

Headnotes

to the order of the First Senate of 8 May 2013

– 1 BvL 1/08 –

- 1. General university tuition fees are compatible with the participatory right to access to higher education under Art. 12 sec. 1 of the Basic Law (Grundgesetz – GG) in conjunction with the right to equality before the law of Art. 3 sec. 1 GG and the principle of the welfare state of Art. 20 sec. 1, Art. 28 sec. 1 sentence 1 GG, provided that the fees are not prohibitive and are designed in a socially responsible way.**
- 2. The provision of Bremen Land (federal state) law on university tuition fees that distinguishes according to residence in favour of in-state residents is inconsistent with Art. 12 sec. 1 GG in conjunction with Art. 3 sec. 1 GG, because it interferes, without sufficient reasons to justify this disadvantage, with the right to free and equal access to higher education in a cohesive nationwide educational system.**



IN THE NAME OF THE PEOPLE

**In the proceedings
for constitutional review**

whether § 6 sentence 1 of the Bremen Act on Study Accounts (*Bremisches Studienkontengesetz*) of 18 October 2005 – BremStKG – (Bremen Law Gazette, *Bremisches Gesetzblatt* – BremGBI, p. 550), in conjunction with § 3 sec. 1, § 2 sec. 1 BremStKG, is incompatible with Art. 11 of the Basic Law (*Grundgesetz* – GG) and Art. 12 sec. 1 sentence 1 in conjunction with Art. 3 sec. 1 GG, inasmuch as, in contrast to students whose sole or principal residence is in the Free Hanseatic City of Bremen, out-of-state students are required to pay tuition of € 500 per semester from the third through the fourteenth semester of study

– Order of suspension and referral from the Administrative Court (*Verwaltungsgericht*) of the Free Hanseatic City of Bremen of 17 September 2007 (6 K 1577/06)

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

Justices Kirchhof, (Vice-President)
Gaier,
Eichberger,
Schluckebier,
Masing,
Paulus,
Baer, and
Britz

decided on 8 May 2013 as follows:

§ 6 sentence 1 of the Bremen Act on Study Accounts of 18 October 2005 – BremStKG – (Law Gazette of the Free Hanseatic City of Bremen, page 550) in conjunction with § 3 section 1 and § 2 section 1 BremStKG, insofar as students residing outside of the Free Hanseatic City of Bremen were thereby charged tuition of € 500 per semester from the third to the 14th semester, is incompatible with Article 12 section 1 in conjunction with Article 3 section 1 of the Basic Law, and therefore void.

Reasons:

A.

These concrete judicial review proceedings concern the question of whether a provision of a *Land's* (federal state's) law under which out-of-state students – unlike students with their residence or, for those with multiple residences, their principal residence in the respective *Land* – are charged general university tuition fees of € 500 per semester from the third through the 14th semester, is compatible with the Basic Law.

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I.

1. During the period of time relevant to this decision, a tuition provision was in effect in Bremen that credited students with a study account of 14 semesters and subsequently charged them tuition. However, this provision applied only to in-state residents (*Landeskinder*) whose residence or, for those with multiple residences, whose principal residence was in Bremen; by contrast, out-of-state students were credited with only two semesters and therefore paid tuition from the third semester onwards.

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2. Under § 109 sec. 2 sentence 1 of the Bremen University Act of 11 July 2003 (*Bremisches Hochschulgesetz* – BremHG; Law Gazette of the Free Hanseatic City of Bremen – BremGBI, p. 295), university education was free of charge through the completion of a first degree qualifying the student for a profession, or in the case of programs not building on a previous degree, through the completion of a second degree qualifying the student for a profession, as provided in § 109a BremHG and the Bremen Act on Study Accounts (BremStKG) of 18 October 2005 (BremGBI p. 550), which entered into force in the winter semester of 2005/2006. For resident students, the former § 2 sec. 1 sentence 1 BremStKG provided that university education was free of charge for 14 semesters. By contrast, under § 3 BremStKG, which was in force from 25 October 2005 to 30 June 2010, the legislature limited free university education for non-resident students to two semesters. § 6 BremStKG provided that tuition fees of € 500 per semester would be charged after the study account had been used up. However, the payment obligation thus imposed could be waived, on application, for social reasons or reasons of university policy. One such reason was the need to care for and raise children under the age of twelve. In addition, the legislature enacted a provision for hardship cases under § 7 BremStKG. On application, tuition could be deferred, reduced, or waived in full if payment would result in undue hardship, which the legislature defined as a rule for specified cases. One specified case under § 7 no. 1 BremStKG, for example, was a disability or severe illness that made it necessary to take up one's principal residence outside the Free Hanseatic City of Bremen.

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a) [...]

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b) According to the explanatory report about the Act (Official Record of the Bremen Parliament – *Bürgerschafts-Drucksache* 16/758, pp. 5 and 6), the *Land* of Bremen

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was pursuing several aims with these provisions: first of all, the law served to encourage students to pursue their studies efficiently and expeditiously. It was furthermore intended to put the *Land* of Bremen financially in a position to ensure that its universities were sure of being appropriately and competitively equipped with both staff and material resources. According to the report, this could be funded directly by the students through tuition fees for students residing outside Bremen, or by having students relocate to Bremen, since this would increase the *Land's* revenue under the system for fiscal equalisation among the federal states (*Länderfinanzausgleich*). The objectives relating to university policy were underscored by the fact that the funds collected from tuition were to be used in particular to improve teaching. In the opinion of the legislature, charging tuition was necessary to achieve these goals. The registration regulations did not impose an obligation on students to register the place of study as their principal residence. Giving preferential treatment to students residing in Bremen, it was argued, did not represent an interference with the students' freedom to choose a place of education or with their right to freedom of movement. Potential unequal treatment within the meaning of Art. 3 sec. 1 GG in conjunction with the principle of the welfare state (*Sozialstaatsprinzip*) was justified, because it did not constitute an arbitrary, objectively unjustified discrimination. Potential hardship cases had been taken into account with legislative provisions for exceptions to the fees.

[...] Furthermore, the reasons argued, a student pursuing his or her studies seriously could be expected in any event to live close to his or her place of study. 6

c) The provision regarding in-state residents [...] was revoked in 2010. Since the winter semester of 2010/2011, all students in Bremen have been credited with a study account of 14 semesters upon enrolment, which is intended to ensure that they can complete their first degree free of charge. This amendment of the law took into account the need to await [...] the outcome of the pending constitutional review proceedings (*Bürgerschafts-Drucksache 17/1309*, p. 7). [...] 7

II.

1. The plaintiffs in the original proceedings protested, as out-of-state students, against the tuition requirement. According to tuition notifications dated 16 May 2006, they were required to pay tuition fees of € 500 under § 6 BremStKG for the winter semester of 2006/2007, because after having studied for two semesters they had already used up the funds in their study account that would have permitted them to study free of charge. The University of Bremen rejected their objections as unfounded, and denied their petitions for a temporary stay of execution. In the subsequent court action, the Administrative Court granted the objections and complaints suspensive effect. 8

2. The Administrative Court then stayed the proceedings in accordance with Art. 100 sec. 1 sentence 1 GG and referred to the Federal Constitutional Court (*Bundesverfassungsgericht*) the question of whether § 6 sentence 1 BremStKG in conjunction with § 3 sec. 1 and § 2 sec. 1 BremStKG was incompatible with Art. 11 GG 9

and Art. 12 sec. 1 sentence 1 GG in conjunction with Art. 3 sec. 1 GG, inasmuch as, in contrast to students with their sole or principal residence in Bremen, it required out-of-state students to pay tuition fees of € 500 per semester from the third through the 14th semester. [...]

III.

Statements on the referral were submitted by the Senate of the Free Hanseatic City of Bremen, the government of the *Land* of Lower Saxony, the government of the *Land* of North Rhine-Westphalia, the Sixth Senate of the Federal Administrative Court, the German Rectors' Conference (*Hochschulrektorenkonferenz*), the German Association of University Professors and Lecturers (*Deutscher Hochschulverband*), the Education and Science Workers' Union (*Gewerkschaft Erziehung und Wissenschaft*), the German National Association for Student Affairs (*Deutsches Studentenwerk*), the University and Science Association of the German Civil Service Federation (*Verband Hochschule und Wissenschaft im Deutschen Beamtenbund*), the Free Association of Student Bodies (*Freier Zusammenschluss von StudentInnenschaften e.V.*) and the plaintiffs. 10

1. The Senate of the Free Hanseatic City of Bremen has no concerns regarding the constitutionality of the provisions submitted for review. [...] 11

2. The Sixth Senate of the Federal Administrative Court [...] doubts that the Bremen provision is compatible with the general right to equality before the law under Art. 3 sec. 1 GG. [...] 12

3. The German Rectors' Conference adopts as its own the comments of the referring court with regard to the compatibility of the referred provisions with Art. 12 sec. 1 GG. [...] 13

4. The German Association of University Professors and Lecturers considers § 6 sentence 1 BremStKG in conjunction with § 3 sec. 1, § 2 sec. 1 BremStKG to be unconstitutional. [...] 14

5. The German National Association for Student Affairs, the University and Science Association of the German Civil Service Federation, the Education and Science Workers' Union, and the Free Association of Student Bodies substantially agree with the referring court. [...] 15

B.

The referral is admissible. 16

[...] 17

C.

The provision formerly applicable in Bremen that charged out-of-state students – in contrast to students residing in the Free Hanseatic City of Bremen – general tuition 18

fees of € 500 from the third through the 14th semester is incompatible with the Basic Law. While there is no overall prohibition of general tuition fees arising out of the Constitution, as long as those fees comply with the constitutional requirements of a socially responsible design (I), charging only out-of-state students such fees cannot be constitutionally justified (II).

I.

Charging general tuition fees is, in principle, compatible with the Basic Law if and insofar as the fees are not prohibitive and are designed in a socially responsible way. 19

1. If the State offers publicly funded university education, it must ensure free and equal access to it (cf. BVerfGE 85, 36 <53>). For those who meet the subjective admission criteria, a right to free and equal access to higher education at institutions run by the state arises out of Art. 12 sec. 1 GG in conjunction with the right to equality before the law of Art. 3 sec. 1 GG and the principle of the welfare state of Art. 20 sec. 1 and Art. 28 sec. 1 sentence 1 GG (cf. BVerfGE 85, 36 <53 and 54>; on the basics, BVerfGE 33, 303 <331 and 332>; cf. also Decisions of the Federal Administrative Court – *Entscheidungen des Bundesverwaltungsgerichts*, BVerwGE 134, 1 <7 and 8>). 20

a) Art. 12 sec. 1 GG guarantees the right to freely choose an educational facility (BVerfGE 85, 36 <53>). This is closely related to the right to freedom of occupation, because education is generally the preliminary stage for taking up a profession, and both – choosing an educational facility and taking up professional activity – are therefore integral parts of an interrelated process in life (cf. BVerfGE 33, 303 <329 and 330>, with reference to BVerfGE 7, 377 <401, 406>). The constitutional protection of fundamental rights does not merely aim at averting interferences by public authorities, but also aims at permitting participation in benefits provided by the State (cf. BVerfGE 33, 303 <330 and 331>). 21

b) This participatory right does not result in an individual claim to free higher education, but tuition fees must not be prohibitive (aa) and have to be designed in a way that is socially responsible (bb). 22

The use of State resources by a limited group of users may result in an obligation on the part of those users to pay a fee. For that reason, the legislature is not prevented from introducing charges for certain public benefits of professional education in the future, even if those benefits were previously provided free of charge (cf. BVerwGE 134, 1 <8> with further references). 23

aa) Art. 12 sec. 1 GG in conjunction with Art. 3 sec. 1 GG and the principle of the welfare state do, however, require the legislature to ensure the existence of equal educational opportunities in the context of access to higher education (cf. BVerfGE 112, 226 <245>); it must regulate the range of options and access according to appropriate criteria that even the disadvantaged can reasonably be expected to satisfy (cf. BVerfGE 43, 291 <345>). The legislature must not design access to educational insti- 24

tutions created by the State in a prohibitive way. Fees must not constitute an insurmountable social obstacle to accessing higher education (cf. BVerwGE 102, 142 <147>; 115, 32 <37>; 134, 1 <8, 14>; BVerwG – Federal Administrative Court, judgment of 15 December 2010 – BVerwG 6 C 9.09 –, juris, paras. 19, 25). A fee provision is impermissible if its amount is unacceptably dissuasive (cf. Federal Administrative Court, judgment of 15 December 2010 – BVerwG 6 C 9.09 –, juris, para. 25).

bb) This does not mean that all hardships connected to charging tuition have to be compensated completely by accompanying social measures (cf. BVerwGE 134, 1 <14>). The Constitution does not require the compensation of every social inequality, especially economic ones, including those that may originate from the familial, social or individual background of persons seeking an education (cf. BVerwGE 134, 1 <14>). Nevertheless, the legislature must not entirely ignore these circumstances insofar as they lead to unequal educational opportunities. For example, it cannot merely refer potential students to the possibility of taking out loans, on standard market terms, to finance their studies.

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Therefore, the Constitution requires a socially responsible educational system – or in other words, either one that is in essence financially viable for all, or one that is supplemented with a system of educational subsidies – that permits all duly qualified persons to study, within the limits of the educational capacities created by the State, and which does not make access to higher education contingent, in particular, on the financial resources of parents (cf. BVerwGE 102, 142 <147>; 115, 32 <37>; 134, 1 <8>). The Basic Law prohibits permitting only a privileged segment of the population to benefit preferentially, with regard to attending university, from limited public funds (cf. BVerfGE 33, 303 <334 and 335>). When tuition is charged the interests of people with low income must thus be taken into account appropriately (cf. BVerfGE 112, 226 <245>; BVerwGE 134, 1 <9 et seq.>); the decisive consideration is how severe a burden a fee will impose, under the specific conditions of the fee's design, and whether all concerned can in fact be reasonably expected to manage that burden. The legislature must design access to institutions for the exercise of constitutional freedoms overall in such a way that social differences are sufficiently compensated, and social permeability is ensured (Rüfner, in: *Bonner Kommentar*, vol. 1, *Art. 3 Abs. 1*, para. 63, October 1992; see also Jarass, in: Jarass/Pieroth, *GG*, 12th ed., 2012, *Art. 20*, para. 119; Robbers, in: *Bonner Kommentar*, vol. 5, *Art. 20 Abs. 1*, para. 1412, April 2009). The principle of the welfare state furthermore requires that tuition fees be designed with due allowance for the burdens of students who, because of personal circumstances or social disadvantages, are hindered in their personal and social development (cf. BVerfGE 45, 376 <387>). This applies to persons with disabilities (Art. 3 sec. 3 sentence 2 GG) as well as to students with children or those responsible for taking care of others in their family (Art. 6 sec. 1 and 2 GG).

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It is largely left to the legislature to determine how exactly the constitutional obligation to institute general tuition fees in a way that is socially responsible is carried out. It may in particular attempt to protect the constitutionally required equality of opportu-

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nity through setting the amount of the tuition fees, scholarships, special student loans, and provisions for hardship cases and exceptions. The Federal Administrative Court has held (BVerwGE 134, 1 <19 et seq.>; Federal Administrative Court, judgment of 15 December 2010 – BVerwG 6 C 9.09 –, juris, para. 32) that the requirements of international law must be observed when instituting tuition fees, in this case Art. 10 no. 4 letter a of the European Social Charter of 18 October 1961 (ESC; effective date 26 February 1965, ETS no. 35, Federal Law Gazette, *Bundesgesetzblatt* – BGBl II p. 1122), under Art. 13 sec. 1 in conjunction with Art. 13 sec. 2 letter c ICESCR (cf. also UN Committee on Economic, Social and Cultural Rights, The right to education (Art. 13), UN Doc. E/C.12/1999/10 of 8 December 1999, nos. 19 f. on Art. 13 sec. 2 letter c ICESCR) and under Art. 2 of Protocol I to the ECHR in conjunction with Art. 14 ECHR. This does not raise any constitutional objection.

2. According to these standards, tuition fees of € 500 per semester are, in principle, not excluded by the Constitution, provided that they are accompanied by measures which ensure that they are socially responsible. 28

a) As a prerequisite for attending university, tuition fees restrict the fundamental participatory right. This restriction is based on the legitimate aim of providing a supplementary source of revenue to finance study programmes, and is also suitable and necessary for that purpose. 29

b) The participatory right is not unduly restricted by tuition fees in the amount at issue here. No prohibitive effect is evident at present from a tuition fee of € 500 (cf. BVerwGE 134, 1 <14>; Bavarian Higher Constitutional Court, *Bayerischer Verfassungsgerichtshof* – BayVerfGH, judgment of 28 May 2009 – Vf. 4-VII-07 –, juris, para. 145). A fee of € 500 per semester does not *a priori* have a deterrent or otherwise unfair effect. 30

However, a fee of € 500 is not negligible. It may be small in comparison to the overall cost of university study, and of minor significance as regards legislative competences (cf. BVerfGE 112, 226 <245>). From the students' point of view, however, who, depending on the source, need in between € 530 and € 812 per month for general living expenses (cf. also University Information System, *Hochschul-Informationssystem* – HIS, Heine/Quast, *Studienentscheidung im Kontext der Studienfinanzierung*, 2011, p. 26), even this amount must be considered as clearly appreciable (so held also for Baden-Württemberg by the Federal Administrative Court, judgment of 15 December 2010 – BVerwG 6 C 9.09 –, juris, para. 21; judgment of 15 December 2010 – BVerwG 6 C 10.09 –, juris, para. 21). 31

It is not impossible that tuition fees in the amount at issue here might promote a deterrent effect. For example, in a 2006 survey of 5,240 school-leavers from North Rhine-Westphalia, 2.4% of female and 6.5% of the male students qualifying for university indicated that they would forgo or delay their studies because of tuition fees (HIS, position statement for the public hearing of the Committee on Innovation, Science, Research and Technology of the *Land* of North Rhine-Westphalia, 2010, p. 10); 32

nationwide, the rate was 3.6% in 2006 (HIS, Heine/Quast/Spangenberg, *Studiengebühren aus der Sicht von Studienberechtigten*, 2008, pp. 15 and 16) and 5.3% in 2008 (HIS, Heine/Quast, *Studienentscheidung im Kontext der Studienfinanzierung*, 2011, p. 58).

However, if tuition fees of € 500 per semester represent more than an insubstantial burden for students, this does not automatically mean that these fees are generally prohibitive in view of students' present economic performance capability. There is no indication of a "flight from the fees" from federal states with university tuition to federal states without tuition. According to the available data, following the introduction of general tuition fees, the probability of planning to begin one's studies in one's home state decreased only about two percentage points in federal states that charged fees (cf. Deutsches Studentenwerk, *Die wirtschaftliche und soziale Lage der Studierenden in der Bundesrepublik Deutschland 2009*, 19th social survey 2010, pp. 63 and 64; Dwenger/Storck/Wrohlich, Do Tuition Fees Affect the Mobility of University Applicants? Evidence from a Natural Experiment, Discussion Paper no. 926, 2009, pp. 15 and 16). There was no evidence in 2008 of a prohibitive effect of tuition fees on potential new students when percentages of school-leavers going on to higher education and figures for incoming university students were compared between federal states with and without fees (cf. HIS, Heine/Quast/Spangenberg, *Studiengebühren aus Sicht von Studienberechtigten*, 2008, p. 15).

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c) Tuition fees of the kind under discussion here, however, must be accompanied by measures which ensure that they are socially responsible, so that the right to the utmost degree of equal opportunities of access to higher education is guaranteed.

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aa) In the absence of such measures, the existing disadvantages regarding access to higher education and obtaining such a degree due to insufficient financial means or a family background without academic degrees are reinforced. According to the 19th Social Survey by the German National Association for Student Affairs in 2009, 71% of children from families with an academic degree went on to higher education, in contrast to only 24% of children whose families had no such degree (Deutsches Studentenwerk, *Die wirtschaftliche und soziale Lage der Studierenden in der Bundesrepublik Deutschland 2009*, 19. Sozialerhebung 2010, p. 10 et seq.; cf. also, on this development, Vodafone Foundation, Schindler, *Aufstiegsangst? Eine Studie zur sozialen Ungleichheit im historischen Zeitverlauf*, 2012). The financial burden is of considerable significance in deciding whether to continue on to higher education (cf. Institut für Demoskopie Allensbach, *Chancengerechtigkeit? Studienfinanzierung als wichtiger Faktor der Entscheidungsfindung für die Aufnahme bzw. den Abbruch eines Hochschulstudiums*, 2009, p. 13). When having to make the decision whether to study, uncertainty increases as parents become less able to finance higher education, thus disadvantaging children from families with a lower income. Students who are financially supported by their parents are far more likely to consider their studies securely financed than those who must take out a loan (cf. HIS, Heine/Quast/Spangenberg, *Studiengebühren aus der Sicht von Studienberechtigten*, 2008, pp. 17 and

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18).

bb) One of the central means by which to secure the social responsibility of tuition fees is to provide adequately designed student loans. One particularly crucial factor with regard to an adequate design may be that these loans are repayable only after studies are completed, and that deferrals, reductions or waivers are possible, depending on the student's personal situation (cf. BVerwGE 134, 1 <10 et seq.>). Apart from this, further instruments in the tuition provisions like exceptions, reductions, or waivers for the socially disadvantaged may be considered – in other words, including making allowances for the interests of people with a lower income (cf. BVerfGE 112, 226 <245>). Finally, the legislature will also have to take into account specific family situations and the particular equality rights under the Basic Law, and consider adequate measures in this regard. 36

3. Whether the provisions in Bremen's Act meet the requirements for a socially responsible design of equal access to higher education in every regard is not at issue in the present proceedings. However, charging tuition fees in the way brought about by the Bremen provision is not per se incompatible with the Constitution. Their amount alone is not prohibitive, and is supported by the intent to design access to higher education in a way that is socially responsible. 37

II.

The provisions submitted for review, § 6 sentence 1 in conjunction with § 3 sec. 1, § 2 sec. 1 BremStKG, which treated out-of-state students differently from in-state students by distinguishing them according to whether their residence (sole or principal) was in Bremen, and by charging only the non-residents university tuition fees from the third semester onwards, violate the participatory right, under Art. 12 sec. 1 GG in conjunction with Art. 3 sec. 1 GG, to free and equal access to higher education in a cohesive nationwide educational system. 38

1. The general right to equality requires the legislature to treat matters that are essentially the same in the same manner and those matters that are essentially different in a different manner (cf. BVerfGE 98, 365 <385>; established case-law). It applies to both unequal burdens and unequal benefits (cf. BVerfGE 79, 1 <17>; 126, 400 <416> with further references). 39

In this regard a flexible standard of constitutional review applies, which is guided by the principle of proportionality; its content and limits cannot be defined in the abstract, but only with a look at the specific facts and subject of regulation (cf. BVerfGE 75, 108 <157>; 93, 319 <348 and 349>; 107, 27 <46>; 126, 400 <416>; 129, 49 <69> with further references). Among other factors, the legislature is subject to stricter limitations deriving from the fundamental rights concerned (cf. BVerfGE 88, 87 <96>). It follows from Art. 12 sec. 1 GG, which establishes a participatory right in the specific area of access to higher education, that in the case of unequal treatment, a stricter standard for justification applies (cf. BVerfGE 33, 303 <329 et seq., 352 and 353>). 40

2. The submitted provisions constitute an unequal treatment of equal matters, which is in need of justification. 41

Students who study at institutions of higher education in Bremen and who reside in Bremen, and those who study in Bremen but reside outside Bremen, are in a comparable situation with respect to the education for which they are charged fees under the provisions at issue. Both make use in equal ways of the educational opportunities offered by Bremen. If only out-of-state students are charged tuition between the third and 14th semester, this constitutes unequal treatment that is subject to the requirements of Art. 3 sec. 1 GG. 42

3. No sound factual reasons can be discerned that would justify this unequal treatment. 43

a) One's sole or principal residence and the ensuing affiliation with the *Land* of Bremen cannot in and of itself constitute a justification. 44

aa) Admittedly, different laws in different federal states and different municipalities are constitutionally not only possible, but indeed desirable. Facilitating diversity is an essential element of the principle of a federal nation, as well as autonomous municipal self-administration. The right to equality before the law is thus not applicable where different legislatures treat issues differently (cf. BVerfGE 10, 354 <371>; 93, 319 <351>). Within its own sphere of jurisdiction, a state legislature is not in principle barred from enacting provisions that differ from the legislation of other federal states, even if in practice such provisions discriminate in favour of in-state residents, or indeed against them (cf. BVerfGE 33, 303 <352>). Thus, if some federal states charge tuition fees while others do not, this alone is not objectionable in general with regard to the right to equal treatment (cf., as regards legislative competences, BVerfGE 112, 226 <244 and 245>). Different from that, the right to equal treatment does apply if, as in this case, there is a different treatment of in-state residents and others under the laws of a single federal state. 45

bb) In the present case, because of the specific nature of the situation being regulated, the unequal treatment, which is based solely on residence, cannot be justified. Federal state laws in the field of higher education have particularly national dimension and require specific consideration among the federal states. If a matter falls within the jurisdiction of the state legislature, but the issue concerned extends by its nature beyond the state's borders and, as in the case at hand, affects the participatory right to free and equal access to higher education that is recognised in all federal states equally, then one-sided benefits for residents of one state are permissible only according to heightened requirements for their justification. The university system is such a nationwide, interrelated system: although it falls to a large degree within the competences of the states, not all study programs are offered in all places, making access to educational capacities across state borders necessary (cf. BVerfGE 33, 303 <352>). Therefore, an across-the-board differentiation according to states is not permissible in the field of higher education (cf. BVerfGE 33, 303 <355 and 356>; 37, 46

104 <119 and 120>). Similarly, the Parliamentary Council (*Parlamentarischer Rat*) expressly argued against privileging in-state residents' access to university study (Parliamentary Council, Stenographic Report, *Stenographischer Bericht – StBer*, on the 44th session of the Main Committee of 19 January 1949, p. 569 <575 and 576>; previously cited in in BVerfGE 33, 303 <329>).

b) There are no sound factual reasons related to higher education to be seen in the present case that would justify Bremen's differentiating tuition provisions. The differences in tuition fees established under the Bremen provision are not justified by a difference in the use of educational facilities (aa). Nor can the legislature justify the distinction by claiming that it meant to motivate students to take up residence in Bremen, so that the state would receive a higher allocation of funds within the system of fiscal equalisation among the federal states (bb): the argument that the funds received by way of the fiscal equalisation system include a portion to finance the education of students residing in Bremen, and that consequently, out-of-state students can be required by state law to also help bear the cost of their education in Bremen through fees in lieu of the fiscal equalisation, does not justify the fee. The same would apply to a special allocation under the State Budget Act earmarked exclusively for students residing in Bremen.

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aa) The differentiation of tuition fees does not serve to compensate for a different use of educational facilities. It is not apparent that students whose sole or principal residence is outside Bremen use the services of Bremen institutions of higher education differently than students who have their sole or principal residence in Bremen. Out-of-state students do not cause higher costs, nor do they benefit more from the services offered by a Bremen university. The place of residence to which the Act on Study Accounts links the obligation to pay tuition has no direct connection to the use of the facilities (similar argument in Kugler, *Allgemeine Studiengebühren und die Grundrechte der Studierenden*, 2009, p. 194).

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bb) Nor is the unequal treatment justified by the *Land* of Bremen's objective of applying financial pressure to induce students to take up residence in Bremen, in order to increase the funds from the fiscal equalisation system. It is true that generally, nothing prevents federal states as well as municipalities from encouraging persons who wish to use their institutions to also establish their sole or principal residence within the entity's territory through financial incentives or financial pressure. For example, for persons with dual residence, the registration regulations or the tax laws – in the form of a tax on second residences – may be applied. However, charging tuition fees that are intended (in part) to motivate students to take up residence, so as to generate additional funds within the system of fiscal equalisation among states lacks the factual connection required in the field of higher education.

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Although, under the fiscal equalisation system, the *Land* of Bremen receives equalisation payments according to §§ 4 et seq. of the Financial Equalisation Act (*Finanzausgleichsgesetz – FAG*) and federal supplementary payments according to § 11

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FAG. However, these normally serve to cover the federal state's general financial needs (§§ 4 et seq. and § 11 sec. 1 and 2 FAG); the other federal supplementary payments according to § 11 sec. 3 and 4 FAG are earmarked for purposes other than financing higher education. Furthermore, all such payments become part of the budget of the *Land* of Bremen. The Bremen budgetary legislature then decides independently as to how these funds are to be used. Thus, there is no factual connection between the equalisation payments under the fiscal equalisation system and the financing of higher education. Consequently, no specific amounts from the equalisation system can be attributed solely to students residing in Bremen; nor can any shortfall be attributed to students not residing in Bremen (cf. also BVerfGE 65, 325 <355 and 356>). There is no sound factual justification of tuition fees for out-of-state students from the third through the 14th semester; there is no sufficient factual connection between the financial equalisation funds, as general revenue that forms part of the state budget, decisions by the budgetary legislature on how to use that revenue, and tuition fees for out-of-state students. Any attempt to justify the tuition by allocating equalisation payments towards the expense of educational options for Bremen students would furthermore raise the legitimate objection that, in effect, precisely these educational options have been jointly financed by third parties – namely, the donor states of the fiscal equalisation system. That way, the *Land* of Bremen would ultimately be attempting to legitimise a tuition fee for out-of-state students on the basis of out-of-state benefits.

The same would apply if the Bremen Budget Act (*Landeshaushaltsgesetz*) itself allocated funds to the universities solely to finance students residing in Bremen, because in view of the nationwide interrelated structure of the higher education system, there is no factual reason for explicitly excluding out-of-state students from studying. In any case, such a provision could not be used as a basis for considering the expenditures for Bremen students to be financed but not the expenditures for out-of-state students; that would fail to take due regard of the participatory right under Art. 12 GG which requires a nationwide, interrelated system of higher education with equal conditions of access (cf., on the basics, BVerfGE 33, 303 <329 et seq.>), inasmuch as the state's budget would provide for the expenses only of students residing in Bremen. From a budgetary perspective, this would result in offering higher education for Bremen students alone. The Senate was not called upon to decide whether such a provision would be permissible purely as a calculation method for the general expenses of the Bremen institutions of higher education.

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D.

The decision under C. II. was reached with a 6:2 vote.

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| Kirchhof | Gaier | Eichberger |
| Schluckebier | Masing | Paulus |
| Baer | | Britz |

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Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 8. Mai 2013 - 1 BvL 1/08 - Rn. (1 - 52), http://www.bverfg.de/e/ls20130508_1bvl000108en.html

ECLI ECLI:DE:BVerfG:2013:ls20130508.1bvl000108