Headnotes

to the Judgment of the Second Senate of 7 December 1999

– 2 BvR 1533/94 –

1. The provision contained in § 1.1 of the Criminal Law Rehabilitation Act (*Straf recht liches Rehabilitierungsgesetz – StrRehaG*), in accordance with which a conviction by a GDR court for desertion as a rule does not give rise to a right to rehabilitation under criminal law, does not violate the convict's fundamental rights under Article 1.1 and Article 3.1 of the Basic Law (*Grundgesetz – GG*).

2. The rehabilitation court violates the right to effective legal protection (Article 2.1 of the Basic Law in conjunction with the principle of the rule of law contained in the Basic Law) if it simply accepts the findings of the GDR court, although the submission claiming political persecution should have led to an examination.

FEDERAL CONSTITUTIONAL COURT

– 2 BvR 1533/94 –

Pronounced
on 7 December 1999
Frik
Angestellte
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Mr W…,

– authorised representative: Rechtsanwalt Klaus Janz,
Präsidentenstaße 40, Neuruppin -

against the order of Rostock Higher Regional Court (*Oberlandesgericht*) of 20 June 1994 – II WsRH 57/94 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Limbach,

Kirchhof,

Sommer,

Jentsch,

Hassemer,

Broß,

Osterloh

held on the basis of the oral hearing of 10 November 1999:

Judgment:

The order of Rostock Higher Regional Court (*Oberlandesgericht*) of 20 June 1994 – II WsRH 57/94 – violates the complainant's fundamental right under Article 2.1 of the Basic Law in conjunction with the principle of the rule of law. It is rescinded. The case is returned to Rostock Higher Regional Court.

The *Land* Mecklenburg-West Pomerania is ordered to refund to the complainant the necessary expenses.

R e a s o n s:

A.

The complainant had been sentenced by a military court of the GDR to two years' and three months' imprisonment in respect of desertion. He objects to the rejection of his rehabilitation in accordance with the Criminal Law Rehabilitation Act. 1

I.

1. a) The substantive law preconditions for rehabilitation under law are set out in § 1 of the Criminal Law Rehabilitation Act in the version of 29 October 1992 (Federal Law Gazette (Bundesgesetzblatt – BGBl) I p. 1814) […]: 2

> Rescission of rulings violating the rule of law 3
>
> (1) The criminal law ruling of a German state court on the territory named in Article 3 of the Unification Treaty (acceding territory) from the period between 8 May 1945 and 2 October 1990 shall be declared on application contrary to the rule of law, and shall be rescinded (rehabilitation) to the degree that it is incompatible with essential principles of a free order based on the rule of law, in particular because 4
>
> 1.the ruling has served the purposes of political persecution; this shall apply as a rule to convictions in accordance with the following provisions: 5

[…]. 6-11

> g) avoidance of and refusal to render military service (§ 256 of the Criminal Code of the German Democratic Republic (*Strafgesetzbuch der Deutschen Demokratischen Republik*) […]) or § 43 of the Act on Military Service of the German Democratic Republic (*Gesetz über den Wehrdienst in der Deutschen Demokratischen Republik*) of 25 March 1982 (…); 12
>
> h) […] 13

i) […] or 14

2.the legal consequences ordered are grossly disproportionate to the offence on which they are based. 15

(2) […] 16

b) The principle of *ex officio* investigation applies in the rehabilitation proceedings in accordance with § 10 of the Criminal Law Rehabilitation Act: 17

Investigation of the facts 18

(1) The court shall investigate the facts *ex officio*. In doing so, it shall determine the nature and scope of the investigations, in particular any taking of evidence, in accordance with duty-bound discretion. 19

(2) […]. 20

c) The legal consequences of rehabilitation are to refund the costs of the previous criminal proceedings (§ 6 of the Criminal Law Rehabilitation Act), to re-transfer or return assets seized (§ 3.2 of the Criminal Law Rehabilitation Act in conjunction with the Property Act (*Vermögensgesetz*) and the Investment Priority Act (*Investitionsvorranggesetz*)), in cases of deprivation of liberty to award capital compensation (§ 17 of the Criminal Law Rehabilitation Act) and to provide support benefits where the economic situation is particularly impaired (§ 18 of the Criminal Law Rehabilitation Act), a victim's pension in cases of impaired health as a result of deprivation of liberty (§ 21 of the Criminal Law Rehabilitation Act) and in the event of death a surviving dependant's pension (§ 22 of the Criminal Law Rehabilitation Act) as well as recognition of the detention time as a period of work subject to obligatory pension insurance (Article 2 § 19 no. 16 of the Act to Create Legal Uniformity in the Statutory Pensions and Accident Insurance (*Gesetz zur Herstellung der Rechtseinheit in der gesetzlichen Renten- und Unfallversicherung (Renten-Überleitungsgesetz – RÜG,* Pensions Transfer Act) of 25 July 1991, Federal Law Gazette I pp. 1606 and 1669). Furthermore, rehabilitation leads to termination of execution (§ 4 of the Criminal Law Rehabilitation Act) and to the cancellation of the conviction from the Federal Central Criminal Register (§ 5 of the Criminal Law Rehabilitation Act). 21

Refusal to rehabilitate certainly does not yet mean that the basic conviction handed down by the GDR court was executed and filed in the Federal Central Criminal Register. This was separately regulated by the legislature: Execution of a criminal conviction handed down by a GDR court is not permissible if it is ascertained by a court that the conviction is not compatible with rule-of-law standards, or that the nature or degree of the legal consequence is not appropriate in accordance with principles of the rule of law, or that they are counter to the purpose of a federal statute (Annex I chapter III subject area A section III no. 14 letter d of the Unification Treaty). In accordance with § 64.a.3 nos. 1 and 2 of the Federal Central Criminal Register Act (*Bundeszen-* 22

tralregistergesetz – BZRG) in the version of the Unification Treaty (Annex I chapter III subject area C section II no. 2 letter a of the Unification Treaty), rulings of GDR courts are not filed in the Federal Central Criminal Register if the basic facts at the time of assumption of the Federal Central Criminal Register Act were no longer punishable or subject to administrative sanctions, or if the ruling is not compatible with rule-of-law standards.

2. In the Unification Treaty of 31 August 1990 (Federal Law Gazette II p. 889), Article 18 of which orders the continued validity of decisions handed down by the courts of the GDR, the parties to the Treaty already confirm their intention "to create without delay a legal foundation permitting the rehabilitation of all persons who have been victims of a politically motivated punitive measure or any court decision contrary to the rule of law or constitutional principles" (Article 17). The legislature intended to fulfil a major part of this mandate in the shape of the Criminal Law Rehabilitation Act (reasons of the draft Bill of the Federal Government of 15 November 1991, *Bundestag* document (*Bundestagsdrucksache – BTDrucks*) 12/1608, p. 13) which replaced the quashing provisions of the Code of Criminal Procedure (*Strafprozessordnung – StPO*) of the GDR and provisions of the Rehabilitation Act (*Rehabilitationsgesetz*) of the GDR which in accordance with the Unification Treaty initially continued to apply after accession by the GDR. 23

3. In contradistinction to convictions in respect of avoidance of and refusal to render military service, the legislature did not include convictions in respect of desertion in the standard list contained in § 1.1 of the Criminal Law Rehabilitation Act. This was in line with the recommendation for an order by the Committee on Legal Affairs of the German *Bundestag*. In its reasons for this, it states that desertion had "largely not been a political crime", but in individual cases could be subordinated to the general provision of § 1.1 of the Criminal Law Rehabilitation Act, whilst "accepting the offence under the criminal law of the GDR of refusal to render military service" took account of "the political significance of refusal to render military service as resistance against the regime" (*Bundestag* document 12/2820, p. 28). […]. 24

4. In the GDR, the Military Service Act (*Wehrpflichtgesetz*) of 24 January 1962 (Law Gazette of the German Democratic Republic (*Gesetzblatt – GBl DDR*) I p. 2) introduced general military service. At the same time, the Criminal Code was supplemented by the Military Criminal Code (*Militärstrafgesetz – MStG*) of 24 January 1962 (Law Gazette of the German Democratic Republic I p. 25) including by the element of the offence of desertion (§ 4 of the Military Criminal Code). […]. 25

[…]. 26-34

By statute of 12 January 1968 (Law Gazette of the German Democratic Republic I p. 97) § 4 of the Military Criminal Code was replaced by § 254 of the Criminal Code of the GDR (Law Gazette of the German Democratic Republic I p. 1, 45) – the offence in accordance with which the complainant was convicted: 35

Desertion 36

(1) Whosoever leaves or remains away from his troop, his unit or another place in which he is intended to stay in order to avoid military service shall be punished by between one year's and six years' imprisonment. 37

[…] 38-43

5. The offences of avoidance of and refusal to render military service, which are listed in the standard list contained in § 1.1 no. 1 of the Criminal Law Rehabilitation Act, read as follows: 44

a) § 256 of the Criminal Code of the GDR: 45

Avoidance of and refusal to render military service 46

(1) Whosoever avoids military service by deception or refuses to render military service shall be punished by up to five years' imprisonment or with conviction on probation or with detention. 47

(2) Punishment shall also be imposed on whomsoever with the aim in mind of impairing his ability to serve inflicts on himself injuries or other health impediments, or has them inflicted by other persons, or whosoever pretends to be unable to serve. 48

[…] 49-50

b) § 43 of the Military Service Act/GDR: 51

Criminal provisions 52

(1) Whosoever intentionally 53

1. fails to follow the call-up order to render military service, or does not follow it in good time, 54

2. does not accept the call-up order, and thereby does not enter military service, or does not enter it on time, or 55

3. avoids entering service to render military service or commits other acts in order to prevent his call-up, or participates in such acts, 56

shall be punished with up to five years' imprisonment or with sentencing on probation or with a criminal fine. 57

[…] 58

6. In accordance with federal German law, desertion is punished with up to five years' imprisonment (§ 16 of the Military Criminal Code (*Wehrstrafgesetz*)); the same applies to desertion from civilian service in accordance with § 53 of the Civilian Service Act (*Zivildienstgesetz*). These criminal provisions also apply to conscientious ob- 59

jectors who refuse to render both military service and civilian service […].

[…] 60-75

Federal German law does not have an offence corresponding to § 256 no. 1 of the Criminal Code of the GDR. 76

II.

The constitutional complaint is based on the following facts: 77

1. By judgment of 17 October 1974, the complainant was sentenced by Rostock Military Court in respect of desertion in accordance with § 254.1 of the Criminal Code of the GDR to two years' and three months' imprisonment, which he served in full. 78

Rostock Military Court found that the complainant had been called up in May 1974 to render basic military service in the People's Navy (*Volksmarine*) and had been deployed there in the fire service section. On 28 July 1974, he had absented himself from his unit without leave and had returned to his wife. Investigation measures had led to his apprehension two days later and his return to the unit. On 1 August 1974, the complainant, deciding once more to desert, had left the unit without authorisation in civilian clothing and had met his … wife. When apprehended two days later, he had stated that he was not willing to render his military service and that he had wished to hide within the GDR. 79

In assessment of punishment, the military court stated that the complainant was … a weak-willed, unbalanced, highly obstinate young person unwilling to do his civil duty in accordance with his allegiance to the flag. His attitude towards rendering military service was “extremely negative”. This negative attitude had already been indicated by the fact that the complainant had continually watched Western television prior to being called up. These programmes had had a sustained impact on his awareness formation. Through his offence, he had shown grievous disrespect for military discipline, which had had a negative impact on the fighting readiness of his unit. He obstinately continued to refuse to render his military service, and stated that he had not drawn any conclusions whatever from his misconduct. 80

2. In 1991, the complainant filed an application for rehabilitation in accordance with the GDR Rehabilitation Act. As reasons, he indicated that his conduct had been characterised by political opposition to the circumstances in the GDR at that time. He had exercised his right to refuse to render military service. … Furthermore, the punishment had been “grossly excessive” because it had not been taken into account that his responsibility under criminal law had been ruled out because of the special situation. … 81

3. By order of 22 February 1994, Rostock Regional Court (*Landgericht*) rejected the complainant's application on the basis of the Criminal Law Rehabilitation Act, which had entered into force on 4 November 1992. 82

[…]. 83-84

5. By order of 20 June 1994, Rostock Higher Regional Court rejected the complainant's complaint as unfounded. 85

It stated that the offence of desertion in accordance with § 254.1 of the Criminal Code of the GDR had not been included in the definitively-worded standard list of § 1.1 no. 1 of the Criminal Law Rehabilitation Act. Conviction in respect of desertion in a non-grievous case could only lead to rehabilitation if the desertion had been committed for political reasons. As emerged from the case-law of the Senate, in concord with the view expressed in the higher court case-law, the provisions imposing punishment in respect of desertion in a non-grievous case were not “statutes in violation of the rule of law as such”. Rehabilitation could be necessary in an individual case, but it could not be deduced here that the complainant had been recognised by the military court as an opponent of the system, and hence that he had been politically persecuted using criminal law. Whilst it was stated in the judgment that the complainant had watched Western television programmes, this had been valued not with regard to his stance towards the political system, but in light of his internal stance towards rendering military service. The military court had presumed that the complainant was weak-willed, unbalanced and highly obstinate. 86

[…] The ruling is said to be […] incompatible with essential principles of a free order based on the rule of law. […]. 87

The legal consequences ordered are said not to be grossly disproportionate to the offence. The judgment is said to comply with the assessment of punishment practice then current and to contain considerations on the assessment of punishment, albeit short ones. 88

The objection put forward by the complainant that his criminal law responsibility had been rescinded or reduced at the time of the offence targeted the evaluation of evidence of the military court, which as demonstrated by the judgment had decided for the opposite presumption on the basis of the available specialist medical report. The rehabilitation proceedings were neither appeal proceedings, nor resumption proceedings within the meaning of §§ 359 *et seq.* of the Code of Criminal Procedure (*StPO*). Hence, the rehabilitation court had been bound by the findings of the basic judgment, and had only to measure this against whether it was compatible with essential principles of a free order based on the rule of law. In accordance with the established case-law of the Senate, it was in principle of no value to challenge the evaluation of evidence of the basic judgment in rehabilitation proceedings. 89

III.

With his constitutional complaint, the complainant challenges the order of Rostock Higher Regional Court of 20 June 1994. He alleges the violation of his fundamental rights under Article 1, Article 2 and Article 3 of the Basic Law. 90

As reasons, the complainant submits that he had avoided military service on the basis of a political motivation because of his opposition to the situation in the GDR. The political objective of his conviction is said to have emerged clearly from the reasons for the ruling, linked to his “negative attitude” and deducing this from his watching Western television. Military service in the National People's Army (*Nationale Volksarmee – NVA*) had served to strengthen and maintain a state based on wrong-doing. … Punishment for avoiding military service – be it through refusal or through desertion – could not be subsequently approved of in accordance with rule of law standards. There had been no right to refuse to render military service guaranteed by the rule of law in the GDR. […]. 91

[…]. 92

B.

The constitutional complaint is well-founded. 93

I.

§ 1.1 of the Criminal Law Rehabilitation Act, on which the ruling of the Higher Regional Court is based, is compatible with the Basic Law. 94

1. a) § 1.1 of the Criminal Law Rehabilitation Act does not violate Article 1.1 of the Basic Law. 95

aa) Article 1.1 sentence 1 of the Basic Law guarantees the inviolability of human dignity; Article 1.1 sentence 2 of the Basic Law obliges the State to protect it. Human dignity encompasses human beings' value to society and their right to respect (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 30, 173 (195); 96, 245 (249)). Each conviction by a criminal court contains a social and ethical judgment of wrong-doing (see BVerfGE 22, 49 (79); 45, 272 (288); 95, 96 (140); 96, 245 (249)), which affects the right of the convict to value and respect rooted in human dignity (see BVerfGE 96, 245 (249)). 96

In contradistinction to the criminal law conviction, the subject-matter of rehabilitation is not the expression of a social and ethical judgment of wrong-doing, but its rectification. Even if rehabilitation is rejected, this does not mean the renewed expression of the judgment of wrong-doing. These particularities characterise the scope of the State's obligation to rehabilitate under criminal law in order to protect human dignity. 97

bb) Article 18 of the Unification Treaty orders that decisions handed down by the courts of the GDR should remain effective; it leaves Article 17 of the Unification treaty unaffected. Article 17 aims at the statutory basis of rehabilitation of all persons who have fallen foul of politically-motivated criminal prosecution measures or otherwise of a court ruling in breach of the rule of law and the constitution. The Unification Treaty hence requires the legislature to determine from the mass of court rulings continuing to apply those which are in breach of the rule of law and the constitution. In the historical transformation situation after reunification, it was important to find a practicable 98

way to deal with state wrong-doing based on the justice of the GDR, and which the Federal Republic of Germany found at the time of reunification without being responsible for it or being obliged to answer for it (see BVerfGE 84, 90 (122-123)).

cc) With criminal law convictions from the GDR courts, which have grievously disregarded the human rights generally recognised in the community of international law, the legislature has provided a form of rehabilitation which remedies as far as possible the taint of the punishment and its consequences. Such wrong-doing may not stand up under the system of values contained in the Basic Law. This was ruled by the Federal Constitutional Court in connection with the punishability of members of the GDR border guard in respect of the killing of refugees at the intra-German border (see BVerfGE 95, 96 (133) […]. The principles formulated there apply equally to the wrong-doing related to rehabilitation under criminal law. The continuation of the taint of punishment from a conviction which has disregarded the human rights generally recognised in the community of peoples must not be accepted by the convicts. 99

dd) When structuring rehabilitation under criminal law, the legislature had to reliably filter out from the totality of all rulings of the GDR's criminal courts those rulings in need of rehabilitation. Furthermore, it had to accommodate the legal certainty anchored in the principle of the rule of law (see BVerfGE 6, 132 (198-199)). Constitutionally speaking, these difficulties open up a broad scope to the legislature. Only when the statutory provisions and measures are evidently completely unsuited or entirely insufficient to achieve the goal of protection (see BVerfGE 79, 174 (202)) can the Federal Constitutional Court find that there has been a breach of duty. 100

b) Measured against these standards, § 1.1 of the Criminal Law Rehabilitation Act is not objectionable. The provision remains within the framework of the scope accruing to the legislature. 101

aa) § 1.1 of the Criminal Law Rehabilitation Act opens up to the court competent for rehabilitation the possibility to adequately respond to a conviction that is in violation of the rule of law if the preconditions of the offence are met: It rescinds the conviction of the GDR court and explicitly finds that it is in breach of the rule of law. In this way, the social and ethical wrong-doing judgment which the convict has to shoulder is publicly withdrawn. The requirement of a request provided for in the statute also opens up to those concerned the possibility to ensure themselves that this right to respect is implemented. 102

bb) The standard has received a broad area of application by virtue of the general clause targeting the incompatibility of the challenged ruling with major principles of a free order based on the rule of law. This area of application is structured by the offences catalogued by way of example in the list contained in § 1.1 no. 1 of the Criminal Law Rehabilitation Act. Hence, the legislature specifically guides the judge with jurisdiction for the ruling on rehabilitation. 103

cc) The fact that rehabilitation is not made possible with all rulings that are in breach 104

of the rule of law is not constitutionally objectionable. For reasons of legal certainty and practicability, in particular because of the impossibility […] of retroactively completely correcting disadvantages caused by the more than 40 years of development in the GDR, the legislature should leave untouched […] rulings of lesser weight of that are in breach of the rule of law – which are not executed and not filed in the Federal Central Criminal Register (Annex I chapter III subject area A section III no. 14 letter d of the Unification Treaty; § 64.a.3 nos. 1 and 2 of the Act on the Federal Central Criminal Register). It has not thereby violated its duty to protect. Rulings of the GDR courts, by contrast, which have grievously disregarded the human rights generally recognised in the community of peoples are also incompatible with essential characteristics of a free order based on the rule of law within the meaning of § 1.1 of the Criminal Law Rehabilitation Act, and hence may also be rehabilitated if the offences applied are not contained in the standard list.

dd) The legislature has also not violated the constitution by not including the GDR offence of desertion (§ 4 of the Military Criminal Code; § 254 of the Criminal Code of the GDR) in the list of rules of § 1.1 no. 1 of the Criminal Law Rehabilitation Act. Convictions handed down by courts of the GDR in respect of desertion did not as a rule grievously disregard the human rights recognised in the community of peoples: The GDR was a state within the meaning of international law (see BVerfGE 36, 1 (22)) and could form an army and safeguard the latter under criminal law. The military criminal law of the GDR did not step outside the framework of military criminal law traditions […] and aimed, as generally customary for such provisions, certainly to ensure the constant readiness and preparedness of the armed forces […]. The specific tasks of the individual soldiers were not necessarily or indeed as a rule in breach of human rights. Special case constellations in which soldiers attempted to avoid orders that were in breach of human rights by means of desertion, and were hence convicted, can be subsumed under the general clause of § 1.1 of the Criminal Law Rehabilitation Act. They do not however give rise to the rule that GDR convictions in respect of desertion constituted grievous violations of human rights. 105

2. a) § 1.1 of the Criminal Law Rehabilitation Act does not breach the general principle of equality of Article 3.1 of the Basic Law. 106

In accordance with the general principle of equality, the legislature may not treat unequally what is essentially equal without a justifying reason, and correspondingly may not treat equally what is essentially unequal (see BVerfGE 4, 144 (155); 86, 81 (87)). Here, it is ascertained by means of weighting in accordance with proportionality whether and to what degree the similarity or difference is legally relevant. Article 3.1 of the Basic Law only permits the legislature to treat groups of individuals unequally if differences of such a nature and significance exist between them that they can justify the unequal treatment (see BVerfGE 65, 377 (384); 78, 232 (247); 79, 87 (98); 92, 277 (318)). The binding of the legislature is all the closer, the more characteristics of personal differentiation become closer to that named in Article 3.3 of the Basic Law (see BVerfGE 92, 26 (51)). Additionally, the statutory distinctions must be traceable in 107

line with subject areas to a sensible or manifest obvious reason (see BVerfGE 75, 108 (157); 76, 256 (329)).

b) Measured against these standards, it is not objectionable that the legislature did not include the GDR offence of desertion in the list of rules of § 1.1 no. 1 of the Criminal Law Rehabilitation Act. 108

aa) The distinction between avoiding and refusing to render military service on the one hand, where political persecution is presumed (§ 1.1 no. 1 letter g of the Criminal Law Rehabilitation Act), and desertion on the other, where rehabilitation can only be obtained in individual cases via the general clause of § 1.1 of the Criminal Law Rehabilitation Act when appropriate circumstances can be proven, does not violate the general principle of equality. 109

(1) This is not opposed by the distinction initially following a personal criterion which those concerned can no longer influence at the time of rehabilitation by means of their conduct, namely conviction in accordance with a specific criminal provision. This does not relate to characteristics corresponding to or coming close to those named in Article 3.3 of the Basic Law. In particular, the political attitudes of those concerned are not – even indirectly – a point of reference for the differentiation of the statute. The only link is to the act on which the conviction is based: Whilst a conviction in respect of refusal to render military service indicates political persecution, this does not apply to convictions in respect of desertion. The criterion ultimately decisive in accordance with the conception of the statute, namely political persecution, however applies to deserters in the same way as those refusing to render military service. If in accordance with the circumstances of the case it emerges that a deserter has been convicted for political reasons, he is to be rehabilitated in the same way as someone convicted in respect of refusal to render military service; conversely, the presumption of political persecution in the case of conviction in respect of refusal to render military service is refutable. The technique selected by the legislature of the regular examples does not inflexibly bind the courts to the distinction between deserters and those refusing to render military service, but leaves them a space to derogate from the statutory presumption in individual cases, circumstances permitting. 110

(2) The reason named in the statute for the differentiation between convictions in respect of refusal to render military service and convictions in respect of desertion – the conviction has served political persecution (see § 1.1 no. 1 first half of the sentence of the Criminal Law Rehabilitation Act) – related to the subject area in question of the rectification of wrong-doing committed by a foreign state power is illustrative and sufficiently weighty. The legislature was permitted to attach considerable significance to the fact of political persecution. The rehabilitation of “victims of a politically motivated punitive measure” was already set out in the Unification Treaty (Article 17). The Basic Law attaches particular significance to the protection of those who have been politically persecuted (Article 16a of the Basic Law). The orientation of rehabilitation towards those who have been politically persecuted is in accord with this valuation. 111

(3) Furthermore, the factual assessment of the legislature that convictions in respect of refusal to render military service, in contradistinction to convictions in respect of desertion, had as a rule served the purposes of political persecution is not constitutionally objectionable. It is based on a valuation of historical events which cannot be precisely measured or quantified. Hence, the legislature has broad scope for discretion here (see also BVerfGE 98, 169 (203) – remuneration of prisoners), especially since the courts are able to derogate from the general estimate of the statute in justified individual cases. The legislature has adhered to the boundaries of its scope for assessment. 112

According to reports on the situation of those avoiding or refusing to render military service, and taking account of the legal context in which military service was rendered in the GDR, the conclusion is obvious that, in the GDR, different punishments were to be meted out when punishing those refusing to render military service, conduct which typically was to be sanctioned as inimical to the regime, than when punishing deserters. 113

There was no right to refuse to render military service in the GDR. Also simple refusal to render military service was punishable (§ 256.1 of the Criminal Code of the GDR). Whilst the possibility of alternative service not involving the use of arms in construction units was created in 1964 […]. The “construction soldiers” were however integrated into the Army according to this order, and could be deployed also to extend defensive and other military installations. […]. 114

Accordingly, the assessment of the legislature is not objectionable that convictions in respect of refusal to render military service as a rule had served political persecution, whilst convictions in respect of desertion could only be presumed to constitute such persecution in light of special circumstances in individual cases. 115

(4) Whilst the offence of “avoidance of military service” in accordance with § 256.2 of the Criminal Code of the GDR – which is contained in § 1.1 no. 1 letter g of the Criminal Law Rehabilitation Act – encompassed any impediment of ability to serve by means of physical encroachments, such as by alcohol abuse on duty, with the incriminated conduct, complete avoidance of military service did not have to be intended […]. Inclusion of the offence of avoidance of and refusing to render military service in the standard list of § 1.1 of the Criminal Law Rehabilitation Act is however a standardisation by the legislature accepting that a moderate percentage of persons falls through the sieve of the standardisation who would not benefit from an individualising standard in accordance with the idea of the statute (see BVerfGE 17, 1 (24)). In accordance with the concept contained in the provision handed down by the legislature, they are small in number: In those cases in which it is found that a person convicted in accordance with § 256.2 of the Criminal Code of the GDR did not wish to avoid military service on principle, and that his conviction also had no other political background, the presumption of § 1.1 no. 1 letter g of the Criminal Law Rehabilitation Act is refuted, and rehabilitation may not take place. 116

bb) Finally, a breach of equality also does not lie in the federal German justice system having regularly refused to render mutual assistance and official assistance to GDR authorities in accordance with the Act on Intra-German Mutual Assistance and Official Assistance in Criminal Matters (*Gesetz über die innerdeutsche Rechts- und Amtshilfe in Strafsachen – RHG*) of 2 May 1953 (Federal Law Gazette I p. 161) with convictions in respect of desertion […]. Assistance in execution which was to be assessed in accordance with the Act on Mutual Assistance (*Rechtshilfegesetz*) (§ 15 in conjunction with § 2 of the Act on Mutual Assistance) cannot be deemed equivalent to refusal to rehabilitate. Whilst execution of a GDR conviction with the assistance of federal German authorities constituted an encroachment by the Federal Republic on fundamental rights of the person concerned, rehabilitation relates to rectifying the wrong-doing of the GDR judiciary for which the Federal Republic does not have to answer. 117

II.

The challenged ruling of the Higher Regional Court violates the complainant's fundamental right under Article 2.1 of the Basic Law in conjunction with the principle of the rule of law contained in the Basic Law. 118

1. The principle of the rule of law contained in the Basic Law also contains the guarantee of effective legal protection which must in principle make possible the comprehensive factual and legal examination of the subject-matter of the proceedings (see BVerfGE 54, 277 (291)). Article 2.1 of the Basic Law in conjunction with the principle of the rule of law affords to the individual a right to factually effective court control. This fundamental right is violated if the courts interpret the procedural law possibilities on ascertaining the facts so narrowly that they cannot factually examine those questions which have been submitted to them (see BVerfGE 53, 115 (127-128)) and the goal of the proceedings pursued by the legislature hence cannot be achieved (see BVerfGE 78, 88 (98-99)). 119

If a rehabilitation court considers itself bound by the facts found by the GDR court, and if it bases its ruling on these without examination, it disregards its duty to ascertain the facts *ex officio* (§ 10.1 sentence 1 of the Criminal Law Rehabilitation Act) and starts by missing the goal pursued by the legislature to rehabilitate politically-pursued convicts from the continued effectiveness of judgments handed down by courts of the GDR. It is not only the interpretation and application of the statute which can violate the convict's fundamental rights, but also the ascertainment of the facts which carry the application of the law. The judge called upon in the rehabilitation proceedings to examine judgments as to their compatibility with essential rule of law principles may not narrow down his or her examination mandate by simply accepting the findings of this judgment in spite of the fact that the submission of political persecution should have led to an examination. 120

2. In accordance with this standard, the challenged ruling of the Higher Regional Court cannot stand. 121

a) The Higher Regional Court did not carry out factually effective court control because it accepted without objection being bound by the findings the military court. Hence, it neglected the principle of investigation *ex officio* which the legislature provided for with regard to the special duty of welfare of the rehabilitation court as against the applicants and with regard to the difficulties which particularly arise in the investigation of facts which are frequently far off in the distant past (see reasons of the draft Bill of the Federal Government, *Bundestag* document 12/1608 p. 21). 122

The Higher Regional Court negated the question as to whether the ruling of the military court served the purpose of political persecution of the complainant solely on the basis of the determinations of the judgment of the military court without examining whether the submission of the complainant that he had avoided military service in defiance of the prevailing political situation, and had been convicted with a political objective, constituted a reason for further investigation. Also the Higher Regional Court ignored the objection of the complainant that the military court had handed down a grossly excessive sentence because for political reasons it had not allowed for the reduction of the complainant's criminal law responsibility, referring merely to the military court's finding of full criminal law responsibility. It also did not examine here whether there was a reason for further investigations, such as by hearing the convict or witnesses. It only pointed out that challenges to the evaluation of evidence in the basic judgment were in principle of no use in rehabilitation proceedings because the rehabilitation court was bound by the findings of the basic judgment. 123

b) The challenged ruling is based on this breach. It cannot be ruled out that the court, had it met its constitutional and statutory duty to investigate *ex officio*, would have taken the submission of the complainant as a reason for further investigations, and that this would have helped the rehabilitation application of the complainant ultimately to be successful. This applies in particular against the background that already the written reasons for the judgment of the military court, which had accused the complainant of his “obstinate” refusal to render military service, and watching Western television, would have moved him further towards being seen as a person refusing to render military service who was to be rehabilitated in accordance with the standard list. 124

Also a possible clarification of the complainant's responsibility under criminal law could have ultimately led to a ruling which was more favourable to him. If his responsibility under criminal law had been reduced because of his personality development, the punishment could have been alleviated in accordance with §§ 16.2 and 62 of the Criminal Code of the GDR, so that the Higher Regional Court should have examined whether taking account of this fact the legal consequences ordered by the military court were not grossly disproportionate to the basic offence (§ 1.1 no. 2 of the Criminal Law Rehabilitation Act). 125

[…]. 126-127

Limbach	Kirchhof	Sommer
Jentsch	Hassemer	Broß
	Osterloh	

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