Headnotes

to the Judgment of the Second Senate of 16 January 2003

– 2 BvR 716/01 –

1. It is part of the parental responsibility, protected by Article 6.2 sentence 1 of the Basic Law (*Grundgesetz* – GG), that parents should protect the rights of their children vis-à-vis the state or third parties. As a result, it is a constitutional necessity for parents to participate early on in criminal proceedings before a juvenile court. Provisions which deprive parents of the right to be involved or which exclude them from the trial are encroachments on their constitutionally protected rights.

2. Safeguarding the administration of the criminal law and the enforcement of the state's right to punish in judicial proceedings are constitutional tasks which can come into conflict with the parental right to bring up a child. A conflict between parental rights and the constitutional requirement that the criminal law protect legal interests does not lead inevitably to parental rights being overruled; it can be resolved through a weighing of interests, whereby the parental right concerned and the protection of legal interests by the criminal law must be balanced against each other.

3. The right to enforce the state's right to punish may allow encroachment upon the parental right to bring up a child, but this does not make the requirement that such encroachment be based on a sufficiently definite statute dispensable.

FEDERAL CONSTITUTIONAL COURT

Pronounced

on 16 January 2003

Ms Seiffge

Amtsinspektorin

as Registrar

of the Court Registry

- 2 BvR 716/01 -

IN THE NAME OF THE PEOPLE

In the proceedings

on

the constitutional complaint

of Mr Z(...),

– authorised representative: Professor Dr. […] –

against 1. a) the order of the Karlsruhe Higher Regional Court (*Oberlandesgericht*) of 11 February 2002 – 2 Ss 185/01 –,

b) the judgment of the Heidelberg Local Court (*Amtsgericht*) of 2 May 2001 – 5 Ds 36 Js 9126/2000 – AK 132/00 Jug –,

2. a) the order of the Heidelberg Regional Court (*Landgericht*) of 3 April 2001 – 3 Qs 10/01 Jug –,

b) the order of the Heidelberg Local Court of 16 March 2001 – 5 Ds 36 Js 9126/2000 – AK 132/00 Jug –,

3. a) the order of the Heidelberg Regional Court of 1 February 2001 – 3 Qs 2/01 –,

b) the order of the Heidelberg Local Court of 11 January 2001 – 5 Ds 36 Js 9126/2000 – AK 132/00 Jug –,

4. the order of the presiding judge of the Heidelberg Local Court of 29 June 2000 – 5 Ds 36 Js 9126/2000 – AK 132/00 Jug – and

5. indirectly § 51.2 of the Juvenile Court Act (*Jugendgerichtsgesetz* – JGG),

the Federal Constitutional Court – Second Senate –

with the participation of Justices

Vice-President Hassemer,

Sommer,

Jentsch,

Broß,

Osterloh,

Di Fabio,

Mellinghoff,

Lübbe-Wolff

held on the basis of the oral hearing of 5 November 2002:

Judgment:

1. **§ 51.2 of the Juvenile Court Act is incompatible with Article 6.2 of the Basic Law and void to the extent that the provision allows persons who bear parental responsibility within the meaning of Article 6.2 of the Basic Law to be excluded [from proceedings before a juvenile court].**

2. **The order of the presiding judge of the Heidelberg Local Court of 29 June 2000 – 5 Ds 36 Js 9126/2000 – AK 132/00 Jug –, the orders of the Heidelberg Local Court of 11 January and 16 March 2001 – 5 Ds 36 Js 9126/2000 – AK 132/00 Jug – and the orders of the Heidelberg Regional Court of 1 February 2001 – 3 Qs 2/01 – and of 3 April 2001 – 3 Qs 10/01 Jug – violate the complainant's fundamental right under Article 6.2 of the Basic Law. Similarly, the judgment of the Heidelberg Local Court of 2 May 2001 – 5 Ds 36 Js 9126/2000 – AK 132/00 Jug – and the order of the Karlsruhe Higher Regional Court of 11 February 2002 – 2 Ss 185/01 – violate Article 6.2 of the Basic Law; they are overturned. The matter is referred back to the Wiesloch Local Court.**

3. **The *Land* (state) Baden-Württemberg must bear the necessary expenses of the complainant in the constitutional complaint proceedings.**

R e a s o n s :

A.

The constitutional complaint concerns the sentencing by a juvenile criminal court of a minor whose father had been excluded from the proceedings pursuant to § 51.2 of the Juvenile Court Act. It raises the question of whether § 51.2 of the Juvenile Court Act is compatible with the parental right to bring up a child in Article 6.2 of the Basic Law. 1

I.

The Juvenile Court Act describes in § 67 the position of the person with parental rights and of the legal representative for the whole of criminal proceedings before a juvenile court. They are granted in principle the same rights as the minor accused of a crime. The rights may, however, be withdrawn to the extent that the above-mentioned persons are suspected of having been involved in the offence of which the minor is accused or there is a justified fear that they could abuse their rights. In these cases, a temporary guardian and, if necessary, counsel must be appointed by the court pursuant to § 68.2 of the Juvenile Court Act to safeguard the interests of the minor in criminal proceedings which are pending. 2

§ 67 of the Juvenile Court Act states: 3

§ 67 Position of the person with parental rights and 4

the legal representative 5

(1) To the extent that the accused has a right to be heard, to submit questions and motions or to be present at investigations, this right shall also be available to the person with parental rights and the legal representative. 6

(2) Where notice must be given to the accused, a similar notice shall be given to the person with parental rights and the legal representative. 7

(3) The rights of the legal representative to choose defence counsel and to exercise legal remedies shall also be available to the person with parental rights. 8

(4) The judge may withdraw these rights from the person with parental rights and the legal representative if they are suspected of having been involved in the offence of which the minor is accused or if they have been sentenced for their involvement. Where the person with parental rights and the legal representative satisfy the prerequisites referred to in sentence 1, the judge shall be entitled to withdraw the rights of both of them if there is a fear that they will abuse their rights. Where the person with parental rights and the legal representative are no longer entitled to their rights, the judge of the court of guardianship shall appoint a temporary guardian to safeguard the interests of the accused in pending criminal proceedings. The trial shall be postponed until a temporary guardian has been appointed. 9

(5) Where several persons have parental rights, each one of them may exercise the rights of a person with parental rights specified in this statute. At the trial or at another hearing before a judge, an absent person with parental rights shall be regarded as being represented by a person with parental rights who is present. If notifications or summonses have to be sent, it shall be sufficient if they are addressed to one person with parental rights. 10

[…] 11

[…] § 51 of the Juvenile Court Act restricts the right to be present since subsection 1 provides for the temporary exclusion of the accused and subsection 2 grants the presiding judge the option of also excluding persons with parental rights and legal representatives from the hearing. 12

§ 51 of the Juvenile Court Act states: 13

§ 51 Temporary exclusion of persons involved 14

(1) The presiding judge should exclude the accused from the hearing for the duration of discussions which could be disadvantageous to his or her upbringing. The presiding judge must inform him or her of what was said during his or her absence if this is necessary for his or her defence. 15

(2) The presiding judge should also exclude relatives, the person with parental rights and the legal representative if there are misgivings about their being present. 16

II.

1. In the challenged judgment the Local Court issued the complainant's son, who is still a minor, with a warning on account of bodily injury and dangerous bodily injury and ordered him to do 50 hours of community service under the instruction of the youth welfare office and to participate in a social training course. The complainant, who has sole custody for his son, was excluded pursuant to § 51.2 of the Juvenile Court Act from participating in the trial. […] 17

The course of proceedings prior to sentencing was as follows: 18

a) The son of the complainant, who was 14 years old at the time of the offence, was prosecuted for bodily injury in two cases in connection with physical fights with other pupils. […] 19

The complainant was initially present at the trial as legal representative. After the court had interviewed a witness who had incriminated the accused son, the juvenile court judge interrupted the hearing of evidence in order to recommend to the accused and the complainant as his legal representative that they enter into "Offender-Victim Mediation" (*Täter-Opfer-Ausgleich*). After consulting with his son the complainant refused to have the proceedings disposed of in this way and insisted that the hearing of evidence be continued. 20

The details of how the hearing continued are unclear. What is certain is that the complainant was ultimately expelled from the courtroom by the judge. 21

The record does not contain more detailed reasons; there is simply a note: 22

“The legal representative was expelled from the courtroom pursuant to § 51.II.” 23

The trial was continued thereafter in the absence of the complainant. Ultimately, the proceedings were temporarily discontinued with the consent of the accused and the public prosecutor’s office in order to carry out “Offender-Victim Mediation” in both cases in which charges were brought. 24

b) […] 25-30

c) The “Offender-Victim Mediation” which had been ordered was only successfully carried out in one case; in the second case, the son of the complainant and the presumable victim rejected this. On 11 January 2001 the juvenile court judge ordered that proceedings be resumed and fixed the oral hearing for 8 February 2001. At the same time, the Local Court dismissed an application of 6 July 2000 to assign court-appointed counsel to the accused and decided to exclude the complainant as legal representative from participating in the new trial (but not from the handing down of judgment) pursuant to § 51.2 of the Juvenile Court Act. […] 31

The complaint directed against this order was dismissed by the Regional Court in its order of 1 February 2001. The court held that neither the seriousness of the offence nor the difficulty of the facts or law made it necessary for defence counsel to be involved. […] 32

d) Private defence counsel for the son of the complainant to submitted a pleading on 6 February 2001, which led to the court postponing the trial. After defence counsel had inspected the court file, the complainant again unsuccessfully rejected the juvenile court judge on the basis that he was concerned that the judge was biased. […] 33

e) The application by defence counsel of 10 March 2001 that he should be appointed by the court as counsel for the accused and that the complainant should be appointed to advise the accused was rejected by the juvenile court judge in his order of 16 March 2001. […] In its order of 3 April 2001 the Regional Court dismissed the complaint submitted by defence counsel against the rejection; at the time of submitting the complaint, defence counsel also withdrew from the case. 34

f) The trial at which numerous witnesses were questioned was ultimately held on 19 April and 2 May 2001 in the absence of the complainant. 35

2. Both the complainant and his son made an appeal against the subsequent judgment which they later described as an appeal on points of law only. The complainant complained in the grounds for his appeal on points of law (which grounds were accepted by his son) that among other things he had been excluded from the trial. 36

[…] 37

In its order of 11 February 2000 the Higher Regional Court dismissed the appeal on points of law by the accused and the complainant pursuant to § 349.2 of the Code of Criminal Procedure (*Strafprozessordnung*). 38

3. In the period thereafter the son of the complainant only performed a part of the community service work he had been ordered to perform. With regard to the remainder of the work, the Local Court ordered juvenile detention in the form of "custody during the minor's usual recreation time" (*Freizeitarrest*) in its order of 18 July 2002 pursuant to § 11 .3 and § 15.3 of the Juvenile Court Act. The Regional Court dismissed the immediate complaint by the complainant against the above in its order of 8 August 2002. 39

Until now juvenile detention has not been enforced. 40

III.

1. Initially, the constitutional complaint of the complainant was directed against the decisions of the Local Court of 29 June 2000 and 11 January 2001 as well as against the decision of the Regional Court of 1 February 2001. To this extent he complained of a violation of Article 6.2 of the Basic Law by the arbitrary application of § 51.2 of the Juvenile Court Act. The complainant alleged that the juvenile court judge had incorrectly exercised his discretion in interpreting the provision where there were no specific facts that could have justified an exclusion. 41

He argued that this was at the same time a violation of Articles 103.1 and 3.1 of the Basic Law as well as against the principles of a fair hearing. In his opinion, the reasons later given could also not justify an exclusion. The precedence of the parental right to bring up a child would prevent this. […] The provision in § 51.2 of the Juvenile Court Act […] was also generally objectionable under constitutional law due to its lack of definiteness. According to the complainant, defence counsel should in any case have been assigned to his son applying § 68 no. 2 of the Juvenile Court Act *mutatis mutandis*. 42

2. In his letter of 14 April 2001 the complainant extended his constitutional complaint to the orders of the Local Court and Regional Court of 16 March and 3 April 2001, which had rejected the appointment of defence counsel and his appointment as adviser. Finally, in his pleading of 26 March 2002 he extended his constitutional complaint to the judgment of the Heidelberg Local Court and the decision of the Higher Regional Court which had dismissed the appeal on points of law. […] 43

[…] 44

IV.

1. The Federal Ministry of Justice (*Bundesministerium der Justiz*) considers the possibility of excluding the person with parental rights from the trial to be constitutionally unobjectionable. In its view, § 51.2 of the Juvenile Court Act does not violate Article 45

6.2 of the Basic Law. […]

[…] 46-50

2. The *Land* Baden-Württemberg did not make use of its opportunity to present an opinion. 51

[…] 52

B.

I.

The constitutional complaint is admissible. 53

1. The complainant is permitted to lodge a constitutional complaint against the decisions sentencing his son. According to the case-law of the Federal Constitutional Court, disciplinary measures are in principle permissible in connection with the "state's watchdog function", and do not conflict with the parental right to bring up a child if the measures are intended to respond to and remedy the misbehaviour of minors which persists in spite of parental disciplinary efforts (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 74, 102 (124-125)). In principle this is at the same time recognition that a decision by a criminal court – in which the state reacts to the criminal offence of a minor – can affect the scope of protection of Article 6.2 of the Basic Law and that parents may thus assert the infringement of their own rights. 54

2. The complainant is also entitled to lodge the complaint to the extent that he is challenging the decisions which ordered his exclusion from ongoing proceedings. He is thus asserting with regard to the position in proceedings granted to him by the Juvenile Court Act (§ 50 and § 67 of the Juvenile Court Act) above all a violation of his parental right under Article 6.2 of the Basic Law, and alleging also – even if decisions in criminal proceedings against his son are at issue – a violation of his own rights. 55

Entitlement to lodge a complaint exists independently of the possibility of the complainant to himself challenge the sentencing of his son with the constitutional complaint. The exclusion of the complainant – irrespective of its effect on the proceedings of the accused juvenile – is a drastic measure which is not only suitable for impairing the complainant's reputation but even goes further by depriving him of his ability to bring up his son with his son's best interests in mind. In this case it can be assumed that a legal interest worthy of protection exists (see BVerfGE 15, 226 (230)). 56

3. The complainant, who regards the necessity for the court to appoint counsel as a necessary consequence of his exclusion from the entire trial, may also allege violations of his own rights to the extent that he challenges those decisions which do not permit court-appointed counsel to be assigned to his son. This also applies to the decisions which do not permit his appointment as adviser; also to this extent the complainant, who regards the refusal to appoint him as advisor as a violation of Article 6.2 57

of the Basic Law, is entitled to lodge a complaint.

The admissibility of the constitutional complaint is also not otherwise placed in question by the fact that the orders last made were not made directly as a result of action by the complainant, but rather in response to pleadings by the defence counsel who was authorised by the son. They affect nevertheless the legal position of the complainant, which the courts were obliged to consider in the same way as the procedural rights of the son. The spirit and purpose of the requirement that appeals be exhausted did not require the complainant on the facts in this case to first exhaust his appeals to the non-constitutional courts through his own additional applications. This is because it could not be expected that the decision on whether he would be permitted to advise his son would be decided differently as a result of such applications (on this, see BVerfGE 38, 105 (110)). 58

II.

The constitutional complaint is also well-founded. 59

§ 51.2 of the Juvenile Court Act, which permits relatives, persons with parental rights and legal representatives to be excluded from the trial if there are misgivings about their being present, is incompatible with Article 6.2 of the Basic Law to the extent that it permits persons to be excluded who bear parental responsibility within the meaning of Article 6.2 of the Basic Law. This provision is not definite enough to be the basis for encroachments on the parental right to bring up a child. 60

1. a) Article 6.2 sentence 1 of the Basic Law guarantees parents the right to the care and upbringing of their children. They may in principle decide free of state influence and according to their own ideas how they wish to live up to their responsibility as parents (see BVerfGE 24, 119 (143-144); 59, 360 (376); 60, 79 (88); established case-law). The goal, content and methods of bringing up a child fall within the parents' sphere of responsibility. The constitution does not lay down specific objectives for them in relation to the bringing up of a child. Article 6.2 of the Basic Law protects parents in the exercise of their parental right to bring up a child from state encroachment and combines this with an obligation on the part of parents to make the best interests of the child their guiding principle in bringing up a child (see BVerfGE 56, 363 (381-382); see too BVerfGE 59, 360 (376)). 61

If parents do not live up to this responsibility because they are not willing or not in a position to fulfil their duty to bring up their child or because their own transgressions permanently pose a considerable risk to the best interests of the child, then the "state's watchdog function" pursuant to Article 6.2 sentence 2 of the Basic Law takes effect. The state is then not just entitled, but also obliged to guarantee the care and upbringing of the child; the child who requires help in order to develop into a responsible member of a society that corresponds to the Basic Law's concept of society has a right to protection by the state (see BVerfGE 24, 119 (144); 60, 79 (88)). Disciplinary measures for minors pursuant to the Juvenile Court Act are accordingly permissible 62

aids for bringing up children as part of the “state’s watchdog function”; they respond to misbehaviour of minors which may persist in spite of their upbringing by their parents and seek to guide minors to a life free of crime (see BVerfGE 74, 102 (124-125)).

Not every failure and not every act of carelessness entitle the state to restrict or even exclude the parents’ authority to bring up their child; it is also not part of the “state’s watchdog function” to see to it that the child develops in the best possible way if this is contrary to the will of the parents (see BVerfGE 60, 79 (91)). Instead the state must always respect the precedence of the parents’ right to bring up their child. In addition, the principle of proportionality also applies here. The type and extent of the encroachment depends on the degree to which the parents have failed and on what is necessary in the interests of the child (see BVerfGE 24, 119 (145)). The separation of a child from his or her family can only be considered in particularly serious cases; it is the strongest encroachment on the rights of persons with parental rights pursuant to Article 6.3 of the Basic Law, which is directed against the removal of children from their families for the purposes of forcing them to be brought up by the state (BVerfGE 24, 119 (139 et seq.); 31, 194 (210)). It can only be justified where the failure of the persons with parental rights amounts to serious misconduct and where there is a considerable risk to the best interests of the child or where the child is on the brink of becoming neglected, which can also be expressed in the commission of serious crimes […] 63

Lü-Wo: „...im Stande, grundrechtseingreifende Regelungen zu rechtfertigen.“ Lü-Wo: „...im Stande, grundrechtseingreifende Regelungen zu rechtfertigen.“ Lü-Wo: „...im Stande, grundrechtseingreifende Regelungen zu rechtfertigen.“ Lü-Wo: „...im Stande, grundrechtseingreifende Regelungen zu rechtfertigen.“ b) The exercise of the parental right is not only limited according to Article 6.2 and 6.3 of the Basic Law; it is subject – in any case as far as the exercise of rights in criminal proceedings against a minor is concerned – to additional limits (see generally on the limitation of parental rights BVerfGE 34, 165 (181-182); 41, 29 (44); 47, 46 (71-72); 96, 288 (304); 98, 218 (244-245)). By way of exception, both conflicting fundamental rights of third persons as well as other legal values that have been given constitutional status are, taking into account the unity of the constitution and the entire value system protected by it, in a position to also limit unrestrictable fundamental rights in individual relationships (see BVerfGE 28, 243 (261); established case-law). 64

The safeguarding of the undisturbed administration of the law by the criminal law has always been an important task of state authority. The solving of criminal cases, the finding of the perpetrator, the determination of his or her guilt and his or her punishment as well as the acquittal of the innocent are the main tasks of the administration of the criminal law (see BVerfGE 39, 1 (45 et seq.); 88, 203 (257-258); see also BVerfGE 51, 324 (343)), which is supposed to uniformly enforce the state’s right to punish in judicial proceedings aimed at ascertaining the truth for the protection of citizens (see BVerfGE 57, 250 (275); 80, 367 (378); 100, 313 (389)). Criminal laws and their application in proceedings governed by the rule of law are constitutional tasks. 65

Just as the state administration of the criminal law may in making its decision encroach under certain circumstances on the fundamental rights of adult suspects and may encroach on the rights of the perpetrator where there is proof that he or she is guilty of the commission of a crime, it is not prevented from also encroaching on the parental right to bring up a child in criminal proceedings against minors. This does not mean, of course, that the parental right must in principle step back. Conflicts between parental rights on the one hand and the constitutional requirement that the criminal law protect legal interests and their enforcement in proceedings on the other hand must be resolved by weighing the rights and interests. In this connection, a balance must be achieved between the parental right concerned and the protection of legal interests by the criminal law. If it is not possible to achieve this balance, then a decision must be made as to which interest should step back taking into account the peculiarities and special circumstances of the individual case (see on Article 5 of the Basic Law: BVerfGE 35, 202 (225); 59, 231 (261 et seq.); 67, 213 (228); see also BVerfGE 81, 278 (292); 93, 1 (21)). However, the disciplinary concepts at the foundation of the criminal law relating to minors, which does not establish any privilege on the part of the state to bring up children and does not suspend the precedence of the parental right to bring up a child […], cannot, be accorded any special significance, at all events prior to the conclusion of the proceedings. The disciplinary effect on the minor where the goal is that he or she lead a life free of crime in the future (see BVerfGE 74, 102 (123) on the goal of a reaction under juvenile criminal law) presupposes in principle that there is judicial evidence that the minor is in need of discipline and that this need has become recognisable due to a specific crime; it also presupposes a legal consequence that is geared towards this neediness has been determined. While criminal proceedings are being conducted it will usually not be possible to ascertain the above, so that there is hardly any constitutional scope for justifying the subordination of the parental right to bring up a child on the basis of disciplinary objectives alone. 66

c) Encroachments on Article 6.2 of the Basic Law require a statutory basis. It is necessary for there to be a sufficiently definite statute; here, the requirements placed on sufficient definiteness will be stricter, the more significant the effects of a rule are (see BVerfGE 49, 168 (181); 59, 104 (114); 86, 288 (311)). The person affected must be able to understand the legal situation (BVerfGE 64, 261 (286)). This applies also to limits on the parental right to bring up a child which result from its limitation inherent in the constitution. The right to enforce the state's right to punish may – over and beyond the prerequisites for state encroachment in the case of parenting failures pursuant to Article 6.2 of the Basic Law – allow encroachment on the parental right to bring up a child, but it does not mean that the necessity for such encroachment to be based on a sufficiently definite statute is also dispensable. 67

2. Measured by the above, § 51.2 of the Juvenile Court Act only stands up to constitutional examination in part. 68

a) The exclusion of parents from a trial in respect of a minor affects the constitutionally protected parental right according to Article 6.2 of the Basic Law. However, to the extent that the issue is the removal of relatives, persons with parental rights or legal representatives who are not the parents the scope of protection of Article 6.2 of the Basic Law is not affected […] 69

aa) The parental right is to be understood comprehensively and refers in principle to the whole person of the child. The parents and other persons with parental responsibility within the meaning of Article 6.2 of the Basic Law (according to the decision in BVerfGE 34, 165 (200), this also includes grandparents who are at the same time legal guardians) are entitled to a constitutionally protected influence on the living and developmental conditions of the child, including those outside of the family. 70

The authority to safeguard ("as trustee") the rights of the child against the state or against third parties derives from the right and the duty to take care of the child […]. If criminal proceedings are commenced against a minor suspected of committing a crime, this in itself is an encroachment on his or her rights and those of his or her parents […]. If the protection of the rights of their children belong to the scope of responsibility of parents, from that it follows also that there is a necessity under constitutional law to ensure the participation of the parents in criminal proceedings in a juvenile court early on. This takes into account above all that, due to the fact that they have less experience of life and due to the intense psychological and physical developmental processes to which they are exposed, minors are much less able to safeguard their interests than adults and are therefore particularly in need of protection when they are confronted with the enforcement of the state's right to punish in criminal proceedings […]. 71

bb) The parental right to exercise a protective and advisory function for the child also includes the right to assert one's own ideas of how to bring up a child in criminal proceedings in a juvenile court. On the one hand, the question of which statements the minor should make in relation to the offence alleged against him or her and which of the means provided by the Juvenile Court Act and the Code of Criminal Procedure he or she should use to invalidate the allegations made and, on the other hand, the parent's decision on the disciplinary measures he or she should take in response to the (possible commission of an) offence (prior to the state taking action) are both related to the bringing up of a child and thus primarily the task of the parents. The goal of proceedings, i.e. to impose a penalty on the minor under the criminal law relating to minors if the commission of an offence is proven, which can itself encroach on the parental right to bring up a child, also requires the inclusion of the parents in the proceedings. In this connection, it is less important from the point of view of constitutional law that the state measures are likely to be more effective if the understanding and support of the parents can be expected (on this, see already Decisions of the Federal Court of Justice in Criminal Matters (*Entscheidungen des Bundesgerichtshofes in Strafsachen* – BGHSt) 18, 21 (5)). What is decisive in this respect is that it must be possible for parents to present contrary ideas of their own prior to the imposition of a 72

measure that impairs their rights […].

cc) The fundamental rights in Article 6.2 of the Basic Law are thus concretised – in non-constitutional law – in the provisions of the Juvenile Court Act on the participation of persons with parental rights and legal representatives in criminal proceedings in a juvenile court (§ 50 and § 67 of the Juvenile Court Act) – to the extent that the parental right is affected […]. Just as is the case with the withdrawal of rights of participation (§ 67.4 of the Juvenile Court Act), exclusion from the trial (§ 51.2 of the Juvenile Court Act) is thus also an encroachment on the constitutionally protected parental rights. 73

b) The exclusion of the parents from the trial of their child is a serious encroachment, which can prevent the exercise of parental rights in criminal proceedings in a juvenile court and put the accused minor, who is dependent on his or her parent's advice, in a largely unprotected position. The constitution requires such exclusion to be based on a law which acquaints those affected by it in a clear and comprehensive way with the objectivised intention of the legislature expressed therein (see BVerfGE 34, 293 (301) in connection with the exclusion of defence counsel; see also BVerfGE 38, 105 (119) on the removal of the person advising a witness). § 51.2 of the Juvenile Court Act does not satisfy this requirement. Nor can clarification of the provision with the aid of traditional methods of interpretation cure this defect. 74

aa) The wording of § 51.2 of the Juvenile Court Act makes the exclusion of the parents possible within the framework of a directory provision to the extent that there are "misgivings (*Bedenken*) about whether they should be present". If one takes the everyday meaning of "misgivings", i.e. "a thought based on existing doubts, fears or reservations, which make it appear advisable to (still) wait with one's consent or to reconsider a plan" (see *Duden, Das große Wörterbuch der deutschen Sprache*, 3rd edition 1999, Vol. 1, entry: "*Bedenken*") or "a thought which contains doubts, concerns or reservations" (with a reference to the origins of the word in the language used in chanceries in the 15th century: *Etymologisches Wörterbuch des Deutschen*, 2nd edition by Wolfgang Pfeifer, 1993, entry: "*bedenken*"), the grammatical interpretation with the surrounding semantics opens up an extensive encroachment on the parental right in Article 6.2 of the Basic Law. 75

The wording does not contain any indication as to what the doubts, reservations or objections should relate. There are many possibilities as to the subject of "misgivings": possibly doubts in the willingness or ability of the parents to assert their rights in the best interests of the child; concern that they will abuse their rights in proceedings or that there will be an impairment of the ascertainment of the truth; fear that the work of the agency assisting the juvenile courts outside of the hearing will be made more difficult; reservations about discussing circumstances in the presence of the parents that are unpleasant for them; doubts as to whether one can take effective disciplinary measures in the presence of the parents […]. The wording allows a judge to use any reservation about the presence of the parents as a reason for excluding them. 76

In addition, to what degree the judge has to be convinced that there are misgivings is not evident from the provision (see expressly in connection with the exclusion of defence counsel BVerfGE 34, 293 (301)). The Act does not shed light on whether it is already sufficient for exclusion that it is in the judge's view obvious, possible or probable that, for example, the parents are not in a position to fulfil their duty to bring up their child, or whether it is necessary for the existence a specific ground for exclusion that the judge hold a conviction based on facts.. 77

bb) Having regard to § 51.2 of the Juvenile Court Act's position in the statutory framework narrows on the one hand the scope of application of the provision, but on the other hand makes it clear that the means that the general law of criminal procedure has of removing legal representatives also remain available in criminal proceedings in a juvenile court. 78

According to the official heading, § 51 of the Juvenile Court Act permits the "Temporary exclusion of participants". This in itself speaks in favour of the interpretation that a judge cannot base an exclusion for the entire trial on § 51.2 of the Juvenile Court Act […], but only an exclusion for a certain part of proceedings or a certain situation during the proceedings. An indication of the correctness of this result is also provided by § 67.4 of the Juvenile Court Act, which makes it possible to deprive the person with parental rights of all of the rights to which he or she is entitled – including the right to participate in the entire trial; and makes this dependent on the existence of important grounds which call into question in principle and in general the exercise of his or her rights in accordance with the rules of procedure. 79

The result arrived at by virtue of this interpretation is further confirmed by the consequences that the legislature attaches to the withdrawal of rights pursuant to § 67.4 of the Juvenile Court Act on the one hand, and the exclusion from the trial pursuant to § 51.2 of the Juvenile Court Act on the other hand. While § 67.4 sentence 3 of the Juvenile Court Act makes the appointment of a temporary guardian to safeguard the interests of the accused in criminal proceedings the consequence of a complete withdrawal of rights and § 67.4 sentence 4 of the Juvenile Court Act orders that the trial be stayed until a temporary guardian is appointed and § 68.2 of the Juvenile Court Act even prescribes that counsel be appointed by the court (in the event that all of the legal representatives and persons with parental rights have had their rights withdrawn), § 51.2 of the Juvenile Court Act does not contain any comparable provision which attempts to compensate for disadvantages caused by the exclusion. If the legislature had wanted § 51.2 of the Juvenile Court Act to be understood as a section that also permits exclusion for the entire duration of the proceedings, the obvious thing to do would have been to make exclusion subject to a rule similar to the one in § 67.4 of the Juvenile Court Act. 80

The general possibilities of excluding the legal representatives remain in principle in existence parallel to § 51.2 of the Juvenile Court Act (see § 2 of the Juvenile Court Act). It is true that the Code of Criminal Procedure does not provide any specific 81

grounds for excluding legal representatives. A general reason for removing a legal representative from the trial can be, however, the fact that he or she is a potential witness; § 58.1 and § 243.2 sentence 1 of the Code of Criminal Procedure allow in this case an oral hearing without the legal representative.

cc) A historical interpretation of § 51.2 of the Juvenile Court Act does not help to further clarify the provision. 82

Already the previous provision in § 34.2 of the Juvenile Court Act of the German Reich (*Reichsjugendgerichtsgesetz* – RJGG) of 6 November 1943 (Reich Law Gazette (*Reichsgesetzblatt* – RGBl) I p. 635), whose wording was almost identical and which was later adopted without additional discussion as § 51.2 of the Juvenile Court Act, was not intended to allow a complete exclusion […]. Both the previous statute and the earlier regulations in respect of the statute expressly mentioned a “temporary exclusion”. 83

There are otherwise no statutory materials which could make the intention of the legislature historically clearer. […] 84

[…] 85-87

dd) Nor does an objective-teleological interpretation serve to more clearly delineate the meaning of § 51.2 of the Juvenile Court Act. 88

To the extent that the provision, understood according to its purpose, is intended to serve in the broadest sense to exclude the influence of relatives in the trial of a minor and thus ensure that the proceedings run smoothly, this insight still provides insufficient information to answer the question of what may be deemed to be a relevant disturbance according to the statute. This could only be answered if one could ascertain the goals which § 51.2 of the Juvenile Court Act is bound to achieve: the ascertainment of the truth, the protection of a minor or a witness, the support of the work of the agency assisting the juvenile courts, the achievement of any disciplinary objective or perhaps even a number of these objectives in a certain order of priority and combination. This is not the case here. 89

ee) An interpretation of § 51.2 of the Juvenile Court Act based on its wording, structure in the legal system, drafting history and purpose cannot determine an area of application sufficiently clearly and bindingly. The cases of application which are referred to in the work of legal commentators indeed pursue different objectives; they all fall easily within the provision in view of the broad formulation of the enactment. The term “misgivings” does not provide a precise definition of the prerequisites for encroachment and also does not stand in the way of a possibly expansive interpretation which goes beyond the types of cases previously discussed. 90

The legislature failed in § 51.2 of the Juvenile Court Act to itself regulate the questions that are important in this connection for the application of the provision – description of the situation in litigation in which exclusion may occur; the degree to 91

which a judge must be convinced that the prerequisite for encroachment exists; measures which are intended to compensate for the encroachment; it left the decision regarding the exclusion to the juvenile court judge.

It would have been possible for the legislature – contrary to the view adopted by the Federal Government – to enact a sufficiently clear and complete provision. This is shown by the provision set forth in § 247 of the Code of Criminal Procedure, which regulates the temporary exclusion of an accused from the trial. It describes the possible cases of application, formulates goals and provides in addition for the accused to be later informed [about proceedings] (when he or she is again present). It succeeds in regulating individual grounds of exclusion and to nonetheless include from a variety of possible cases mention of those that are significant. The legislature should thus not see itself as hindered from identifying from the variety of conceivable cases certain types of cases in which it is permissible to override the parental right to bring up a child within the limits set by the Basic Law; nor should it therefore see itself as hindered from clarifying the goal, conditions of application and consequences of § 51.2 of the Juvenile Court Act – for example, the protection of the accused minor or other parties to proceedings, the ascertainment of the truth or the response to an abuse of rights by parents (see § 67.4 of the Juvenile Court Act). 92

ff) In view of the lack of definiteness of § 51.2 of the Juvenile Court Act an interpretation in conformity with the Basic Law also does not come into consideration. If the interpretation of a provision leads, as with § 51.2 of the Juvenile Court Act, to the result that one cannot deduce from the provision sufficiently definite terms intended by the legislature, then the necessary prerequisite, pursuant to the case-law of the Federal Constitutional Court, for an interpretation in conformity with the Basic Law, which is that there is, at all events, one interpretation of the provision which is in conformity with the Basic Law (see BVerfGE 88, 145 (166); established case-law), will not be satisfied. An interpretation of a provision encroaching on parental rights set forth in Article 6.2 of the Basic Law, which interpretation is compatible with the Basic Law, would require however – for the satisfaction of the constitutional requirement of the specific enactment of a statute – that there be a core provision covering all important questions which can be traced back to the clear, objectivised intention of the legislature. 93

This is missing, however, in the case of a provision such as § 51.2 of the Juvenile Court Act, which does not contain either specific requirements for exclusion or allow the purpose which the provision is intended to fulfil to be clearly recognised. If one nevertheless allowed an interpretation in conformity with the Basic Law, the constitutional necessity for the specific enactment of a statute – which requires that any encroachment on a fundamental right be based on a statutory regulation and have its nature and scope defined by the legislature itself – would be devoid of effect. 94

3. a) The decision of the Local Court of 29 June 2000, which excluded the complainant from participating in the trial, is incompatible with the Basic Law. 95

The provision set forth in § 51.2 of the Juvenile Court Act on which the removal was based is unconstitutional and thus it may not be used as an enabling law. Since there is also no other provision which could justify exclusion, the challenged order violates Article 6.2 of the Basic Law. 96

b) The decisions of 11 January and 1 February 2001, which excluded the complainant from participation in the trial (except for the handing down of the judgment) and at the same time refused the appointment of counsel by the court, are also incompatible with the Basic Law. 97

Mem. AbsatzMem. AbsatzMem. AbsatzMem. AbsatzSoSoSoSoThis follows – as far as exclusion from the trial is concerned – from the fact that § 51.2 of the Juvenile Court Act, the provision on which the removal was based, violates Article 6.2 of the Basic Law. To the extent that the courts rejected the complainant's application for the appointment of counsel for his son by the court, this too was also based on a fundamental misjudgement of the meaning of Article 6.2 of the Basic Law. Already the fact that the courts dealt first and foremost with the prerequisites for the appointment of counsel by the court pursuant to § 140 of the Code of Criminal Procedure (which did not exist in their opinion) and only dealt in passing with the exclusion of the complainant and the possible resulting necessity for appointing defence counsel show that they were not aware of the seriousness of the encroachment on a fundamental right caused by the exclusion and the resulting procedural consequences. 98

The statement that the son of the complainant was also able to appropriately defend himself at the first hearing in the absence of his father and the idea that the facts and law were quite simple even for a 15-year-old, cannot replace consideration of the necessity according to the Basic Law for compensation of the exclusion of a parent who had taken over the representation of the interests of a minor in the trial. In particular, it was not taken into consideration that the complainant was not just excluded from part of the trial, but completely excluded so that removal pursuant to § 51.2 of the Juvenile Court Act – in any case as far as the exercise of rights at the trial were concerned – was the same as withdrawal of rights pursuant to § 67.4 of the Juvenile Court Act. If the courts had considered the matter along these lines, it cannot be ruled out that they would have – although there was no express statutory provision – appointed counsel. 99

c) The orders of 16 March and 3 April 2001, in which the appointment of counsel by the court was again rejected and at the same time the appointment of the complainant as advisor was rejected, are also not compatible with the constitution. 100

With regard to the rejection of the appointment of counsel by the court, the violation of a fundamental right by the previous orders of 11 January and 1 February 2001 is repeated. To the extent that the Local Court bases the rejection of the appointment of the complainant to advise his son primarily on the exclusion pursuant to § 51.2 of the Juvenile Court Act and thus on an unconstitutional provision, the order thus already shows itself to be constitutionally unsound. 101

The additional consideration of the Local Court not to contemplate the appointment of the complainant to advise his son in view of § 69.2 of the Juvenile Court Act also does not give the rejection order a constitutionally sound basis. In any case, with regard to the parents whom the fundamental right set forth in Article 6.2 of the Basic Law protects, “disadvantages to the child’s upbringing”, as referred to by the Act in § 69.2 of the Juvenile Court Act, do not unconditionally justify the rejection of the parents’ appointment to advise their child. The precedence which the parental rights to bring up a child enjoy vis-à-vis state influence on a minor in criminal proceedings in a juvenile court, which are aimed at solving and prosecuting a crime, requires restraint according to the constitution in assuming that disadvantages to the child’s upbringing exist and ordering consequences based on this during ongoing proceedings […]. 102

In this case, whether the considerations of the Local Court could support a rejection based on § 69.2 of the Juvenile Court Act can be ultimately left open. This is because the Local Court was in any case just as unaware in its decision as it was in the application of § 51.2 of the Juvenile Court Act of the effect of the parental right to bring up a child, which counters state influence on a minor in criminal proceedings. Thus it cannot in any case be ruled out that the Local Court and subsequently also the Regional Court would have reached different decisions if they had properly evaluated the parental right to bring up a child. 103

BrBrBrBrd) The verdict sentencing the son of the complainant also violates the complainant’s fundamental right under Article 6.2 of the Basic Law. This right grants him a constitutional right to be present at the trial. The withdrawal of this right to be present on the basis of a provision that does not satisfy constitutional standards and the subsequent trial in the absence of the complainant violate the meaning and scope of the rights guaranteed by Article 6.2 of the Basic Law which the complainant is prevented from exercising. 104

[…] 105

The violation of the parental right also had an effect on the decision of the Local Court sentencing the son of the complainant. At all events, the possibility cannot be excluded that the Local Court would have decided differently if the complainant had had the opportunity to participate at the oral hearing, to exercise his rights and to support his son. The subject of the trial was primarily the hearing of evidence and the interrogation of several witnesses on the accusation of bodily injury, which the son of the complainant had denied on the basis that there had been justifying circumstances. It is obvious that the complainant could have influenced the course and result of the trial by exercising his right to ask questions, by submitting motions to admit evidence, by submitting his comments on particular evidence collected and by making closing arguments. 106

e) The order of the Higher Regional Court, which dismissed the appeals on points of law by the complainant and his son against the sentence of the Local Court pursuant to § 349.2 of the Code of Criminal Procedure, is also not compatible with Article 6.2 of 107

the Basic Law.

[…] 108-109

4. The decisions that are not compatible with the Basic Law must be overturned and the original proceeding referred back to the Local Court (§ 95.2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG)). In doing so the Federal Constitutional Court has made use of the possibility of referring the matter back to a Local Court other than the one which adjudicated previously (see BVerfGE 20, 336 (343)). At the same time, § 51.2 of the Juvenile Court Act is to be declared void on account of being incompatible with Article 6.2 of the Basic Law to the extent that it allows persons to be excluded who take parental responsibility within the meaning of Article 6.2 of the Basic Law (§ 95.3 sentence 2 of the Federal Constitutional Court Act). 110

III.

[…] 111

Hassemer Sommer Jentsch

Broß Osterloh Di Fabio

Mellinghoff Lübbe-Wolff

Bundesverfassungsgericht, Urteil des Zweiten Senats vom 16. Januar 2003 - 2 BvR 716/01

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