H e a d n o t e s

to the judgment of the Second Senate of 19 March 2013

– 2 BvR 2628/10 –

– 2 BvR 2883/10 –

– 2 BvR 2155/11 –

1. **The principle of individual guilt enshrined in the Basic Law (*Grundgesetz* – GG) and the related duty to ascertain the substantive truth, as well as the principle of fair trial in accordance with the rule of law, the presumption of innocence, and the court's duty to maintain neutrality make it impermissible to allow parties to the proceedings and the courts to freely determine how to ascertain the truth, how to apply the law to the facts so established, and what sentences to impose.**

2. **Plea bargains between the court and the parties to the proceedings that concern the trial's status and prospects, and that promise the accused minimum and maximum sentencing limits if he or she confesses, entail a risk that the constitutional requirements will not be fully met. Nevertheless, the legislature is not *a priori* precluded from permitting plea bargains to simplify proceedings. It must, however, take adequate precautions to ensure that the constitutional requirements continue to be met. The legislature must continually review the effectiveness of the designated safeguard mechanisms. If they prove to be incomplete or unsuitable, the legislature must make improvements and, if necessary, revise its decision to permit plea bargains in criminal proceedings.**

3. **The Plea Bargaining Act adequately ensures compliance with the constitutional requirements. The fact that the implementation of the Plea Bargaining Act falls considerably short of these requirements does not, at present, render it unconstitutional.**

4. **The provisions of the Plea Bargaining Act comprehensively govern the permissibility of plea bargains in criminal proceedings. Any "informal" agreements made outside the statutory framework are impermissible.**

FEDERAL CONSTITUTIONAL COURT

– 2 BvR 2628/10 –

– 2 BvR 2883/10 –

– 2 BvR 2155/11 –

Pronounced
on 19 March 2013
Kunert
Government Official
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I.

of Mr S…

– authorised representatives:

1) Prof. Dr. Dr. h.c. mult. Bernd Schünemann, Kaagangerstraße 22, 82279 Eching am Ammersee

2) Prof. Dr. Heinrich Amadeus Wolff,

Europa-Universität Viadrina, Große Scharmstraße 59, 15230 Frankfurt

1. directly against

a) the order of the Federal Court of Justice (*Bundesgerichtshof* – BGH)

of 8 October 2010 —1 StR 443/10 –,

b) the judgment of the Munich II Regional Court (*Landgericht*)

of 9 March 2010 – W5 KLs 70 Js 40038/07 –,

2. indirectly against

§ 257c of the Code of Criminal Procedure (*Strafprozessordnung* – StPO)

1.

– 2 BvR 2628/10 –,

II.

1) of Mr S…

2) of Mr G…

– authorised representative:

Prof. Prof. Dr. Heinrich Amadeus Wolff,
Europa-Universität Viadrina, Große Scharrnstraße 59,
15230 Frankfurt (Oder) –

1. directly against

a) the order of the Federal Court of Justice of 2 November 2010 – 1 StR 469/10 –,

b) of the Munich II Regional Court of 27 April 2010 – W5 KLs 63 Js 20750/08 –,

2. indirectly against

§ 257c StPO

– 2 BvR 2883/10 –,

III.

of Mr R…

– authorised representative: *Rechtsanwalt* Johann Schmid-Drachmann,
Kurfürstenstraße 40, 12249 Berlin –

against a) the order of the Federal Court of Justice of 29 August 2011 – 5 StR 287/11 –,

b) the judgment of the Berlin Regional Court of 15. March 2011 – (503) 2 St Js 1194/10 KLs (37/10) –

– 2 BvR 2155/11 –

the Federal Constitutional Court – Second Senate –

sitting with the Justices

President Voßkuhle,

Lübbe-Wolff,

Gerhardt,

Landau,

Huber,

Hermanns,

Müller,

Kessal-Wulf

held on the basis of the oral hearing of 7 November 2012

as follows:

A. The proceedings are joined.

B. 1. The order of the Federal Court of Justice of 8 October 2010 – 1 StR 443/10 – and the judgment of the Munich II Regional Court of 9 March 2010 – W5 KLs 70 Js 40038/07 – violate the first complainant's fundamental right under Article 2 section 1 in conjunction with Article 20 section 3 of the Basic Law (*Grundgesetz* – GG). The Federal Court of Justice's order of 8 October 2010 – 1 StR 443/10 – is reversed insofar as it relates to the first complainant. To the extent that the matter is reversed, it is remitted to the Federal Court of Justice.

2. The remainder of the first complainant's constitutional complaint is rejected as unfounded.

3. […]

C. 1. The order of the Federal Court of Justice of 2 November 2010 – 1 StR 469/10 – and the judgment of the Munich II Regional Court of 27 April 2010 – W5 KLs 63 Js 20750/08 – violate the second complainants' fundamental rights under Article 2 section 1 in conjunction with Article 20 section 3 of the Basic Law. The Federal Court of Justice's order of 2 November 2010 – 1 StR 469/10 – is reversed. The matter is remitted to the Federal Court of Justice.

4. The remainder of the second complainants' constitutional complaint is rejected as unfounded.

5. […]

D. 1. The order of the Federal Court of Justice of 29 August 2011 – 5 StR 287/11 – and the judgment of the Berlin Regional Court of 15 March 2011 – (503) 2 St Js 1194/10 KLs (37/10) – violate the third complainant's fundamental rights under Article 1 section 1 and Article 2 section 1 in conjunction with Article 20 section 3 of the Basic Law. The decisions are reversed to the extent that they concern the third complainant. The matter is insofar remitted to the Berlin Regional Court.

6. […]

Reasons:

A.

The complainants challenge their convictions for criminal offences that were entered after plea bargains between the court and the parties to the proceedings had been made. In addition, the constitutional complaints of the first and second complainant indirectly challenge § 257c StPO, which was added to the Code of Criminal Procedure by the Act on the Regulation of Plea Bargaining in Criminal Proceedings of 29 July 2009 (*Gesetz zur Regelung der Verständigung im Strafverfahren,* Federal Law Gazette, *Bundesgesetzblatt* – BGBl. I p. 2353 – hereinafter: the Plea Bargaining Act), and which has since then formed the legal basis for plea bargaining. 1

I.

1. The practice of handing down judgments based on plea bargains – which has been obvious since at least the 1970s – has emerged as an instrument for conducting criminal proceedings, even though it has no express legal basis. Plea bargains are agreements between the court, the prosecution, the defence and the accused in which the court promises the accused a certain punishment or at least a maximum limit on punishment if he or she confesses. Such plea bargains were often agreed upon outside of the oral hearing. If the defendant confessed, taking further evidence was usually dispensed with so that plea bargains resulted in proceedings being considerably shorter. Only rarely were appeals lodged against such plea bargain judgments; in fact the right to lodge an appeal was often explicitly waived […]. 2

2. The continually increasing workload of the criminal justice system is regarded as being one of the main reasons for the high practical relevance of plea bargaining […]. In addition to cases growing increasingly complex as a result of economic and technical progress as well as of globalisation, which also manifests itself in new forms of cross-border crime, the federal legislature contributes to this development by adding to the continually growing body of criminal laws that affect many areas of life. […] At the same time, criminal procedure becoming increasingly differentiated and complicated leads to continually higher requirements. […] The *Laender* have not compensated for the increased burden on the criminal justice system by providing appropriate personnel and resources; on the contrary, judicial authorities are also frequently affected by austerity measures. 3

3. […] 4

4. […] 5-7

5. The legislature has responded to the demand for legal regulation by enacting the Plea Bargaining Act. […] 8

The central provision of the statutory framework of § 257c StPO reads as follows: 9

[…] 11

In addition, provisions were introduced that expressly allow the prosecution during investigations and the court before and after the commencement of the main proceedings as well as during the oral hearing to discuss the “status of the proceedings with the parties insofar as this appears suitable to expedite the proceedings” (§§ 160b, 202a, 212, 257b StPO). The main content of such discussion must be added to the court file; the content of a discussion held during the oral hearing must be added to the record of proceedings (§ 273 sec. 1 sentence 2 StPO).

[…] 13-17

These rules are accompanied by additional new provisions that are designed to ensure that a plea bargain is transparent and reviewable by the appellate courts. § 243 sec. 4 StPO obliges the presiding judge to report during the oral proceedings whether the court and the parties to the proceedings have outside the oral hearing engaged in discussions regarding the status of the proceedings in which the possibility of a plea bargain pursuant to § 257c StPO was discussed and, if so, what the content of such discussions was. 18

[…] 19

If the judgment was preceded by a plea bargain under § 257c StPO, this fact must be included in the written reasons for the judgment (§ 267 sec. 3 sentence 5, sec. 4 sentence 2 StPO). 20

The provisions in § 273 StPO regarding the record of the oral hearing were amended as follows: 21

If a plea bargain (§ 257c) has preceded the judgment, a waiver of appellate proceedings shall not be possible (§ 302 sec. 1 sentence 2 StPO). In this case, the accused must be instructed that they are completely free to lodge an appeal (§ 35a sentence 3 StPO). 23

6. […] 24

II.

1. a) The first complainant was one of four accused. He was sentenced by the Munich II Regional Court in its judgment of 9 March 2010 to an aggregate of six years imprisonment for being part of a fraud gang that committed 259 multiple offences of commercial fraud in conjunction with aiding and abetting four intentionally illegal banking transactions. The conviction was preceded by a plea bargain. […] He was not given instructions according to § 257c sec. 5 StPO. […] 25

b) […] 26

2. a) The complainants of the second case were each sentenced by the Munich II Regional Court in its judgment of 27 April 2010 for jointly committing 27 multiple offences of fraud in conjunction with jointly carrying out one intentionally illegal banking 27

transaction; second complainant no. 1 was sentenced to an aggregate of three years and six months while second complainant no. 2 was sentenced to an aggregate of three years and four months. The conviction was preceded by a plea bargain. […] The complainants were not given instructions according to § 257c sec. 5 StPO. […]

b) […] 28

3. a) The third complainant was one of two accused sentenced by the Berlin Regional Court in its judgment of 15 March 2011 to an aggregate of three years imprisonment for two cases of aggravated robbery and property damage. His sentence was suspended subject to certain conditions. The conviction was preceded by a plea bargain. After the indictment had been read, the presiding judge instructed the accused that there were essentially three possibilities in relation to the robberies. The first was an acquittal, the second a sentence for one or two cases of aggravated robbery with a minimum term of imprisonment of three years in each case following contested proceedings to take evidence. […] The third possibility was a middle course as far as the consequences were concerned: the court informed the accused that if they decided to make confessions that dispensed with the need to take evidence, this factor could play a decisive role in the overall evaluation of whether the robberies at hand were of a minor nature and could ultimately tip the balance in their favour. The accused were told that they could expect aggregate sentences if they confessed and that the Chamber could suspend enforcement of the sentences. During an 85-minute break in proceedings the accused were given an opportunity to consider the court's proposal and to discuss it with their defence counsel. However, the presiding judge urged them to decide quickly. According to the third complainant's submissions, his defence counsel also warned him about the possibility of being "arrested in the courtroom" if he did not accept the proposed plea bargain. After the break in proceedings, the accused and the prosecution declared their agreement to the court's proposal. This was noted for the record. Following general and special instructions pursuant to § 257c sec. 4 and 5 StPO, the accused confessed by simply confirming the terms of the indictment. […] All the parties to the proceedings waived their right to call witnesses. […] The findings in the judgment are based entirely on the statements made by the accused and correspond to a large extent with the indictment. 29

b) […] 30

III.

1. The first and second complainants allege a violation of Art. 2 sec. 2 sentence 2 GG in conjunction with the right against self-incrimination and the right to fair trial as well as with the principle of individual guilt. In addition, they allege violations of Art. 1 sec. 1 in conjunction with Art. 2 sec. 1 and sec. 2 GG, Art. 19 sec. 4 GG as well as of Art. 101 sec. 1 GG due to failure by the court to provide the instructions required by § 257c sec. 5 StPO prior to making the plea bargain. As an alternative motion, they challenge the constitutionality of § 257c StPO on the basis that it violates the principle of individual guilt and the requirements of the rule of law.

[…] 32-33

2. The third complainant alleges a violation of his fundamental right to effective legal protection and to fair trial under Art. 2 sec. 1 and sec. 2 GG, Art. 19 sec. 4 GG and Art. 20 sec. 3 GG. He alleges that the Federal Court of Justice set the requirements for the admissibility of an appeal on procedural grounds too high. In addition, he claims that the Regional Court's threat to make the length of his sentence dependent on a confession constituted a violation of his right to fair trial. Finally, he alleges that the Regional Court violated its duty to investigate because it did not examine the veracity of his confession. 34

IV.

[…] 35-47

V.

The Senate appointed the expert Prof. Dr. Altenhain, who is a university professor at Heinrich Heine University, Düsseldorf, to conduct a representative, empirical study of the practice of plea bargaining in criminal proceedings. For these purposes, the expert between 17 April and 24 August 2012 interviewed a total of 190 judges who deal with criminal matters in the *Land* North Rhine-Westphalia[…]. In addition, a control group of 68 prosecutors as well as of 76 lawyers specialised in criminal law was interviewed. 48

According to estimates made by the interviewed judges, 17.9% of the criminal proceedings before local courts and 23% of the criminal proceedings before regional courts were concluded on the basis of plea bargains in the 2011 calendar year. When asked for their estimate on the percentage of cases in which plea bargaining provisions were violated, slightly more than half of the judges answered that this could well be the case in over half of all proceedings involving plea bargains. […] 54.4% of the judges stated that they did not consider it necessary to record unsuccessful attempts at concluding a plea bargain in the court records. Contrary to the requirements of § 267 sec. 3 sentence 5 StPO, 46.7% of the judges stated that they did not include in the reasons for their judgment that it had been preceded by a plea bargain. The discontinuation or limitation of the proceedings according to §§ 154, 154a StPO was very often the subject of a plea bargain; in this context, the issue of discontinuing other proceedings not included in the indictment as part of a so-called "package solution" arose frequently. […] While 61.7% of the judges answered that they always checked 49

the credibility of a confession made in the context of a plea bargain, 38.3% of them conceded that they did not always check the credibility of a confession but rather that they only checked it often, sometimes, seldom or never. […] According to information supplied by 27.4% of the judges, even in cases of plea bargains pursuant to § 257c StPO, the accused expressly waived their right to lodge an appeal – contrary to § 302 sec. 1 sentence 2 StPO. […] According to the interviewed judges, the "reduction in sentence" following a plea bargain confession usually ranges between 25% and 33.3% of the sentence that would be expected in a "contested" case.

VI.

[…] 50

VII.

[…] 51

B.

The constitutional complaints are well-founded insofar as they are directed against the challenged decisions; otherwise, they are unsuccessful. 52

I.

1. Criminal law is based on the principle of individual guilt (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 123, 267 <413>), which governs the entire area of punishment by the state. This principle has constitutional status; it is enshrined in the guarantee of human dignity and personal responsibility (Art. 1 sec. 1 GG and Art. 2 sec. 1 GG) as well as in the principle of the rule of law (cf. BVerfGE 45, 187 <259 and 260>; 86, 288 <313>; 95, 96 <140>; 120, 224 <253 and 254>; 130, 1 <26>). 53

a) […] In the field of criminal justice, Art. 1 sec. 1 GG defines the understanding of the nature of punishments and the relationship between guilt and atonement (cf. BVerfGE 95, 96 <140>) as well as the principle that guilt is a prerequisite for every punishment (cf. BVerfGE 57, 250 <275>; 80, 367 <378>; 90, 145 <173>; 123, 267 <413>). […] Punishment sanctions the offender for having violated social ethics (cf. BVerfGE 20, 323 <331>; 95, 96 <140>; 110, 1 <13>). Such a reaction by the criminal justice system would violate the guarantee of human dignity and the principle of the rule of law if individual blame had not previously been established (cf. BVerfGE 20, 323 <331>; 95, 96 <140>). 54

b) The principle of the rule of law is one of the elementary principles of the Basic Law (BVerfGE 20, 323 <331>). It safeguards the use of liberty rights in that it protects legal certainty, obliges state authorities to abide by the law and protects legitimate expectations (BVerfGE 95, 96 <130>). The principle of the rule of law is one of the guiding ideas of the Basic Law, which also encompasses the requirement of substantive justice (cf. BVerfGE 7, 89 <92>; 7, 194 <196>; 45, 187 <246>; 74, 129 <152>; 122, 55

248 <272>), and includes the principle of equality before the law as one of the fundamental axioms of justice (cf. BVerfGE 84, 90 <121>). In the field of criminal law, these concerns are also enshrined in the principle of individual guilt (BVerfGE 95, 96 <130 and 131>). According to the concept of justice, crimes must be punished fairly and punishments must match the crime (cf. BVerfGE 20, 323 <331>; 25, 269 <286>; 27, 18 <29>; 50, 205 <214 and 215>; 120, 224 <241>; established jurisprudence). […]

2. The aim of criminal proceedings is to enforce the state's right to punish in the interest of protecting the legal interests of individuals and the general public by conducting judicial proceedings whilst guaranteeing effective protection of the accused's fundamental rights. […] It is the central concern of criminal proceedings to establish the true facts of a case without which it is impossible to implement the substantive principle of individual guilt (cf. BVerfGE 57, 250 <275>; 118, 212 <231>; 122, 248 <270>; 130, 1 <26>). It is necessary to prove in accordance with the rules of procedure the fact that the perpetrator committed the offence as well as the existence of guilt (cf. BVerfGE 9, 167 <169>; 74, 358 <371>). An individual is presumed to be innocent until proven guilty (cf. BVerfGE 35, 311 <320>; 74, 358 <371>). 56

a) The government is obliged under the Constitution to ensure the functioning of the criminal justice system without which it is impossible for justice to prevail (cf. BVerfGE 33, 367 <383>; 46, 214 <222>; 122, 248 <272>; 130, 1 <26>). Protecting elementary legal interests by criminal law and enforcing this protection in proceedings are constitutional tasks (cf. BVerfGE 107, 104 <118 and 119>; 113, 29 <54>). This makes it necessary that criminals be prosecuted under the law in force, be convicted and given fair sentences, in other words, sentences commensurate with their crimes (cf. BVerfGE 33, 367 <383>; 46, 214 <222>; 122, 248 <272 and 273>; 129, 208 <260>). […] 57

b) Still, individuals charged with a criminal offence in the Basic Law's system governed by the rule of law may not be mere objects of criminal proceedings; instead they must be given the opportunity to influence the course and the result of the proceedings in order to protect their rights (cf. BVerfGE 65, 171 <174 and 175>; 66, 313 <318>). 58

aa) As an indispensable element of the conformity of criminal proceedings with the principles of the rule of law, the right to fair trial ensures that individuals charged with a criminal offence dispose of the necessary knowledge to make use of their procedural rights and opportunities to take appropriate steps in order to ward off infringements by government entities or other parties to proceedings (cf. BVerfGE 38, 105 <111>; 122, 248 <271 and 272>). […] It is primarily for the legislature to determine which specific procedural rights and assistance individuals charged with a criminal offence should be granted under the principle of fair trial and what form these rights should take. It is then up to the courts to make this determination in the individual cases, within the boundaries of the law, as part of their duty to interpret and apply the law. 59

The right to fair trial is violated only if an overall assessment of the procedural law (including its interpretation and application by the courts) shows that conclusions that are compelling under the rule of law have not been drawn, or that rights that are indispensable under the rule of law have been waived (cf. BVerfGE 57, 250 <276>; 64, 135 <145 and 146>; 122, 248 <272>). Such an overall assessment must also take into account the requirements of a functioning criminal justice system (cf. BVerfGE 47, 239 <250>; 80, 367 <375>; 122, 248 <272>). Accordingly, procedural decisions that serve the interests of an effective criminal justice system do not automatically violate the constitutional right to fair criminal trial if the procedural position of the accused or the individual charged with a criminal offence is diminished in favour of a more effective criminal justice system (BVerfGE 122, 248 <273>). When shaping the right to fair trial, one must also take into account the requirement of a speedy trial (cf. BVerfGE 41, 246 <250>; 63, 45 <68 and 69>; 122, 248 <273>) as unnecessary delays in proceedings not only endanger the effectiveness of legal protection (cf. BVerfGE 60, 253 <269>; 88, 118 <124>; 93, 1 <13>) and the purpose of a criminal sentence, but also interfere with fulfilling the constitutional duty to effectively ascertain the substantive truth since evidence can be distorted as time passes (cf. BVerfGE 57, 250 <280>; 122, 248 <273>; 130, 1 <27>).

bb) The right of individuals charged with a criminal offence to make statements or to remain silent and the prohibition on compelling an individual to incriminate him- or herself (*nemo tenetur se ipsum accusare*) are the natural manifestation of the basic approach in a state under the rule of law, which is guided by respect for human dignity (cf. BVerfGE 38, 105 <113 and 114>; 55, 144 <150 and 151>; 56, 37 <43>). The right against self-incrimination is enshrined in the principle of the rule of law and possesses constitutional status (cf. BVerfGE 38, 105 <113 and 114.>; 55, 144 <150 and 151>; 56, 37 <43>; 110, 1 <31>). […] Individuals charged with a criminal offence must be able to decide independently and without constraints whether they wish to co-operate in criminal proceedings and, if so, to what extent (cf. BVerfGE 38, 105 <113>; 56, 37 <43>). This presupposes they have been instructed as to their right to make statements or to remain silent. 60

cc) The presumption of innocence, as a specific manifestation of the principle of the rule of law, also possesses constitutional status (BVerfGE 74, 358 <371>). […] As such, the presumption of innocence – like the right of individuals charged with a criminal offence to fair trial in accordance with the rule of law – does not, however, contain specific requirements or prohibitions; instead, its implications for procedural law require shaping – depending on the circumstances of the respective case. This task primarily pertains to the legislature (BVerfGE 74, 358 <371 and 372>; cf. also BVerfGE 7, 89 <92 and 93>; 57, 250 <275 and 276>; 65, 283 <291>). 61

3. The Basic Law guarantees the parties to court proceedings the right to be heard by an independent and impartial judge who guarantees neutrality and detachment towards all the parties as well as the subject of the proceedings (cf. BVerfGE 4, 412 <416>; 21, 139 <145 and 146>; 23, 321 <325>; 82, 286 <298>; 89, 28 <36>). […] 62

Thus, the judge's role requires absolute neutrality concerning the parties to the proceedings (BVerfGE 21, 139 <146>; 103, 111 <140>). […] This requirement of neutrality and freedom from prejudice on the part of the judge is also a requirement of the rule of law (cf. BVerfGE 3, 377 <381>; 37, 57 <65>).

4. The right to a fair hearing in criminal proceedings, which is enshrined in the principle of the rule of law and in the general right to liberty includes the right of individuals charged with a criminal offence to be defended by an attorney of their own choosing in whom they have confidence (BVerfGE 66, 313 <318 and 319>; 110, 226 <253>). […] In view of the special emphasis the principle of the rule of law places on the relationship of trust between individuals charged with a criminal offence and their defence attorney (cf. BVerfGE 110, 226 <254>), it is not permissible to make procedural provisions in criminal law that – by e.g. creating improper incentives – are likely to undermine such trust and thus devalue the right to an effective defence. 63

II.

On the basis of these standards, the Court currently cannot find that the Act on the Regulation of Plea Bargaining in Criminal Proceedings is unconstitutional. The legislature allowed plea bargaining in criminal trials merely within a limited framework and added specific safeguard mechanisms to its statutory framework, which, if interpreted and applied with the required specificity, may be expected to satisfy the constitutional requirements imposed on the design of criminal proceedings (1. and 2.). The fact that court practice ignores the Plea Bargaining Act to a not insignificant extent does not at present indicate a constitutionally relevant legislative deficit (3.). The legislature is, however, required to monitor the effectiveness of the safeguards adopted to ensure criminal proceedings are in conformity with the law (4.). 64

1. The objective intent of the legislature, which is manifested in the wording and methodology of the Plea Bargaining Act (a), was not to introduce a new "consensual" class of proceedings. Instead, the Plea Bargaining Act integrates the forms of plea bargaining it allows into the existing system of criminal procedure with the aim of ensuring that criminal proceedings continue to be committed to ascertaining the substantive truth and to arriving at a just punishment that is commensurate with the crime. The legislature expressly stated that plea bargains as such may never constitute the sole basis of a judgment, but that instead the courts continue to be bound by their duty to investigate *ex officio*, which is laid down in § 244 sec. 2 StPO. Moreover, the legal evaluation of a case is not subject to a determination by the parties to a plea bargain (b). The Plea Bargaining Act comprehensively governs the permissibility of plea bargains in criminal proceedings; it thus prohibits what are euphemistically called "informal" approaches during plea bargaining (c). The legislature added specific safeguard mechanisms to its statutory framework, which guarantee that the steps leading to a plea bargain are completely transparent and that they are documented, thus enabling the exhaustive monitoring of the plea bargaining process by the public, the prosecution and the appellate courts that was deemed necessary by the legisla- 65

ture (d). Finally, by imposing a limitation on the binding effect of plea bargains, the Act guarantees the court's neutrality. It also safeguards the interests of accused individuals by imposing a duty to instruct them that the plea bargain may have limited effect (e).

a) […] 66

b) […] 67

aa) The clarification of § 257c sec. 1 sentence 2 StPO must be interpreted as a particular manifestation of the legislature's desire to integrate the possibility of plea bargaining into the existing system of criminal procedure while leaving "unaffected" the court's duty to investigate the facts *ex officio*, which is laid down in § 244 sec. 2 StPO. The wording of § 257c sec. 1 sentence 2 StPO is unambiguous; the provision prohibits any determination on the subject-matter and the scope of the court's *ex officio* duty to investigate the events on which the indictment is based. This stresses the fact that a plea bargain as such may never constitute the basis for a judgment, but that only the – adequately reasoned – conviction of the court concerning the facts it needs to establish remains decisive (cf. explanatory notes to the Federal Government's legislative draft, Bundestag document, *Drucksache des Deutschen Bundestages* – BT-Drucks 16/12310, p. 13). The legislature was aware of the particularities of a confession that is based on a plea bargain, particularly of the increased likelihood of errors that is due to the incentives and temptations the accused individuals as well as their defence counsel face and, thus, of the risk of "false confessions". For this reason, the legislature made it explicitly clear that the court is bound by its *ex officio* duty to investigate, which is laid down in § 244 sec. 2 StPO. […] 68

[…] 69-70

In light of the legislature's aim of leaving unaltered the principles of the court's *ex officio* duty to investigate and the freedom of judges to form their own convictions, § 257c sec. 1 sentence 2 StPO can only be understood as requiring that the veracity of a confession based on a plea bargain be reviewed. This review must be conducted by hearing evidence at the oral hearing while also taking into account the legislature's primary concern of making plea bargaining transparent and monitorable (cf. § 261 StPO). Naturally, this cannot mean that the review of a confession based on a plea bargain should be subject to stricter requirements than would be applied to evidence taken during a conventional oral hearing after a confession. […] However, reviewing a confession based on a plea bargain simply by comparing it with the court records is not sufficient (a different view was advanced in Decisions of the Federal Court of Justice in Criminal Matters, *Entscheidungen des Bundesgerichtshofes in Strafsachen* – BGHSt 50, 40 <49>, Schmitt adopts a similar approach in the monthly journal *Strafverteidiger-Forum* – StraFo 2012, p. 386 <387 and 388>) since this does not constitute an adequate foundation for the necessary formation of a judge's conviction that is based on the oral hearing as a whole (§ 261 StPO) and because precisely such 71

an approach would not pay due regard to the transparency required under the Plea Bargaining Act or permit effective monitoring of judgments based on plea bargains.

[…] 72

bb) According to the legislature's aim of continuing to guarantee that criminal proceedings are committed to ascertaining the truth and finding a just punishment that is commensurate with the crime, not only the actual findings of fact, but also their legal evaluation remain outside the power of determination of the parties to a plea bargain (similarly the Federal Court of Justice, *Bundesgerichtshof* – BGH, judgment of 21 June 2012 – 4 StR 623/11 –, *juris*, para. 16). The statutory embodiment of this legislative purpose is contained in § 257c sec. 2 sentence 1 StPO, which expressly limits the permissible content of a plea bargain to the "legal consequences", in the prohibition imposed by § 257c sec. 2 sentence 3 StPO on plea bargains that concern the terms of a conviction as well as in the lack of binding effect of a plea bargain in those cases where the requirements of § 257c sec. 4 sentence 1 and 2 StPO are met. 73

Taking into account the methodology as well as the spirit and intent of the statutory framework, it follows particularly from § 257c sec. 2 sentence 1 StPO that the sentencing range cannot be adjusted by a plea bargain. This holds true even in cases in which an adjustment concerns special sentencing ranges for particularly major or minor cases as opposed to the regular penalty range. […] 74

c) The provisions of the Plea Bargaining Act comprehensively govern the permissibility of plea bargains in criminal proceedings. Any "informal" agreements made outside the statutory framework are impermissible. 75

aa) It already follows from the wording of § 257c sec. 1 sentence 1 StPO, which only permits plea bargaining "in accordance with the sections below", that every "informal" agreement, deal or "gentlemen's agreement" is prohibited. This prohibition achieves the statutory provision's objective, namely to provide clear framework conditions for plea bargaining in order to establish legal certainty and to guarantee the consistent application of the law through a "comprehensive and differentiated statutory framework" (legislative draft of the Federal Government, BTDrucks 16/12310, pp. 7 and 8, 9). If the enactment were not by its very nature comprehensive, the accompanying provisions, which the legislature deems necessary for guaranteeing the transparency and openness of the events associated with plea bargains, would from the outset fail to effectively fulfil their function of enabling effective monitoring of plea bargaining. […] 76

In light of the fact that every exercise of sovereign power is strictly bound by law and justice (Art. 20 sec. 3 GG), there was no further need to expressly emphasise the legislature's intention of only permitting such plea bargains that remain within the legal boundaries. 77

bb) […] 78

cc) […] 79

d) The guarantee of transparency and documentation of the events associated with a plea bargain as a prerequisite for the effective monitoring by the public, the prosecution and the appellate courts, which is expressly deemed “necessary” by the legislature, is a key aspect of the Plea Bargaining Act’s statutory framework (cf. explanatory notes to the Federal Government’s legislative draft, BTDrucks 16/12310, pp. 1, 8 and 9). In order to achieve this objective, the legislature made provisions for specific safeguard mechanisms that define the statutory framework. 80

aa) The public nature of the oral hearing plays a central role in the legislature’s concept. By instituting the requirement that the events associated with a plea bargain be an essential part of the oral hearing, the legislature not only guarantees complete transparency; at the same time it also attaches special weight to the monitoring capacity of the oral hearing’s public nature and thus reinforces the fact that even with plea bargains the judge’s formation of a conviction remains the quintessence of the trial (§ 261 StPO). 81

(1) (a) […] 82

(b) Regarding the content of potential discussions between the court and the parties to the proceedings and regarding the duty to provide transparency and documentation, which needs to be observed in this context, the following distinctions are necessary: 83

(aa) Conversations that are related solely to organisational matters and procedural preparation for and conduct of the trial, such as arranging hearing dates, are possible. […] 84

(bb) Furthermore, conversations that may be regarded as preparation for a plea bargain and whose main content must under § 243 sec. 4 StPO be reported in the oral hearing are also possible. […] 85

(cc) It is essential that the plea bargain itself be concluded during the oral hearing where the documentation required by the legislature under § 273 sec. 1a sentence 1 StPO and thus a precondition for exhaustive monitoring is guaranteed. 86

(2) […] 87-89

(3) […] 90

bb) By making plea bargains subject to the prosecution’s consent, the legislature assigns the prosecution an active role in achieving the objective of guaranteeing effective monitoring of plea bargaining. 91

The prosecution is assigned the task of ensuring that proceedings are conducted in accordance with the principles of legality and that their results have a legal basis. Its 92

duty of objectivity (§ 160 sec. 2 StPO) makes the prosecution a guarantor for conducting proceedings in conformity with the principles of the rule of law and the principles of legality; as the representative of the indictment it guarantees the effective functioning of the criminal justice system (cf. Kühne, in: Löwe-Rosenberg, StPO, 26th ed. 2006, Introduction J para. 42). […]

In cases involving plea bargains, monitoring by the prosecution acquires particular importance because the accused and the court subject themselves to a commitment – albeit a limited commitment – as far as the possible results of the proceedings are concerned. The main purpose of including the prosecution in plea bargaining is to ensure that plea bargaining takes place in conformity with the principles of legality (cf. also Federal Court of Justice, order of 5 May 2011 –1 StR 116/11 –, *juris*, paras. 23 and 24; Federal Court of Justice, order of 12 July 2011 –1 StR 274/11 –, *Strafverteidiger* – StV 2011, pp. 645 and 646; Federal Court of Justice, judgment of 9 November 2011 – 1 StR 302/11 –, juris, para. 45). The Plea Bargaining Act is based on the expectation that the prosecution will – in accordance with its role as "guardian of the law" (cf. in this respect *Promemoria der Staats- und Justiz-Minister von Savigny und Uhden über die Einführung der Staats-Anwaltschaft im Kriminal-Prozesse* of 23 March 1846, printed in Otto, *Die Preußische Staatsanwaltschaft*, 1899, pp. 40 et seq.) – reject goings-on in connection with illegal plea bargains. The fact that the prosecuting system is hierarchically organised and includes reporting obligations, makes it possible to establish and enforce uniform standards for consenting to plea bargains and for exercising appellate rights. The prosecution is not only obliged to refuse its consent to illegal plea bargains, but is also obliged to appeal judgments that are based on such pleas (for example in cases in which it was initially unaware of the fact that the judgment was based on a plea bargain). […] 93

cc) After all, the safeguard mechanisms' aim under the statutory framework of the Plea Bargaining Act is to facilitate effective "exhaustive monitoring" by appellate courts of judgments that are based on plea bargains. 94

(1) […] 95

(2) The duty to provide transparency and documentation is intended to ensure the effectiveness of monitoring. […] 96

(3) Violations of the duty to provide transparency and documentation will, thus, in principle render plea bargains illegal in spite of the fact that they were otherwise concluded properly. If a court abides by the terms of such an illegal plea bargain, there will frequently be the possibility that the judgment was based on this violation of the law if for no other reason than that the plea bargain upon which the judgment is based was for its part tainted by a violation of the law. […] 97

(4) If the parties to the proceedings do not enter into a plea bargain and in the absence of a corresponding report, which is required under § 243 sec. 4 sentence 1 StPO (cf. Federal Court of Justice, order of 5 October 2010 –3 StR 287/10 –, *wistra* 98

2011, pp. 72 and 73 = *StV* 2011, pp. 72 and 73), or of a note in the record pursuant to § 273 sec. 1a sentence 3 StPO stating that no agreement was negotiated, it will, according to the spirit and purpose of the statute's protective concept, also in principle not be possible to exclude the possibility that the judgment was based on a violation of § 257c StPO (disputed; in the final analysis, the same view as here is taken by Kirsch, *StraFo* 2010, p. 96 <100>; Schlothauer, *StV* 2011, p. 205 <206>; a similar tendency is shown by Schmitt, *StraFo* 2012, p. 386 <390>; a diverging opinion is held by the Federal Court of Justice, order of 20 October 2010 –1 StR 400/10 –, *Neue Zeitschrift für Strafrecht* – NStZ 2011, p. 592 <593> on § 243 sec. 4 StPO), unless there is the exceptional certainty that no discussions occurred that examined the possibility of a plea bargain (cf. OLG Celle, order of 30 August 2011 – 32 Ss 87/11 –, *juris*, para. 11, 13). […]

e) For the purpose of permitting accused individuals to make autonomous decisions regarding the risks associated with participating in a plea bargain, […] § 257c sec. 5 StPO provides that prior to concluding the plea bargain they must be instructed as to the prerequisites and consequences of the court deviating from the promised outcome. By including this provision, the legislature sought to secure the fairness of the plea bargaining procedure and […] to broadly protect the accused's autonomy. The prospect of being able to affect the outcome of the proceedings by concluding a plea bargain to attain a promise of a maximum limit on their sentence that is binding on the court, exposes accused individuals to particular incentives and temptations. The ensuing danger to the right against self-incrimination is *inter alia* countered by the duty to provide instructions under § 257c sec. 5 StPO. In cases of violations of the duty to provide instructions, the appellate court will regularly have to assume that the confession and, thus, the judgment as well, were based on this violation. It will be able to exclude the possibility of the confession and, thus, the judgment as well, being based on such a violation only if it establishes that the accused would also have confessed if proper instructions had been given (cf. also BGHSt 38, 214 <226 and 227> on a violation of § 136 sec. 1 sentence 2 StPO, the significance of which for the right against self-incrimination is similar to the one of the violation at hand). This is the only way to guarantee that the protective function of the duty to give instructions has the intended effect. 99

2. The Plea Bargaining Act is compatible with the Basic Law. The Basic Law does not in principle preclude plea bargaining in criminal proceedings (a). The legislature took adequate precautions to guarantee that plea bargains meet the constitutional requirements on criminal proceedings (b). 100

a) Plea bargains in criminal proceedings affect the constitutional requirements on criminal proceedings (aa). However, the legislature is not precluded from permitting plea bargains as long as it adopts the necessary precautions to ensure that they be constitutional (bb). 101

aa) The principle of individual guilt must be applied in criminal proceedings. Such 102

proceedings are not permitted to depart from their set objective of effectively ascertaining the substantive truth and ensuring that the factual and legal situation is evaluated by an independent and neutral court. The court's lack of personal interest in the outcome of the proceedings combined with the fact that it is bound by law and justice (Art. 20 sec. 3 GG) form the foundation for effectively ascertaining the true factual situation and for properly applying substantive law to the established facts. In this context, in individual cases as well, the requirement that punishment be commensurate with the crime takes into account the principle of equality before the law, which is one of the fundamental axioms of justice. The accused's degree of guilt legitimises differentiating between legal consequences and, thus, also guarantees the equal treatment of accused individuals that is required in criminal proceedings.

(1) The constitutional principle of individual guilt is not at the legislature's disposal (cf. BVerfGE 123, 267 <413>). […] 103

(2) The court's duty to effectively ascertain the truth, which is an essential precondition for applying the principle of individual guilt, cannot be overridden by the legislature. […] 104

(3) […] 105

On the other hand, the Basic Law does not preclude non-binding discussions between the court and the parties to the proceedings that concern the evaluation of the factual and legal situation. Proceedings may benefit from being conducted in an open and communicative fashion. Such techniques have, thus, become essential to proper trial management. Accordingly, no constitutional reservations exist concerning the conduct of legal discussions or providing points of information on the preliminary evaluation of the body of evidence or on the mitigating effect a confession may have on punishment. Conducting proceedings in such a communicative manner does not call into question the court's impartiality as long as the methods used remain transparent and do not exclude parties to the proceedings. 106

bb) Plea bargains between the court and the parties to the proceedings that concern the status and the prospects of the proceedings, and that promise the accused maximum and minimum sentencing limits if he or she confesses, entail a risk that the constitutional requirements will not be completely met. Nevertheless, in light of its legislative capacity, the legislature is not a priori precluded from permitting plea bargains to simplify proceedings. The legislature must, however, take adequate precautions to ensure that the constitutional requirements continue to be met. The legislature must continually review the effectiveness of the designated safeguard mechanisms. If they prove to be incomplete or unsuitable, the legislature must make improvements and, if necessary, revise its decision to permit plea bargains in criminal proceedings (cf. BVerfGE 110, 141 <158> with further references). 107

b) The Plea Bargaining Act adequately ensures compliance with the constitutional requirements. 108

aa) […] The court may not use plea bargains to replace the legislature's evaluation with its own. […] 109

bb) The Plea Bargaining Act also protects the principle of individual guilt insofar as it precludes reducing the length of proceedings at the expense of ascertaining the truth. […] 110

cc) In addition, by regulating cases in which the court ceases to be bound by a plea bargain (§ 257c sec. 4 StPO), the legislature gave distinct shape to the consequences for the boundaries on judicial promises that derive from the court's duty to ascertain the substantive truth and its duty of neutrality as well as from the presumption of innocence and the principle of individual guilt. […] 111

dd) The Plea Bargaining Act also satisfies the requirement that accused individuals must be able to autonomously decide whether they wish to waive their right against self-incrimination, agree to a plea bargain and by confessing waive their right to remain silent. This requirement is primarily enshrined in the right to fair trial. […] 112

[…] 113

ee) The Plea Bargaining Act takes extensive precautions to ensure that the events leading up to a plea bargain are included in the oral hearing and documented […]. 114

ff) What is more, the legislature reached a clear decision that judgments in criminal proceedings may not be based on "informal" agreements. […] 115

3. The fact that the implementation of the Plea Bargaining Act falls considerably short of these requirements does not, at present, render it unconstitutional. 116

a) It is true that the representative empirical study by Prof. Dr. Altenhain and the witnesses heard at the oral hearing as well as written opinions on the constitutional complaints and the available case-law of the Federal Court of Justice and higher regional courts show that the courts, prosecution and defence ignore the legislative requirements in a large number of cases and that the appellate courts do not always adequately fulfil their task of monitoring how plea bargaining is effected in practice. These empirical findings do not, however, suffice to conclude that the safeguard mechanisms inherent in the Plea Bargaining Act fail to guarantee the fulfilment of the constitutional requirements in a manner that would lead to the act being unconstitutional. 117

b) A statutory provision that is violated by legal practice in an unconstitutional manner violates the Basic Law itself only if the unconstitutional practice may be attributed to the provision itself, i.e. if there is an intrinsic legislative deficit that leads to this practice. […] The statutory framework would only be unconstitutional if the envisaged protection mechanisms were so fragmentary or otherwise inadequate that they promoted the practice of "informal" agreements in violation of the Basic Law, i.e. if the deficit in implementation were determined by the Plea Bargain Act's structure. 118

c) The Court does not at present find that a legislative deficit exists. The reasons for the considerable shortcomings in the implementation of the statutory provision, which 119

are by no means limited to individual cases, are multi-layered and cannot on the basis of current knowledge be attributed to a protection gap in the statutory provision. The statutory provision was applied in circumstances that reflected increasingly complex scenarios, a continual expansion of substantive criminal law and ever more differentiated requirements placed on the conduct of criminal proceedings. It was faced with the difficult task of bringing back on track a practice that had developed over three decades and had long since become established. In comparison to the long lasting and – as is evident from the developments in the Federal Court of Justice's case-law – continually growing practice of entering into agreements that are at least not governed by law, the current period of the statutory safeguard mechanisms being applied has been very short. This would indicate that the implementation of the strictly defined and highly formalised form of plea bargaining provided for by the statutory framework has not yet been completed and that particularly the high significance of the safeguard mechanisms has not yet been fully realised in practice. […] In addition, there is the not infrequent evaluation of the safeguard mechanisms as "unsuitable for practice" which fails to acknowledge that securing the constitutional requirements is a central task of the law of criminal procedure. This evaluation ignores the fact that in the Basic Law's state under the rule of law practice follows the law and the law does not follow practice.

d) […] 120

4. Even if it is currently not possible to conclude from the deficits in the implementation of the Plea Bargaining Act that the statutory provision is unconstitutional, it is nonetheless necessary that the legislature keep a close eye on future developments. If the judicial practice of ignoring the statutory provisions to a significant extent continues and if the substantive and procedural precautions contained in the Plea Bargaining Act are insufficient for the purposes of remedying this deficit and are, thus, insufficient for the purposes of satisfying the constitutional requirements on plea bargains in criminal proceedings, the legislature must take reasonable steps to counteract this undesirable development (cf. on the legislature's duties to monitor and remedy BVerfGE 25, 1 <12 and 13> 49, 89 <130>; 95, 267 <314>; 110, 141 <158, 166>; order of the Third Chamber of the First Senate of 24 November 2009 – 1 BvR 213/08 –, *Gewerblicher Rechtsschutz und Urheberrecht* – GRUR 2010, p. 332 <334>; order of the Second Chamber of the First Senate of 27 January 2011 – 1 BvR 3222/09 –, *Neue Juristische Wochenschrift* – NJW 2011, p. 1578 <1582>). Should it fail to do so, an unconstitutional situation would arise. 121

5. […] 122

III.

The decisions by the regular courts that were challenged by the constitutional complaints are incompatible with the Basic Law's requirements for plea bargaining in criminal proceedings. 123

1. The decisions of the Munich II Regional Court and the Federal Court of Justice that were challenged by the first and second complainants violate the complainants' right to fair trial in accordance with the rule of law and infringe their right against self-incrimination (Art. 2 sec. 1 in conjunction with Art. 20 sec. 3 GG). […] 124

a) In general, a plea bargain can only be reconciled with the principle of fair trial if, before it being concluded, the accused has been instructed on the plea bargain's limited binding effect on the court. […] 125

It is true that accused individuals must decide whether they will testify irrespective of the possibility of concluding a plea bargain. However, the prospect of a plea bargain creates a procedural situation in which accused individuals are put in a position that allows them to specifically influence the outcome of proceedings through their conduct. Unlike in the case of proceedings conducted in the conventional way, they can through their confession obtain a promise that in principle binds the court regarding a maximum limit on their sentence and are, thus, able to obtain certainty concerning the outcome of the proceedings. Accordingly, from the perspective of accused individuals, retaining the right against self-incrimination only comes at the cost of relinquishing the possibility to obtain a plea bargain that is binding on the court and, thus, an (ostensibly) fixed maximum limit on their sentence. The expectation that the court will be bound by such an agreement is, thus, a motivation and basis for their decision whether or not to co-operate in the proceedings; thus, they are exposed to considerably stronger incentives and temptations than would be the case e.g. in the situations covered by § 136 sec. 1 or § 243 sec. 5 sentence 1 StPO – as in these cases there can be no expectation of a fixed maximum limit on sentencing. Consequently, accused individuals must know that the court's commitment is not absolute and that the commitment can cease to be binding under certain circumstances – of which they must also have knowledge. Only if this is the case, will it be possible for them to independently assess the consequences and the risks associated with their co-operation in a plea bargain. The duty to give instructions enshrined in § 257c sec. 5 StPO is therefore not simply a procedural provision, but rather a central guarantee of the principle of fair trial and the right against self-incrimination in a state under the rule of law. 126

b) The decisions of the Federal Court of Justice ignore this special function of § 257c sec. 5 StPO. A plea bargain that is not preceded by court instructions in accordance with this provision violates the accused's right to fair trial and right against self-incrimination. If the plea bargain that is concluded on the basis of a violation of the duty to instruct continues to exist and if the confession based on the plea bargain is incorporated in the judgment, the judgment will be based on the violation of a fundamental right, unless one can exclude the inaccurate instruction as the reason for the confession because the accused would have confessed even if correctly instructed. The appellate courts need to make specific determinations on this matter. […] 127

2. The decisions of the Berlin Regional Court and the Federal Court of Justice that were challenged by the third complainant violate the complainant's rights under Art. 1 128

sec. 1 and Art. 2 sec. 1 in conjunction with Art. 20 sec. 3 GG.

a) The judgment of the Berlin Regional Court violates the constitutional principle of individual guilt and the duty contained herein to effectively ascertain the substantive truth if for no other reason than that the Regional Court accepted as a basis for a conviction a meaningless, formal confession, which was submitted while the accused was otherwise refusing to answer questions. Apart from a question concerning the possession of a service weapon and if it was loaded, which the accused eventually answered, the Regional Court did this without taking additional evidence at the oral hearing to verify the confession's content by having the accused provide specific information. A confession that merely refers to the indictment is unsuitable as the basis for a plea bargain if for no other reason than that it provides no basis for reviewing its credibility (§ 257c sec. 1 sentence 2 in conjunction with § 244 sec. 2 StPO). In addition, the challenged judgment is based on a plea bargain that determined the content of the conviction in an impermissible way as it made a confession "on the terms of the indictment" subject to a waiver of motions to admit evidence "on the issue of guilt" and, in addition, adjusted the penalty range. Consequently, the judgment amounts to "bargain justice" prohibited by the Basic Law. 129

Moreover, this "bargain justice" is based on an interference with the complainant's right against self-incrimination that no longer is constitutionally acceptable. […] What is decisive is the discrepancy between the promised maximum sentencing limit in case a plea bargain is reached on the one hand and the length of the sentence that may be expected if the accused is convicted in conventionally conducted proceedings on the other hand. This discrepancy cannot be justified in light of the requirement that punishment be commensurate with the crime. The question of when the line to an unconstitutional infringement of the right against self-incrimination is crossed is not something that can be calculated mathematically. In the present case, this line was, however, clearly crossed since the court not only promised an excessively low maximum sentence but also assured the accused the sentence would be suspended. This second assurance was only possible because the range of applicable penalties was also changed to that, which applies to minor cases (§ 250 sec. 3 StGB). 130

b) […] 131

C.

[…] 132

Voßkuhle Lübbe-Wolff Gerhardt

Landau Huber Hermanns

Müller Kessal-Wulf

Bundesverfassungsgericht, Urteil des Zweiten Senats vom 19. März 2013 - 2 BvR 2628/10, 2 BvR 2155/11, 2 BvR 2883/10

Zitiervorschlag BVerfG, Urteil des Zweiten Senats vom 19. März 2013 - 2 BvR 2628/10, 2 BvR 2155/11, 2 BvR 2883/10 - Rn. (1 - 132), http://www.bverfg.de/e/rs20130319_2bvr262810en.html

ECLI ECLI:DE:BVerfG:2013:rs20130319.2bvr262810