Headnotes

to the judgment of the Second Senate

of 18 January 2012

– 2 BvR 133/10 –

Art. 33 sec. 4 of the Basic Law (*Grundgesetz* – GG) also applies where sovereign functions are performed by private-law entities.

Exceptions from the principle of the reservation of functions to civil servants must be justified by a specific reason that is consistent with the purpose for which the Constitution allows such exceptions.

Delegating the operation of forensic treatment facilities to formally privatised operators can be compatible with Art. 33 sec. 4 GG as well as with the principle of democracy and the patients' fundamental rights.

FEDERAL CONSTITUTIONAL COURT

– 2 BvR 133/10 –

Delivered
on
18 January 2012
Ankelmann
Amtsinspektor
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Mr S …

– Authorised representative: attorney at law Bernhard Schroer,
Deutschhausstraße 32, 35037 Marburg –

1. directly against

a) the order of the Frankfurt/Main Higher Regional Court (*Oberlandesgericht*)

of 8 December 2009 – 3 WS 239/09 (StVollz) –,

b) the order of the Marburg Regional Court (*Landgericht*)

of 12 February 2009 – 7a StVK 78/08 –,

2. indirectly against

§ 5 sec. 3 of the Hessian Act on Forensic Treatment

(*Hessisches Maßregelvollzugsgesetz* – HessMVollzG)

the Federal Constitutional Court – Second Senate –

composed of the Justices

President Voßkuhle,

Di Fabio,

Mellinghoff,

Lübbe-Wolff,

Gerhardt,

Landau,

Huber,

Hermanns

on the basis of the oral hearing of 25 October 2011 decided by

Judgment

as follows:

The constitutional complaint is rejected as unfounded.

R e a s o n s:

The constitutional complaint raises the question of whether staff of a private-law company entrusted by delegation with the operation of a forensic treatment facility may order and carry out an exceptional protective measure. 1

A.

I.

1. According to the Hessian Act on Forensic Treatment in a Psychiatric Hospital or in a Detoxification Institution (*Maßregelvollzugsgesetz* – HessMVollzG) of 3 December 1981 (Law and Ordinance Gazette, *Gesetz- und Verordnungsblatt* – GVBl I p. 414, last amended by the Act of 28 June 2010, GVBl I p. 185), companies owned directly or indirectly by the Hessian Social Welfare Agency (*Landeswohlfahrtsverband*) may be entrusted by contract to provide forensic psychiatric treatment, provided that they have demonstrated the required expertise and reliability (§ 2 sentences 3, 4 HessMVollzG). The Entrustment Agreement must ensure that the resources needed to properly perform this function are available at all times (§ 2 sentence 5 HessMVollzG). The heads of the facilities and their deputies, as well as other doctors with managerial function, remain employees of the Hessian Social Welfare Agency; they alone may make the discretionary decisions that interfere with the patients‘ fundamental rights (§ 2 sentence 6 HessMVollzG). 2

The sentences 3 to 6 have been inserted in § 2 HessMVollzG by the Act of 5 July 3

2007 (GVBl I p. 402). As amended by this Act, § 2 HessMVollzG reads as follows:

§ 2 HessMVollzG

Forensic Treatment Facilities

[1]Forensic treatment shall be provided in facilities of the Hessian Social Welfare Agency or in facilities of other operators determined by ordinance of the Minister for Social Affairs or of the Minister for Social Affairs in agreement with the Minister of Justice. [2]This does not exclude forensic treatment being also provided in facilities not covered by this Act. [3]The forensic treatment facilities can also be operated by corporations whose shares are fully owned by the Hessian Social Welfare Agency or by a company whose shares are also fully owned by the Hessian Social Welfare Agency, provided that they have demonstrated the required expertise and reliability. [4]They shall be entrusted with the task of providing forensic treatment under a public-law contract between the ministry responsible for forensic treatment and the operator. [5]In particular, the Entrustment Agreement must ensure that the human, functional, structural, and organisational resources needed to provide forensic treatment are available at all times. [6]The heads of the facilities and their deputies, as well as the other doctors with managerial functions, shall remain employees of the Hessian Social Welfare Agency and be entitled to make the discretionary decisions that interfere with the patients' fundamental rights.

[…] Certain decisions which affect fundamental rights of patients and may, at times, affect security – e.g. medical treatment requiring the patients' consent (§ 7 sec. 2 HessMVollzG), day-releases or privileges (§8 HessMVollzG), leaves (§ 9 sec. 1 HessMVollzG), grant and revocation of privileges and leaves (§ 10 HessMVollzG) and in particular certain protective measures (§ 36 HessMVollzG) – are reserved to the head of the facility. However, other employees are authorised to provisionally order exceptional protective measures in cases of imminent danger (§ 5 sec. 3 HessMVollzG), with the exception of shackling other than by handcuffs or foot-chains (§ 36 sec. 3 sentence 2 HessMVollzG).

§ 5 HessMVollzG

Competences

(1) In forensic treatment facilities, the responsibilities of the law enforcement authorities shall fall on the treatment facility, unless stipulated otherwise by law.

(2) The decisions according to § 7 sec. 2, § 8, § 9 sec. 1 and § 10, as well as orders according to § 36 shall be reserved to the head of the forensic treatment facility.

(3) In cases of imminent danger, employees of the forensic treatment facility who do not possess the powers set forth in sec. 1 may provisionally order exceptional protective measures; only a doctor may order the measure described in § 36 sec. 3 sentence 2. The head of the forensic treatment facility must be informed of a provisional order given according to sentence 1 without delay.

According to § 3 HessMVollzG, the operators of the forensic treatment facilities are subject to supervision via general instructions plus, in case of non-compliance with legal requirements or general instructions, via special instructions[.] 13

[…] 14-17

2. a) The forensic hospital in which the complainant is detained (formerly: *Zentrum für Soziale Psychiatrie Haina*, Social Psychiatry Centre Haina; now: *Vitos Klinik für Forensische Psychiatrie Haina*, Vitos Forensic Treatment Centre) was until the year 2007 a facility of the Hessian Social Welfare Agency (LWV), an association of local authorities in the form of a legal entity under public law, that is subject to the competent ministry's technical supervision regarding the tasks it performs in the area of forensic treatment […]. 18

After the Act of 5 July 2007 had created the necessary statutory conditions by adding sentences 3 to 6 to § 2 HessMVollzG, the psychiatric hospitals formerly operated by the Hessian Social Welfare Agency were transformed into non-profit limited liability companies (gGmbH). With 5.1% and 94.9% of the shares respectively, its shareholders are the Hessian Social Welfare Agency and a holding operating today under the name of *Vitos GmbH* – until 2009: *LWV-Gesundheitsmanagement GmbH* – which, for its part, is owned to 100% by the Hessian Social Welfare Agency. Thus, the forensic hospitals – including the one in which the complainant is detained – became facilities of the respective gGmbH. 19

b) Represented by the Hessian Ministry of Social Affairs (*Hessisches Sozialministerium* – HSM), the *Land* of Hesse concluded with the gGmbH as operators of the individual forensic facilities Entrustment Agreements (*Beleihungsverträge* – BV). By these Agreements it entrusted them with conducting, under their own names, the detention and treatment of offenders ordered according to § 61 no. 1 and 2 of the Criminal Code (*Strafgesetzbuch* – StGB), and granted them the sovereign powers required to perform this function, including the power to interfere with fundamental rights to the degree permissible under the HessMVollzG. 20

[…] 21-32

The *Vitos Haina gGmbH* must maintain 407 treatment places, and must be able to accommodate a greater number of persons if need be. If the regular capacities are exceeded by 10% over a period longer than six months, the Ministry of Social Affairs must, after consultation with the head of the facility, decide on measures to durably reduce overcrowding (§ 3 BV). The more general statutory obligation to contractually ensure that the facilities are equipped appropriately (§ 2 sentence 5 HessMVollzG) is matched by a clause in the Entrustment Agreement that obliges the operator to do so within the budget allocated by the Hessian Ministry of Social Affairs (§ 7 sec. 1 BV), plus the specifying stipulation that, at the request of the head of the facility, safety deficiencies must be immediately corrected by the operator (§ 7 sec. 2 BV). 33

§ 5 BV defines the respective management powers of the operator and the head of 34

the forensic facility and marks the area of responsibility in which the head of the facility is not subject to instructions by the private operator[.]

[…] 35-39

§ 6 BV stipulates that the staff employed for enforcement purposes must have the required expertise and personal suitability, and grants the head of the facility the possibility to participate in the selection of the staff working in his or her area of responsibility. 40

[…] 41-43

Other parts of the Agreement regulate the operator's safety obligations 44

§ 7 BV 45

[…] 46-48

[…] matters related to the operation of the forensic hospital, 49

§ 8 BV 50

[…] 51-52

liability issues (§ 10 BV), and provide for the term of the Agreement (§ 11 BV, thirty years, subject to earlier termination). 53

c) The persons who must remain employees of the Hessian Social Welfare Agency according to § 2 sentence 6 HessMVollzG, and who alone may make discretionary decisions on interferences with fundamental rights, are seconded to the *Vitos Haina gGmbH* under a secondment agreement. 54

According to § 2 sec. 2 sentence 1 of the Staff Secondment Agreement, the Hessian Social Welfare Agency is responsible for appointing a new head of the facility following a proposal by the *LWV-Gesundheitsmanagement GmbH* (now: *Vitos GmbH*) in agreement with the Hessian Ministry of Social Affairs. Concerning the replacement of seconded doctors in other positions and vacancies for doctors with managerial functions, the Hessian Social Welfare Agency is responsible for appointment following a proposal from the GmbH according to § 2 sec. 2 sentence 2 of the Staff Secondment Agreement in accordance with the procedure set forth in § 6 BV, thus on the basis of a right of proposal by the head of the facility, bound to his or her professional assessment and with the stipulation that he or she will take the matter to the general shareholders meeting if the proposal is rejected. 55

[…] 56-58

According to § 3 sec. 2 sentence 1 of the Staff Secondment Agreement, and within the framework defined in § 5 BV, the Hessian Social Welfare Agency delegates to the private operator its management powers as employer of the seconded doctors. 59

According to the information provided by the Hessian State Government, currently a 60

total of twenty salaried doctors and one psychologist of the Hessian Social Welfare Agency are working in the six hospitals managed as facilities of the non-profit companies in the holding company, including six doctors and one psychologist in the *Vitos Klinik für forensische Psychiatrie Haina*. The remaining hospital staff are employed by the *Vitos Haina gGmbH*.

3. A the time of the contested decision, § 31 HessMittelstufengesetz regulated the competence and procedures for allocating the funds to the forensic facilities 61

[…] 62-73

II.

1. In April 2008, as repeatedly in the past, the complainant had an aggressive outburst and was secluded by violent means by nurses of the forensic hospital in which he was detained. The doctor on duty was informed *ex post facto;* he in turn advised the senior doctor on duty of the incident.

2. With a request for a court decision (§ 109 sec. 1 Act on the Enforcement of Criminal Penalties, *Strafvollzugsgesetz* – StVollzG), the complainant applied for a declaration that his seclusion had been unlawful because it had not been ordered and carried out by public authorities. […]

3. […] the Regional Court rejected the request as unfounded.

4. […] 77

5. By its decision of 8 December 2009 (*Neue Zeitschrift für Strafrecht, Rechtsprechungs-Report* – NStZ-RR 2010, pp. 93 et seq.), the Higher Regional Court dismissed the complainant's appeal. 78

[…] 79-82

III.

In his constitutional complaint, which was filed in due time, the complainant alleges violations of Art. 33 sec. 4, Art. 2 sec. 2 sentence 2, and Art. 20 sec. 2 GG. 83

[…] 84-123

B.

I.

The constitutional complaint is admissible. 124

1. This also applies insofar as the complainant claiming violations of Art. 33 sec. 4 GG and the principle of democracy. 125

It is not relevant in this respect whether and, if so, to what extent Art. 33 sec. 4 GG itself contains a subjective right (answering this question in the negative: Decisions of 126

the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 6, 376 <385>; BVerfG, Order of the First Chamber of the Second Senate of 18 February 1988 – 2 BvR 1324/87 –, juris, para. 9; leaving the question open: BVerfGE 35, 79 <147>). In any case, the decisions confirming his seclusion as lawful affect the complainant's fundamental right under Art. 2 sec. 1 GG (see II. 1). In this context, the contention is permissible that the interference cannot be justified because it violates Art. 33 sec. 4 GG. This holds true independently of whether the fundamental right under Art. 2 sec. 1 GG protects a person against any interference that is contrary to any rule of objective law (cf. on this issue Dreier, in: id., GG, vol. I, 2nd ed. 2004, Art. 2 Abs. 1, para. 44, with further references). For although Art. 33 sec. 4 GG is not intended to protect the individual interests of civil servants or those who want to become civil servants (cf. Masing, in: Dreier, GG, vol. II, 2nd ed. 2006, Art. 33, para. 61; Jachmann, in: v. Mangoldt/Klein/Starck, GG, vol. 2, 6th ed. 2010, Art. 33 Abs. 4, para. 29), it *is* intended to – *inter alia* – protect citizens whose fundamental rights are affected by the performance of sovereign functions (cf. BVerfGE 119, 247 <261>; Decisions of the Constitutional Court of Lower Saxony, *Entscheidungen des Niedersächsischen Staatsgerichtshofs* – Nds.StGHE 4, 232 <256>; Badura, in: Maunz/Dürig, *GG*, Art. 33, para. 55 <April 2010>; Dollinger/Umbach, in: Umbach/Clemens, GG, vol. 1, 2002, *Art. 33*, para. 75; Brohm, *Strukturen der Wirtschaftsverwaltung*, 1969, p. 284; Bansch, *Die Beleihung als verfassungsrechtliches Problem*, 1973, p. 68; Leisner, in: id., *Beamtentum*, 1995, p. 163 <166>; Ossenbühl, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* – VVDStRL 29 <1971>, p. 137 <162>; Badura, *Zeitschrift für Beamtenrecht* – ZBR 1996, p. 321 <325>; Jachmann/Strauß, ZBR 1999, p. 289 <296>).

The complainant's claim that the principle of democracy (Art. 20 sec. 2 GG) has been violated is equally admissible, because this claim is forwarded as a reason why, in the complainant's opinion, the interference with one of his fundamental rights is unjustified. 127

2. It does not affect the admissibility of the complaint that the complainant does not allege an interference with his general freedom of action (Art. 2 sec. 1 GG), but a violation of his fundamental right to freedom of personality under Art. 2 sec. 2 sentence 2 GG, which is not affected in the present case (see II.1.). If a complainant invokes the wrong article of the Basic Law, or no article at all, against a violation of a fundamental right that is clearly objected to, this does not make the complaint inadmissible (cf. BVerfGE 92, 158 <175>; 115, 166 <180>; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 2, 275 <277>). 128

3. Furthermore, it does not weigh against the admissibility of the constitutional complaint that the complainant does not address the organisational structure of the Hessian forensic treatment system, in particular the fact that the privatised forensic facilities are still – in part directly and in part indirectly – publicly owned. The constitutional complaint is based on the assumption that in this form, too, the privatisation is uncon- 129

stitutional and the acting hospital staff therefore did not have the right to carry out the measure affecting the complainant's fundamental right. The complainant submits that he should not have been secluded by the private operator's salaried employees. At least in the absence of any jurisprudence of the Federal Constitutional Court to the contrary (for an onus of argument that would arise from such jurisprudence cf. BVerfGE 101, 331 <346>), this is sufficient to show the possibility of an interference with fundamental rights.

II.

The constitutional complaint is unfounded. The complainant's seclusion constitutes an interference with his fundamental rights (1.). The assumption on which the contested decisions are based, i.e. that the seclusion was carried out on a legal basis compatible with the Basic Law – also with respect to the forensic hospital's organisation and the status of the acting staff – is unobjectionable (2.). 130

1. The complainant's seclusion, recognised as lawful by the regular courts, affected the complainant's general freedom of action (Art. 2 sec. 1 GG). 131

It does not, however, fall within the scope of the fundamental right to personal liberty (Art. 2 sec. 2 sentence 2 GG). The complainant's seclusion in a more confined part of the forensic facility modifies and intensifies the deprivation of liberty already imposed; it does not constitute a renewed deprivation of liberty that must comply with the special requirements of Art. 104 sec. 2 sentence 1 GG (cf. BVerfGK 2, 318 <323>; BVerfG, Order of the Second Chamber of the Second Senate of 8 July 1993 – 2 BvR 213/93 –, *Neue Juristische Wochenschrift* – NJW 1994, p. 1339). 132

2. The justification of the interference does not fail because it lacks a legal basis conforming to the Constitution. § 5 sec.3 HessMVollzG, by which the staff of privatised forensic facilities, too, is authorised to provisionally order exceptional protective measures against a patient in cases of imminent danger, is consistent with the Basic Law. 133

The requirements of Art. 33 sec. 4 GG also apply where sovereign functions are performed by private-law entities (a)). The fact that Art. 33 sec. 4 applies only to functions carried out to be carried out on a permanent basis does not exclude its applicability to the present case (b)). However, there is no violation here, due to a permissible exception from the reservation of certain functions to civil servants (c)). 134

a) Art. 33 sec. 4 GG governs not only the performance of sovereign functions by public operators, but also applies to the delegation of such functions to private operators. 135

The wording of Art. 33 sec. 4 GG does not indicate that it might be inapplicable in the latter case. A restrictive interpretation to that effect would also be incompatible with the object and purpose of the provision. The reservation of certain functions to civil servants is intended to ensure that the permanent exercise of sovereign powers 136

is subject to the special safeguards of qualified, loyal and law-abiding performance, provided by the institution, guaranteed in Art. 33 sec. 5 GG, of a professional civil service (cf. BVerfGE 9, 268 <284>; 119, 247 <260 and 261>; concerning the protective function for the persons whose fundamental rights are affected, see above B.I.1.). For this purpose, Art. 33 sec. 4 GG institutionally guarantees the professional civil service a minimum field of operation (cf. Jachmann, in: v. Mangoldt/Klein/Starck, GG, vol. 2, 6th ed. 2010, Art. 33 Abs. 4, para. 29; Battis, in: Sachs, GG, 6th ed. 2011, Art. 33, para. 45; Masing, in: Dreier, GG, vol. II, 2nd ed. 2006, Art. 33, paras. 60, 65; Kunig, in: v. Münch/Kunig, GG, vol. 2, 4th/5th ed. 2001, Art. 33, para. 39; Ossenbühl, in: VVDStRL 29 <1971>, p. 137 <161>). This regulatory purpose would not be achieved if the performance of sovereign functions could be excluded from the scope of Art. 33. sec. 4 GG by delegating it to private operators.

Accordingly, it is the prevailing opinion in both case-law and academic literature that Art. 33 sec. 4 GG is applicable regardless of whether the entity responsible for the task in question is organised under public or private law (cf. Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 57, 55 <60>; Decisions of the Constitutional Court of Lower Saxony, Nds.StGHE 4, 232 <pp. 248 et seq., for the parallel provision of Art. 60 sec. 1 of the Dutch Constitution>; Jachmann, in: v. Mangoldt/Klein/Starck, GG, vol. 2, 6th ed. 2010, Art. 33 Abs. 4, para. 38; Masing, in: Dreier, GG, vol. II, 2nd ed. 2006, Art. 33, para. 62; Kunig, in: v. Münch/Kunig, GG, vol. 2, 4th/5th ed. 2001, Art. 33, para. 42; Klüver, *Zur Beleihung des Sicherheitsgewerbes mit Aufgaben der öffentlichen Sicherheit und Ordnung*, 2006, p. 134; Freitag, *Das Beleihungsrechtsverhältnis*, 2004, p. 59; Seidel, *Privater Sachverstand und staatliche Garantenstellung im Verwaltungsrecht*, 2000, pp. 56 and 57; Nitz, *Private und öffentliche Sicherheit*, 2000, pp. 397 and 398; Burgi, in: Isensee/Kirchhof, HStR IV, § 75, para. 21, with further references; a different view is held by Bansch, *Die Beleihung als verfassungsrechtliches Problem*, 1973, pp. 66 et seq.; Scholz, NJW 1997, p. 14 <15>; Scherer, in: Festschrift für Frotscher, 2007, p. 617 <pp. 625 et seq.>; Kruis, *Zeitschrift für Rechtspolitik* – ZRP 2000, p. 1 <4>; Manssen, ZBR 1999, p. 253 <257>). 137

b) Only the exercise of sovereign powers is subject to the reservation of functions set forth in Art. 33 sec. 4 GG, and only where such powers are exercised as a permanent task. 138

The compatibility of § 5 sec. 3 HessMVollzG with Art. 33 sec. 4 GG does not follow from these restrictions, since the provision does confer sovereign powers to be exercised on a permanent basis. 139

Whatever else may be covered by the term “sovereign powers” – at any rate, such powers are exercised where public authority is exerted in such a way as to interfere, in the narrower sense (cf. Dreier, in: id., GG, vol. I, 2nd ed. 2004, Vorb. para. 124, with further references), with fundamental rights, i.e. where in the exercise of public authority, constitutionally protected liberties are directly restricted by command or co- 140

ercion. There is no need to clarify at this point the extent to which the term “sovereign powers” goes beyond this [references omitted]. § 5 sec. 3 HessMVollzG authorises the interference, in the narrow sense, with fundamental rights, and thus the exercise of sovereign powers.

The exercise of the power granted by § 5 sec. 3 HessMVollzG is also delegated to the authorised staff as a permanent task. In this respect, it is not decisive how often the authority to interfere is used in practice (cf. Nds. StGHE 4, 232 <255>). Historically, the reservation was limited to functions exercised on a permanent basis in order exclude sovereign functions that would cease to exist in the foreseeable future, such as those of food and commerce agencies (cf. Masing, in: Dreier, *GG*, vol. II, 2nd ed. 2006, *Art. 33*, para. 69; Jachmann, in: v. Mangoldt/Klein/Starck, *GG*, vol. 2, 6th ed. 2010, *Art. 33 Abs. 4*, paras. 28, 37, each with further references). In accordance with the wording, whether the exercise of authority has been delegated as a “permanent task" depends on the time span for which the functions have been delegated, not on how often the power is exercised. Whether the delegated public power is, in practice, exercised rarely or frequently, and whether or not it dominates the overall picture of the authorised employee’s activities, may, however be relevant with respect to the permissibility of an exception from the rule of the reservation of functions. 141

c) The power to provisionally order exceptional protective measures that is provided by § 5 sec. 3 HessMVollzG is […] a permissible exception to the rule of the reservation of functions of Art. 33 sec. 4 GG. 142

aa) According to Art. 33 sec. 4 GG, the exercise of sovereign powers as a permanent task is "as a rule" to be entrusted to professional public servants. This restriction allows for exceptions. 143

(1) Firstly, the relationship between rule and exception established here has a quantitative dimension. The exception may not be used to an extent that would, in quantitative terms, factually turn exceptional cases into regular ones. Any other interpretation would frustrate the purpose of Art 33 sec. 4 GG (see above II.2.a)) to institutionally secure a field of operation for the professional civil service. However, in its purely quantitative dimension, the normative power of the rule is limited, because […] a frame of reference for the necessary quantitative comparison can hardly be identified without some degree of arbitrariness (on this problem, leaving the question open, cf. Higher Regional Court of Schleswig-Holstein – SH OLG, decision of 19 October 2005 – 2-W 120/05 –, juris, para. 21; Higher Regional Court for the *Land* of North Rhine-Westphalia – OVG NW, decision of 4 November 1970 – III A 434/68 –, ZBR 1971, p. 207 <210>). 144

(2) According to the genesis, object and purpose of Art. 33 sec. 4 GG, the admissibility of exceptions is also subject to a qualitative requirement. In the debates of the Parliamentary Council, examples that were mentioned for possible exceptions concerned areas such as economic activities of the public sector, including state and municipal public services and welfare services, which were not considered as areas pri- 145

marily (if at all) falling into the imperative realm of public authorities. Furthermore, the widespread use of honorary instead of professional civil servants was meant to remain possible (cf. reports in Masing, in: Dreier, GG, vol. II, 2. ed. 2006, Art. 33, para. 13, 14; Remmert, *Private Dienstleistungen in staatlichen Verwaltungsverfahren*, 2003, pp. 405 et seq. <pp. 407 et seq.>). The possibility of exceptions was therefore not allowed for any use possible within certain quantitative limits, but with a view to areas in which, according to experience, the safeguarding purpose [of Art. 33 sec. 4 GG] does not require that the sovereign functions in question be carried out by professional civil servants, or where, due to certain functional characteristics of the task in question, reserving it to civil servants does not seem as appropriate as in the normal case.

146 According to the predominant and correct opinion, derogations from the principle of the reservation of functions must therefore be justified by an objective reason (cf., e.g., SH OLG, decision of 19 October 2005 – 2 W 120/05 –, juris, para. 22; Pieroth, in: Jarass/Pieroth, GG, 11th ed. 2011, Art. 33, para. 42; Masing, in: Dreier, GG, vol. II, 2nd ed. 2006, Art. 33, para. 70; Dollinger/Umbach, in: Umbach/Clemens, GG, vol. 1, 2002, Art. 33, para. 83; Kunig, in: v. Münch/Kunig, GG, vol. 2, 4th/5th ed. 2001, Art. 33, para. 50; Lecheler, in: *Berliner Kommentar zum Grundgesetz* – BK-GG, as at October 2000, Art. 33, para. 56; Barisch, *Die Privatisierung im deutschen Strafvollzug*, 2010, p. 134). The justifying reason must be specific and consistent with the purpose for which the Constitution allows such exceptions, taking into account experiences with established structures or, considering the purpose of the reservation of functions, the relevant specificities of the activity in question (cf. on the permissibility of an exception in case of a function that, specifically for constitutional reasons, should be carried out in a certain independence from the public authorities; BVerfGE 83, 130 <150>; for the functions of the teacher that are not predominantly of a sovereign nature BVerfGE 119, 247 <267>; more generally for the mixed functions that, taken as a whole, are not attributable to sovereign action Masing, in: Dreier, GG, vol. II, 2nd ed. 2006, Art. 33, para. 70; Jachmann, in: v. Mangoldt/Klein/Starck, GG, vol. 2, 6th ed. 2010, Art. 33 Abs. 4, para. 31 et seq.; Mösinger, *Bayerische Verwaltungsblätter* – BayVBl 2007, p. 417 <424>). Reasons that could be brought forward with respect to any other sovereign activities as well as for the task for which an exception is envisaged […] will therefore not do to justify the exception […].

147 Consequently, derogations from the reservation of functions cannot be justified by the purely fiscal argument that the performance of functions by persons who are not civil servants would […] reduce the burden on the public budget (cf. Kunig, in: v. Münch/Kunig, GG, vol. 2, 4th/5th ed. 2001, Art. 33, para. 50; Rüppel, *Privatisierung des Strafvollzugs*, 2010, p. 79; Barisch, *Die Privatisierung im deutschen Strafvollzug,* 2010, p. 134; Pilz*, Die Privatisierung des Gerichtsvollzieherwesens*, 2008, S. 77; Müller-Dietz, *Neue Kriminalpolitik* 2006, p. 11 <11>; Roth/Karpenstein, *Zeitschrift für Verbraucher-Insolvenzrecht* – ZVI 2004, p. 442 <447>; Arloth, *Zeitschrift für Strafvollzug und Straffälligenhilfe* – ZfStrVO 2002, p. 3 <5>; Gusy, *Zulässigkeit und Grenzen*

des Einsatzes privater Sicherheitsdienste im Strafvollzug, in: Stober <ed.>, *Privatisierung im Strafvollzug?*, 2001, p. 5 <24>). A blanket consideration that to employ professional civil servants produces costs that would not accrue in other organisational settings – e.g. in case of private services produced at lower wages – would be non-specific and run counter to the preference for an exercise of sovereign powers by professional civil servants expressed in Art. 33 sec. 4 GG.

148 This does not mean, however, that aspects of economic efficiency must be completely ignored (cf. SH OLG, decision of 19 October 2005 – 2 W 120/05 –, juris, para. 26; Schimpfhauser, *Das Gewaltmonopol des Staates als Grenze der Privatisierung von Staatsaufgaben*, 2009, p. 97; Klüver, *Zur Beleihung des Sicherheitsgewerbes mit Aufgaben der öffentlichen Sicherheit und Ordnung*, 2006, pp. 150 and 151; Bonk, *Juristenzeitung* – JZ 2000, p. 435 <439>). In fact, it can be taken into account whether a function that might qualify as an exception has special characteristics due to which, in the specific case, the relationship between the costs and the safeguard benefits of having permanent civil servants carry out the function is considerably more disadvantageous than might be expected for the standard case by Art. 33 sec. 4 GG (cf. BVerwGE 57, 55 <59 and 60>: “comparative appraisal”). The examples mentioned in the Parliamentary Council demonstrate that the purpose of allowing for exceptions was precisely to allow for a balancing consideration of such special reasons for which it may be inappropriate to monopolise the exercise of certain powers with professional civil servants.

149 In this line of reasoning, the requirement of an objective reason for exceptions from the reservation of functions can be interpreted as meaning that such exceptions are limited by the principle of proportionality (cf. Pieroth, in: Jarass/Pieroth, GG, 11th ed. 2011, Art. 33, para. 42; Jachmann, in: v. Mangoldt/Klein/Starck, GG, vol. 2, 6th ed. 2010, Art. 33 Abs. 4, para. 37; Roth, *Privatisierungsmöglichkeiten im geschlossenen Strafvollzug*, 2006, p. 36; Seidel, *Privater Sachverstand und staatliche Garantenstellung im Verwaltungsrecht*, 2000, p. 71; Jachmann/Strauß, ZBR 1999, p. 289 <297>; Sterzel, in: DBH-Fachverband für Soziale Arbeit, Strafrecht und Kriminalpolitik e.V. <ed.>, *Privatisierung und Hoheitlichkeit in Bewährungshilfe und Strafvollzug*, 2008, p. 52 <61>; further references in Remmert, *Private Dienstleistungen in staatlichen Verwaltungsverfahren*, 2003, p. 365). The more a certain activity affects fundamental rights, the less acceptable is the loss of institutional safeguards provided by having the activity performed by particularly qualified and law-abiding civil servants.

150 Insofar as, consequently, the permissibility of exceptions depends, among other factors, on an assessment of factual circumstances and their developments, it is primarily for the legislature to make this assessment (cf. BVerwGE 57, 55 <pp. 59 and 60>: Freitag, *Das Beleihungsrechtsverhältnis*, 2004, p. 61).

151 bb) According to these standards, there is no violation of Art. 33 sec. 4 GG in the present case.

152 (1) The permissibility of using staff who are not civil servants as nurses authorised to

provisionally order exceptional protective measures (§ 5 Abs. 3 HessMVollzG) does not follow from the fact that, compared with their caretaking activities, such interferences constitute only such a small part of their nursing task that the respective jobs as a whole do not appear to be characterised by the exercise of sovereign authority.

The implementation of detentions imposed under criminal law belongs to the core functions of sovereign power. In that respect, there is no relevant difference, be it in view of the intensity of potential interferences with fundamental rights or otherwise, between forensic treatment and the execution of prison sentences (cf. SH OLG, decision of 19 October 2005 – 2 W 120/05 –, juris, para. 32). In such a context, a person endowed with coercive powers in its interactions with inmates exercises a sovereign function even if in most cases – precisely because of these powers – he or she does not have to issue official orders or use direct force to implement them. 153

This does not, however, categorically exclude the possibility of an exception from the reservation of functions of Art. 33. sec. 4 GG in this area (cf. Nds. StGH, decision of 5 December 2008 – StGH 2/07 –, Nds.StGHE 4, 232 <pp. 247 et seq.; on the parallel provision of the Dutch Constitution>; Kammeier, in: *Festschrift für Tondorf* 2004, p. 61 <pp. 70 et seq.>; Baur, in: Kammeier, *Maßregelvollzug*, 2nd ed. 2002, para. C 15, p. 72; in the same direction SH OLG, decision of 19 October 2005 – 2 W 120/05 –, juris, para. 21 et seq.; a different view is held by Higher Regional Court of Saxony-Anhalt – OLG Sachs.-Anh., decision of 21 June 2010 – 1 Ws 851/09 –, juris, para. 42; Volckart/Grünebaum, *Maßregelvollzug*, 7th ed. 2009, paras. 508 et seq.; Grünebaum, *Recht und Psychiatrie* – R&P 2006, p. 55 <pp. 55 et seq.>; Willenbruch/ Bischoff, NJW 2006, p. 1776 <pp.1777 and 1778>). 154

(2) The formal privatisation of forensic clinics in Hesse to the effect that the use of civil servants is not mandatory at the management level (consisting of Hessian Social Welfare Agency staff), and impossible below this level, is justified by objective reasons. 155

The Hessian government has stated that the approach to privatisation that was chosen aims at maintaining the organisational cooperation between forensic and other psychiatric facilities combined today under the umbrella of the respective gGmbH; maintaining this organisational cooperation is intended to have a beneficial effect on the very quality of the forensic treatment through synergy effects and improved possibilities of staff recruitment, training and further education (see above A.V.2.). The medical director of the clinic where the complainant is detained has confirmed this assessment and, in addition, emphasised the advantages of cooperation with the non-forensic institutions resulting from the fact that most inmates had repeatedly received psychiatric treatment before they were committed to forensic treatment, and would continue to need psychiatric care after their release (see above A.V.3.). 156

In view of experiences with the use of the exception offered by Art. 33 sec. 4 GG in the forensic treatment system and in view of the institutional organisation of the privatised system under review here, the assessment that the advantages of this system 157

have not been bought at the price of noticeable disadvantages with regard to securing the indispensable qualified and law-abiding exercise of functions […] is covered by the margin of appreciation of which the legislature – and the government in the exercise of its responsibility for the contractual framework – dispose.

(aa) It must be taken into account that, long before the relevant legal amendments and the privatisation based on them, it had not been common practice any more to employ civil servants in the Hessian forensic treatment system at the management level, let alone for the nursing tasks (see above A.V.2.). This development follows a general trend in Germany, confirmed by the experts who testified at the oral hearing (cf. also Volckart/Grünebaum, *Maßregelvollzug*, 7th ed. 2009, para. 533; Grünebaum, R&P 2006, p. 55 <57>). According to the unanimous opinion not only of the Hessian government, but also of the heads of privatised forensic facilities that have been heard, this trend has not led to a deterioration in the quality of forensic treatment (see above A.V.2., 3., 4.; for results of a survey concerning not specifically Hesse and not directly the quality of forensic treatment cf. Strohm, in: Dessecker <ed.>, *Privatisierung in der Strafrechtspflege*, 2008, p. 175 <pp. 180 et seq.>). 158

Such assessments of the consequences of privatisations by individuals and bodies must certainly be interpreted with caution, given the complexity of the conditions to be considered and their evolution in the course of time, as well as the possibility of bias. It is therefore doubtful whether such assessments alone could rebut the presumption founded in Art. 33 sec. 44 GG that, particularly in the core area of sovereign powers, the fundamental rights of the persons affected by the exercise of such powers are best protected where these powers are reserved to professional civil servants. However, in the present case, they are corroborated both by the convincingly argued benefits of the cooperative organisational solution, and by the examination of the institutional framework of the privatised Hessian forensic treatment system. Subject to further monitoring of the state of affairs, the assessment that the actual institutional design provides a sufficient guarantee that the treatment system is bound by the law and managed in a legal framework that secures democratic responsibility and protection of the patients' fundamental rights appears to be justified. 159

(bb) In this respect, it is important, firstly, that the privatisation of the Hessian forensic facilities which is envisaged by statutory law and has taken place is a merely formal one. The law guarantees that, directly or indirectly, the forensic hospitals, though run in a private-law form, completely remain in direct or indirect ownership of a public entity, the Hessian Welfare Agency (§ 2 sentence 3 HessMVollzG). The operators are thus not exposed to the motives and constraints of materially private entities. Forensic treatment is therefore not exposed to forces and interests of market competition which might systemically get into conflict with the statutory objectives of forensic treatment and the right of patients, e.g. with respect to prolonged retention periods or reduction of treatment and care costs (for the significance of this aspect cf. Kammeier, in: *Festschrift für Tondorf* 2004, p. 61 <pp. 89 et seq.>; for incompatibility with human dignity of detention in a materially privatised prison, independently of ques- 160

tions of systemic false incentives, cf. Supreme Court of Israel, decision of 19 November 2009, Academic Center of Law & Business v. Minister of Finance – HCJ 2605/05 –). It makes no difference that the holding company in which the non-profit companies operating the different forensic facilities are combined is not itself organised as a non-profit GmbH.

(cc) The law makes it clear that the obligation of the public authorities to ensure that the equipment of the forensic facilities is adequate to fulfil their functions is not in any way affected by the privatisation. According to § 2 sentence 5 HessMVollzG, the Entrustment Agreement must ensure that the human, functional, structural and organisational resources required to properly provide forensic treatment are available at all times. The Entrustment Agreement includes a provision to that effect concerning the budget that is to be allocated by the competent ministry (§ 7 sec. 1 BV). It also provides against a permanent impairment of treatment due to considerable overcrowding (§ 3 sec. 4 BV), and stipulates that the staff must have the necessary expertise and must also be otherwise suitable (§ 6 sentence 1 BV). The resources, which are of vital importance for a forensic treatment in conformity with the law, and especially with the fundamental rights, are thus ensured in the same way as would be the case with facilities under direct public control. 161

In case of a strike, which cannot be ruled out if the persons entrusted with forensic treatment are not civil servants, emergency services can and must ensure that the strike will not disproportionally damage the common good, or disproportionately negatively affect third parties (cf. BVerfGE 38, 281 <307>; *Entscheidungen des Bundesgerichtshofes in Zivilsachen,* Decisions of the Federal Court of Justice in Civil Matters – BGHZ 70, 277 <pp. 280 et seq.>; Higher Labour Court of Rhineland-Palatinate – LAG Rheinland-Pfalz, decision of 14 June 2007 – 11 Sa 208/07 –, Arbeit und Recht – ArbuR 2007, S. 319 <320>; Higher Labour Court of Saxony – LAG Sachsen, decision of 2 November 2007 – 7 SaGa 19/07 –, *Neue Zeitschrift für Arbeits- und Sozialrecht* – NZA 2008, S. 59 <pp. 67 et seq.>; Hergenröder, in: Henssler/Willemsen/Kalb, Arbeitsrecht, 4th ed. 2010, Art. 9 GG, paras. 258 et seq.; Bauer, in: Dreier, GG, vol. I, 2nd ed. 2004, Art. 9, para. 99; Kissel, Arbeitskampfrecht 2002, § 43, paras. 3, 120 and 121; Reinfelder, in: Däubler, Arbeitskampfrecht, 3rd ed. 2011, § 15, para. 36). 162

(dd) The legal obligations […] of the private operators and their staff concerning the patients' fundamental rights, as well as other legal obligations, are addressed not only on paper, but also safeguarded in practice – in a way that is similar to the situation in case of a body formally organised under public law – by extensive controlling powers of both the Hessian Welfare Agency and the supervising ministry as well as by the particular status of the head of the facility (see for details 3.b)bb)(1) and (2)). The equivalence of these safeguards is not endangered by any limitations to parliamentary control. The legislature's ability to fulfil its duty to observe the consequences of the organisational modifications it adopted, and to react to any grievances by changing the framework, is in no way restricted (more details under 3.b)bb)(3)). 163

3. Thus the requirements of the principle of democracy are also met. The authorisation of salaried nurses to order provisional protective measures under § 5 sec. 3 HessMVollzG does not violate the constitutional requirements concerning the democratic legitimation of sovereign action. 164

a) aa) According to the principle of democracy (Art. 20 sec. 2 GG), any official action with the character of a decision requires democratic legitimation. It must be reducible and responsible to the will of the people (BVerfGE 77, 1 <40>; 83, 60 <72>; 93, 37 <66>; 107, 59 <87>). The nexus of attribution which must exist between the people and the exercise of governmental authority is established first and foremost by parliamentary elections, by the laws which Parliament adopts as the basis for the exercise of executive power, by parliamentary influence on government policy, and by the subordination of administration to governmental direction (cf. BVerfGE 83, 60 <72>; established jurisprudence). 165

Delegation of functions to private entities requires *inter alia* that parliamentary control remains unrestricted (cf. Constitutional Court of Bremen – BremStGH, decision of 15 January 2002 – St 1 / 01, *Neue Zeitschrift für Verwaltungsrecht* – NVwZ 2003, p. 81 <83, 85>; Lange, *Die Öffentliche Verwaltung* – DÖV 2001, p. 898 <903>). Parliamentary control is of special importance here because the delegation of sovereign functions to private entities must not result in an escape by the state from its responsibility for the tasks concerned. The legislative assertion that this responsibility is adequately met by entrusting a private entity with a certain sovereign function under a legal framework created for this purpose must prove true in reality. The state's responsibility to ensure that the functions are carried out properly therefore includes a corresponding monitoring obligation; this also applies to Parliament (cf. Schmidt-Aßmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd ed. 2004, pp. 172 et seq.; Freitag, *Das Beleihungsrechtsverhältnis*, 2004, pp. 158 and 159; Kahl, *Die Staatsaufsicht: Entstehung, Wandel und Neubestimmung unter besonderer Berücksichtigung der Aufsicht über die Gemeinden*, 2000, p. 308, 355; Spannowsky, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* – ZGR 1996, p. 400 <417>; Bauer, VVDStRL 54 <1995>, p. 243 <280>; Schuppert, in: Gusy, *Privatisierung von Staatsaufgaben*, 1998, p. 72 <83>; Britz, *Verwaltungsarchiv* – VerwArch 91 <2000>, pp. 418 <435>, with further references). The "chain of democratic legitimation" remains intact only where Parliament is not limited in carrying out this monitoring obligation. 166

bb) Legitimation via the acting staff is generated where sovereign decisions are attributable to the people via an uninterrupted chain of legitimation ("legitimation via staff" or "personal legitimacy", *personelle Legitimation*). [Editor's note: Full personal legitimacy is conferred to a public servant by parliamentary election or by way of appointment by, or with the consent of, an official enjoying personal legitimacy himself/herself, cf. BVerfGE 93, 37 <67>; 107, 59 <89>]. Regarding the content of a decision, its legitimation derives from [the decision-maker] being bound by the law, and by orders and instructions of the government ("legitimation by content", *sachlich-inhaltliche* 167

Legitimation, cf. BVerfGE 93, 37 <pp. 67 et seq.>; 107, 59 <pp. 87 and 88>). Legitimation via staff and legitimation by content are correlated in such a way that a lower degree of legitimation in one of these respects can be compensated by a higher degree in the other, as long as a certain level of legitimation as a whole is achieved (cf. BVerfGE 83, 60 <72>; 93, 37 <66 and 67>; 107, 59 <87 and 88>; SH OLG, decision of 19 October 2005 – 2 W 120/05 –, R&P 2006, p. 37, juris, para. 28). The more intensively the relevant decisions affect fundamental rights, the higher the level of legitimation must be (cf. BVerfGE 93, 37 <73>).

b) With regard to decisions that interfere with fundamental rights in the course of forensic treatment in Hesse, including the orders mentioned in § 5 sec. 3 HessMVollzG, the level of legitimation required according to the above considerations is sufficiently ensured. 168

aa) The head of the respective facility, the deputies and other doctors with managerial functions derive their personal legitimacy from the fact that they, as employees of the Hessian Welfare Agency, are appointed by a public entity (§ 2 sentence 6 HessMVollzG). Regarding the personal legitimacy of the facility's head, it must also be taken into account that the Hessian Welfare Association can appoint a new head only in agreement with the Hessian Ministry of Social Affairs (§ 2 sec. 2 sentence 1 of the Staff Secondment Agreement). 169

The other employees of the facility – except for third parties acting with the consent of the head (§ 6 sentence 3 BV) – are indeed formally appointed by the private operators as their staff. With regard to these employees, the mere fact that the operator is entrusted with the tasks of forensic treatment and insofar stands under state supervision (cf. Nds. StGHE 4, 232 <262>) does not create personal legitimacy. However, the employment of all of the private operator's staff who are responsible for making, participating in, or implementing decisions potentially affecting fundamental rights, is substantively integrated into a "chain of legitimation" due to the fact that, according to the Entrustment Agreement, the head of the facility who is himself personally legitimised has a right of proposal when a vacancy is filled in his area of responsibility (§ 6 sentence 2 BV). Admittedly, this right of proposal is not absolute; if the management intends to reject the proposal, a general shareholders' meeting of the facility's operator, who is in part directly, in part indirectly publicly controlled, must be convened (§ 6 sentence 5 BV). The management is, however, bound by the head's professional assessment; the head therefore has a veto with respect to all decisions bearing on his professional role and responsibility (§ 6 sentence 4 BV). […] 170

bb) With regard to content, the exercise of authority by the privatised operators and by the persons working for them is democratically legitimate by virtue of their being bound by law and subject to the responsible public operators' comprehensive authority to give instructions, while the management of the private operator is barred from giving instructions in the area of responsibility of the head of the respective forensic facility. 171

(1) According to § 3 HessMVollzG, the forensic treatment system, including all its affairs, is subject to supervision by the Ministry of Social Affairs […] The supervisory authority can issue general instructions to the operators of the facilities, as well as specific instructions if these do not fulfil the tasks of the forensic treatment system in a lawful manner or if they fail to follow the general instructions (sec. 2). In addition, the Hessian Social Welfare Agency as the – partly direct, partly indirect – owner of the formally privatised forensic hospitals is subject to the competent ministry's supervision (see above A.I.2.a)). The Agency itself has the extensive means provided by corporate law to control, within the limits of the respective corporate purpose, the operations the private-law limited liability companies of which it is the dominant owner (cf., e.g., Weisel, *Das Verhältnis von Privatisierung und Beleihung* 2003, pp. 225 et seq.; Schön, ZGR, 1996, p. 429 <pp. 435 et seq., pp. 444 and 445>, with further references; for the comprehensive rights of the assembly of shareholders to issue instructions cf. also § 9 sec. 3 of the Articles of Association of the *Vitos GmbH* and § 11 sec. 4 of the Articles of Association of the *Vitos Haina gGmbH*). 172

Under the general responsibility of the facility operator, who is subject to supervision, the head of the facility is responsible for all measures that need to be taken in the respective facility in order to provide forensic treatment (§ 4 sec. 2 sentence 2 BV). He has to comply with the provisions of public law and with the instructions given by the supervisory authority to the operator of the forensic facility according to § 3 sec. 3 HessMVollzG, but is not, within his area of responsibility, subject to instructions by the private operator (§ 5 sec. 1 BV). The head, in turn, has the power to instruct the employees working in the facility (§ 5 sec. 2 BV). 173

All decisions directly interfering with fundamental rights of forensic patients are thus insulated from improper influence and placed, as required, in an uninterrupted nexus of submission to responsible public authority that reaches down to the acting individuals (cf. Nds. StGHE 4, 232 <pp. 264 and 265>). 174

(2) The fact that § 3 HessMVollzG does not *explicitly* provide the means to obtain information and enforce instructions which are necessary for an effective supervision (cf. BVerfGE 17, 232 <252>; Trute, DVBl 1996, p. 950 <957>, with further references), does not make the technical supervision provided insufficient. 175

It can be left open at this point whether, when public authority is entrusted to private entities, the required supervisory powers are generally – independently of a more specific legal regulation to that effect – implicit in the entrustment, which always requires a legal basis [references omitted]. In any event, to the extent that an express legal regulation subjects the entity upon which sovereign authority is conferred to supervision by the responsible public entity without specifying the means of supervision, the only way of interpreting such a provision in conformity with the Constitution is to read it as conferring upon the supervisory authority all powers necessary to obtain information and enforce instructions. As to the legislation relevant in the present case, there is nothing to prevent this reading. § 3 sec. 2 HessMVollzG specifies that the 176

technical supervision is to be exercised via general instructions, and that specific instructions are to be used only in case of non-compliance with such instructions or legal requirements; this specification limits the authority of the supervisory agency to give specific instructions in a manner still sufficient to comply with the state's obligation to guarantee the proper functioning of public services; it preserves full power to intervene in case of violations of the law. There are no indications that the regulation might have a more restrictive purpose.

(3) The competent supervisory authorities, who are not only authorised, but also obliged to effectively supervise the private entities to which they have entrusted sovereign functions (cf. BremStGH, decision of 15 January 2002 – St 1/01 –, NVwZ 2003, p. 81 <84>; Rüppel, *Privatisierung des Strafvollzugs*, 2010, pp. 55 and 56, pp. 123 et seq.; Freitag, *Das Beleihungsrechtsverhältnis*, 2004, p. 155; Baumann, *Private Luftfahrtverwaltung*, 2002, p. 314; Schuppert, DÖV 1998, p. 831 <pp. 832 and 833>; Pitschas, DÖV 1998, p. 907 <908>; Spannowsky, ZGR 1996, p. 400 <pp. 413 et seq.>; id., DVBl 1992, p. 1072 <pp. 1073 et seq.>; Püttner, DVBl 1975, p. 353 <354>), also carry the necessary democratic legitimation (see above under a)). Neither secrecy concerning the contractual obligations (cf. Trute, DVBl 1996, p. 950 <957>; Schorkopf, NVwZ 2003, p. 1471 <pp. 1472 et seq.>) nor other restrictions on parliamentary control impair or interrupt the chain of legitimation" of which the supervisory authorities are part. 177

cc) Consequently, personal and content-related aspects of democratic legitimation in combination show a sufficient level of legitimation. 178

It must be taken into account that according to § 2 sentence 6 HessMVollzG, which, in general, reserves discretionary decisions that interfere with fundamental rights to the management staff, the private operators' staff members – who only have limited personal legitimacy – may carry out tasks interfering with fundamental rights only to the extent that their operations are defined by instructions from the managing staff in such a way as to leave no discretion; where individual margins of discretion remain, it will generally be for the management-level staff to use that discretion. 179

Insofar as, moreover, § 5 Abs. 3 HessMVollzG authorises private staff members to take provisional protective measures which are, according to the wording ("may"), discretionary, there is in fact only a narrow, if any, margin of discretion. This is due to the strict requirements for the permissibility of such measures imposed by the principle of proportionality (§ 36 Abs. 1 HessMVollzG), from which it follows that as a rule, such measures are only permitted where required. Furthermore, the application of such measures is linked to the powers of the head of the facility by the staff's legal obligation to immediately inform him (§ 5 sec. 3 sentence 2 HessMVollzG) in a manner that will produce a preventive effect. 180

c) There is no deficit in democratic legitimation with respect to decisions that do not *directly* interfere with fundamental rights, either. In this area, a high level of legitimation is required, in particular, for decisions concerning the allotment of the necessary 181

financial means, because this has an indirect bearing on the ability of forensic facilities to respect the fundamental rights of their inmates. The decisions concerning budgets and hospital rates which are important in that respect were and are to be made by the competent ministry in agreement with the Ministry of Finance, and after consultation with the operators of the facilities (see § 31 sec. 1 HessMittelstufengesetz; now § 19 sec. 1 Gesetz über den Landeswohlfahrtsverband Hessen) – in other words: unrestricted democratic accountability is guaranteed. Regarding minor decisions on the use of resources within facilities, which do not appear to be subject to systemic false incentives, the existing supervisory powers and the possibilities of exerting influence under corporate law are sufficient.

4. From all this, it follows that § 5 sec. 3 HessMVollzG does not give rise to objections concerning insufficient protection against unjustified interference with fundamental rights. 182

5. Consequently, the constitutional complaint cannot succeed […]. 183

		Mellinghoff has retired from office and is therefore unable to sign Voßkuhle
Voßkuhle	Di Fabio	
Lübbe-Wolff	Gerhardt	Landau
Huber		Hermanns

Bundesverfassungsgericht, Urteil des Zweiten Senats vom 18. Januar 2012 - 2 BvR 133/10

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