

## Headnotes

to the Order of the First Senate of 27 October 2016

– 1 BvR 458/10 –

**1. The recognition of Good Friday as a public holiday as well as its further specification as a day that enjoys special protection of silence, and the resulting limiting effects on fundamental rights can generally be justified on the basis of the constitutional rules governing Sundays and public holidays under Article 140 of the Basic Law (*Grundgesetz* – GG) in conjunction with Article 139 of the Weimar Constitution (*Weimarer Reichsverfassung* – WRV) as they do not prescribe anyone's personal attitude but rather create an external, silent atmosphere.**

**2. In constellations in which an event that conflicts with the statutory protection of silence is covered by the scope of protection of the freedom of religion and belief (Article 4(1) and 4(2) GG) or the freedom of assembly (Article 8(1) GG), the legislature must provide for statutory exceptions according to which it is possible to grant an exemption from duties to refrain from certain activities, which have been set out to protect silence.**



**IN THE NAME OF THE PEOPLE**

**In the proceedings**

**on**

**the constitutional complaint**

of the Union for Freedom of Spirit (*Bund für Geistesfreiheit München*),  
recognised body under public law (*Körperschaft des öffentlichen Rechts*),  
represented by its chairman Mr. T(...),

– authorised representatives: Rechtsanwälte Wächtler und Kollegen,  
Rottmannstraße 11 a, 80333 München -

1. directly against
  - a) the order of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 21 December 2009 – BVerwG 6 B 35.09 –,
  - b) the judgment of the Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof*) of 7 April 2009 – 10 BV 08.1494 –,
  - c) the judgment of the Bavarian Administrative Court Munich (*Bayerisches Verwaltungsgericht München*) of 12 March 2008 – M 18 K 07.2274 –,
  - d) the ruling of the Government of Upper Bavaria (*Regierung von Oberbayern*) of 23 May 2007 – 10-2172-2-07 – upon the protest filed by the complainant,
  - e) the ruling of the federal state capital Munich (*Landeshauptstadt München*) of 3 April 2007 – KVR-I/321AG2 –,
2. indirectly against

Article 3 (2) first and third sentence, Article 5 second sub-sentence of the Bavarian Act on the Protection of Sundays and Public Holidays (*Bayerisches Gesetz über den Schutz der Sonn- und Feiertage* – FTG) of 1 January 1983 (Collection of Bavarian *Land* Law, *Bayerische Rechtssammlung* – BayRS II p. 172), last amended by the Act of 12 April 2016 (Bavarian Law and Regulation Gazette, *Bayerisches Gesetzes- und Verordnungsblatt* – BayGVBl p. 50)

the Federal Constitutional Court – First Senate –  
with the participation of Justices

Vice-President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on 27 October 2016:

1. **Article 5 second sub-sentence of the Bavarian Act on the Protection of Sundays and Public Holidays (*Bayerisches Gesetz über den Schutz der Sonn- und Feiertage* - FTG) is incompatible with Article 4(1) and (2) as well as Article 8(1) of the Basic Law, and void.**
2. a) **The judgment of the Bavarian Higher Administrative Court of 7 April 2009 – 10 BV 08.1494 –, the judgment of the Bavarian Administrative Court Munich of 12 March 2008 – M 18 K 07.2274 –, the ruling of the Government of Upper Bavaria of 23 May 2007 – 10-2172-2-07 – upon the protest filed by the complainant, and the ruling of the federal state capital Munich of 3 April 2007 – KVR-I/321AG2 – violate the complainant’s fundamental rights under Article 4(1) and (2) as well as under Article 8(1) of the Basic Law.**  
  
b) **The judgment of the Bavarian Higher Administrative Court of 7 April 2009 – 10 BV 08.1494 – is reversed. The matter is remanded to the Bavarian Higher Administrative Court. Thus, the order of the Federal Administrative Court of 21 December 2009 – BVerwG 6 B 35.09 – has become obsolete.**

**3. The Free State of Bavaria shall reimburse the complainant for its necessary expenses.**

**Reasons:**

**A.**

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The constitutional complaint concerns the protection of Good Friday as a silent public holiday under the Bavarian Public Holiday Act (*Bayerisches Feiertagsgesetz – FTG*).

[Excerpt from the press release no. 87/2016 of 30 November 2016]

As an ideological community, the complainant is a recognised body under public law (*Körperschaft des öffentlichen Rechts*). According to its programme, it defines itself as a community that represents the interests and rights of non-denominational persons on the basis of Enlightenment and secular humanism. The complainant advocates, *inter alia*, a strict separation of church and state. The complainant announced a ticketed event in a theatre in Munich to take place on Good Friday. The event's motto was "Religion-free Zone Munich 2007"; in addition to the prohibited part it comprised film screenings ("Atheist Film Night"/ "Free Spirits' Cinema"), a chocolate buffet as well as explanations on the interests and presentation of the aims of the ideological community. The party that was planned to take place towards the end of the event – the "*Heidenspaß-Party*<sup>1</sup>" – and which the complainant had announced as a "Dance for Free Spirits" to be accompanied by a rock band, was prohibited.

According to the public authority, the last part of the event would have violated the provisions of the FTG. The FTG determines that Good Friday is a "silent day" which is subject to prohibitions going beyond the general protection of Sundays and public holidays; accordingly, public entertainment events that do not preserve the day's solemn character as well as any kind of musical performances taking place in venues licensed to serve alcohol are prohibited on Good Friday. Unlike in the case of the other "silent days" the FTG determines that an exemption from the prohibition to perform such activities is ruled out for Good Fridays (Art. 5 second sub-sentence FTG). The complainant's legal remedies initiated against this prohibition were not successful. With the constitutional complaint, the complainant claims in particular that its rights to freedom of belief and freedom of assembly have been violated (Art. 4(1) and (2), Art. 8 GG).

[End of Excerpt]

[...]

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1. *translator's note: literally: "heathen-fun party" according to a common colloquial usage of the term "Heiden-" as a prefix denoting an emphasised degree, but which is here also a play on words*

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	<b>II.</b>	
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	<b>III.</b>	
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With its constitutional complaint, the complainant challenges the initial prohibition, the ruling on the protest filed by the complainant, the judgment of the Administrative Court, the judgment of the Higher Administrative Court as well as the order of the Federal Administrative Court on the complaint against the non-admission of the appeal on points of law (*Nichtzulassungsbeschwerde*), and claims that its fundamental rights under Art. 4(1) and (2) of the Basic Law (*Grundgesetz – GG*, Art. 3 and Art. 33(3) GG in conjunction with Art. 140 GG and Art. 137 of the Weimar Constitution (*Weimarer Reichsverfassung – WRV*) as well as Art. 8(1) and Art. 20(3) GG have been violated.

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#### **IV.**

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#### **B.**

The admissible constitutional complaint is well-founded.		53
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The provisions of the Bavarian Public Holiday Act on which the challenged decisions are based are constitutional as far as the legislature recognises Good Friday as a public holiday and provides it with a qualified protection of rest and silence covering the day in its entirety (Art. 3(2) first and third sentence FTG). However, the absolute exclusion of exemptions (*Befreiungsfestigkeit*) according to which exemptions – even exemptions for important reasons – from the prohibitions of activities are barred from the outset (Art. 5 second sub-sentence FTG) proves to be disproportionate. It does not do justice to the significance and scope of the fundamental rights, in particular of the freedom of belief (Art. 4(1) and (2) GG) and the freedom of assembly (Art. 8(1) GG).

The challenged decisions of the authorities and the trial courts are based on this lack of an exemption possibility and violate the complainant's fundamental rights under Art. 4(1) and (2) GG as well as under Art. 8(1) GG. The prohibited part of the event organised by the complainant was covered by these fundamental rights' scope of protection. An understanding of the given circumstances, assessed in conformity with the Constitution, should have led to an exceptional permission of the prohibited part of the event.

## I.

Under constitutional law, the recognition of Good Friday as a public holiday as well as its further specification as a day that enjoys a special external, silent atmosphere is not objectionable. Admittedly, the prohibition of public entertainment events which do not uphold the day's solemn character and of musical performances taking place in venues licensed to serve alcohol (Art. 3(2) first and third sentence FTG) interferes with the general freedom of action (Art. 2(1) GG) and potentially, under certain conditions, with the freedom of occupation (Art. 12(1) GG) and the freedom of arts (Art. 5(3) first sentence GG). In special constellations, it can [...] also affect the freedom of belief (Art. 4(1) and (2) GG) and the freedom of assembly (Art. 8(1) GG) that are protected as fundamental rights (below 1). However, such interferences can generally be justified according to the constitutional provision of Art. 139 WRV (in conjunction with Art. 140 GG). It provides for the legislature's power to not only recognise holidays as public ones, but also to closely determine the nature and extent of their constitutionally stated purpose of being days of rest from work and spiritual edification (below 2).

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1. The recognition of Good Friday as a public holiday and its specification as a silent day, first of all, interferes with the general freedom of action (Art. 2(1) GG) as well as the freedom of occupation (Art. 12(1) GG) because the typical weekday bustle generally has to rest on that day – just like on Sundays (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 125, 39 <85>). The prohibition of certain public entertainment events and musical performances taking place in venues licensed to serve alcohol (Art. 3(2) first and third sentence FTG) also affects the freedom of all those who want to participate in or organise such events on Good Friday. Thereby, the freedom of occupation of professional event organisers, owners of venues licensed to serve alcohol as well as professional musicians can be affected. Artists who perform as entertainers or musicians can potentially also be affected in terms of their freedom of arts (Art. 5(3) first sentence GG). In special constellations – as the case at hand indicates – also the freedom of assembly (Art. 8(1) GG) as well as the freedom of faith and to profess a belief, and specifically its manifestation as freedom of ideological belief (Art. 4(1) and (2) GG), can be affected.

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The fundamental rights are partly subject to the requirement that the practice of an occupation or a profession be regulated by or pursuant to a law (Art. 12(1) GG), partly they contain an explicit reservation that allows for a statutory restriction (Art. 2(1) GG). If this is not the case, restrictions are permitted only on the basis of the Constitution's immanent limitations. This concerns freedom of arts, as well as particularly freedom of ideological belief and the freedom of assemblies that do not take place outdoors (Art. 5(3) first sentence, Art. 4 (1) and (2), Art. 8(1) GG).

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2. These interferences are generally justifiable on the basis of the constitutionally guaranteed protection of Sundays and public holidays as well as the legislature's constitutional authority to recognise public holidays and to determine both nature and

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extent of their protection (Art. 140 GG in conjunction with Art. 139 WRV).

a) According to Art. 139 WRV (in conjunction with Art. 140 GG) Sundays and holidays recognised by the state shall remain protected by law as days of rest from work and spiritual edification. This provision sets out an objective statutory protection mandate which calls on the state to guarantee public holidays. On these days, bustle in the form of gainful labour, in particular the exercise of dependent employment, should generally be suspended in a temporally coordinated manner, so that individuals can seize the opportunity to spend such days either alone or with others without being hampered by obligations and demands of working days. Hence, the protection relates to the generally perceivable character of the day as a day of rest from work. The social significance of the protection of Sundays and public holidays in the secular sphere essentially results from the common rhythm of social life (cf. BVerfGE 125, 39 <82>). In that respect, within the secularised society and state order the provision primarily pursues the mundane purposes of individual rest, recreation and distraction. At the same time, Art. 140 GG in conjunction with Art. 139 WRV aims at the possibility of spiritual edification which shall be equally granted to all people irrespective of any religious ties (cf. BVerfGE 111, 10 <51>; 125, 39 <86>). The provision also guarantees that fundamental rights that serve the personal development can be exercised (cf. BVerfGE 125, 39 <80>).

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According to its genesis, its systematic embedding within the church articles of the Weimar Constitution which the Basic Law has incorporated, and its regulatory purpose, the provision also has a Christian religious meaning in addition to this secular-social one (cf. BVerfGE 125, 39 <80 and 81>). Being tied to holidays that stem from Christian tradition, the provision also aims at providing opportunities to practise one's religion and at providing believers with the means to shape the overall character of these days in a way that conforms to their beliefs.

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By qualifying the protection of Sundays and public holidays in Art. 139 WRV as protection of a statutory nature, the Constitution guarantees the institution of Sundays and public holidays directly. Hence, the selection as well as the nature and extent of the protection are entrusted to further statutory specifications. In that regard, the legislature is free to reflect interests other than the protection of rest from work and spiritual edification within the provisions. The legislature is called on to strike a balance between the protection of public holidays (Art. 140 GG in conjunction with Art. 139 WRV), on the one hand, and other fundamental rights, namely Art. 12(1) GG, but also Art. 2(1) GG, on the other hand (cf. BVerfGE 111, 10 <50>; 125, 39 <85>). In principle, within the scope of its leeway to design, the legislature is therefore able to provide certain holidays with a special degree of protection if it considers a specific protection in favour of the holiday's character to be necessary or simply reasonable.

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b) According to these principles, declaring Good Friday a public holiday is not objectionable under constitutional law. It can be based on the legislative power under Art. 139 WRV (in conjunction with Art. 140 GG) and does not violate neutrality or

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equality requirements either.

aa) Art. 139 WRV makes clear that the officially recognised holidays shall “remain” protected by law. Hence, the selection is generally left to the legislature; however, it has to maintain an inviolable core of public holidays (cf. BVerfGE 111, 10 <50>). [...] In that respect, the legislature may also uphold holidays that have evolved throughout history. In its decision regarding the Berlin Shop Opening Hours Act, the Senate already emphasised that, in Art. 140 GG in conjunction with Art. 139 WRV, the Constitution itself [...] delivers an appreciation with regard to holidays which is also rooted in and, in terms of its calendrical approach, linked to the occidental Christian tradition (cf. BVerfGE 125, 39 <84>). 64

bb) In its case-law, the Federal Constitutional Court developed, by way of interpretation and on the basis of a synopsis of different constitutional provisions, the state’s general duty to remain ideologically and religiously neutral (cf. BVerfGE 138, 296 <238 and 239> with further references to established case-law). This duty is not an obstacle to selecting Good Friday as an officially recognised public holiday. In fact, its recognition is based on Art. 139 WRV and, thus, on the Constitution itself. It does not prove to be a privilege violating neutrality requirements. 65

According to Art. 139 WRV the legislature, within its leeway to design, is not barred from recognising exactly those days as public holidays that are important to large parts of the population due to traditions or due to cultural, ideological or religious imprint. [...] The fact that the legislature [...] takes account of the historically grown significance of Christianity, which continues to be of special significance for large parts of the population does not amount to an unconstitutional privilege for a “majority religion”, but rather reflects history’s influential effects. In any case, Art. 139 WRV does not allow the legislature to identify with specific religions or denominations when determining public holidays. [...] Unreasonable burdens must not be imposed on those parts of the population that have a different cultural and ideological or religious background, as nobody may be forced to mark this day in accordance with specific religious traditions or even just for the purpose of contemplation. The statutory duties to refrain from certain activities may merely serve the purpose of creating an external atmosphere of rest and spiritual edification. 66

The fact that the Bavarian legislature deciding on public holidays determined Good Friday to be an officially recognised public holiday does not prove to be evidently deficient. In fact, it lies within the legislature’s margin of appreciation and evaluation. [...] 67

c) As such, the specification that Good Friday is a silent day that is subject to special provisions, and the thereby created qualified protection of silence is generally justified under Art. 139 WRV (in conjunction with Art. 140 GG). 68

aa) By being entrusted with the task of governing statutorily the extent of the protection of public holidays (cf. BVerfGE 125, 39 <85>), the legislature also has the opportunity to provide for public holidays of different natures. In this respect, the legislature 69



is also free to provide certain days with a protected atmosphere of rest and silence that goes beyond a bare rest from work by establishing specific duties to refrain from certain activities [...]. As for the specific reach and comprehensiveness of the legislatively determined protection, the legislature's limits in that regard conform to the outcome of a review of the provision's proportionality.

bb) Even introducing a special degree of protection of silence that corresponds to the consolidated significance of Good Friday according to Christian tradition does not as such raise effective concerns in terms of the Basic Law's understanding of neutrality.

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(1) According to its historical meaning and systematic position in the Constitution, the term "spiritual edification" (Art. 139 WRV) has, aside from a religious meaning, an ideological and ethical connotation. When specifying the conditions for the possibility of "spiritual edification", the legislature can create different types of Sundays and public holidays without violating the principle of neutrality. Yet, the principle that the state be neutral limits the degree to which religious, ideological or other implications of these days may be substantiated materially. The state may not determine the nature of the population's "spiritual edification". While the state can reflect social opinions and needs in its legislation, it must not try to specifically shape the secularised community in religious or ideological terms. Accordingly, with the protection of Sundays and public holidays and the assignment of a statutory implementation, the Constitution simply allocates a protected atmosphere which only enables a religious and otherwise specified celebration of such days. It is up to the individuals to fill this setting, either by themselves or in a community.

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(2) According to the explanatory memorandum to the draft of the revised version of the Public Holiday Act (*Landtag* document, *Bayerische Landtagsdrucksache* – BayLTDrucks 16/15696, p. 3), the legislative aim of the special provisions on the protection of Good Friday and their duties to refrain from certain activities is to establish for the Christian population the external conditions for marking that day according to its significance. Apart from that, the provisions certainly create a day of special silence with an impact on everyone and thus also vis-à-vis the non-Christian or nonreligious parts of the population. For the purpose of a common rhythm of social life, it is, however, not objectionable that the legislature shapes a day in a particular way (cf. BVerfGE 125, 39 <82 and 83>). It is essential that the statutory duties to refrain from certain activities only shape the day's external atmosphere. While these statutory duties attach specific external conditions to Good Friday as a day of rest from work and spiritual edification, they leave it to the individuals themselves to choose how to spend the day. However, in terms of shaping the extent of protection, the Constitution does not give the legislature the right to choose provisions which would have to be conceived to reflect its identification with one specific religion. The purpose of "spiritual edification" (Art. 139 WRV) has to be understood as a solely secular one insofar as the state itself is unable to fill the external atmosphere of rest and silence with any religious or ideological content. Rather, this is left to personal and social

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self-determination – including religious communities’ self-determination. Accordingly, legislative provisions solely provide the freedom for a respective individual and collective development. Therefore, the special protection of silence simply constitutes an offer which also leaves room for individually felt needs even if these are not consistent with the legislative motives underlying the purposes of the design (cf. BVerfGE 111, 10 <51>). [...] The statutory duties to refrain from certain activities which are set out to ensure the day’s external atmosphere of silence do not impose any religiously motivated “attitude” on people of different faith or nonreligious people. Subject to the restrictions resulting from the specific prohibitions of certain – publicly perceivable – activities, they are free to spend this day in keeping with their different ideology.

cc) [...] The legislature is not barred from protecting public holidays which are not marked as such by everyone. The right to select days that are of specific significance only to some parts of the population is part of the legislature’s democratically legitimised leeway to design. [...]

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## II.

The specific nature and extent of the protection of Good Friday as an officially recognised holiday and also as a silent day, including both the prohibition of public entertainment events that do not uphold its solemn character and the prohibition of musical performances in venues licensed to serve alcohol is compatible with the Constitution with regard to the regularly entailed interferences with Art. 12(1) and Art. 2(1) GG and therefore also in principle compatible with the Constitution. Regarding interferences with other fundamental rights, such as Art. 4(1) and (2) or Art. 8(1) GG, in some individual cases, such protection of Good Friday, however, proves to be disproportionate because of its lack of any provision for exceptions. [...]

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1. By shaping the protection of silence for Good Friday under Art. 3(1) and (2) first and third sentence FTG, the legislature pursues a legitimate purpose. Following the constitutionally enshrined purpose of “spiritual edification” (Art. 140 GG in conjunction with Art. 139 WRV), the legislature conceives silent days as anchor points and places of rest for reflecting on fundamental values, and aims to provide an external atmosphere for remembering cultural, historical and religious foundations in order to gain strength for contemporary challenges (BayLT-Drucks 16/15696, p. 3). Thereby, the legislature creates provisions like those of other silent Sundays and public holidays that interrupt the everyday hustle and bustle, and – by synchronising the rhythm of social life – give the day a distinct character defined by silence and solemnity. To some extent, this also applies to secularly attributed days. It does not raise any concerns to create a specifically enhanced setting of rest and silence for certain days, as Art. 3(2) first and third sentence FTG provides with respect to Good Friday and potentially also to a more secular context (Art. 3(3) second sentence FTG). When it comes to shaping this silent setting, the legislature is given considerable leeway.

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The fact that the legislature wants to give Christians the opportunity to mark this day according to the significance they attach to it correlates with Art. 139 WRV which has

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the purpose of perpetuating existing holidays. With respect to religion, this constitutional provision is deliberately phrased neutrally; it does not violate the principle of ideological neutrality and does not reflect any form of identification with Christian religions. Accordingly, tying in with the historically developed existence, the legislature is generally allowed to schedule public holidays in a way that also satisfies religious needs. Nonetheless, even with respect to legislation concerning Public Holidays the legislature may not prescribe any religious behaviour, let alone a specific attitude.

It is beyond question that Art. 3(1) and (2) first and third sentence FTG is suitable for achieving the intended specific protection of Good Friday by creating a specific atmosphere of rest and silence. 77

2. a) Based on the legislature's intention to provide this day with the generally perceptible character of a silent day it is, with regard to necessity requirements, not objectionable that Art. 3(2) first sentence FTG allows for public entertainment events only if the solemn character of the day is upheld. 78

The limitation of public entertainment events does not only ensure the protection of rest on Sundays and public holidays but also adds a protected atmosphere of silence for employees who work on Sundays and public holidays. At the same time, the limitation implies that these events, given impact on the public, do not preserve the solemn character. Insofar, the prohibition of these events is conducive to providing the day with a protection of rest and silence which would not be ensured in an equally effective way without such a provision. 79

b) Nothing different applies to Art. 3(2) third sentence FTG which aims at providing this day with a particularly strict atmosphere of rest and silence, and thereby characterising it in a way that goes beyond the character of other silent days. [...] 80

3. In principle, the prohibitions under Art. 3(1) and (2) first and third sentence FTG also prove to be proportionate in a narrow sense. Only with respect to particular circumstances of cases and to the fundamental rights which the provisions affect in such a case, an exemption clause is required for them to be reasonable. Art. 5 of the Bavarian Public Holiday Act provides for such an exemption, but it does not apply to Good Friday, and is, to that extent, unconstitutional. 81

a) With regard to its impact on the general public, the provision of Art. 3(1) and (2) first and third sentence FTG appropriately limits the freedom to practice an occupation (Art. 12(1) GG) and the general freedom of action (Art. 2(1) GG). 82

Special importance is attached to the protection of rest on Sundays and public holidays as the Constitution itself imposes it on the legislatures, namely under Art. 140 GG in conjunction with Art. 139 WRV. It proves to be a constitutionally enshrined, fundamental element of social coexistence and state order, and has to be conceived a guarantee that is linked to various fundamental rights (cf. BVerfGE 125, 39 <80>). Thereby, in the form of a common rhythm of social life, everyone is given the possibility of physical and mental recreation exercised individually or in a community – de- 83

pending on one's own organisation. Hence, the provisions under Art. 3(2) FTG create a protection of silence as an external atmosphere for the purpose of spiritual edification which supplements the rest from work. In conjunction with the special protection of rest and following longstanding provisions to that end, the protection of Good Friday as a public holiday including its generally protected rest from work offers a large number of believers an external atmosphere for marking the day according to Christian religious tradition, even if it is spent in individual privacy.

In comparison, the burdening effects resulting from the protection of external rest and silence weigh less. The number of [...] silent days in the course of a year (cf. Art. 3(1) FTG) is reasonably limited. [...] The statutorily imposed duties to refrain from certain activities do not lead to any content-related compliance requirements, and do not require any personal attitude of individuals. [...]

Furthermore, the prohibitions remain limited and leave numerous possibilities to mark Good Friday in a non-religious or in another, alternative way, and to express, in doing so, even one's rejection of the special protection or of the appreciation of this particular public holiday. [...] Insofar, due to the interpretation of Art. 3(2) third sentence FTG by the regular courts [...] non-public formats, namely events set out to take place in private or as a "closed event", generally continue to be possible.

The fact that prohibitions of certain activities are reinforced by administrative fines (Art. 7 no. 3 letters a and c FTG) does not entail a significantly increased, onerous burden. [...]

Contrary to the complainant's view, the legislature was not obliged to limit the constraints to open-air events for the purpose of preserving a reasonable balancing of interests. The legislature can generally assume that public entertainment events typically impact the public sphere considerably and can compromise the solemn character of the day even if they take place indoors. [...] However, in accordance with an interpretation in conformity with the Constitution it always needs to be born in mind that the Christian understanding of Good Friday is not elevated to be the applicable standard of solemnity. Instead, and satisfying the principle of neutrality, the notion of its solemn character simply describes the day's specific external atmosphere for the purpose of spiritual edification.

b) However, particularities regarding the appropriate balance that has to be achieved can also result from other affected fundamental rights. In this respect, particularly the freedom of assembly (Art. 8(1) GG) and the freedom of religion and to profess a belief – in its manifestation as a freedom of ideological belief – (Art. 4(1) and (2) GG) may be considered.

aa) In individual cases, the prohibitions under Art. 3(2) first and third sentence FTG can also interfere with fundamental rights other than the general freedom of action and the freedom of occupation. The prohibitions affect entertainment events as well as musical performances in venues licensed to serve alcohol regardless of their pro-

tection under other fundamental rights. In particular, they also affect cases in which events are in fact also assemblies or display of the freedom of religion and to profess a belief in its manifestation as a freedom of ideological belief.

Such constellations resulting from the protection of Good Friday constitute particular exceptions. Entertainment events and musical performances in venues licensed to serve alcohol do not usually qualify as assemblies within the meaning of Art. 8 GG, or as an exercise of one's freedom of belief. Vice versa, assemblies cannot usually be deemed to qualify as entertainment events, and therefore the Public Holiday Act's constituent elements are not applicable. Music and dance events of an entertaining character are, by their very nature, mostly not aimed at the participation in the process of shaping public opinion either (cf. BVerfGE 104, 92 <104>). Such events are usually not an expression of religious or ideological exercise within the meaning of Art. 4(1) and (2) GG.

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However, if such circumstances coincide, it can lead to an assessment of whether prohibitions aiming to protect the silent character are appropriate that differs from usual cases. The prohibition does not only affect plain economic interests in earnings or a mere interest in entertainment and recreation of event managers, performers and potential visitors. In fact, due to the special significance of the freedom of assembly as an essential element of "democratic openness" (cf. BVerfGE 69, 315 <346>), it also concerns participation in the process of shaping public opinion, and hence, a constitutional guarantee which in itself is of great importance for the community. Carrying out such events does not challenge the general protection of rest and silence on Good Friday to the same degree and has a different weight. The same applies to events that are subject to the protection of the freedom of religion and to profess a belief, especially in its manifestation as a freedom of ideological belief.

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In these cases, the special protection of silent days can only prevail over the affected fundamental rights if this is the result of a balancing test in each individual case. What is particularly relevant for this purpose is whether and to what extent the event leads to specific interferences. In individual cases the protection of rest and silence can prevail, and, as a consequence, these restrictions would be permissible. In these cases, however, a careful balance realising preferably all interests has to be sought.

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If events which are subject to the mentioned special protection of fundamental rights are also subject to the statutory prohibitions the legislature must provide for statutory exceptions which allow for exemptions from the duties to refrain from certain activities under Art. 3(1) and (2) FTG (regarding the importance of statutory exceptions in the context of the protection of public holidays cf. BVerfGE 111, 10 <52>). According to the necessary balancing of interests, these statutory exemptions may have to be subject to conditions in terms of the event's duration, location and size or, for instance, regarding the volume of a possible sound exposure.

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bb) The freedom of faith and the freedom to profess a belief of Christian parts of the population do not pose an obstacle to exemptions for events involving conflicts of

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fundamental rights as described above [...]. [...] Insofar, Art. 4(1) and (2) GG do not allow for a constitutional position – even if combined with Art. 140 GG in conjunction with Art. 139 WRV – that could be held against the exercise of fundamental rights by other religious and ideological communities or the exercise of the freedom of assembly. The Christian population’s freedom of faith and freedom to profess their belief or the guarantee of public holidays do not entail any state obligation to provide for a – yet to be defined – general protection of silence on Christian-religious holidays, or to design laws on public holidays according to the significance that certain religious communities attach to special days in keeping with their doctrines. In particular, Art. 4(1) and (2) GG do not protect believers from advertisements indicating that others provocatively question the solemn character of Good Friday. Rather, the guaranteed degree of protection only amounts to a minimum level of protection; in that respect, the protection of public holidays is not limited to a religious or ideological meaning (cf. BVerfGE 125, 39 <79, 85>). Furthermore, in a society which provides room for different religious and ideological convictions someone’s own freedom of faith does not generally provide the right not to be confronted with expressions of a faith or an ideology which that person does not share (cf. BVerfGE 93, 1 <16>; 138, 296 <336 para. 104>).

cc) Unlike the protection of other silent days, Art. 5 second sub-sentence FTG explicitly rules out any exemptions for Good Friday. This strict approach cannot be held to constitute an adequate balance of the constitutional positions at issue, at least not in constellations in which the requirements of the prohibition under Art. 3 (2) first and third sentence FTG and thus the protection of the public holiday conflict with the guaranteed freedom of assembly or the freedom of faith and the freedom to profess a belief of others. Therefore, the absolute exclusion of exemptions as set out in Art. 5 second sub-sentence FTG is incompatible with the constitutional guarantees under Art. 8(1) and Art. 4(1) and (2) GG.

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### III.

The challenged decisions of the authorities and of the trial courts do not meet the constitutional requirements and, given the legal situation under statutory law, in fact could not satisfy these requirements. They violate the complainant’s fundamental rights under Art. 4(1) and (2) as well as Art. 8(1) GG. As a mixed event, the “*Heidenspaß-Party*” planned by the complainant cannot be denied protection under the freedom of assembly and under the freedom of belief. This should have been considered in the context of the decision regarding the exemption from the prohibition according to Art. 3(1) and (2) first and third sentence FTG – an option which the legislature would have been obliged to make available.

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1. The prohibited part of the event falls within [...] the protective scope of freedom of faith and the freedom to profess a belief in its manifestation as freedom of ideological belief (Art. 4(1) and (2) GG).

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a) In principle, the complainant can claim the fundamental right of freedom of faith and to profess a belief as an ideological community in the form of a recognised body under public law. [...]

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Apart from that, the fact that the complainant also pursues purposes other than the mere cultivation and promotion of professing an ideological belief does not exclude its classification as an ideological community. Regarding economic activities, the Federal Constitutional Court has already held that these do not rule out that an ideology is accepted as such within the meaning of Art. 4(1) GG if the community's spiritual purposes do not only serve as an excuse for its economic activities, and if the community's activities are not primarily aimed at generating turnover (cf. BVerfGE 105, 279 <293>, "Osho-Movement"; cf. also Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 9, 371 <377> regarding the "Moon-Association"). [...]

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Religious communities, the Christian Church in particular, have always been granted the right to comment on political day-to-day questions. [...] In principle, they are [...] awarded a "right of publicity" without being at risk of losing their legal status as guaranteed under Art. 140 GG in conjunction with Art. 137 WRV as a consequence. Religious communities may claim to impact the public as an independent spiritual community and to monitor and evaluate public life from their religious point of view.

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With regard to equal treatment of ideological and other religious communities, the complainant cannot be denied a comparable "right of publicity" and, thus, a right of making political statements. [...]

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b) When corporately claimed, the protective scope of Art. 4(1) and (2) GG does not only include ritual practices and adherence to and exercise of religious commandments or customs, but also religious education, non-denominational and atheistic celebrations and other expressions of a religious and ideological life as well as the cultivation and promotion of professing the respective belief in general (cf. BVerfGE 53, 366 <392>; 105, 279 <293 and 294>). Both religious and ideological communities are equally entitled to this freedom which is a significant component of the freedom of faith and the freedom to profess a belief. Art. 4 GG also protects the freedom to promote one's own religion and ideology as well as the right to proselytise (BVerfGE 105, 279 <294>). Essentially, the question which specific actions are covered is a matter of the respective religious or ideological community's self-definition and self-conception. It is part of the constitutionally guaranteed freedom of faith and the freedom to profess a belief that the state does not determine genuinely religious questions – or ideological questions, respectively. [...] However, state organs may assess and decide whether it has been sufficiently substantiated that, regarding its spiritual content and its external appearance, the conduct in question can plausibly be attributed to the protective scope of Art. 4 GG; so that it actually has to be considered religiously – and respectively: ideologically – motivated (cf. BVerfGE 138, 296 <329 para. 86>; see also BVerfGE 83, 341 <353>; 108, 282 <298 and 299>).

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c) According to these standards, the event in question (*“Heidenspaß-Party”*) has to be rated as an exercise of the freedom of belief. [...] 103

aa) When classifying and exploring the ideological character of the event, it has to be taken into account that particularities result from the fact that the underlying ideology is not geared towards any deities, sacred scriptures or founders of religion. The event’s announced appearance and its content have to be assessed having regard to the fact that the complainant is also orientated towards the limitation of human cognitive capacity and a strictly scientific rationality based on principles of Enlightenment and secular humanism as well as an atheistic view. It has to be conceded to the complainant, just as to any other religious community, to influence the public on the basis of the meaningful principles it represents, and to monitor and evaluate public life from its ideology’s point of view. The complainant itself correctly points out that the freedom to actively profess an atheist ideological belief implicates not only the dissemination of positive principles such as humanism, Enlightenment, tolerance and liberality, but rather that it also requires dissociation from theistic opinions. The complainant states that ungodliness is an essential criterion for distinction and, at the same time, a link within an atheistic ideological community. Necessarily, this also requires dissociation from the holidays of religious communities. Thus, according to the complainant, the desire to dance on Good Friday is an element of an active profession of its ideological belief. [...] 104

Under the given circumstances, particularly given the close link to the first part of the event which was undoubtedly of an ideological character, and it appears to be sufficiently plausible, despite remaining doubts, to assume that the so-called *“Heidenspaß-Party”* is of an ideological character [...]. [...] 105

bb) At the same time it has to be considered that the announcements for the event presented it as a quite provocative counter-event to the silent Good Friday rooted in Christianity, and that it was also specifically understood, promoted and planned as such by the complainant. [...] 106

Compared to the first part of the event, the thematic focus of the event’s second part is apparently less on collective self-assurance regarding the own principles, yet all the more on collectively rejecting this public holiday of Christian origin. [...] Existing doubts as to whether it is a predominantly political event after all, or an event dominated by its entertaining character, must stand back in favour of protecting the complainant’s fundamental rights. 107

To that, the objection has been raised that it is not discernible that the complainant, as an ideological community, abides by any commandment with the nature of a rule of faith that requires that the intended event take place specifically on Good Friday. This objection, however, is not persuasive. Art. 4(1) and (2) GG does not only protect the adherence to imperative doctrines (cf. BVerfGE 32, 98 <106 and 107>; 108, 282 <297>), but reaches beyond that. The extent to which a conduct is of binding character within a religious or an ideological community only affects the severity of the inter- 108



ference and the weight accorded to the interest within a balancing of the conflicting constitutional positions, but not whether it is attributed to the fundamental right's scope of protection. In that respect it has to be born in mind that the "Good Friday Protest" is ultimately based on the complainant's basic programme and its purposes that impact the world. The requirement to pay for that part of the event does not mean that it does not fall within the fundamental right's protective scope [...]. It can be ruled out from the outset that commercial and economic interests could have been so dominant that they would have been able to eliminate the event's promoted ideological character.

2. Furthermore, the complainant was also able to invoke protection for the prohibited event under the freedom of assembly (Art. 8(1) GG). Also in this context doubts remain as to whether the event would have focused predominantly on mere entertainment. However, these doubts have to be dispelled in favour of the freedom of assembly. 109

a) The protection under Art. 8 GG is not limited to events consisting of debates and arguments, but also comprises multifarious forms of collective activities, including even nonverbal forms of expressions. However, in order to be covered by the fundamental right's scope of protection, it is not sufficient that the participants are connected by a random purpose within their collective and communicative development. Rather, the gathering has to be aimed particularly at the participation in the process of shaping public opinion (cf. BVerfGE 104, 92 <104>; established case-law). Folk festivals and entertainment events are just as little subject to the scope of protection as events serving the simple display of a lifestyle, and which are intended to be mass parties merely focused on fun and entertainment (cf. Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG, Order of the First Chamber of the First Senate of 12 July 2001 – 1 BvQ 28/01, 30/01 –, *Neue Juristische Wochenschrift* – NJW 2001, p. 2459 <2460>, "Fuckparade/Love Parade"). 110

On the other hand, the protective scope of the freedom of assembly also covers those events that achieve their communicative purpose by using music and dance. That is the case if these means for communicative unfolding are specifically used to influence the process of shaping public opinion. [...] However, a music or dance event does not qualify as an assembly within the meaning of Art. 8 GG simply because opinions are also expressed on this occasion. (cf. BVerfG, Order of the First Chamber of the First Senate of 12 July 2001 – 1 BvQ 28/01, 30/01 –, NJW 2001, p. 2459 <2460 and 2461>; [...]). 111

If an event includes elements which are aimed at participating in the process of shaping public opinion as well as elements which do not reflect this purpose, the entire character of the event determines whether such a mixed event constitutes an assembly (cf. BVerfG, Order of the First Chamber of the First Senate of 12 July 2001 – 1 BvQ 28/01, 30/01 –, NJW 2001, p. 2459 <2460>; [...]). 112

When determining whether a mixed event, considering its overall character, consti- 113

tutes an assembly, all facts relevant to the case have to be assessed. In this process, all those arrangements of the planned event which are aimed at participating in the process of shaping public opinion have to be determined. Then, those modalities that are not aimed at participating in the process of shaping public opinion such as dance, music and entertainment, have to be assessed and evaluated, and the different elements have to be put in a relation to each other. If it cannot be determined beyond doubt whether one sphere outweighs the other, the event has to be treated as an assembly [...]. In that respect it does not depend on the event's standards or its contribution to the process of shaping public opinion.

b) In this case, an overall assessment of all circumstances which is subject to constitutional review by the Federal Constitutional Court due to its immediate relevance for the exercise of fundamental rights leads to the conclusion that the prohibited part of the event, the so-called "*Heidenspaß-Party*", is also covered by the protective scope of the freedom of assembly. 114

The prohibited part of the event was embedded in an overall concept which included substantial elements of the expression of opinion. [...] The event was perceivably designed as a provocative display of the complainant's objectives of strict separation of church and state, decreasing of church influence on the state and, specifically, the statutory limitations under the Public Holiday Act. The deliberate provocation was supposed to provide a platform for the complainant's concern [...]. 115

With regard to the event as a whole, the expression of opinion has not only been a random side action. The deliberate provocation immanent in the event and the ostentatiously highlighted entertainment character serve to express the complainant's opinion and its programme regarding the character of the day reflected in the Public Holiday Act which, in the complainant's opinion, has to be viewed critically. 116

These elements of an expression of opinion which were initially strong are, however, not as clear anymore regarding the prohibited "*Heidenspaß-Party*" which was set out to take place at the end of the entire event. [...] Even though an average observer could not miss the opinion-shaping character of the event's beginning, the announced "*Heidenspaß-Party*" [...] displayed clear characteristics of a subsequent entertainment event. 117

Nevertheless, considering all circumstances, the event has to be held to constitute an assembly within the meaning of Art. 8(1) GG. When connecting the different elements of the event, it has to be taken into account that the prohibited part of the event is linked to an overall concept. [...] In addition, the explanation given in the programme and the description "Dance for Free Spirits" [...] had established a connection with the complainant's political concern and the rejection of the silent Good Friday was intended to be symbolised by dance and music as well. [...] 118

3. As the complainant's event was consequently covered by the protection under Art. 4(1) and (2) GG and the protection under Art. 8(1) GG, it was not permissible, 119

according to the standards stated above, to give absolute priority to the protection of public holidays and to apply Art. 3(2) FTG without limitations. Rather, a balancing test in the individual case would have been required.

In this case, the balancing test would have resulted in an exemption with respect to both fundamental rights. In this particular case, the discretion regarding exemptions provided in Art. 5 FTG would have been limited to only one lawful decision (*Ermessensreduzierung auf Null*) – assuming that the absolute exclusion of exemptions on Good Friday is void. The event took place in a closed venue with a manageable number of participants, and also its second part was supposed to take place there. At this particular venue, the event had comparatively low implications for the day's atmosphere of public rest and silence. Given the thematic reference to Good Friday, it was also of significant importance to hold the event precisely on that day. Under the given conditions of this case, the weight of the complainant's fundamental rights and the comparatively minor impact on the special protection of rest and silence on Good Friday result, when interpreted in conformity with the Constitution, in assuming that there were important reasons for an exemption within the meaning of Art. 5 FTG. [...]

4. In the case at hand, in which an ideological community campaigns for its ideology by holding a public event and in which the fundamental right of freedom of faith and the freedom to profess a belief under Art. 4(1) and (2) GG and the freedom of assembly under Art. 8(1) GG are affected, neither of the fundamental rights prevails; instead, their respective scopes of protection co-exist side by side (*Idealkonkurrenz*).

5. As the challenged decisions of the administrative authorities and the judgments of the Bavarian Administrative Court as well as the Bavarian Higher Administrative Court do not meet the constitutional requirements, and also were not able to satisfy these requirements under the given the legal situation, the decisions violate the complainant's fundamental rights under Art. 4(1) and (2) as well as Art. 8(1) GG.

#### IV.

After all, the absolute exclusion of exemptions from the protection of rest and silence on Good Friday (Art. 5 second sub-sentence FTG) is to be declared both incompatible with Art. 4(1) and (2) as well as Art. 8(1) GG, and void (§ 95(3) of the Federal Constitutional Court Act). [...]

[...]

Kirchhof	Gaier	Eichberger
Schluckebier	Masing	Paulus
Baer		Britz

**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 27. Oktober 2016 -  
1 BvR 458/10**

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