Headnote

to the Order of the Second Senate of 11 July 2013

– 2 BvR 2302/11 –

– 2 BvR 1279/12 –

On the Constitutionality of the Therapeutic Confinement Act.

FEDERAL CONSTITUTIONAL COURT

- 2 BvR 2302/11 -

- 2 BvR 1279/12 -

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

of Mr H…,

- authorised representative: Rechtsanwalt Michael Rehberger,
in Sozietät k+r kropfrehberger,
Hindenburgstraße 59, 66119 Saarbrücken -

1. directly against

a) the order of the Saarland Higher Regional Court (*Oberlandesgericht*)

of 30 September 2011 - 5 W 212/11-94 -,

b) the order of the Saarbrücken Regional Court (*Landgericht*)

of 2 September 2011 - 5 O 59/11 -,

2. indirectly against

the Therapeutic Confinement Act (*Therapieunterbringungsgesetz* – ThUG)

of 22 December 2010

- 2 BvR 2302/11 -,

1. directly against

a) the order of the Saarland Higher Regional Court

of 14 May 2012 - 5 W 44/12 - 22 -,

b) the order of the Saarbrücken Regional Court

of 17 February 2012 - 5 O 59/11 Th -,

2. indirectly against

the Therapeutic Confinement Act

of 22 December 2010

- 2 BvR 1279/12 -,

the Second Senate of the Federal Constitutional Court

with the participation of Justices

President Voßkuhle,

Lübbe-Wolff,

Gerhardt,

Landau,

Huber,

Hermanns,

Müller,

Kessal-Wulf

held on 11 July 2013:

1. **The constitutional complaints are joined for decision.**

2. **a) The order of the Saarland Higher Regional Court of 30 September 2011 - 5 W 212/11-94 - and the order of the Saarbrücken Regional Court of 2 September 2011 - 5 O 59/11 - violate the complainant's fundamental right under Article 2 section 2 sentence 2 in conjunction with Article 20 section 3 of the Basic Law (*Grundgesetz* – GG).**

a. **The order of the Saarland Higher Regional Court of 14 May 2012 - 5 W 44/12-22 - and the order of the Saarbrücken Regional Court of 17 February 2012 - 5 O 59/11 Th - violate the complainant's fundamental right under Article 2 section 2 sentence 2 in conjunction with Article 20 section 3 of the Basic Law.**

3. **§ 1 section 1 of the Therapeutic Confinement Act as introduced by the Act on Reforming the Law of Preventive Detention and Accompanying Legislation (*Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen*) of 22 December 2010 (Federal Law Gazette – *Bundesgesetzblatt* – I page 2300) is compatible with the Basic Law subject to the condition that confinement or any extension of such may only be ordered if specific circumstances directly related to the confined person or to his or her conduct suggest a high risk that he or she will commit the most serious violent crimes or sexual offences.**

4. **The remainder of the constitutional complaints is rejected as unfounded.**

5. **The federal state (*Land*) of the Saarland shall reimburse the complainant for two thirds of his necessary expenses.**

R e a s o n s :

A.

The complainant directly challenges his court-ordered confinement under the Therapeutic Confinement Act. Indirectly, he challenges the provisions of the Therapeutic Confinement Act themselves. 1

I.

1. The Act on Reforming the Law of Preventive Detention and Accompanying Legislation (*Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen*) of 22 December 2010 introduced the “Act on Therapy and Confinement of Mentally ill Violent Offenders” (*Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter – Therapieunterbringungsgesetz* – ThUG), which entered into force on 1 January 2011, the day after its promulgation (Federal Law Gazette – *Bundesgesetzblatt* – BGBl I p. 2300 <2305>). The legislative aim of this act was to deal with “gaps of protection” under the former arrangements on preventive detention, gaps that arose following the decision of the European Court of Human Rights in the case of *Mücke v. Germany* (European Court of Human Rights – ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*). The intention was to create a legal basis for certain cases allowing the authorities to securely confine the criminal offenders in question without violating the Convention for the Protection of Human Rights and Fundamental Freedoms – ECHR – (cf. *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 17/3403, p. 14). This “requires limiting the new law’s scope to cases, in which the dangerousness of the criminal offenders who are to be released or already have been released from preventive detention follows from a mental disorder” (BTDrucks 17/3403, p. 14). By requiring a mental disorder, the legislature reacted to the European Court of Human 2

Rights, which had found that there had been a violation of Art. 5 sec. 1 ECHR (cf. BT-Drucks 17/3403, p. 14, 53 and 54). The additional requirement of confinement with a therapeutic focus was meant to address the European Court of Human Rights' finding of a violation of Art. 7 sec. 1 sentence 2 ECHR with regard to retrospectively extended preventive detention (cf. BTDrucks 17/3403, p. 14, pp. 54 and 55).

The Act on the Federal Implementation of the *Abstandsgebot* in the Law of Preventive Detention (*Gesetz zur bundesrechtlichen Umsetzung des Abstandsgebots im Recht der Sicherungsverwahrung*) of December 2012 added a second section to § 2 ThUG; the amendment entered into force on 1 June 2013 (BGBl I p. 2425 <2430>). 3

2. Key provision of the Therapeutic Confinement Act is § 1 ThUG, which governs the scope of the Therapeutic Confinement Act and contains the substantive requirements for a confinement. Since its entry into force, it has read as follows: 4

§ 1 5

Therapeutic Confinement

(1) If a final and binding decision by a court has established that a person convicted of a crime of the kind mentioned in § 66 sec. 3 sentence 1 of the German Criminal Code (*Strafgesetzbuch*) can no longer be confined in preventive detention because the law of preventive detention must respect the prohibition on retrospectively increasing the severity of a sentence, the competent court may order that this person be confined in an appropriate closed institution if

1. the person suffers from a mental disorder and, taking into consideration his or her personality, prior life and situation as a whole, there is a high probability that he or she will, as a consequence of this mental disorder, cause considerable harm to the life, physical integrity, personal freedom or sexual self-determination of another person, and

2. for the reasons stated in no. 1, confinement is necessary to protect the general public.

(2) Section 1 shall be applicable irrespective of whether the convicted person is still in preventive detention or has already been released.

§ 2 ThUG further defines the above-mentioned "appropriate closed institution". In the amended version (prior, § ThUG had only one section), in force since 1 June 2013 (BGBl 2012 I p. 2425 <2430>), § 2 ThUG reads as follows: 6

§ 2 7

Appropriate Closed Institutions

(1) Only such closed institutions are appropriate for therapeutic

confinement pursuant to § 1 of the Therapeutic Confinement Act that

1. can, due to their medical-therapeutic focus, guarantee to provide adequate treatment of the respective mental disorder, with treatment that is based on an individual treatment plan and is aimed at the shortest possible duration of confinement,

2. taking into account therapeutic considerations as well as the security interests of the general public, allow for accommodation of the confined persons that causes them the least hardship, and

3. are separated from penal institutions both spatially and organisationally.

(2) Institutions within the meaning of § 66c sec.1 of the German Criminal Code are also appropriate for therapeutic confinement if they meet the requirements of section 1 nos. 1 and 2.

With regard to the appropriate institutions, the new section 2 refers to § 66c of the German Criminal Code (*Strafgesetzbuch* – StGB), which was also introduced by the Act on the Federal Implementation of the *Abstandsgebot* in the Law of Preventive Detention of 5 December 2012 (BGBl I p. 2425 <2425>), and the purpose of which was to ensure that the design of preventive detention meet the requirements of the constitutional requirement for a clear differentiation between prison sentences and preventive detention (*Abstandsgebot*). 8

In addition to these central provisions, the Therapeutic Confinement Act contains provisions on procedure (§§ 3, 4 ThUG), legal remedies (§§ 16, 17, 18 ThUG), medical assessments (§ 9 ThUG), preliminary injunctions (§ 14 ThUG), duration and extension of confinement (§ 12 ThUG), and reversal of therapeutic confinement (§ 13 ThUG). 9

3. The legislature explicitly included in the scope of the Therapeutic Confinement Act certain cases in which a person had previously only preliminarily been placed in preventive detention, by introducing Art. 316e sec. 4 of the Introductory Act to the German Criminal Code (*Einführungsgesetz zum Strafgesetzbuch* – EGStGB) via the Second Amendment of the Introductory Act to the German Criminal Code (*Zweites Gesetz zur Änderung des Einführungsgesetzes zum Strafgesetzbuch*) of 20 December 2012 – in force since 28 December 2012 – (BGBl I p. 2756). Art. 316e sec. 4 EGStGB reads as follows: 10

(4) § 1 of the Therapeutic Confinement Act of 22 December 2010 (BGBl. I p. 2300, 2305) is also to be applied under the conditions mentioned therein in cases in which the individual in question had not been placed in preventive detention, but his preventive detention had been ordered by a court of first instance, and an appellate deci- 11

sion rendered before 4 May 2011 held that the individual could not be placed in preventive detention only because the prohibition on retroactive aggravations in the law of preventive detention precluded such a final decision and had to be respected, without considering the degree of threat to the general public that the individual in question may pose.

II.

The background of the initial proceedings was as follows: 12

[The following summary is for the most part taken from press release no. 50/2013 of 8 August 2013.]

[The complainant had] committed several violent offences, mostly with a sexual component and under the influence of alcohol. In 1989, the Regional Court *[convicted him of committing offences in a senselessly drunken state (Vollrausch), sentenced him to imprisonment, and]* ordered him to be confined in a psychiatric hospital because his criminal incapacity could not be ruled out. In 2005, the Regional Court declared that he was to be no longer confined; although he was still dangerous, his criminal capacity was no longer significantly impaired. In April 2007, before the complainant had completed his sentence, the Regional Court ordered for the first time his subsequent preventive detention. In May 2010, in light of the jurisprudence of the European Court of Human Rights (ECtHR), the Federal Court of Justice (*Bundesgerichtshof* – BGH) ordered the immediate release of the complainant. Following this decision, the city of S. applied for his therapeutic confinement. 13-30

Subject-matter of the proceedings 2 BvR 2302/11 are orders concerning the complainant's provisional therapeutic confinement for three months, issued by the Regional Court on 2 September 2011 and by the Higher Regional Court on 30 September 2011. Subject-matter of the proceedings 2 BvR 1279/12 are the orders of the Regional Court (17 February 2012) and of the Higher Regional Court (14 May 2012), which concern the complainant's confinement in the principal proceedings until 1 March 2013.

[End of summary]

[…]

III.

In both proceedings, the complainant's largely identically worded constitutional complaints claim that the Federation did not have the competence to enact federal legislation under Art. 74 sec. 1 of the Basic Law (1.), as well as that the legislation violates the principles of non-retroactivity (*Rückwirkungsverbot*) (2.) and legal specificity (*Bestimmtheitsgebot*) (3.), which both follow from Art. 103 sec. 2 GG. He further claims that because there was no legal basis for his confinement, Art. 2 sec. 2 sentence 2 in conjunction with Art. 104 GG was violated (4.). 31

1. According to the complainant, the Federation lacks the legislative competence for the Therapeutic Confinement Act because the law's concept, as laid down in the reasons provided during the legislative process, shows that it can precisely not be considered part of "criminal law" and that it can thus not be based on the competence for "criminal law" under Art. 74 sec. 1 no. 1 GG. […] 32

2. If, however, the Federation were competent under its competence for criminal law, the Therapeutic Confinement Act, as well as the comparable provisions on retrospective preventive detention, would still violate the principle of non-retroactivity under Art. 103 sec. 2 GG. […] 33

3. The complainant further alleges that the requirements of legal specificity under Art. 103 sec. 2 GG were violated because § 1 sec. 1 no. 1 ThUG did not in a sufficiently precise way define the criteria for a "mental disorder". According to him, the term was too broad because it went clearly beyond the reasons for detention described in Art. 5 sec. 1 sentence 2 letter e ECHR, which only covers the mentally ill and those not legally responsible for their actions. The complainant particularly stresses that in connection with his termination of confinement in a psychiatric hospital he was held to no longer be in a state of greatly diminished criminal responsibility or even exempt from criminal responsibility, and that he could thus not be considered a person "of unsound mind" within the meaning of Art. 5 sec. 1 sentence 2 letter e ECHR. The reference to one of the crimes enumerated in § 66 sec. 3 StGB (so-called "*Katalogtat*") was also too vague, the complainant states, because there is no indication whether any conviction for such a crime suffices or whether such a crime also needs to be the qualifying offence for ordering preventive detention. 34

4. Finally, the complainant claims that the provisions of the Therapeutic Confinement Act could not apply to him because he had not previously been placed in preventive detention. Therefore, he claims that still having been placed in therapeutic confinement violates Art. 2 sec. 2 sentence 2 in conjunction with Art. 104 GG because there was no formal law that justified this deprivation of liberty. […] 35

IV.

1. The Federal Ministry of Justice submitted a statement for the Federal Government. It holds that the Therapeutic Confinement Act is compatible with the Basic Law. […] 36

2. The Ministry of Justice of the federal state of the Saarland, which has submitted a statement in the proceedings 2 BvR 2302/11, considers the constitutional complaint unfounded. […] 37

3. […] 38

4. The Federal Prosecutor General (*Generalbundesanwalt*) believes that the constitutional complaints are unfounded in so far as they indirectly challenge the Therapeutic Confinement Act. […] 39

However, in so far as the complainant in the proceedings 2 BvR 2302/11 challenges the application of the law by the regular courts with regard to his right to liberty, […] the Federal Prosecutor General considers the constitutional complaint admissible and well-founded. […] 40

5. In its statement, the German Association of Judges (*Deutscher Richterbund*) expresses concerns regarding the Therapeutic Confinement Act, and it gives examples of problems when applying the law in practice. The Association holds that the compatibility of § 1 ThUG with the Convention for the Protection of Human Rights is problematic. […] 41

6. The German Bar Association (*Deutscher Anwaltverein*), who has submitted a statement in the proceedings 2 BvR 2302/11, considers the constitutional complaint well-founded. […] 42

7. The statement by the German Society for Psychiatry, Psychotherapy, and Neurology (*Deutsche Gesellschaft für Psychiatrie, Psychotherapie und Nervenheilkunde*, DGPPN) expresses the Society's view on confinement under the Therapeutic Confinement Act from a psychiatric and psychotherapeutic perspective. […] 43

[…] 44-47

V.

With each of the constitutional complaints, the complainant submitted an application for a preliminary injunction. The applications were rejected by the orders of the First Chamber of the Second Senate of the Federal Constitutional Court of 23 November 2011 - 2 BvR 2302/11 - and of 28 June 2012 - 2 BvR 1279/12 -. Both rejections were based on the argument that, considering the prediction of the complainant's dangerousness, and until a decision was made on the constitutionality of the orders of confinement and the Therapeutic Confinement Act, the security interests of the general public outweighed the complainant's interest in immediately regaining his freedom. 48

B.

The admissible (I.) constitutional complaints are unfounded to the extent that they indirectly challenge the provisions of the Therapeutic Confinement Act (II. to V.). With regard to the challenged decisions, the constitutional complaints are well-founded (VI.). 49

I.

The constitutional complaints are admissible. […] Notwithstanding the fact that the challenged decisions themselves no longer serve as basis for a further implementation of therapeutic confinement, the complainant in both cases continues to have the specific interest in legal recourse that is required of him (2.). 50

1. […] 51

2. The fact that the orders containing the preliminary injunction, which were challenged in the proceedings 2 BvR 2302/11 (cf. LG – *Landgericht* – Saarbrücken, order of 2 September 2011 - 5 O 59/11 - and Saarland OLG – *Oberlandesgericht* –, order of 30 September 2011 - 5 W 212/11-94 -), have become moot due to the subsequent developments in the principal proceedings, namely the extension of the preliminary injunction (cf. LG Saarbrücken, order of 1 December 2011 - 5 O 59/11 -) and the order of confinement (cf. LG Saarbrücken, order of 17 February 2012 - 5 O 59/11 - and Saarländisches OLG, order of 14 May 2012 - 5 W 44/12-22 -), does not mean that the complainant no longer has an interest in legal recourse, a requirement that must still exist at the time the Federal Constitutional Court decides on the challenged decisions. In general, the latest decision rendered in a case is the basis of further execution of a temporary confinement under the Therapeutic Confinement Act (cf. on the arrest warrant, Chamber Decisions of the Federal Constitutional Court – *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 5, 230 <234>; Graf, in: *Karlsruher Kommentar zur StPO*, 6th ed. 2008, § 117 para. 5; Meyer-Goßner, Strafprozessordnung – StPO, 55th ed. 2012, § 117 para. 8; both with further references). An order issued in the principal proceedings replaces previously rendered preliminary injunctions. The same is true with respect to the (first) decision in the principal proceedings, challenged in the proceedings 2 BvR 1279/12. It was limited in time until 1 March 2013 (cf. LG Saarbrücken, order of 17 February 2012 - 5 O 59/11 -) and also became moot upon expiry of this time limit. Nevertheless, the complainant still has a continuing legitimate interest in subsequent constitutional review (cf. on this issue Decisions of the Federal Constitutional Court – *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 9, 89 <92 et seq.>; 32, 87 <92>; 53, 152 <157 and 158>; 104, 220 <234>; Federal Constitutional Court – *Bundesverfassungsgericht* – BVerfG, order of the Third Chamber of the Second Senate of 31 October 2005 - 2 BvR 2233/04 -, juris, paras. 20 et seq.), because in each case, the orders formed the basis of a severe encroachment upon fundamental rights, namely the deprivation of liberty, lasting from 2 September 2011 until 1 December 2011 (2 BvR 2302/11) and from 17 February 2012 until 1 March 2013 (2 BvR 1279/12). 52

II.

The Therapeutic Confinement Act does not violate the provision on legislative powers of Art. 70 sec. 1 GG. The federal legislature has concurrent legislative power to enact the Therapeutic Confinement Act, which follows from Art. 72 sec. 1 in conjunction with Art. 74 sec. 1 no. 1 GG. 53

Art. 70 sec. 1 GG confers the legislative powers to the federal states (*Laender*), unless the Basic Law grants certain legislative powers to the Federation (*Bund*). Under Art. 70 sec. 2 GG, the respective powers of the *Bund* and the *Laender* are assessed pursuant to the provisions on “exclusive” (*ausschließliche*) and “concurrent” (*konkurrierende*) legislative competence of the *Bund*. The matter regulated in the Therapeutic Confinement Act is to be regarded as criminal law, meaning that it falls under the concurrent legislative powers of the *Bund* within the meaning of Art. 74 sec. 1 no. 1 54

GG.

1. The Basic Law does not define the term “criminal law” with a view to legislative powers. In interpreting the provisions on legislative competence, the general rules apply, but historical interpretation is of particular importance (cf. BVerfGE 68, 319 <328>; 97, 198 <219>; 106, 62 <105>). Especially where legislative powers were assigned in a normative-receptive way, i.e. where the legislature, when creating the Constitution, took pre-existing areas of law and assigned them as a matter to be regulated to the various areas of legislative competence, the decisive factor in determining the respective areas of legislative competence is the traditional, conventional understanding of content and scope of the area of law in question (cf. BVerfGE 109, 190 <218>). The Federal Constitutional Court has thus held that, considering in particular legislative history and state practice (cf. BVerfGE 109, 190 <213 and 214>), the area of criminal law within the meaning of Art. 74 sec. 1 no. 1 GG covers regulating all, even retrospective, repressive or preventive reactions of the state to crimes that use the crime as a qualifying offence, that are aimed exclusively at criminals, and that are factually justified by the original offence (BVerfGE 109, 190 <212>). 55

2. Pursuant to these standards, the Therapeutic Confinement Act has to be counted as criminal law in terms of legislative competences and falls under the concurrent legislative powers of the *Bund* . 56

[…] 57

a) Historically, the competence for “criminal law” covers not only retributive sanctions to make amends for the crime, but also specific preventive reactions to a criminal act (cf. BVerfGE 109, 190 <213>; BVerfGE 85, 134 <142> for measures pursuant to §§ 63, 64 StGB). […] 58

[…] 59

b) The substantive regulatory content of therapeutic confinement and the function of the law, which is to close a gap in the range of legal resources available, establish the basis for the concurrent legislative power of the *Bund* to adopt the Therapeutic Confinement Act. 60

[…] 61-62

c) Neither the freedom-oriented therapy concept (§ 2 ThUG) nor the procedural set-up of the Therapeutic Confinement Act (§§ 3, 4 ThUG) stand in the way of it falling under the competences for criminal law. 63

[…] 64-65

III.

Interpreted in conformity with the Constitution, confinement pursuant to § 1 sec. 1 ThUG is consistent with the protection of legitimate expectations under the rule of law pursuant to Art. 2 sec. 2 sentence 2 in conjunction with Art. 20 sec. 3 GG. 66

1. a) Standard for the constitutional review of § 1 sec. 1 ThUG is Art. 2 sec. 2 sentence 2 GG in conjunction with the principle of the protection of legitimate expectations (cf. BVerfGE 72, 200 <242>; 128, 326 <390>). These provisions set limits for the legislative powers when the legislature acts out of concern for the public interest (cf. BVerfGE 14, 288 <300>; 25, 142 <154>; 43, 242 <286>; 43, 291 <391>; 75, 246 <280>; 109, 133 <182>; 128, 326 <390>). The importance of the respective legitimate expectations increases with the severity of the encroachment upon the affected fundamental rights (for an earlier decision, see BVerfGE 109, 133 <186 and 187>; 128, 326 <390>). 67

Since the Therapeutic Confinement Act authorises ordering potentially indefinite detention, confinement pursuant to § 1 Abs. 1 ThUG constitutes one of the most serious encroachments upon the fundamental right to liberty (Art. 2 sec. 2 sentence 2 GG) – even if the requirement of distinguishing the circumstances of confinement from those of prison sentences is fulfilled. It thus encroaches upon a right that already on its own holds particular weight among the fundamental rights (cf. BVerfGE 128, 326 <390>). 68

b) Against this backdrop and considering the values of the Convention for the Protection of Human Rights and Fundamental Freedoms (cf. BVerfGE 111, 307 <315 et seq.>; 128, 326 <366 et seq.>; 131, 268 <295 et seq.>) which, via Art. 5 and Art. 7 sec. 1 ECHR, limit the retrospective imposition or extension of preventive measures that involve deprivation of liberty (cf. on this BVerfGE 128, 326 <391 et seq.>, with further references), the interference with the right to liberty that therapeutic confinement entails, and which is made more severe by concerns regarding the protection of legitimate expectations, is only proportionate if the requirement of distinguishing the circumstances of confinement from those of prison sentences is fulfilled, specific circumstances directly related to the confined person or his or her conduct suggest a high risk that he or she will commit the most serious violent crimes or sexual offences (*hochgradige Gefahr schwerster Gewalt- oder Sexualstraftaten*), and if the requirements of Art. 5 sec. 1 sentence 2 letter e ECHR are met (cf. on preventive detention BVerfGE 128, 326 <399>; 129, 37 <46 and 47>; BVerfG, order of the Second Senate of 6 February 2013 - 2 BvR 2122/11 et al. -, juris, para. 27). 69

2. Pursuant to the standards developed for the law of preventive detention, which also apply to therapeutic confinement being a retrospective measure involving deprivation of liberty (a), confinement pursuant to § 1 sec. 1 ThUG is compatible with Art. 2 sec. 2 sentence 2 in conjunction with Art. 20 sec. 3 GG. In this context, the risk assessment under § 1 sec. 1 no. 1 ThUG only meets the standards set by the Constitution if it can be established that there is a high risk that the most serious violent crimes or sexual offences will be committed. This result can be achieved by interpreting the provision in a way that conforms to the Constitution (b). § 2 ThUG takes into account the values of Art. 7 sec. 1 ECHR and describes the necessary distance to the enforcement of criminal detention (c). Taking into account the jurisprudence of the European Court of Human Rights and the margin of appreciation awarded to the states parties, the term “mental disorder” within the meaning of § 1 sec. 1 ThUG is compati- 70

ble with the requirements of Art. 5 sec. 1 sentence 2 letter e ECHR (d).

a) Therapeutic confinement is a deprivation of liberty that is ordered retrospectively. The intensity of this interference with fundamental rights corresponds to that of preventive detention. 71

While the legislative purpose is forward-oriented since the Therapeutic Confinement Act, based on a current anticipation of dangerousness, aims at protecting the public from serious violations of their legal interests by mentally ill violent criminals and sexual offenders (cf. BTDrucks 17/3403, p. 53), this does not change the fact that therapeutic confinement is connected with the past nor the necessity for protecting legitimate expectations that is established by this connection. (cf. BVerfGE 109, 133 <184>, for preventive detention). However, § 1 sec. 1 ThUG does not provide for retroactivity of legal consequences (*Rückbewirkung von Rechtsfolgen* so-called "true retroactivity" ["*echte Rückwirkung*"]). It limits the expectations of those affected only in the form of a factual link to the past (*tatbestandliche Rückanknüpfung* or so-called "quasi retroactivity" ["*unechte Rückwirkung*"]; regarding this terminology see BVerfGE 127, 1 <16 and 17>; also 131, 20 <36 and 37>). While the onerous legal consequences of the confinement only come into action after the promulgation of the law, they are factually triggered by legally relevant behaviour that happened before the law's promulgation. 72

Confinement pursuant to § 1 sec. 1 ThUG allows for potentially unlimited deprivation of liberty, which, regarding the deprivation of liberty, is comparable to a prison sentence or preventive detention. The fact that the law's explanatory memorandum states that "therapeutic confinement is fundamentally different from punishment, but also from preventive detention" (BTDrucks 17/3403, pp. 20 and 21), clearly refers to the punishment-like conditions of preventive detention that the European Court of Human Rights found (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, paras. 127 et seq.). As long as the constitutional requirement of distinguishing the circumstances of confinement from those of prison sentences is observed, there is no fundamental difference between confinement under the Therapeutic Confinement Act and preventive detention. 73

The intensity of its interference with fundamental rights does not differ from the interference caused by preventive detention, just because § 2 ThUG prescribes confinement in an appropriate therapeutic institution and a freedom-oriented therapeutic concept. The law of preventive detention, too, must comply with certain requirements regarding its implementation ("*Abstandsgebot*", cf. BVerfGE 128, 326 <374 et seq.>), since imprisonment, which serves to make amends for a crime, and preventive detention, which entails preventive deprivation of liberty and is independent of individual guilt (cf. BVerfGE 128, 326 <376 and 377>), differ in their aims and objective justifications. This holds true notwithstanding the deficits of the legal concept of preventive detention that have been observed in the past (cf. BVerfGE 128, 326 <382 et seq.>) and the problems with its actual implementation (cf. BVerfGE 128, 326 <384 et seq.>; 74

also ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, paras. 127 et seq.). Accordingly, confinement in preventive detention must – in clear contrast to prison sentences – be freedom-oriented and have a clear therapeutic dimension, so as to minimise the threats posed by the detainee and in order to reduce the duration of the deprivation of liberty to the amount strictly necessary (BVerfGE 128, 326 <374 and 375>). Based on the requirements for a freedom-oriented overall concept for implementing preventive detention, which have since been further specified (cf. BVerfGE 128, 326 <378 et seq.>), there are no serious reasons that would make confinement in an appropriate institution within the meaning of § 2 ThUG appear as a less intensive interference with the fundamental right to liberty than preventive detention.

b) Taking into consideration the requirements under the European Convention on Human Rights, the principle of proportionality demands that when a decision on therapeutic confinement is made, the protection of the affected person's legitimate expectations be sufficiently considered in the balancing of interests, and that therapeutic confinement only be ordered if specific circumstances related to the confined person or to his or her conduct suggest a high risk that the most serious violent crimes or sexual offences will be committed. 75

The wording of § 1 sec. 1 no. 1 ThUG itself does not provide for such a narrow prediction of dangerousness but merely requires that an assessment of the affected person's personality, prior life, and life situation as a whole lead to the conclusion that there is a high probability that he or she will cause considerable harm to the life, physical integrity, personal freedom or sexual self-determination of another person. However, a restrictive interpretation in conformity with the Constitution is possible. 76

aa) The requirement of interpretation in conformity with the Constitution demands that when there are several possible interpretations of a provision, some of which lead to a constitutional result, while others lead to an unconstitutional result, preference be given to the interpretation that is in conformity with the Basic Law (cf. BVerfGE 119, 247 <274>; established jurisprudence). Thus, a provision may only be declared unconstitutional if there is no possible interpretation that is in accordance with the recognised principles of interpretation and in conformity with the Constitution. Respect for the legislative authority commands that, within the limits of the Constitution, the maximum of what the legislature intended be maintained (cf. BVerfGE 86, 288 <320>). Interpretation in conformity with the Constitution finds its limits where it would conflict with the wording of the provision and the legislature's clearly identifiable intention (BVerfGE 110, 226 <267>, with further references). 77

bb) Pursuant to these standards, a – restrictive – interpretation of § 1 sec. 1 no. 1 ThUG in conformity with the Constitution is possible to the effect that, with regard to the prediction of dangerousness, confinement is only ordered if specific circumstances related to the confined person or to his or her conduct suggest a high risk that the most serious violent crimes of or sexual offences will be committed. 78

(1) The wording of the provision does not conflict with this interpretation. § 1 sec. 1 ThUG requires a high probability that the life, physical integrity, personal freedom, or sexual self-determination of another person will be severely harmed. The Court need not decide whether there are qualitative differences between the terms of “high probability” (“*hohe Wahrscheinlichkeit*”) and “high risk” (“*hochgradige Gefahr*”) since in any case the provision’s wording covers the necessary limitation to the criterion of “high risk”. Nor does the fact that § 1 sec. 1 no. 1 ThUG requires a “considerable” interference with the legal interests enumerated therein preclude an interpretation in conformity with the Constitution in the way described above. Since the legal interests mentioned in § 1 sec. 1 no. 1 ThUG are always significantly affected in cases of serious violence or sexual offences, the legislative intent clearly covers these cases. 79

(2) The legislative purpose does not conflict with such an interpretation in conformity with the Basic Law. According to the explanatory memorandum, the aim of therapeutic confinement is “the protection, as effective as possible, of the public from serious violations of their legal interests by mentally ill violent criminals and sexual offenders” (BTDrucks 17/3403, p. 53). The explanatory memorandum accepts at the same time that the legislature acts within a “narrow range that is shaped both by a connection to crimes and by preventive objectives, and on which both the Basic Law and the ECHR impose strict requirements” (BTDrucks 17/3403, p. 19). If the legislature thus explicitly recognises the limits imposed on its stated aims by the Basic Law and the European Convention on Human Rights, it is not contrary to the law’s purpose if, via an interpretation in conformity of the Constitution, a protection of the public from serious violations of their legal interests by mentally ill violent criminals and sexual offenders is guaranteed that is both compatible with the Basic Law and as effective as possible. 80

Nor does the argument that the Therapeutic Confinement Act is left without any area of application if it is interpreted according to the Federal Constitutional Court’s strict standards on retrospectively ordered or extended preventive detention stand in the way of interpretation in conformity with the Basic Law. This holds true independent of the question, to which degree the Therapeutic Confinement Act is still applicable if the strict proportionality standards are used, now that the standards set by the Federal Constitutional Court on retrospectively ordered or extended preventive detention have been promulgated as a statutory transitional arrangement in Art. 316f sec. 2 sentence 2 EGStGB via the Act on the Federal Implementation of the *Abstandsgebot* in the Law of Preventive Detention of 5 December 2012 (BGBl I p. 2425). According to the wording of § 1 sec. 1 ThUG and the legislature’s intent (BTDrucks 17/3403, p. 53), therapeutic confinement is subsidiary to preventive detention, meaning that the law itself stipulates that confinement in preventive detention takes precedence over therapeutic confinement. Moreover, one should also take into consideration that the Therapeutic Confinement Act was passed at a time when – following the decision of the European Court of Human Rights (ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*) – it had not yet been clarified in the ju- 81

risprudence of the Federal Court of Justice whether and if so, under which conditions preventive detention that affected protected legitimate expectations could be ordered. […] At that time, the Federal Constitutional Court had not yet spoken on the matter either. The legislature's concern at the time was thus to create with the Therapeutic Confinement Act a narrowly defined transitional arrangement until the new provisions for preventive detention came into effect (BTDrucks 17/3403, p. 19). Following this line of argument, no recourse to the Therapeutic Confinement Act is necessary in so far as subsequent developments granted the opportunity, within the boundaries of the Constitution and the European Convention Human Rights, to protect the public from dangerous violent criminals or sexual offenders via the law of preventive detention. It is not contrary to the legislature's intention if the law of preventive detention limits the act's scope of application.

c) § 2 ThUG contains the constitutionally-mandated differentiation from the serving of a prison sentence. 82

aa) § 2 sec. 1 no. 3 ThUG in the version in force since 1 June 2013 (cf. BGBl 2012 I p. 2425 <2430>) explicitly prescribes spatial and organisational separation from penal institutions. Pursuant to § 2 sec. 1 no. 1 ThUG, confinement is limited to institutions that can, due to their medical-therapeutic focus, guarantee to provide adequate treatment of the respective mental disorder, treatment that is based on an individual treatment schedule and is aimed at the shortest possible duration of confinement. Moreover, while taking into account therapeutic needs as well as the safety interests of the general public, confinement shall burden the confined persons as little as possible (§ 2 sec. 1 no. 3 ThUG). 83

bb) With these provisions, the act ensures compliance with the requirement of clearly differentiating between prison sentences and therapeutic confinement, which applies not only to preventive detention but also to therapeutic confinement, since the latter is a preventive measure that extends the deprivation of liberty irrespective of individual guilt (cf. BVerfGE 128, 326 <374 et seq.>). Thereby the act at the same time creates a necessary element to ensure that therapeutic confinement is not classified as punishment within the meaning of Art. 7 sec. 1 ECHR. 84

(1) The European Court of Human Rights defines the concept of punishment autonomously, i.e. independent of how a measure is classified under domestic law. Starting point of its evaluation is thus whether the measure in question was imposed as a consequence of or following a criminal conviction. Other relevant factors are how the measure in question is characterised under domestic law, the nature and purpose of the measure, the procedure for its imposition and execution as well as its severity (cf. only ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 120). Using these criteria in the decision *Mücke v. Germany*, the European Court of Human Rights came to the conclusion that preventive detention must be considered a punishment within the meaning of Art. 7 sec. 1 ECHR. In addition to the reference to the qualifying offence which, along with other requirements, is 85

essential for confinement in preventive detention, the European Court of Human Rights particularly stressed that the way a measure is enforced in practice is relevant for how it is classified: The relatively minor differences of the detention regime compared to that of an ordinary prisoner serving his sentence – for example the right to wear one's own clothes and to further equip one's more comfortable prison cells – could not mask the fact that there was no substantial difference between execution of a prison sentence and of a preventive detention order. There were no special measures, instruments or institutions in place that were directed at persons in preventive detention and aimed at reducing the threat they present and thus at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences. Moreover, the court stressed the fact that preventive detention is ordered in criminal proceedings and is, considering the potential duration of the deprivation of liberty, among the most severe interferences with a person's rights (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, paras. 124 et seq.; see also ECtHR, judgment of 13 January 2011 - Application no. 20008/07 - *Mautes ./. Germany*, para. 55; judgment of 13 January 2011 - Application nos. 27360/04 and 42225/07 - *Schummer ./. Germany*, para. 67; judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit ./. Germany*, para. 68).

(2) Against this backdrop, the Second Senate of the Federal Constitutional Court has specified the constitutional requirements for preventive deprivation of liberty that is independent of individual guilt and qualitatively different from punishment (BVerfGE 128, 326 <374>). The European Court of Human Rights' interpretation of Art. 7 sec. 1 ECHR does not, however, require adjusting the Basic Law's concept of "punishment" under Art. 103 sec. 2 GG to the concept of "punishment" under Art. 7 sec. 1 ECHR, but suggests that the "*Abstandsgebot*" must be defined more clearly (BVerfGE 128, 326 <392 and 393>). 86

(3) In the following, the European Court of Human Rights repeated the criteria from its decision in *Mücke v. Germany* and referred to the conclusions it had made in this judgment, namely the quality of preventive detention as punishment within the meaning of the European Convention on Human Rights (cf. ECtHR, judgment of 24 November 2011 – Application no. 4646/08 - *O.H. ./. Germany*, paras. 103 et seq.). At the same time, however, it specified its reasons for considering the measure in question a punishment to the effect that, most importantly, it was not convinced that the challenged conditions of preventive detention, which were largely identical to those of an ordinary prisoner serving his sentence, had changed (cf. ECtHR, judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, para. 106; for the latest decision see also ECtHR, judgment of 7 June 2012 - Application no. 61827/09 - *K. ./. Germany*, paras. 82 and 83; judgment of 7 June 2012 - Application no. 65210/09 - *G. ./. Germany*, paras. 73 and 74). The focus on the implementation deficit, which could be established at least for the past, fits in with the European Court of Human Rights' subsequent reasoning because the court mentions in connection with Art. 46 ECHR that with its judgment of 4 May 2011, the Federal Constitutional Court implemented 87

the findings the European Court of Human Rights had made in its above-mentioned judgments on German preventive detention in the German domestic legal order and thereby fully met its respective obligations (cf. ECtHR, judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, paras. 117 and 118; see also the identically worded statements in the ECtHR's later decision, judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner ./. Germany*, paras. 101 and 102). With a view to the set time-frame, the judgment further states that the Federal Constitutional Court found an adequate solution to put an end to ongoing violations of the convention (cf. ECtHR, judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, para. 118; ECtHR, judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner ./. Germany*, para. 102).

d) The statutory requirement of a "mental disorder" within the meaning of § 1 sec. 1 ThUG does not conflict with the values of Art. 5 sec. 1 sentence 2 letter e ECHR. 88

aa) The Therapeutic Confinement Act itself does not provide a definition of the term "mental disorder" as used in § 1 sec. 1 no. 1 ThUG. However, the meaning of the words and the act's genesis provide a sufficiently clear indication of how it should be understood. 89

According to the act's explanatory memorandum, the term "mental disorder" follows the jurisprudence of the ECtHR on Art. 5 sec. 1 sentence 2 letter e ECHR, which explicitly allows a deprivation of liberty for "persons of unsound mind" (French: aliéné). This also covers abnormal personality traits that do not amount to mental illness. Ongoing abnormally aggressive and seriously irresponsible behaviour of a convicted criminal could be sufficient. Nor does the individual criminal responsibility of the respective person stand in the way of detention based on Art. 5 sec. 1 sentence 2 letter e ECHR (cf. BTDrucks 17/3403, pp. 53 and 54; with references to the jurisprudence of the European Commission of Human Rights and the European Court of Human Rights). The term "mental disorder" also follows the choice of words of the diagnostic classification systems ICD-10 (WHO International Statistical Classification of Diseases and Related Health Problems, 10th revision, chapter V) and DSM-IV (Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, 4th ed.), which are nowadays used in the field of psychiatry (cf. BTDrucks 17/3403, p. 54). 90

The act's explanatory memorandum further states that the disorder need not be of a kind that excludes criminal responsibility of the perpetrator or is assessed as a mental illness in psychiatric-forensic assessment practice. However, there must be a clinically recognisable complex of such symptoms or disturbed behaviours that are accompanied by stress and impairment at the individual level, as well as – not always, but frequently – at the collective or social level. Mere social deviations or social conflicts, which do not affect the individuals in question on a personal level, are thus not covered. Specific disorders of the personality, behaviour, sexual preference, or impulse control could constitute mental disorders; this applies in particular to the dissocial per- 91

sonality disorder and various disorders of sexual preference, for instance paedophilia or sado-masochism (cf. BTDrucks 17/3403, p. 54).

This alone shows that the statutory content of a mental disorder pursuant to § 1 sec. 1 no. 1 ThUG is meant to be in conformity with the justification for deprivation of liberty under Art. 5 sec. 2 letter e ECHR. It is primarily the responsibility of the regular courts to ensure this conformity when applying the Therapeutic Confinement Act to individual cases. 92

bb) Notwithstanding these considerations, from the perspective of legal systematics, therapeutic confinement differs from the previous two-track system of confinement in a psychiatric hospital (§ 63 StGB) on the one hand, and preventive detention (§ 66 StGB) on the other. The legislature has installed a “third way”, which cannot be distinguished on the basis of criminal responsibility (§§ 20,21 StGB). Not requiring a lack of criminal responsibility for therapeutic confinement does not conflict with the values under Art. 5 sec. 1 sentence 2 letter e ECHR, nor with the respective jurisprudence of the European Court of Human Rights. 93

(1) According to the jurisprudence of the European Court of Human Rights on Art. 5 sec. 1 sentence 2 letter e ECHR, this provision must be interpreted as requiring a finding, based on an objective medical assessment, that the person concerned suffers from a “real” or “true” mental disorder that, due to its “kind or degree”, requires compulsory admission either in the best interests of the affected person or in the interest of the public. The duration of deprivation of liberty which, according to its cause, must take place in a psychiatric hospital or other appropriate institution (for the latest decision on this aspect see ECtHR, judgment of 19 April 2012 – Application no. 61272/09 - *B. ./. Germany* , para. 69, with further references), must be subject to the continued existence of this disorder (cf. only ECtHR, judgment of 24 October 1979 - Application no. 6301/73 - *Winterwerp ./. Netherlands* , paras. 37 et seq.; established jurisprudence). What is thus required is a relationship between the mental disorder and a certain threat, and that the deprivation of liberty – provided that it is enforced in an appropriate psychiatric facility – can be justified with countering this threat. This also requires that the mental disorder be of a corresponding intensity (cf. Schöch, Goltdammer’s Archiv für Strafrecht – GA 2012, p. 14 <28>; Meyer-Ladewig, Europäische Menschenrechtskonvention – EMRK, 3rd ed. 2011, Art. 5 para. 45). In assessing whether the requirements of a mental disorder within the meaning of Art. 5 sec. 1 sentence 2 letter e ECHR and its continued existence are satisfied, the state parties also have a certain margin of appreciation (for the latest judgment on this issue, see the judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner ./. Germany* , para. 71). 94

By requiring that the deprivation of liberty be “lawful” and carried out “in accordance with a procedure prescribed by law”, Art. 5 sec. 1 ECHR in essence refers to domestic law and demands that the deprivation of liberty conform to domestic substantive and procedural rules (cf. ECtHR, judgment of 24 October 1979 - Application no. 95

6301/73 - *Winterwerp ./. Netherlands*, paras. 39, 45; judgment of 25 June 1996 - Application no. 19776/92 - *Amuur ./. France*, para. 50; judgment of 9 July 2009 - Application no. 11364/03 - *Mooren ./. Germany*, para. 72). *Inter alia*, this requires that any arrest or detention have a legal basis in domestic law (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 90, with further references).

However, compliance with national law does not suffice to comply with the general principle of legality. Any deprivation of liberty must also comply with the purpose of Art. 5 sec. 1 ECHR, i.e. protecting individuals from arbitrariness (cf. only ECtHR, judgment of 9 July 2009 - Application no. 11364/03 - *Mooren ./. Germany*, para. 72, with further references). Accordingly, domestic law must have a certain “quality”, requiring it in particular to be “sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness” (cf. ECtHR, judgment of 9 July 2009 - Application no. 11364/03 - *Mooren ./. Germany*, para. 76; judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 90, with further references). Moreover, it must provide “adequate legal protections” as well as “fair and proper procedures” (cf. ECtHR, judgment of 24 October 1979 - Application no. 6301/73 - *Winterwerp ./. Netherlands*, para. 45; judgment of 25 June 1996 - Application no. 19776/92 - *Amuur ./. France*, para. 53; judgment of 5 October 2004 - Application no. 45508/99 - *H.L. ./. United Kingdom*, para. 115). Finally, for a depravation of liberty to be compatible with the European Convention on Human Rights, there must be some relationship between the reasons for the deprivation of liberty and the place and conditions of detention. Thus, in principle, it is “lawful” within the meaning of Art. 5 sec. 1 sentence 2 letter e ECHR to deprive a person of his or her liberty on the basis of mental illness only if such deprivation of liberty is effected in a hospital, a clinic or another appropriate institution (for the latest decision on this aspect see ECtHR, judgment of 19 April 2012 - Application no. 61272/09 - *B. ./. Germany*, para. 69, with further references). 96

(2) Pursuant to these standards, the statutory requirement of a “mental disorder” in § 1 sec. 1 no. 1ThUG does not conflict with the values of the ECHR. To comply with the legal requirements of the convention, it is in particular not necessary to have a mental disorder that reaches the level of severity of §§ 20, 21 StGB ((a)). The conditions for foreseeability are met ((b)), as are the other requirements ((c)). 97

(a) (aa) A decision by the European Commission on Human Rights of 12 July 1976 already clarified that the concept of “mental disorder” is to be understood in a broader sense that includes abnormal personality traits that do not amount to mental illness. While it is apparent from the facts of the case provided in the decision that the national courts had classified the person concerned as not criminally liable (cf. decision of the European Commission on Human Rights of 12 July 1976 - Application no. 7493/76 - *X ./. Germany* , Decisions and Reports, volume 6, pp. 182 and 183), the European Court of Human Rights in two further decisions approved of persons who had at least diminished criminal responsibility being confined on the basis of Art. 5 sec. 1 98

sentence 2 letter e ECHR. While one of these decisions stated that the challenged confinement was lawful because of a “mental illness”, it must be noted that the case involved a person who under English criminal law – which, except in murder cases, only distinguishes between (full) responsibility and insanity and only differentiates according to possible gradations of guilt in the sentencing stage (cf. Albrecht, in: Kröber/Dölling/Leygraf/Sass, Handbuch der forensischen Psychiatrie, volume 1 (2007), p. 547) – had been considered criminally responsible and had thus served a prison sentence before he had been placed in confinement (cf. ECtHR, judgment of 20 February 2003 - Application no. 50272/99 - *Hutchinson Reid ./. United Kingdom* , paras. 14, 50). Also the second proceedings concerned the detention of a criminal who had been found to have (only) diminished criminal responsibility and who had been sentenced to imprisonment in combination with psychiatric confinement (cf. ECtHR, judgment of 11 May 2004 - Application no. 48865/99 - *Morsink ./. Netherlands* , paras. 9, 62).

(bb) In its decisions on preventive detention, the European Court of Human Rights does not rule out the possibility that placing certain offenders in preventive detention may meet the conditions of Art. 5 sec. 1 sentence 2 letter e ECHR (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 103). This is important because offenders in preventive detention do not typically have significantly impaired criminal responsibility. If the conditions of both confinement in preventive detention (§ 66 StGB) and of confinement in a psychiatric hospital (§ 63 StGB) are met because the person concerned suffers from a mental disorder that leads to considerably diminished criminal responsibility, and if the propensity to commit certain crimes that is required for placement in preventive detention results from the psychological defect, confinement in a psychiatric hospital usually takes priority (cf. BGH, order of 6 August 1997 - 2 StR 1999/97 -, Neue Zeitschrift für Strafrecht – NStZ 1998, p. 35 <36>; BGH, judgment of 20 February 2002 - 2 StR 486/01 - juris, para. 15; similarly, with reference to the ultima-ratio character of preventive detention, BGH, judgment of 20 September 2011 - 1 StR 71/11 -, juris, para. 21). 99

When the European Court of Human Rights’ decisions on preventive detention rejected a justification under Art. 5 sec. 1 sentence 2 letter e ECHR, the court did not base its findings on the argument that a mental disorder within the meaning of this provision must at least be accompanied by an impairment of criminal responsibility. In some cases, the European Court of Human Rights found that there was no mental disorder (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 103), and in other cases it doubted the existence of a mental disorder (cf. ECtHR, judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit ./. Germany*, para. 55; judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, para. 86; judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner ./. Germany*, para. 79). In doing so, the European Court of Human Rights followed the distinctions made at that time in the German legal system, namely that a difference is made between the placement of dangerous offenders in 100

preventive detention and the placement of mentally ill persons, who committed criminal acts without or with diminished criminal responsibility, in a psychiatric hospital (cf. ECtHR, judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit ./. Germany*, para. 55). The Court based this assessment on the findings of the domestic courts, which had refused to order the concerned persons' placements in a psychiatric hospital pursuant to § 63 StGB (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, paras. 22, 103; judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit ./. Germany*, para. 55; judgment of 13 January 2011 - Application no. 6587/04 - *Haidn ./. Germany*, para. 92, on provisions under the laws of the federal states).

101 Without always rendering a final decision on the question of a mental disorder, the European Court of Human Rights also considered the fact that the domestic courts did not have the authority to review the existence of a mental disorder, and that they did not base their decisions on the persons in question being of unsound mind (cf. ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 103; judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit ./. Germany*, para. 56; judgment of 13 January 2011 - Application no. 6587/04 - *Haidn ./. Germany*, para. 93; judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, para. 86; judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner ./. Germany*, para. 79). In addition to this – and again independent of the existence of a mental disorder – there could be no justification under Art. 5 sec. 1 sentence 2 letter e ECHR, because the detention had not been effected in an institution that was appropriate for mentally ill persons (cf. ECtHR, judgment of 13 January 2011 - Application no. 17792/07 - *Kallweit ./. Germany*, para. 57; judgment of 13 January 2011 - Application no. 6587/04 - *Haidn ./. Germany*, para. 94; judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, paras. 87 et seq.; judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner ./. Germany*, paras. 80 et seq.).

102 Detention that is consistent with the convention requires that there be a certain relationship between reasons, place, and conditions of the deprivation of liberty. In this context, the European Court of Human Rights considered the fact that the domestic courts had made no use of the possibility granted them by law to have the preventive detention take place in a psychiatric hospital (§ 67a sec. 2 StGB). Discussing the differing national rules under § 67a sec. 2 StGB, which imply better promotion of rehabilitation via the transfer to a different measure, the European Court of Human Rights held that in order to be justified under Art. 5 sec. 1 sentence 2 letter e ECHR, even those who are unwilling to undergo therapy but have been deprived of their liberty because of their mental illness, have to be placed in a medical therapeutic facility that is appropriate for their condition (cf. ECtHR, judgment of 24 November 2011 - Application no. 4646/08 - *O.H. ./. Germany*, para. 89; judgment of 19 January 2012 - Application no. 21906/09 - *Kronfeldner ./. Germany*, para. 82). However, one cannot draw conclusions about the existence or absence of a mental disorder from the fact that a

person has not been transferred to a psychiatric hospital.

(cc) As a result, the decisions on the law of preventive detention are to be understood as meaning that the European Court of Human Rights follows the findings of the domestic courts concerning the degree of severity required for a mental disorder, findings which the domestic courts of the respective states parties have made based on the system of their respective national law. Before the Therapeutic Confinement Act entered into force, under German law, the only reasons why the mental state of a dangerous criminal was relevant to the decision of whether he or she was to be placed in preventive detention was to distinguish between full criminal responsibility, diminished criminal responsibility or no criminal responsibility (§§ 20, 21 StGB) – if the offender was fully criminally responsible, he or she could only be placed in preventive detention, if not, the only option was to confine him or her to a psychiatric hospital. With regard to the existence of a mental disorder, the European Court of Human Rights thus had to rely on the findings by the German courts, which were made on the basis of the above-mentioned distinction. 103

This does not mean, however, that the national legislature cannot alter the system of national law, as has happened with the Therapeutic Confinement Act, and introduce the criterion of a “mental disorder” as a “third way” that is independent of significantly diminished criminal responsibility, and make this criterion the statutory requirement for placement in therapy-focussed confinement. Accordingly, the European Court of Human Rights repeatedly emphasised in recent decisions that when the domestic courts ruled on the continuation of confinement of people who were placed in preventive detention – and thus outside of the scope of § 63 StGB – they did not have to decide on the question of whether the person concerned had a mental disorder. This is where the Therapeutic Confinement Act comes into play. For the first time, it has made the existence of a mental disorder – in addition to certain requirements regarding an ensuing threat – a statutory requirement for confinement, and has thus established judicial obligations to scrutinise this decision that are independent of the conditions of §§ 20, 21 StGB. 104

(b) To the extent that the European Court of Human Rights also places qualitative requirements on national law regarding a lawful deprivation of liberty, the Therapeutic Confinement Act satisfies these, especially with regard to predictability. The European Court of Human Rights demands that all law be sufficiently “precise”, a requirement that does not differ noticeably from the domestic requirements of legal specificity (on this, see IV.). It also requires a “foreseeable” application of the law, meaning that the provision in question must be in force at the relevant point in time, in order to avoid all risk of arbitrariness (cf. only ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany* , para. 90, with further references). 105

So far, the European Court of Human Rights has not expressly decided on the relevant time for predictability under Art. 5 sec. 1 sentence 2 letter e ECHR. The decisive moment for deprivation of liberty under Art. 5 sec. 1 sentence 2 letter e ECHR, which 106

does not – as do Art. 7 and Art. 5 sec. 1 sentence 2 letter a ECHR – concern deprivation of liberty that results from past behaviour and the ensuing criminal conviction, but deprivation of liberty that results from a present state (in this case a mental disorder and the threat to the public that results from it) (cf. BVerfGE 128, 326 <398>), is the time it was ordered. At this point in time, there must also be clear evidence of a mental disorder (cf. ECtHR, judgment of 23 February 1984 - Application no. 9019/80 - *Luberti ./. Italy*, para. 28; judgment of 19 April 2012 - Application no. 61272/09 - *B. ./. Germany*, para. 68).

In this context, the Senate does not fail to see that in the decision *Mücke v. Germany* and with regard to Art. 5 sec. ECHR, the European Court of Human Rights somewhat broadly voiced “serious doubts” with regard to foreseeability, and that it seemed to consider as the relevant point in time the moment the crime was committed (cf. only ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*, para. 104). However, the statement made in that decision cannot be generalised as meaning that one must always look to this point in time when ordering deprivation of liberty pursuant to Art. 5 ECHR. This would also be problematic from a systematic point of view, because such a generalised statement about Art. 5 sec. 1 ECHR as a whole would ultimately mean that the specific prohibition of retroactivity in criminal cases within the meaning of Art. 7 sec. 1 ECHR would be transferred to all justifications under Art. 5 sec. 1 ECHR. Moreover, this interpretation would not fit in with the jurisprudence of the Grand Chamber of the European Court of Human Rights, according to which predictability and the relevant point in time, which are meant to help avoid arbitrariness, must be considered in the light of the particular reason for detention and its objectives (cf. ECtHR, judgment of 9 July 2009 - Application no. 11364/03 - *Mooren ./. Germany*, para. 77; see also ECtHR, judgment of 29 January 2008 - Application no. 13229/03 - *Saadi ./. United Kingdom*, para. 68). If one includes in the consideration that detention under Art. 5 sec. 1 sentence 2 letter e ECHR constitutes deprivation of liberty resulting from a present condition and aiming at protecting the general public (cf. ECtHR, judgment of 4 April 2000 - Application no. 26629/95 - *Litwa ./. Poland*, para. 60) and is not primarily the response to previous behaviour, one must, in light of the provision’s purpose and in keeping with the national margin of appreciation, take the time at which the detention was ordered as the relevant point in time, and not, in the sense of an absolute prohibition of retroactivity, a certain point in the past. 107

(c) The Therapeutic Confinement Act also satisfies the convention’s other requirements for lawful confinement pursuant to Art. 5 sec. 1 sentence 2 letter e ECHR. The existence of a mental disorder has to be proven through expert assessments (§ 9 ThUG). The limit on the duration of compulsory confinement (§ 12 sec. 1 ThUG) and the requirement of a new medical assessment for an extension (§ 12 sec. 2 in conjunction with § 9 ThUG) ensure that the extension of the deprivation of liberty depends on the existence of a mental disorder. From § 1 sec. 1 no. 1 ThUG follows the necessity of compulsory confinement, which may be necessary not only where a per- 108

son needs therapy, medication or other clinical treatment but also where the person needs supervision to prevent him or her, for example, from causing harm to him- or herself or other persons (cf. ECtHR, judgment of 20 February 2003 - Application no. 50272/99 - *Hutchison Reid ./. United Kingdom* , para. 52). Interpreted in conformity with the Basic Law, § 1 sec. 1 no. 1 ThUG requires a high risk that the most serious violent crimes or sexual offences will be committed and thus a qualified interference with high-ranking legal interests of third parties. The specifications for appropriate institutions (§ 2 ThUG) guarantee the nexus between the reason for the deprivation of liberty and the place and conditions of the confinement that the convention demands. Finally, in order to secure a fair trial, the person concerned must be provided with a lawyer to assist his or her cause (§ 7 ThUG), and he or she must be heard separately and in person (§ 8 sec. 2 ThUG). The Regional Courts (*Landgerichte* , § 4 ThUG) decide on the confinement by way of an order (*Beschluss* , § 10 ThUG) that can be challenged by complaint (*Beschwerde* , § 16 ThUG).

IV.

When interpreted in conformity with the Basic law, which is necessary due to concerns regarding the protection of legitimate expectations (see above), confinement pursuant to the Therapeutic Confinement Act does not for other reasons interfere with the right to liberty under Art. 2 sec. 2 sentence 2 in conjunction with Art. 104 sec. 1 GG; in particular, the principle of legal specificity is satisfied. 109

1. Art. 103 sec. 2 GG does not apply to therapeutic confinement because, just like preventive detention, this kind of confinement does not constitute punishment within the meaning of Art. 103 sec. 2 GG (cf. BVerfGE 109, 133 <187 and 188>; 128, 326 <376 and 377, 392 and 393>; all cases being on preventive detention). Punishment under Art. 103 sec. 2 GG requires that the burden imposed be accompanied by a disapproval of culpable conduct and that it aim (at least to some degree) at compensation for criminal guilt (BVerfGE 109, 133 <172 et seq.>; 128, 326 <376 and 377, 392 and 393>). The purpose of therapeutic confinement, however, is solely to protect in the future society and its members from individual offenders who, based on their previous behaviour, are deemed to be highly dangerous. 110

In the case at hand, the standards for legal specificity are set by Art. 104 sec. 1 sentence 1 GG. This provision requires that the legislature describe with sufficient clarity the cases in which deprivation of liberty is permissible. Deprivation of liberty must be regulated in a predictable, measurable and reviewable manner. In this respect, Art. 104 sec. 1 sentence 1 GG substantiates the requirements for legal specificity that follow from the rule of law (cf. BVerfGE 29, 183 <195 and 196>; 76, 363 <387>; 109, 133 <188>). The more severe the interference with fundamental rights, and the more serious the consequences of the provision, the more accurate the requirements set by the legislature must be (cf. BVerfGE 86, 288 <311>; 93, 213 <238>, with further references; 109, 133 <188>). Since preventive deprivation of liberty interferes with the fundamental right of Art. 2 sec. 2 sentence 2 GG just as strongly as prison sen- 111

tences, Art. 104 sec. 1 GG leads to similar requirements for legal specificity as Art. 103 sec. 2 GG (BVerfGE 29, 183 <196>; 78, 374 <383>; 96, 68 <97>; 131, 268 <306>).

The principle of legal specificity does not preclude the use of terms requiring further clarification (cf. BVerfGE 11, 234 <237>; 28, 175 <183>; 48, 48 <56>; 92, 1 <12>; 126, 170 <196>). The legislature must remain in a position to master the diversity of life (with regard to Art. 103 sec. 2 GG, cf. BVerfGE 28, 175 <183>; 47, 109 <120 and 121>; 126, 170 <195>). The degree of specificity required of a given provision cannot be defined in the abstract, but depends on the specifics of the particular fact pattern including the circumstances that led to the statutory regulation (BVerfGE 28, 175 <183>; 86, 288 <311>; 126, 170 <196>). As long as it is possible to arrive at a reliable basis for interpreting and applying the provision via the usual methods of interpretation, in particular by reference to other provisions of the same act, by considering the context of the provision, or as a result of established jurisprudence, there are no concerns against using vague legal terms (BVerfGE 45, 363 <371 and 372>; 86, 288 <311>). Moreover, it is the task of the courts to dispel any questions remaining regarding the scope of a provision by interpreting this provision as well as possible and thus making it more precise and concrete (cf. BVerfGE 126, 170 <198> regarding the obligation to specify which Art. 103 sec. 2 GG imposes on the courts). 112

2. Pursuant to these standards, there are no concerns against § 1 sec. 1 ThUG. Via the links contained in the explanatory memorandum on the Therapeutic Confinement Act (cf. BTDrucks 17/3403, pp. 53 and 54), which refer to the requirements developed in the context of Art. 5 sec. 1 sentence 2 letter e ECHR, and to the language of contemporary diagnostic classification systems used in the field of psychiatry, the vague legal term of “mental disorder” (cf. BVerfG, order of the Third Chamber of the Second Senate of 15 September 2011 - 2 BvR 1516/11 -, juris, para. 39) is specified in a way that – together with the other statutory criteria – is available to an interpretation specifying its content and meeting the requirements of legal specificity. 113

a) aa) Even without any final definition of the term, the jurisprudence of the European Court of Human Rights on Art. 5 sec. 1 sentence 2 letter e ECHR establishes a restrictive interpretation to the effect that a “mental disorder” must meet at least certain qualitative minimum requirements. One of these requirements demands an objective medical opinion establishing that the person suffers from a “true mental disorder”, the “kind or degree” of which requires involuntary commitment to an institution, either in the interest of the affected person, or in the public interest. The duration of the deprivation of liberty must also depend on the continued existence of this disorder and the confinement must – in accordance with its cause – take place in a psychiatric hospital or institution (cf. only ECtHR, judgment of 24 October 1979 – Application no. 6301/73 - *Winterwerp ./. Netherlands* , paras. 37 et seq.; established jurisprudence). In addition to the formal aspect that the diagnosis may only be based on an objective medical opinion, there is also a substantive requirement, namely that there is a “true” mental disorder which, due to the way it presents itself, requires compulsory confine- 114

ment. Thus, Art. 5 sec. 1 sentence 2 letter e ECHR – like § 1 sec. 1 ThUG itself (cf. on this below at (b)) – links the mental disorder to the purpose of the confinement and thus imposes requirements on the intensity of the mental disorder (cf. Schöch, GA 2012, p. 14 <28>; Meyer-Ladewig, ECHR, 3rd ed. 2011, Art. 5 para. 45), because the mental disorder must be reflected in the reason for the deprivation of liberty. The latter is also reflected in the fact that, in accordance with its cause, the confinement must take place in an appropriate institution.

bb) Moreover, for determining whether there is a mental disorder, the explanatory memorandum follows the classification systems ICD-10 (International Statistical Classification of Diseases and Related Health Problems of the WHO, 10th revision, chapter V) and DSM-IV (Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, 4th ed.), which are recognised in the field of psychiatry (cf. BTDrucks 17/3403, p. 54). 115

(1) With regard to the criticism that the diagnosis of “antisocial personality disorder” pursuant to DSM-IV is controversial because its criteria are already met by repeated violations of rules and behavioural problems without need for psychopathological symptoms (cf. statement of the DGPPN of 6 March 2012, p. 4), the Court points out that at least according to the explanatory memorandum (BTDrucks 17/3403, p. 54) and the reference to the classification system ICD-10, which is also made, it cannot be doubted that mere social deviations or conflicts are not sufficient for a mental disorder within the meaning of § 1 sec. 1 ThUG. 116

(2) The usual methods of interpretation can also answer the question of whether it is a requirement for confinement pursuant to § 1 sec. 1 ThUG that there be subjective distress on the part of the person involved. Existing disagreements over this question do also not establish insufficient specificity of this provision. 117

[…] 118

As for psychiatry’s view of the relationship between subjective distress and mental disorders there is an empirical, but no conceptual connection. While it is argued that suffering is usually or always indicative of a mental disorder (cf. Merkel, Betrifft Justiz 2011, p. 202 <205>; Morgenstern, Zeitschrift für Internationale Strafrechtsdogmatik – ZIS 2011, p. 974 <977>), it is also conceded that, alternatively, merely objective limitations of important functions could be enough (Mahler/Pfäfflin, Recht und Psychatrie – R&P 2012, p. 130 <131>; probably also Morgenstern, ZIS 2011, p. 974 <978>). Accordingly, even though subjective distress is a frequent or typical side effect of a mental disorder, it is no precondition by definition for its existence. In keeping with this, it fits that the preface on personality and behavioural disorders (F60-F69) pursuant to ICD-10 mentions that they are often – and therefore not always – accompanied by varying degrees of personal distress and impaired social functioning (cf. International Statistical Classification of Diseases and Related Health Problems of the WHO, 10th revision, version 2013, chapter V, personality and behavioural disorders (F60-F69), p. 297). 119

In addition, while the legal concept of mental disorders pursuant to § 1 sec. 1 ThUG is modelled on the diagnostic classification systems used in psychiatry, the purpose of the provision cannot be disregarded when interpreting it as a legal concept. This is different from a hippocratic approach, which uses distress as justification for therapeutic intervention (cf. Kröber, Forensische Psychatrie, Psychologie, Kriminologie – FPPK 2012 p. 60 <61>). In accordance with the requirements of Art. 5 sec. 1 sentence 2 letter e ECHR, § 1 sec. 1 ThUG aims at protecting the public as effectively as possible from serious violations of their legal interests by mentally ill violent criminals and sexual offenders (cf. BTDrucks 17/3403, p. 53). It would not be compatible with this legislative concept to focus on subjective distress and thus to preclude the possibility of confining people who, according to their own perception, do not suffer from their psychological condition – a condition that makes them commit the most serious violent and/or sexual offences (cf. Merkel, Betrifft Justiz 2011, p. 202 <206>). 120

Nor does the wording of § 1 sec. 1 no. 1 ThUG, according to which an order of confinement requires that the person concerned "suffer from a mental disorder" warrant such inappropriate interpretation. The verb "to suffer (from)" ("*leiden (an)*") can stand for a mere affliction that has a negative connotation for the person using the word, but not necessarily for the afflicted person him- or herself (cf. Duden, Deutsches Universalwörterbuch, 5th ed. 2003, p. 1008). […] Often the phrase is used in personal, especially medical, contexts in a way that says nothing about the subjective feelings of the person concerned, and that does not require any determinations on this issue (cf. only, e.g., § 21 sec. 2 no. 6 of the Medicinal Products Act – Arzneimittelgesetz). § 1 sec. 1 no. 1 ThUG is an example of such use (cf. also Nußstein, Strafverteidiger – StV 2011, p. 633 <634>). 121

b) The possibility of therapeutic confinement is further significantly limited by the fact that apart from a mental disorder, the law also expressly requires a causal link between the mental disorder and the threat. Pursuant to § 1 sec. 1 no. 1 ThUG, the competent court may order a person to be confined if he or she suffers from a mental disorder and if, taking into consideration his or her personality, prior life and life situation as a whole, there is a high probability that he or she will, as a consequence of this mental disorder, cause considerable harm to the life, physical integrity, personal freedom or sexual self-determination of another person. With regard to this causality, the explanatory memorandum remarks that the requirement of performing a prediction of dangerousness, which requires a high degree of probability, ensures that confinement is only an option if it is very likely that the disorder will result in serious threats to particularly significant legal interests of third parties; there must be a causal link between the mental disorder and the resulting dangerousness of the person concerned (cf. BTDrucks 17/3403, p. 54). This link implements the legal requirement of the convention that the degree or type of the disorder must justify the involuntary confinement (cf. only ECtHR, judgment of 19 April 2012 - Application no. 61272/09 - B. ./. Germany, para. 69, with further references; consistent jurisprudence). 122

It does not matter that, based on the diagnostic manuals, the term “mental disorder” covers diverse disorders that have very different effects, and that it thus encompasses a wide range of people who rarely also pose a threat, let alone a considerable threat. The fact that the provision’s requirements refer to a mental disorder does not contain a stigmatising attribution to the effect that persons who suffer from a mental disorder are at the same time dangerous in a way that warrants confinement. To the contrary, the additional requirement of a mental disorder that results in a particular level of dangerousness implies that the threat is very much not seen as automatically connected with a mental disorder. By demanding a causal link between the mental disorder and the additionally required dangerousness, the legislature implemented the requirement of the convention that the degree or type of the disorder must justify the involuntary confinement (cf. only ECtHR, judgment of 19 April 2012 - Application no. 61272/09 - B. ./. Germany, para. 69 with further references; established jurisprudence). 123

c) Moreover, the scope of the interfering provision is further restricted by the formal requirements of therapeutic confinement, which in turn are sufficiently specific. This applies above all to the requirement of a conviction for one of the enumerated criminal acts of § 66 sec. 3 StGB that, according to the explanatory memorandum, clearly does not need to have been the qualifying offence for the preventive detention (cf. BTDrucks 17/3403, p. 53), and to the requirements of previous preventive detention. 124

Ultimately, the Therapeutic Confinement Act also satisfies the special requirements that apply to the legal specificity of predictive decisions. If preventive deprivation of liberty is at stake, they require that the legislature not only determine the statutory requirements of the custodial measure but, in view of the uncertainty related to making predictions, that it also determine how long the predictive decision shall be valid and when it must be re-assessed (cf. BVerfGE 109, 133 <188>). In § 12 sec. 1 ThUG, the legislature limited the validity of the predictive decision to no more than 18 months, and in § 12 sec. 2 sentence 1 ThUG it declared that the provisions regarding the first decision ordering confinement apply accordingly to a decision on its extension (with some adaptions regarding medical assessment) (§ 12 sec. 2 sentences 2 to 4 ThUG). 125

V.

In the version relevant for this case, the Therapeutic Confinement Act does not violate the prohibition of laws that are merely applicable to a single case (*Verbot des Einzelfallgesetzes*) under Art. 19 sec. 1 sentence 1 GG. 126

1. Within its scope of application in the case at hand (cf. on the scope of application, BVerfGE 24, 367 <396>; 83, 130 <154>; 95, 1 <17>), Art. 19 sec. 1 GG prohibits laws that restrict fundamental rights not in a general way but only for individual cases. A law fulfils the requirement of being “general” if, due to its abstract constituent elements, one cannot tell to how many and which cases it applies (BVerfGE 121, 30 <49>, with further references). 127

This does not, however, preclude the possibility that a law applies only to a single case, if the facts are such that there is just one case of this kind and there are objective reasons for regulating this individual case (cf. BVerfGE 25, 371 <399>; 85, 360 <374>). Ultimately, Art. 19 sec. 1 sentence 1 GG contains a substantiation of the general principle of equality (cf. BVerfGE 25, 371 <399>; Jarass, in: Jarass/Pieroth, Grundgesetz, 12th ed. 2012, Art. 19 para. 2; cf. also Dreier, in: Dreier, Grundgesetz, 2nd ed. 2004, volume I, Art. 19 I para. 16 ("*Verschärfung oder Konkretisierung*"); Hufeld, in: Bonner Kommentar, Art. 19 sec. 1 sentence 1 para. 8 (156th shipment 2012) ("*Verschärfung*")), which forbids the legislature to pick one case from a number of similar ones and make this case the subject of an exception (cf. BVerfGE 25, 371 <399>; 85, 360 <374>). The prohibition of laws that apply only to a single case aims at ensuring equality. This aim is also met if the prohibition is read to include the task of safeguarding the principle of separation of powers by leaving specific-individual provisions to the executive branch and by reserving general-abstract provisions for the legislature (cf. Sachs, in: Sachs, Grundgesetz, 6th ed. 2011, Art. 19 para. 20). Here, the principle of separation of powers applies specifically in its equality-ensuring function. 128

Without such a limitation, which is based on the provision's purpose, and according to which regulating an individual fact pattern can be permissible if there is sufficient justification, Art. 19 sec. 1 sentence 1 GG could potentially conflict with other principles of the Constitution. Since the legislature may enact legislation only in the form of formal laws, this applies in particular to the requirement of a statutory provision (*Vorbehalt des Gesetzes*) in the form of the requirement of parliamentary approval (*Parlamentsvorbehalt*), which follows from the principle of democracy of Art. 20 sec. 1 and sec. 2 GG and the principle of the rule of law of Art. 20 sec. 3 GG (cf. Remmert, in: Maunz/Dürig, Grundgesetz, Art. 19 sec. 1 para. 15 (66th shipment 2012); Krebs, in: von Münch/Kunig, Grundgesetz, 6th ed. 2012, Art. 19 paras. 8 et seq.). It is up to the legislature to resolve this tension. This is a way to avoid a situation in which the authorities would otherwise have to remain inactive because an individual fact pattern required statutory regulation. 129

2. Pursuant to these standards, the Therapeutic Confinement Act does not violate Art. 19 sec. 1 sentence 1 GG. 130

In its wording, § 1 sec. 1 ThUG is phrased in an abstract way and thus complies with the requirement of generality (*Allgemeinheitsgebot*) of Art. 19 sec. 1 sentence 1 GG. It is true that the scope of application of the act concerns a closely limited group of persons, because from the outset it affects only those persons in preventive detention who, as a result of the judgment of the European Court of Human Rights of 17 December 2009, had to be dismissed from preventive detention or who had already been dismissed (cf. BTDrucks 17/3403, p. 19). However, this abstract limitation does not individually target the affected persons. At the time of legislative proceedings, the legislature did not know the exact number of persons affected by the scope of § 1 sec. 1 ThUG. *A fortiori*, the legislature could not know which individuals would be affected. 131

Since at the time, the regular courts had not yet clarified how the judgment of the European Court of Human Rights (ECtHR, judgment of 17 December 2009 - Application no. 19359/04 - *Mücke ./. Germany*) was to be taken into account in the national context (cf., on the one hand, BGH, order of 12 May 2010 - 4 StR 577/09 -, juris; on the other hand BGH, order of 21 July 2010 - 5 StR 60/10 -, BGHSt 55, 234), there had not been a determination for which group of persons in preventive detention the protection of legitimate expectations would end their preventive detention, and would render the Therapeutic Confinement Act applicable. Moreover, § 1 sec. 1 ThUG did not establish an automatism to the effect that all people in preventive detention who were still classified as dangerous, but who were released or were to be released as a result of the judgment of the European Court of Human Rights of 17 December 2009, were to be transferred into therapeutic confinement.

VI.

The decisions by the regular courts challenged by the constitutional complaints are not consistent with the requirements set by the Basic Law for applying the Therapeutic Confinement Act. The orders violate the complainant's fundamental right under Art. 2 sec. 2 sentence 2 in conjunction with Art. 20 sec. 3 GG, because the regular courts did not base their decisions on the requisite standards of proportionality as warranted by the Constitution. What is decisive for finding a violation of fundamental rights is alone the objective unconstitutionality of the challenged decisions of the regular courts at the time of the decision of the Federal Constitutional Court; it is irrelevant whether the regular courts can be blamed for the violation of the fundamental rights (cf. BVerfGE 128, 326 <407 and 408>). 132

1. a) The challenged decision of the Saarland Higher Regional Court of 30 September 2011 in proceedings 2 BvR 2302/11 does not meet the requirements of the protection of legitimate expectations. 133

Having quoted the text of the statute, the Higher Regional Court uses as standard of review whether, on the basis of expert opinions, there is a "high likelihood that there will be other serious (sexual) offences" and refers to the "higher standard of dangerousness" mentioned in the decision of the Federal Constitutional Court of 4 May 2011. However, the court did not apply the part of this higher standard of dangerousness that requires a high risk of the most serious violent crimes or sexual offences being committed (cf. BVerfGE 128, 326 <332>). Rather, the Higher Regional Court only referred to "serious (sexual) offences". Nor can it be concluded from its other statements that the Higher Regional Court applied the strict standards for retrospectively ordering or extending preventive detention that also follow from the Federal Constitutional Court's decision. In particular, saying that "one must assume that there is a very high probability of renewed offences of the same overall category being committed" does not indicate that "overall category" only encompassed "the most serious" violent crimes or sexual offences. 134

b) Nor does the decision of the Saarbrücken Regional Court of 2 September 2011, which preceded the constitutional complaint, use the standards that follow from the protection of legitimate expectations. Instead, following the expert opinions submitted in this case, the decision relies on its finding that “the person concerned continues to pose a risk of committing serious violent crimes and/or sexual offences of the kind mentioned in § 66 sec. 3 sentence 1 StGB” without giving reasons for its choice of standard of review. This does not meet the constitutional requirements because not all crimes of the referenced (broad) list of cases of § 66 sec. 3 sentence 1 StGB belong to the category of the most serious violent crimes or sexual offences, and because the probability of such crime being committed has not been addressed. 135

2. a) With regard to the decision of the Saarland Higher Regional Court of 14 May 2012, which was challenged in proceedings 2 BvR 1279/12, the combination of the referenced results of the medical assessments, of the statements regarding standards differing from the ones contained in the Federal Constitutional Court’s order on continued validity (*Fortgeltungsanordnung*), and of the court’s application of the law to the facts does also not show whether the Higher Regional Court applied the standards of proportionality that are required for ordering therapeutic confinement. Following the wording of § 1 sec. 1 ThUG, the Higher Regional Court points out that the “high probability” within the meaning of the Therapeutic Confinement Act is not the same as the “high risk that the most serious violent crimes or sexual offences will be committed”, as is required for retrospectively ordered or extended preventive detention. 136

It need not be decided at this point to what extent the statements of the Higher Regional Court regarding the appropriate standard of probability are, *per se*, compatible with the constitutional requirements. Not objectionable under constitutional law is the Higher Regional Court’s approach, according to which no fixed percentage can be used for determining the required degree of probability, and which states that one must instead consider the weight of the predicted offences. This correlation is based on the fact that the mentioned strict requirements are a manifestation of the protection of legitimate expectations of the person concerned, which has to be considered when performing the proportionality test, and which has to be balanced against the security interests of the general public. Two criteria determine the weight of the general public’s interest – the severity of the expected offences and the probability that these offences will actually be committed. Accordingly, when determining the weight of the interests of the general public, and within narrow limitations, a lesser pronounced criterion can be offset by the other, more strongly pronounced criterion. In this context, offences below the threshold of “most serious violent crimes or sexual offences” must not be taken into consideration. Due to the normative correlation described above, the establishment of a “high risk” can vary within the range of this group of offences, but even with regard to the most serious violent crimes or sexual offences conceivable, there always has to be a significant probability of them actually being committed. 137

The challenged decision of the Saarland Higher Regional Court does not meet the constitutional requirements, because the decision does not show that the standard used for the prediction only refers to the “most serious violent crimes or sexual offences”, which alone are to be considered in this context. Both the account of the findings of the medical assessments that had previously been made, and the account of the medical assessments made specifically for the judicial proceedings, do not refer in their prediction of probability to the field of the “most serious violent crimes or sexual offences”, but refer more generally to “violent offences against women”, “further sexual or violent offences”, “crimes belonging to the same general category”, “further crimes”, “violent sexual offences”, or “sudden aggressive behaviour”. Because these terms can also include types of offences that do not belong to the category of the “most serious violent crimes or sexual offences”, it is not enough that the Higher Regional Court comes to the conclusion that there is a “high probability” that “the most serious crimes” will be committed, even though there is no basis for this conclusion in the medical assessments referred to. In particular, one cannot simply refer in this context to previously committed offences. While among them there are undoubtedly some of the “most serious” type, the court failed to specifically indicate which previous offences belonged to the “most serious” type of crimes and what the degree of probability was that specifically these crimes – which alone are to be considered in this context – would be committed. 138

b) The preceding order of the Saarbrücken Regional Court of 17 February 2012 also violates Art. 2 sec. 2 sentence 2 in conjunction with Art. 20 sec. 3 GG, because it is likewise not based on the standards required by the Constitution. Instead, with regard to substance, the order refers to (only) “severe” violent crimes, and the order also explicitly rejects the idea that, with regard to legitimate expectations, the more exacting standards of the law of preventive detention be used. 139

3. There is no need to decide whether, in addition to this, the challenged orders also violate the prohibition of analogy of Art. 2 sec. 2 sentence 3 in conjunction with Art. 104 sec. 1 GG because the Therapeutic Confinement Act was used in the case of the complainant by way of interpretation even though, lacking a final decision on his preventive detention, he had not yet been placed in preventive detention but instead, the legal basis for executing the confinement was merely preliminary confinement pursuant to § 275a sec. 5 StPO (old version). The orders challenged in this case are already unconstitutional due to the stated violation of Art. 2 sec. 2 sentence 2 in conjunction with Art. 20 sec. 3 GG. 140

4. Pursuant to § 95 sec. 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), it is sufficient to declare the challenged decisions unconstitutional. It is not necessary to annul the challenged decisions since they are no longer the basis for the current confinement and thus no longer impact the complainant (cf. BVerfGE 50, 234 <243>; BVerfG, order of the Third Chamber of the Second Senate of 17 April 2012 - 2 BvR 1762/10 -, juris, para. 18). 141

C.

The decision on reimbursement of expenses is based on § 34a sec. 2 BVerfGG. 142

D.

The decision on legislative powers (B./ II.) was taken with 6:2 votes, the decision on the possibility of interpretation in conformity with the Constitution (B./III.) with 5:3 votes. 143

Voßkuhle Lübbe-Wolff Gerhardt

Landau Huber Hermanns

Müller Kessal-Wulf

Dissenting Opinion of Justice Huber on the Decision of the Second Senate of 11 July 2013 - 2 BvR 2302/11, 2 BvR 1279/12 -

To the extent that the Senate majority affirms the competence of the Federal Government for enacting the Therapeutic Confinement Act, I agree with this finding. However, I do not agree with basing this competence on Art. 74 sec. 1 no. 1 GG. The concurrent legislative competence for criminal law does not cover the adoption of the Therapeutic Confinement Act (I.); instead, the competence of the federal legislature merely follows from the objective link between the Therapeutic Confinement Act and criminal law (II.). 144

I.

The view of the Senate majority overstretches the concept of criminal law under Art. 74 sec. 1 no. 1 GG and does not pay sufficient attention to the design of the Therapeutic Confinement Act, which differs very much from criminal law; nor does it sufficiently consider the act's legislative history (1.). Moreover, the majority view runs the risk of depriving the already very broad definition of "criminal law" in terms of legislative powers of its limits (2.). 145

1. From the objective content of the Therapeutic Confinement Act (a) as well as its legislative history (b) follows that therapeutic confinement was not intended to be a reaction to criminal acts, and that it thus does not fall under the legislative competence for criminal law – Art. 74 sec. 1 no. 1 GG. 146

a) The Therapeutic Confinement Act was deliberately designed in a way that is very different from criminal law (cf. BTDrucks 17/3403, pp. 20 and 21). […] 147

[…] 14-1538

b) The legislative history of the act also confirms that therapeutic confinement was not meant to be a new instrument of criminal law. By enacting the Therapeutic Confinement Act, the legislature reacted to a decision of the European Court of Human Rights, which held that retrospectively ordered preventive detention violates Art. 5 sec. 1 and Art. 7 sec. 1 ECHR, because there is no causal link as required by Art. 5 sec. 1 sentence 2 letter a ECHR, and because retrospectively ordered preventive detention falls under Art. 7 sec. 1 sentence 2 ECHR's absolute ban on retrospective punishment, since the implementation of preventive detention does not substantially differ from punitive imprisonment (cf. ECtHR, loc. cit., paras. 126, 128 and 129). As a result of this jurisprudence, some people had been released from preventive detention even though they were still considered to be dangerous, and more people were expected to be released (BTDrucks 17/3403, p. 14). 154

Against this backdrop, the legislature tried to design therapeutic confinement in a way that was very different from criminal law and stated in its explanatory memorandum that therapeutic confinement was "fundamentally different from punishment, but also from preventive detention" and that it was meant to constitute "a new form of deprivation of liberty" (cf. BTDrucks 17/3403, pp. 20 and 21 and p. 53). This must be 155

taken into account when assessing the legislative competence for enacting this law.

2. Moreover, the view of the Senate majority risks overstretching the concept of criminal law in the meaning of Art. 74 sec. 1 no. 1 GG. 156

It is recognised that measures of correction and prevention are part of criminal law (cf. BVerfGE 85, 134 <142>; 109, 190 <213>), and that this also applies to primary and reserved preventive detention. As the Senate majority emphasises, such a wide understanding of competence for criminal law is both due to historical reasons and suggests itself for substantive reasons. It is the qualifying offence to which the ensuing measures of correction and prevention are linked, which shows the level of dangerousness, and which also determines whether measures are imposed and if so for how long and of which kind (cf. BVerfGE 109, 133 <174 and 175>; 128, 326 <374>). The qualifying offence is also of decisive importance for the review of proportionality (cf. BVerfGE 70, 297 <312>; 109, 133 <175>). Moreover, the (partial) interlocking of punishment and measures of correction and prevention in the German two-track system of sanctions permits preserving liberty as far as possible. 157

However, the genesis and the effectiveness of the two-track system of sanctions do not justify assigning the federal legislature the competence to establish other pillars in the field of criminal law. Already with regard to retrospective preventive detention, the link to the qualifying offence was so weak (for the weakness of the historical argument see Gärditz, Bayerische Verwaltungsblätter – BayVBl. 2006, p. 231 <237>; Rissing-van Saan/Peglau, in: Leipziger Kommentar zum StGB, volume 3, 12th ed. 2007, § 66b para. 26; for the importance of the qualifying offence see BVerfGE 109, 190 <219, 225>), that it's assignment to "criminal law" was feared to entail an excessive interpretation of Art. 74 sec. 1 no. 1 GG to the detriment of the *Laender* (cf. Gärditz, loc. cit., p. 231 <233>). This applies all the more to therapeutic confinement. It is not only historically without precedent. Its connection to criminal law is still much weaker than was the case for retrospectively ordered preventive detention. While the qualifying offence does play a role for therapeutic confinement, the crucial reference point is the dangerousness of the detained person, which does not follow from the qualifying offence, but primarily from his or her mental disorder (cf. Bumiller/Harders, FamFG - Freiwillige Gerichtsbarkeit, 10th ed. 2011, § 1 ThUG para. 3; Klein, in: Beck'scher Online-Kommentar StPO, § 1 ThUG para. 8 <28 January 2013>; Nußstein, Neue Juristische Wochenschrift – NJW 2011, p. 1194). As its name suggests, therapeutic confinement is thus more similar to the laws on confinement in psychiatric institutions (*Psychatrie- und Unterbringungsgesetze*) of the *Laender* (cf. II.1). 158

II.

Nevertheless, the federal legislature has legislative competence arising from a factual connection (1.), on which it can base the Therapeutic Confinement Act. Generally, public security law (*Recht der Gefahrenabwehr*) falls into the legislative powers of the *Laender* (2.). However, the provisions on therapeutic confinement are essential 159

for the concept of protection pursued by the federal legislature, which means that one must recognise that it has the respective legislative powers due to a factual connection with criminal law (3). This also limits the interference with the legislative powers of the *Laender* (4.).

1. […] 160-162

2. […] 163-166

3. Regulating therapeutic confinement is essential for the federal legislature's concept of protection, which aims at protecting the general public from a high degree of risk that the most serious violent crimes or sexual offences will be committed (a). With regard to its content, the regulation resembles measures of correction and prevention (b). Apart from this, it fills a legislative gap with regard to available measures of correction and prevention (c). […] 167

a) […] 168

b) […] 169-171

c) […] Accordingly, therapeutic confinement is a new kind of deprivation of liberty, fundamentally different from preventive detention, precisely not a measure of correction and prevention, requiring different conditions of confinement, and having a different procedural structure. Since it aims at – comparable to preventive detention – facilitating confinement of criminal offenders focusing on therapy, insofar as this is permissible under the Convention for the Protection of Human Rights and Fundamental Freedoms, and to the extent that it is necessary to protect the general public, it constitutes another necessary building block within the legislature's concept to protect the public. Since this legislative concept would remain imperfect without the instrument of therapeutic confinement, a federal regulation is indispensable. To this extent, the Federation thus has the respective legislative powers stemming from an objective connection [to criminal law]. 172-173

4. This allocation of competences better meets the requirements of the fundamental concept of Arts. 70 et seq. GG than the view of the Senate majority and contributes to protecting the legislative competences of the *Laender*. 174

[…] 175-177

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