interpreted constitutionally.

B. Freedom of faith, Art. 4 (1), (2) GG

Lastly, the freedom of faith could be violated by Sec. 17 (1) Nr. 1 VersG NRW. Art. 4 (1) and (2) GG guarantee a uniform fundamental right to the freedom of faith.[66] Part of this

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[64] BVerfGE 2, 266, 282; BayVerfGH, NJW 1951, 455, 456; Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th edition, Springer Verlag 1991) 339.

[65] BVerfG 63, 131, 147-48; 69, 1, 55; 102, 254, 327; Klaus Schlaich and Stefan Korioth, *Das Bundesverfasungsgericht, Stellung, Entscheidungen, Verfahren, ein Studienbuch* (12th edn, C.H. Beck Verlag 2021) ch 5 para 449; Christian Walter, 'Art. 93' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz Kommentar. Band 2* (100th supp, C.H. Beck January 2023) para 113.

[66] BVerfGE 24, 236, 245; Manssen (n 9) § 14 para 352; Emanuel V Towfigh and Alexander Gleixner, *Smartbook Grundrechte, ein hybrides Lehrbuch mit 67 Lernvideos* (1st edn, Nomos 2022) § 10 para 2.

freedom is the freedom to excise one's beliefs. There are religions where it is mandatory to wear headscarves. These can now fall under Sec. 17 (1) Nr. 1 VersG NRW.

I. Does Sec. 17 (1) Nr. 1 VersG NRW include religious clothing?

There are no doubts that religious headscarf's can objectively be used to cover up one's identity (i.e. Burkas). Given the religious background, the subjective component has to be rejected in most of the cases. People who wear a headscarf to exercise their religion do not wear it to prevent law enforcement from identifying them for prosecution.

What is problematic is if people who are not religious wear headscarves to commit crimes and stay unidentified. How should the police distinguish between believers and non-believers who only intend to commit crimes? Even more problematic is the case when religious people wear headscarves to commit crimes and stay unidentified. In these cases, it is impossible for the police to distinguish between religious reasons and the aim to stay unidentified to commit crimes.

II. Is it unconstitutional to prohibit religious clothing with Sec. 17 (1) Nr.1 VersG NRW?

Assuming that the police interpret religious clothing as objects that fall under Sec. 17 (1) Nr. 1 VersG NRW, a fundamental dispute comes up. Namely if Sec. 17 (1) Nr. 1 VersG NRW can be used to prohibit religious clothing.

This is only possible if Sec. 17 (1) Nr. 1 VersG NRW fulfils the formal requirements that Art. 4 GG sets for restrictions (i.e. a limitation proviso). Which formal requirements result from Art. 4 GG, is in dispute.

1. Is it up to the legislator to restrict religious freedoms?

One understanding is that due to the lack of specification, Art. 4 GG will be granted unconditionally and can only be restricted by colliding fundamental rights and constitutional goods.[67] This position gets embellished by some in its relation to the constitution of the Weimar Republic ("*WRV*"), but remains the same in its core.[68] Enhancing prosecution and ensuring public safety are legitimate causes, but aren't explicitly rooted in the constitution. Hence, following this understanding,

[67] BVerfGE 108, 282, 297; 52, 223, 246f-47; Thomas Kingreen and Ralf Poscher, *Grundrechte Staatsrecht II* (38th edn, C.F. Müller 2022) § 12 para 753; Michael Germann, *BeckOK GG* Art. 4 para 48; *Hufen* (n 9) § 22 para 27f.; Michael Germann, 'Art. 4' in Volker Epping and Christian Hillgruber (eds), *Grundgesetz Kommentar* (3rd edn, C.H. Beck Verlag 2020) para 47.3.

[68] BVerfGE 33, 23, 30-31; Michael and Morlok (n 9) § 9 para 188; Manssen (n 9) § 14 para 371.

Sec. 17 (1) Nr. 1 VersG NRW does not fulfil the formal requirements and cannot be used to prohibit religious clothing.

Another understanding is that simple laws can be used to restrict Art. 4 GG, because of the relation to the WRV, especially Art. 136 (1) WRV in combination with Art. 140 GG.[69] Today it is legal consensus that Art. 136 (1) WRV is fully valid constitutional law in the federal republic of Germany.[70] Art. 136 (1) WRV states: *"civil and civic rights and duties are neither conditioned nor limited by the exercise of religious freedom".* Reversing this sentence, civil and civic rights and duties are apt to limit the exercise of religious freedom. Essentially, there would only be the requirement for a simple law to restrict Art. 4 GG. Sec. 17 VersG NRW is a simple law.

For this understanding it is argued that the wording of Art. 140 GG is unequivocal and that the historical development of Art. 4 GG would indicate the lower barrier for restrictions.[71] The parliamentary council assumed that general laws were an unwritten barrier of Art. 4 GG.[72] This would correspond to the legal understanding at the time.[73] Additionally it should be noted that state-church law including religious freedoms developed together and should therefore also be viewed together today.[74]

In the end, these arguments are still not convincing. Above all, the prohibition lowers the barrier to restrict religious freedoms significantly. And that despite Art. 4 GG being an expression of human dignity and core elements of personality.[75] The historical argumentation is also not persuasive. At the end of the consultations of the parliamentary council, Art. 135 WRV was explicitly not embedded into Art. 140 GG, despite it setting a formal requirement for the restriction of religious freedom.[76] This indicates that the legislator did not intend to make it possible to restrict Art. 4 GG on the basis of a simple law.[77] This makes sense given the impressions of national socialism and the possibility to

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[69] BVerwG, NJW 2001, 1225, 1226-27; Stefan Muckel, *Handbuch der Grundrechte in Deutschland und Europa, Band IV: Grundrechte in Deutschland: Einzelgrundrechte I* (1st edn, C.F. Müller 2011) § 96 para 94-98; Martin Heckel, 'Zur Zukunftsfähigkeit des deutschen „Staatskirchenrechts" oder "Religionsverfassungsrechts"' [2009] AöR 134, 309, 377-78; Jarass (n 3) art 4 para 32.

[70] BVerfG, NJW 1966, 147; Till Patrik Holterhus and Nazli Aghazadeh, 'Die Grundzüge des Religionsverfassungsrechts' [2016] JuS 19; Germann (n 67) para 47.3; Heinrich de Wall, '§ 111' in Klaus Stern, Helge Sodan and Markus Möstl (eds), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund. Band 4: Die einzelnen Grundrechte* (2nd edn, C.H. Beck Verlag 2022) para 93.

[71] Muckel (n 69) § 96 para 95; Stefan Muckel, *Berliner Kommentar zum Grundgesetz Band 1* (1st edn, Erich Schmidt Verlag 2021) art 4 para 52.

[72] Muckel (n 69) § 96 para 95.

[73] Muckel (n 69) § 96 para 95.

[74] Muckel (n 71) art 4 para 52.

[75] BVerfGE 33, 23, 28-29; Jarass (n 3) art 4 para 4.

[76] Hans Michael Heinig and Martin Morlok, 'Von Schafen und Kopftüchern: Das Grundrecht auf Religionsfreiheit in Deutschland vor den Herausforderungen religiöser Pluralisierung' [2003] 15-16 JZ 780; Germann (n 67) para 47.3.

[77] Heinig and Morlok (n 75).

undermine religious freedoms by law.[78] Systematically, Art. 136 (1) WRV is meant to repeat and strengthen Art. 4 GG.[79] In turn it is not convincing to interpret a restriction out of it.[80]

Be that as it may, a possible way around this problem is to derive public safety from the right to physical integrity (Art. 2 (2) S. 1 GG). Public safety contains the protection of individual rights and goods, the protection of the integrity of the legal order *("Unversehrtheit der objektiven Rechtsordnung")* and the protection of state institutions.[81] As outlined earlier, the legislator prohibits identity concealment due to the probability of violent encounters. Therefore, the prohibition's target of ensuring public safety can be specified to the protection of individual rights, namely the right to physical integrity. This right is part of the constitution (Art. 2 (2) S. 1 GG). Hence, it is apt, to restrict religious freedoms.

2. Would the breach of religious freedoms be proportional?

The breach would still need to be proportional in order to protect the right to physical integrity.

a. Legitimate cause

The protection of the right to physical integrity is of utmost importance and part of the constitution. It is undoubtably a legitimate cause.

b. Suitability

Due to the margin of assessment, the restriction of Art. 4 GG is suitable (see p. 86).

c. Necessity

Regarding the necessity of the prohibition in relation to Art. 4 GG, an administrative law order can achieve the same result as the criminalisation (see p. 89-90). The criminalisation (Sec. 27 (7) S. 1 VersG NRW) is unnecessary.

d. Adequateness

As done before, the adequateness of Sec. 17 (1) Nr. 1 VersG NRW can additionally be assessed. This is especially useful given the context of the breach. Even if there were to be

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[78] Heinig and Morlok (n 75); cf Saul Friedländer, *Das Dritte Reich und die Juden: die Jahre der Verfolgung 1933-1939* (C.H. Beck Verlag 2007) ch 5.
[79] Germann (n 67) para 47.3.
[80] Germann (n 67) para 47.3.
[81] Dietlein (n 19) § 3 paras 50-54.

an administrative law order prohibiting to wear religious headscarves, this administrative law order could be in violation of Art. 4 (1), (2) GG due to its inadequateness.

aa. Intensity of the prohibition

A persistent theme is the criminalisation of identity concealment. As for the freedom of assembly, Sec. 27 (7) S. 1 VersG NRW is of major importance concerning the intensity of the prohibition. Again, the consequences have to be underlined (see p. 91-93).

For religious people, the prohibition to wear religious headscarves is even more intense. Taken to the extreme, they would have to decide whether they want to exercise their religious beliefs or participate in the political process through protesting.

On the contrary, the use case of Sec. 17 (1) Nr. 1 VersG NRW does not include every person that wears headscarves. The identity is only concealed by wearing burkas. Regular headscarves typically do not prevent identification. Additionally, the headscarves would have to be aimed at covering up one's identity for the purpose of preventing identification by law enforcement.

Broadly speaking there are three categories for which Sec. 17 (1) Nr. 1 VersG NRW is relevant: 1) Non-religious people wearing headscarves to commit crimes and stay unidentified, 2) religious people wearing headscarves to exercise their beliefs *and* stay unidentified committing crimes, 3) religious people only wearing headscarves to exercise their beliefs.

Group 1) is not protected by Art. 4 (1), (2) GG. Group 3) does not fall under the scope ofSec. 17 (1) Nr. 1 VersG NRW. Hence, there is no implication for the constitutionality of the regulation by these groups. Accordingly, the intensity is lowered.

A more difficult assessment is to be made for group 2). They enjoy protection of Art. 4 GG. On the other hand, the state is obligated to protect its citizens.

Taking this obligation as well as the intention to commit crimes into account, the protestors of group 2) are not worthy of protection.

Subsequently, the intensity of the prohibition is not all to high. Not only can people wear headscarves, only burkas are apt to prevent identification, but the main group that is targeted is the one that commits crimes. Still it has to be seen if this academic distinction holds up to the reality and if policemen can distinguish the different groups. Due to the risk of wrongful categorisation and the applicable consequences (Sec. 27 (7) VersG NRW in conjunction with StPO-regulations), a moderate intensity has to be assumed.

bb. Effectiveness

As for the freedom of assembly, the prevention of violence can be achieved moderately (see p. 93-94).

cc. Conclusion

Potentially criminalising wearing religious clothing is unnecessary as the same result can be achieved through an administrative law order. Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW are in violation of Art. 4 (1), (2) GG.

Yet, evaluating the regulation on its merits in relation to Art. 4 (1), (2) GG; Sec. 17 (1) Nr. 1 VersG NRW is not unproportionate to protect the right to physical integrity.

III. General remarks on the implications of Sec. 17 (1) Nr. 1 VersG NRW on the freedom of faith

To conclude, there are different rationales for restricting religious freedoms. But not any target of the legislator suffices. They have to be based on the constitution. Sec. 17 (1) Nr. 1 VersG NRW can be viewed as protecting the right to physical integrity (Art. 2 (2) S. 1 GG). In turn, it is up to the legislator to restrict religious freedoms in this case.

If religious freedoms are breached by Sec. 17 (1) Nr. 1 VersG NRW depends upon the intent of the protestors, which is assessed by law enforcement. Clearly this assessment can be criticised and is to be specified. However, the use case of Sec. 17 (1) Nr. 1 VersG NRW is restricted and does not target religious people in general. Those who are targeted want to commit crimes and are therefore not worthy of protection.

Still, the principles of BVerfGE 122, 342 have to be applied. In consequence, the breach of Art. 4 (1), (2) is unnecessary. Therefore Sec. 17 (1) Nr. 1 VersG NRW is unconstitutional due to a violation of Art. 4 (1), (2) GG.

Deviating from the assessment of the freedom of assembly, Sec. 17 (1) Nr. 1 VersG NRW does not generally violate Art. 4 (1), (2) GG. If the criminalisation was to be linked to the disregard of an administrative law order, the constitutional concerns arising from Art. 4 (1), (2) GG have no merits.

C. Conclusion

The prohibitions outlined in Sec. 17 (1) Nr. 1 and 2 VersG NRW are unconstitutional. Their main deficiency is the criminalisation through Sec. 27 (7) VersG NRW. In its specific modalities this is unnecessary. But even if one does not agree with that assessment, the breach of Art. 8 (1) GG by Sec. 17 (1) Nr. 1 VersG NRW is unproportionate.

Further, it is not obvious for protestors when they fall under Sec. 17 (1) VersG NRW. The wording is unclear in both the objective and subjective scope, as well as the applicability.

Taking these failures into account, the only way Sec. 17 (1) VersG NRW could remain is if it can be interpreted constitutionally. Such an interpretation does not seem possible without extending the wording or breaking with fundamental assessments of the legislator.

A different assessment has to be conducted for the breach of the freedom of faith. The only one's where a violation of Art. 4 (1), (2) GG can be suspected are those who are religious and use the headscarf simultaneously to protect themselves from identification by law enforcement. The legislator does not have to accept that crimes get committed under the protection of religious freedom. If it weren't for the unnecessary criminalisation, Sec. 17 (1) Nr. 1 VersG NRW would not be in violation of Art. 4 (1), (2) GG.

Similarly, Sec. 17 (1) Nr. 2 VersG NRW is, in general, proportional. It still is unnecessary and inadequate due to the criminalisation.

All in all, Sec. 17 (1) VersG NRW fails to live up to the constitutional standards of Art. 8 (1) GG, Art. 4 (1), (2) GG and Art. 103 (2) GG. The legislator of North Rhine Westphalia could not resolve the constitutional doubts that adhered to Sec. 17a VersG. In light of this analysis, a quick and clear decision of the VerfGH NRW is to be awaited.

Heine Law Review

Established 2023

Published by students at the Faculty of Law of the Heinrich Heine University in Düsseldorf.

Issues available at www.heinelawreview.de

We would like to thank our sponsor, the Student Parliament of the HHU.

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