Pressemitteilungen

Federal Constitutional Court - Press office -

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Judgment of 30 July 2008
- 1 BvR 3262/07; 1 BvR 402/08; 1 BvR 906/08 -

Constitutional complaints in "ban on smoking" cases successful

The constitutional complaints of two publicans and a discotheque owner who objected to the provisions of the non-smoking laws of Baden-Württemberg and Berlin were successful.

Facts of the case:

In order to protect people, especially children and youths, from the dangers of passive smoking, the Non-Smoking Act (*Landesnichtraucherschutzgesetz*) of the *Land* Baden-Württemberg has banned smoking in a variety of public buildings, including eating and drinking establishments and discotheques, since 1 August 2007. Nonetheless, the operator of an eating and drinking establishment is granted the opportunity to establish separate rooms in which smoking is allowed. This exception does not apply in the case of discotheques; to this extent the ban on smoking is without exceptions. The operators of eating and drinking establishments or, as the case may be, discotheques are responsible for ensuring that the ban on smoking is complied with in the establishments they operate. The Berlin Non-Smoking Act (*Nichtraucherschutzgesetz*), which entered into force on 1 January 2008, contains similar provisions. It prohibits tobacco smoking in eating and drinking establishments, including clubs and discotheques. The Berlin Non-Smoking Act provides for an exception in the case of separate rooms which are set aside in eating and drinking establishments as well as in the case of separate rooms which are set aside in discotheques that only admit adults.

The complainant in proceedings **1 BvR 3262/07** operates a small single-room pub in Tübingen, whilst the complainant in proceedings **1 BvR 402/08** does the same in Berlin. Both pubs are frequented mainly by regular customers. According to the complainants' submissions, the percentage of smokers among the patrons is approximately 70 per cent. The complainants object that neither the Baden-Württemberg Non-Smoking Act nor the Berlin Non-Smoking Act provides exceptions for single-room pubs. They regard this as a violation of their fundamental rights under Article 12.1 of the Basic Law (*Grundgesetz* - GG), which guarantees occupational freedom as well as under Article 14.1 GG, which guarantees the right of ownership. They allege that the existing exceptions for eating and drinking establishments with several rooms distort competition in favour of large establishments and endanger the economic existence of single-room establishments. Since they cannot for practical reasons have separate smoking rooms, the ban on smoking leads in the end to single-room establishments becoming unprofitable due to the resulting decrease in turnover and thus having to be closed. They

argue that what is in practice a complete ban on smoking, which leads in a foreseeable way to a certain common type of eating and drinking establishment no longer being financially viable, is no longer proportionate. Furthermore, they argue that a less restrictive alternative which does justice to the contradictory interests of smokers, non-smokers and establishment operators would be to require eating and drinking establishments which allowed smoking to put up a sign to that effect rather than to impose a ban on smoking. This, they say, would enable non-smokers to decide before entering eating and drinking establishments whether they wished to expose themselves to tobacco smoke or not.

The complainant in proceedings **1 BvR 906/08** directs its complaint against the Non-Smoking Act of the *Land* Baden-Württemberg, which bans it as a discotheque operator from allowing smoking on its premises and, in addition, excludes it from establishing smoking rooms. The complainant argues that the space situation in its large discotheque would allow it to separate one or more rooms as smoking areas without any problem. It is of the opinion that the complete ban on smoking in discotheques is a disproportionate provision concerning the exercise of its occupation. As far as it is concerned, sufficient health protection could be achieved in discotheques through a voluntary ban on smoking and the use of modern ventilation systems. A less restrictive means of providing health protection would also be to establish smoking rooms in discotheques. It argues that a complete ban on smoking violates in addition the prohibition of excessiveness. In any case, it believes that it would be preferable in discotheques that only admit adults to create separate smoking rooms. The complainant submits that in addition the provision violates the principle of equality. It argues that discotheque operators are being treated less well in comparison with operators of eating and drinking establishments because the latter have the option of establishing smoking rooms. It points out that the operators of party tents in which dance parties are often held are exempted from the ban on smoking entirely, while particularly strict provisions apply to discotheque operators. In its opinion there are no objective reasons for this unequal treatment.

The First Senate of the Federal Constitutional Court found that the challenged provisions had violated the complainants' fundamental right of occupational freedom.

Admittedly, the legislature is not prevented from imposing a strict ban on smoking in eating and drinking establishments to which there can be no exceptions. However, if it decides in favour of a concept whereby the goal of health protection is pursued with reduced vigour and exceptions to the ban on smoking are allowed due to the occupational interests of publicans, then these exceptions must also extend to smaller establishments which primarily serve alcoholic beverages ("corner pubs") and which are subject to an especially heavy economic burden. The *Land* legislatures have until 31 December 2009 to amend the law. In this connection, they may decide in favour of a strict concept of protection for non-smokers in eating and drinking establishments which does not allow any exceptions; alternatively, they may adopt a less strict concept of protection which does allow exceptions, but then, however, logically requires account to be taken of the special burdens in the individual areas of the eating and drinking sector and which has to be drafted to afford equal treatment. Due to the high significance of people's protection against the dangers of passive smoking, the challenged provisions will remain in force until the legislature has amended the law. Thus the current provisions regarding the ban on smoking will initially remain in force in Baden-Württemberg and Berlin. In order to avoid a situation where the operators of smaller eating and drinking establishments would suffer damage to their livelihood, the Federal Constitutional Court extended, however, the

application of the exceptions already provided for in the non-smoking laws by adding an exception for smaller establishments which primarily serve alcoholic beverages until the amended law takes effect. The prerequisites for such an exception are that the establishment concerned does not offer prepared meals, does not have space for patrons exceeding 75 square meters, does not have a separate room which is set aside and does not admit persons under 18 years of age. In addition, the establishment must have a sign in its entrance area indicating that it is a smokers' establishment that does not admit persons under 18 years of age.

If a non-smoking law allows the establishment of smoking rooms in eating and drinking establishments as an exception to the ban on smoking, then the general exclusion of discotheques from this privilege is not justified. Until the law is amended, which the legislature must do by 31 December 2009, the provision applies subject to the proviso that smoking rooms - without dance floors - may be established in discotheques which only admit people over the age of 18.

Two judges, Judge Bryde and Judge Masing, have each attached dissenting opinions.

In essence, the decision is based on the following considerations:

I. The ban on smoking in eating and drinking establishments amounts to a serious encroachment on the publicans' free exercise of their occupation. In view of the fact that the percentage of smokers among the adult population in Germany amounts to 33.9 per cent, this can - depending on the type of gastronomy being offered and thus the patrons being targeted - result in a sharp drop in turnover for the operators of eating and drinking establishments. This encroachment is not justified in the shapes that it takes in the provisions to be evaluated here. It is true that the legislature in seeking to protect people from danger to their health through passive smoking pursues a community interest of paramount importance. The challenged provisions are not, however, proportionate. They burden in an unreasonable way the operators of smaller single-room establishments which primarily serve alcoholic beverages.

1. When weighing the seriousness of the encroachment against the weight of reasons that justify it, one must respect the limits of what is reasonable. In this context, due to the scope for assessment, evaluation and action accorded to the legislature it would not be prevented from giving priority to the protection of the health of the population at large, including that of establishment employees, over the liberty rights which would be consequently impaired, and it would not be prevented from imposing a strict ban on smoking in eating and drinking establishments to which there can be no exceptions. The legislatures were entitled to assume on the basis of a multitude of scientific investigations that there are serious health risks associated with passive smoking. Since health and especially human life are among those interests valued particularly highly, it is possible to seek to protect them with means that severely encroach on a person's fundamental right to exercise his or her occupation. The legislature is not bound by the constitution, in view of the occupational freedom of the operators of eating and drinking establishments, to allow exceptions to the ban on smoking in relation to the operation of eating and drinking establishments in buildings and fully enclosed rooms.

2. However, the proportionality test leads to a different result where the issue for decision is not a strict ban on smoking,

but rather - as in the present cases - the selection of a concept whereby the goal of health protection is pursued with reduced vigour due to the interests of publicans and smokers. Both in Baden-Wurttemberg as well as in Berlin exceptions to the ban on smoking which are of considerable significance in practice, such as, for example, the establishment of separate smoking rooms, are allowed. It is true that the scope for assessment, evaluation and action accorded to the legislature do not prevent it from selecting a concept to protect non-smokers in eating and drinking establishments which is less stringent about enforcing the health protection of non-smokers when balanced against the liberty rights of establishment operators and smokers. It must then, however, also carry through this decision consistently.

For this reason, the specific effects of the ban on smoking for smaller establishments which primarily serve alcoholic beverages acquire greater importance in the course of the required weighing of all of the interests. The ban on smoking results in a significantly heavier economic burden for them than for the operators of larger premises because of the high percentage of smokers among their patrons; there is support for this in particular from the surveys presented by the Federal Statistics Office (*Statistisches Bundesamt*). In the case of larger eating and drinking establishments which have separate rooms or which can make such rooms available, the ban on smoking is only relative; the establishments' interest in also being able to cater for guests who smoke is satisfied. On the other hand, there is a complete ban on smoking in the case of smaller eating and drinking establishments if separate rooms are not available, which is usually the case due to the fact that they have less floor space. The operators of such establishments are expected to strictly comply with the ban on smoking even if it costs them their economic existence although the *Land* legislature did not want to pursue the desired health protection without restriction, but only whilst taking into account the occupational needs of the publicans. The dangers to health caused by passive smoking are thus given a different importance in comparison to the occupational freedom of the publicans. In view of the retraction of the protection sought, the extent of the burden on them is no longer in a reasonable proportion to the advantages for the public sought to be achieved by the *Land* legislature in relaxing the ban on smoking. The smaller establishments which primarily serve alcoholic beverages are not of significance for effective protection of non-smokers since the majority of their patrons are smokers. The considerable decline in turnover following the coming into force of the bans on smoking show that such eating and drinking establishments obviously have no success in generating a greater interest in their gastronomy on the part of their patrons who do not smoke.

II. In addition, the constitutional complaint of the discotheque operator against the provisions of the Baden-Württemberg Non-Smoking Act is justified. It is incompatible with Article 12.1 GG in conjunction with Article 3.1 GG to exclude discotheques that do not admit youths from the opportunity of establishing smoking rooms. The general exclusion of discotheques from the privilege to be seen in the exclusion of separate smoking rooms from the ban on smoking is not justified. The objectives pursued by the legislature are not of such a kind or of such a weight that they could justify unequal legal consequences for discotheques on the one hand and other eating and drinking establishments on the other.

It is true that it is not constitutionally objectionable that the *Land* legislature assumed that there is a particularly high concentration of pollutants in discotheques. It can rely on relevant scientific investigations in support of this. This fact does not, however, make it necessary to generally exclude discotheques from this exception when other eating and drinking establishments are permitted to have smoking rooms. If smoking is only allowed in separate rooms which are completely set aside, then the argument of the increased dangerousness of passive smoking in discotheques which relates to the particular kind of operation vanishes. Nor can a reference to the great significance of the copycat effects and peer pressure in the case of youths or young adults justify treating discotheques differently to other types of eating and drinking establishments. It is sufficient for achieving the protection sought for this group of the population if the ban on establishing smoking rooms is limited to those discotheques that admit persons under 18 years of age.

III. The *Land* legislatures have the option, in connection with the enactment of the necessary amendment, of giving priority to the goal of protecting people's health against the dangers of passive smoking and deciding in favour of a strict concept to protect non-smokers in eating and drinking establishments which does not allow any exceptions; alternatively, they may adopt a less strict concept of protection which allows the interests of establishment operators and smokers more leeway and permits exceptions to the ban on smoking. If it is decided that the protection of health will have a lower priority, then the exceptions permitted to the ban on smoking must, however, logically also take into account the special burdens on individual areas of the eating and drinking sector and be drafted to afford equal treatment. For this reason, the legislature, which allows smoking in separate rooms as an exception to the ban on smoking in eating and drinking establishments, may not lose sight in particular of the interests of smaller establishments which primarily serve alcoholic beverages. Since the space limitations of these establishments do not usually allow for the establishment of separate smoking areas, only exemption from the ban on smoking can be considered in their case.

Six judges concurred on the permissibility of the strict ban on smoking (I 1) and the disproportionality of the rule for smaller establishments which primarily serve alcoholic beverages (I 2), whilst in both cases two judges dissented; otherwise the decisions were unanimous.

Dissenting opinion of Judge Bryde

From the point of view of the legislature, the challenged provisions are based on a sound concept. There is no indication that the *Land* legislatures intended to make the goal of protection of non-smokers relative so that the protection of life and health could be weighed as one factor in relation to economic interests. The legislation sought to guarantee non-smokers smoke-free eating and drinking establishments, i.e. at least one smoke-free main room. The intention was to allow exceptions to the ban on smoking only to the extent that this did not endanger the protection of non-smokers. The legislature may not have been entirely successful in its implementation of this, but it is a matter for its legislative prerogative.

Dissenting opinion of Judge Masing

The challenged provisions are based on a statutory concept of an exacting but balanced protection of non-smokers, which is in principle

constitutionally sound. On the other hand, a ban on smoking in eating and drinking establishments without exceptions would be disproportionate.

The challenged provisions are based on the principle that the protection of non-smokers should clearly be given precedence. They set forth a duty on the part of every eating and drinking establishment to aim to cater primarily for non-smokers and only allow the establishment of smoking rooms by way of addition. This is in principle also justified in the case of corner pubs for the purposes of the protection of health. In the same way as there is no reason to exempt small enterprises from conditions imposed for environmental reasons, there is no reason to generally exempt corner pubs because they are hit particularly severely. It would be adequate constitutionally if there were hardship provisions to soften the transition. Only to the extent that such provisions do not exist are the challenged provisions unconstitutional. There is no need for further exceptions and they weaken the legislative concept of protection substantially.

On the other hand, a radical ban on smoking in eating and drinking establishments without any exceptions would be unconstitutional; this did not have to be decided in the present case. Such a ban is not necessary for the protection of non-smokers where non-smoking rooms exist; and the protection of corner pubs from the loss of patrons does not in principle justify it. Nor does the objective of addiction prevention justify it. Admittedly, the legislature has considerable scope for discretion. However, the legislature cannot fully ban tobacco, food or drink from the public arena by prohibiting them at social gatherings or celebrations. This kind of uncompromising ban would be disproportionate and would entail a risk of paternalism.

This press release is also available in the original german version.

Zum ANFANG des Dokuments