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Editorial

Is Our Legal System Able to Tackle Climate Change?

Can Degistirici[*]

Whether it’s in business, politics or science, the issue of sustainability is on everyone's lips. Since it is one of the most important issues of our time, there is nothing wrong with that. We as lawyers should ask ourselves to what extent our legal system provides answers to the challenges.

Increasingly, the legal profession seems to feel a responsibility to drive this issue forward by taking cases to courts in order to bring about landmark decisions. ‘Climate Change Litigation’[1] is the name given to this area, which has grown particularly in recent years. Notable decisions include the so-called ‘climate decision’ of the German Federal Constitutional Court (“Bundesverfassungsgericht”) in 2021.[2] At the European level, the decision of the European Court of Human Rights (ECHR), which was brought about by the ‘climate seniors’ (“KlimaSeniorinnen”), can be taken into account.[3] Although bringing about fundamental decisions in favour of sustainability is a highly commendable endeavour, the question can be raised (especially from the point of view of democratic legitimacy) as to whether the most important questions of our legal system should not rather be answered by the parliamentary legislature.

However, the issue of sustainability does not only concern constitutional law. There is also an aspect that has been controversially discussed in the context of the sales law warranty for defects. It is the question of whether the lack of sustainability within the production phase constitutes a material defect of the good in question.[4] The voices in favour of a broad understanding of material defects argue that the German concept of material defects does not only cover factors that are directly connected to the item. Rather, a material defect can also be based on the economic, social or legal relationships of the item to its environment, which influence the usability or value.[5] Changing the general understanding of when a product is considered defective would either force

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[*] The author is editor-in-chief and founder of the Heine Law Review.
[1] <https://climatecasechart.com> accessed 31 October 2024.
[2] BVerfGE 157, 30-177.
[3] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App no 53600/20 (ECHR, 9 April 2024).
[4] Lukas Beck, ‘Die Rechte des Käufers bei fehlender Nachhaltigkeit der Kaufsache’ [2022] NJW 3313; Jan-Erik Schirmer, ‘Nachhaltigkeit in den Privatrechten Europas’ [2021] ZEuP 35, 43.
[5] cf BGHZ 67, 134, 136; BGHZ 70, 47, 49.

manufacturers to critically question their process of production or at least demand them to explicitly state that their products have not been produced sustainable. Either way, sustainability would be at the front and centre in the field of commerce.

There is no doubt, that there are still gaps in our legal system regarding the issue of climate change, which raises the question of how the legislator intends to act. The so-called 'Right to repair', which was adopted in April 2024 and came into force in July 2024 as part of a directive[6] of the European Parliament, is a positive development.[7] The directive is part of sustainability strategy of the European Union. The main objective is to strengthen the EU repair market and reduce repair costs for consumers.[8] It should be stressed, that the Directive still needs to be implemented into national law. However, according to Article 3 of the Directive, Member States shall not maintain or introduce in their national law provisions diverging from those laid down in this Directive.

As we can see, the current legal system is in itself somewhat equipped to deal with the challenges that our society is facing. Nonetheless, the legislator should be applauded for trying to tackle climate change. The coming years will show whether these efforts are sufficient.

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[6] Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828.

[7] <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20590/right-to-repair-making-repair-easier-and-more-appealing-to-consumers> accessed 23 October 2024.

[8] <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20590/right-to-repair-making-repair-easier-and-more-appealing-to-consumers> accessed 23 October 2024.

Articles

The Impact of Digitalisation on the Protection to One's Own Image in the Employment Context

Sarah Deutschmann[*]

Due to increasing digitalisation, employees are confronted with technologies in the employment relationship that enable the monitoring of their entire behaviour. A particularly valuable protected right, the right to one's own image, is being particularly threatened by the increased use of smart glasses and video surveillance.
So far, the German Bundesdatenschutzgesetz (Federal Data Protection Act) and the European General Data Protection Regulation have provided a legal framework. In order to comprehensively protect the rights of employees, but still take into account the economic interests of employers, the laws offer various authorisations that allow a comprehensive balancing of interests.

The author shows under which conditions and for which purposes employees' images may be collected and processed. In doing so, she deals with the individual phases of the employment relationship and shows how the interests of employees and employers are to be balanced in detail. The author also assesses the extent to which the authorisations can be appropriately applied to new technologies. She concludes that the flexible authorisations can also lead to appropriate results with regard to new technologies and illustrates her argument using the example of data glasses.

However, she also claims that the current legal situation entails legal uncertainties and difficulties with implementation and proposes the establishment of an independent Employee Data Protection Act. She suggests creating specific regulations for different phases of the employment relationship and including criteria developed by case law. Nevertheless, she also argues in favour of retaining a general clause with a flexible assessment in order to be able to include new technologies that emerge in the future.

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[*] Law student, HHU Düsseldorf. The author gives her thanks to Professor Jan Busche. All errors are entirely the author's.

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A. Introduction

The production and distribution of employee portraits has always played a significant role in the external appearance of companies.[1] Images in booklets, on posters or in newspapers have always been intended to give customers a personal impression and an overview of the company structure.[2] While the editions were mainly regionally limited and spread slowly, nowadays large amounts of data can be collected and distributed at high speed,[3] which also makes the possibilities for producing and distributing images much more diverse. Companies present themselves through promotional films in which their employees can be seen, with photos of the team on their website, in newsletters or on social media.[4] Content on websites and social media platforms can be accessed worldwide and employees are confronted with video surveillance at their workplace.[5] It is important to be aware of the need to find appropriate solutions for balancing the interests of employees and employers.[6] On the employee side, the general right of personality enshrined in Article 2 (1) in conjunction with Article 1 (1) GG (Grundgesetz, German Constitution), which gives the individual the right to decide for themselves about the production of photographs of their image and any utilisation.[7] Moreover, Article 8 CFR

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1 Martina Benecke and Nadja Groß, 'Das Recht am eigenen Bild im Arbeitsverhältnis, Voraussetzungen und rechtliche Probleme einer Einwilligung durch den Arbeitnehmer' (2015) 32 NZA 833.

2 Karl Riesenhuber, '§ 26 BDSG Datenverarbeitung für Zwecke des Beschäftigungsverhältnisses' in Amadeus Wolff, Stefan Brink and Antje v Ungern-Sternberg (eds), *Beck´scher Online Kommentar Datenschutzrecht* (48th edn, C.H.Beck 2024) para 179; Michael Fuhlrott and Julia Madeleine Remy, '"Neuer" Datenschutz in Kanzleien – Anwälte als Arbeitgeber, Datenverarbeitende und Werbende' (2018) 35 NZA 609, 612.

3 Rüdiger Krause, Expertise Digitalisierung und Beschäftigtendatenschutz (research report 482, Federal Ministry of Labour and Social Affairs 2016) 7; Marita Körner, 'Beschäftigtendatenschutz in Betriebsvereinbarungen unter der Geltung der DS-GVO' (2019) 36 NZA 1389, 1393.

4 Ubbo Assmuss and Florian Winzer, 'Mitarbeiterfotos im Intranet, auf Websites und in sozialen Netzwerken, Anforderungen an Einwilligung und Widerruf nach dem KUG und der DS-GVO' (2018) 9 ZD 508, 509; Joachim Ritter von Strobl-Albeg, '7. Kapitel Bildberichterstattung – Bildnisse und Bilder' in Karl Egbert Wenzel, *Das Recht der Wort- und Bildberichterstattung, Handbuch des Äußerungsrechts* (6th edn, Otto Schmidt 2018) 192.

5 LAG Hamm Case 11 Sa 858/16, 12 June 2017, ZD 2018, 92; Frank Venetis and Christian Oberwetter, 'Videoüberwachung von Arbeitnehmern' (2016) 69 NJW 1051.

6 Maxi Nebel, 'Big Data und Datenschutz in der Arbeitswelt, Risiken der Digitalisierung und Abhilfemöglichkeiten' (2018) 9 ZD 520, 523; Axel von Walter, *Datenschutz im Betrieb* (Haufe 2018) 17.

7 BVerfG Case 1 BvR 653/96, 15 December 1999, BVerfGE 101, 361, 381; Tristan Barczak 'GG Art. 2 Abs. 1' in Frauke Brosius-Gersdorf (ed), *Dreier Grundgesetz-Kommentar Band 1* (4th edn, Mohr Siebeck 2023) para 80.

(Charter of the fundamental rights of the EU) ensures the protection of personal data. However, this is accompanied by the interests of the employer, for example to optimise operational processes and thus economic benefits or to protect property or employees through surveillance measures.[8] These interests are guaranteed by the freedom of occupation arising from Article 12 (1) GG or the right to property under Article 14 (1) GG.[9] New challenges for legislators to strike a balance between these interests arise as technologies such as video conferencing, biometric access systems or working with assistance systems including smart glasses and artificial intelligence make it increasingly easy to monitor employees and control their behaviour.[10]

This article will answer the question of whether the regulations on the right to one's own image in the employment relationship are still contemporary with regard to the effects of digitalisation and new technologies. It will provide an overview of the permissibility of the processing of employee images before, during and after the employment relationship has ended, as well as highlighting and discussing new problems and adjustments already made by the legislator as a result of digitalisation. It will also outline the legislative need for action to create an independent Employee Data Protection Act.

B. Legal framework

I. Special need for protection of the right to one's own image in the employment relationship

The right to one's own image is a specification of the general personality right under Article 2 (1) in conjunction with Article 1 (1) GG and guarantees that everyone may decide for themselves on the production and use of their own image.[11]

Modern technologies make it possible to capture and process a person's appearance unnoticed and at any time,[12] making it impossible for individuals to decide which image data they wish to disclose. The risk of the unnoticed profiling, for example using facial recognition technology, data glasses or video surveillance, is increasing.[13]

The employment relationship in particular bears considerable risks for the individual

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[8] BAG Case 8 AZR 1010/13, 11 December 2014, BAGE 150, 195 para 38; Nebel (n 6) 523.

[9] OVG Saarlouis Case 2 A 662/17, 14 December 2017, ZD 2018, 134 para 39; BAG Case 2 AZR 133/18, 23 August 2018, ZD 2019, 226 para 30.

[10] Rüdiger Krause, 'Herausforderung Digitalisierung der Arbeitswelt und Arbeiten 4.0' (2017) 34 NZA-Beilage 53; Alexander Roßnagel, 'Datenschutzgesetzgebung für öffentliche Interessen und den Beschäftigungskontext, Chancen für risikoadäquate Datenschutzregelungen?' (2017) 41 DuD 290.

[11] BVerfG Case 1 BvR 653/96 (n 7) 381.

[12] BVerfG Cases 1 BvR 1602/07, 1 BvR 1606/07 and 1 BvR 1626/07, 26 February 2008, BVerfGE 120, 180, 198; Udo Di Fabio, 'GG Art. 2 Abs. 1' in Günter Düring and others (eds), *Grundgesetz Kommentar* (103th edn, C.H.Beck 2024) para 193.

[13] Thomas Klebe, 'Betriebsrat 4.0 – Digital und global?' (2017) 34 NZA-Beilage 77, 82; Florian Klein, *Personenbildnisse im Spannungsfeld von Datenschutzgrundverordnung und Kunsturhebergesetz* (Peter Lang 2017) 254.

employee's right to their own image. Due to the personal dependency on the employer, which characterises the employment relationship (see Section 611a (1) sentence 1 BGB, German civil code), the two parties do not meet as equals and the employee is in a particularly vulnerable position.[14] It is often the case that the employee grants the employer comprehensive access to their image data during the employment relationship.[15] Photos in application documents, on employee ID cards or video surveillance are mandatory requirements in some companies.[16]

In view of these circumstances, the protection of the right to one's own image in the employment relationship is of great importance so that comprehensive legal regulations are required in order to find solutions that are in line with the interests of the parties involved.

II. Legal Sources

1. Kunsturhebergesetz (German Law for the protection of images)

In German law, the protection of the right to one's own image is initially governed by the Kunsturhebergesetz (KUG, German Law for the protection of images),[17] which has been in existence for over 115 years.[18] Sections 22 ff KUG protects the distribution and public display of images, but not their production. According to Section 22 KUG, images of the person shown may only be published with the consent of the person concerned. Section 23 (1) KUG makes exceptions in this respect, according to which consent may be waived, but these are subject to the condition under Section 23 (2) KUG that they must not infringe any legitimate interests of the person depicted.

2. General Data Protection Regulation

The General Data Protection Regulation (GDPR) has provided far-reaching protection for the processing of personal data at European level since 2018, as set out in Section 1(1) of the Regulation. According to Art. 4 (1) GDPR, 'personal data' is any information relating to an identified or identifiable natural person. If it is possible to recognise the person depicted on the basis of the photo or video recording, this allows conclusions to be drawn about the individual employee and is therefore to be classified as personal data within the

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[14] Federal Ministry of Labour and Social Affairs, *Weißbuch Arbeiten 4.0* (2017) 142 <https://www.bmas.de/SharedDocs/Downloads/DE/Publikationen/a883-weissbuch.pdf?__blob=publicationFile&v=2> accessed 24 July 2024; Tim Wybitul, 'Der neue Beschäftigtendatenschutz nach § 26 BDSG und Art. 88 DSGVO' (2017) 34 NZA 413, 416.

[15] Kerstin Reiserer and others, 'Beschäftigten-Datenschutz und EU-Datenschutz-Grundverordnung, Der Countdown ist abgelaufen – Anpassungsbedarf umgesetzt?' (2018) 56 DStR 1501, 1502; Fuhlrott and Remy (n 2) 612.

[16] Assmuss and Winzer (n 4) 511; Riesenhuber (n 2) 159.

[17] Benecke and Groß (n 1) 834; Klein (n 13) 93.

[18] RGBL 1907, number 3, page 7 (official Law Journal of the German Empire).

meaning of Art. 4 (1) GDPR.[19] According to Art. 4 (2) GDPR, the processing of this data includes any operation relating to personal data, such as the collection, storage, distribution or deletion of such data. In the employment context, the General Data Protection Regulation therefore regulates the period between the initiation and the termination of the employment relationship.

3. Bundesdatenschutzgesetz (Federal Data Protection Act)

However, images of employees are also subject to the provisions of the German Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG). The scope of protection in Section 1 BDSG covers the processing of personal data by public bodies of the federal government and the federal states as well as by non-public bodies, whereby the scope of application for these is limited by Section 1 (1) sentence 2, (4) sentence 2 BDSG. The terms 'processing' and 'personal data' are identical to those of the General Data Protection Regulation,[20] meaning that any process relating to information of identifiable natural persons is covered. If it is possible to recognise the person depicted and conclusions can be drawn about the individual employee, personal portraits are also covered by the scope of protection of the German Federal Data Protection Act.

III. Current legal situation

1. Primacy of the General Data Protection Regulation

The protection of the right to one's own image therefore falls within the scope of protection of the General Data Protection Regulation as well as the German Kunsturhebergesetz and the German Federal Data Protection Act. However, as a European regulation, the GDPR is binding in its entirety pursuant to Article 288 TFEU (Treaty on the Functioning of the European Union) and applies directly in every member state. It therefore takes primacy over national law, which means that both the BDSG and the KUG are inapplicable.[21]

2. Opening clauses

However, the General Data Protection Regulation provides so-called opening clauses, through which the European member states are granted regulatory autonomy.[22]

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[19] Benecke and Groß (n 1) 836; von Strobl-Albeg (n 4) 29.

[20] Riesenhuber (n 2) 32.

[21] Fuhlrott and Remy (n 2) 610; Peter Gola and Yvette Reif, 'BDSG § 1' in Peter Gola and Dirk Heckmann (eds), *Datenschutz-Grundverordnung, Bundesdatenschutzgesetz* (3rd edn, C.H.Beck 2022) para 19.

[22] Assmuss and Winzer (n 4) 511; Pascal Schumacher, 'Scope of application of the GDPR' in Daniel Rücker and Tobias Kugler (eds), *New European General Data Protection Regulation A Practitioner´s Guide* (C.H.Beck 2018) para 206; Stefan Brink, 'Aktuelle Tendenzen im Beschäftigtendatenschutz der Europäischen Union' (2023) 40 NZA-Beilage 86, 87.

a. Opening clause in Art. 88 GDPR

In the context of employees, Article 88 (1) GDPR provides for an authorisation to adopt more specific provisions to ensure the protection of rights and freedoms with regard to the processing of personal employee data (para 1), insofar as these are appropriate to ensure specific measures to protect human dignity and the legitimate interests of the fundamental rights of the affected person (para 2). The German legislator has enacted Section 26 BDSG in this sense.[23]

b. Opening clause in Art. 6 (2) GDPR

For employee data protection in the public sector, there is a further opening clause in Art. 6 (2) GDPR, which the legislator has not yet made use of.[24]

c. Opening clauses for the KUG

The German legislator has also not utilised possible opening clauses that exist for the Kunsturhebergesetz, as no notification has been made to the Commission that could justify retention in accordance with Article 85 (3) or Article 88 (3) GDPR,[25] meaning that the Art Copyright Act does not apply to the right to one's own image in the employment relationship so far.

d. ECJ judgement from 30 March 2023

However, uncertainties regarding the legality of the German regulation in Section 26 BDSG were raised by the ruling of the ECJ on 30 March 2023, which had to decide on a question referred for a preliminary ruling regarding the state data protection regulation Section 23 HDSIG (Hessian Data Protection and Freedom of Information Act).[26] It argued that Section 23 (1) sentence 1 HDSIG violates the prohibition of repetition under EU law, according to which national regulations must necessarily 'distinct from the general rules of that regulation'.[27]

The purpose of this provision is to prevent member states from undermining the interpretation of EU law through their own case law.[28]

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[23] BT-Drs 18/11325, 96 (governmental proposal); Krause, 'Herausforderung Digitalisierung der Arbeitswelt und Arbeiten 4.0' (n 10) 58; Brink (n 22) 87.

[24] Alexander Roßnagel 'DS-GVO Art. 6 II' in Spiros Simitis and other (eds), *Datenschutzrecht DSGVO mit BDSG* (2nd edn, Nomos 2019) para 33.

[25] Klein (n 13) 181; Behrang Raji, 'Auswirkungen der DS-GVO auf nationales Fotorecht, Das KUG im Zahnradmodell der DS-GVO' (2019) 9 ZD 61, 65.

[26] Case C – 34/21 *Hauptpersonalrat der Lehrerinnen und Lehrer* [2023] EU:C:2023:270.

[27] ibid 61, 74, 81.

[28] Robert Selk, 'DS-GVO Art 88' in Eugen Ehrmann and Martin Selmayr (eds), *Datenschutzgrundverordnung* (3rd edn, C.H. Beck 2024) para 60; Markus Wünschelbaum, 'Tabula rasa im Beschäftigtendatenschutz? – EuGH setzt neue Maßstäbe: Rechtsfolgen und Handlungsoptionen' (2023) 9 NZA 542.

However, Section 23 (1) sentence 1 HDSIG is almost identical in wording to Section 26 (1) sentence 1 BDSG, meaning that a breach of Union law in the state law provision must consequently also lead to the inapplicability of Section 26 (1) sentence 1 BDSG.[29] Therefore, the provisions of the GDPR must be applied. In the case of Section 26 (1) sentence 1 BDSG, this is Article 6 (1) GDPR.[30]

It remains unclear to what extent the other authorisation provisions of Section 26 BDSG fulfil the requirements of EU law. In the German literature, there are opinions that assume conformity with EU law[31] as well as those that argue contrary to this.[32] However, Section 26 BDSG remains applicable until further notice, except for paragraph 1 sentence 1.[33]

3. Preliminary result

Consequently, the assessment of the permissibility of the processing of image data of employees under German law is still mainly based on Section 26 BDSG whereby the basic principles of the GDPR must be observed even when applying German law.[34] However, in cases where Section 26 (1) sentence 1 BDSG was applied, Art. 6 GDPR must now be used. Also if employees' personal data is processed for purposes outside the context of the employment relationship, Section 26 BDSG does not apply, but instead those of the General Data Protection Regulation.[35]

C. Legitimacy of the processing of employee images

I. Scope of application

Section 26 BDSG has a broad scope of application. Firstly, within the personal scope of application in accordance with Section 26 (8) BDSG also temporary workers, trainees, applicants and persons whose employment relationship has ended are covered, in addition to ‘traditional’ employees.[36] In terms of time, it even includes pre-contractual

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[29] Daniel Sandvoß and Hans-Hermann Schild, ‘Neue Entwicklungen des Beschäftigtendatenschutzes im Lichte der Rechtsprechung des EuGH vom 30.3.2023’ (2023) 23 NJOZ 1056, 1057; Peter Wedde, ‘Neues zum Rechtsrahmen für den Beschäftigtendatenschutz’ (2024) AuR 197.

[30] Case C – 34/21 (n 26) paras 18 ff.

[31] Markus Wünschelbaum, ‘Kommt ein souveränes Beschäftigtendatenschutzgesetz?’ (2023) 26 MMR 548; Wedde (n 29).

[32] Sandvoß and Schild (n 29) 1058.

[33] See also Wünschelbaum, ‘Tabula rasa im Beschäftigtendatenschutz?’ (n 28).

[34] Martin Franzen, ‘Datenschutz-Grundverordnung und Arbeitsrecht’ (2017) 10 EuZA 313, 346; Michael Kort, ‘Die Zukunft des deutschen Beschäftigtendatenschutzes, Erfüllung der Vorgaben der DS-GVO’ (2016) 6 ZD 555, 556.

[35] Johannes Klausch and Jan Felix Grabenschröer, ‘Zukünftige Erlaubnistatbestände der Verarbeitung von Beschäftigtendaten’ (2018) 6 (3) PinG 135, 139; Wybitul (n 14) 415.

[36] Fuhlrott and Remy (n 2) 612; Michael Kort, ‘Der Beschäftigtendatenschutz gem. § 26 BDSG-neu, Ist die Ausfüllung der Öffnungsklausel des Art 88 DS-GVO geglückt?’ (2017) 7 ZD 319, 323.

relationships in addition to the period of employment and after its termination.[37]

II. Authorisations

Pursuant to Section 26 BDSG, the processing of personal employee data is generally prohibited unless there is a legal authorisation (so-called prohibition with reservation of permission).[38] A distinction must be made between statutory authorisation (Section 26 (1), (3) BDSG, Art 6 (1) (b) and (f) GDPR) and processing on the basis of consent or collective agreements (Section 26 (4) BDSG).[39]

1. Statutory authorisation

In the case of statutory authorisation, the law initially differentiates between a general clause, processing for the detection of criminal offences and the processing of special categories of personal data.

a. Processing under the general clause

Previously, Section 26 (1) 1 BDSG regulated the processing of personal data of employees for the purposes of the employment relationship. Even though this provision is no longer applicable following the judgement of the ECJ,[40] data processing remains permitted based on Article 6 (1) GDPR. Pursuant to Article 6 (1) (b) GDPR processing shall be lawful if it is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract. The term 'necessity' in this context refers to what is 'absolutely necessary' within the scope of the contractual relationship.[41]

However, Article 6 (1) (f) extends the scope that processing shall be lawful if it is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which requires protection of personal data. In this case, the conflicting fundamental rights positions, for example the employee's right to

[37] Peter Gola and others, 'Was wird aus dem Beschäftigtendatenschutz? – Die DS-GVO, das DS-AnpUG und § 26 BDSG-neu' (2017) 41 DuD 244, 245; Michael Kort, 'Beschäftigtendatenschutz gemäß dem BDSG 2018 (unter Einbeziehung neuerer Rechtsprechung)' in Martina Benecke (ed), *Unternehmen 4.0 Arbeitsrechtlicher Strukturwandel durch Digitalisierung* (Nomos 2018) 101.

[38] Rüdiger Linck, '§153 Beschäftigtendatenschutz' in Günter Schaub, *Arbeitsrechts-Handbuch – Systematische Darstellung und Nachschlagewerk für die Praxis* (20th edn, C.H.Beck 2023) para 5; Harald Stelljes, 'Stärkung des Beschäftigtendatenschutzes durch die Datenschutz-Grundverordnung – Viel Lärm um Nichts?' (2016) 40 DuD 787, 788.

[39] Dagmar Gesmann-Nuissl 'Rechtliche Herausforderungen in der Arbeitswelt 4.0 im Mittelstand anhand von zwei Beispielen' in Christian Bosse and Klaus J Zink (eds), *Arbeit 4.0 im Mittelstand Chancen und Herausforderungen des digitalen Wandels für KMU* (Springer Gabler 2019) 47 f; von Walter (n 6) 101.

[40] Case C – 34/21 (n 26).

[41] Sandvoß and Schild (n 29) 1058; Horst Heberlein, 'DS-GVO Art 6' in Eugen Ehrmann and Martin Selmayr (eds), *Datenschutzgrundverodnung* (3rd edn, C.H. Beck 2024) para 25.

one's own image, and the employer's interests in data processing must be balanced.[42] In conclusion, processing that was previously permitted under Section 26 (1) sentence 1 BDSG is now generally permitted under Article 6 (1) (b) and (f) GDPR. However, the extensive case law of the German courts on Section 26 (1) sentence 1 BDSG is not applicable, as the ECJ has sovereignty over the interpretation of Union law.[43]
When assessing the permissibility it must be taken into account that different requirements have to be applied for in the individual periods of employment due to the different accessibility of the data and the employees' need for protection.

aa. Before the employment relationship is established

The processing of image data prior to the establishment of the employment relationship may become relevant, for example, in the context of application documents in which the applicant has attached a photo, as well as in the application process in general[44] or if the employer obtains information about the applicant on social networks.[45] In all three cases, the processing is generally considered proportionate. While the employee is largely free to decide whether to use photos in the application process, the employer is generally entitled to collect information from publicly accessible sources, including social networks, insofar as the information is publicly accessible.[46] However, such applicant data may only be used up to the time of the decision on the employment of the applicant and must be deleted as soon as no further legal disputes are to be expected.[47]

bb. During the employment relationship

In the employment relationship, for example, photos on employee ID cards are generally considered necessary as they serve to authenticate the individual, treat the employee's data with care and are only made accessible to a limited group of recipients.[48] In contrast, the publication of employee photos in a promotional film, in the employee profile on the company's website and in social networks is not necessary and is therefore subject to the requirement of consent.[49] Public dissemination constitutes a serious infringement of the

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[42] Case C – 275/06 *Promusicae* [2008] EU:C:2008:54 para 66; Case C – 597/19 *Mircom International* [2021] ECLI:EU:C:2021:492 para 112.

[43] Case C – 135/15 *Griechenland/Nikiforidis* [2016] EU:C:2016:774 para 28; Sandvoß and Schild (n 29) 1059 f.

[44] Reiserer and others (n 15) 1504.

[45] Martin Franzen 'BDSG § 26' in Rudi-Müller-Glöge and others (eds), *Erfurter Kommentar zum Arbeitsrecht* (24th edn, C.H.Beck 2024) para 19; Ralf Selig, *Arbeitnehmerdatenschutz – Das Datenschutzrecht im Spannungsfeld zwischen Mitarbeiterkontrolle und Arbeitnehmerinteressen* (Logos 2011) 118.

[46] Riesenhuber (n 2) 99, 101; Franzen, 'BDSG § 26' (n 45) 19.

[47] Franzen, 'BDSG § 26' (n 45) 20; Peter Gola and Stephan Pötters, 'BDSG § 26' in Peter Gola and Dirk Heckmann (eds), *Datenschutz-Grundverordnung – Bundesdatenschutzgesetz* (3rd edn, C.H.Beck 2022) para 186.

[48] Riesenhuber (n 2) 159.

[49] ArbG Lübeck Case 1 Ca 538/19, 20 June 2019, BeckRS 2019, 36456 para 23; Franzen, 'BDSG § 26' (n 45) 33.

employee's general right of personality, which is not outweighed by the employer's interests in presenting its workforce or wanting to convey a personal impression to customers.[50] Exceptions are rare, for example in the case of important company events such as company celebrations or if publication is expressly the subject of the contract, for example in the case of a professional model.[51]

cc. After termination of the employment relationship

Personal data of employees may also be processed after termination of the employment relationship.[52] This is particularly relevant in the case of video recordings permitted under Section 26 (1) sentence 2 BDSG, which may constitute evidence for any legal disputes.[53] However, for many other personal data, in particular personal portraits, the purpose of the processing of this data or the necessity will cease to apply upon termination of the employment relationship.[54]

b. Processing for the detection of criminal offences

Section 26 (1) sentence 2 BDSG places much stricter requirements than Section 26 (1) sentence 1 BDSG and Article 6 (1) (f) GDPR on the permissibility of processing employees' personal data.[55] Processing data is permitted if (1) there are factual indications that justify the suspicion of a criminal offence by the data subject, (2) the processing is necessary for detection and (3) no interests of the data subject prevail. Consequently, vague indications or preventive surveillance measures, administrative offences or breaches of contract do not fall within the scope of application.[56] If the requirements of Section 26 (1) sentence 2 BDSG are not met, data processing may still be justified under Article 6 lit (f) GDPR. Section 26 (1) sentence 2 BDSG does not have a preclusive effect in this respect.[57]

In particular, video surveillance of non-public areas is covered by the authorisation requirement of Section 26 (1) sentence 2 BDSG.[58] The 'concept of necessity' also requires the conflicting fundamental rights positions to be weighed up in the context of the

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[50] See also Assmuss and Winzer (n 4) 511.

[51] ibid 509, 511; Julian Fischer, 'Datenschutzrechtliche Stolperfallen im Arbeitsverhältnis und nach dessen Beendigung, Ein Leitfaden für Arbeitgeber nach der EU-Datenschutzgrundverordnung' (2018) 35 NZA 8, 11.

[52] Heberlein (n 41) 24.

[53] BAG Case 2 AZR 133/18 (n 9) 33; Katja Chadna-Hoppe, 'Beweisverwertung bei digitaler Überwachung am Arbeitsplatz unter Geltung des BDSG 2018 und der DS-GVO – Der gläserne Arbeitnehmer?' (2018) 35 NZA 614, 618.

[54] Fuhlrott and Remy (n 2) 613; von Walter (n 6) 27.

[55] Benkert, 'Beschäftigtendatenschutz in der DS-GVO-Welt' (2018) 15 NJW-Spezial 562.

[56] Klausch and Grabenschröer (n 35) 137; Michael Kort, 'Die Bedeutung der neuen arbeitsgerichtlichen Rechtsprechung für das Verständnis des neuen Beschäftigtendatenschutzes' (2018) 35 NZA 1097, 1099.

[57] Chadna-Hoppe (n 53) 617; Kort, 'Die Bedeutung der neuen arbeitsgerichtlichen Rechtsprechung für das Verständnis des neuen Beschäftigtendatenschutzes' (n 56) 1098.

[58] von Walter (n 6).

'principle of proportionality'.[59] The intensity of the surveillance is determined by the number of people being monitored, in particular the number of unsuspected third parties, the intensity of the interference, the duration, the reason for and type of surveillance, as well as the seriousness of the offence and the extent of the existing or imminent damage.[60] The more intensive the monitoring, the more important the employer's interests have to be.

In the case of overt video surveillance, it must first be taken into account that this is permissible in a large number of cases in publicly accessible areas in accordance with Section 4 BDSG and is to be assessed less strictly in the context of the proportionality test. In these cases, video surveillance often even serves to protect employees, such as in banks or petrol stations.[61] However, it must also be taken into account that the person concerned is often under increased psychological pressure to behave inconspicuously as a result of the surveillance, which directs their overall behaviour and thus constitutes a serious infringement of their general right of personality.[62] This is particularly the case in areas that are not publicly accessible. However, video surveillance is prohibited in the highly personal living areas of employees, such as changing rooms or showers (see Section 201a StGB, German Criminal Code).[63]

In the case of concealed video surveillance, the person concerned does not even have the opportunity to decide on the processing of their personal data themselves, which is why such an infringement is particularly severe.[64] Case law therefore requires the concrete suspicion of a criminal offence and the exploitation of less extensive instruments for clarification, so that concealed video surveillance is practically the only remaining instrument.[65] It is therefore only permissible in those exceptional cases.[66]

c. Processing of special categories of personal data

Section 26 (3) sentence 1 BDSG provides a more specific legal authorisation for the processing of special categories of personal data. According to Article 9 GDPR, this includes, for example, data revealing racial or ethnic origin or data of a genetic or

[59] BAG Case 2 AZR 681/16, 27 July 2017, BAGE 159, 389 para 30; Wybitul (n 14) 416.

[60] Riesenhuber (n 2) 137; Michael Kort, 'Neuer Beschäftigtendatenschutz und Industrie 4.0, Grenzen einer „Rundumüberwachung" angesichts der Rechtsprechung, der DSGVO und des BDSG nF' (2018) 71 RdA 24, 25.

[61] Riesenhuber (n 2) 148.

[62] BAG Case 1 ABR 46/15, 25 April 2017, BAGE 159, 49 para 20; Riesenhuber (n 2) 144.

[63] Isabell Conrad and Christina Treeger '§ 34 Recht des Datenschutzes' in Astrid Auer-Reinsdorff and Isabell Conrad (eds), *Handbuch IT- und Datenschutzrecht* (3rd edn, C.H. Beck 2019) para 283.

[64] BAG Case 2 AZR 681/16 (n 59) 23; von Strobl-Albeg (n 4) 41.

[65] BAG Case 2 AZR 51/02, 27 March 2003, BAGE 105, 356; BAG Case 2 AZR 395/15, 20 October 2016, BAGE 157, 69 para 22.

[66] Gola and others (n 37) 246; Selig (n 45) 134f; Wünschelbaum, 'Kommt ein souveränes Beschäftigtend-atenschutzgesetz?' (n 31) 549.

biometric nature that enables the identification of an employee. This generally does not include photographs according to Recital 51 sentence 3 GDPR, however, they can be categorised as biometric data if they are processed using special technical means. This may apply, for example, to photos of identity cards,[67] which often have to be presented to the employer to establish the employment relationship. Information on racial or ethnic origin may also emerge from photographs or video recordings.[68] In principle, it should be noted that such recordings are only to be classified as special categories of data if a special type of analysis is carried out, which is becoming increasingly possible through facial recognition technologies.[69] Nevertheless, if the image can be categorised as special categories of personal data, a proportionality test must also be carried out in accordance with Section 26 (3) sentence 1 BDSG, although the processing has to comply with stricter requirements.[70]

2. Processing on the basis of consent

In accordance with Section 26 (2) BDSG, personal data can also be processed on the basis of the employee's consent. However, the validity of consent is subject to a number of requirements in terms of voluntariness, form and certain information obligations.[71]

a. Voluntariness

The criteria of the voluntary nature of the declaration of consent required in Article 4 (11) GDPR is of particular importance due to the pressure that arises in relation to the submission of such a declaration as a result of the dependent relationship between the employee and the employer (see p. 3).[72] When assessing voluntariness, this relationship of dependency and the circumstances under which the consent was given are therefore taken into account in Section 26 (2) sentence 1 BDSG. These circumstances include the type of data processed, the intensity of the interference, the amount of data processed and the timing of the declaration of consent.[73] Consent prior to the establishment of the employment relationship is generally subject to higher requirements because the affected person is often under increased pressure with regard to the signing of an employment

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[67] Marion Albers and Raoul-Darius Veit, 'DS-GVO Art. 9' in Amadeus Wolff, Stefan Brink and Antje v Ungern-Sternberg (eds), *Beck´scher Online Kommentar Datenschutzrecht* (48th edn, C.H.Beck 2024) para 43.

[68] Klein (n 13) 27; Eike Michael Frenzel, 'DS-GVO Art. 9' in Boris P Paal and Daniel A Pauly (eds), *Datenschutzgrundverordnung, Bundesdatenschutzgesetz* (3rd edn, C.H.Beck 2021) para 10.

[69] Klein (n 13) 249 ff; Stephan Schindler and Katharina Wentland, 'Videoüberwachung – quo vadis?' (2018) 8 ZD-aktuell 06057.

[70] Nebel (n 6) 523; Kort, 'Beschäftigtendatenschutz gemäß dem BDSG 2018' (n 37) 101 f.

[71] Tim Wybitul '§ 96 Beschäftigtendatenschutz' in Heinrich Kiel and others (eds), *Münchener Handbuch zum Arbeitsrecht Band 1: Individualarbeitsrecht I* (6th edn, C.H.Beck 2024) para 123.

[72] Conrad and Treeger (n 63) 338; Kort, 'Beschäftigtendatenschutz gemäß dem BDSG 2018' (n 37) 95.

[73] Riesenhuber (n 2) 47; Susanne Dehmel and Gesa Diekmann, 'I, Robot, Mr. Know-it-all? Datenschutz und Industrie 4.0' (2016) 4 (4) PinG 141, 143.

contract.[74]

In this context, the prohibition of tying under Article 7 (4) and Recital 43 sentence 2 GDPR needs to be considered. According to this, the employer may not restrict the signing and fulfilment of the employment contract to the employer's consent to data processing unless this is necessary for the fulfilment of the contract.[75]

However, the relationship of dependency between employee and employer can also be significantly less extensive in certain cases.[76] Section 26 (2) sentence 2 BDSG mentions two constellations in which a voluntary declaration of consent is regularly given. Firstly, if this results in a legal or economic advantage for the employee, and secondly, if the employer and employee pursue the same interests. The explanatory memorandum to the law cites a number of standard examples for these cases. According to this, the publication of a photo on the intranet is considered to be in the same interest.[77] Irrespective of this, it must be taken into account that the specific circumstances have to be weighed up in each individual case.[78]

b. Form

With regard to the required form, Section 26 (2) sentence 3 BDSG demands that consent is given in written or electronic form, unless there are specific circumstances that allow this requirement to be waived. However, the concept of electronic evidence is to be understood more broadly than that of Section 126a BGB (German civil code), so that a declaration of consent in an email is also sufficient to fulfil the formal requirements.[79] By dispensing with the originally exclusive written requirement, the legislator has declared circumstances such as exclusively electronic applications or consent for employees working from home to be the rule and thus made an important adjustment to digitalisation.[80]

As a further requirement, consent must relate to a specific use case in accordance with the principle of specificity and must not be generalised, which is also stated in Article 4 (11) GDPR.[81]

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[74] BT-Drs 18/11325, 97 (governmental proposal); Conrad and Treeger (n 63) 339.

[75] Martin Franzen, 'VO (EU) 2016/679 Art. 5' in Martin Franzen and others (eds), *Kommentar zum Europäischen Arbeitsrecht* (5th edn, C.H.Beck 2024) para 9; Klausch and Grabenschröer (n 35) 139; Linck (n 38) 13.

[76] Tobias Gräber and Christine Nolden, 'BDSG § 26' in Boris P Paal and Daniel A Pauly, *Datenschutz-grundverordnung, Bundesdatenschutzgesetz* (3rd edn, C.H.Beck 2021) para 27.

[77] BT-Drs 18/11325, 97 (governmental proposal).

[78] Klausch and Grabenschröer (n 35) 139; von Walter (n 6) 122.

[79] BT-Drs 19/11181, 19 (decision recommendation by the Committee on Home Affairs and Integration); Gregor Thüsing and Sebastian Rombey, 'Die „schriftlich oder elektronisch" erteilte Einwilligung des Beschäftigten nach dem neuen Formerfordernis in § 26 II 3 BDSG' (2019) 36 NZA 1399, 1401.

[80] Riesenhuber (n 2) 45; Franz Düwell and Stefan Brink, 'Beschäftigtendatenschutz nach der Umsetzung der Datenschutz-Grundverordnung: Viele Änderungen und wenig Neues' (2017) 34 NZA 1081, 1084 f.

[81] Linck (n 38) 15; Conrad and Treeger (n 63) 340.

c. Duty to provide information and right of withdrawal

According to Section 26 (2) sentence 4 BDSG, the employer is also obliged to inform the employee in text form about the purpose of the data processing and their right to withdraw consent in accordance with Article 7 (3) GDPR.

This right of withdrawal entitles the affected person to withdraw their consent at any time without giving reasons.[82] According to Article 7 (3) 2 GDPR, the revocation is effective for the future. However, as Article 17 (1) (b) GDPR clarifies, the processing of personal data may still be permitted by the statutory permissions. This provision is essential, for example, if the publication of an image is part of the fulfilment of a contract for which the affected person has been paid, as is usually the case with a modeling contract.[83]

d. Relevance of processing on the basis of consent

In connection with the legal uncertainties in contractual relationships resulting from the possibility of withdrawal and the high requirements for voluntariness and its provability, the question arises to what extent processing on the basis of consent is used in practice at all. The widely held view that processing on the basis of consent is less relevant in practice due to these circumstances[84] must be contradicted. Even if the permissibility of the processing of personal data often already results from the statutory authorisation, processing on the basis of consent is indispensable as soon as employee images are published, for example on the company's website or on social media.[85]

3. Collective agreements

According to Section 26 (4) BDSG, collective agreements constitute a further element of authorisation. The purpose of this provision is to enable adaptation to the specific characteristics of different companies. [86] As Section 26 (4) sentence 2 BDSG also clarifies, the principles of Article 88 (2) GDPR must be observed, in particular the legitimate interests and fundamental rights of the affected persons must be protected.[87] The interests of the parties concerned must be balanced, as is also the case with the other statutory authorisation possibilities. This can be ensured, for example, in works

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[82] Assmuss and Winzer (n 3) 510; Karin Spelge, 'Der Beschäftigtendatenschutz nach Wirksamwerden der Datenschutz-Grundverordnung (DS-GVO)' (2016) 40 DuD 775, 781.

[83] Fischer (n 51) 11; Philip Uecker, 'Die Einwilligung im Datenschutzrecht und ihre Alternativen, Mögliche Lösungen für Unternehmen und Vereine' (2019) 9 ZD 248, 250.

[84] Dehmel and Diekmann (n 73) 142 f.; Klausch and Grabenschröer (n 35) 139; see also Data Protection Working Party, 'Opinion 2/2017 on data processing at work' (WP 249, 2017) <http://ec.europa.eu/newsroom/document.cfm?doc_id=45631> accessed 24 July 2024.

[85] Regarding the requirement of consent in these cases see also Assmuss and Winzer (n 3) 509; Fuhlrott and Remy (n 2) 612.

[86] BT-Drs 18/11325, 98 (governmental proposal); Nebel (n 6) 523.

[87] Franzen, 'BDSG § 26' (n 45) 48; Wybitul (n 14) 413.

agreements through the works council's duty to co-operate.[88] The regulation in collective agreements is particularly suitable for the video surveillance of employees.[89]

4. Interim result

Summarising, it can be said that there are many ways to regulate the interests of employers and employees in the various periods of employment with the statutory authorisation, consent and the possibility of regulation in collective agreements.

III. Compliance with the principles of Art. 5 GDPR

When weighing up the interests of the individual circumstances, certain principles for the processing of personal data must also be taken into account (see Section 26 (5) BDSG), which are listed in Article 5 GDPR. Some of these principles, which can be problematic in the employment relationship, are highlighted below as examples.

1. Principle of transparency

The principle of transparency is enshrined in Article 5 (1) (a) GDPR. Accordingly, the data subject must be informed about the purpose of the processing of their personal data and their rights.[90] In the employment context, problems may arise in particular with concealed video surveillance as well as the use of artificial intelligence, but these can be solved by the employer informing the works council about the scope of the use so that they can check compliance with the principles.[91]

2. Principle of purpose limitation

One of the most important principles of European data protection law is the principle of purpose limitation, which is set out in Art. 5 (1) (b) GDPR.[92] The purpose of data processing must be established and clearly defined at the time of processing. Further processing for other purposes, known as a 'change of purpose', requires a separate legal basis (Recital 50 GDPR sentence 2) or must still be compatible with the original regulatory purpose (Recital 50 GDPR sentence 1). This becomes relevant in the context of the protection of the right to one's own image in the case of so-called ‘chance finds’. These occur when another offence, for example one of another employee, is uncovered as a

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[88] Reiserer and others (n 15) 1505; von Walter (n 6) 133.

[89] Kort, ‘Die Bedeutung der neuen arbeitsgerichtlichen Rechtsprechung für das Verständnis des neuen Beschäftigtendatenschutzes’ (n 56) 1102; von Walter (n 6) 142.

[90] Stelljes (n 38) 790; Joachim Schrey, ‘General conditions for data processing in companies under the GDPR’ in Daniel Rücker and Tobias Kugler (eds) *New European General Data Protection Regulation, A Practitioner´s Guide* (C.H.Beck 2018) para 606.

[91] Dehmel and Diekmann (n 73); Matthias Lachenmann, ‘Neue Anforderungen an die Videoüberwachung, Kritische Betrachtung der Neuregelungen zur Videoüberwachung in DS-GVO und BDSG-neu’ (2017) 7 ZD 407.

[92] Franzen, ‘VO (EU) 2016/679 Art. 5’ (n 75) 5.

result of permitted concealed video surveillance of an employee.[93] A change of purpose is justified in this context in accordance with Section 26 (1) sentence 2 BDSG, as long as the misconduct discovered would itself have justified such surveillance, i.e. it is a criminal offence or other serious breach of duty that is proportionate to the violation of the right to one's own image.[94]

3. Principle of data minimisation

It is also important to observe the principle of data minimisation, which arises from Article 5 (1) (c) GDPR. According to this, the processing of personal data should be 'adequate in relation to the purposes for which it is processed and limited to what is necessary'. In the employment relationship, for example, the group of uninvolved persons monitored should be kept as small as possible in the case of permitted video surveillance and, if possible, the data should be anonymised.[95]

4. Interim result

It can be seen that the principles of transparency, purpose formation and data minimisation are fundamental to the consideration of the employee's right to their own image. They consequently require comprehensive consideration when weighing up interests.

IV. Co-determination right of the works council

In order to ensure even more comprehensive protection of the employee's right to one's own picture, the works council has a right of co-determination in accordance with Section 87 (1) no. 6 BetrVG (German Works Constitution Act) with regard to 'the introduction and use of technical equipment' if this is 'intended to monitor the behaviour or performance of employees'. According to the case law of the Federal Labour Court, an intention to process data by the employer is not required. Instead, the only condition is that the technical equipment is objectively suitable for monitoring behaviour or performance.[96] With regard to the protection of the right to one's own image, this right of co-determination of the works council is mainly relevant in the case of video surveillance of employees, but also when working with assistance systems or biometric access systems.[97] These new technologies are making co-determination rights increasingly relevant, which

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[93] Chadna-Hoppe (n 53) 618; Kort, 'Neuer Beschäftigtendatenschutz und Industrie 4.0' (n 60) 27.

[94] LAG Hamm Case 11 Sa 858/16 (n 5) 95; Venetis and Oberwetter (n 5) 1053.

[95] See also Peter Schantz, 'DS-GVO Art. 5' in Amadeus Wolff, Stefan Brink and Antje v Ungern-Sternberg (eds), *Beck´scher Online Kommentar Datenschutzrecht* (48th edn, C.H.Beck 2024) para 25.1; Selig (n 45) 134.

[96] BAG 1 Case ABR 43/81, 6 December 1983, BAGE 44, 285; BAG Case 1 ABR 7/03, 27 January 2004, BAGE 109, 235.

[97] Riesenhuber (n 2) 201.

can lead to negotiation processes between employers and works councils slowing down a company's technical progress.[98] Many representatives in the literature as well as companies and employers' associations are therefore calling for the co-determination law to be adapted so that only those cases in which the employer intends to monitor are subject to approval.[99] It remains to be seen to what extent this is possible, taking into account the protection of employee data privacy.[100]

V. Applicability of the principles to new technologies

As already shown, the use of new assistive devices such as smart glasses or even artificial intelligence, biometric access systems or the exchange of information using video conferencing is constantly increasing.[101] The question therefore arises whether the authorisation provisions of Section 26 BDSG are suitable for integrating these technologies. This is analysed in more detail below using the example of smart glasses.

Smart glasses are glasses that provide users with information about their surroundings. For example, they can show the employee information about work steps or stock levels and are used by employers to improve operational processes.[102] However, they can consistently collect image data and thus create movement profiles and behavioural patterns of the employees who are wearing them and those who are in the area surrounding the data glasses.[103] It is questionable whether the authorisation conditions guarantee a comprehensive balance of interests.

Processing on the basis of consent seems rather unsuitable as a legal basis, as the purpose of wanting to improve operational processes cannot be considered voluntary due to the relationship of dependency between employer and employee. It would also create legal uncertainties for the employer due to the freedom to withdraw consent.[104] However, the permissibility can be based on Article 6 (1) (f) GDPR. The collection of personal data therefore has to be necessary for the purposes of the legitimate interests pursued by the controller or by a third party, which requires the conflicting fundamental

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[98] Thomas Kania 'BetrVG § 87' in Rudi Müller-Glöge and others (eds), *Erfurter Kommentar zum Arbeitsrecht* (24th edn, C.H.Beck 2024) para 57; Johannes Schipp, 'Industrie 4.0 und Mitbestimmung bei technischen Innovationen' (2016) ArbRB 177, 179.

[99] Federal Ministry of Labour and Social Affairs (n 14) 147; Gerrit Hornung and Kai Hofmann 'Datenschutz als Herausforderung der Arbeit in der Industrie 4.0' in Hartmut Hirsch-Kreinsen and others (eds), *Digitalisierung industrieller Arbeit, Die Vision Industrie 4.0 und ihre sozialen Herausforderungen* (2nd edn, Nomos 2018) 238.

[100] Federal Ministry of Labour and Social Affairs (n 14) 148.

[101] Krause, 'Herausforderung Digitalisierung der Arbeitswelt und Arbeiten 4.0' (n 10); Roßnagel (n 10).

[102] Krause, *Expertise Digitalisierung und Beschäftigtendatenschutz* (n 3) 14 f; Dehmel and Diekmann (n 73) 142.

[103] Klebe (n 13) 82; Klein (n 13) 254.

[104] Reiserer and others (n 15) 1505 ff; von Walter (n 6) 126.

rights to be weighed up as part of a proportionality test.[105] Data glasses can be used to display helpful information to employees,[106] which can make their work easier and open up the possibility of organising production processes more effectively, resulting in an improvement in operational work processes. This purpose is permitted as such under the law, relates to the performance of the employment relationship and is promoted by the use of smart glasses, which is why they appear suitable for achieving the purpose.[107] Whether there is no equally suitable means that is less restrictive of the employee's personal rights ('necessity')[108] cannot be answered in general terms. Firstly, it should be noted that there are assistance systems that could provide the relevant information with the help of employee input. Nonetheless, this would not be equally suitable for facilitating their work and improving operational work processes, particularly in terms of the time required and the skills required for employees to recognise the problem in question. Furthermore, the employer's autonomy generally allows him to decide on the effectiveness of the measures.[109]

In the context of a detailed weighing up, the employee's right to their own image as an expression of the general right of personality (Article 2 (1) in conjunction with Article 1 (1) GG) must be taken into account.[110] The data glasses can record the entire environment of the employee wearing them.[111] This means that comprehensive movement profiles, behavioural patterns and communication with others can be recorded.[112] It should also be noted that employees who are simply in the area around the smart glasses are particularly affected,[113] as they cannot determine the extent to which their image is recorded and will often not even notice the process. In addition, data is collected throughout the entire working time and is therefore particularly intensive. On the employer's side, particularly economic interests are at stake, which are secured as utilisation and exploitation interests by the right of property and the basic right to carry on the business.[114]

In order to fulfil the interests of both parties, it is necessary to ensure that the employee's personal rights are protected while permitting the use of the smart glasses. To accomplish

[105] BT-Drs 18/11325 (governmental proposal); Bernd Grzeszick, 'GG Art .20' in Günter Düring and others (eds), *Grundgesetz Kommentar (*103th edn, C.H.Beck 2024) para 109 ff.
[106] Dehmel and Diekmann (n 73) 142; Klebe (n 13).
[107] On the concept of 'necessity' see BVerfG Case 2 BvL 45/92, 10 April 1997, BVerfGE 96, 10, 23; BVErfG Cases 1 BvR 52/66, 1 BvR 665/66, 1 BvR 667/66 and 1 BvR 754/66, 16 March 1971, BVerfGE 30, 292, 316.
[108] BVerfG Case 1 BvL 14/60B, 14 December 1965, BVerfGE 19, 330, 337; Gesmann-Nuissl (n 39) 49 f.
[109] Nebel (n 6) 523.
[110] Düwell and Brink (n 80) 1084; Klausch and Grabenschröer (n 35) 136.
[111] Kai Hofmann, 'Smart Factory, Arbeitnehmerdatenschutz in der Industrie 4.0, Datenschutzrechtliche Besonderheiten und Herausforderungen' (2016) 6 ZD 12, 13; Reinhold Kopp and Karen Sokoll, 'Wearables am Arbeitsplatz – Einfallstore für Alltagsüberwachung?' (2015) 32 NZA 1352, 1354.
[112] Hofmann (n 111) 13; Klebe (n 13) 82.
[113] Kopp and Sokoll (n 111) 1354.
[114] Krause, 'Herausforderung Digitalisierung der Arbeitswelt und Arbeiten 4.0' (n 10) 54; Selig (n 45) 90.

this, video data should not be stored and personal data should not be accessible to the employer in real-time. If personal data needs to be evaluated for operational optimisation purposes, it has to be deleted immediately afterwards.[115] It is also essential that the data is anonymised,[116] that the employee has the option of switching off the smart glasses[117] and that the employer ensures that the data cannot be accessed by third parties.[118] Ensuring that employees are not monitored, but that the data is only analysed to optimise work, is therefore imperative.[119] The use of smart glasses in the employment relationship can therefore take into account the interests of both parties, if certain conditions are met. As the example of data glasses shows, the flexible balancing of interests made possible by the authorisation provisions of Section 26 BDSG and Article 6 (1) (f) GDPR can be used to find solutions that are in line with the interests of both parties, allowing new technologies to be integrated.

D. Conclusion and perspectives

The previous explanations have shown that Section 26 BDSG and Article 6 GDPR provide regulations that enable a comprehensive balancing of interests with regard to the permissibility of processing employee images from the period before the employment relationship is established until after it has ended. Although positive aspects of the regulation could be emphasised, there are also certain aspects that appear to be in need of improvement. However, there is currently an urgent need for action, particularly in view of the ECJ judgement from 2023, which leads to the inapplicability of Section 26 (1) 1 BDSG.

Nevertheless, it is worth mentioning that different types of authorisations ensure that both the interests of the employer and the right to one's own image of the employee are taken into account.[120] The respective weighting of interests in individual cases proves to be flexible and suitable for balancing interests in the context of new technologies.[121] Moreover, the legislator has made important adjustments to digitalisation by dispensing with the written requirement[122] or the specific prerequisite to be placed on the processing of special categories of personal data.[123] The risks of digitalisation have also been counteracted by the primacy of the General Data Protection Regulation and the resulting

[115] Gesmann-Nuissl (n 39) 50; Stelljes (n 38) 790.
[116] Dehmel and Diekmann (n 73) 144; Klebe (n 13) 82.
[117] Gesmann-Nuissl (n 39) 50.
[118] Kopp and Sokoll (n 111) 1355.
[119] Dehmel and Diekmann (n 73) 144; Hofmann (n 111) 17.
[120] Chadna-Hoppe (n 53) 617.
[121] ibid 619.
[122] Riesenhuber (n 2) 45; Düwell and Brink (n 80) 1084 f.
[123] Frenzel (n 68) 10; Schindler and Wentland (n 69).

inapplicability of the provisions of the Kunsturhebergesetz. This is significant because the provisions of the KUG do not appear to be able to cope with the risks of facial recognition software and increasingly advanced camera technology, as Section 23 (1) KUG permits the dissemination of images in exceptional cases, such as when the person concerned appears merely as an accessory to a landscape or other location (No. 2).[124]

However, problems have arisen in particular since the ECJ ruling of 30 March 2023. Not only the applicability of Art. 6 GDPR alongside the applicability of Section 26 (1) sentence 2, (3), (4) BDSG, but specifically the concerns regarding the legality of Section 26 BDSG in its entirety under EU law have led to considerable legal uncertainty.[125]
In order to make employee data protection even more comprehensive and, above all, more legally certain, it is essential to create an independent Employee Data Protection Act.[126] Section 26 BDSG and Article 6 (1) GDPR are characterised by many undefined legal terms and, in particular, the abstract proportionality test leads to certain legal uncertainties.[127] Those entail particular risks for companies due to the fines, which can amount to up to 4% of a company's annual turnover depending on the severity of the violation in accordance with Art. 83 GDPR.[128] A separate law could specify these terms and it would be possible to stipulate certain criteria for the assessment. In addition, different requirements must be placed on the various phases of the employment relationship, which is why a separation of these phases appears appropriate in order to create individual balancing factors.[129] In the context of Section 26 BDSG (especially as a result of the inapplicability of Section 26 (1) sentence 1 BDSG) the General Data Protection Regulation must be referred to again and again. This could be simplified for legal practitioners by an independent Employee Data Protection Act. However, challenges arise for legislators due to the prohibition of repetition under EU law, according to which national regulations must necessarily 'distinct from the general rules of that regulation'.[130] In addition, the case law of the Federal Labour Court or the Higher Administrative Courts is often used because no specific statutory balancing factors are specified as part of the weighing process. A statutory structure would create more clarity for employers in this respect. An independent Employee Data Protection Act could include individual provisions for different types of personal data. As part of the regulations on the right to one's own image of employees, separate provisions could be created for publication, overt and concealed video surveillance or the use of artificial intelligence, for example, in addition to a division

[124] Klein (n 13) 253.
[125] Sandvoß and Schild (n 29) 1063; Wünschelbaum, 'Tabula rasa im Beschäftigtendatenschutz?' (n 28) 547.
[126] Krause, *Expertise Digitalisierung und Beschäftigtendatenschutz* (n 3) 5 ff; Körner (n 3) 1385; Brink (n 22).
[127] Körner (n 3) 1385.
[128] Kort, 'Datenschutz-Grundverordnung und Arbeitsrecht' (n 22) 90.
[129] See also Stelljes (n 38) 791.
[130] See also Wünschelbaum, 'Kommt ein souveränes Beschäftigtendatenschutzgesetz?' (n 31) 550.

into the various phases of the employment relationship.[131] In these provisions, it is then possible to take up individual criteria from case law, form concrete standards and also take into account elementary principles of the General Data Protection Regulation, such as the principles of transparency, purpose limitation and data minimisation.[132] In addition, a flexible general clause could be maintained to cover previously unknown technologies in the future.

In a nutshell, digitalisation poses a high potential risk to the protection of the right to one's own image in the employment relationship, in particular due to the relationship of dependency between the employee and the employer.[133] The General Data Protection Regulation and the associated Federal Data Protection Act have brought some changes to the German legal situation that guarantee the protection of the right to one's own image. Although Section 26 BDSG and Article 6 GDPR can be applied particularly flexibly, because of their abstract consideration in relation to the rapidly developing new technologies, an independent Employee Data Protection Act is now indispensable with regard to the legal certainty of the data subjects due to the wide variety of cases and a possible infringement of EU law by Section 26 BDSG.[134] It is therefore gratifying that the Federal Ministry of Labour and Social Affairs and the Federal Ministry of the Interior and Home Affairs announced the revision of the Employee Data Protection Law in a statement in April 2023.[135] Apart from single proposals in the key issues paper that have not yet been worked out in detail, there have been no concrete elaborations since then. Neither does the key issues paper contain any real innovations for employee data protection law.

Essentially, it aims to establish clear requirements, most of which have already been developed by case law, to form concrete categories of cases and to incorporate practical case studies. In terms of legal certainty, however, this appears to be a consistent and necessary solution. Even though a government draft was announced for the first half of

[131] See also Frank Schemmel, 'Neuer Anlauf Beschäftigtendatenschutzgesetz – was lange währt, wird endlich gut?' (2023) 13 ZD-Aktuell 01164; Federal Ministry of Labour and Social Affairs and the Federal Ministry of the Interior and Home Affairs, 'Vorschläge für einen modernen Beschäftigtendatenschutz Innovation ermöglichen – Persönlichkeitsrechte schützen – Rechtsklarheit schaffen' (12 April 2023) <https://www.denkfabrik-bmas.de/fileadmin/Downloads/Publikationen/Vorschlaege_fuer_einen_modernen_Beschaeftigtendatenschutz.pdf> acessed 24 July 2024.

[132] See also Wünschelbaum, 'Kommt ein souveränes Beschäftigtendatenschutzgesetz?' (n 31) 549; Federal Ministry of Labour and Social Affairs and the Federal Ministry of the Interior and Home Affairs, 'Vorschläge für einen modernen Beschäftigtendatenschutz: Innovation ermöglichen – Persönlichkeitsrechte schützen – Rechtsklarheit schaffen' (12 April 2023) <https://www.denkfabrik-bmas.de/fileadmin/Downloads/Publikationen/Vorschlaege_fuer_einen_modernen_Beschaeftigtendatenschutz.pdf> acessed 24 July 2024.

[133] Hornung and Hofmann (n 99) 235 f; Krause, 'Herausforderung Digitalisierung der Arbeitswelt und Arbeiten 4.0' (n 10).

[134] Chadna-Hoppe (n 53) 619; See also Körner (n 3) 1385.

[135] Federal Ministry of Labour and Social Affairs and the Federal Ministry of the Interior and Home Affairs, 'Vorschläge für einen modernen Beschäftigtendatenschutz Innovation ermöglichen – Persönlichkeitsrechte schützen – Rechtsklarheit schaffen' (12 April 2023) <https://www.denkfabrik-bmas.de/fileadmin/Downloads/Publikationen/Vorschlaege_fuer_einen_modernen_Beschaeftigtendatenschutz.pdf> acessed 24 July 2024.

the 20th legislative period (2021 – 2025), it will still take a long time before an Employee Data Protection Act comes into force.

Articles

Consensual Cannibalism: A Case Study on Germany's Most Notorious Murder Case and the Offences Against Life

Julian Laubenstein[*]

The killing of humans amongst each other is a fundamental aspect of human civilization and criminal law. The sixteenth chapter of the German Criminal Code tries to solve this fundamental issue by considering especially reprehensible reasons and mitigating circumstances, attempting to find the appropriate punishment for the conduct.

The article introduces the reader to this system, using as its baseline a most notorious case - that of the Rotenburg Cannibal. It is simple enough to find criteria for what makes an act especially reprehensible. How these criteria are to be applied once the victim consents and demands into this otherwise reprehensible act opens up a whole new layer of complexity which even puts the fundamentals to the test and is not easily dealt with.

The author summarizes the arguments put forward by defendant counsel, the prosecution and both the trial court and the appellate court. The limits of the privilege afforded to consensual homicide or "homicide on demand" are deemed to have been exceeded, whereas the murder sentence handed down by the courts is criticized. The reader is invited to critically question the underlying system and the solutions arrived at by the courts while being provided with the necessary tools to reach their own conclusions on the case.

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A. Introduction

The field of criminal law is notorious for having to deal with grotesque murders, hideous acts and other problems that challenge both the courts' morality and their ability to apply the law when it comes to deciding on a judgement. However, no case is quite like that of the Rotenburg cannibal. Cases of cannibalism are already a spectacular occurrence in trials.[1] A cannibalism case, combined with a voluntary agreement between the victim and the perpetrator and accompanied by hours of documented footage, however, is an anomaly even in this field. Accordingly, it had some of the biggest national as well as international media coverage at the time.[2]

As it is one of the biggest German criminal cases still to this day, this article aims not just to analyse the dogmatic problems which it revealed but also to introduce and demonstrate generally, the approach a German criminal lawyer would take when assessing such a case. By the end of this article, the reader should be able to pass their own judgement on the case based on the courts' findings as well as the legal tools provided. In a manner which might be unfamiliar to common law lawyers, the proceedings largely did not rely on prior decisions, as German Law is primarily one of statutory law. Thus, to grasp challenges facing the judiciary, the reader needs to be familiar not just with the exact facts of the case as well as the personality and motives of the perpetrator, but

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[1] Just compare Michael Newton, *Die große Enzyklopädie der Serienmörder* (Robert Zingerle, Fatima Awwad and Sabine Geiger trs, 3rd edn, Leopold-Stocker-Verlag 2005) 83, 158, 217, 219 (describing most infamous cannibalism cases in Germany).

[2] Richard Bernstein, 'Germany: Cannibal gets Life Sentence in Retrial' (*New York Times*, 10 May 2006) <https://www.nytimes.com/2006/05/10/world/europe/10briefs-brief-001.html> accessed 15 August 2024; CNN, 'Alleged Cannibal Tried for Murder' (*CNN*, 4 December 2003) <https://edition.cnn.com/2003/WORLD/europe/12/03/germany.cannibal.trial/> accessed 15 August 2024; Ray Furlong, 'Frenzy Builds for German 'cannibal' trial' (*BBC News*, 2 December 2003) <http://news.bbc.co.uk/2/hi/europe/3258226.stm> accessed 15 August 2024.

also the statutes in question as well as the criminal justice system corroborating these statutes.

B. The Deed and its Perpetrator

Armin M. (M) was born on the 1st of December 1961, as the youngest of three brothers in Essen-Holsterhausen.[3] When he was just 8 years old, he lost all the men in his life, as his two brothers moved out to study in Berlin and his father left after divorcing his mother. This disconnect from male figures led him to develop an imaginary friend called "Frank."[4] However, as he eventually found his merely imaginary companion no longer satisfactory, M started to seek the companionship of someone "more in the flesh." Said turning point came after watching an adaptation of Robinson Crusoe in which a person's corpse is eaten by their friend, allegedly in honour of their memory. His neighbours at the time also had a butcher's shop, which made it easy to observe the slaughtering of pigs, developing his interests further.[5] Based on these experiences, his longing for companionship was twisted into the desire to become "one" with another person, i.e. another person voluntarily offering their life to M so that they could keep on living inside of him. In M's view, this voluntary sacrifice was necessary to establish the connection which he was seeking.[6]

In the mid-2000s, M started to interact with people of similar interests in online chatrooms about cannibalism, which would eventually lead to the meeting with Bernd B. (B) on the 9th of March 2001.[7]

B was mainly motivated by his sexual masochism, expressed in the desire to be mutilated and killed. He already had a history of asking prostitutes to cut off his genitalia, and in his online chatrooms with M he described himself as "M's flesh."[8] Sparing the gruesome details, after a lot of hesitation on the side of M and strong encouragement by B, M eventually cut off B's genitalia, so that the two of them could eat it later. Afterwards, B took a warm bath to bleed out and enjoy the feeling of having been mutilated. B rejected all of M's offers to call an ambulance and insisted on following through with the plan, which was

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[3] Martin Knobble and Detlef Schmalenberg, 'Kriminalität: Der Kannibale' (*Stern*, 22 July 2003) <www.stern.de/panorama/kriminalitaet-der-kannibale-3514316.html> accessed 24 July 2024.

[4] Günther Stampf and Thomas Müller, 'Der Kannibale von Rotenburg: Das Interview – Ungekürzt und Unzensiert' (2008) <https://www.youtube.com/watch?v=Bv8lGo7eHjw> accessed 24 July 2024, 00:07:00.

[5] ibid 00:08:45.

[6] ibid 00:11:00.

[7] FAZ, 'Eine Chronik des Kannibalismus-Falls von Rotenburg' (*FAZ*, 30 January 2004) <https://www.faz.net/aktuell/gesellschaft/hintergrund-eine-chronik-des-kannibalismus-falls-von-rotenburg-1129308.html> accessed 15 August 2024.

[8] Knobble and Schmalenberg (n 3).

that he should be stabbed in the neck once he passed out.[9]

During the night, M cut up the by now bled-out B and stored roughly 30 kilograms (or 70 pounds) of flesh in his refrigerator, recording the process with a camera in a manner agreed upon earlier. When asked afterwards how he felt about his eventual victim, he stated that he saw him as a friend who is always by his side.[10] M was ultimately arrested after a student found another one of his ads on the internet and reported him to the police, who then found the fridge containing B's remains.[11]

C. An introduction to German criminal law: Offences against life and the relationship between the different statutes

The various forms of homicide are laid down in the Special Part (*Besonderer Teil*) of the German Criminal Code (*Strafgesetzbuch* – StGB), division (*Abschnitt*) 16, "Offences against life" (*Straftaten gegen das Leben*). If a person commits homicide (*Totschlag*, section 212 paragraph 1), i.e. intentionally kills another person, the sentence may be less than 5 years. In especially severe cases the perpetrator is sentenced to life imprisonment for murder (*Mord,* section 211). A murderer is defined by section 211 paragraph 2 as "whoever kills a person because of lust for murder, sexual satisfaction, greed or other petty reasons, malice, while constituting public danger, or in order to enable or hide another crime." Whoever kills another person while also fulfilling one or more of these 9 elements is categorized as a murderer. A murderer will always be sentenced to life imprisonment (section 211 paragraph 1), "life imprisonment" translating to at least 15 years, whereafter the perpetrator may apply for a 5-year parole (section 57a).[12]

Another statute regulating homicide is section 216, "killing upon request" (*Tötung auf Verlangen*), whose exact elements and details will be discussed at a later stage of this article. The essential idea behind this provision is that a killer who acted based on the demand of the victim is not justified or excused in his actions, but that his sentence is at least reduced to anywhere between 5 months to 5 years. The need for section 216 is also exemplary for the issue at hand, as it is situated right at the intersection between individual sovereignty and the objective values of the legal system. Even though only

[9] Stampf and Müller (n 4) 01:26:00.

[10] Mark Landler, 'German Court convicts Internet Cannibal of Manslaughter' (*New York Times*, 31 January 2004) <https://www.nytimes.com/2004/01/31/world/german-court-convicts-internet-cannibal-of-manslaughter.html> accessed 24 July 2024

[11] BBC News, 'German cannibal tells of fantasy' (*BBC News*, 3 December 2003) <news.bbc.co.uk/2/hi/europe/3286721.stm> accessed 22 August 2024.

[12] cf Henning Radtke, '§ 38 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar zum StGB, Bd. 2* (4th edn, C.H. Beck 2020) para 8; Ekkehard Appl, '§ 454 StPO' in Christoph Harthe and Jan Gericke (eds), *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 50.

section 228 and section 299 StGB name consent as grounds for justification of their respective offences, the concept, as an expression of the fundamental right of freedom of action (under Article 2 paragraph 1 of the German Constitution) has been extended to all other personal goods.[13] Since life is an individual right, consenting into its elimination should therefore theoretically be possible. However, section 216 abrogates the general rule, according to most legal practitioners due to life also being the objectively highest constitutional value, overshadowed only by the principle of human dignity.[14] Section 216 is thus interpreted as implying that it is categorically unjustifiable to kill another person whilst not defending oneself or another from an imminent unlawful attack (*Notwehr* – self-defence, section 32) or outside of war.[15]

Although the exact relationship between murder and demanded homicide is heavily discussed, the legal consensus is that a judgement of demanded homicide under section 216 bars the perpetrator from being criminalized under either section 212 or section 211. Section 216 therefore has a "privileging effect."[16] Based on this, it is a matter of discussion whether sections 211 and 216 function as stand-alone offences or as mere specifications of section 212, as well as what the exact motive behind the "privilege" of section 216 is and how it relates to the objective criteria of section 211.[17] However, as this topic is relevant only insofar as the extent of punishing participators (instigators / abettors and assistants / aides, sections 26 and 27) is concerned, it will not be discussed here.[18]

Summarizing the majority view on the relationship between sections 211, 212 and 216, the penalization of homicide is regulated in a three-tiered system.[19] Section 212 acts as the baseline. There are then sections 211 and 216 which act as "*lex specialis*" or, more specifically, function as either "qualifying" as in "aggravating" (as regards section 211) or "privileging" as in "mitigating" (in the case of section 216) elements in addition to the

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[13] BGH NStZ 2004, 204, 205; 2021, 494, 496; Rudolf Rengier, *Strafrecht Allgemeiner Teil* (15th edn, C.H. Beck 2023) § 23 para 1.

[14] BGHSt 2,258; 13, 362, 365; Albin Eser and Detlev Sternberg-Lieben, '§ 216 StGB' in Albin Eser and others (eds), *Schönke/Schröder Strafgesetzbuch* (30th edn, C.H. Beck 2019) para 1; Ralf Eschelbach, '§ 216 StGB' in Hans Kudlich and Bernd von Heintschel-Heinegg (eds), *Beck'scher Online-Kommentar StGB* (61th edn, C.H. Beck May 2024) para 21; Alexander Bechtel, 'Selbsttötung, Fremdtötung, Tötung auf Verlangen. Eine Abgrenzungsfrage von herausragender Bedeutung' (2016) 56 JuS 887.

[15] Compare Martin Heger, '§ 216 StGB' in Martin Heger, Karl Lackner and Kristian Kühl (eds) *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2023) paras 1 ff.

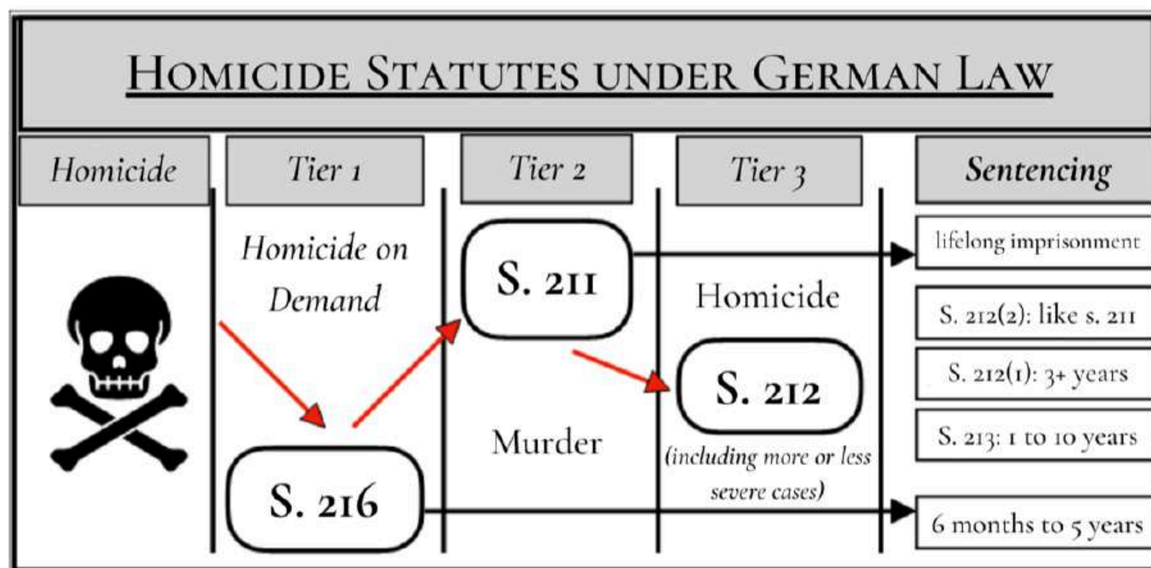
[16] BGHSt 13, 162, 165; Urs Kindhäuser and Edward Schramm, *Strafrecht Besonderer Teil I. Straftaten gegen Persönlichkeitsrechte, Staat und Gesellschaft* (11th edn, Nomos 2023) § 1 para 2; Rudolf Rengier, *Strafrecht Besonderer Teil II. Delikte gegen die Person und die Allgemeinheit* (25th edn, C.H.Beck 2024) § 6 para 3.

[17] Ulfrid Neumann, 'Vor § 211 StGB' in Frank Saliger and others (eds), *Nomos Kommentar Strafgesetzbuch* (6th edn, Nomos 2023) para 164.

[18] BGHSt 1, 368; BGH NJW 2005, 996; Wilfried Küper, 'Im Dickicht der Beteiligung an Mord und Totschlag' (2006) 61 JZ 1157; Klaus Geppert 'Die Akzessorietät der Teilnahme (§28 StGB) und die Mordmerkmale' (2008) 30 JURA 34; Karl-Heinz Gössel, 'Empfiehlt sich eine Änderung der Rechtsprechung zum Verhältnis der Tatbestände der vorsätzlichen Tötungsdelikte (§211 ff. StGB) zueinander?' (2008) 3 ZIS 153.

[19] Hartmut Schneider, 'Vor § 211 StGB' in Günther M Sander (ed), *Münchener Kommentar zum StGB, Bd. 4* (4th edn, C.H. Beck 2021) para 191.

ones of section 212.[20] If the elements of neither of these sections are fulfilled, section 212 paragraph 2 and section 213 may step in to adjust the sentencing in order to properly acknowledge the reprehensibility of the crime (or a relative lack thereof).[21]



D. The necessary statues for the Case

After having gained insight into the system more generally, one can take a more detailed look at the necessary elements of all these statutes. Since section 216 acts as a less reprehensible form of section 212 and section 211 as a qualified form of homicide, the three statutes are to be considered in that same order.

I. Homicide on demand (section 216 StGB)

Section 216 grants the exceptional privilege to infringe on the objectively highest valued good, suffering only a reduced sentence.[22] The privileging elements of section 216 are threefold, all of which need to be fulfilled and whose requirements are accordingly high. Specifically, the killing must have been induced by a serious and explicit demand by the victim. The "demand" in question has to be understood as more than just the victim's consent into the killing, as the victim must desire to be killed and must exert some direct influence on the perpetrator's will.[23] While the demand needs to be an expression of the

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[20] Neumann (n 17) para 164.

[21] Rüdiger Deckers, 'Die Provokationsvariante des § 213 StGB, insbesondere unter Betrachtung der Anwendung auf Körperverletzungsdelikte' in Ernst-Walter Hanack and others (eds), *Festschrift für Peter Rieß zum 70. Geburtstag am 4. Juni 2002* (De Gruyter 2002) 651; Gerd Geilen, 'Provokation als Privilegierungsgrund der Tötung? – Kritische Betrachtungen zu § 213 StGB' in Hans-Heinrich Jescheck (ed), *Festschrift für Eduard Dreher am 70. Geburtstag am 29. April 1977* (De Gruyter 1977) 357; Hartmut Schneider, '§ 213 StGB' in Sander (n 19) para 1.

[22] Frank Saliger '§ 216 StGB' in Saliger and others (n 17) para 1.

[23] BGH NJW 2019, 449, 450 [19]; *Rengier* (n 16) § 6 para 7.

victim's desire, it is not required that the victim takes the initiative. Rather, section 216 also allows for the desire to be killed to be expressed reactively after a suggestion on the part of the perpetrator.[24] The term "explicit" signifies that the victim must have made it unmistakably clear that they want to be killed. There must be no doubt about their intention.[25]

The demand must also be serious, meaning that the victim must make the demand in a conscious state of mind and out of their own free will. Any sort of mental defect impairing their freedom of choice, such as a state of depression, would hinder the seriousness of the demand.[26]

A universal element for most crimes under the German penal code is that the objective elements must be accompanied by a subjective intent to fulfil them (see section 15 StGB). Hence, the perpetrator must have known and assented to his actions causing the death of the victim and must have known about the demand and its seriousness. The last element is that the killer must have been "induced" by the victim. To meet this requirement, the killer must have been guided by the demand of the victim, meaning the demand must have been the cause of and primary motive behind the killing.[27] Only when all of these elements are satisfied cumulatively, the privilege of section 216 will take effect. However, if the killer has erred about the seriousness of the demand, section 16 paragraph 2 dictates that they will still be sentenced under section 216 and not the harsher sections 212 or 211.

II. Murder (section 211 StGB)

The murder statute, on the other hand requires that the homicide has occurred while satisfying one or more of the nine criteria listed in section 211 paragraph 2. These criteria can be divided into three different groups: (1) An especially lowly motivation to kill (desire to kill, sexual satisfaction, greed, or petty reasons), (2) the reprehensibility of the objective execution of the act (treachery, cruelty, or using means which constitute public danger) or (3), a specific overarching goal behind the killing (namely to enable or cover up another crime).[28] Thus, the first and third groups entail subjective reasons, while the second group includes objective elements.

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[24] Bechtel (n 14) 886.

[25] BGH NJW 1987, 1092; K Kühl, 'Anmerkung zum Beschluss des BGH vom 25.11.1986 – 1 StR 613/86' [1988] JR 338; Carsten Momsen and Caroline Jung, 'Der "Kannibale von Rotenburg" – Ein vorläufiges Resümee' (2007) 2 ZIS 162.

[26] *BGH* NStZ 2011, 340-41; StV 2012, 90, 91

[27] Volker Haas, '§ 26 StGB' in Holger Matt and Joachim Renzikowski (eds), *Strafgesetzbuch Kommentar* (2nd edn, Verlag Franz Vahlen 2020) paras 8 ff; Carsten Momsen, '§ 216 StGB' in Helmut Satzger, Wilhelm Schluckebier and Raik Werner (eds), *Strafgesetzbuch Kommentar* (6th edn, Wolters Kluwer 2024) para 6.

[28] Johannes Wessels, Michael Hettinger and Armin Engländer, *Strafrecht Besonderer Teil 1 – Delikte gegen die Person und Allgemeinheit (*47th edn, C.F. Müller 2023) § 2 para 37.

1. Attempts at restriction

As the fulfilment of either of these elements results in the perpetrator being sentenced to a lifelong prison sentence, it is acknowledged that there need to be limiting mechanisms so as not to punish disproportionately, especially persons who might satisfy an objective criterion while having acted out of a noble motivation. There are three approaches which are proposed: A restrictive interpretation of the individual criteria, a single corrective measure aimed at eliminating certain types of perpetrators, or a mitigation of the sentence.

The "perpetrator-type" correction, as demanded by some, requires that in addition to the satisfaction of a criterion of section 211 paragraph 2, the special reprehensibility of the act needs to be determined or denied separately.[29] Because of its vague criteria, however, all such approaches have been denied by the Federal Court (*Bundesgerichtshof* - BGH).[30] The Federal Court on the other hand has acknowledged the potential shortcomings of the murder statute and refers to the appearance of "impactful unusual circumstances" only when assessing certain criterions, namely "treachery", and lightens the sentence, should these be present.[31] The only limitation of the murder statute that is demanded universally and even by the Federal Constitutional Court (*Bundesverfassungsgericht* - BVerfG) is a "restrictive interpretation" of its various elements in order for the lifelong prison sentence and statute to be constitutional.[32]

2. Murder criteria

So as not to overload this article with abstract preliminary explanations, only the murder elements essential for the subject matter at hand will be highlighted. These are the desire to kill, sexual satisfaction, petty reasons and the enabling of another crime. The attentive reader will have spotted that, even though the case at hand deals with the grotesque phenomenon of cannibalism, not a single objective criterion of section 211 is relevant for the discussion.

The "desire to kill" is a variant which is rarely fulfilled but simple in its explanation. It requires that the perpetrator acted solely out of his interest to see another person die, thereby displaying a general disregard for someone else's life.[33] This is determined by analysing if the death itself constitutes the main and sole reason for the act.[34]

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[29] Albin Eser and Detlev Sternberg-Lieben, '§ 211 StGB' in Albin Eser and others (n 14) para 10; Riess, 'Zur Abgrenzung von Mord und Totschlag' (1968) 21 NJW 628, 630.

[30] BGHSt 9, 385, 389; 11, 139, 143; 30, 105, 115.

[31] BGH NJW 1981, 1965.

[32] BVerfGE 45, 187, 261 f.

[33] BGH NStZ 2007, 522, 523.

[34] Eser and Sternberg-Lieben (n 29) para 15.

A murder out of sexual satisfaction is typically at hand (1) where sexual satisfaction is sought in the killing itself, (2) in cases of necrophilia, i.e. if the perpetrator kills in order to satisfy their lust using the corpse after the fact, or (3) if the killer knowingly risks the death of their sexual partner in the course of or as a consequence of the sexual act.[35]

"Petty reasons" in the context of section 211 means that the motivation must be, judged by general moral standards, considered to be of the lowest level and therefore especially despicable.[36] This is to be determined by a complete evaluation of the facts, including the living conditions of the perpetrators and his personality.[37] Typical examples of this element are killings out of xenophobia[38] or racial hatred,[39] killing for the sake of venting of frustration on someone uninvolved,[40] or killing just to show off.[41] Basically, if the killing is an expression of extreme, egoistical disregard for other life, and the motivation is therefore not relatable, the killing happened for petty reasons.[42] Lastly, there is the element of "enabling another crime," which could also be regarded as a murder "out of petty reasons" but specifically penalizes the heightened lethality of a murderer who is not only willing to achieve his goals by "trampling over corpses," but is also aiming at even more criminal activity.[43] It is an exclusively subjective element which merely requires the murderer to have an "enabling intent", i.e. wanting to achieve an unjust goal using the killing, regardless of it being successful or not.[44]

3. Delineation between sections 211 and 216 StGB

Such subjective reasons are also the primary distinction between the privilege of section 216 and section 211. While section 211 accounts for increased reprehensibility associated with certain personal reasons for a killing, the protective purpose (*Normzweck*) of section 216, according to the majority view between legal practitioners, is to account for the voluntary waiver of life by the victim as well as the psychological

[35] Rengier (n 16) § 4 para 12.
[36] BGHSt 3, 132, 132-33; BGH NJW 1993, 1664, 1665; NStZ 2002, 368; NStZ-RR 2003, 78.
[37] BGHSt 35, 116, 127; BGH NStZ 2023, 231; BeckRS 2008, 13471.
[38] BGH NStZ 94, 124.
[39] BGHSt 18, 37.
[40] BGH NStZ 2015, 690, 691.
[41] BGH NStZ 1999, 129.
[42] Gunnar Duttge, '§ 211 StGB' in Dieter Dölling, Gunnar Duttge and Stefan König (eds), *Gesamtes Strafrecht – Handkommentar* (5th edn, Nomos 2022) paras 34-38.
[43] BGHSt 39, 159, 161; BGH NStZ 1996, 81; NJW 2000, 2517, 2519; Wessels, Hettinger and Engländer (n 28) § 2 para 73.
[44] BGH NJW 2021, 326, 329; NStZ 2005, 332, 333.

conflict raised inside the killer by the demand, as mitigating circumstances.[45] It is seen as the necessary balance between the prohibition of killing another person while also accounting for the freedom of action of the victim. Hence, if a killer has been instigated by the victim and is therefore guided in his actions by external reason (the freedom of action of the victim), the act is not as reprehensible as an act which has been committed for personal reasons.[46] This, however, does not mean that the perpetrator needs to have only a single motivation but rather that, among a variety of motives, the primary guiding force determines whether the act is subsumed under section 211 or section 216.[47]

III. Intentional homicide (sections 212 and 213 StGB)

If neither section 216 nor 211 is fulfilled, the homicide is then judged according to section 212, while the sentencing of the act is based on section 212 paragraph 1, paragraph 2 or section 213. Since both section 212 paragraph 2 and section 213 are sentencing provisions and not stand-alone statutes, there is no general rule on which of these provisions takes precedence. Rather, whether these provisions are to be carefully assessed or only quickly considered and discarded by the judge is dependent on the individual case.

Section 212 paragraph 2 deals with homicides that are especially reprehensible and should therefore also result in a lifelong sentence. Hence, a case of section 212 paragraph 2 is at hand where a homicide, because of its unlawful and vile character, is held to be as reprehensible as a murder. However, even though the sentencing is equivalent to section 211, section 212 paragraph 2 cannot be employed as a substitute if no specific murder criterion is satisfied. Instead, the reprehensibility of the act in its totality needs to amount to the same as that of a murder.[48] Examples include the killing of one's wife in front of the children[49] or an execution-like act.[50]

Section 213, on the other hand, awards a lowered sentence of one to ten years in "less severe cases." Typically, these are ones where the perpetrator acted out of affect (in the

[45] Hartmut Schneider, '§ 216 StGB' in Sander (n 19) para 1; Saliger (n 22) para 2; Gunther Arzt, Ulrich Weber, Bernd Heinrich and Eric Hilgendorf (eds), *Strafrecht Besonderer Teil* (4th edn, Verlag Ernst und Werner Gieseking 2021) § 3 para 12; Ralph Ingelfinger, *Grundlagen und Grenzbereiche des Tötungsverbots* (Heymanns 2004) 215 ff; Pierre Hauck, 'Rechtfertigende Einwilligung und Tötungsverbot' (2012) 159 GA 202, 210; Katrin Gierhake, 'Zum „ernstlichen Tötungsverlangen" i.S. des § 216 I StGB und zum Irrtum über dessen Vorliegen gemäß § 16 II StGB – Zugleich Überlegungen zum Strafgrund der Tötung auf Verlangen' (2012) 159 GA 291, 300.

[46] BGHSt 2, 258; Rolf D Herzberg, 'Das Zusammentreffen privilegierender und qualifizierender Umstände bei den Tötungsdelikten: Zugleich ein Beitrag zur Neufassung der Tötungsdelikte' (2000) 55 JZ 22 1093.

[47] Arndt Sinn, '§ 216 StGB' in Jürgen Wolter and Andreas Hoyer (eds), *Systematischer Kommentar zum Strafgesetzbuch Bd.* 4 (10th edn, Wolters Kluwer Deutschland 2024) para 6.

[48] BGHStV 2022, 96; Carsten Momsen '§ 212 StGB' in Satzger, Schluckebier and Werner (n 27) para 14; Albin Eser and Detlev Sternberg-Lieben, '§ 212 StGB' in Eser and others (n 14) para 12.

[49] BGH BeckRS 2005, 4291.

[50] BGH NJW 1982, 2264.

heat of the moment, simply put) or a similarly energized state and is thereby severely reduced in their cognitive faculty.[51] Cases named by the statute itself include the severe abuse of the perpetrator or a close companion by the victim, or where the perpetrator has been provoked by the victim through intense slander. Otherwise, an unwritten case of section 213 is affirmed if, because of the totality of the circumstances, the killing act differs from a "regular" homicide in such a way that the application of the sentence of section 212 paragraph 1 is deemed as inappropriate.[52] This includes forms of self-defence which do not meet the criteria of the self-defence statute[53] or a killing committed under extreme intoxication and a correlating absence of restraint.[54]

After these provisions are considered and their respective elements denied, the homicide is to be penalized under the sentencing rule of section 212 paragraph 1.

IV. Interim review

Dissecting the details of the German system of the offences against life, it has become apparent that the three-tiered system described earlier can be described more accurately as one consisting of five tiers, wherein the last stage of section 212 allows for a flexible assessment of the crime, not bound to the hard standards set by section 211.

E. The court procedure

After acquiring the necessary insight into the relevant statutes for this case as well as the facts surrounding the perpetrator and his acts, we can now discuss the parties' respective strategies and the various court proceedings.

I. The defendant's strategy

The defendant M's strategy was to plead for a consensual homicide in accordance with section 216 or at least a minor case in the sense of section 213. One of the main reasons why B insisted on documenting the act was exactly to prove that it was consensual and mutually agreed upon. The video recording was made so that the Court could ascertain that B himself wanted to be killed and eaten, and that this guided M's actions.[55]

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[51] Albin Eser and Detlev Sternberg-Lieben, '§ 213 StGB' in Eser and others (n 14) para 1.
[52] BGH NJW 1956, 756.
[53] BGH NStZ 2015, 151, 151-52.
[54] BGH NStZ-RR 2023, 168-69.
[55] Claus Peter Müller, 'Plädoyers im Kannibalen-Prozess' (*FAZ*, 26 January 2004) <https://www.faz.net/aktuell/gesellschaft/kriminalitaet/kasseler-prozess-plaedoyers-im-kannibalen-prozess-1134478.html> accessed 22 August 2024.

M cooperated with the Court, giving very detailed descriptions and explanations not just of the killing itself but also of his earlier contact with B. He insisted several times that he had only acted because of B's firm demands.[56] In essence, M wanted and needed to prove that his personal reasons were secondary motivation for the act, whereas the dominant reason would have been the demand by B. This strategy was necessitated by the aforementioned rivalry between sections 211 and 216. Since most of the elements of murder are specifications of an "especially egoistic and detestable motivation to take someone's life,"[57] if the defence can establish that the primary reason for the act was because of the victim's demand, then a sentence in accordance with section 211 would not be possible.[58]

II. The prosecutor's strategy

On the other hand, the prosecution made the case that four of the aforementioned elements of section 211, namely the desire to kill, sexual satisfaction, petty reasons and the enabling of a different crime, had been fulfilled. In the prosecution's view, M had mainly killed B out of curiosity and therefore a desire to kill, all his other reasons being of secondary importance. To that end, they cited M's upbringing and early cannibalistic interests.[59]

Regarding the murder out of "sexual satisfaction", the prosecution argued that M acted as a necrophile, since he later masturbated to the sighting of the videotape. According to them, there had at least been indirect sexual intention as the primary guiding force for his act. Citing the earlier chatroom messages between the actors and the subsequent masturbatory acts with reference to the recording, they posited that there had been sexual intent at the time of the killing as well as the recording, which was then expressed by the following masturbation for sexual satisfaction.[60]

In terms of "petty reasons," the prosecution posited that there were no understandable, in any way sympathetic reasons for the killing. Instead, they focused on M desire to "become one" with his victim, interpreting it as a selfish and lowly reason.[61] Lastly the prosecution argued that M had wanted to enable another crime, since he planned on "disturbing the peace of the dead" within the meaning of section 168.

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[56] Gönke Jacobsen, 'Lebenslang trotz schwerer psychischer Störung – Abkehr von der restriktiven Auslegung der Mordmerkmale?' (2006) 18 NK 73.

[57] Albin Eser and Detlev Sternberg-Lieben, 'Vor § 211 StGB' in Eser and others (n 14) para 4.

[58] See n 28.

[59] Helmut Schwan, 'Staatsanwaltschaft will Höchststrafe für „Kannibalen von Rotenburg"' (*Welt*, 3 May 2006) <https://www.welt.de/vermischtes/article214181/Staatsanwalt-will-Hoechststrafe-fuer-Kannibalen-von-Rotenburg.html> accessed 12 September 2024.

[60] NBC News, 'German Cannibal sentenced to 8 ½ years' (*NBC News*, 30 January 2004) <https://www.nbcnews.com/id/wbna4104727> accessed 22 August 2024.

[61] Müller (n 55).

III. The District Court's decision

On the 30th of January 2004, the District Court of Kassel found M guilty of homicide in the sense of section 212 and sentenced him to 8 and a half years in prison.[62]

First, the Court found that the demand by B had not been "serious" in the sense of section 216 because B had suffered from mental issues and was therefore incapable of judging the weight of his actions. This alone did not eliminate the application of section 216 (in conjunction with section 16 paragraph 2), however, as it was found that M was under the assumption that B had been in a conscious state of mind.[63] The reason why section 216 was ultimately denied was because M had already been determined to kill B, even before the latter gave his consent. B's consent was therefore not the dominant motivator.[64]

However, the Court also rejected any arguments the prosecution had made in favour of a murder verdict. They ruled that M had not been motivated by lustful sexual gratification but rather by his desire to experience a human connection. Regarding the masturbation while watching the video, the court cited the timeframe between the killing and the masturbation.[65] At that point in the development of jurisprudence concerning section 211, case law demanded that for a killing to qualify as a murder for sexual satisfaction, there had to be a short timeframe between the killing and the sexual act in order to establish an immediate connection.[66] In typical cases, as aforementioned, the satisfaction would be sought either in the killing act itself, in the corpse, or by prioritizing one's own satisfaction to such an extent that the victim dies because of it.[67] Thus all the cases had in common that there was a direct connection between the killing and the satisfaction in a spatial and temporal sense. Because M had only admitted to masturbating while watching the video at a later date, the court found that there was no such immediate connection.[68] Regarding the enabling of another crime, the Court argued that there had not been an intended "disturbance of the peace of the dead" because B's consent into the cannibalization and the chary butchering had caused the act to not be insulting, hence not violating B's postmortal claim to dignity.[69]

The Court then found that the killing also did not happen for "petty reasons." They

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62 BBC News, Manslaughter verdict for cannibal (*BBC News* 30 January 2004) <http://news.bbc.co.uk/2/hi/europe/3443293.stm> accessed 15 August 2024.

63 LG Kassel, 2650 Js 36980/02 (30 January 2004) 202.

64 ibid 203; Wolfgang Mitsch, 'Der „Kannibalen-Fall"' (2007) 2 ZIS 197, 198.

65 LG Kassel (n 63) 206; beck-aktuell-Redaktion, 'BGH verweist Fall des „Kannibalen von Rotenburg" zurück ans Landgericht' [2005] becklink 146368.

66 BGHSt 7, 353; Burkhard Jähnke, '§ 211 StGB' in Burkhard Jähnke and others (eds), *Strafgesetzbuch. Leipziger Kommentar Bd. 5* (11th edn, De Gruyter 2005) para 7; Michael Köhne, 'Die Mordmerkmale „Mordlust" und „zur Befriedigung des Geschlechtstriebs"' (2009) 31 JURA 100, 103.

67 See n 35.

68 LG Kassel (n 63) 207.

69 ibid 210.

elaborated that M's reasons sprang out of pathological wishes and desires which were not the result of any illness or mental disability. According to the Court, M was in a complex mental state where he had the dominant desire to become one with another person while also respecting the life of his victim, to a point where the killing was not motivated by selfishness.[70]

In conclusion, according to the District Court, neither the privileging elements of section 216 nor the qualifiers of section 211 were met. Because M was not criminally irresponsible or legally insane within the meaning of section 20, the District Court ruled M to be guilty (merely) of homicide. The sentencing rules of section 212 paragraph 2 and section 213 were not applied.[71]

IV. The Federal Court's decision and ultimate outcome

By many, this ruling by the District Court was seen as a compromise, allowing them to punish M while also considering the mitigating special circumstances which accompany the case. Unsurprisingly, both M and the prosecutors appealed the case.

According to the Federal Court of Justice (*Bundesgerichtshof* – BGH), in its opinion delivered on the 22nd of April 2005, the decision of the District Court did not hold up to legal scrutiny. The ruling was therefore nullified and remanded for trial. The federal judges were especially displeased with the decision to deny a murder for sexual satisfaction. They also found fault with the decision because the District Court had not properly discussed a murder "to enable another crime."[72] The judges argued that the element of a sufficient timeframe in between the killing act and the sexual act needs to be interpreted in a more extensive manner. The immediate connection between the killing and the satisfaction was to be viewed as an "ends and means relationship." Thus, M's later viewings of the recording as well as the handling of the corpse were deemed sufficient to fulfil this element, since the killing and recording were both means for reaching the ends of sexual satisfaction.[73]

Regarding a killing to "enable another crime," the Court mainly found that the main crime which M had wanted to enable was a "disturbance of the piece of the dead," as in section 168. The judges pointed towards section 168 paragraph 1, the 2nd alternative punishing "anyone who commits insulting mischief to a corpse or its remains." Such "insulting mischief" is described as a "grossly indecent action or an action which is characterized by a particularly crude disposition by which the offender expresses his contempt for the

[70] ibid 210-15; Jessica Wagner, 'Der Kannibalen-Fall – Probleme des Eingreifens der in Betracht kommenden Delikte' [2011] StudZR 174.
[71] Jacobsen (n 56) 73.
[72] BGH NJW 2005, 1876.
[73] ibid.

object or the dead person."[74] According to the judges, M's act of eating B and later masturbating to the sight of the recording met this requirement. The Federal Court supported this argument with some degrading comments that M had made which were documented in the recording. The judges denied that the underlying agreement or the deep emotional connection between M and B elements were relevant for the fulfilment of section 168, since that offence does not just protect individual rights but also a certain sense of piety. In the judges' opinion, the latter had been violated, because M had knowingly expressed his contempt for humanity and disregard for the right to human dignity itself.[75]

With these new findings the case was then assigned to the District Court of Frankfurt am Main for another assessment. The reason why it was a different court than the initially responsible District Court of Kassel is because of section 354 of the Code of Criminal Procedure (*Strafprozessordnung* – StPO). If an appellate court has found fault with the initial judgement, it can remit the case either to the initial court or another court of the same level. Fault in this context means that the higher court has found that the law has been incorrectly applied or assessed. The appellate court, however, cannot re-assess the case as a whole, admit new evidence, or dismiss the initial judgement because of later findings. It may only correct the initial court's reasoning and application of the law. The facts of the case can only be investigated and assessed by the district courts and therefore, if the court also finds that the corrected application of the law demands the facts of the case to be reassessed, it will remit the case to a district court. Precisely to which court the case is then assigned to is at the discretion of the appellate court. Usually, the case is to be assigned to a different chamber of the initial court. However, it may also be assigned to a different court of the same rank and in the same state (section 354 paragraph 2 StPO). Because of the overall publicity of the case, it seems plausible that the Federal Court repartitioned to the Frankfurt Court in order to enable a third independent assessment and diminish any possible bias of the Kassel Court or criticism directed thereat.

The Frankfurt Court decided in line with the findings of the Federal Court and, on the 9th of May 2006, sentenced M to a lifelong sentence for murder due to having killed for sexual satisfaction as well as for the enabling of another crime.[76] The verdict then became final on the 7th of February 2007, after an appeal (*Revision*) by M was denied by the 2nd Criminal Senate of the Federal Court.[77]

[74] RGSt 42, 145, 146; BGH NStZ 1981, 300.
[75] BGH (n 72) 1878.
[76] LG Frankfurt/Main - 5/21 Ks 3550 Js 220983/05 (04/2005).
[77] BGH - 2 StR 518/06, BeckRS 2007, 3006.

F. Analysis

I. Section 216 StGB

Surprisingly, and much to the dismay of M, not a single court which had been confronted with the case assumed that it was one of "homicide on demand." The primary reason why every court denied the application of Section 216 was because of the crucial element of the designation by the victim, i.e. the demand being the driving factor behind the killing.[78]

In the author's view, the courts correctly denied an application of section 216. The reader might find this result counter-intuitive, since an essential element of M's actions, as acknowledged by the court,[79] was B's consent. It is a fact that even though there was some initial interest by M, the trigger for the killing was situated within B himself.[80] Had he not consented to the act, it would not have happened. Furthermore, B did not merely consent, i.e. tolerate to being killed, but rather demanded to be stabbed after passing out, even after M offered to call for an ambulance.[81] Even after being given the option not to be killed, he actively demanded this of the hesitating M to, thereby convincing him to uphold their agreement. This is also in line with the purpose of section 216 which reduces the sentencing of the homicide because it accounts for the reduced reprehensibility of the act evoked by the victim's consent.[82] Therefore, because the consent played such an essential role in the act and it is in line with the fundamentals of section 216, one could argue for it to be applicable. However, these arguments merely prove that the killing was caused by B's serious and explicit demand, not that M had technically been instigated by that demand. M's personal interest to cannibalize, i.e. kill another person and assimilate them to him, was also a primary factor for the course of events. B was mainly driven by his interest to have his genitalia amputated and thereby reach his "ultimate pleasure," the consent into the killing acting as a means so that M would grant him this wish.[83]

To reiterate, section 216 requires that the perpetrator must be motivated by the demand of the victim. The statute uses the same wording as the offense of instigating another crime (section 26) and therefore has roughly the same requirements. The element relevant in this case is that the instigation must be the primary driving factor behind the act, hence that the wishes of the victim need to be the driving factor.[84] Consequently, if the perpetrator already has the inner motivation to commit the act before being instigated to

[78] Mitsch (n 64) 198.
[79] BGH (n 72).
[80] Harro Otto, 'Anmerkung zu BGH, 22.4.2005 – 2 StR 310/04' (2005) 60 JZ 799.
[81] BGH (n 72).
[82] See n 22.
[83] BGH (n 72).
[84] Christoph Safferling, '§ 216 StGB' in Matt and Renzikowski (n 27) para 10.

do so, being a so called "omnimodo facturus," an instigation is not possible.[85] As such section 216 runs parallel to the different subjective motives of section 211, i.e. the subjective driving factor constitutes the turning point for determining the appropriate statute.[86] This inner motivation by M to cannibalize B was already present in this case and represented one of the reasons why the two parties came to their final agreement. Since B initially only wanted to be maimed, the desire by M to cannibalize another caused B's interest to be mutilated to transform into the demand to be killed.[87] The deed was thus the quid pro quo for the given consent.

Just as much as M respected B's interests, the agreement served for M to fulfil his own wishes, not to adhere to B's. Both interests equally motivated the killing and were equally fulfilled. Therefore, no interest had a clear superiority over the other. This causes the deed not to fall under section 216`s altruistic purpose of privileging the perpetrator who mainly acts to satisfy the interests of another, this external factor needing to be the dominant motivation.[88] It was also M who had the initial interest to cannibalize another person and was actively searching for a consenting partner. Even though the consensual agreement with B was a necessity for M, it was merely the tipping point for the final commitment of the act by the hesitating M. Therefore, his determination cannot be fully attributed to the instigation by B in the way needed for section 216.[89] In the author's opinion, the application of section 216 should thus be denied.

II. Section 211 StGB

The Federal Court did not contend that the murder criteria "petty reasons" and "desire to kill" were somehow fulfilled. As the Kassel Court already established, M was less interested in annihilation or anything strictly egotistical than in assimilating with B. The Federal Court did, however, insist on the elements of "sexual satisfaction" and "enabling intent."

1. Killing for sexual satisfaction

For the element of "sexual satisfaction," the District Court latched onto the precedent that there had to be a narrow timeframe between the killing act and the sexual satisfaction reached by it.[90] The reason for that interpretation, in turn, was the principle of "restrictive

[85] Frank Saliger, '§ 216 StGB' in Saliger and others (n 17) para 16; Satzger, 'Der „omnimodo facturus" – und das, was man in jedem Fall dazu wissen muss!' (2017) 39 JURA 1169, 1170.
[86] See n 47.
[87] Michael Kubiciel, '"Kannibalen"-Fall. Mord zur "Befriedigung des Geschlechtstriebs" und zur Ermöglichung einer "Störung der Totenruhe". Anmerkung zu BGH, Urteil vom 22.4.2005' (2005) 37 JA 763, 764.
[88] See also Werner Hinz, 'Mord bei einverständlicher Tötung mit sexueller Motivation?' [2016] JR 576, 582.
[89] See Satzger (n 85) 1172.
[90] beck-aktuell-Redaktion (n 65).

Interpretation" demanded by the Federal Constitutional Court.[91] This interpretive principle was essentially contradicted by the Federal Court in its ruling when it resorted to the "ends and means relationship" as opposed to a spatial and temporal link between the satisfaction and the killing, thereby expanding the scope of this element.[92]

The Federal Court is, of course, correct in its assessment insofar as the wording of section 211 does not explicitly entail such a restriction.[93] It is also not fundamentally wrong to evaluate the act based on the "ends and means relationship," as it is in accordance with the fundamental idea of punishing someone acting especially wicked by subjugating another to his own pleasure, thereby fully disregarding their value and dignity.[94] To put this into perspective, there was a parallel case in Berlin in 2005, directly inspired by the Rotenburg case. There, two men had met to have sex, but, while one of them was blindfolded, the other stabbed him in the head with a screwdriver in order to then take out his organs, though ultimately not consuming them.[95] Even though it was a fetish meeting where the infliction of pain had priorly been agreed upon, the killing had not. Hence, it was evident that the murderer completely disregarded the victim's dignity and acted purely out of own sexual desire.

The Federal Court seems to consider the same reprehensibility to be present where the killer created video material which may be used to masturbate to later.[96] This deserves approval insofar as typical cases of this sort are concerned, i.e. ones where from the very beginning, the act and its recording would serve exclusively to satisfy the murderer's interest. In the Rotenburg case, however, the killing and recording both happened with the consent and demand of the victim. Thus, any later revisitation of the act by watching the recordings is a return to a consensual act, not just satisfying the killer's own desires but also recalling the victim's desire as well as the relationship between the two parties. The protective purpose of section 211, namely, to punish a murderer who expresses extreme disregard for another human by ruthlessly subjugating them to their own interests, is therefore not met.[97] Consequently, in accordance also with the precept of restrictive interpretation as far as the letter of the law allows, the rule regarding murder for the sake of sexual satisfaction should be disapplied. This would also be in line with the earlier-mentioned "perpetrator type" correction, which demands a positive assessment

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[91] See n 32.

[92] BGH (n 72); Arthur Kreuzer, 'Einverständliches Töten als Mord? Kriminologische, strafrechtliche und justizkritische Bemerkungen zum Revisionsurteil im Kannibalenfall' (2005) 88 MSchKrim 412, 422.

[93] BGH (n 72) 1877.

[94] Kristian Kühl, 'Die drei speziellen niedrigen Beweggründe des § 211 II StGB' [2009] JA 566, 568.

[95] LG Berlin – 522-18/04 (10 May 2005); Michael Mielke, '"Kannibale aus Neukölln" kommt in die Psychiatrie' (*Berliner Morgenpost*, 11 May 2005) <https://www.morgenpost.de/printarchiv/berlin/article104453003/Kannibale-aus-Neukoelln-kommt-in-die-Psychiatrie.html> accessed 16 August 2024.

[96] BGH (n 72) 1877.

[97] See Hinz (n 88).

that the act was especially reprehensible, which was not the case here. In a second cannibal case which took place in 2016, also with a consenting victim, the District Court had applied the sentence reduction solution, acknowledging the mitigating circumstances. This was also denied by the Federal Court at the time, only remarking that said "solution" is to be used very sparingly and not in the context of this murder criterion. Further elaborations on how the law is to be interpreted were not made.[98]

2. Killing in order to enable another crime

In addition, M was sentenced for murder because the subsequent act of cannibalism supposedly constituted another crime which the killing merely served to enable.

a. Distribution of depictions of violence (sections 131 and 184 StGB)

Sceptically, the Federal Court suggested the enabling of the distribution of depictions of violence under section 131 and section 184a StGB.[99] Since there had been actual distribution of the video material, there is an argument to be made that the recordings were made to enable a later distribution.[100] It would however have to be proven that the goal of distributing the videos and "luring" in potential victims was the driving factor behind the killing, which cannot be assumed when looking at the consensual act and the interests to be fulfilled. It seems realistic that the act would have been committed regardless of a potential recording.

b. Disturbance of the peace of the dead (section 168 StGB)

More importantly, M was said to have disturbed the peace of the dead and thus violated section 168 StGB. The Federal Court assessed that M had done "insulting mischief" to B by butchering him and later consuming his flesh, expressing his distaste for the human species as a whole and violating human dignity, the act thereby being degrading.[101] That M's actions can be considered mischief, i.e grossly inappropriate behaviour,[102] is evident. The main concern related to section 168 is that the act also needs to be "insulting," i.e violating or degrading the subject's dignity or the dignity of the human species.[103] The argument of the Court, in favour of this element being fulfilled, is that section 168 protects a "public sense of piety" which is to be prioritized before the victim's

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[98] BGH NStZ 2016, 469.

[99] ibid.

[100] Hans Kudlich, 'Anmerkung zu BGH, Urteil vom 22.4.2005 – 2 StR 310/04' (2005) 45 Jus 958, 960; Anja Schiemann, 'Mord oder Totschlag? - Kannibalismus und die Grenzen des Strafrechts' [2005] NJW 2350, 2351.

[101] BGH (n 72) 1878.

[102] Tatjana Hörnle, '§ 168 StGB' in Jürgen Schäfer (ed), *Münchener Kommentar zum Strafgesetzbuch Bd. 3* (4th edn, C.H. Beck 2021) para 20.

[103] Momsen and Jung (n 25); Jacobsen (n 56) 74.

individual sense of piety. Accordingly, M's deeds were "insulting" regardless of B's consent or M's special care because the act stripped B of his subjective quality, only regarding him as an object. Of the right not to be treated as a mere object, the victim would then be unable to dispose of.

The subjective element demanded by section 15 is also satisfied, according to the Court, because M knew of the societal taboo against cannibalism and willingly went against it.[104] This is problematic on the one hand because the Federal Court equates the violation of a taboo to the commitment of another crime. Breaking a taboo is merely the transgression of an unwritten code of conduct, whereas a crime can be defined rather as a violation of a written societal rule, established by a higher authority.[105] Arguing that the knowledge of transgressing a taboo is equal to knowingly violating a criminal statute is not unjustifiable, but is once again taking a more extensive approach that also leaves unanswered exactly which statute M wanted to violate.

Moving on, it is unclear from the Court's line of argument whether the act violated the human dignity of B individually or him as part of the human species.[106] The court only refers to the protective purpose of section 168 and deems that to have been violated.[107] The Federal Court is thereby again taking an extensive approach, which is not in line with the fundamentals laid out by the Federal Constitutional Court.[108] Acknowledging that section 168 protects a public sense of piety bears the consequence that there is now a dilemma between the protective purposes of section 168, the legal subjectivity of the individual and the public sense of piety, which unveils the fundamental question of this "insulting" element: Is the autonomy of the individual, as part of his human dignity, to be valued less than the dignity which he deserves as a part of the human species?[109]

According to the Federal Court, at least, it is. This is supported by the words of the very first article of the German constitution, stating that "human dignity is inviolable," thereby acknowledging an objective standard, the maintenance of which every human is entitled to.[110] There is also a systematic argument to be drawn from section 168 being situated within division 11 of the German Criminal Code, "offences relating to religion and

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[104] BGH (n 72) 1878.

[105] Schiemann (n 100) 2351; Dirk Fabricius, 'Der Begriff des Tabus. Funktion, Entstehung und Auflösung individueller und kollektiver Tabus' in Otto Depenheuer (ed), *Recht und Tabu* (Westdeutscher Verlag 2003) 26 ff.

[106] Schiemann (n 100) 2351.

[107] BGH (n 72) 1878.

[108] Mitsch (n 64) 200.

[109] Kubiciel (n 87) 766.

[110] Matthias Herdegen, 'Art 1 GG' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz-Kommentar, Bd. 1* (103rd edn, C.H. Beck January 2024) paras 34 ff.

ideology," thus demonstrating that section 168 prioritizes public and intangible values.[111] On the other hand, such an exclusively objective standard could pre-emptively undermine the subjective autonomy held to be one primary element of that very guarantee of human dignity.[112] As mentioned before, section 168 also protects the legal subjectivity of the person.[113] Consent into the killing, as another expression of this personal subjectivity of a person, should then be considered to mitigate the reprehensibility normally needed to fulfil the murder statute.[114]

Furthermore, it is unclear, what exactly a "public sense of piety" entails. As criminal law and the constitution under article 103 paragraph 2 demand for a statute to be sufficiently tangible, the introduction of an element which is determined by the zeitgeist and the judge's personal perspective creates uncertainty and the potential for extensive interpretations.[115] Considering the consent of the victim when assessing the "insulting" nature of the act, even from a public perspective, would cause the element to be a lot more tangible. It would also balance both protective purposes of section 168 since the legal subjectivity as well as the public sense of piety would be considered and respected when evaluating the act. This would also adhere more strongly to the constitutional requirement of article 103 paragraph 2, since every court would be required to evaluate the demand, if present, before introducing their own subjective perspective into the judgement.

To summarize, the legal subjectivity of the individual should be considered while assessing the public sense of piety. The public sense of piety is a standard safeguarding the legal subjectivity of the individual. To disregard this exact subjectivity when applying the standard precisely undermines the values it is trying to protect.

3. Dominant motivation

Lastly, regardless of whether the act is classified as insulting or not, the intent to enable the crime would have to be dominant. As mentioned earlier, both the demand by B and the interest by M were causal for the deed being done. Both interests are of approximately equal weight to the effect that, while the threshold of section 216 is not met, neither is the one required for the fulfilment of section 211.

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[111] BVerfGE 115, 118; Filip Horák, 'Human Dignity in Legal Argumentation: A Functional perspective' (2022) 18 EuConst 237, 253.

[112] Kubiciel (n 87) 766; Herdegen (n 110) paras 37 ff.

[113] Stephan Stübinger, '§ 168 StGB' in Saliger and others (n 17) para 2.

[114] Thomas Hillenkamp, '„Unbedingter Todeswunsch" und konsensierte Tötung – (k)ein Strafmilderungsgrund?' in Rainer Beckmann and others (eds), *Gedächtnisschrift für Herbert Tröndle* (Duncker & Humblot 2019) 553, 570.

[115] Nikolaus Bosch and Ulrike Schnittenhelm, '§ 168 StGB' in Eser and others (n 14) para 10.

In the author's view, M's actions falling within the scope of the consent given by B should not be held to qualify as a deed under section 168, the antecedent killing thus not "enabling another crime."

III. Sections 212 and 213 StGB

Finally, the act has to be assessed from the angle of section 212 paragraph 1, section 212 paragraph 2 and section 213.

Concerning section 213, an argument could be made that M was in such an energized state as required by the statute. It was proven by psychologists and experts that he had developed a schizophrenic personal disorder as well as a fetish for the flesh of men.[116] Therefore, when being able to divulge in these interests, such an energized state could be assumed which then caused him to prematurely act on this desire. However, M never lost his restraint in such a manner, as evidenced by his hesitation even after the amputation of B's genitalia and his offer to call for an ambulance. It can thus not be assumed that he fully succumbed to his mental state in the needed for the application of section 213. Section 212 paragraph 2 cannot serve as a compensation for section 211 but rather, in the absence of section 211, the overall reprehensibility needs to be achieved by a factor which was not considered during the assessment of section 211.[117] Such factors, such as listed above, do not exist in this case, as evidenced by the comprehensive documentation.

Thus, in the author's view, the judgement of M's deeds ultimately boils down to a simple homicide in the sense of section 212 paragraph 1, carrying with it a punishment of no less than five years but no more than fifteen years. Within that margin, the judges would be able to consider the overall cooperation of the perpetrator with the authorities which, under German criminal law, usually lightens the sentence but was, in the actual procedure, completely disregarded by the judges because of section 211's hard and inflexible range of sentences.

G. Conclusion: A critique of section 211 StGB

In conclusion, the case of Armin M. reveals several problems regarding the homicide statutes, the most obvious being the absolute lifelong sentence of section 211. Between sections 216 and 211, the range of the sentencing of the crime is either six months to five years, or a "lifelong" sentence amounting to a minimum of fifteen years, being enforced for about nineteen years on average.[118] These different sentences sometimes stem from only

[116] BGH (n 72).
[117] See n 48.
[118] Ralf Eschelbach, '§ 211 StGB' in Kudlich and von Heintschel-Heinegg (n 14) para 122.

tiny differences in the investigation or evaluation of a case, for example in the process of determining which motivation was dominant within the perpetrator.

Furthermore, the inflexible sentencing of Section 211 renders most mitigating circumstances otherwise usable as arguments by the defendant as worthless. In the case at hand, M had been a model prisoner at the time as played a big part in the investigations, cooperating with the public prosecutors.[119] However, the sentence of section 211 does not allow for these factors to be considered, rendering the case entirely dependent on the classification as a murder. It is problematic that the perpetrator can really only expect a fair sentencing which incorporates all the facts only if the act does not constitute a murder.[120] It is also the wrong message to send to future perpetrators and their defending lawyers, since even a proper and model cooperation does not guarantee a lighter sentencing which in turn incentivizes the perpetrator to try and hide as many details of the crime as possible. Conversely, a reform of section 211 would increase the efficiency of the legal proceedings and decrease the time needed for evaluation and discovery. This would also ease the second criticism with section 211, which is that even despite its exhaustive elements and systematic restrictive interpretation, it remains imprecise in its vocabulary. If judges were given some leeway and an opportunity to balance all interests involved in the sentencing of a murder even when one of the elements is fulfilled, they would be less tempted to overanalyse the required elements.[121]

It was the purpose of this article to provide the reader with an overview of the German criminal system regarding homicide and enable them to make their own assessment regarding the handling of the case. Due to the complex nature of the act in question, there is no obviously correct answer, and it is up to one’s own assessment and now acquired legal tools to find one’s own answer, which might even result in disagreeing with the author or the courts. The discussion is limited by the nature of the statutes in question, so that every treatment will necessarily begin and possibly find an end on an interpretive level, even though a fair evaluation of the act and the perpetrator should be the ultimate goal.

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[119] Stefan Maier, ‘§ 46 StGB‘ in Erb and Schäfer (n 14) para 174, 175.

[120] For a critique of section 211 and the need for reform by the then-Federal Minister of Justice and Consumer Protection, see also Heiko Maas, ‘Why it is High Time to reform the Homicide Statutes’ (2014) 15 GLG 1029.

[121] Rüdiger Deckers and others, ‘Zur Reform der Tötungsdelikte Mord und Totschlag – Überblick und eigener Vorschlag‘ (2014) 34 NStZ 9, 15 ff.

Articles

The Party Prohibition Procedure in Germany: A Viable Approach to Protect the Constitution?

Gina Nadine Scheuer[*]

This paper explores the use of Germany's party prohibition procedure as a way to defend its democratic system from political threats. With the recent rise of the far-right Alternative für Deutschland (AfD), there is growing debate over whether some political parties in Germany are undermining the democratic order.

This article reviews the legal basis, key requirements, and past examples of party bans, as set out in Article 21 of the German Basic Law. Historical cases, like those of the Socialist Reich Party and the Communist Party of Germany, show that Germany has used this tool successfully in the past. However, more recent attempts, such as the failed 2017 ban on the National Democratic Party (NPD), highlight the challenges of the procedure.

The paper also considers alternatives, such as excluding parties from state funding or using non-legal strategies to counter anti-democratic movements. Finally, it argues that, while the party prohibition procedure is a powerful tool to protect democracy, it needs to be used carefully and strategically to avoid potential backlash and misuse.

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A. Introduction

Political parties assume a pivotal function in any modern democracy. They contribute to the formation of the political will of the people (Art. 21 Para. 1 of the German Constitution) and thereby constitute an important intermediary between state and society.[1] But it is precisely the significance of those parties and their indispensable function that poses a viable and persistent threat to this form of rule. In view of the significance and the inherent risks, it is hardly surprising what strong reactions election results trigger in the electorate and general society, especially when a new shift in the poll results can be observed.

Not least, the results of the last European elections to elect members of the European Parliament in June of this year fueled considerable public attention and fuelled wider debate regarding the matter at both national and international level. In Germany, the party "Alternative für Deutschland" (AfD) in particular caused quite vocal reactions, emerging as the second strongest party in Germany (with a total of 15.90% of the votes) in this year's elections and thus building on its electoral success in the last general national election as a comparatively young party.[2] There they were able to achieve 10.4 % of the validly cast second votes cast and 10.2 % of the first votes, enabling them to win 83

[1] Christoph Gröpl, *Staatsrecht I: Staatsgrundlage, Staatsorganisation, Verfassungsprozess* (15th edn, C.H. Beck 2023) para 378.

[2] European Parliament, 'European Elections 2024: Election Results, Official Results Germany 2024, Results by National Party' (European Elections 2024: Election Results) <https://results.elections.europa.eu/de/deutschland/> accessed 27 July 2024.

of the 735 seats in the German "Bundestag", the national parliament.[3] However, it is not only the relatively short existence of the party, which was founded in 2013 and joined the national parliament in 2017, but rather its political orientation and the regular controversies surrounding both the party and its members that have raised public scrutiny.[4] It joined the ranks of the Western European Populist Radical Right Parties (PRRPs) and became by far the most successful far right-wing party after World War II in the Federal Republic of Germany.[5] Despite their presence and success in Western Europe, these parties remained comparatively unsuccessful in Germany before the 2017 general election.[6]

In addition to the indisputable success in Germany since 2017, this new dynamic has also become apparent at European level, where a clear rightward shift in the EU Parliament became noticeable, not least in the European elections.[7] In France, corresponding election results even led to the dissolution of the National Assembly ("*Assemblée Nationale*") and the announcement of new elections by the French President Emmanuel Macron.[8] At national, international and at European level, a noticeable shift can be observed, which is met with concern by some voices. At all of these levels, the election results are being severely criticised, some to such an extent that a section of the electorate vocally raises concerns regarding the constitutionality of individual winning parties. But what legal instruments are available if these concerns have substance? How should non-constitutional parties be dealt with legally and how can they be countered?

On the occasion of current debates at national level in Germany, one constitutional instrument in particular is being mentioned as a possible countering method: a party ban by means of a party prohibition procedure. Aside from addressing the question of what a party ban is and what general legal foundation underlies it, this article will also consider whether it is a viable approach to protect the constitution. Political views of parties, their

[3] Die Bundeswahlleiterin, 'Bundestag election 2021, Results, Germany, Distribution of Seats' (*Bundestag Election 2021, Results*) <https://www.bundeswahlleiterin.de/bundestagswahlen/2021/ergebnisse/bund-99.html#sitze2> accessed 10 June 2024.

[4] Frank Decker, 'Parteien in Deutschland: Etappen der Parteigeschichte der AfD' (*bpb.de*, 13 December 2022) <https://www.bpb.de/themen/parteien/parteien-in-deutschland/afd/273130/etappen-der-parteigeschichte-der-afd/> accessed 13 June 2024.

[5] Matthias Diermeier, 'The AfD's Winning Formula – No Need for Economic Strategy Blurring in Germany' (*Intereconomics*, Vol. 55, 2020, No. 1) <https://www.intereconomics.eu/contents/year/2020/number/1/article/the-afd-s-winning-formula-no-need-for-economic-strategy-blurring-in-germany.html> accessed 5 June 2024; Carl C. Berning, 'Alternative für Deutschland (AfD) – Germany's New Radical Right-wing Populist Party' (*Publikationen | ifo Institut*, 4/2017), 16 <https://www.ifo.de/publikationen/2017/aufsatz-zeitschrift/alternative-fuer-deutschland-afd-germanys-new-radical-right> accessed 8 June 2024.

[6] Berning (n 5).

[7] MDR Aktuell, 'Europawahl - Rechtsruck im EU-Parlament: So haben die anderen 26 EU-Länder gewählt' (*MDR*, 10 June 2024) <https://www.mdr.de/nachrichten/welt/politik/europawahl-eu-laender-ergebnisse-europa-rechtsruck-100.html> accessed 13 June 2024.

[8] Legal Tribune Online, 'Neuwahlen in Frankreich: Ein Präsident ohne Macht' (*Legal Tribune Online (LTO)*, 10 June 2024) <https://www.lto.de/persistent/a_id/54732> accessed 13 June 2024.

members or voters will not be assessed or scrutinized in any detail on this occasion.[9]

Thereby, the main section of the general legal foundation will be preceded by a current contextualisation of the national debate and its relevance, as well as the historical context of party prohibitions in Germany, and will then be complemented by a brief presentation of alternatives and a final conclusion.

B. Current relevance and triggering cause

The legal issue of party prohibition proceedings is currently experiencing an extensive and persistent relevance in politics and society, making it of interest on a national and international level. At national level, in particular the electoral success of the AfD party in the wake of persistent social and political criticism of the party and a multitude of concluded legal proceedings on various topics have contributed to the emerging relevance of the topic and the sustained interest in it. While no respective proceedings have yet been initiated against them, the issue has been petitioned by some members of society, or raised by individual members of parliament.[10]

The party can generally be categorized as right-wing populist, with a profile that is now especially critical with respect to immigration, among other aspects, although it was focused in particular on criticism of the Euro in its early days.[11] Not only a shifting profile, but also a strengthening of far-right forces and power-strategic isolation in the party system have become increasingly noticeable.[12]

It is now progressively being mentioned in the context of racism, fascism and even

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[9] The formation of an informed political opinion should remain the sole prerogative of the reader. Regular information on the parties in this regard is also recommended outside the election periods.

[10] A corresponding petition 'Prüft ein AfD-Verbot!' has already found over 800,000 supporters to date (21 June 2024) <https://innn.it/afdverbot> accessed 21 June 2024; A respective interest is also represented by individual members of parliament: Sebastian Friedrich, Nils Schniederjann, 'CDU-Abgeordneter Wanderwitz will AfD-Verbot beantragen' (*Tagesschau.de*, 5 October2023) <https://www.tagesschau.de/inland/innenpolitik/afd-verbot-cdu-wanderwitz-100.html> accessed 20 June 2024; Open Petition Region Germany, 'Antrag AfD Parteiverbot im Bundestag' (*Open Petition*, January 2024) <https://www.openpetition.de/petition/online/antrag-afd-parteiverbot-im-bundestag> accessed 27 June 2024; Deutsche Presse-Agentur (dpa), 'Diskussion um AfD-Verbotsverfahren hält an' (*Süddeutsche.de*, 4 January 2024) <https://www.sueddeutsche.de/politik/parteien-diskussion-um-afd-verbotsverfahren-haelt-an-dpa.urn-newsml-dpa-com-20090101-240104-99-487330> accessed 12 June 2024; Andre Kartschall, 'Vorwurf der Verfassungsfeindlichkeit: Bündnis setzt sich für schnelles AfD-Verbot ein' (*Tagesschau.de*, 22 June 2024) <https://www.tagesschau.de/inland/afd-verbot-100.html> accessed 23 June 2024.

[11] Simon Franzmann, '(Die) AfD' (*bpb.de*, 3 August 2022) <https://www.bpb.de/kurz-knapp/lexika/handwoerterbuch-politisches-system/511455/die-afd/> accessed 17 June 2024; Decker (n 4); cf. Berning (n 5) 17.

[12] Decker (n 4); cf. Florian , Stefanie Gäbler, Björn Kauder, Manuela Krause, Luisa Lorenz, Niklas Potrafke, Alexander van Roessel, 'Demokratische Vielfalt in Deutschland – unterscheiden sich die Volksparteien noch?' (2017) Vol. 70 / Iss. 20, ifo Schnelldienst, 28, 31.

antisemitism by critical voices.[13] Particular public outrage and debate was triggered not least by the meeting in a villa in Potsdam on the 25th November 2023, where high-ranking AfD politicians and Neo-Nazis were among those, discussing the deportation of millions of people from Germany.[14] People inside and outside politics regularly dispute the party's programme and the tendencies it upholds, as well as the behaviour of its members, even beyond specific occasions.

The party remains a particular area of interest for the Constitutional and Administrative Courts beyond politics and society.[15] Recent cases concern, for instance, a desired access to the event hall "*Grugahalle*" by the city of Essen for the hosting of the party's national conference, or the urgent motion by several media companies to grant access to an AfD election party in Thuringia.[16]

Of particular relevance in this regard is the categorisation of the party and its state divisions by constitution protection authorities and the associated court proceedings. Several state associations of the AfD have already been assessed by constitution protection authorities as suspected cases of investigation, or even as confirmed extremist activity.[17] Alongside this, five of the party's youth organizations have already been

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[13] cf Marcel Fratzscher, 'AfD wählen – und verlieren' (*Zeit Online*, 24 January 2024) <https://www.zeit.de/wirtschaft/2024-01/rechtsextremismus-afd-wirtschaft-demokratie> accessed 21 May 2024; Der Spiegel, 'Analyse im Auftrag jüdischer NGO: Antisemitismus gehört laut Studie zum »programmatischen Kern« der AfD', (Der Spiegel, 17 December 2021) <https://www.spiegel.de/politik/deutschland/afd-antisemitismus-gehoert-laut-studie-zum-programmatischen-kern-der-partei-a-ee57381b-a3c2-4910-a69e-d68e0bac8f73> accessed 5 June 2024; Deutsches Institut für Menschenrechte, 'Rassistisch und rechtsextrem: Klare Abgrenzung von der AfD geboten', (Institut für Menschenrechte, Press Release 07 June 2021) <https://www.institut-fuer-menschenrechte.de/aktuelles/detail/rassistisch-und-rechtsextrem-klare-abgrenzung-von-der-afd-geboten> accessed 24 July 2024.

[14] cf Deutscher Bundestag (ed.), 'Potsdamer Treffen zur massenhaften Abschiebung' (*Parlamentsnachrichten*, 20 March 2024) <https://www.bundestag.de/presse/hib/kurzmeldungen-994810> accessed 5 June 2024; Marcus Bensmann, Justus von Daniels, Anette Dowideit, Jean Peters, Gabriela Keller, 'Neue Rechte: Geheimplan Gegen Deutschland' (Correctiv.*Org*, 10 January 2024) <https://correctiv.org/aktuelles/neue-rechte/2024/01/10/geheimplan-remigration-vertreibung-afd-rechtsextreme-november-treffen/> accessed 25 May 2024.

[15] A detailed overview can be found here: Bertold Huber, 'Die AfD – Facetten aktueller Rechtsprechung', (2024) 43 NvwZ 119.

[16] Administrative Court Gelsenkirchen, 'Stadt Essen muss der AfD die Grugahalle für Parteitag zur Verfügung stellen' (*VG Gelsenkirchen*, Press Release 14 June 2024) <https://www.vg-gelsenkirchen.nrw.de/behoerde/presse/pressemitteilungen/09_240614/index.php> accessed 24 June 2024; Tanja Podolski, 'VG Gelsenkirchen entscheidet im Eilverfahren - AfD darf Stadthalle in Essen für Bundesparteitag nutzen' (*Legal Tribune Online (LTO)*, 14 June 2024) <https://www.lto.de/recht/hintergruende/h/vg-gelsenkirchen-15l888-24-afd-stadthalle-grugahalle-essen-bundesparteitag/?utm_source=Eloqua&utm_content=WKDE_LEG_NSL_LTO_Daily_EM&utm_campaign=wkde_leg_mp_lto_daily_ab13.05.2019&utm_econtactid=CWOLT000036935294&utm_medium=email_newsletter&utm_crmid=> accessed 24 June 2024; Legal Tribune Online, 'LG Erfurt erlässt einstweilige Verfügung: AfD muss Journalisten zur Wahlparty zulassen' (*Legal Tribune Online (LTO)*, 22 August 2024) <https://www.lto.de/recht/nachrichten/n/einstweilige-verfuegung-lg-erfurt-9o94124-afd-thueringen-muss-journalisten-zur-wahlparty-zulassen?utm_source=Eloqua&utm_content=WKDE_LEG_NSL_LTO_Daily_EM&utm_campaign=wkde_leg_mp_lto_daily_ab13.05.2019&utm_econtactid=CWOLT000036935294&utm_medium=email_newsletter&utm_crmid=> accessed 24 August 2024.

[17] A statistic concerning the status of assessments of state associations of the AfD by constitution protection authorities can be found here: Philipp Heinrich, 'Status der Landesverbände der AfD zur Prüfung durch die Behörden des Verfassungsschutzes der Länder bis 2023' (*Statista*, 12 June 2024) <https://de.statista.com/statistik/daten/studie/1428143/umfrage/status-der-landesverbaende-der-afd-zur-pruefung-durch-den-verfassungsschutz/> accessed 26 June 2024.

classified as secured right-wing extremist, as well as the nationwide state association of the youth organization.[18] The party itself was categorized as an investigation case for the first time in 2019 and upgraded to a “suspected right-wing extremist case” (“rechtsextremistischer Verdachtsfall”) in 2021, enabling the use of intelligence service resources, and causing the party to file a complaint against the categorization.[19] These findings were confirmed in the first instance by the Administrative Court of Cologne and also motions filed with the same court for the issuance of a temporary injunction against, among other things, the categorization as a confirmed extremist activity and a corresponding public announcement remained unsuccessful.[20] The Higher Administrative Court of North Rhine-Westphalia recently ruled on the appeal lodged against the former to the disadvantage of the party and has upheld the confirmation that the constitution protection authorities are allowed to monitor the party and its youth organization as a suspected case and to inform the public about it.[21] It is stated that “the Senate is convinced that there are sufficient factual indications that the AfD is pursuing endeavours that are directed against the human dignity of certain groups of people and against the principle of democracy”.[22] The party has already announced its intention to take the legal dispute to the next higher court.[23]

Proceedings to ban the party have not yet been initiated. The German Institute for Human Rights (DIMR) has concluded in its analysis ‘Why the AfD could be banned, recommendations for the state and politicians’ that the corresponding requirements for a

[18] Patricia Haensel, ‘Wo AfD und Junge Alternative gesichert rechtsextrem sind’, (*Redaktionelles Netzwerk Deutschland (RND)*, 23.05.2024) <https://www.rnd.de/politik/wo-gelten-afd-und-junge-alternative-als-gesichert-rechtsextrem-und-was-bedeutet-das-BEOYLLR67FCABBNQ6ESSRUZJWM.html> accessed 25 June 2024; Higher Administrative court North Rhine-Westphalia, ‘Bundesamt für Verfassungsschutz darf AfD und JA als Verdachtsfall beobachten’ (*OVG NRW,* Press Release 13 May 2024) <https://www.ovg.nrw.de/behoerde/presse/pressemitteilungen/23_240513/index.php> accessed 24 June 2024.

[19] Tagesschau, ‘Oberverwaltungsgericht Münster, AfD-Einstufung als Verdachtsfall ist rechtens’ (*Tagesschau.de*, 13 May 2024) <https://www.tagesschau.de/inland/innenpolitik/afd-ovg-verdachtsfall-100.html#:~:text=Nach%20einer%20erstmaligen%20Einstufung%20der,im%20M%C3%A4rz%202022%20als%20rechtm%C3%A4%C3%9Fig.> accessed 23 June 2024; cf. OVG NRW (n 18).

[20] VG Köln openJur 2022, 9341 (Administrative court of Cologne); Bundesamt für Verfassungsschutz, ‘Bundesamt für Verfassungsschutz obsiegt vor Verwaltungsgericht Köln gegen die AfD‘ (*Bundesamt für Verfassungsschutz*, Press Release 2022) <https://www.verfassungsschutz.de/SharedDocs/pressemitteilungen/DE/2022/pressemitteilung-2022-1-afd.html> accessed 20 June 2024; VG Köln openJur 2024, 1377 (Administrative court of Cologne).

[21] OVG NRW (n 18).

[22] OVG NRW (n 18).

[23] Further information on the proceeding in the next instance: Tagesschau.de, 13 May 2024 (n 19); Markus Ogorek cited by Denise Dahmen, ‘OVG-Urteil bringt AfD-Verbotsdebatte zurück’, (*Beck Aktuell,* 13 May 2024 <https://rsw.beck.de/aktuell/daily/meldung/detail/ovg-muenster-urteil-afd-verdachtsfall-verbotsdebatte> accessed 12 June 2024.

ban, however, have already been met.[24] It is assumed there that "the AfD is characterized in its programme by racist and right-wing extremist positions that oppose the guarantees enshrined in Article 1 para 1 GG and thus the absolute core of the constitution as part of the free democratic fundamental order within the meaning of Article 21 GG".[25] It is deemed that concrete evidence is given to such extent that the realization of its anti-constitutional aims seems possible.[26] Sufficient potentiality, which was considered to be lacked in the NPD prohibition procedure, is presumed to be sufficiently evident here and it is assumed that "the danger posed by the AfD to the free democratic fundamental order is therefore considerable."[27]

To date, however, there has been no unanimous consensus in general society or politics as to whether the necessary requirements have already been met and can be adequately demonstrated.[28]

While it remains uncertain whether a prohibition procedure will ultimately be initiated and whether it will be successful, it is certain that this debate will contribute to the ongoing relevance of the legal framework for a party ban and the respective court proceeding.

C. Historical context of party prohibitions in Germany

The legal possibility of a party prohibition has already been applied at court. The German Federal Constitutional Court ("*Bundesverfassungsgericht*") thereby successfully prohibited the "*Sozialistische Reichspartei*" (SRP) in 1952 and the "*Kommunistische Partei Deutschlands*" (KPD) in 1956.[29] In terms of historical contextualisation, it should be noted that the Federal Republic of Germany was still very young and therefore fragile at that time.[30]

Other court proceedings concerned the "*Nationaldemokratische Partei Deutschlands*" (NPD). Following the suspension of the first prohibition proceeding in 2003 for procedural reasons, the Federal Constitutional Court ruled again in 2017 on the

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[24] Dietrich Karl Mäurer, 'Analyse zu rechtlichen Voraussetzungen: Menschenrechtsinstitut hält AfD-Verbot für möglich' (Tagesschau.de, 7 June 2023) <https://www.tagesschau.de/inland/innenpolitik/afd-verbot-menschenrechtsinstitut-100.html> accessed 15 June 2024; Hendrik Cremer, *Warum die AfD verboten werden könnte: Empfehlungen an Staat und Politik* (1st edn, Deutsches Institut für Menschenrechte 2023) 60.

[25] Cremer (n 24) 23, cf Cremer (n 24) 27 ff.

[26] Cremer (n 24) 48 ff.

[27] Cremer (n 24) 59.

[28] Ogorek on the effects of a potential future change in categorisation and the impact on the prospects of success of a potential proceeding: Ogorek cited by Dahmen (n 23).

[29] BVerfGE 2, 1; BVerfGE 5, 85.

[30] Martin Morlok and Lothar Michael, *Staatsorganisationsrecht* (6th edn, Nomos 2023) para 295.

possibility of a prohibition of the party.[31] While it was determined that the party's goals and behaviour were aimed at eliminating the free democratic fundamental order, a prohibition failed due to the lack of potential to achieve these goals.[32] However, despite the lack of successful prohibition in court, the proceedings have markedly impacted and expanded the constitutional dealing with parties with anti-constitutional aspirations. At the suggestion of the Federal Constitutional Court in the second prohibition proceeding in 2017, the possibility of the exclusion from state funding, standardized in Article 21 para 3 of the German constitution, was stipulated.[33] This lead to the first process of its kind and resulted in the eventual defeat of the NPD at court in January 2024, where they were ordered to be excluded from state funding for the period of six years.[34]

The above-mentioned cases not only show the de facto possibility and judicial application of party prohibition, but also the reaction and findings of alternatives by the legislature.

D. General legal foundation and alternatives

The German constitution provides for various ways of dealing with parties that pose a threat to the fundamental democratic order or the existence of the Federal Republic, such as by means of a prohibition of the party. In the following, the general legal foundation enshrined in the constitution, including their raison d'être and other alternative approaches, such as the exclusion from government funding, for dealing with (potentially) anti-constitutional parties will be elaborated on.

I. The raison d'être in a militant democracy

Political parties are of outstanding importance in the German democracy.[35] They are given a constitutional status under Article 21 GG and assume a distinct standing in terms of their importance for democracy as a cornerstone of the building of the political will of the people and thus also of the fundamental components of the German democratic state (see Article 21 para 3 GG).[36] Yet their outstanding importance in state and society can be reversed from a cornerstone of a democracy to an imminent threat to it. With regard to this danger, Article 21 para 2 and 3 GG provides for appropriate reactions to parties

[31] BVerfGE 107, 339; BVerfGE 144, 20.

[32] BVerfGE 144, 20.

[33] BVerfGE 144, 20, paras 1-1010, 527; Jörn Ipsen and Thorsten Koch, 'Article 21' in Michael Sachs (ed) *Grundgesetz Kommentar* (9th edn, C.H. Beck 2021) para 212; Rudolf Streinz, 'Article 21' in Michael Huber, Andreas Voßkuhle (eds), *Grundgesetz Kommentar, Band 2* (8th edn, C.H. Beck 2024) para 6a.

[34] BVerfG, NJW 2024, 645; cf Guy ‚Beaucamp, 'Eine Demokratie, die sich wehren kann', (2021) 53 JA 1, 2.

[35] A simple legal definition of the term "party" can be found in Section 2 para 1 sentence 1 PartG; cf. also Ipsen, Koch, 'Article 21' (n 33) para 7.

[36] Cf. Streinz, 'Article 21' (n 33) para 1 et seq.; cf. Hans D. Jarass, 'Article 21' in Hans D. Jarass, Bodo Pieroth (eds), Grundgesetz für die Bundesrepublik Deutschland: GG, Kommentar, (18th edn, C.H. Beck 2024) para 1.

which, according to their objectives or behaviour of their supporters, aim to impair or eliminate the free democratic fundamental order, or to endanger the continuance of the Federal Republic of Germany. Article 21 paras 2 to 4 GG constitute an immediate constitutional barrier to the freedom of political parties and are an expression of the militant democracy.[37]

Such inherent defence-oriented elements can be found in the German constitution as a reaction to the Weimar Republic, which in contrast lacked such and was oriented towards value neutrality.[38] They are intended to prevent enemies of democracy from eliminating or endangering it by its own means, the freedoms and fundamental rights protected in the constitution, and thus to ensure the continued self-preservation of the state and the persistent protection of this form of rule.[39] As a result, the possibility of a prohibition of political parties vests its raison d'être in the German legal system, despite or precisely because of their outstanding importance for this system.

II. Party prohibition proceedings

The effects of a party prohibition are severe and therefore entail high hurdles in the prohibition proceeding, particularly in view of the mentioned outstanding importance of political parties in a democracy and the dangers associated with their prohibition. There is an inherent risk of abuse in the possibility of a party ban, given its potential to be utilised to combat unfavourable political opponents and opposing views.[40]

In the following, the prerequisites of the legal proceedings and the substantive legal requirements as well as the grave legal consequences of a positive finding of unconstitutionality and the imposition of a party prohibition will be outlined.

1. Procedural requirements

In accordance with Article 21 para 4 GG, Section 13 number 2 and section 43 of the Federal Constitutional Court Act ("*Bundesverfassungsgerichtsgesetz*" / "*BVerfGG*"), the Federal Constitutional Court decides on the unconstitutionality of a party and is the only court that can make such a determination. The procedure is regulated under Article 21 para 2 GG and Sections 43 et seq. BVerfGG. Pursuant to Section 43 BVerfGG, only the German "*Bundestag*", the "*Bundesrat*", the Federal Government or, pursuant to Section 43

[37] Jarass, 'Article 21' (n 36) para 46; Martin Morlok, 'Article 21' in Horst Dreier (ed), *Grundgesetz-Kommentar, Band 2* (3rd edn, Mohr Siebeck 2015) paras 143 ff.

[38] Tristan Barczak, '§ 4 Geschichtliche Grundlagen deutscher Verfassungsstaatlichkeit' in Klaus Stern, Helge Sodan and Markus Möstl (eds), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund, Band 1* (2nd edn, C.H. Beck 2022) para 192; Daniel Volp, 'Parteiverbot und wehrhafte Demokratie', (2016) 69 NJW, 459, 460 ff.

[39] Volp, 'Parteiverbot und wehrhafte Demokratie' (n 38) 462 ff.

[40] Morlok (n 30) para 295.

para 2 BVerfGG for a state party, the state government are authorized to file a motion.

It is disputed whether the aforementioned authorized bodies have a discretion or an obligation regarding the filing of such motion.[41] The subject matter is the determination of the unconstitutionality of a political party. A statutory definition of the latter term can be found in Section 2 para 1 sentence 1 Party Act ("*Parteiengesetz*" / "*PartG*"). The legal representation of a party is regulated by Section 44 BVerfGG. In preparation for the motion, all available sources of information regarding the activities of the party and the attributable activities of its members, including those obtained by the use of intelligence services, must be analysed in order to justify it.[42] The court can only make a decision on the merits after a preliminary proceeding (Section 45 BVerfGG), where the party's authorized representative has to be given the opportunity to make a pleading within a period to be determined and where it is then decided whether the application will be rejected as inadmissible or insufficiently substantiated, or whether the hearing will be held. Inadmissibility can be assumed, for instance, if the court has already ruled on the merits of an application against the same defendant and no new facts have been submitted (Section 47 in conjunction with Section 41 BVerfGG).[43]

Pursuant to Section 38 in conjunction with Section 47 BVerfGG, the court can order the usage of criminal investigation instruments, namely a seizure or search, in the preliminary and further proceedings in accordance with the provisions of the Code of Criminal Procedure ("*Strafprozessordnung*" / "*StPO*").[44] The form requirements are stipulated in Section 23 para 1 BVerfGG, according to which the application must be submitted to the court in writing, the reasons for the application must be stated and the necessary evidence must be provided. A provisional regulation can be made by means of a temporary injunction, if it is urgently required to avert serious disadvantages, to prevent imminent violence, or for another important reason in the public interest (Section 32 para 1 BVerfGG), whereby the party concerned can be banned from further political activity within the meaning of Article 21 para 2 GG.[45] This option was utilized in the proceedings against the SRP by banning the party from engaging in political activity by means of a temporary injunction until the deliverance of the judgement after the conclusion of the oral hearing.[46]

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[41] More detailed consideration in the following: Ipsen and Koch, 'Article 21' (n 33) para 175 ff..
[42] Ipsen and Koch, 'Article 21' (n 33) para 184.
[43] Ipsen and Koch, 'Article 21' (n 33) para 185; Sebastian Kluckert, '§ 52 Verfassungsgerichtsbarkeit' in Klaus Stern, Helge Sodan and Markus Möstl (eds.), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund*, *Band 2* (2nd edn, C.H. Beck 2022) para 215.
[44] Ipsen and Koch, 'Article 21' (n 33) para 187; Kluckert, '§ 52 Verfassungsgerichtsbarkeit' (n 43) para 215.
[45] Ipsen and Koch, 'Article 21' (n 33) para 189.
[46] Ipsen and Koch, 'Article 21' (n 33) para 189; BVerfGE 1, 349-351.

2. Substantive legal requirements

According to Article 21 para 2 GG, parties are unconstitutional if their aims or the behaviour of their adherents are such as to impair or eliminate the free democratic fundamental order, or to endanger the preservation of the Federal Republic of Germany. This results in several constituent elements that must be met and that will be examined in the following.

a. Political Parties

Article 21 para 2 GG refers to political parties. A definition cannot be found in the constitution, but in ordinary law (*"einfachgesetzlich"*) in Section 2 para 1 sentence 1 PartG.[47] Accordingly, parties are defined as "associations of citizens who wish to influence the formation of political will on a permanent or long-term basis in the domain of the Federation or a state and to participate in the representation of the people in the German Bundestag or a state parliament if, according to the overall picture of the actual circumstances, in particular the scope and strength of their organization, the number of their members and their public profile, they offer a sufficient guarantee of the seriousness of such objective". The definition is applicable insofar as it is compatible with the constitutional concept of a party.[48] A corresponding compatibility is assumed by the Federal Constitutional Court.[49] It assumes a constitutional concretisation by the legislator in its established case law and determines that the definition in ordinary law must be interpreted and applied in the light of Art. 21 Para. 1 of the constitution.[50]

Parties must be distinguished from other auxiliary and subsidiary organizations, where executive intervention, as well as in relation to political associations that cannot be considered parties, is ruled by Article 9 para. 2 GG, Sections 3 et seq. Associations Act ("*Vereinsgesetz*" / "*VereinsG*").[51]

Relevant endeavours may arise from the objectives of the party itself or from the attributable behaviour of its members.[52] Issues can emerge with regard to the imputability of such behaviour. A general responsibility of the party has to be rejected, the party's supporters must instead act as such and the party's responsibility can only exist within the scope of its influence.[53] The unconstitutional endeavours within the party must

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[47] Gröpl (n 1) para 371 ff..
[48] Streinz, 'Article 21' (n 33) para 221.
[49] Gröpl (n 1) para 372.
[50] BVerfGE 91, 262 para 22; BVerfGE 89, 266 para 14.
[51] Streinz, 'Article 21' (n 33) para 221; Hans H. Klein, 'Article 21' in Günter Dürig, Roman Herzog, Rupert Scholz and Hans H. Klein (eds), *Grundgesetz Kommentar* (103rd Ergänzungslieferung, C.H. Beck January 2024) para 518.
[52] Further elaborations in this regard will ensue in the following.
[53] Streinz, 'Article 21' (n 33) para 236.

be dominant and need to have such an influence on the party itself and its basic tendencies that corresponding political action arises, which must then be proven.[54] The objectives of the party as a whole and the behaviour of its members are in an interactive relationship, whereby in general both manifest themselves in the other and can allow conclusions to be drawn about each other.[55]

b. Objects of protection and constituent offences

The statute mentions two different objects of protection: The free democratic fundamental order and the preservation of the Federal Republic of Germany. These alternatives are in a "relationship of genuine alternative offences" (*"Verhältnis echter Tatbestandsalternativität"*).[56] The protected interests are listed conclusively, and the terms are to be interpreted narrowly in view of the extreme severity of the impending interference by a party prohibition.[57]

i. Impairment or elimination of the free democratic fundamental order

The first alternative is the free democratic fundamental order as an object of protection. It encompasses the fundamental substance of the constitution.[58] According to the jurisdiction of the Federal Constitutional Court, this is to be understood as an order "which, to the exclusion of any rule of force and arbitrariness, presents an order of rule under the rule of law on the basis of the self-determination of the people according to the will of the respective majority and of freedom and equality. The fundamental principles of this order include at least the following: respect for the human rights concretized in the constitution, above all the right of the individual to life and free development, the sovereignty of the people, the separation of powers, the accountability of the government, the legality of the administration, the independence of the courts, the multi-party principle and equal opportunities for all political parties with the right to form and exercise an opposition in accordance with the constitution."[59]

The statute requires the impairment or elimination of this object of protection. The court has differentiated between these constituent elements in its jurisdiction and grants them an independent regulatory content.[60] Elimination refers to "the elimination of at least one of the essential elements of the free democratic fundamental order or its substitution by

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[54] Streinz, 'Article 21' (n 33) para 238.
[55] Streinz, 'Article 21' (n 33) para 238.
[56] Klein, 'Article 21' (n 51) para 524; Morlok, 'Article 21' (n 37) para 149.
[57] Streinz, 'Article 21' (n 33) para 223.
[58] Ipsen and Koch, 'Article 21' (n 33) para 160.
[59] Ipsen and Koch, 'Article 21' (n 33) para 161; Streinz, 'Article 21' (n 33) para 225; BVerfGE 2, 1 para 12.
[60] Streinz, 'Article 21' (n 33) para 228a; BVerfGE 144, 20 para 551.

another constitutional order or another system of government".[61] An impairment, on the other hand, is to be assumed "if a party, according to its political concept, causes a noticeable threat to the free democratic fundamental order with sufficient intensity." A party is therefore already deemed to have "impaired" the free democratic fundamental order if, even if it does not yet indicate which constitutional order should replace the existing constitutional order, it is engaged in a qualified attempt to override the existing constitutional order. It is sufficient that it opposes one of the essential elements of the free democratic fundamental order (human dignity, democracy, rule of law), as these are intertwined and mutually dependent".[62] It also states that "however, not every unconstitutional demand is sufficient in itself to be able to assume the objective of impairing the free democratic fundamental order. Rather, the decisive factor is that a party specifically opposes those fundamental principles that are indispensable for free and democratic coexistence, as this alone ensures that a party prohibition procedure can only be used for the purposes of preventive protection of the constitution and not also to eliminate unwelcome political competition".[63]

ii. Endangerment of the preservation of the Federal Republic of Germany

The second named object of protection is the preservation of the Federal Republic of Germany. This includes the territorial integrity of the state and its ability to act in foreign political matters or its political independence.[64] The territory consists of the states listed in the Preamble to the Constitution.[65] Additionally, pursuant to Section 92 para 1 of the German Criminal Code ("*Strafgesetzbuch*" / "*StGB"*), the existence of the Federal Republic of Germany includes not only its territory, but also its freedom from foreign domination and its state unity.[66] The freedom from foreign domination refers in this regard to the preservation of German statehood, including the characteristic of external sovereignty.[67]

The constituent offence in this case is the endangerment of this protected good. Compared to the impairment or elimination required for the alternative object of protection, the severity of the interference requirement is lessened.[68] A corresponding endangerment to the preservation of the Federal Republic only has to be intended, not realized.[69] With regard to territorial integrity, this is not already the case if the division into the existing

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[61] BVerfGE 144, 20 para 550.
[62] BVerfGE 144, 20 para 556.
[63] BVerfGE 144, 20 para 556.
[64] Klein, 'Article 21' (n 51) para 520; cf Ipsen and Koch, 'Article 21' (n 33) para 165 ff.; Streinz, 'Article 21' (n 33) para 229 ff.
[65] Klein, 'Article 21' (n 51) para 520; cf Ipsen and Koch, 'Article 21' (n 33) para 165.
[66] Klein, 'Article 21' (n 51) para 521.
[67] Klein, 'Article 21' (n 51) para 521.
[68] cf Streinz, 'Article 21' (n 33) para 229.
[69] Ipsen, Koch, 'Article 21' (n 33) para 168; Streinz, 'Article 21' (n 33) para 230.

federal states is questioned, or if consensual border changes are made on the basis of international law.[70] Rather, separationist endeavours are required that aim, for instance, to separate individual states from the Federal Republic of Germany, even if this does not impair the free democratic fundamental order.[71] The aim of separatist endeavours is to separate part of the territory of a country or a region that touches the territories of several countries in order to create a new, independent state or to establish a new state within the borders of an already existing state.[72]

With regard to external sovereignty, a critical limit is in any case reached if, for instance, the state existence of the members is to be relinquished by means of the merging of states.[73] This is not the case if a party's objective is a European federal state, as the commitment to a united Europe is enshrined in the Constitution in Article 23 para 1 sentence 1 GG and the Preamble of the GG and the state quality of the Federal Republic would remain preserved in a European federal state.[74]

c. Objectives

Whereas a party prohibition pursuant to Article 21 para 2 GG requires an “aim” (“*darauf ausgehen”*), the exclusion from government funding pursuant to para 3 sentence 1 merely mandates a corresponding orientation (*“darauf ausgerichtet sind”*). This element includes specific conduct, its intention and intensity, the attribution of actions and the evidence relevant to the prohibition proceedings, and moreover the "potentiality" of achieving such objective.[75] The principle of proportionality, however, does not apply as an unwritten element.[76] The party's objectives require a certain “actively combative, aggressive attitude”.[77]

To determine the objective, the party's programme can be referenced, amongst other factors, whereby this is not limited to the written published party programme, but also includes for example other official party statements or speeches by leading functionaries.[78] Furthermore, the attributable behaviour of the party's adherents can be

[70] Klein, ‘Article 21’ (n 51) para 520; Streinz, ‘Article 21’ (n 33) para 230.
[71] Streinz, ‘Article 21’ (n 33) para 230; Ipsen and Koch, ‘Article 21’ (n 33) para 166.
[72] Definition of the Federal Office for the Protection of the Constitution, see Bundesamt für Verfassungsschutz, ‘Separatistische Bestrebungen’ (Bundesamt für Verfassungsschutz, Glossar 2022) <https://www.verfassungsschutz.de/SharedDocs/glossareintraege/DE/S/separatistische-bestrebungen.html> accessed 15 June 2024.
[73] Klein, ‘Article 21’ (n 51) para 522 ff.
[74] Ipsen and Koch, ‘Article 21’ (n 33) para 167.
[75] Streinz, ‘Article 21’ (n 33) para 231.
[76] Klein, ‘Article 21’ (n 51) para 540a; cf Ipsen and Koch, ‘Article 21’ (n 33) paras 171 ff..; BVerfGE 144, 20 paras 599 ff.
[77] Streinz, ‘Article 21’ (n 33) para 232; cf Klein, ‘Article 21’ (n 51) paras 533 ff.; BVerfGE 5, 85 para 141.
[78] Streinz, ‘Article 21’ (n 33) para 234.

taken into account.[79] In this respect, it should be noted that unconstitutional objectives are not usually proclaimed openly, but that a corresponding overall tendency is to be determined by the political means used or the style of the party's actions.[80]

Since the NPD judgement in 2017, the criterion of potentiality must be considered additionally, which can be assumed as given "if there are concrete indications of weight that make it appear at least possible that the actions of a party directed against the protected interests of Article 21 para 2 GG may be successful".[81] The party must therefore have sufficient opportunities for action that do not make it appear completely futile to achieve the anti-constitutional goals it is pursuing and must also make use of these opportunities.[82] The existence of sufficient potentiality must be determined as part of an overall assessment, taking into account "the party's situation (membership and membership development, organizational structure, degree of mobilization, ability to campaign, financial situation), its impact on society (election results, publications, alliances, support structures), its representation in offices and mandates, the means, strategies and measures it uses and all other circumstances" that "may provide information as to whether it appears possible to implement the objectives pursued by the party".[83] A prohibition of the NPD failed in 2017 due to a corresponding lack of potentiality.[84]

Relevant information can be obtained, for instance, by the federal and state constitution protection authorities by means of surveillance using intelligence services (c.f. Section 3 and 8 of the Federal Constitution Protection Act ("*Bundesverfassungsschutzgesetz*" / "*BVerfSchG*").[85] The acquisition of information, in particular if no open surveillance is carried out on the basis of publicly accessible sources, but rather intelligence services such as confidential counsellors are utilized, constitutes an interference with the parties' freedom of activity under Article 21 para 1 GG.[86] The requirements for the justification of such an infringement are based on its severity.[87] The use of these means to prepare an application for a prohibition order is generally considered permissible, if there is a concrete suspicion regarding the pursuance of anti-constitutional endeavours and a corresponding verification only appears possible using these means.[88] The observations, however, must be discontinued if it is determined that the party is not pursuing such

[79] See also the problem of imputation mentioned above; Streinz, 'Article 21' (n 33) para 235.
[80] Streinz, 'Article 21' (n 33) para 234; cf Morlok, 'Article 21' (n 37) 151.
[81] Streinz, 'Article 21' (n 33) para 233a; BVerfGE 144, 20 para 585.
[82] BVerfGE 144, 20 para 586.
[83] BVerfGE 144, 20 para 587.
[84] BVerfGE 144, 20.
[85] cf Klein, 'Article 21' (n 51) para 577.
[86] Klein, 'Article 21' (n 51) para 577 ff.
[87] Klein, 'Article 21' (n 51) para 579.
[88] Klein, 'Article 21' (n 51) para 579.

endeavours.[89]

There are varying levels for monitoring. A party can be categorized as an "investigation case" (*"Prüffall"*), for instance, and thus information from open, i.e. freely accessible, information can be viewed and evaluated.[90] A more advanced level is the qualification as a "suspected case" (*"Verdachtsfall"*), where the use of intelligence service means is also possible or at least not ruled out from the outset in compliance with the principle of proportionality.[91] If an organization or individual behaviour is previously assessed as a "confirmed extremist activity" (*"gesichert extremistische Bestrebung"*), the threshold for intervention is lowered accordingly and "a consolidation of suspicions to the point of certainty" is sufficient with regard to the required degree of suspicion.[92] A confirmed extremist activity differs from a suspected case in particular in this degree of consolidation of the actual circumstances of suspicion and not primarily with regard to the legal assessment of the qualification of the endeavour as extremist or not.[93] To qualify as a confirmed extremist activity, the investigative phase must therefore exceed that of a mere investigation case and the observation during this investigation phase must show that the actual indications that triggered the investigation case have intensified to such an extent "that there is a belief that these are indeed extremist activities".[94]

3. Legal consequences

If an admissible application for a ban has been filed and all of the factual requirements have been met, the Federal Constitutional Court must determine that the party in question is unconstitutional.[95] The prohibition of an unconstitutional party by the court entails substantive legal consequences. It results in the loss of party status, the prohibition of substitute organizations in accordance with Section 33 para 1 PartG and Section 46 para 3 BVerfGG and a (not uncontroversial) loss of mandate of their delegates.[96] Pursuant to Section 46 para 3 sentence 2 BVerfGG, the court may also instruct the confiscation of party assets in favour of the federal government, the state or for charitable purposes.[97]

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[89] Klein, 'Article 21' (n 51) para 580.

[90] Bertold Huber, 'Die AfD – Facetten aktueller Rechtsprechung', (2024) 43 NvwZ 119; BVerwGE 137, 275, para 14 ff.

[91] Huber (n 90).

[92] Huber (n 90); VG Köln BeckRS 2022, 3818 para 357 (Administrative court of Cologne).

[93] VG Köln BeckRS 2022, 3818 para 358 (Administrative court of Cologne).

[94] VG Köln BeckRS 2022, 3818 para 359 (Administrative court of Cologne).

[95] Markus Heintzen, '§ 32 Die politischen Parteien' in Klaus Stern, Helge Sodan, Markus Möstl (eds), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund, Band 2* (2nd edn, C.H. Beck 2022) fn 89; Streinz, 'Article 21' (n 33) fn 239.

[96] Winfried Kluth, 'Article 21' in Volker Epping and Christian Hillgruber (eds), *BeckOK Grundgesetz*, (57th edn, C.H. Beck 2024) para 211; Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht: Stellung Verfahren, Entscheidungen* (12th edn, C.H. Beck 2021) para 341.

[97] cf Schlaich and Korioth (n 96) para 341.

The prerequisites for the unconstitutionality of a party are presumed by law, but the consequences may only arise after the unconstitutionality has been ascertained by the Federal Constitutional Court.[98] As a manifestation of party privilege, a party may not be assumed to be unconstitutional in other proceedings and no one must legally assert the unconstitutionality of the party, as long as it is has not been prohibited.[99] The decision by the court therefore has a pivotal effect.

A party ban should not constitute a ban on ideology or beliefs and prevent the dissemination of merely unfavourable ideas. Rather, in view of its serious impact, it has an absolutely exceptional character as a preventive prohibition of organization.[100] It is "the sharpest sword" available.[101]

4. Advisability and expediency of initiating a prohibition procedure

The extensive legal consequences of prohibiting an unconstitutional party constitute an effective measure to preserve the constitution and the democratic legal order. Nevertheless, it also entails equally substantial risks, which must be taken into account when assessing the advisability and expediency of initiating proceedings. This does not only refer to the general potential abuse of a prohibition to combat unfavourable political opponents and opposing views, but also to the specific dangers that may arise when initiating a procedure in the respective individual cases.[102] The mere initiation of a prohibition procedure, or its failure, can be strategically utilised by a party, for instance, to establish itself in a 'martyr role'.[103] Thus, the general initiation and the concrete timing thereof must be considered wisely. Particularly considering that the collection of further information by intelligence services is getting significantly complicated upon initiation, as, for example, confidants from the party would have to be deactivated.[104] There is a fine line between a tactical wait-and-see approach to maximize the likelihood of success and

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[98] Heintzen, '§ 32 Die politischen Parteien' (n 95) para 89; Streinz, 'Article 21' (n 33) para 239.

[99] Kluth, 'Article 21' (n 96) para 211; cf Streinz, 'Article 21' (n 33) para 240.

[100] BVerfGE 144, 20, para 585.

[101] Quotation from Nancy Faeser in an analysis of Kilian Pfeffer, 'Debatte über Parteiverbot: Das AfD-Dilemma' (*Tagesschau.de*, 17 January 2024) <https://www.tagesschau.de/inland/innenpolitik/afd-verbot-debatte-100.html> accessed 12 June 2024.

[102] cf Morlok (n 30) para 295.

[103] Friedrich Merz on a potential AfD ban proceeding: Agence France-Presse (AFP), 'Merz warnt vor "Märtyrerrolle" der AfD bei Parteiverbotsverfahren' (*Stern*.de, 13 January 2024) <https://www.stern.de/news/merz-warnt-vor--maertyrerrolle--der-afd-bei-parteiverbotsverfahren-34363186.html> accessed 25 June 2024; Kerstin Rottmann, Deutsche Presse-Agentur (dpa), '„Halte ich für falsch": Ex-Verfassungsgerichtspräsident Papier rät von AfD-Verbotsantrag ab' (*Die Welt*, 13 January 2024) <https://www.welt.de/politik/deutschland/article249509572/Halte-ich-fuer-falsch-Ex-Verfassungsgerichtspraesident-Papier-raet-von-AfD-Verbotsantrag-ab.html> accessed 26 June 2024.

[104] Christian Rath, 'Demokratie und BVerfG, Der richtige Zeitpunkt für ein AfD-Verbotsverfahren' (*Legal Tribune Online (LTO),* 11 March 2024) <https://www.lto.de/recht/hintergruende/h/afd-verbot-zeitpunkt-parteiverbotsverfahren-rechtextremismus-politik/> accessed 19 June 2024; cf Pia Lorenz, 'Erster Tag im NPD-Verbotsverfahren: Von V-Leuten und anderen Verfahrenshindernissen' (*Legal Tribune Online (LTO),* 1 March 2016) <https://www.lto.de/recht/nachrichten/n/bverfg-npd-verbotsverfahren-npd-bezweifelt-abschaltung-von-v-leuten/> accessed 20 June 2024; cf OVG NRW (n 18).

the use of the mildest possible means to safeguard the legal order and a belated reaction that could be precisely what threatens it. The fact that the German constitution has now been in existence for 75 years by no means guarantees its eternal durability. Unconstitutional endeavours can endanger its existence and the defensive elements that the constitution offers against them therefore must not run hollow. However, in order to effectively constitute a viable approach for a sustained safeguarding of the constitution, certain strategic considerations need to be taken into account when initiating the procedure in order to minimise the risks in case of failure and maximise them in case of a positive outcome.

The question of the expediency of filing a motion, however, would not even arise if a respective obligation to do so is to be assumed. Pursuant to Section 43 BVerfGG, only the German "*Bundestag*", the "*Bundesrat*", the Federal Government, the "*Bundesregierung*" are authorized to file a motion regarding the examination of the unconstitutionality of a federal party. The wording does not unanimously allow for discretion in this regard. While Section 43 BVerfGG standardizes that a corresponding motion can be made by the bodies mentioned ("*kann*"), Article 21 para 2 GG is formulated categorically ("*are unconstitutional*" / "*sind verfassungswidrig*").[105] Similarly, the rulings of the Federal Constitutional Court do not allow a clear conclusion to be drawn. On the one hand, it is assumed that the German government has an "obligatory discretion" ("*pflichtmäßiges* Ermessen") with regard to the application, while in some cases this is seen as a "question of political judgement" ("*Frage des politischen* Ermessens") and it is also argued, "that unconstitutional parties must be excluded from the political decision-making process of the people".[106] In any case, discretion must be reduced to zero if there are no serious doubts as to the unconstitutionality of the party and efforts to combat the party politically within a reasonable period of time could not reduce it to sheer insignificance.[107] Consequently, evaluating the benefits and risks by initiating a prohibition procedure remains viable.

III. Exclusion from government funding

A prohibition is not the sole juridical mean of defence against parties with anti-constitutional aims. In the following one alternative in particular will be outlined, which is also standardized in Article 12 GG and resembles the wording of the conditions for a prohibition of political parties: The exclusion from government funding.

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[105] Affirmative: Klein, 'Article 21' (n 51) para 545.

[106] Klein, 'Article 21' (n 51) para 545; BVerfGE 39, 334 paras 69, 154; BVerfGE 40, 287 para 17; BVerfGE 5, 85, paras 184, 1484; cf Andreas Fischer-Lescano, 'AfD-Verbotsverfahren als demokratische Pflicht' (*Verfassungsblog on Matters Constitutional (VerfBlog)*, 18 January 2024) <https://verfassungsblog.de/afd-verbotsverfahren-als-demokratische-pflicht/> accessed 20 June 2024.

[107] Klein, 'Article 21' (n 51) para 547.

In accordance with their constitutive relevance for the democratic fundamental order and in order to carry out their essential tasks, political parties receive financial resources from the state in accordance with Section 18 PartG.[108] The possibility of partial funding was recognized by the German Constitutional Court in the decision "Party Funding II".[109] Previously, the court had considered the state funding of the total political activity of political parties to be incompatible with the free and transparent formation of the opinion and will building process.[110] The granting of funding is based on the valid votes achieved in the respective elections (Section 18 para 4 PartG), which also determines the amount of funding granted (Section 18 para 2 and 3 PartG). In order to counter the potential dilemmas associated with state funding, financing is not granted without limitations but is subject to an upper limit and other constitutional requirements, such as an obligation to account for the origin and use of their party's funds (Article 21 para 1 sentence 4 GG) and the guarantee of state freedom and equal chances of political parties.[111] In addition to this direct funding through government grants, funding is further provided in the form of tax privileges for party donations and contributions.[112]

Parties can also be excluded from this government party funding. Pursuant to Article 21 para 3 sentence 1 GG, parties which, according to their objectives or behaviour of their supporters, are orientated to impair or eliminate the free democratic fundamental order, or to endanger the preservation of the Federal Republic of Germany, are exempted from state funding. Sentence 2 extends this by stating that if an exclusion is determined, the tax benefits of the parties and contributions to such are forfeited. The procedural standards of the party prohibition proceedings are also to be applied to the exclusion from party funding pursuant to Article 21 para 3 GG in conjunction with Article 93 para 1 number 5 GG, Sections 13 number 2a, 43a et seq. BVerfGG.[113]

Likewise, the factual requirements resemble the material requirements of a party ban regarding the wording used by the constitutional legislator. The crucial discrepancy lies in the requirement that a party ban stipulates that parties, in terms of their objectives or the behaviour of their supporters, aim to impair or eliminate the free democratic fundamental order, or to endanger the continuance of the Federal Republic of Germany (*"darauf ausgehen"*), whereas an exclusion from party funding merely requires a corresponding orientation (*"darauf ausgerichtet sind"*). Such a corresponding orientation presupposes a qualified and planned endeavour to eliminate or impair the free democratic fundamental

[108] cf Streinz, 'Article 21' (n 33) para 197; Klein, 'Article 21' (n 51) para 405.
[109] BVerfGE 85, 264.
[110] BVerfGE 20, 56 para 144; further elaboration on the problem of state funding: Klein, 'Article 21' (n 51) para 424 ff.
[111] Klein, 'Article 21' (n 51) para 429 ff.; cf BVerfG, NVwZ 2023, 407.
[112] Ipsen, Koch, 'Article 21' (n 33) para 137 ff.
[113] BVerfG, NJW 2024, 645 para 155.

order, without the requirement of potentiality (*"Potentialität"*).[114] This differentiation corresponds to the intention of the legislator amending the constitution, who deliberately made the anti-constitutional orientation the sole prerequisite for the exclusion of political parties from state funding, without taking into account the probability of success of such aim.[115]

Consequently, parties with respective aspirations, which cannot be banned due to a lack of potentiality, and which are therefore anti-constitutional (*"verfassungsfeindlich"*) but not declared unconstitutional (*"verfassungswidrig"*), can be effectively defended against and countered by means of this constitutional provision. Pursuant to Section 43 para 1 sentence 2 BVerfGG, the motion for a ruling on the exclusion from state funding may be filed as an auxiliary motion to a motion for a ruling on the unconstitutionality of a party.

IV. Other alternatives

There are also numerous non-judicial approaches to combat anti-constitutional parties, including by means of political methods. This could be achieved for instance through substantive debates or the strengthening of constitutional moderate mainstream parties, by addressing the current problems of the people and thus assuming a stronger and more accurate representation of the electorate and thereby achieving a strengthened mediating role between citizens and political leaders.[116] The prior utilisation of suitable non-legal strategies can prove to be a successful exhaustion of milder means.

Threats to the constitution, however, are multi-faceted and do not only originate from political parties. The constitution recognises this and incorporates manifestations of militant democracy directed at individuals, for instance regarding the forfeiture of fundamental rights pursuant to Article 18 GG. According to the provision, an abuse of the freedom of expression, especially the freedom of the press, the freedom to teach, the freedom of assembly, the freedom of association, the secrecy of correspondence, post and telecommunications, property or the right of asylum to combat the free democratic fundamental order can result in a forfeiture of these fundamental rights. A corresponding forfeiture is currently being contemplated by some voices in society regarding the AfD politician Höcke with a related petition already attaining 1.7 million signatures.[117]

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[114] BVerfG, NJW 2024, 645 paras 277, 286.

[115] BVerfG, NJW 2024, 645 para 288.

[116] cf statements on a possible AfD ban procedure: Agence France-Presse (AFP) (n 103); Kerstin Rottmann, Deutsche Presse-Agentur (dpa) (n 103); Deutsche Presse-Agentur (dpa) (n 10); Heike Jahberg, 'Update / Debatte über AfD-Verbot : Ex-Verfassungsrichter Papier rät von Antrag ab – auch Steinmeier ist skeptisch' (*Tagessspiegel Online*, 13 January 2024) <https://www.tagesspiegel.de/politik/diskussion-uber-afd-verbot-ex-verfassungsgerichtsprasident-papier-rat-ab-11043922.html> accessed 25 June 2024.

[117] Indra Ghosh, 'WeAct-Petition: Wehrhafte Demokratie: Höcke stoppen!' (*Compact*) <https://aktion.campact.de/weact/hocke-stoppen/teilnehmen>; Critical assessment: Christian von Coelln, 'Keine Grundrechtsverwirkung statt Parteiverbot' (*Verfassungsblog*, 22 January 2024) <https://verfassungsblog.de/keine-grundrechtsverwirkung-statt-parteiverbot/> accessed 26 June 2024.

Also other potential sources of danger are recognised by the constitution and defended against accordingly, such as against associations ("*Vereine*"). Section 2 Associations Act defines associations as "any association, irrespective of its legal form, to which a majority of natural or legal persons have voluntarily joined together for a longer period of time for a common purpose and have subjected themselves to an organised decision-making process". According to Article 9 para 2 of the Constitution those "whose purposes or whose activities are in conflict with criminal law or which are directed against the constitutional order or against the idea of an amicable international understanding" are prohibited.[118] They may be treated as prohibited if the aforementioned requirements have been established by order of the prohibition authority.[119] More recently, the possible ban on associations has attracted particular attention due to the ban imposed on the Compact-magazine, which is classified as right-wing extremist.[120] Following the decision of the Federal Administrative Court ("*Bundesverwaltungsgericht*" / "*BVerwG*"), however, the immediate enforcement of the ban was provisionally suspended with the main proceedings being scheduled for February 2025.[121]

Numerous alternative types of proceedings thus exist and also valuable alternative non-judicial approaches. The prohibition of political parties is one possible remedy for safeguarding the constitution, but by no means the only one.

E. Conclusion

At present, the option of prohibiting a political party is garnering a remarkable amount of attention in both politics and society. It comes to no surprise given the noticeable shift in election results at national and international level. Given their outstanding position in a democracy, the elected parties are, after all, of central importance, so that a potential anti-constitutional stance poses a serious threat to the basic democratic fundamental order. The German constitution recognises and counters this danger through therein contained defensive elements, such as the possibility of a prohibition of anti-constitutional parties. In this regard, however, high demands are placed on the procedural and substantive legal

[118] Detailed elaboration on the legal framework and the distinction to the prohibition of political parties: Christian Baudewin, 'Das Vereinsverbot', (2021) 40 NVwZ 1021.

[119] Bundesministerium des Innern und für Heimat (BMI), 'Vereinsverbote' (*BMI*, 26 July 2024) <https://www.bmi.bund.de/DE/themen/sicherheit/extremismus/vereinsverbote/vereinsverbote-artikel.html> accessed 22 August 2024.

[120] Bundesministerium des Innern und für Heimat (*BMI*) (n 119); Felix W. Zimmermann, Markus Sehl, Max Kolter, 'So begründet das BMI das Compact-Verbot' (*Legal Tribune Online (LTO),* 18 July 2024) <https://www.lto.de/recht/hintergruende/h/compact-verbot-bmi-begruendung-medium-elsaesser-vereinsverbot-pressefreiheit> accessed 15 August 2024.

[121] Bundesministerium des Innern und für Heimat (BMI) (n 119); Beck-Aktuell, '"Compact"-Verbot: Entscheidung im Hauptverfahren im Februar' (*Beck-Aktuell*, 23 August 2024) <https://rsw.beck.de/aktuell/daily/meldung/detail/compact--verbot-entscheidung-hauptverfahren-februar> accessed 25 August 2024; BVerwG, Beschluss vom 14.08.2024 - 6 VR 1.24, BeckRS 2024, 20294 = DÖV 2024, 1024.

requirements. Previous procedures have already resulted in successful party prohibitions and a legislative development in the handling of anti-constitutional parties through the introduction of an exclusion from state funding. The resulting legal consequences are of the highest intensity for the parties involved. The procedure harbours a grave risk of abuse, as it could be exploited to combat disagreeable political opponents and opposing views. This risk is, nonetheless, mitigated by the aforementioned high requirements. In specific individual cases, however, a procedure may still be devoid of expediency. Regardless of the prospects of success, those affected could use the mere initiation as a political strategy and thus gain greater power and influence.

Consideration must also be given to the increased difficulty of the collection of information after initiation. Although the approach of party prohibition proceedings is in essence a viable approach to protect the constitution, alternative judiciary or even non-judicial approaches may prove to be preferable in individual cases. It is not foreseeable that the topic will cease in relevance in the near future. On the contrary: the party prohibition procedure is experiencing an upswing in politics and society and its possible further application by the Federal Constitutional Court remains to be anticipated.

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