Headnotes

to the Judgment of the Second Senate of 12 June 2018

– 2 BvR 1738/12 –

– 2 BvR 1395/13 –

– 2 BvR 1068/14 –

– 2 BvR 646/15 –

1. **The personal scope of protection of Art. 9(3) of the Basic Law also includes civil servants (*Beamte*) (cf. Decisions of the Federal Constitutional Court 19, 303 <312, 322>). While the fundamental right of labour coalitions (*Koalitionsfreiheit*) is guaranteed without explicit reservation, it can, however, be restricted by conflicting fundamental rights of third parties and other rights of constitutional status.**

2. **a. The ban on strike action for civil servants is an independent and traditional principle of the career civil service system (*Berufsbeamtentum*) within the meaning of Art. 33(5) of the Basic Law. It meets both requirements necessary for being qualified as a traditional principle: traditionality and substantiality.**

   b. The legislature must have regard to the ban on strike action for civil servants as an independent and traditional principle of the career civil service system. It is closely linked to the civil service principle of alimentation, the duty of loyalty, the principle of lifetime employment and the principle that the legal relationship under civil service law, including remuneration, must be regulated by the legislature.

3. **a. The provisions of the Basic Law must be interpreted in a manner that is open to international law. At the level of constitutional law, the text of the European Convention on Human Rights and the case-law of the European Court of Human Rights serve as guidelines for the interpretation of the content and scope of fundamental rights and rule of law principles of the Basic Law (cf. Decisions of the Federal Constitutional Court 74, 358 <370>; 111, 307 <317>; 128, 326 <367 and 368>; established case-law).**

b. According to Art. 46 of the European Convention on Human Rights, the Contracting Parties have undertaken to abide by the final judgment of the European Court of Human Rights in any case to which they are parties (cf. also Decisions of the Federal Constitutional Court 111, 307 <320>). Beyond the scope of application of Art. 46 of the European Convention on Human Rights, however, the specific circumstances of the case must particularly be considered to provide for contextualisation when using the case-law of the European Court of Human Rights as guidelines. The Contracting Parties must also identify statements regarding principal values enshrined in the Convention and address them. The direction and guidance have a particularly strong impact if parallel cases within the same legal order are at issue that means (other) proceedings in the state affected by the initial decision of the European Court of Human Rights are affected.

c. The limits to an interpretation that is open to international law follow from the Basic Law. The possibilities of interpretation in a manner open to the Convention end where such an interpretation no longer appears tenable according to the recognised methods of interpretation of statutes and of the Constitution (cf. Decisions of the Federal Constitutional Court 111, 307 <329>; 128, 326 <371>). Furthermore, where the Basic Law is interpreted in a manner open to the Convention, the case-law of the European Court of Human Rights must be integrated as carefully as possible into the existing, dogmatically differentiated national legal system.

4. **The ban on strike action for civil servants in Germany is in accordance with the principle of the Constitution's openness to international law; in particular, it is compatible with the guarantees of the European Convention on Human Rights. Also with respect to the case-law of the European Court of Human Rights, it cannot be established that German law conflicts with Art. 11 of the European Convention on Human Rights.**

FEDERAL CONSTITUTIONAL COURT

– 2 BvR 1738/12 –

– 2 BvR 1395/13 –

– 2 BvR 1068/14 –

– 2 BvR 646/15 –

Pronounced
on
12 June 2018
Fischböck
Amtsinspektorin
as Registrar of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I. of Mr. G(...),

– authorised representatives: Rechtsanwälte Dr. Hartwig Schröder, Katrin Löber
Reifenberger Straße 21, 60489 Frankfurt am Main –

against a) the Judgment of the Lower Saxony Higher Administrative Court (*Oberverwaltungsgericht*) of 12 June 2012 – 20 BD 8/11 –,

b) the Judgment of the Osnabrück Administrative Court (*Verwaltungsgericht*) of 19 August 2011 – 9 A 1/11 –

c) the Disciplinary Order of the Lower Saxony *Land* School Authority of 11 January 2011 – OS 1 P.103 –

– 2 BvR 1738/12 –,

II. of Ms. W(...),

– authorised representative: Rechtsanwalt Karl Otte,
An der Lutherkirche 19, 30167 Hannover –

against a) the Order of the Lower Saxony Higher Administrative Court (*Oberverwaltungsgericht*) of 16 May 2013 – 20 AD 2/13 –,

b) the Judgment of the Stade Administrative Court (*Verwaltungsgericht*) of 6 December 2012 – 9 A 171/11 –,

c) the Disciplinary Order of the Lower Saxony *Land* School Authority of 10 January 2011 – LG 1 P 120 - 03150/F 21 –

– 2 BvR 1395/13 –,

III. of Ms. D(…),

– authorised representatives: Rechtsanwälte Dr. Hartwig Schröder, Katrin Löber, Volker Busch, Reifenberger Straße 21,
60489 Frankfurt am Main –

against a) the Judgment of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 27 February 2014 – BVerwG 2 C 1.13 –,

b) the Judgment of the Higher Administrative Court (*Oberverwaltungsgericht*) for the *Land* of North Rhine-Westphalia of 7 March 2012 – 3d A 317/11.O –,

c) the Disciplinary Order of the Cologne District Government (*Bezirksregierung*) of 10 May 2010 – 10.05.08 – 4/09 –

– 2 BvR 1068/14 –,

IV. of Ms. H(…),

– authorised representative: Rechtsanwalt Karl Otte,
An der Lutherkirche 19, 30167 Hannover –

against a) the Order of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 26 February 2015 – BVerwG 2 B 10.15 –,

b) the Judgment of the Higher Administrative Court (*Oberverwaltungsgericht*) of the *Land* Schleswig-Holstein of 29 September 2014 – 14 LB 3/13 –,

c) the Judgment of the Administrative Court (*Verwaltungsgericht*) of the *Land* Schleswig-Holstein of 8 August 2012 – 17 A 21/11 –,

d) the Disciplinary Order of the Ministry for Education and Culture of the *Land* Schleswig-Holstein of 5 July 2011 – III 131-1 –

– 2 BvR 646/15 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held on the basis of the oral hearing of 17 January 2018:

Judgment

1. **The proceedings are joined for a joint decision.**
2. **The constitutional complaints are rejected.**

R e a s o n s:

A.

The constitutional complaints, which have been joined for a joint decision, concern the question whether German civil servants (*Beamte*) have the right to participate in strike actions. [...] 1

I.

[…] 2-6

II.

[Excerpt from Press Release no. 46 of 12 June 2018]

The complainants are, or were, teachers with civil servant status at schools in three different federal states (*Länder*). In the past, they took part in protests and strikes organised by a trade union during working hours. In response to their participation, the competent disciplinary authorities imposed sanctions on the complainants. The authorities held that by participating in these events, the civil servants had breached fundamental duties under civil service law. In particular, civil servants were not allowed to be absent from work without permission. In the initial proceedings before the regular courts, the complainants challenged the respective disciplinary orders, ultimately without success.

[End of excerpt]

[…] 7-37

III.

[…] 38-62

IV.

[…] 63-105

V.

[…] 106

B.

The constitutional complaints are admissible. 107

[…] 108-110

C.

The constitutional complaints are unfounded. The challenged decisions of the authorities and the courts do not violate the rights of the complainant no. I. and complainants no. II. to IV. 111

I.

The standards of review under constitutional law applicable to the claimed violations of fundamental rights particularly follow from the freedom of labour coalitions (*Koalitionsfreiheit*) guaranteed by Art. 9(3) of the Basic Law (*Grundgesetz* – GG) (1.), the traditional principles of the career civil service system (*Berufsbeamtentum*) within the meaning of Art. 33(5) GG (2.), and the principle of the Constitution's openness to international law (3.). 112

1. a) [...] The freedom of labour coalitions protects all individuals in their capacity as professionals (employees and employers) and does not exclude specific professional fields. Thus, the personal scope of protection of Art. 9(3) GG also includes civil servants in addition to employees in the public sector (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 19, 303 <312, 322>). 113

b) The material scope of protection of Art. 9(3) GG extends to the right to engage in activities that are typical of labour coalition (aa) including the right to strike action (bb). 114

aa) According to the Federal Constitutional Court's established case-law, the fundamental right under Art. 9(3) GG is primarily a right to freely engage in activities that are typical of labour coalition (cf. BVerfGE 17, 319 <333>; 19, 303 <312>; 28, 295 115

<304>; 50, 290 <367>; 58, 233 <246>; 93, 352 <358>; 146, 71 <114 para. 130>) which guarantees the individual freedom to establish associations that serve to promote economic and working conditions and to jointly pursue this aim. […]

bb) To the extent that the aims protected under Art. 9(3) GG can only be pursued by use of specific means, these means are also protected under the fundamental right (cf. BVerfGE 84, 212 <224 and 225>). The means protected under Art. 9(3) GG are for instance measures of industrial action that are aimed at the conclusion of collective agreements. At least to the extent that they are necessary to ensure effective free collective bargaining, they are subject to the freedom of labour coalitions (cf. BVerfGE 88, 103 <114>; 92, 365 <393 and 394>; 146, 71 <114 and 115 para. 131>). Art 9(3) third sentence GG also indicates this (cf. BVerfGE 84, 212 <225>). 116

2. While the fundamental right of labour coalitions is guaranteed without explicit reservation (cf. e.g. BVerfGE 92, 26 <41>), that does not mean that any restrictions are excluded from the outset. Even fundamental rights that are guaranteed without explicit reservation can be restricted by conflicting fundamental rights of third parties and other rights of constitutional status (cf. e.g. BVerfGE 28, 243 <261>; 84, 212 <228>; 92, 26 <41>; 146, 71 <118 para. 141>). The traditional principles of the career civil service system guaranteed by Art. 33(5) GG (cf. BverfGE 19, 303 <322>) can be considered such a limitation with constitutional status. 117

a) Art. 33(5) GG is directly applicable law and contains a regulatory duty of the legislature and a guarantee of the career civil service system as an institution (cf. BVerfGE 117, 330 <344>; 119, 247 <260>). The traditional principles of the career civil service system within the meaning of Art. 33(5) GG are the core of structural principles which were generally or at least predominantly recognised as binding and observed during a longer tradition-forming period, in particular in times of the Weimar Constitution (cf. BVerfGE 8, 332 <343>; 46, 97 <117>; 58, 68 <76 and 77>; 83, 89 <98>; 106, 225 <232>; 107, 218 <237>; 117, 330 <344 and 345>; 117, 372 <379>; 121, 205 <219>; without reference to the Weimar Constitution BVerfGE 145, 1 <8 para. 16>). Historically, the development of the career civil service system is closely linked to the development of the state under the rule of law [...]. As an institution, the career civil service system is based on expertise, professional performance and loyal exercise of duties. It is intended to ensure a stable administrative system that functions as an equalising factor vis-à-vis the political forces shaping the state (cf. BVerfGE 7, 155 <162>; 119, 247 <260 and 261>; established case-law). 118

b) The point of reference in Art. 33(5) GG, which applies to all civil servants, is not the established civil service law, but the career civil service system (cf. BVerfGE 117, 330 <349>). Thus, only such provisions are protected that significantly shape the image of the career civil service system in its traditional form so that their removal would affect the career civil service system as such (cf. BVerfGE 43, 177 <185>; 114, 258 <286>). This requirement of substantiality already follows from the nature of an institutional guarantee which has the purpose of determining the core of structural princi- 119

ples [...] as a binding framework for the legislature when it drafts legal provisions. The Federal Constitutional Court made this clear by stating that not only must Art. 33(5) GG be taken into account, but also be observed in that respect (cf. BVerfGE 8, 1 <16 and 17>; 11, 203 <210>; 61, 43 <57 and 58>). Yet, Art. 33(5) GG does not preclude further developments of civil service law as long as the provisions essential to the image and function of the career civil service system are not subject to structural change (cf. BVerfGE 117, 330 <348 and 349>; 117, 372 <379>). The obligation to take Art. 33(5) GG into account entails an openness to developments that enables the legislature to adjust the provisions of public service law to the respective developments in statehood and thereby adapt the civil service law to current circumstances. Maintaining the general structure of the career civil service system as required by Art. 33(5) GG leaves sufficient room to fit the historically developed institution into the framework of our present statehood (cf. BVerfGE 3, 58 <137>; 7, 155 <162>; 70, 69 <79>) and adjust it to the functions which the Basic Law assigned to public service (*öffentlicher Dienst*) in the free democracy under the rule of law and the principle of the social state.

c) The core of structural principles, which must be observed and is therefore excluded from profound structural changes by the general legislature, includes among others the civil servants' duty of loyalty (cf. BVerfGE 39, 334 <346 and 347>; 119, 247 <264>), the principle of lifetime employment (cf. BVerfGE 71, 255 <268>; 121, 205 <220>), the principle of alimentation (cf. BVerfGE 8, 1 <16 et seq.>; 44, 249 <265>; 49, 260 <271>; 70, 251 <267>; 99, 300 <314>; 106, 225 <232>; 117, 372 <380>; 139, 64 <111 para. 92>; 140, 240 <277 para. 71>) and the corresponding principle that remuneration of civil servants must be determined unilaterally by law (cf. BVerfGE 44, 249 <264>; cf. also BVerfGE 8, 1 <15 et seq.>; 8, 28 <35>). These characteristic structural elements do not exist independently, but are related to each other (on the principle of lifetime employment and the principle of alimentation cf. BVerfGE 119, 247 <263>; 121, 205 <221>; on the duty of loyalty and the principle of alimentation cf. BVerfGE 21, 329 <345>; 44, 249 <264>; 130, 263 <298>; on the civil servants' duty of loyalty and on the employers' duty of care cf. BVerfGE 9, 268 <286>; cf. also BVerfGE 71, 39 <59>). 120

aa) The civil servants' duty of loyalty is one of the traditional principles of the career civil service system and part of the core of the institutional guarantee under Art. 33(5) GG (cf. already BVerfGE 9, 268 <286>). This duty of loyalty bears special importance even in a modern administrative state whose professional and efficient exercise of functions depends upon an intact, loyal, dutiful staff of civil servants who are deeply committed to the state and its constitutional order (cf. BVerfGE 39, 334 <347>). Civil servants are bound to serve the common good and thus to exercise their duty in a disinterested manner and they must set aside their own interests when carrying out the duties entrusted to them. Engaging in activities of industrial disputes and the use of economic pressure to assert one's own interests, in particular measures of collective industrial disputes within the meaning of Art. 9(3) GG like the right to strike are not 121

compatible with the civil servants' duty of loyalty (cf. BVerfGE 119, 247 <264> with further references). The guarantee of positions that are legally and financially secured has the purpose of enabling civil servants to fulfil their duty of loyalty.

bb) The purpose of the principle of lifetime employment is to ensure the civil servants' independence in the interest of an administration under the rule of law. It is the legal and financial security that provide a guarantee that the career civil service system can contribute to the fulfilment of its duty – assigned to it by the Basic Law – of ensuring a stable and lawful administration in the context of the political power play (cf. BVerfGE 121, 205 <221>). This also and above all includes the fact that civil servants cannot be removed from office arbitrarily and at the whim of political bodies. Lifetime employment guarantees that civil servants cannot be removed from the office they hold according to their legal status; this guarantee is of fundamental significance because it provides civil servants with the independence regarding the exercise of their duties, which is necessary in the interest of them being bound by law and justice (cf. BVerfGE 121, 205 <222>; 141, 56 <71 para. 38>). 122

cc) The principle of alimentation obliges the employer to support civil servants and their families with an appropriate lifetime alimentation and to ensure an appropriate maintenance (*Lebensunterhalt*) according to the development of the general economic and financial conditions and the general standard of living. The level of this maintenance is also corresponding to the grade, the responsibilities related to their office, and the relevance of the career civil service system for the general public (cf. BVerfGE 8, 1 <14>; 117, 330 <351>; 119, 247 <269>; 130, 263 <292>; 139, 64 <111 and 112 para. 93>; 140, 240 <278 para. 72>). Remuneration of civil servants is not considered a compensation for certain specific services, but the employer pays civil servants in "return" for being available to the employer with their entire personality. It is the prerequisite that civil servants can completely commit themselves to public service as a lifetime profession and fulfil the function, assigned to them in the state system, of ensuring a stable administration, thereby constituting a balancing factor to the political forces that shape the state (cf. BVerfGE 7, 155 <162 and 163>; 21, 329 <345>; 39, 196 <201>; 44, 249 <265>; 117, 372 <380>; established case-law). This leads to the irrefutable conclusion that the securing of an appropriate maintenance must be regarded as a particularly significant traditional principle, which must be observed by the state (BVerfGE 8, 1 <16 and 17>; 117, 372 <380 and 381>). 123

The direct objective guarantee of an appropriate maintenance under Art. 33(5) GG also establishes an individual right each civil servant holds vis-à-vis the state that is equivalent to a fundamental right (cf. BVerfGE 99, 300 <314>; 107, 218 <236 and 237>; 117, 330 <344>; 119, 247 <266>; 130, 263 <292>). […] 124

d) […] 125

3. The provisions of the Basic Law must be interpreted in a manner that is open to international law. While the European Convention on Human Rights ranks as statutory federal law and is therefore below constitutional rank (a), it must be taken into ac- 126

count when interpreting fundamental rights and the constitutional principles of the rule of law (b). This also applies to the interpretation of the European Convention on Human Rights by the European Court of Human Rights (c). This significance of the European Convention on Human Rights and thus also of the case-law of the European Court of Human Rights is based on the Constitution's openness to international law and its substantive focus on human rights (d). Using them as guidelines for interpretation does not require that the statements of the Basic Law and those of the European Convention on Human Rights be schematically aligned or completely harmonised, but that the values be included (e). Beyond Art. 46 ECHR, special importance must be attached to the specific context of the decision by the European Court of Human Rights when interpreting the Basic Law. Where it is methodologically untenable or incompatible with the Basic Law to include values of the European Convention on Human Rights, the Constitution's openness to international law is limited (g).

a) The European Convention on Human Rights and its protocols are international treaties. The Convention leaves it to the Contracting Parties to decide in what way to comply with their duty to observe the provisions of the Convention (cf. BVerfGE 111, 307 <316> with further references). The federal legislature approved of the indicated conventions by formal act in accordance with Art. 59(2) GG (Act on the Convention for the Protection of Human Rights and Fundamental Freedoms – *Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten* of 7 August 1952, Federal Law Gazette, *Bundesgesetzblatt* – BGBl II p. 685; according to the publication of 15 December 1953, BGBl II 1954 p. 14, the Convention entered into force for the Federal Republic of Germany on 3 September 1953; the Convention was newly published in the version of the 11th Protocol in BGBl II 2002 p. 1054). With this approval, the federal legislature issued the respective order giving effect to international law. Within the German legal system, the European Convention on Human Rights and its protocols – to the extent that they entered into force in Germany – have the rank of statutory federal law (cf. BVerfGE 74, 358 <370>; 111, 307 <316 and 317>). 127

b) At the same time, the guarantees provided by the European Convention on Human Rights also have constitutional significance as they influence the interpretation of fundamental rights and the constitutional principles of the rule of law (cf. BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <316 and 317, 329>; 120, 180 <200 and 201>; 128, 326 <367 and 368>; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 3, 4 <8>; 9, 174 <190>; 10, 66 <77>; 10, 234 <239>; 20, 234 <247>). According to established case-law of the Federal Constitutional Court, the text of the European Convention on Human Rights and the case-law of the European Court of Human Rights serve, at the level of constitutional law, as guidelines for the interpretation of the content and scope of fundamental rights and constitutional principles of the rule of law provided that this does not lead to restricting or lowering the protection of fundamental rights under the Basic Law – which is also not the intent of the Convention (cf. Art. 53 ECHR) (cf. 128

BVerfGE 74, 358 <370>; 111, 307 <317>; 120, 180 <200 and 201>).

c) Pursuant to Art. 46 ECHR, the decisions of the European Court of Human Rights rendered in proceedings against Germany must be abided by. When using the European Convention on Human Rights as guideline for interpretation, the Federal Constitutional Court also takes into account decisions of the European Court of Human Rights even if they do not concern the same issue. This is based on the factual function of direction and guidance attached to the case-law of the European Court of Human Rights with regard to interpreting the European Convention on Human Rights, also beyond the decision of a specific case (cf. BVerfGE 111, 307 <320>; 128, 326 <368>; BVerfGK10, 66 <77 and 78>; 10, 234 <239>). Since the Basic Law is intended to avoid conflicts between domestic law and Germany's obligations under international law, where possible and with regard to the at least factual precedent character of the decisions of international tribunals, the effects of decisions of the European Court of Human Rights on the domestic level are, in that respect, not restricted to the duty, derived from Art. 20(3) GG in conjunction with Art. 59(2) GG, to take account of these decisions regarding only the circumstances on which the specific decisions are based (cf. BVerfGE 111, 307 <328>; 112, 1 <25 and 26>; BVerfGK 9, 174 <190, 193>). The Constitution's openness to international law thus expresses an understanding of sovereignty that is not only in favour of an integration into international and supranational contexts and their further development, but requires and expects them. Against this background, even the "final say" of the German Constitution is not opposed to an international and European dialogue of courts, but provides its normative basis. 129

d) Using the European Convention on Human Rights and the case-law of the European Court of Human Rights as guidelines for interpretation at the level of constitutional law beyond individual cases serves to give effect to the guarantees of the European Convention on Human Rights as extensively as possible in Germany, and, in addition, it may contribute to avoid the Federal Republic of Germany being held in violation (BVerfGE 128, 326 <369>). The substantive orientation of the Basic Law to human rights is expressed in the German people's profession of inviolable and inalienable human rights in Article 1(2) GG in particular. In Article 1(2) GG, the Basic Law accords special protection to the core of human rights. In conjunction with Article 59(2) GG, it is the basis for the constitutional duty of using the European Convention on Human Rights in its specific manifestation as an interpretation guideline even when applying German fundamental rights. Article 1(2) of the Basic Law is therefore not a gateway to give the European Convention on Human Rights direct constitutional rank, but the provision is more than a non-binding programmatic statement in that it provides a principle for the interpretation of the Basic Law and spells out the fact that its fundamental rights must also be understood as a manifestation of general human rights and have incorporated the latter as a minimum standard (cf. BVerfGE 74, 358 <370>; 111, 307 <329>; 128, 326 <369> […]). 130

e) Using the European Convention on Human Rights as a guideline for interpretation of the provisions of the Basic Law is focussed on the outcomes: It does not aim at schematically aligning individual constitutional concepts in parallel (BVerfGE 137, 273 <320 and 321 para. 128> with further references), but serves to avoid violations of international law. While it may often be easier to remove or avoid violations of international law if domestic law is harmonised with the Convention, this is not imperative under international law: The Convention leaves it to the Contracting Parties to decide how they comply with their duty to observe the provisions of the Convention (cf. BVerfGE 111, 307 <316>; 128, 326 <367>). In light of this, it must be stated that similarities of norm texts must not cover up the differences which follow from the context of the legal systems. This applies to the interpretation of concepts of the Basic Law in a manner that is open to international law and, in a similar way, to the interpretation based on comparative analyses of constitutions. The human rights content of the relevant international treaty must be "adapted" to the context of the receiving constitutional system in an active process (of acknowledgment) (cf. BVerfGE 128, 326 <370> […]). 131

f) According to Art. 46 of the European Convention on Human Rights, the Contracting Parties have undertaken to abide by the final judgment of the European Court of Human Rights in any case to which they are parties (cf. also BVerfGE 111, 307 <320>). Beyond the scope of application of Art. 46 ECHR, however, the specific circumstances of the case must particularly be considered to provide for contextualisation when using the case-law of the European Court of Human Rights as guidelines. […]. In this context, it must first be considered that, unlike the law of the European Union (cf. BVerfGE 75, 223 <244 and 245>), the European Convention on Human Rights does not have precedence of application (*Anwendungsvorrang*) over domestic statutory law for lack of a respective national order giving effect to international law. In that regard, the rights under the Convention do not take precedence over the German constitutional order, but rather are an important principle for the interpretation of the Basic Law. Therefore, beyond its *inter-partes* effect taking account of the case-law of the European Court of Human Rights primarily means to identify statements regarding principal values enshrined in the Convention and address them [...]. If possible, a conflict with principal values enshrined in the Convention must be avoided. Acknowledging the Convention's direction and guidance function therefore requires elements of comparability with national law. When the case-law of the European Court of Human Rights is taken into account, the specific facts of the decided case and its background (in terms of legal culture) must be included as well as possible specific particularities of the German legal order. They conflict with an indiscriminate transfer in terms of a mere "parallel alignment of concepts". The direction and guidance have a particularly strong impact if parallel cases within the same legal order are at issue that means (other) proceedings in the state affected by the initial decision of the European Court of Human Rights are affected. 132

g) The limits of an interpretation that is open to international law follow from the Ba- 133

sic Law. The possibilities of interpretation in a manner open to the Convention end where such an interpretation no longer appears tenable according to the recognised methods of interpretation of statutes and of the Constitution (cf. BVerfGE 111, 307 <329>; 128, 326 <371>; cf. BVerfGE 123, 267 <344 et seq.> on the absolute limit of the core of the constitutional identity of the Basic Law pursuant to Art. 79(3) GG). If German courts have latitude for interpreting and balancing within the scope of recognised methods of the interpretation of laws, they are obliged to give precedence to an interpretation that is in accordance with the Convention. The situation is different only if observing the decision of the European Court of Human Rights violates, for instance due to a changed factual basis, clearly opposing statutory law or German constitutional provisions, in particular fundamental rights of third parties (cf. BVerfGE 111, 307 <329>). It is therefore not contrary to the objective of openness to international law if the legislature does not observe international treaty law in exceptional cases, provided this is the only way to avert a violation of fundamental constitutional principles (cf. BVerfGE 111, 307 <319>).

Moreover, an interpretation of fundamental rights in a manner that is open to international law may not result in a limitation of the protection of fundamental rights as afforded by the Basic Law; this is also excluded by the European Convention on Human Rights itself (cf. Art. 53 ECHR, on this cf. BVerfGE 111, 307 <317>). Above all, this obstacle to acknowledging international law may become significant in multi-polar fundamental rights relationships in which the increase of liberty for one holder of fundamental rights means a decrease of liberty for the other at the same time (cf. BVerfGE 128, 326 <371> with further references). 134

Furthermore, where the Basic Law is interpreted in a manner that is open to the Convention, the case-law of the European Court of Human Rights must be integrated as carefully as possible into the existing, dogmatically differentiated national legal system (cf. BVerfGE 111, 307 <327>; 128, 326 <371>). Therefore, international law concepts must not be adopted indiscriminately. Particularly where, with regard to guarantees that have a similar text, a concept of the European Court of Human Rights has developed autonomously and differs from the corresponding Basic Law concept, the principle of proportionality as a principle inherent in the Basic Law is available for taking account of assessments of the European Court of Human Rights from the perspective of the Basic Law: in light of this, “using them as interpretation guidelines” may mean that aspects considered by the European Court of Human Rights in its weighing of interests are also included in the constitutional review of proportionality (cf. BVerfGE 111, 307 <324>; 128, 326 <371 and 372>; BVerfGK 3, 4 <9>). 135

II.

The acts of public authority challenged by the constitutional complaints are not objectionable under constitutional law. Partly based on different reasons, the authorities ultimately assumed that German civil servants are subject to a ban on strike action. In 136

doing so, they did not disregard the relevant constitutional requirements. It is true that the complainant no I. and the complainants no. II. to IV. fall within the scope of protection of the freedom of labour coalitions (1) and that the measures challenged in the initial proceedings constitute an interference with the fundamental right under Art. 9(3) GG (2.). However, these interferences are justified under constitutional law (3.). A different assessment cannot be reached even with regard to the guarantees of the European Convention on Human Rights (4.).

1. The freedom of labour coalitions has no direct constitutional limits due to the traditional principles of the career civil service system (Art. 33(5) GG) (a). The matter at hand falls within the material scope of protection of Art. 9(3) of the Basic Law (b). 137

a) So far, the case-law of the Federal Constitutional Court contains no specific statements with regard to the relation between Art. 9(3) GG and Art. 33(5) GG. [...] 138

However, a systematic and teleological interpretation leads to the conclusion that the traditional principles of the career civil service system are conflicting constitutional law and may justify limiting Art. 9(3) GG; they are not direct constitutional limits to the freedom of labour coalitions [...]. Such an interpretation takes account of the prominent status of fundamental rights as core of the free democratic order (cf. BVerfGE 31, 58 <73>) and avoids a premature and abstract balancing of interests with the consequence of realising one legal interest at the expense of another [...]. Rather, this approach takes full account of the principle of practical concordance by which two interests protected by the Constitution are reconciled in such a way as to find the most careful balance. Each of these interests must be realised to the largest extent possible so that it can reach its maximum effectiveness. This also holds true for the structural principles of Art. 33(5) GG which do not exclude a balancing with other interests from the outset [...]. 139

b) [...] Repeatedly, and most previously in its decision on the Act on Uniformity of Collective Agreements (*Tarifeinheitsgesetz*), the Federal Constitutional Court held that measures of industrial action that are aimed at the conclusion of collective agreements, at least to the extent that they are necessary to ensure effective free collective bargaining, are protected under Art. 9(3) GG (cf. BVerfGE 84, 212 <225>; 88, 103 <114>; 92, 365 <393 and 394>; 146, 71 <114 and 115 para. 131>). A statement to the effect that a strike must always be held in connection with the conclusion of a collective agreement, can, however, not be found in the Court's previous decisions. In fact, for actions to be protected under Art. 9(3) GG it is decisive that they are initiated by trade unions and related to collective bargaining (cf. BVerfG, Order of the Third Chamber of the First Senate of 26 March 2014 – 1 BvR 3185/09 -, juris, para. 26 et seq.). The Federal Labour Court does not (no longer) exclude a strike called by a trade union in support of a strike aimed at the conclusion of a collective agreement from the scope of protection of Art. 9(3) GG [...]. In line with an interpretation that is in accordance with the Constitution's openness to international law, such a broad understanding of Art. 9(3) GG and the effort to guarantee a protection of fundamental 140

rights as extensive as possible expressed therein, also draws on the assessments of the European Court of Human Rights regarding Art. 11 ECHR. According to these assessments, secondary strikes are at least an accessory aspect of the freedom of labour coalitions (cf. ECtHR, National Union of Rail, Maritime and Transport Workers v. United Kingdom, Judgment of 8 April 2014, no. 31045/10, § 77). In the proceedings at hand, the alleged participation of the complainant no I. and the complainants no. II. to IV. in (token) strike actions called by the trade union *Gewerkschaft Erziehung und Wissenschaft* (GEW) took place in connection with collective bargaining for the public sector conducted at that time and is therefore not obviously unsuitable to contribute to reaching the aims pursued in the course of the main labour dispute.

2. The challenged decisions of the authorities and the courts impair the fundamental right under Art. 9(3) GG. Any curtailing of the fundamental rights guarantees limits the freedom of labour coalitions. All regulations and measures complicating the exercise of fundamental rights at any stage are therefore considered impairments by the state. […] The disciplinary sanctioning of the complainant no. I. and the complainants no. II. to IV. for their actions by orders issued by their employers and the upholding of the challenged decisions by the disciplinary courts restrict the possibility to participate in labour disputes. 141

3. However, the impairment of the freedom of labour coalitions is justified by sufficiently weighty interests that are protected under constitutional law. 142

It is unobjectionable under constitutional law that the decisions challenged by the constitutional complaints consider the ban on strike action for civil servants to be a traditional principle with constitutional status (a), which the legislature must not only take into account but observe (b). A legal provision that expressly lays down the ban on strike action for civil servants is not required (c). Nor does the status-related ban on strike actions for civil servants disproportionately interfere with the guarantee under Art. 9(3) GG (d). 143

a) The ban on strike action for civil servants is an independent and traditional principle of the career civil service system within the meaning of Art. 33(5) GG. It meets both requirements necessary for being qualified as a traditional principle: traditionality (aa) and substantiality (bb). 144

The wording of Art. 33(5) GG does not specify what is considered a traditional principle under the Constitution. [...] 145

[…] 146

aa) The ban on strike action for civil servants fulfils the element of traditionality which is essential for being regarded as an independent and traditional principle of the career civil service system. [...] The ban on strike actions for civil servants […] traces back to a line of tradition established (at least) in the state practice of the Weimar Republic, and, on this basis, proves to be traditional within the meaning of Art. 33(5) GG. 147

[…] 148

bb) In substantive terms, the ban on strike action is closely linked to the foundations of the German career civil service system under constitutional law, in particular to the duty of loyalty under civil service law and to the principle of alimentation. In view of that, the requirement of substantiality is satisfied. 149

[…] 150-151

According to the present constitutional concept of the career civil service system, the ban on strike action is inseparably linked to the principle of alimentation and the duty of loyalty. A right to strike for civil servants is incompatible with these two principles which are essential elements of a civil servant's functions; rather, the ban on strike action for civil servants guarantees and justifies the present set-up of the described structural principles of the career civil service system. Against this background, the ban on strike action for civil servants under Art. 33(5) GG is an independent structural principle of the career civil service system that is necessary for the system and thus fundamental. […] Abandoning it would fundamentally challenge the order of the career civil service system as it exists in Germany [...]. 152

b) The ban on strike action is part of the institutional guarantee under Art. 33(5) GG and must be observed by the legislature. A right to strike, even for some groups of civil servants only, would fundamentally reshape the understanding and regulations of the civil service. It would erode the principles of alimentation, of the duty of loyalty, of lifetime employment, and the principle that material rights and duties, including remuneration, must be regulated by the legislature. At the very least, it would require fundamental changes to these principles, which are essential to the functioning of the civil service. If a right to strike was granted, there would be no scope, for instance, for regulating remuneration by law. If civil servants' remuneration or parts of it could be negotiated by means of labour disputes, the existing possibility for civil servants to enforce alimentation, guaranteed by the Constitution, before the courts – and hence the guarantee of subjective rights under Art. 33(5) GG – could no longer be justified. Yet the alimentation principle, in combination with the principle of lifetime employment, serves to ensure the independent exercise of duty and guarantees civil servants the means necessary to fulfil their obligation to fully dedicate themselves to their office. In order to ensure that, the Federal Constitutional Court has identified the duty of the employer to remunerate civil servants commensurate with their office as an essential part of the principle of alimentation (cf. BVerfGE 130, 263 <292>; 139, 64 <111 and 112 para. 93>; 140, 240 <278 para. 72>; 141, 56 <70 para. 35>; 145, 249 <272 para. 48>; 145, 304 <324 and 325 para. 66>). A (partial) abandonment of these closely linked core principles would challenge the career civil service system as such and thus the matter regulated in Art. 33(5) GG […]. Therefore, a right to strike for civil servants would not merely mean to adapt the provisions of the public service law to the current developments of statehood and the civil service law to current circumstances. Rather, it would interfere with the core of structural principles guaranteed 153

under Art. 33(5) GG. Hence, the obligation to observe the ban on strike action blocks the way to profound structural changes effected by the general legislature […]

c) A legal provision that expressly lays down a ban on strike action for civil servants is not required under constitutional law. […]. 154

The disciplinary orders challenged by the present constitutional complaints referred, among other legal bases, to the provisions on the absence from work included in the *Land* laws on civil servants. In addition, the orders partially also referred to the Law on the Status Rights of Civil Servants in the *Länder* (*Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern* – BeamtStG) regulating the fundamental duties of civil servants, which include the disinterested exercise of duty for the common good and the obligation to follow instructions (§§ 33-35 BeamtStG). [...] If the fundamental duties of civil servants specifically regulated by law include to fully dedicate themselves to their office and to exercise their duties in a disinterested manner and in good faith (cf. also § 61(1) of the Law on Federal Civil Servants, *Bundesbeamtengesetz* – BBG, § 34 BeamtStG) it is inferred that measures of collective industrial disputes to assert common (own) professional interests are prohibited (cf. also Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 53, 330 <331>). It is not required under constitutional law to further regulate the ban on strike action beyond this. 155

d) To the extent that it concerns the participation of civil servants in labour disputes, the restriction of the freedom of labour coalitions is not objectionable under constitutional law. The ban on strike action for civil servants has its basis in Art. 33(5) GG and accommodates the principle of practical concordance. 156

aa) Like the remaining core of structural principles of the career civil service system within the meaning of Art. 33(5) GG, the ban on strike action for civil servants serves the purpose of maintaining a stable administration (cf. BVerfGE 56, 146 <162> with further references), of ensuring the fulfilment of state functions and thereby the functioning of the state and its institutions. This goal, which the Constitution also guarantees through other provisions of Art. 33 GG, is achieved inter alia by a staff of civil servants, whose working conditions are unilaterally determined by the state, whose labour can always be requested, in particular in times of crisis, and which refrains from participating in a power struggle with the employer or the democratically legitimated legislature. The conflict between Art. 9(3) GG and Art 33(5) GG must be resolved in accordance with the principle of practical concordance, which means that conflicting constitutional law positions must be assessed in terms of how they interact and they must be balanced in such a way that they are as effective as possible for all persons involved (cf. BVerfGE 28, 243 <260 and 261>; 41, 29 <50 and 51>; 93, 1 <21>; 134, 204 <223 para. 68>; established case-law). 157

bb) The conflict between the freedom of labour coalitions and Art. 33(5) GG must be resolved in favour of the ban on strike action for civil servants. The weight of the interference with Art. 9(3) GG is not unreasonable for civil servants. On the one hand, the 158

right to strike [...] is only one element of the freedom of labour coalitions. A ban on strike action does not result in the complete irrelevance of the freedom of labour coalitions and does not render it entirely ineffective. On the other hand, the legislature has created provisions designed to help compensate for the restriction of Art. 9(3) GG for civil servants. Although the mentioned provisions of § 118 BBG and § 53 BeamtStG as well as the civil service laws of the *Länder* do not accord any co-decision rights to the trade unions' umbrella organisations, they are granted participation rights when legal provisions for the civil service are drawn up. According to the explanatory memorandum to the law, this participation was created to compensate for the ban on strike action (cf. *Bundestag* document – BTDrucks 16/4027, p. 35). Another element of these compensating measures is the alimentation principle under civil service law. It grants civil servants the right, which is equivalent to fundamental rights, to subject the state's duty of alimentation to judicial review and, enforce it before the courts if necessary. In this reciprocal system of interrelated rights and duties, expansions or restrictions of one right or duty of the civil service generally also result in changes to the other rights or duties. The civil service status does not permit "cherry-picking" (cf. also BVerfGE 130, 263 <298>). [….] A right to strike (for certain groups of civil servants) would trigger a chain reaction with regard to the structuring of the civil service and would affect essential principles of civil service law and related institutions [...]. Granting the right to strike would raise the question of its effects on the introduction of a collective bargaining system and the commitment to collective agreements of civil servants and employers, on the continued validity or change of the alimentation principle and the principle of lifetime employment, on single aspects like health insurance benefits and the civil servants' exemption from payment of social security contributions and on the possibility to enforce the right to alimentation commensurate with the civil servants' office before the courts. [...]

cc) Balancing the positions as carefully as possible in terms of practical concordance cannot be achieved by granting of a restricted right to strike that is subject to special requirements which must be developed by judicial decisions or provided for by statutes, as for example an obligation to notify of or obtain an approval for a planned strike action. [...] A (restricted) right to strike that is subject to such conditions would reduce the negative effects of the strike action on the realisation of fundamental rights by third persons, e.g. parents, students and the impairments on the functioning of the administration. Furthermore, an obligation of notifying or obtaining an approval would allow the administrative bodies to at least partly ensure that their duties are fulfilled. [...] However, this would only be possible – and this is an important objection because of the unpredictability – if a sufficient number of civil servants would decide not to participate in the strike action or could be excluded from participating in the strike by imposing a ban in individual cases. 159

In case of longer lasting labour disputes and the participation of persons with operative functions in schools, the educational mandate of the state pursuant to Art. 7(1) GG (cf. on this BVerfGE 47, 46 <71>; 93, 1 <21>; 98, 218 <244>), i. e. a 160

functioning school system (cf. BVerfGE 138, 1 <29 para. 80>) – which is also protected under constitutional law – can no longer be ensured on a continued basis. [...]

A weighing of the freedom of labour coalitions against the traditional principles of the career civil service system in accordance with the principle of practical concordance does also not require that the ban on strike action be limited to a particular group of civil servants by taking into account their functions stipulated in Art. 33(4) GG [...]. This would mean that for civil servants whose main role is to exercise public authority within the meaning of this provision, a ban on strike action would continue to be in effect; all other civil servants would have to be granted a right to strike [...]. Dividing civil servants into groups that have or do not have the right to strike based on their different functions would entail difficulties of distinction that are connected to the concept of public authority. [...] To clearly determine whether a specific official act involves the exercise of public authority is already extremely difficult. It is also difficult to make a distinction in cases where the specific official act is not the determining factor, but where it must be clarified whether a particular civil servant who performs different functions (partly public authority functions, partly non-public authority functions) as a result of a delegation, reassignment or transfer is to be accorded the right to strike. Regardless of these considerations, the recognition of a right to strike for “civil servants in marginal areas” would mean forgoing the guarantee of a stable administration and the exercise of state functions other than those stipulated in Art. 33(4) GG. Besides, a right to strike based on functional criteria within the meaning of Art. 33(4) GG would create a special category of “civil servants with the right to strike” or “civil servants subject to collective agreements” [...]. This category would be added as a “third pillar” to the refined system of public service. While the alimentation principle would continue to apply for civil servants who exercise core functions of public authority, other civil servants would be given the possibility of enforcing demands regarding their working conditions through labour dispute measures where applicable, while keeping their civil servant status. In addition to the existing problem of proper distinction and of equal treatment with regard to employees in the public service, this would raise the question to what extent this category of personnel could still be regarded as having the legal status of civil servants [...]. 161

[…] 162

4. The ban on strike action for civil servants in Germany is in accordance with the principle of the Constitution’s openness to international law; in particular, it is compatible with the guarantees of the European Convention on Human Rights. The European Court of Human Rights has further developed its case-law with regard to Art. 11 ECHR in a number of proceedings (a). When taking into consideration the decisions’ essential principal values, a conflict between German law and the European Convention on Human Rights can presently not be established (b). Regardless of this, and with regard to the particularities of the German system of career civil service, the Senate finds that the requirements to restrict the right to strike stipulated in Art. 11(2) ECHR would also be met (c). 163

a) Art. 11(1) ECHR grants every person the right to freedom of peaceful assembly and to freedom of association with others; this also includes the right to form and join trade unions for the protection of his interests. In its recent case-law, the European Court of Human Rights has further specified the guarantees of Art. 11(1) ECHR and the conditions of interference under Art. 11(2) ECHR. 164

aa) In the case Demir and Baykara v. Turkey (Judgment of 12 November 2008 no. 34503/97, § 145) the Grand Chamber of the European Court of Human Rights held that the freedom of association of Art. 11(1) ECHR includes the right to form and join a trade union, the prohibition of closed-shop agreements and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members. For its interpretation of the provision, the European Court of Human Rights has taken into account other international instruments (Convention No. 87 and No. 98 of the International Labour Organisation, European Social Charter) and their interpretation by the competent organs as well as the practice of the European states (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 85). In that specific case which concerned a collective agreement between the Turkish trade union Tüm Bel Sen and a Turkish municipality, the European Court of Human Rights held that members of the administration of the State cannot be excluded from the scope of Art. 11 ECHR. At most, restrictions can be imposed in accordance with the requirements of Article 11(2) ECHR. However, the groups of persons stated in the exceptions set out in Article 11(2) second sentence ECHR are to be construed strictly (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 107, 119). The Turkish Government omitted to show a pressing social need for the exclusion from the right to collective bargaining (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 163 et seq.). The explanation that civil servants enjoy a privileged position in relation to other workers is not sufficient in this context (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 168). 165

The concurring opinion of Judge Spielmann concerning the aforementioned Judgment of 12 November 2008, joined by Judges Bratza, Casadevall and Villiger, emphasises the importance of the right to freedom of labour coalitions also for the public service (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, Separate Opinion of Judge Spielmann §§ 1 et sq.) According to the opinion, it must be taken into account that, in many legal systems, the statutory situation of civil servants is governed by laws or regulations, from which no derogation can be made by means of individual agreements. Referring to Nicolas Valticos (Droit International du Travail, Vol. 8 [Droit du Travail], 2nd Edition 1983, p. 264 et seq.), the separate opinion states that the concept of relation between the state and its civil servants varies depending on the country. In some countries civil servants and other public officials – or most of them – tend to be treated as workers in the private sector, as regards, for example, collective bargaining and even the right to strike. In 166

other countries, however, the traditional notions are still recognised. It is further stated that another problem stems from the fact that the definition of civil servant varies in scope depending on the country, according to the extent of the public sector and to whether or not a distinction is made – and also to what degree – between civil servants as such and public-sector employees in a broader sense (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, Separate Opinion of Judge Spielmann § 6). Even though the right to bargain collectively has been finally recognised by the decision of the Grand Chamber of 12 November 2008, certain exceptions or limits must nevertheless always be possible in the public service, provided that the role of staff representatives in the drafting of the applicable employment conditions or regulations remains guaranteed (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, Separate Opinion of Judge Spielmann § 8). The authorising of public officials to make their voices heard certainly implies that they have a right to engage in social dialogue with their employer, but not necessarily the right to enter into collective agreements or that states have a corresponding obligation to enable the existence of such agreements. States must therefore be able to retain a certain freedom of choice in such matters (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, Separate Opinion of Judge Spielmann §§ 8 and 9).

bb) In the case Enerji Yapi-Yol Sen v. Turkey in 2009, concerning the application of a civil servants trade union, the Chamber of the Third Section of the European Court of Human Rights held that a ban on strike action interferes with the guarantees of Art. 11(1) ECHR. It states that a strike enables a trade union to make its voice heard and that it is an important factor enabling the trade-union members to protect their interests (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, § 24). However, the right to strike is not an absolute right and can be subject to conditions and restrictions. The Chamber also held that the principle of freedom of trade unions is in accordance with a ban on strike action for civil servants exercising public authority on behalf of the state. In the case Enerji Yapi-Yol Sen v. Turkey, a circular placed a prohibition on the right to strike on all civil servants without considering the goals stipulated in Art. 11(2) ECHR. The Turkish government failed to demonstrate that the restriction it imposed was necessary in a democratic society (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no 68959/01, § 32). 167

cc) Even before that, in its Judgment of 27 March 2007, the Chamber of the Second Section of the European Court of Human Rights decided on the scope of Art. 11 ECHR with regard to the legal situation in Turkey (cf. ECtHR, Karaçay v. Turkey, Judgment of 27 March 2007, no. 6615/03). First, the European Court of Human Rights set out that the personal scope of protection of Art. 11(1) ECHR was comprehensive and did not *a priori* exclude civil servants (cf. ECtHR, Karaçay v. Turkey, Judgment of 27 March 2007, no. 6615/03, § 22). The disciplinary warning imposed in case of the applicant, an electrician who participated in a strike held in con- 168

nection with the remuneration of civil servants, would not have been necessary in a democratic society. (cf. ECtHR, Karaçay v. Turkey, Judgment of 27 March 2007, no. 6615/03, §§ 37 and 38).

dd) On 17 July 2008, the Chamber of the Second Section of the European Court of Human Rights decided in the case Urcan and others v. Turkey on applications of a number of Turkish teachers on whom disciplinary sanctions had been imposed by Turkish courts for going on strike for one day. In this context, the European Court of Human Rights held that these sanctions constituted an interference with Art. 11 ECHR with regard to the freedom of assembly. It further stated that the measure was not justified within the meaning of Art. 11(2) ECHR, since the interference had not been necessary in a democratic society (cf. ECtHR, Urcan and others v. Turkey, Judgment of 17 July 2008, no. 23018/04 and others, §§ 26 et seq.). 169

ee) After the decisions in the cases Demir and Baykara v. Turkey and Enerji Yapi-Yol Sen v. Turkey, the European Court of Human Rights repeatedly dealt with the guarantees under Art. 11 ECHR in application proceedings brought against Turkey. In the case Kaya and Seyhan v. Turkey, the Chamber of the Second Section ruled on sanctions imposed on two teachers and trade-union members who participated in a day of action against a law concerning the organisation of the public service (cf. ECtHR, Kaya and Seyhan v. Turkey, Judgment of 15 September 2009, no. 30946/04, §§ 5 and 6). The European Court of Human Rights held that the disciplinary measures imposed on the applicants did not correspond to a compelling social need and thus were not necessary in a democratic society. These measures constituted a disproportionate impairment of the applicants' right to freedom of assembly (cf. ECtHR, Kaya and Seyhan v. Turkey, Judgment of 15 September 2009, no. 30946/04, § 31). 170

ff) In the case Saime Özcan v.Turkey the Chamber of the Second Section, on 15 September 2009, again ruled on an application of a teacher who also was a trade-union member and had participated in a national day of strike fighting for the improvement of working conditions of civil servants. Referring to the decisions on the cases Urcan and others v. Turkey and Karaçay v. Turkey, the Chamber concluded that the initial criminal conviction of the teacher was a violation of Art. 11 ECHR (cf. ECtHR, Saime Özcan v. Turkey, Judgment of 15 September 2009, no. 22943/04, §§ 22 et seq.). In its Judgment of 13 July 2010 in the case Çerikci v. Turkey that concerned a Turkish municipal civil servant's participation in a strike and the disciplinary measures subsequently imposed, the Chamber of the Second Section referred to its findings in the case Karaçay v. Turkey and again held that there was a violation of Art. 11 ECHR (cf. ECtHR, Çerikci v. Turkey, Judgment of 13 July 2010, no. 33322/07, §§ 14 and 15). 171

b) When considering the findings of the European Court of Human Rights in the aforementioned cases, it can neither be established that the current legal situation in Germany is not in compliance with the European Convention on Human Rights, nor that domestic law conflicts with the Convention. If domestic law does not conflict with 172

the Convention, questions concerning the limits of the Constitution's openness to international law, which have been raised in the constitutional complaint proceedings, are not essential for the decision in the present case. In particular, there is presently no need to clarify, whether the ban on strike action for civil servants, which is a traditional principle of the career civil service system and a traditional element of the German state structure (cf. paras. 144 et seq. above), also is a fundamental constitutional principle [...]. Nonetheless, many arguments would support this.

173 [...] The Judgment pronounced against Turkey as well as the other decisions in the application proceedings Demir and Baykara v. Turkey, Karaçay v. Turkey, Urcan and others v. Turkey, Kaya and Seyhan v. Turkey, Saime Özcan v. Turkey, Çerikci v. Turkey do not attain immediate legal validity for the Federal Republic of Germany […] (cf. also BVerfGE 111, 307 <320>). In this context, it must be taken into account that *inter partes* statements concerning a specific case are made before the background of the respective relevant legal system and that conceptual similarities must not cover up differences that arise from the context of legal orders (cf. also BVerfGE 128, 326 <370> […]). Decisions of the European Court of Human Rights also have a specific relevance for the interpretation of domestic law in compliance with the Convention that goes beyond Art. 46 ECHR and results from their direction and guidance function. The guidance function has a particularly strong impact if it applies to parallel cases within the same legal order, that means (other) proceedings in the contracting state affected by the initial decision of the European Court of Human Rights are affected [...]. Beyond this impact on parallel cases, the direction and guidance function must be taken into account by reviewing one's own legal order (cf. BVerfGE 111, 307 <320>) and by adopting the principal values formulated by the European Court of Human Rights in terms of abstract, general guidelines (cf. also BVerfGK 3, 4 <9>).

174 Art. 9(3) GG and the related case-law of the Federal Constitutional Court specify that German civil servants are also subject to the personal scope of protection of the freedom of labour coalitions without exception (cf. BVerfGE 19, 303 <312, 322> […]), but cannot exercise the right to strike as one manifestation of Art. 9(3) GG due to conflicting constitutional law (Art. 33(5) GG); thus, they are in accordance with the principal values enshrined in the Convention. Regarding the scope of protection and restrictions of Art. 11 ECHR, the European Court of Human Rights has developed principal statements in terms of values that must be considered in the context of an interpretation that is open to the Convention. In the case Demir and Baykara v. Turkey, the Grand Chamber elaborated on the scope of protection when assessing the guarantees under Art. 11 ECHR (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 96 et seq.). Regarding the personal scope of protection, the Chamber concluded that members of the state administration cannot generally be excluded from the scope of Art. 11 ECHR, and that, at most, restrictions can be imposed on those members (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 107). Moreover, it held that these restrictions must not impair the very essence of the freedom of asso-

ciation (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 97 [...]). A similar assessment can be found in the Judgment in the case Karaçay v. Turkey, which states that the right to join trade unions guaranteed by Art. 11(1) ECHR is afforded to everyone and also civil servants are not automatically excluded from it (ECtHR, Karaçay v. Turkey, Judgment of 27 March 2007, no. 6615/03, § 22).

Particularly with regard to the right to strike, the European Court of Human Rights, in the case Enerji Yapi-Yol Sen v. Turkey, put forward the abstract principle of interpretation that a strike enables trade unions to make their voice heard and to protect their interests (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, § 24). German law does not conflict with this assessment either. As far as the representation of civil servants in Germany is concerned, the umbrella organisations of the competent trade unions are not granted a right to strike, but the right to participate in the drafting of general provisions concerning the working conditions under civil service law (cf. § 118 BBG and § 53 BeamtStG and the provisions of civil service laws of the *Länder*). Even if this procedure does not and, due to the lack of any commitment to collective agreements, cannot create the atmosphere of pressure that is inherent in labour disputes, it enables trade unions to make their voice heard by means of a compensation and balancing measure. 175

c) Regardless of the question whether the ban on strike action for civil servants constitutes an interference with Art. 11(1) ECHR, it is in any case justified under Art. 11(2) first sentence (aa) and Art. 11(2) second sentence ECHR (bb) based on the particularities of the German system of the career civil service. 176

aa) (1) In Germany, the ban on strike action is prescribed by law within the meaning of Art. 11(2) first sentence ECHR. This requires that a basis exists in domestic law (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, § 26). Such a basis exists. The laws on civil service of the Federation and the *Länder* include specific provisions for all civil servants regarding their absence from work without permission and their obligation to follow instructions. Participating in strike action without permission is incompatible with these provisions. Moreover, the ban on strike action for civil servants is a manifestation of Art. 33(5) GG that has been recognised by the highest courts for decades […]. 177

(2) Ensuring a functioning public administration, in the specific case of the complainants ensuring the fulfilment of the state’s educational mandate and a functioning school system (Art. 7(1) GG), which was the argument used to justify the disciplinary measures, serves to maintain order and thus pursues a legitimate aim within the meaning of Art. 11(2) first sentence ECHR. 178

(3) Due to the particularities of the German system of career civil service, the ban on strike action is also necessary in a democratic society. As was stated by the European Court of Human Rights in its decision on the case Demir and Baykara v. Turkey, a justified interference with Art. 11(1) ECHR requires that there is a pressing social 179

need; moreover, the restriction must be proportionate (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 119). According to the European Court of Human Rights, Turkey, however, failed to demonstrate that the absolute prohibition for civil servants to form trade unions stipulated in Turkish law fulfils such a pressing social need. The mere fact that the relevant laws do not provide for the possibility to form trade unions is not sufficient (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 120). The explanation that Turkish civil servants enjoy a privileged position is not sufficient in this context either (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 168). In the proceedings Enerji Yapi-Yol Sen v. Turkey, the Turkish government also failed to demonstrate that there was a need for the impugned restriction of the right to strike action in a democratic society, by claiming that Art. 11 ECHR did not guarantee that trade unions could take certain actions (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, §§ 29, 32).

Moreover, in the case Demir and Baykara v. Turkey, the European Court of Human Rights held that the Contracting Parties only have a limited margin of appreciation when defining the general legal concept of a pressing social need (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 119). However, the case did not concern the guarantee of a right to strike action. It has not been particularly held to be an element of the core guarantees of Art. 11 ECHR by the European Court of Human Rights to this date (cf. ECtHR, National Union of Rail, Maritime and Transport Workers v. United Kingdom, Judgment of 8 April 2014, no. 31045/10, § 84). Rather, with regard to the margin of appreciation concerning restrictions of the freedom of trade unions, it made the following differentiation: If a legislative restriction strikes at the core of trade-union activity, the national legislature has a lesser margin of appreciation and more is required to justify the resulting interference, in the general interest, with the exercise of trade-union freedom. Conversely, if it is not the core but a secondary or accessory aspect of trade-union activity that is affected, the margin of appreciation is wider and the interference is more likely to be proportionate (cf. ECtHR, National Union of Rail, Maritime and Transport Workers v. United Kingdom, Judgment of 8 April 2014, no. 31045/10, § 87). With regard to secondary strike action, the European Court of Human Rights held that it did not affect the core of the freedom of association, but merely constituted a secondary or accessory aspect and therefore a wider margin of appreciation concerning restrictions were to be recognised to the national authorities (cf. ECtHR, National Union of Rail, Maritime and Transport Workers v. United Kingdom, Judgment of 8 April 2014, no. 31045/10, § 88). 180

Against this background, a ban on strike action for German civil servants and specifically for teachers with civil servant status is justified under Art. 11(2) first sentence ECHR. In the present constitutional complaint proceedings, teachers with civil servant status participated in strike action called by the German Education Union (*Gew-* 181

erkschaft Erziehung und Wissenschaft – GEW). This union represents both teachers with civil servant status and teachers with employee status. Based on the legal situation in Germany, the GEW negotiates collective agreements with the Employers' Association of the *Länder* (*Tarifgemeinschaft der Länder*) for teachers with employee status only. These collective agreements do not apply to civil servants; in their case, the federal legislature and the respective *Land* legislatures, which have exclusive competence for determining the working conditions of civil servants, decide whether and to what extent the outcomes of collective bargaining for employees in the public sector are transferred to civil servants. In part, the complainant no. I. and the complainants no. II. to IV. sought to bring about such a transfer of collective bargaining outcomes by means of their participation in strike action. This behaviour was (at least also) intended to support a strike action aimed at the conclusion of a collective agreement, and shows a certain similarity to a secondary strike; thus, this behaviour is not a core aspect of the guarantees of Art. 11(1) ECHR. The wide margin of appreciation that is generally granted to the Federal Republic of Germany in such cases has not been exceeded in the case at hand. The ban on strike action, which is applicable to parts of the public service and which is also a recognised constitutional tradition, is not a manifestation of the civil servants' privileged status (permanent employment status, entitlement to health insurance benefits, pensions) and is not justified merely based on their function to maintain the administration and the protection of third party rights. Rather, it is decisive that in the system of German civil service law, the civil servant status entails interrelated rights and duties; expansions or restrictions of one right or duty of the civil service generally also result in changes to the other rights or duties. [...] Granting a right to strike to civil servants would fundamentally change the system of German civil service law and thus call it into question. This system is a particular national tradition of the Federal Republic of Germany; it is due to the fact that there is a great diversity between the States of Europe in the sphere of cultural and historical development (cf. also ECtHR <GC>, Lautsi et al. v. Italy, Judgment of 18 March 2011, no. 30814/06, § 68 […]).

182 The balancing of interests against the rights and freedoms of others to be undertaken under Art. 11(2) first sentence ECHR also has to include the fact that in the case of the complainant no. I. and the complainants no. II. to IV., the ban on strike action serves to safeguard the right to education, and thus serves to protect a human right enshrined in Art. 2 of the First Protocol ECHR and in other international treaties [...].

183 As a compensation for the ban on strike action [...] Germany has established a participation of umbrella organisations of the trade unions in the drafting of statutory provisions concerning the civil service […]. To further compensate for the civil servants' lacking possibility to influence their employment conditions by measures of labour dispute, Art 33 (5) GG affords them the subjective public right to have the constitutionality of their alimentation reviewed in court (cf. BVerfGE 139, 64 et seq.; 140, 240 et seq. […]). This possibility of judicial review, traditionally granted only to the civil servants and not to public service employees, and the subjective rights granted under

Art. 33(5) GG would be almost completely meaningless if civil servants had a right to strike.

bb) In addition, as (former) teachers with civil servant status, the complainant no. I. and the complainants no. II. to IV. are members of the administration of the state within the meaning of Art. 11(2) second sentence ECHR. In the opinion of the European Court of Human Rights, this exception provision neither excludes a specific sector nor is it an independent reason to justify the restriction, but an addition to Art. 11(2) first sentence ECHR, for which a review of proportionality is specifically required (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, §§ 97, 107, in derogation from the European Commission on Human Rights, Council of Civil Service Unions and others v. United Kingdom, Decision of 20 January 1987, no. 11603/85 […]). 184

Pursuant to Art. 11(2) second sentence ECHR, the exercise of the guarantees under Art. 11(1) ECHR can be restricted for members of the armed forces, of the police or of the administration of the state. The restrictions that can be imposed on the above-mentioned groups of persons must be construed strictly (cf. ECtHR <GC>, Demir and Baykara v. Turkey, Judgment of 12 November 2008, no. 34503/97, § 97 [...]; in particular regarding members of the administration of the state cf. ECtHR <GC>, Vogt v. Germany, Judgment of 26 September 1995, no. 17851/91, § 67). Thus, one aspect to be assigned to the concept of administration of the state could be the exercise of public authority on behalf of the state (cf. ECtHR Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, § 32 with reference to ECtHR <GC>, Pellegrin v. France, Judgment of 8 December 1999, no. 28541/95, §§ 64 et seq. […]). 185

So far, the European Court of Human Rights has not answered the question, whether teachers employed at state schools in Germany are members of the administration of the state within the meaning of Art. 11(2) second sentence ECHR. Rather, the Court left the question unanswered in two proceedings against the Federal Republic of Germany, because it was not essential for the decision of these cases (cf. ECtHR <GC>, Vogt v. Germany, Judgment of 26 September 1995, no. 17851/91, § 68; ECtHR, Volkmer v. Germany, Judgment of 22 November 2001, no. 39799/98). 186

In the opinion of the Senate, teachers with civil servant status are members of the administration of the state within the meaning of Art. 11(2) second sentence ECHR. However, it would be excessive and no longer be compatible with the requirements of the European Convention on Human Rights to consider all public service employees of a state – even employees of state-run commercial or industrial concerns (cf. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Judgment of 21 April 2009, no. 68959/01, § 32) – members of the administration of the state. As the legal facts already show, civil servants who, pursuant to Art. 33(4) GG, stand in a relationship of service and loyalty defined by public law, make up the smaller part of personnel in comparison to public service employees in the two-track German public service system. On 30 June 2016, 187

only about 1.7 million persons of almost 4.7 million employees working in the public service held the status of civil servant or judge (cf. *Statistisches Bundesamt* [Destatis], public service personnel, at: https://www.destatis.de)

188 Moreover, in case of teachers at state schools, which is the relevant group in these proceedings, the state has a special interest in the discharge of duties by civil servants. The school system and the state's educational mandate are of great significance under the Basic Law (Art. 7 GG) and the constitutions of the *Länder*. In some of the *Länder*, the employment of teachers with civil servant status is the rule (cf. Art. 133(2) of the Constitution of the Free State of Bavaria). It is true that teachers do not primarily fulfil government duties (cf. BVerfGE 119, 247 <267>). Thus, Art. 33(4) GG does not conflict with hiring teachers as employees in the public service, which is in fact practiced in Germany to a varying degree depending on the respective *Land*. The employment of teachers without civil servant status is not based on their function or the duties they perform, but generally on special factual reasons [...]. Some of the teachers employed without civil servant status do not fulfil the personal requirements necessary to become civil servants; in other cases the state based its decision to establish an employee relationship on practical administrative considerations. In the past, the hiring of teachers without civil servant status lead to more flexible types of employment; for instance, the Free State of Saxony reacted to the (then) necessary reduction of overemployment in the education sector that had been caused by demographic changes after the German reunification. Due to the factual separation of the employment relationships of teachers in Germany, it can hence not be denied that teachers with civil servant status are (to be treated as) members of the administration of the state within the meaning of Art. 11(2) second sentence ECHR. Teachers exercise such important duties that the decision on granting them the status of a civil servant must be reserved to the state.

III.

189 The constitutional complaints are also unfounded with regard to the violation of Art. 9(3) GG in conjunction with Art. 20(3) GG claimed by the complainants in the proceedings 2 BvR 1738/12 and 2 BvR 1068/14.

190 1. The binding effect of law and justice also includes a duty to take into account the guarantees of the European Convention on Human Rights and the decisions of the European Court of Human Rights as part of a methodologically tenable interpretation of the law. Both, failing to consider a decision of the ECtHR and ”enforcing” such a decision in a schematic way, in violation of higher-ranking law, may therefore violate fundamental rights in conjunction with the principle of the rule of law (cf. BVerfGE 111, 307 <323 and 324>). [...] If decisions by the European Court of Human Rights are relevant for the evaluation of the facts of a case, the aspects, which the European Court of Human Rights took into account in the course of its balancing must principally also be included in the constitutional assessment, i. e. in the review of proportionality, and the results of the balancing must be addressed (cf. also BVerfGK 3, 4 <9>).

2. The challenged decisions fulfil these requirements. For the evaluation of the respective facts of the case, the courts took into account Art. 11 ECHR as interpreted by the European Court of Human Rights and addressed it. [...] Thus, the courts neither failed to examine the guarantees of the European Convention on Human Rights nor to take into account the decisions of the European Court of Human Rights. 191

Voßkuhle Huber Hermanns

Müller Kessal-Wulf König

Maidowski Langenfeld

Bundesverfassungsgericht, Urteil des Zweiten Senats vom 12. Juni 2018 - 2 BvR 1738/12, 2 BvR 646/15, 2 BvR 1068/14, 2 BvR 1395/13

Zitiervorschlag BVerfG, Urteil des Zweiten Senats vom 12. Juni 2018 - 2 BvR 1738/12, 2 BvR 646/15, 2 BvR 1068/14, 2 BvR 1395/13 - Rn. (1 - 191), http://www.bverfg.de/e/rs20180612_2bvr173812en.html

ECLI ECLI:DE:BVerfG:2018:rs20180612.2bvr173812