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Decisions

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FEDERAL CONSTITUTIONAL COURT

- 1 BvR 3198/07 -

- 1 BvR 1431/08 -

## **In the proceedings regarding constitutional complaints**

1. Ms. N...

2. Ms. N...

- Authorized Representative:

Dr. Alexander Nerz, Attorney at Law

Maximilianstraße 24/III, 80539 Munich, Germany -

v. Article 3, Paragraph 1, Clause 1 and Article 9 Paragraph 1 of the

Public Health Protection Act (Gesundheitsschutzgesetz - GSG) of December 20, 2007 (BayGVBl S. 919), modified by the Act of July 22, 2008 (BayGVBl S. 465)

- 1 BvR 3198/07 -,

3. Mr. B...

- Authorized Representative:  
Schaut / Lösch, Attorneys at Law,  
Martinstraße 1, 97070 Würzburg, Germany -

v. Article 3, Paragraph 1, Sentence 1 of the Public Health Protection Act (Gesundheitsschutzgesetz - GSG) of December 20, 2007 (BayGVBl S. 919), modified by the Act of July 22, 2008 (BayGVBl S. 465)

- 1 BvR 1431/08 -

the 2<sup>nd</sup> Chamber of the First Senate of the Federal Constitutional Court has, through

Justices Hohmann-Dennhardt,  
Gaier and  
Kirchhof

in accordance with § 93b in connection with § 93a BVerfGG in the version of the publication of August 11, 1993 (BGBl I S. 1473) on August 6, 2008, unanimously decided:

The constitutional complaints will not be ruled on.

## **Reasons:**

**I.**

1

The complainants oppose the legal provisions of the Free State of Bavaria regarding the ban on smoking in restaurants.

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1. According to Article 3, Paragraph 1, Sentence 1 of the Public Health Protection Act (Gesundheitsschutzgesetz - GSG) of December 20, 2007 (BayGVBl S. 919) smoking is forbidden inside restaurants, among other places, in the Free State of Bavaria. This ban applies to "restaurants in the sense used in the Restaurant Act... as long as they are open to the public" in accordance with Art. 2 No. 8 GSG. Whoever smokes in spite of the ban or, as the owner of a restaurant (see Art. 7 Clause 1 No. 3 of the GSG), fails to take the required measures to prevent a violation of the smoking ban, can be fined in accordance with Art. 9 GSG. The act to modify the Public Health Protection Act of July 22, 2008 (BayGVBl S. 465) has expanded Art. 11 GSG by a second paragraph with a transitional arrangement, according to which the smoking ban is not applicable to only temporary beer, wine and festival tents and festival halls temporarily used for fairs and similar large events according to Art. 3 Para. 1 Clause 1 GSG until its expiration on December 31, 2008.

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2. The complainant in 1) is a smoker. She resides in Bavaria and frequents restaurants in her hometown M. several times a week. She considers her rights violated by the general smoking ban (Art. 2, Paragraph 1 GG).

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The complainant in 2) is the owner of a restaurant in M. She complains of a violation of her right to practice her chosen profession (Art. 12, Paragraph 1 GG) and the right of ownership (Art. 14 GG). According to her, since the smoking ban has gone into force, her restaurant's revenues have fallen by more than 20%. This poses a threat to her livelihood.

5

The complainant in 3) runs a restaurant in W. in which he offers not only drinks and light fare but also smoking in hookahs. At least 95% of his guests supposedly frequent the restaurant to smoke hookahs. According to the opinion of the complainant in 3), the smoking ban in restaurants violates his rights outlined in Art. 2, Paragraph 1 and Art. 14 GG.

**II.**

6

The constitutional complaints are not to be ruled on. The requirements of § 93a, Paragraph 2 BVerfGG do not exist. The constitutional complaints have no significant basis under constitutional law. Ruling on them in order to enforce the rights of the complainants alleged to have been violated is not indicated; the constitutional complaints have no chance of success. The regulations challenged violate neither the basic rights of the complainant in 1) as a smoker, nor those of the complainants in 2) and 3) as restaurant owners.

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1. With its judgment of July 30, 2008 – 1 BvR 3262/07 among others –, the Federal Constitutional Court has decided that legislators are not prevented by the constitution from giving preference to public health rather than to the rights negatively impacted by the Public Health Protection Act, in particular the right of the restaurant owner to practice his or her chosen profession and the right of the smoker to smoke, and imposing a strict smoking ban in restaurants. A strict smoking ban like that follows for the interiors of restaurants open to the public from Art. 3, Paragraph 1, Clause 1 in connection with Art. 2, No. 8 GSG. No exceptions are allowed in that case. The lifting of the smoking ban for beer, wine and festival tents and temporarily used festival halls presented in Art. 11 Paragraph 2 GSG merely represents a transitional arrangement until its expiration on December 31, 2008, which does not throw into question the regulatory concept underlying the law.

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2. As long as Art. 2, No. 8 GSG makes it a prerequisite of the smoking ban that the restaurant be "open to the public" and it is therefore inferred in practice – which cannot be objected to constitutionally – that under certain conditions "smoking clubs" are not covered by the smoking ban in restaurants (see the Guidance for Implementation from the Bavarian Ministry for Environment, Health and Consumer Protection), it can also not constitute a violation of the right of the complainant in 2) to practice her chosen profession (Art. 12, Paragraph 1 GG). Nothing else applies with regard to the autonomy (Art. 2, Paragraph 1 GG), which the complainant in 3) can claim as a foreign national for his profession (see BVerfGE 104, 337 <346>). Financial burdens that cannot be applied equally or that are unacceptable for individual classes of the restaurant industry are not displayed with the constitutional complaints and can also not be identified. The possibility of turning a restaurant into the establishment of a "smoking club", whose members are allowed to smoke there, does not depend on requirements that the owners of certain groups of restaurants cannot satisfy. The requirements mentioned in the Guidelines for Implementation for the approval of a "smoking club" – fixed member structure with familiar or available member list, admission controls with the exclusion of "walk-in customers", no purchasing of membership at the entrance of the restaurant – can be met particularly in specially organized restaurants such as that of the complainant in 3) or in "drink-oriented minor gastronomy" (getränkegeprägten Kleingastronomie).

9

The court refrains from providing any additional reasons in accordance with § 93d, Paragraph 1, Clause 3 BVerfGG.

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This decision is final.

Hohmann-Dennhardt Gaier

Kirchhof