FEDERAL CONSTITUTIONAL COURT

- 2 BvR 1741/99 -

- 2 BvR 276/00 -

- 2 BvR 2061/00 -

IN THE NAME OF THE PEOPLE

In the proceedings

on the constitutional complaints of

1. Mr S…,

– authorised representatives: …

against a) the Order of the Hanover Regional Court of 4 August 1999 - 46 Qs 193/99 -,

b) the Order of the Hanover Local Court of 3 June 1999 - 234 AR 50201/99 -

- 2 BvR 1741/99 -,

2. Mr P…,

– authorised representative: …

against a) the Order of the Leipzig Regional Court of 17 December 1999 - 1 Qs 223/99 -,

b) the Orders of the Torgau Local Court of 3 November 1999 - Gs 69/99 -,

c) indirectly: § 2(1) of the DNA Identification Act in the version of 2 June 1999 (BGBl I, p. 1242) in conjunction with § 81g of the Code of Criminal Procedure

- 2 BvR 276/00 -,

3. Mr F…,

– authorised representative: …

against a) the Order of the Arnsberg Regional Court of 5 October 2000 - 2 Qs 185/00 -,

b) the Order of the Werl Local Court
of 1 September 2000 - 3 Gs 239/00 -,

c) indirectly: § 2(1) of the DNA Identification Act in the version of 2 June 1999 (BGBl I, p. 1242) in conjunction with § 81g of the Code of Criminal Procedure

- 2 BvR 2061/00 -

the Third Chamber of the Second Senate of the Federal Constitutional Court with the participation of Justices

President Limbach,

Hassemer,

Broß

unanimously held on 14 December 2000, on the basis of § 93c in conjunction with §§ 93a, 93b of the Federal Constitutional Court Act in the version of 11 August 1993 (BGBl I, p. 1473):

1. **The constitutional complaints are combined for joint decision.**
2. **The Orders of the Hanover Regional Court of 4 August 1999 - 46 Qs 193/99 - and of the Hanover Local Court of 3 June 1999 - 234 AR 50201/99 - violate complainant no. 1's right under Article 2(1) in conjunction with Article 1(1) of the Basic Law. They are reversed and the matter is remanded to the Hanover Local Court […]**
3. **The constitutional complaints of complainants nos. 2 and 3 are not admitted for decision. […]**

REASONS:

A.

The constitutional complaints concern judicial orders requiring that cell tissue of persons convicted of considerable criminal offences by final judgment in so-called old cases be collected and used in molecular genetic analysis for the purpose of identifying [offenders] in future criminal cases ('DNA fingerprinting').

I.

The challenged orders are based on the following provisions:

§ 81g of the Code of Criminal Procedure 3

(1) If persons are suspected of a considerable criminal offence, in particular of a felony, of a misdemeanour against sexual self-determination, of causing bodily harm 4

by dangerous means, or of aggravated theft or blackmail, cell tissue may be collected from them and subjected to molecular genetic analysis to create their DNA profile for the purpose of identification in future criminal proceedings if the nature of the offence or the way it was committed, the personality of the suspect, or other relevant information provide grounds for assuming that criminal proceedings will be conducted against them in the future in respect of one of the aforementioned criminal offences.

(2) The collected cell tissue may be used only for the molecular genetic analysis referred to in section (1); it shall be destroyed without undue delay once it is no longer required for that purpose. The analysis may not be used to retrieve information other than that required to create the DNA profile; examinations seeking to gain information serving other purposes are impermissible. 5

(3) […] 6

§ 2 of the DNA Identification Act 7

(1) The measures authorised in § 81g of the Code of Criminal Procedure may also be carried out if the person concerned was convicted by final judgment of one of the criminal offences listed in § 81g(1) of the Code of Criminal Procedure or was not convicted solely due to exemption from criminal responsibility on grounds of proven or possible incapacity or due to their inability to stand trial on the grounds of mental illness; the same applies in cases where a conviction was not handed down due to proven or possible lack of criminal responsibility under the law on juvenile offenders (§ 3 of the Youth Courts Act) and the relevant entry has not yet been removed from the Federal Central Criminal Register (*Bundeszentralregister*) or the Register on Educative Measures for Juvenile Offenders (*Erziehungsregister*). 8

(2) […] 9

The law […] enacting these provisions was promulgated on 21 March 1997 (BGBl I, p. 534). […] 10

II.

1. Constitutional complaint 2 BvR 1741/99 11

a) The creation of the complainant's DNA profile was ordered because he had been repeatedly convicted of criminal offences. […] 12

The immediate grounds prompting the measure were complainant no. 1's conviction on 19 April 1995 for attempted aggravated arson, causing bodily harm by dangerous means and threatening the commission of a felony, all committed in a single crime (*Tateinheit*). […] Most recently, on 29 December 1995, complainant no. 1 was convicted on petty theft charges and sentenced to a fine. 13

By order of 3 June 1999, the Local Court ordered the collection of cell tissue of complainant no. 1 and its molecular genetic analysis to create a DNA profile […]. 14

[…] 15-22

b) Complainant no. 1 challenged this decision […]. 23

By order of 4 August 1999, the Regional Court rejected his complaint […]. 24

[…] 25-26

c) In his constitutional complaint, complainant no. 1 claims a violation of his right to informational self-determination under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. He asserts that the ordinary courts neither took into account the positive social prognosis he was given in the context of the probation decision nor his personal situation. He argues that the remission of his sentence and the time that has passed since he committed a crime and since his last conviction were not sufficiently taken into consideration. The courts failed to base their decisions on a prognosis specifically relating to his personality, he claims. He contends that the challenged decisions amount to schematic decision-making. 27

d) […] 28

2. Constitutional complaint 2 BvR 276/00 29

a) At the request of the Public Prosecution Office, the Local Court ordered the collection and molecular genetic analysis of cell tissue from complainant no. 2 to create a DNA profile. This order was made because complainant no. 2 was sentenced to a prison term of seven years and six months for attempted murder on 9 June 1995. 30

[…] 31-33

b) The Regional Court rejected as unfounded the complaints filed by complainant no. 2 against the […] orders of the Local Court. […] 34

c) Complainant no. 2 claims a violation of his fundamental rights under Art. 2(1) in conjunction with Art. 1(1), Art. 2(2), Art. 3(3) and Art. 19(4) of the Basic Law. He argues that building a DNA database paves the way towards creating “a transparent citizen”, which is why a particularly strict standard must be applied to the proportionality assessment. He contends that the statutory provisions [on which the challenged orders are based] do not sufficiently give effect to this constitutional standard. […] 35

The complainant argues that, even assuming that the statutory provisions authorising the measure constituting an interference were constitutional, the measures ordered in his case violate his right to informational self-determination. He submits that the measure is disproportionate given that he has been kept in prison almost without interruption since December 1993. 36

[…] 37

3. Constitutional complaint 2 BvR 2061/00 38

a) The measure pursuant to § 2(1) of the DNA Identification Act in conjunction with § 81g of the Code of Criminal Procedure was ordered against complainant no. 3 be- 39

cause he was convicted, by final judgment, of five counts of rape and one count of causing bodily harm, all committed in a single crime (*Tateinheit*) with unlawful deprivation of liberty. […]

b) Complainant no. 3 lodged a complaint against this order, which the Regional Court rejected […]. 40

c) Complainant no. 3 claims a violation of his right to informational self-determination under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. […] 41

B.

[…]

I.

The challenged measures are based on § 2 of the DNA Identification Act in conjunction with § 81g of the Code of Criminal Procedure.

1. Formally, these provisions are constitutional. They were enacted by the federal legislator based on its concurrent legislative powers for court organisation and procedure in criminal matters. […] 45

[…] 46

2. Substantively, § 2 of the DNA Identification Act in conjunction with § 81g of the Code of Criminal Procedure is also compatible with constitutional law. 47

a) The core of personality enjoys absolute protection (cf. BVerfGE 34, 238 <245>; 80, 367 <373 and 374>; with further references), even against interferences that have a basis in statutory law. However, the challenged provisions do not affect the core of personality. This holds true at least insofar as the statutory provisions authorising the interferences in the case at hand only concern the noncoding part of DNA […], DNA profiles are created exclusively for the purposes of identifying the person concerned in future criminal cases and the DNA material is destroyed once the DNA profile has been created. Only the DNA profile thus created is stored, and, from a forensic perspective, the code individuality it attains is comparable to that of a fingerprint. The taking and storage of fingerprints does not affect the core of personality. It is irrelevant that the evidentiary value attainable with DNA fingerprinting far exceeds that of conventional fingerprinting, serological procedures (biochemical fingerprinting) or other identification methods […] and that, in practice, the comparison of DNA patterns offers considerable technical advantages for forensic examinations […]. What is decisive is that once a DNA fingerprint has been derived from the samples, which must then be destroyed pursuant to § 81g(2) of the Code of Criminal Procedure, it is not permissible to create a personality profile of the person concerned; in particular, the procedure does not allow for any conclusions to be drawn on personality-related characteristics such as genetic make-up, character traits or illnesses of the person concerned […]. 48

b) However, the creation, storage and (future) use of DNA profiles do interfere with the fundamental right to informational self-determination guaranteed by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law […]. Based on the notion of self-determination, this fundamental right confers upon the individual the authority to, in principle, decide themselves whether and to what extent to disclose aspects of their personal life (cf. BVerfGE 65, 1 <41 and 42>; 78, 77 <84>). It affords fundamental rights holders protection against the unlimited collection, storage, use or sharing of personal data that is individualised or that can otherwise be attributed to them as individual persons (cf. BVerfGE 65, 1 <43>; 67, 100 <143>). This guarantee may only be restricted by law or pursuant to a law if the restrictions serve an overriding public interest and if the principle of proportionality is observed; restrictions may not go beyond what is absolutely necessary to protect public interests (cf. BVerfGE 65, 1 <44>; 67, 100 <143>). 49

§ 2 of the DNA Identification Act in conjunction with § 81g of the Code of Criminal Procedure sufficiently reflects the limits recognised in constitutional law for the right to informational self-determination (cf. BVerfGE 65, 1 <44>). The provisions aim to facilitate future investigations of considerable criminal offences; they thus serve the administration of justice based on rule of law guarantees, to which constitutional law attributes high standing (cf. BVerfGE 77, 65 <76>; 80, 367 <375>). 50

§ 2 of the DNA Identification Act in conjunction with § 81g of the Code of Criminal Procedure also satisfies the requirements of legal clarity and justiciability deriving from the rule of law (cf. BVerfGE 47, 239 <252>; cf. also BVerfGE 65, 1 <46>). It is sufficient that the provisions allow for a [sufficiently clear] interpretation based on established legal methodology (cf. BVerfGE 65, 1 <54>; 78, 205 <212 and 213>); this is especially true with regard to the element of considerable criminal offences, to which the authorised measures must have a sufficient connection. The term ‘considerable criminal offences’ is also used in other provisions of the Code of Criminal Procedure (cf. §§ 98a(1), 110a(1), 163e of the Code of Criminal Procedure), and has been recognised by the courts as an element that sets limits to the use of investigation methods that are not governed by specific provisions […]. The existing case-law can serve as a basis for further clarifying the meaning of this term [in the challenged provisions]. 51

According to the prevailing legal view, a considerable criminal offence must at least amount to medium-level crime, seriously disrupt the peaceful legal order (*Rechtsfrieden*) and be capable of considerably impairing the sense of security of the general public […]. While ‘considerable criminal offence’ is an indeterminate legal concept (*unbestimmter Rechtsbegriff*), the examples of typical offences fitting this element that are listed in the challenged provision further help to delimit this concept, which sufficiently gives effect to the requirement of specificity […]. Contrary to complainant no. 2’s assumption, whether a criminal act qualifies as a considerable offence [within the meaning of the challenged provision] does not depend on the likelihood that the type of criminal offence will produce the type of evidence sought by the measure; 52

rather, this likelihood is a relevant factor for establishing whether the measure is necessary, which must be assessed on a case-by-case basis […].

Precautionary gathering of evidence pursuant to § 2 of the DNA Identification Act in conjunction with § 81g of the Code of Criminal Procedure also does not violate the prohibition of excessive measures (*Übermaßverbot*). Carrying out the measure at issue is only permissible if the person concerned has a prior conviction for a considerable criminal offence, and requires a prognosis indicating, based on specific facts, that criminal proceedings regarding considerable criminal offences will likely be conducted against that person in the future. The measure is thus restricted to special cases. The requirement of prior judicial authorisation (*Richtervorbehalt*) pursuant to §§ 81g(3), 81a(2) of the Code of Criminal Procedure gives effect to the interest of affected persons in effective fundamental rights protection, as it requires courts to review the circumstances of the individual case. 53

The interest in rehabilitation of affected persons that could be jeopardised by the risk of social stigmatisation (cf. BVerfGE 65, 1 <48>) is sufficiently taken into consideration given that, pursuant to § 2(1) of the DNA Identification Act, the measures may only be carried out as long as entries have not yet been erased from the Federal Central Criminal Register or the Register on Educative Measures for Juvenile Offenders [in accordance with the statutory time limits]; in addition, § 33(2) no. 2 of the Federal Criminal Police Office Act provides that the blocking of data must be ordered, in the individual case, if it is established that knowledge of the data is no longer necessary for the Federal Criminal Police Office (*Bundeskriminalamt*) to perform its tasks. 54

Furthermore, § 81g(2) of the Code of Criminal Procedure requires that data be subject to a strict purpose limitation and that the entire collected cell tissue be destroyed [after the procedure is completed] […]. This prevents abuse, in particular [impermissible] examinations of coding DNA. The remaining option of storing the DNA profiles at the Federal Criminal Police Office (§ 3(1) of the DNA Identification Act) and the uses and processing measures provided for in § 3(2) of the DNA Identification Act are not objectionable under constitutional law given that they were created by the legislator as precautionary measures that serve a public interest, namely future law enforcement […]. The same applies with regard to the possibility of requesting information from the DNA profile database established by the Federal Criminal Police Office in April 1998 pursuant to § 8(6) of the Federal Criminal Police Office Act (cf. §§ 32, 33 of the Federal Criminal Police Office Act). 55

II.

The interpretation and application of § 2(1) of the DNA Identification Act in conjunction with § 81g of the Code of Criminal Procedure undertaken by the ordinary courts is only objectionable under constitutional law in the case of complainant no. 1. In the cases of complainants nos. 2 and 3, no violation of specific constitutional law can be found.

1. Where legal challenges concern interferences with the right to informational self-determination, a decision based on sound reasons requires the deciding court to sufficiently investigate the facts of the case (cf. BVerfGE 70, 297 <309>), in particular by requesting and examining available records on criminal proceedings and the enforcement of criminal sentences against the person concerned as well as probation records and recent entries in the Federal Central Criminal Register […]; it also requires that reasons provided for the decision show that the court conducted a balancing of the relevant circumstances. In this context, it is always necessary to make a case-by-case assessment; merely repeating the wording of the law is not sufficient […]. 57

a) [The court deciding on DNA fingerprinting measures] is not bound by a social prognosis provided by another court in a decision on suspending a sentence on probation, not least because the reasons provided for the conviction and sentencing decision in the original criminal proceedings, including the findings on the facts of the case, do not partake in the binding effect of the final judgment […]. Moreover, the court ordering the measure pursuant to § 2 of the DNA Identification Act in conjunction with § 81g of the Code of Criminal Procedure must apply different legal standards and decides on different legal consequences than the court deciding on the suspension of a sentence […]. For the same reasons, the court competent to authorise DNA fingerprinting is not bound by the prognosis that the person concerned poses a danger to public security where such prognosis was provided in a prior decision ordering a measure of reform and prevention, like in the case of complainant no. 2. 58

Nonetheless, when the court deciding on measures pursuant to § 81g(1) of the Code of Criminal Procedure conducts its own prognosis of danger, it must take into account some of the same circumstances that are also relevant for the social prognosis that is undertaken by the courts deciding on the suspension of a sentence or the prognosis of danger and that is required for imposing a measure of reform and prevention. These include, for example, how quickly the person concerned has reoffended after a conviction, how much time has passed since the person concerned committed criminal acts […], their conduct during probation or after remission of their sentence, their motives for committing the crime, their life situation […] and their personality. However, the fact that the different frameworks serve different purposes and thus imply different standards of prognosis must be taken into account as well […]. Therefore, in the individual case, it may even be justified to find that the person concerned is likely to reoffend [as part of the prognosis] pursuant to § 2 of the DNA Identification Act in conjunction with § 81g of the Code of Criminal Procedure despite the fact that in a prior court decision their sentence had been suspended on probation […]. Where the prognosis by one court differs from the prognosis issued by another court in a prior decision, the later court decision must generally be based on a more detailed and substantiated reasoning […]. 59

b) For ordering the measure pursuant to § 2 of the DNA Identification Act in conjunction with § 81g of the Code of Criminal Procedure, it is necessary, but also suffi- 60

cient, to establish that there is reason to assume – based on the nature of the criminal offence for which the person concerned was convicted, the way they committed the offence or the offender's personality, or based on other findings – that criminal proceedings concerning charges of considerable criminal offences will again be initiated against the person concerned in the future. […] The creation of a DNA profile can only be ordered based on facts that are relevant for establishing that the person concerned is likely to reoffend […]. Regarding persons that were sentenced a long time ago, the mere assumption that a risk of reoffending "cannot be ruled out with certainty" […] is not capable of justifying an interference with the right to informational self-determination. Rather, the deciding court must provide reasons related to the individual case that positively establish a risk of repeat offences.

2. The decisions challenged by complainant no. 1 evidently do not meet this standard. 61

a) In its reasons [for ordering DNA fingerprinting], the Local Court merely lists the prior convictions of the complainant and repeats the wording of the law. 62

It is not ascertainable from these reasons that the offences that the complainant was convicted of are considerable criminal offences. […] The fact that [other courts] have repeatedly decided to suspend prison sentences imposed on complainant no. 1 […] would have called for an assessment of whether the committed offences were indeed considerable. Then, given the differences in nature and weight of the offences, the courts would have had to examine which type of criminal offence the negative prognosis refers to and if that offence, in turn, falls into the category of considerable criminal offences. Such an assessment was not undertaken. 63

The Local Court in particular failed to provide sound reasons for its negative prognosis. The mere listing of entries from the Federal Central Criminal Register suggests that no further judicial investigation of the facts took place, although such investigation would have been required of the court in light of the favourable social prognosis issued by other courts in their decisions on probation. The challenged decision only makes general references to the "severity of the criminal offence committed", which, according to the Local Court, implies a "high level of criminal motivation", without taking into account the fact that the sentence was suspended on probation; this was not a sufficient basis for forgoing an investigation and assessment of all relevant circumstances, including counter-indications against a negative prognosis. At the very least, the Local Court should have addressed the reasons provided for the prior [positive] prognosis in the probation decision, which differs from its own prognosis. This applies all the more because the complainant's prior conviction already dated back several years at the time the Local Court decided to order the creation of a DNA profile, and because the sentence had been remitted. 64

b) By referring to "the accurate reasons of the [Local Court's] order", the Regional Court failed to remedy the obvious shortcomings of the decision rendered by the examining judge (*Ermittlungsrichter*) in the proceedings before the Local Court. Neither 65

the general references [made by the Regional Court] to “crime statistics” nor its criminological assertions for which no evidence was provided are adequate substitutes for the required assessment of the circumstances of the individual case.

3. a) By contrast, the decisions challenged by complainants nos. 2 and 3 adequately give effect to the constitutional requirements that the deciding court sufficiently investigate the facts of the case and provide sound reasons for its decision. The challenged decisions are based on robust evidence and reflect the requirement of a case-by-case assessment. […] 66

[…] 67

b) DNA fingerprinting measures pursuant to § 2(1) of the DNA Identification Act in conjunction with § 81g of the Code of Criminal Procedure do not give rise to an irresolvable conflict with the requirement to seek social reintegration of offenders, as derived from Art. 1(1) and Art. 2(1) of the Basic Law in conjunction with the constitutional principle of the rule of law, even in cases of long-term imprisonment or confinement as a measure of reform and prevention. Considerable criminal offences, in particular offences against life or limb that tend to generate evidence traceable by way of cross-checking DNA profiles, can still be committed when the person concerned is in prison or confinement, or during times when execution of the prison sentence or the confinement measure is suspended, which cannot necessarily be foreseen at the time a prison sentence or confinement measure is imposed. 68

c) […] 69

III.

The decisions challenged by complainants nos. 2 and 3 do not violate the constitutional principle of proportionality, which requires that a measure must be suitable and necessary for the purpose pursued and that the interference which it entails not be disproportionate to the importance of the matter and the strength of suspicion. In view of the fact that complainant no. 2 was convicted of several offences against life and limb, it is not ascertainable that the interference with his right to informational self-determination [resulting from DNA fingerprinting] was disproportionate. The same applies with regard to complainant no. 3, who had been convicted multiple times of crimes against sexual self-determination.

IV.

[…] 71

C.

[…] 72

D.

[…] 73-75

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Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 14. Januar 73 - 2 BvR 1741/99, 2 BvR 2061/00, 2 BvR 276/00

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