Headnotes

to the Order of the First Senate of 24 May 2005

– 1 BvR 1072/01 –

1. **Where the report of the Office for the Protection of the Constitution of a *Land* (state) refers to a suspicion that a press publishing house has shown tendencies hostile to the constitution, this is equivalent to an encroachment on the freedom of the press and must therefore be justified by a general statute in the meaning of Article 5.2 of the Basic Law (*Grundgesetz – GG*). § 15.2 of the Act on the Protection of the Constitution in North-Rhine/Westphalia (*Gesetz über den Verfassungsschutz in Nordrhein-Westfalen*) is such a statute.**
2. **On the constitutional requirements for the substantiation of a suspicion of tendencies hostile to the constitution on the part of a press publishing house.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 1072/01 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Junge Freiheit GmbH & Co., represented by the managing director,

authorised representatives: Rechtsanwalt Alexander von Stahl,
Schönblick 14, 76275 Ettlingen –

against

a) the order of the Higher Administrative Court (*Oberverwaltungsgericht*) for the *Land* North-Rhine/Westphalia of 22 May 2001 – 5 A 2055/97 –,

b) the judgment of the Düsseldorf Administrative Court (*Verwaltungsgericht*) of 14 February 1997 – 1 K 9318/96 –,

c) the reports of the Office for the Protection of the Constitution of the *Land* North-Rhine/Westphalia for the years 1994 and 1995

the Federal Constitutional Court – First Senate –

with the participation of Justices:

President Papier,

Haas,

Hömig,

Steiner,

Hohmann-Dennhardt

Hoffmann-Riem

Bryde

Gaier

held on 24 May 2005:

1. **The order of the Higher Administrative Court for the *Land* North-Rhine/Westphalia of 22 May 2001 – 5 A 2055/97 – and the judgment of the Düsseldorf Administrative Court of 14 February 1997 – 1 K 9318/96 – violate the complainant's fundamental right under Article 5.1 sentence 2 of the Basic Law. The decisions are overturned. The matter is referred back to the Düsseldorf Administrative Court.**
2. **The *Land* North-Rhine/Westphalia is ordered to reimburse the complainant its necessary expenses.**

Reasons:

A.

I.

1. The complainant, whose seat is in Berlin, publishes the weekly newspaper *Junge Freiheit*. The Ministry of the Interior of the *Land* North-Rhine/Westphalia publishes annual reports of the Office for the Protection of the Constitution to inform the public. The legal basis for this is § 15.2 of the Act on the Protection of the Constitution in North-Rhine/Westphalia (*Gesetz über den Verfassungsschutz in Nordrhein-Westfalen, Verfassungsschutzgesetz Nordrhein-Westfalen – VSG NRW* – NRW Protection of the Constitution Act) as amended by the Act of 18 December 2002 (North-Rhine/Westphalia Legal Gazette (*Gesetz- und Verordnungsblatt Nordrhein-Westfalen – GV NRW*) 2003 p. 2), which reads as follows: 1

The authority for the protection of the constitution may publish information, in particular reports of the Office for the Protection of the Constitution, for the purpose of informing the public on tendencies and activities specified under § 3.1,, but it may publish personal data only if disclosure is necessary for the understanding of the context or the presentation of organisations and the interests of the general public outweighs the interests warranting protection of the person affected. 2

§ 3.1 of the Act on the Protection of the Constitution in North-Rhine/Westphalia, to which reference is made, reads as follows: 3

The function of the authority for the protection of the constitution is the collection and evaluation of information, in particular of factual and personal information, news and documents concerning 4

1. tendencies that are directed against the free democratic fundamental order, the existence or the security of the Federal Government or the government of a *Land* or whose aim is an unlawful interference with constitutional bodies of the Federal Government or of a *Land* or of their members in carrying out their duties, 5

2. to 4. (…), 6

in the area of application of the Basic Law, to the extent that there are factual indications supporting the suspicion of such tendencies and activities. 7

Subsection 3 of § 3 of the NRW Protection of the Constitution Act contains a definition: 8

In the meaning of this Act, 9

a) and b)(…), 10

c) tendencies against the free democratic fundamental order are such politically determined, goal-directed and purposeful practices in or for an association of persons as has the purpose of removing or invalidating one of the constitutional principles named in subsection 4. 11

A person who acts for an association of persons strongly supports that association of persons in its tendencies. Practices of individuals who are not acting in or for an association of persons are tendencies in the meaning of this Act if they are directed towards the use of force or by reason of their mode of operation are capable of causing substantial damage to an interest protected by this statute. 12

2. In the reports on the years 1994 and 1995, *Junge Freiheit* – in a similar way as in the following years too – was dealt with in detail as part of the reporting on extremist right-wing tendencies. The contributions published in it, in the estimation of the *Land*, contained indications supporting the suspicion of tendencies hostile to the constitution. It was published in 1994 under the heading "right-wing extremism" in the subcategory "right-wing publications, publishing houses, distributors, media" and in 1995 under the heading "right-wing extremist organisations, groupings and tendencies". 13

a) In the report of the Office for the Protection of the Constitution for the year 1994, extracts of articles from *Junge Freiheit* in the following subject areas are quoted and analysed: 14

–Nationalist- and racist-motivated xenophobia / tendencies against fundamental rights of equality – disregard for human dignity; 15

–Anti-parliamentarianism / tendencies against parliamentary democracy; 16

–Lack of distance to Nazi rule / minimising and relativising Nazi crimes – justification of National Socialism; 17

–Strategic statements / strategic demands. 18

In addition, the report contains an assessment of the New Right (*Neue Rechte*) movement, whose thought, it states, is propagated in *Junge Freiheit*. *Inter alia*, the report states: 19

The North-Rhine/Westphalia Office for the Protection of the Constitution has assessed the editions of *Junge Freiheit* that have appeared to date, in particular those of the year 1994, and this assessment has found a large number of factual indications 20

supporting the suspicion of extremist right-wing tendencies. Consistently and strikingly, *Junge Freiheit* is permeated with articles in which the authors promote political viewpoints or make claims that are not consistent with fundamental principles of the free democratic fundamental order, in particular not consistent with respect for the human rights put into concrete terms in the Basic Law and the principle of the responsibility of the government to parliament.

21 b) In the report of the Office for the Protection of the Constitution for the year 1995, it is emphasised that the North-Rhine/Westphalia Office for the Protection of the Constitution is not at present employing any means of intelligence in the observation of *Junge Freiheit*. In the case of *Junge Freiheit*, it is stated, observation means that the newspaper is read and assessed and the results of this assessment are published. In order to document continuing factual indications supporting the suspicion of extremist right-wing tendencies, articles from *Junge Freiheit* are collected under the following main topic headings: agitation in connection with 8 May; revisionism; re-education and *Vergangenheitsbewältigung* (accounting for the past); political correctness (PC); re-evaluation of the terms "conservative", "nation" and "democracy"; conservative revolutionary movement; anti-parliamentarianism; agitation against institutions and office-holders of free democracy; tendencies against fundamental rights.

22 In addition, there are reports on the circles of readers of *Junge Freiheit*, on the relationship to what is known as the JF Summer University, and again on the New Right.

II.

23 The complainant instituted legal proceedings at the Administrative Court against the *Land* North-Rhine/Westphalia, *inter alia* for an order that the *Land* cease and desist from disseminating the reports of the Office for the Protection of the Constitution, unless the passages on *Junge Freiheit* were removed, for a declaration that the *Land* was not entitled to classify *Junge Freiheit* in the category of right-wing extremism as long as it had no more than a suspicion of this, and in addition for a correction to the effect that the classification had not been justified and for the revocation of allegations.

24 1. The Administrative Court dismissed the action in the year 1997.

25 a) The court stated that the areas protected by Article 5.1 sentence 2 and Article 12.1 of the Basic Law (*Grundgesetz*) were not even impinged on. Article 5.1 sentence 2 of the Basic Law, it held, protected the dissemination of opinions and facts in printed works. Despite the publication of the reports of the Office for the Protection of the Constitution, it was possible for the complainant to produce and disseminate *Junge Freiheit* and to make decisions as to the contents of the articles it published. The disadvantages of a financial nature asserted by the complainant as a result of the criticism expressed in the reports of the Office for the Protection of the Constitution were not part of the scope of protection of Article 5.1 sentence 2 of the Basic Law.

The fundamental right under Article 12.1 of the Basic Law was equally unaffected by the reports of the Office for the Protection of the Constitution and the associated information of the public, because the editors and employees of the complainant were able to continue their activities. 26

b) Nor did the reports violate the complainant's general right of personality following from Article 2.1 in conjunction with Article 1.1 of the Basic Law, because the encroachment constituted by the reports was justified. The basis for this was in the enabling provision of § 15.2 of the NRW Protection of the Constitution Act, whose formal and substantive requirements were satisfied. In a formal respect, the *Land* was the competent association to act; in particular, the defendant *Land* had jurisdiction to mention the newspaper published by the complainant in the reports of the Office for the Protection of the Constitution. An association of persons with its seat in North-Rhine/Westphalia was not required; it was sufficient, rather, that *Junge Freiheit* was disseminated in North-Rhine/Westphalia. 27

The publication of the reports of the Office for the Protection of the Constitution was also substantively lawful. The complainant did not only wish to express opinions, but to set in motion through its publications a process of change in the public climate of opinion, in the spirit of its editorial principles. There were factual indications supporting the suspicion that this practice was intended to remove or invalidate constitutional principles that are part of the free democratic fundamental order. This was sufficient for publication in a report of the Office for the Protection of the Constitution; this followed from the mere wording of § 15.2 of the NRW Protection of the Constitution Act, which referred to § 3.1 of the NRW Protection of the Constitution Act and the last half-sentence thereof. The meaning and purpose of the provision did not require a departure from this. Reports of the Office for the Protection of the Constitution served the purpose of information, as followed directly from § 15.2 of the NRW Protection of the Constitution Act, which provided for information of the public on tendencies against the constitutional order. The provision was the expression of the principle of "militant democracy", which constitutionally imposed on the state the duty to protect the free democratic fundamental order. The discharge of this duty entailed the task of effectively warning the public of dangers to constitutionally protected interests even if there were only indications of the suspicion of tendencies hostile to the constitution. If the information were permissible only when there was certainty, it might be too late to ward off the danger. 28

There had been factual indications supporting a suspicion against the complainant. The newspaper did not offer a "market for opinions", since not every opinion could be, and was indeed, advocated by it. The opinions expressed and facts printed in the newspaper were published on the responsibility of the editorial department in compliance with the rules of press law and were to be attributed to the newspaper if the newspaper did not express disapproval or distance itself from the texts distinctly enough at a close point in time or at a place close to the publication. An overall survey of all articles revealed the tendency of the newspaper, which showed intentions di- 29

rected against the free democratic fundamental order. Conclusions were to be drawn from all articles, including those written by freelances and the readers' letters. The objective declaratory content of a statement was essentially to be understood in the way in which it affected a third party, that is, the circle of addressees.

30 On this basis, the reports led to the conclusion that the complainant disregarded the human rights of the Basic Law. Foreigners were represented as inferior and undesirable for economic and ecological reasons. A racist reader's letter with the heading "ASYLyrik" [Translator's note: a combination of the terms for "asylum" and "lyric poetry"] had been published with no indication at a close date that the newspaper distanced itself from this. An anti-Semitic stance was displayed by the cynical denigration of holocaust victims through satirical means displayed an anti-Semitic stance. Aids victims were also defamed in a review of the year by being named in the same breath as the victims of animal slaughter. In addition, the newspaper showed indications supporting the suspicion of tendencies against the principle of democracy. Doubt was cast on the multiparty system. A form of state was propagated in which the government would no longer be answerable to parliament. An anti-democratic attitude was also shown in the fact that the complainant supported the idea of a "conservative revolutionary movement", which was advocated in the German empire and in the Weimar Republic.

31 The publication in the reports of the Office for the Protection of the Constitution was not out of proportion. It was suitable and necessary in order to show the public indications supporting the suspicion of tendencies that were significant from the point of view of protection of the constitution. Nor was it out of proportion to the disadvantages asserted by the complainant. On the one hand, the complainant had not substantiated its submissions of financial disadvantages caused by the reports of the Office for the Protection of the Constitution. On the other hand, these disadvantages were subordinate to the concerns pursued in the reports, and in the last instance they were merely a consequence of the reports.

32 2. The Higher Administrative Court rejected the application for leave to appeal in the year 2001.

33 It stated that there were no serious doubts as to the correctness of the decision of the Administrative Court in the meaning of § 124.2 no. 1 of the Rules of Procedure of the Administrative Courts (*Verwaltungsgerichtsordnung – VwGO*). The complainant's general right of personality had not been violated, since the reports had been lawful. The *Land* had been the competent association to act with regard to the challenged measures. The Administrative Court, whose arguments the Higher Administrative Court adopted, had rightly assumed, on the basis of a comprehensive assessment of a large number of publications of *Junge Freiheit*, that with regard to the complainant there were factual indications supporting the suspicion of tendencies against the free democratic fundamental order which justified a publication in the reports of the Office for the Protection of the Constitution. In an overall survey, the impression was formed

that the complainant actively advocated the above opinions hostile to the constitution. The objections of the complainant made against this were not capable of removing the suspicion. It was irrelevant whether the articles could also be interpreted differently. The only conclusive factor was the fact that the articles in question, when considered reasonably, could also, and particularly, be understood in the sense set out by the Administrative Court and the totality of the articles assessed by the Administrative Court at all events gave sufficient cause for the suspicion of aims hostile to the constitution. Over a prolonged period of time, the editorial department had published a large number of such articles without commentary and without distancing itself from them. In addition, the Higher Administrative Court, in conformity with the decision of the Administrative Court, assumes that a violation of the principle of proportionality cannot be established and the areas protected by Article 5.1 sentence 2 and Article 12.1 of the Basic Law are not affected. The Higher Administrative Court also, without giving details of the reasons for this, refused leave to appeal for the reasons in § 124.2 no. 2 of the Regulations of the Administrative Courts (case with special factual or legal difficulties) and of § 124.2 no. 3 of the Regulations of the Administrative Courts (fundamental importance).

III.

In its constitutional complaint, the complainant challenges a violation of its fundamental rights under Article 2.1 in conjunction with Article 1.1 and under Article 5.1 sentences 1 and 2 and Article 12.1 of the Basic Law by the two reports of the Office for the Protection of the Constitution and the decisions of the Administrative Courts. In addition, it submits, the order of the Higher Administrative Court violates its fundamental rights under Article 2.1 in conjunction with Article 20.3 and under Article 3.1 and Article 19.4 of the Basic Law. 34

1. The complainant submits that an encroachment on the freedom of the press and occupational freedom also results from the intensity of the detriment suffered by the complainant in consequence of the reports. In this connection, it is not necessary to substantiate this in detail, because including the complainant in the reports of the Office for the Protection of the Constitution stigmatises it in public. This makes it considerably more difficult to obtain advertising customers, to secure its marketing and to attract readers. The complainant submits that the public does not differentiate between the statement that *Junge Freiheit* is of the extremist right and the statement that there are factual indications supporting such a suspicion. As a result of the reports, the complainant states that it cannot successfully defend itself in legal disputes under private law against being designated as of the extremist right. In addition, it should be taken into account that the reports of the Office for the Protection of the Constitution have a political effect mainly through the mass media. The public at large does not read the reports of the Office for the Protection of the Constitution; in contrast, the media follow the reports of the Office for the Protection of the Constitution in their reporting and their assessments when it comes to classifying political groups or publications as extremist. The fact that the report of the Office for the Protection of the 35

Constitution states that there are “factual indications supporting the suspicion of a right-wing extremist tendency” scarcely moderates the stigmatising effect of the report in practice. In the “Osho” and “Glykol” decisions (reference to Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 105, 279 and BVerfGE 105, 252), according to the complainant, the Federal Constitutional Court established that adverse effects that did not have the quality of an encroachment are to be reviewed by the standard of the special right of freedom involved. Here, the Federal Constitutional Court departed from an earlier decision (BVerfGE 40, 287) under which the indirect effects of the classification as extremist in a report of the Office for the Protection of the Constitution are to be measured only against the prohibition of arbitrariness.

2. The complainant submits that the encroachment on its fundamental rights is not justified by § 15.2 of the NRW Protection of the Constitution Act. 36

a) In the courts’ interpretation of the provision, the *Land* is not the competent association under § 15.2 of the NRW Protection of the Constitution Act. Even in the area of protection of the constitution, the jurisdiction of each of the *Länder* is territorially restricted. This applies to a greater extent to the public-relations activities of the Office for the Protection of the Constitution than to its collection and processing of information. The present case concerns an opinion on a Berlin newspaper. Any “tendencies” hostile to the constitution can have occurred only there. Merely disseminating *Junge Freiheit* in North-Rhine/Westphalia too, in contrast, cannot be regarded as such a “tendency”, since it is a matter of acts by people; in this case, those people are the members of the editorial staff resident in Berlin, not the readers and sellers in North-Rhine/Westphalia. In publishing the reports, the *Land* encroached on the competence to assess of the *Land* Berlin and the Federal Government. 37

b) § 15.2 of the NRW Protection of the Constitution Act, according to the complainant, is also substantively unconstitutional, if the interpretation used by the courts is applied. It is neither a general statute, nor does it put into concrete terms a barrier to the freedom of the press that is inherent to the Basic Law. Including matters in the reports on the basis of a mere suspicion of tendencies hostile to the constitution is incompatible with the fundamental rights of the complainant and with the principle of the rule of law and the principle of democracy. The purpose of the reports is not informing the public, but protecting the free democratic fundamental order. For this reason, according to the complainant, a mere suspicion is inadequate. On the contrary, drafting challenges to organisations presupposes that these are actually known to have an objective outside the scope of democratic consensus. The idea of warding off dangers does not lead to a different result. If a group is wrongly included in a report of the Office for the Protection of the Constitution, the free democratic fundamental order as the interest protected by the publication is adversely affected. On account of the serious consequences of inclusion in a report, it is even appropriate to draw an analogy to the presumption of innocence in criminal law. The suspicion of tendencies hostile to the constitution, the complainant submits, may justify only measures for the 38

purpose of investigation, but not an attack on the organisation affected. Under the aspect of proportionality too, an investigation of dangers has priority over potential measures to ward off dangers. At least, it is not necessary to set out the cases of suspicion in the same chapter and with the same visual design and manner of presentation as is used for groups that have been proved to be hostile to the constitution. The designation “extremist” is also out of proportion, according to the complainant.

c) The complainant submits that the application of § 15.2 of the NRW Protection of the Constitution Act to the present case is also incompatible with the constitution. There are no factual indications supporting the suspicion that *Junge Freiheit* has objectives hostile to the constitution. The courts misunderstood the message of the majority of the quotations that are contained in the reports cited. Other possibilities of interpretation had not been excluded. An exception was the racist reader’s letter, but the letter is not attributable to the complainant and the complainant distances itself from it. 39

According to the complainant, an overall consideration of *Junge Freiheit* does not justify the reports of the Office for the Protection of the Constitution either. The reader’s letter alone, at all events, is insufficient. The Administrative Court referred to only sixteen quotations, six of which did not come from the periods of time to which the reports related. Bearing in mind that *Junge Freiheit* publishes several thousand articles per year, this is too small a proportion. 40

Finally, the publication in the reports of the Office for the Protection of the Constitution was out of proportion. The free democratic fundamental order, the complainant submits, is wrongly weighed as an abstract quantity against the adverse effects on the complainant. Instead, the importance of the complainant’s acts for this fundamental order should have been determined; here, for example, the relevant factors are the number of readers, the influence of the newspaper in society as a whole and the stability of democracy in Germany, The courts, according to the complainant, also failed to appreciate the intangible adverse effect of the reports on the complainant and made exaggerated demands for the submission of financial disadvantages. 41

3. The complainant submits that the Order of the Higher Administrative Court deals with the requirements for leave to appeal in a manner that violates fundamental procedural rights. The Higher Administrative Court passed an appeal judgment in the matter without conducting appeal proceedings on points of fact and law. In consequence, the complainant’s possibility of making further factual submissions was curtailed in a manner contrary to the rule of law. In addition, the complainant submits that proceedings lasting more than four years at the appeal level are too long, although in its pleading of 6 December 2004 it points out that it is interested above all in a decision on the merits, since finality can only be attained if the fundamental constitutional questions are solved. 42

IV.

The *Land* North-Rhine/Westphalia, in its submission, denies that substantive fundamental rights of the complainant have been violated and submits in particular that the suspicion against the complainant was sufficient to include it in the reports of the Office for the Protection of the Constitution. It submits that *Junge Freiheit* gives a large number of factual indications to support the suspicion that the complainant, through this newspaper, shows tendencies that are directed above all against the democratic and parliamentary order of the Basic Law. The complainant relies, sometimes expressly and sometimes impliedly, on the anti-democratic and anti-parliamentarian thought of the "conservative revolutionary movement", inclines to minimise National Socialism and the holocaust, advocates geographical revisionism and denigrates the constitutional order of the Basic Law and its political opponents. In addition, a large number of articles in *Junge Freiheit* contain remarks that are xenophobic and tend to anti-Semitism. The North-Rhine/Westphalian Office for the Protection of the Constitution is entitled, according to the *Land*, to pursue such a suspicion, since *Junge Freiheit* is also disseminated in North-Rhine/Westphalia. Contrary to the opinion of the complainant, the Office is not obliged to print the information on *Junge Freiheit* separately from reports on organisations with regard to which more than a suspicion exists. 43

B.

The constitutional complaint is admissible and is well-founded. 44

I.

The challenged decisions violate the complainant's fundamental right to freedom of the press under Article 5.1 sentence 2 of the Basic Law. 45

1. The Administrative Court dismissed the complainant's action *inter alia* on the grounds that incorporating passages on *Junge Freiheit* in the North-Rhine/Westphalia reports of the Office for the Protection of the Constitution of 1994 and 1995 does not impinge on the scope of protection of the freedom of the press. The same legal assessment is a principal argument for the rejection by the Higher Administrative Court of the application for leave to appeal. This view fails to appreciate the scope of the scope of protection of the fundamental right of freedom of the press. 46

a) The complainant, as the publisher and editor of a weekly newspaper, is protected by the fundamental rights under Article 5.1 sentences 1 and 2 of the Basic Law. Also as a legal person under private law, it may rely on freedom of speech and freedom of the press under Article 19.3 of the Basic Law (see BVerfGE 80, 124 (131); 95, 28 (34)). The fundamental right safeguards the freedom of production and dissemination of printed works and thus the press as a medium of communication (see BVerfGE 85, 1 (12-13)). In contrast, freedom of speech under Article 5.1 sentence 1 of the Basic Law protects the form and content of expressions of opinion, even if they are disseminated in a printed publication (see BVerfGE 97, 391 (400)). 47

48 In the present case, the basis for the court's judicial review is the freedom of the press. The government measure affects the printed publication itself and influences the basic conditions of press activity. The object of the reports of the Office for the Protection of the Constitution is the reference to the suspicion that the complainant shows tendencies to remove or invalidate, with the help of the newspaper, the free democratic fundamental order in the federal and *Länder* governments. The reports of the Office for the Protection of the Constitution, in order to evidence the assumed suspicion of tendencies hostile to the constitution, pick out individual articles from *Junge Freiheit* in order to justify an overall assessment of the newspaper and the group behind it on this basis: the negative assessment of the tendencies applies to the organisation that uses the newspaper as a mouthpiece.

49 In this connection, the reports of the Office for the Protection of the Constitution assess individual expressions of opinion each in isolation as hostile to the constitution and attribute them to the complainant. From this point of view, the freedom of speech in Article 5.1 sentence 1 of the Basic Law may become a basis for the court's judicial review. But in the present case, the complainant challenges only the conclusions drawn from the articles on the complainant's tendencies hostile to the constitution as the publisher of a newspaper. Consequently, the fundamental right to freedom of speech has no independent significance for the constitutional assessment of the challenged decisions in the present proceedings.

50 b) Not every government activity relating to information and not every participation of the government in the process of formation of public opinion is to be assessed as an encroachment upon fundamental rights (see BVerfGE 105, 252 (265 et seq.) on Article 12.1 of the Basic Law; 105, 279 (294 et seq., 299 et seq.) on Article 4.1 of the Basic Law). The conclusive factor is whether the area of protection of a fundamental right is impinged on and whether the adverse effect is an encroachment or a measure equivalent to an encroachment. These requirements are satisfied when the complainant is named in the report of the Office for the Protection of the Constitution.

51 aa) The area of protection of the fundamental right of freedom of the press is determined taking into account the purpose of the guarantee made by the fundamental right. The freedom of the press is specially protected as a fundamental right in view of the fact that a free press not controlled by public authority is an essential element of a free state and is indispensable to a democracy (see BVerfGE 20, 162 (174)). Consequently, it is the task of the press to enable comprehensive information, to reproduce the variety of existing opinions and itself to form and advocate opinions (see BVerfGE 52, 283 (296)). For this to happen, the press must be independent of the state. The freedom of the press therefore protects the subjects of fundamental rights against influence exerted by the state on information disseminated with the help of the press, in particular against negative or positive sanctions which are linked to the content and design of the publication (see BVerfGE 80, 124 (133-134) on subsidies).

52 The protection against encroachments relating to content relates not only to en-

croachments in the traditional sense (on the traditional concept of encroachment, see BVerfGE 105, 279 (300)), but may also be triggered in the case of indirect effects on the press (see BVerfGE 52, 283 (296)), if the objective and effects of these are equivalent to encroachments (see BVerfGE 105, 252 (273)). Article 5.1 sentence 2 of the Basic Law therefore grants the subjects of freedom of the press a subjective defensive right even against adverse effects that are caused indirectly when the state influences third parties, for example in such a way that the conduct of those third parties has negative effects on the possibilities of journalistic impact or the financial returns of the organ of the press in a manner that is equivalent to an encroachment. That, in addition to actual disadvantages for activity relating to information, the state measure must also entail legal consequences – as the Second Senate assumed in the year 1975 for the area of Article 21 of the Basic Law (BVerfGE 40, 287 (293)) is, in contrast, not a requirement for finding that the freedom of communication may have been adversely effected.

53 bb) In the present case, the mention of *Junge Freiheit* and the critical examination of it in the reports of the Office for the Protection of the Constitution serve the purpose of the Office for the Protection of the Constitution, paraphrased in § 3.1 and § 15.2 of the NRW Protection of the Constitution Act, of warding off tendencies against the free democratic fundamental order of the federation and the *Länder* through informing the public. The effects caused by a report of the Office for the Protection of the Constitution in connection with this objective are equivalent to an encroachment.

54 The report of the Office for the Protection of the Constitution is not an arbitrary product of government public relations work. It is aimed at warding off particular dangers (§ 1 of the NRW Protection of the Constitution Act) and comes from an office specialised in this and acting with particular powers (see §§ 5 et seq. of the NRW Protection of the Constitution Act), including the legal power to employ intelligence resources. In this respect, publication in the report of the Office for the Protection of the Constitution goes beyond the mere participation of government office-holders in public discussion or in the creation of a sufficient information basis to enable the citizens to form decisions independently, for example as participants in the market (see BVerfGE 105, 252 (267 et seq.)). It is a negative sanction imposed on the complainant, linked to the disseminated contents communicated and indirectly onerous.

55 In the reports, the authority for the protection of the constitution assesses individual contents of the newspaper as hostile to the constitution and adds conclusions on the complainant’s tendencies. In the opinion of the Administrative Court, the statement in the report of the Office for the Protection of the Constitution at the same time has the character of a warning against the complainant and the newspaper for which it is responsible (on the warning function, see also Higher Administrative Court of North-Rhine/Westphalia (*Oberverwaltungsgericht Nordrhein-Westfalen – OVG NRW*), *Neue Zeitschrift für Verwaltungsrecht - NVwZ* 1994, pp. 588-589; Murswiek, *Neue Zeitschrift für Verwaltungsrecht* 2004, p. 769 (771) with further references in footnote 21). The publishing house and the editorial department of *Junge Freiheit* are admit-

tedly not prevented by the mention in the reports of the Office for the Protection of the Constitution from continuing to produce and distribute the newspaper and from publishing articles in the future like those objected to. However, their possibilities of impact are adversely affected by the report of the Office for the Protection of the Constitution. Potential readers may be prevented from buying and reading the newspaper, and it is not unlikely, for example, that advertisers, journalists or writers of readers' letters may take the reference in the report of the Office for the Protection of the Constitution as a cause to turn away from or boycott the newspaper.

Such an indirect effect of the reports of the Office for the Protection of the Constitution is equivalent to an encroachment on the fundamental right of communication. 56

2. The assumption of the authority and the courts, which admittedly took place as part of the assessment under Article 2.1 of the Basic Law, that such an adverse effect is at all events justified, does not in every respect stand up to examination under constitutional law. 57

a) In principle, the state is not prevented from making a value judgment on the actual conduct of groups or their members (see BVerfGE 105, 279 (294) on Article 4.1 of the Basic Law). The defence of principles and values of the constitution by organs and office-holders of the state may also take place with the help of information to the public and participation in public discussions. But if the government activity relating to information results in adverse effects that are equivalent to an encroachment on a fundamental right (see BVerfGE 105, 252 (273)), these must be justified (see BVerfGE 105, 279 (299 et seq.) on Article 4 of the Basic Law). 58

aa) The freedom of the press is not guaranteed without restriction. Under Article 5.2 of the Basic Law, it finds its limits *inter alia* in the general statutes. General statutes are statutes that are not directed against the fundamental right in itself or against the expression of a particular opinion, but serve the protection of a legal interest in itself, irrespective of a particular opinion (see BVerfGE 7, 198 (209-210); 97, 125 (146); established case-law). 59

§ 15.2 of the NRW Protection of the Constitution Act is such a general statute. The authorisation contained in § 15.2 of the NRW Protection of the Constitution Act to inform the public in reports of the Office for the Protection of the Constitution for the purpose of giving information on tendencies and activities hostile to the constitution, as is shown by the reference to § 3.1 of the NRW Protection of the Constitution Act, serves to protect the free democratic fundamental order on the federal and on the *Länder* level. The authorisation is directed neither against a particular opinion nor against the process of free formation of opinions or against free information as such, but aims to preserve a legal interest generally enshrined in the legal order, in the present case in the constitution, the protection of which is independent of whether it is endangered or violated by expressions of opinion or in another way. 60

bb) There are no reservations as to the formal constitutionality of § 15.2 in conjunc- 61

tion with § 3.1 of the NRW Protection of the Constitution Act. In particular, the *Land* North-Rhine/Westphalia has not exceeded its legislative competence.

62 Under Article 73 no. 10 letter b of the Basic Law, the Federal Government has the exclusive legislative competence for the cooperation of the Federal Government and the *Länder* in the area of protection of the constitution, but not for the protection of the constitution in general. In this respect, the legislative competence of the *Länder* arises under Article 70.1 of the Basic Law. The *Länder* are authorised to pass statutes to avert tendencies against the free democratic fundamental order to the extent that these have their effects in the *Land* in question and can therefore give rise to dangers there. In the case of a newspaper, this may be the case in every *Land* in which it is distributed. Contrary to the opinion of the complainant, it is not decisive whether the tendencies originate in another *Land* – in the present case Berlin, the seat of the editorial department and publishing house of *Junge Freiheit*.

63 Nor is the legislature in principle prevented from authorising measures to avert tendencies hostile to the constitution where those measures unavoidably have effects outside the boundaries of the *Land*. In the case of reports of the Office for the Protection of the Constitution as printed works, the possibility can never be excluded that the information contained in them is also received in other *Länder* or is disseminated further, for example through reporting in the media.

64 cc) Under substantive law too, there are no constitutional objections against § 15.2 in conjunction with § 3.1 of the NRW Protection of the Constitution Act, which authorises the authority, in circumstances set out in more detail, to inform the public of tendencies hostile to the constitution in the report of the Office for the Protection of the Constitution.

65 (1) Publication in the reports of the Office for the Protection of the Constitution is a precaution basically appropriate to inform the public and, in this context, to guard against tendencies hostile to the constitution. When the authorisation of § 15.2 of the NRW Protection of the Constitution Act is relied on to publish information in the report of the Office for the Protection of the Constitution, the legal limits of discretion must be observed (see § 40 of the Administrative Procedure Act for North-Rhine/Westphalia (*Verwaltungsverfahrensgesetz Nordrhein-Westfalen – VwVfG NRW*); these include the principle of proportionality. Admittedly, in § 15.2 of the NRW Protection of the Constitution Act the precept of necessity is mentioned expressly only with regard to the publication of personal data. However, under constitutional law, it is always part of the principle of proportionality in the case of encroachments or adverse effects equivalent to encroachments on fundamental rights, and it is therefore an unwritten element of the provision.

66 (2) The constitutional requirements of the proportionality of an onerous measure are influenced individually by the priority of the legal interest to be protected and the intensity of its endangerment, but also by the manner and severity of the adverse effect on the right of freedom of the person affected.

67 The authority for the protection of the constitution and the courts have interpreted § 15.2 in conjunction with § 3.1 no. 1 of the NRW Protection of the Constitution Act to mean that the existence of factual indications supporting the suspicion of tendencies hostile to the constitution is sufficient for a matter to be included in the report of the Office for the Protection of the Constitution. In support, they have relied on the last part of the sentence in § 3.1 of the NRW Protection of the Constitution Act, which contains a general restriction of the task of the authority for the protection of the constitution in the words “to the extent that factual indications supporting the suspicion of such tendencies and activities are available”. Notwithstanding the criticism expressed in the literature of this understanding of the provision, in particular for systematic reasons (see Murswiek, *Neue Zeitschrift für Verwaltungsrecht* 2004, p. 769 (775)), the Federal Constitutional Court, in the constitutional evaluation of the measures challenged, must proceed on the basis of the interpretation of the non-constitutional courts, because no constitutional objections may be made to it.

68 (a) The factual indications must, however, be sufficiently weighty. If they justify merely the conclusion that there may possibly be grounds for a suspicion, then they are not sufficient as the basis of an adverse effect on fundamental rights under this interpretation either. If the tendencies are not yet established but factual indications give rise to such a suspicion, their intensity must be sufficient to justify publication in reports of the Office for the Protection of the Constitution even despite the adverse effects on the persons involved.

69 The statute understands tendencies in the meaning of § 15.2 of the NRW Protection of the Constitution Act as politically motivated, goal-directed and purposeful practices in or for an association of persons which has the purpose of removing or invalidating one of the constitutional principles named in § 3.4 of the NRW Protection of the Constitution Act (§ 3.3 sentence 1 letter c VSG NRW). A person who acts for an association of persons strongly supports that association of persons in its tendencies (§ 3.3 sentence 2 of the NRW Protection of the Constitution Act). Practices of individuals who are not acting in or for an association of persons are only in exceptional cases to be regarded as tendencies in the meaning of the statute, for example if they are directed toward the use of force (§ 3.3 sentence 2 of the NRW Protection of the Constitution Act).

70 In the definition of the tendencies in § 3.3 sentence 1 letter c of the NRW Protection of the Constitution Act, the statute takes up an element of the definition that is also contained in § 92.3 no. 3 of the Criminal Code (*Strafgesetzbuch – StGB*). In criminal law, it is recognised that the disapproval of a principle of the constitution is not sufficient to satisfy the element. On the contrary, it is required that particular persons or groups attempt to remove one of the principles of the constitution (see Stree/Sternberg-Lieben in: Schönke/Schröder, *Strafgesetzbuch*, 26th ed. 2001, marginal nos. 16-17 on § 92). The mere criticism of constitutional values and constitutional principles is not to be assessed as a danger to the free democratic fundamental order, but activities to remove it that go beyond this are indeed. Taking into account the

principle of proportionality, the nature and gravity of the sanction must be correlated to the concrete potential for danger.

(b) If the sanction is linked to expressions of opinion or press publications, account must also be taken of the fact that freedom of speech and of the press is itself a constitutive element of democracy, which also permits critical discussion of constitutional principles and values. The extent of protection of fundamental rights of communication may have effects both on the requirements for establishing tendencies or suspicion to this effect and also on the legal evaluation of the measure taken, in particular with regard to its reasonableness. 71

(aa) However, it is constitutionally unobjectionable if the authority for the protection of the constitution links inclusion in its reports to the contents of expressions of opinion to the extent that these are the expression of a tendency to remove the free democratic fundamental order. In principle, the state is not prevented from drawing conclusions from expressions of opinion and if necessary taking measures to protect legal interests. Thus, for example, statements giving notice of an intended criminal offence may be the cause for taking measures to prevent the offence being committed. If tendencies to remove the free democratic fundamental order may be inferred from expressions of opinion, measures to defend this fundamental order may be taken. But protection by Article 5.1 of the Basic Law has effects on the examination as to whether the tendency hostile to the constitution is expressed in the statement. Here, it must be taken into account that criticism of the constitution and its essential elements is just as much allowed as is the expression of the demand that principal elements of the free democratic fundamental order should be changed. 72

Consequently, the mere criticism of constitutional values is not a sufficient cause to affirm a tendency hostile to the constitution in the meaning of § 15.2 in conjunction with § 3.3 of the NRW Protection of the Constitution Act, or for this reason alone to impose the negative sanction of publication in the reports of the Office for the Protection of the Constitution. Nor does § 15.2 of the NRW Protection of the Constitution Act provide for an evaluation of the contents of articles in the report of the Office for the Protection of the Constitution separate from the establishment of the suspicion of such tendencies. However, individual articles may be cited to justify the suspicion of tendencies hostile to the constitution if they suggest this in themselves or in conjunction with other findings. 73

(bb) The use of the articles published in the newspaper as indications of such tendencies on the part of the complainant may also refer to articles that the complainant or the members of its editorial department did not themselves write. However, § 3.3 sentence 1 of the NRW Protection of the Constitution Act expressly does not regard practices by individuals that do not satisfy the requirements of § 3.3 sentence 3 of the NRW Protection of the Constitution Act as tendencies in the meaning of the statute insofar as they do not act in or for an association of persons. Special indications are therefore necessary to show why such tendencies on the part of the publishing house 74

and the editorial department can be derived from the articles of third parties who are not part of the editorial department. This may be the case if tendencies hostile to the constitution on the part of the publishing house and the editorial department are expressed as a result of the editorial choice of the publications written by third parties.

However, in the evaluation it must be taken into account that newspapers usually do not adopt all the contents they publish, even if they do not expressly distance themselves from these in each case. Consequently, the Administrative Court stated that decisive indications were mainly derived from articles and commentaries by the members of the editorial department itself and by the freelances. Other statements [in the newspaper] could at all events be ruled out, insofar as the newspaper offered a "market for opinions" without identifying itself with any. If this was not the case, the statements of third parties, for example of other authors and writers of readers' letters, might be attributable to the publishing house and the editorial department, unless these were merely isolated aberrations. 75

In principle, this opinion is constitutionally unobjectionable. But when it is put into practice, it must be noted that the newspaper is free to restrict the function and scope of the forum it opens, for example to a particular political spectrum. If the reproduction of the articles or readers' letters by third parties shows the intention of the editorial department not to restrict itself to contributions that follow a particular editorial line, then it may not be automatically concluded from their publication that this also shows a tendency of the publishing house and the editorial department. For this to be the case, additional indications would be needed. If, on the contrary, the newspaper does not see itself as a "market for opinions", it is constitutionally unobjectionable to attribute to the editorial department the positions shown in the published articles, unless it expressly distances itself from them. It is also possible to make an attribution if a particular line of content is recognisable from the selection of the articles and expressions of opinion of third parties. 76

(c) If there is a suspicion based on facts that the group has tendencies hostile to the constitution, the principle of proportionality is the standard for the decision as to the way in which it may be reported. 77

The measure must be restricted to what is necessary to protect legal interests, which includes, when a report is made on the basis of a suspicion, not creating the impression that it has been established that the group in question pursues tendencies directed against free democratic fundamental order. In consequence, a clear distinction must be made – for example in the headings chosen and the structure of the report – between organisations in the case of which there is only a suspicion and those in the case of which such tendencies have been proved. 78

The principle of necessity further requires that where such a suspicion based only on individual publications is repeatedly published over a prolonged period of time, other measures should be taken to determine whether the tendencies actually exist. 79

b) The decisions of the Administrative Court and the Higher Administrative Court do not in every respect take these constitutional requirements into account. 80

aa) As already set out, it is in principle not constitutionally objectionable for the suspicion of tendencies hostile to the constitution to be based on publications in the newspaper, to the extent that these are attributable to the complainant. 81

(1) Whether particular articles in the complainant's newspaper are the expression of its own tendencies, however, may, contrary to the opinion of the Administrative Court and the Higher Administrative Court not be derived from the institution of responsibility under the press laws. It serves other purposes. The duty, expressly provided in the press laws, to have a masthead and in this, *inter alia*, to give the name of the publishing house and of the responsible editor (see § 8 North-Rhine/Westphalia Press Act – *Landespressegesetz NRW – LPG NRW*) is intended to prevent the frustration of criminal and civil liability by escape into anonymity (see Sedelmeier in: Löffler, *Presserecht*, 4th ed. 1997, marginal no. 1 on § 9 of the North-Rhine/Westphalia Press Act). This responsibility under the press law, however, does not lead to all published articles, readers' letters and advertisements being attributed to the press organ. Nor does the criminal liability of the responsible editor or publisher rest on the attribution to them of criminal articles by third parties. Rather, they are independently liable if they do not prevent the publication of criminal publications by others (see § 21.2 of the North-Rhine/Westphalia Press Act). 82

(2) The suspicion of tendencies hostile to the constitution on the part of the publishing house and the editorial department that is based on facts must therefore be substantiated in a different way. Establishing such circumstances is the duty of the authority and the non-constitutional courts. The Federal Constitutional Court merely assesses whether constitutional principles were disregarded in the assessment of facts (see BVerfGE 18, 85 (92-93, 96); 42, 143 (148); 60, 79 (90)). That is in part the case here. 83

(a) However, it is not constitutionally objectionable that the authority and the courts did not rely solely on the assessment of articles that were published in the years 1994 and 1995. It is the duty of the report of the Office for the Protection of the Constitution to provide information on tendencies of a group without it necessarily being possible to derive these only from articles in the period reported. 84

(b) But the constitutional requirements are not satisfied by the explanation why the articles cited as evidence are understood to express the tendencies hostile to the constitution of the publishing house and editorial department and not merely of their authors. The Administrative Court rejects the assumption that *Junge Freiheit* opened a "market for opinions" in making it a requirement that it must be possible that "everything can be, and is indeed, advocated". The freedom of the press also covers the decision to intend to offer a forum for only one particular political spectrum, but in that forum to allow the authors great freedom and thereafter not to identify oneself with all individual publications. In its own assessment, *Junge Freiheit* is conservative and 85

right-wing, but in the spectrum of the right wing it publishes articles of greatly differing authors with different concerns. These also include in part articles by prominent conservative politicians and writers who are not under suspicion of tendencies hostile to the constitution. Special indications would therefore be needed as to why the editorial department does not identify itself with these articles, but does identify itself with the articles cited by the courts, or why the editorial department uses this spectrum of opinions only in order to be able to place articles hostile to the constitution in such a context and to better communicate them to the public. The courts evidently omitted arguments on this because they wrongly assumed that *Junge Freiheit* could not be seen as a “market for opinions” for the sole reason that it was open only to one particular political spectrum.

86 (c) There are also constitutional objections to the assumptions that the decisive factor is the objective content of the declaration of a statement as it is understood by third parties (according to the Administrative Court), and that what matters is how the articles may be understood when considered reasonably (according to the Higher Administrative Court). These approaches fail to appreciate the requirements made to establish the suspicion of tendencies hostile to the constitution on the part of a press publishing house. The statutory authorisation for the adverse effects on fundamental rights that are decisive in the present case is, under § 3.3 sentence 1 letter c of the NRW Protection of the Constitution Act, linked exclusively to the aims of the group, and is therefore not related to the effect on third parties.

87 (d) Whether the factual indications supporting a suspicion of tendencies hostile to the constitution on the part of the complainant are sufficient even when these principles are taken into account must be re-evaluated by the non-constitutional courts.

88 bb) The non-constitutional courts will also have to examine whether the nature of the publication in the reports of the Office for the Protection of the Constitution for 1994 and 1995 satisfied the requirements of the principle of proportionality.

89 Although the authority proceeded on the assumption only of factual indications to support a suspicion, it equated the complainant with groups for which it has established tendencies hostile to the constitution, under the headings “Rightwing extremism”, “Rightwing extremist publications, publishing houses, distributors, media” or “Rightwing extremist organisations, groups and movements”, without any differentiation in the classification or in the headings of the report. A less onerous approach might be to design the report in such a way that it is apparent that the tendencies hostile to the constitution have by no means been established. It is true that in the text of the report it is not claimed that these tendencies are firmly established; on the contrary, there is reference only to the factual indications supporting the suspicion of such tendencies. But it is possible that on a cursory reading, this differentiation will not be noticed, and the lack of differentiation in the design of the report might mislead readers. It must also be taken into account that the media, when reporting on tendencies hostile to the constitution, do not usually reproduced nuances contained in the

text, but put all organisations contained in the report of the Office for the Protection of the Constitution under the same heading in one category. It is necessary for the further findings of the non-constitutional courts to determine whether the design and the content of the report make it clear without doubt and in an easily discernible way that no tendencies hostile to the constitution have been proved.

II.

Since the courts did not take sufficient account of the constitutional requirements arising from Article 5.1 sentence 2 of the Basic Law, their decisions are overturned. The matter is to be referred back to the Administrative Court for a new decision. 90

Whether in addition other fundamental rights, for example Article 2.1 and Article 12.1 of the Basic Law, have been violated need not be decided here. Nor is a decision necessary on the submission that fundamental procedural rights have been violated. The complainant, in its pleading of 6 December 2004, points out that, in the interest of attaining finality, it is most concerned to obtain a decision on the merits by clarifying the basic constitutional questions. 91

III.

The decision on costs is based on § 34 a.2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz - BVerfGG*). 92

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