Decisions of the Federal Constitutional Court (Bundesverfassungsgericht)

Bundesverfassungsgericht (Federal Constitutional Court), Second Senate, decision of 9 March 1994, BVerfGE 90, 145

Translation by Michael Jewell.

[Note: The numbering refers to the page numbering of the official reports. References in the German text to German secondary literature have been omitted where indicated.]

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1 a) The restrictions contained in Article 2 para 1 of the *Basic Law* apply to dealings with drugs. There is no "right to be intoxicated" which is not subject to these restrictions.

b) The constitutionality of the penal provisions of the *Intoxicating Substances Act*, which impose penalties for illegal dealings with Cannabis products, is to be tested as follows: The constitutionality of the prohibition subject to criminal penalties is to be tested against Article 2 para 1; The constitutionality of the threat of imprisonment is to be tested against Article 2 para 2 sentence 2 of the *Basic Law*.

2 a) The principle of proportionality requires a decisionmaker to form an opinion as to whether the chosen means is capable of attaining the desired goal, and whether the restrictions it places on rights are kept to the minimum necessary. In this

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context it is necessary to form an opinion and make predictions as to the dangers which threaten the individual or the general public. In making these judgements the legislature has a degree of discretion, and the power of the Federal Constitutional Court to review its decisions is limited.

b) In balancing the severity of the infringement of the individual's rights against the gravity and the urgency of the considerations which are adduced to justify the infringement the decisionmaker must keep within the limits of what can reasonably be demanded of the person to whom the prohibition is addressed (proportionality in the narrower sense). The application of this test can lead to the conclusion that a measure, which in itself is capable of attaining the desired goal and is necessary to doing so, may not be applied because the resulting limitation of the affected individual's rights clearly outweighs the increased protection of legal interests which the measure attains, with the result that the use of the measure under consideration would be disproportionate.

3. The penal provisions of the *Intoxicating Substances Act* impose punishment for behaviour which is merely preparatory to the personal consumption of small amounts of Cannabis and which does not pose any danger to third parties. To the extent that they do this they are not disproportionate in the narrower sense because the legislature has left it open to the authorities responsible for the enforcement of the statute to take the limited wrongfulness of the deed into account in individual cases by refraining from the imposition of a penalty (s 29(5) *Intoxicating Substances Act*) or by refraining from prosecution (s 153 and following of the *Criminal Procedure Regulations*, s 31a *Intoxicating Substances Act*). In such cases the principle of proportionality in its narrower sense would, as a general rule, require the authorities responsible for enforcing the statute to refrain from prosecuting the offences listed in s 31a of the *Intoxicating Substances Act.*

4. The principle of equality does not require that all drugs which are potentially equally harmful should be prohibited or permitted in the same way. The legislature can regulate dealings with Cannabis products differently from dealings with alcohol or nicotine without infringing the constitution.

...

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Reasoning of the court

A

The proceedings, which have been joined for a single judgment, concern the question whether the penal provisions of the *Intoxicating Substances Act* are compatible with the Basic Law to the extent that they impose punishment on the various forms of illegal dealing with Cannabis products.

I

The *Act Concerning Dealings with Intoxicating Substances (Intoxicating Substances Act)* of 28. July 1981 (*Federal Gazette* I p 681 with corrections at p 1187) has been amended several times. In the detailed provisions of ss 3 to 28 it subjects dealings with drugs to comprehensive regulation by the state. The basic rule is that any sort of dealing with drugs requires official licence (s 3 of the Act). Dealing without such licence is prohibited. Such official licence, together with the statutory exceptions to the requirement of a licence,

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distinguishes legal dealings with drugs from illegal dealings. The Act applies only to such substances and preparations as are explicitly listed in it. These are listed in schedules I to III of the Act (ss 1 para 1, 2 para 1 numbers 1 and 2 of the Act). In these schedules the Act distinguishes between substances which may not be dealt with (Schedule I), substances which may be dealt with but not prescribed to patients (Schedule II) and drugs which may both be dealt with and prescribed (Schedule III). As far as the drugs listed in Schedule I, ie those which may not be dealt with at all, are concerned a licence may only be granted in exceptional cases for scientific purposes or other purposes in the public interest (s 3 para 2 of the Act). The drugs listed in Schedule I include:

- Cannabis (Marihuana) - Plants and parts of plants belonging to the species Cannabis - with the exception of

  a) their seed

  b) when they are planted as a protective strip in the cultivation of turnips and are destroyed before they bloom.

  c) when dealings (other than cultivation) are for the purpose of producing or processing the fibre for commercial purposes

- Cannabis resin (Hashish) - The separated resin of plants belonging to the species Cannabis
- Tetrahydrocannabinol (THC) - Tetrahydro-6, 6, 9-trimethyl-3-tentylbenzo(c)chromen-1-ol (the active ingredient contained in Marihuana and Hashish which produces the state of intoxication)

Illegal dealing with drugs is comprehensively penalised by ss 29 ff of the *Intoxicating Substances Act*. In the amended version of the Act which was in force before 28 February 1994 the provisions, insofar as they are relevant, read as follows:

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> s 29 - Offences
>
> (1) A fine or imprisonment for up to five years may be imposed on anyone who:
>
> 1. Cultivates, produces or trades in drugs without obtaining permission under s 3 para 1 number 1, or who, without trading in them, imports, exports, passes ownership, supplies or otherwise brings them into circulation; or who buys them or obtains them in any other way.
>
> 2. ....
>
> 3. Possesses drugs without having obtained them in accordance with a licence under s 3 para 1
>
> 4. ...
>
> 5. Transports drugs through the country contrary to s 11 para 1 sentence 2.
>
> s 29a - Offences
>
> (1) A sentence of imprisonment of at least one year is to be imposed on anyone who:
>
> 1.....
>
> 2. Without a licence granted under s 3 para 1 number 1 trades in amounts of drugs which are not insubstantial; or without having obtained them in terms of a licence granted under s 3 para 1 produces or possesses or passes ownership in amounts of drugs which are not insubstantial.
>
> (2) In less serious cases a sentence of imprisonment for between three months and five years is to be imposed.
>
> s 30 - Offences
>
> (1) A sentence of imprisonment of at least two years is to be imposed on anyone who:
>
> ...
>
> 4. Imports drugs in not insubstantial amounts without a licence granted under s 3 para 1 number 1.
>
> (2) In less serious cases a sentence of imprisonment for between three months and five years is to be imposed.

Until the amendment of the *Intoxicating Substances Act* by the *Act Combatting the Illegal Trade in Drugs and Other Forms of Organised Crime (Organised Crime Act)* of 15 July 1992 (*Federal Gazette* I page 1302), which came into force on 22 September 1992, the maximum penalty in s 29 of

the *Intoxicating Substances Act* was only four years. Furthermore, illegal trading with not insubstantial amounts of drugs was still

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dealt with under s 29 para 3 sentences 1 and 2 number 4 *Intoxicating Substances Act* (unamended version) rather than under s 29a, which was newly created by the act of 15 July 1992. s 29 para 3 was worded as follows:

> (3) In particularly serious cases the sentence is to be imprisonment for not less than one year. As a general rule a case will be particularly serious if the defendant
>
> ...
>
> 4. trades drugs in not insubstantial amounts, or possesses or supplies insubstantial amounts.

The *Intoxicating Substances Convention Implementation Act* of 2 August 1993 (notice of 23 February 1994 *Federal Gazette* I page 342) came into force on 28 February 1994. It implements the *UN Convention Against the Illegal Trade in Intoxicating and Psychotropic Substances* of 20 December 1988. This Act substitutes the word "illegal" for the words "without licence in terms of s 3 paragraph 1 number 1" in s 29 paragraph 1 sentence 1 number 1 *Intoxicating Substances Act*. It also substitutes the words "without at the same time being in possession of written permission for the acquisition" for the words "without having obtained them on the basis of a licence in terms of s 3 para 1" in s 29 para 1 sentence 1 number 3 *Intoxicating Substances Act.*

II

... [facts of the various proceedings]

III

[163] ... [review of legal opinions on the subject presented on behalf of various authorities]

B

[166] ... [considers whether the court has jurisdiction to hear the matter]

... [171]

C

The penal provisions of the *Intoxicating Substances Act* which have been presented for examination of their constitutionality are, to the extent that the court has the power to review them, compatible with the *Basic Law*. The imposition of penalties for illegal dealings with Cannabis products, in particular Hashish, thus does not infringe either Article 2 para 2 sentence 1, or Article 3 para 1, of the *Basic Law*. In principle it also does not infringe Article 2 para 1 read with Article 2 para 2 sentence 2 of the *Basic Law*. The application to have the Act declared unconstitutional fails on the merits.

I

1. The constitutionality of the penal provisions of the *Intoxicating Substances Act*, which impose

penalties for illegal dealings with Cannabis products, is to be tested as follows: The constitutionality of the prohibition subject to criminal penalties is to be tested against Article 2 para 1; The constitutionality of the threat of inprisonment is to be tested against Article 2 para 2 sentence 2 of the *Basic Law*.

Article 2 para 1 of the *Basic Law* protects every form of human activity without consideration of the importance of the activity for a person's development (see BVerfGE 80, 137 at 152). However, only the inner core of the right to determine the course of one's own life is accorded absolute protection and thus withdrawn from interference by public authority (see BVerfGE 6, 32 at 41; BVerfGE 54, 143 at 146; BverfGE 80, 137 at 153). Dealings with drugs and, in particular the act of voluntary becoming intoxicated, cannot be reckoned as part of that absolute core because of the numerous direct and indirect consequences for society. Outside the core the general right to freedom of action is only guaranteed within the limits of second half of the sentence contained in Article 2 para 1 *Basic Law*. This means that it is subject to the limits placed on it in accordance with the constitutional order *Basic Law* (see BVerfGE 80, 137 at 153).

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This phrase refers to any legal rule which, both in form and content, is compatible with the constitution (BVerfGE 6, 32ff as repeatedly applied by this court). Limitations on the general right to freedom which are based on such legal rules are not an infringement of the right guaranteed in Article 2 para 1 *Basic Law* (see BVerfGE 34, 369 at 378 and following; BVerfGE 55, 144 at 148). There is thus no "right to be intoxicated" which is not subject to these restrictions.

As far as the content of limitations is concerned, the principle of proportionality is, in the absence of explicit constitutional guarantees, the general constitutional test for deciding to what extent the right to freedom may be limited (see BVerfGE 75, 108 at 154 and following; BVerfGE 80, 137 at 153). This basic principle gains even greater significance in considering a penal provision, since such a provision is the most severe sanction available to the state. It is thus an expression of social and ethical disapproval of a particular act on the part of a private person (see BVerfGE 25, 269 at 286; BVerGE 88, 203 at 258).

If imprisonment is a potential penalty then the statute is authorising an infringement of the fundamental right to liberty of the person, which is guaranteed in Article 2 para 2 sentence 2 *Basic Law*. Liberty of the person, which is described as "inviolable", is a legal interest of such importance that it can only be impinged upon on the authority of Article 2 para 2 sentence 3 if there are particularly weighty reasons for doing so. Leaving aside the fact that such interventions may come into question in certain circumstances when they are aimed at preventing the person affected from causing himself serious personal harm (see BVerfGE 22, 180 at 219; BVerfGE 58, 208 at 224; BVerfGE 59, 275 at 278; BVerfGE 60, 123 at 132), restrictions are generally only permissible if the protection of others or of the public interest requires them, after having due regard to the principle of proportionality.

According to this principle a statute which limits fundamental rights must be both suitable for achieving the purpose to which it is directed and necessary to doing so. A statute is suitable when with its help the desired result can be promoted. It is necessary if the legislator could not have chosen a different means which would have been equally effective but which would have infringed on fundamental rights to a lesser extent or not at all (BVerfGE 30, 292 at 316; BVerfGE 63, 88 at 115; BVerfGE 67, 157 at 176).

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In forming a judgement as to whether the chosen means is suitable and necessary for achieving the desired goals the legislator has a certain degree of discretion. The same applies to the estimation and

prediction of the dangers which threaten other individuals or the public good which must be undertaken in this context. The Federal Constitutional Court can only review the exercise of this discretion to a limited extent, the precise extent depending on the nature of the subject in question, the feasibility of forming a sufficiently clear view, and the nature of the legal interests which are at stake (see BVerfGE 77, 170 at 215; BVerfGE 88, 203 at 262).

In addition, in weighing the seriousness of the infringement against the importance and urgency of the factors which justify it the decisionmaker must take into account the limits of what can be demanded of the individuals to whom the prohibition is addressed (see BVerfGE 30, 292 at 316; BVerfGE 67, 157 at 178; BVerfGE 81, 70 at 92). The measure may not place a disproportionate burden on them (proportionality in the narrower sense) (See BVerfGE 48, 396 at 402; BVerfGE 83, 1 at 19).

The principle that there should be no punishment without fault has its roots in Article 1 para 1 *Basic Law* (see BVerfGE 45, 187 at 228). In the context of state-imposed punishments this, together with the principle of proportionality, which is derived from the rights to liberty and the rule of law [*Rechtstaatsprinzip*], means that the seriousness of an offence and the culpability of the offender must bear a just relation to the punishment imposed. The nature and extent of the penalty man not be inherently disproportionate to the behaviour which is being subjected to punishment. The offence and its legal consequences must stand in an appropriate relation to one another (see BVerfGE 54, 100 at 108 and numerous other decisions).

It is essentially for the legislature to determine what sorts of behaviour are to be punishable in specific cases after due consideration or the specific situation. The Federal Constitutional Court cannot consider whether the legislature's decision was the very most suitable, reasonable or just way of solving the problem in issue. The court's role is merely to check that the substance of the penal provision is compatible with the provisions of the constitution and accords with the fundamental values of the *Basic Law* and the unwritten principles which underlie the constitution (see BVerfGE 80, 244 at 255 which provides further references on this point).

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2 a) In the current version of the *Intoxicating Substances Act* as in the earlier versions the aim of the legislature is to protect the health both of the individual and of the population as a whole against the dangers which flow from drugs. It also aims to prevent the population, especially the young from becoming addicted to drugs (See the the supporting arguments adduced by the government when introducing the *Intoxicating Substances Bills* of 1971 and 1981 BRDrucks. 665/70 (new) page 2 and BRDrucks 8/3551 page 23 and following). The penal provisions of the *Intoxicating Substances Act* also serve this purpose. To achieve this purpose the legislature does not merely prescribe penalties for behaviour which poses an immediate danger to the health of individuals. Instead it aims to control social interaction in such a way as to protect it from the socially damaging effects of dealings with drugs. These can also arise from the so-called soft drug Cannabis: It has the effect of introducing young people in particular to drugs. Through it they become accustomed to intoxicating substances. The formation of the personality of youths and young persons can be stunted. The aim of the Act has been considerably extended in the interim by the international convention. United Nations have recognised that any sort of dealings with drugs - including Cannabis - are worthy of punishment, particularly in the *Intoxicating Substances Convention* of 1988. The reason given is that the production of intoxicants and psychotropic substances and the illegal trade in such substances "seriously threaten the health and well-being of people and damage the economic, cultural and political foundations of society." (Preamble to the *Intoxicating Substances Convention* of 1988.) In particular the Convention makes the point that the illegal trade in intoxicants and psychotropic substances exploits children as consumers and promotes organised crime "which undermines the legal economy and threatens the stability, security and sovereignty of states". In addition it leads to

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high financial gains and wealth which make it possible for international criminal organisations to permeate, poison and corrupt legitimate trading and financial activities, the structures of the state, and society in general at all levels". The United Nations are therefore determined to end the basic causes of this abuse by international co-operation. These causes include "the illegal demand for such substances and the massive profits derived from the illegal trade." The European states, within whose borders hardly any drugs are produced, have thereby undertaken primarily to combat the demand for drugs. The Federal Republic of Germany has concurred in this evaluation of the dangers involved by passing the *Intoxicating Substances Convention Implementation Act* and subsequently ratifying the convention, and has made this evaluation the basis of its treaty obligation to combat dealings with drugs by means of criminal penalties. In the light of this convention the *Intoxicating Substances Act* is at the same time the contribution of the Federal Republic of Germany to the international control of drugs and psychotropic substances and of dealings with these substances. It is Germany's contribution to combating the illegal market in drugs and the criminal organisations who participate in it. This is the common business of the community of states joined together in the United Nations. It is their unanimous conviction that the only chance of pursuing these goals with any success is for various states to co-operate.

In setting this objective the *Intoxicating Substances Act* serves communal interests which are recognised by the constitution.

b) According to the judgement of the legislature the dangers to health which arise from the consumption of Cannabis products are significant. The government's explanatory notes to the *Intoxicating Substances Act* 1971 made the following points (see BRDrucks. 665/70 (new) page 5 ff):

> "A particular characteristic of the surge in drug-taking is the considerable increase in the use of Indian Hemp (Cannabis Sativa) and of the resin which it produces (Hashish). These are hallucinogens which, according to the dominant medical opinion,

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can lead to changes of consciousness and to psychological dependency if used on an ongoing basis. The psychoactive mechanism depends on the isomer Tetrahydrocannabinol (THC) which is contained by these substances. The ability to produce this substance by a fully synthetic process has only existed for a few years. This drug does not produce any withdrawal symptoms and there is only a slight tendency to increase the dosage. It is highly probable that the drug serves as a stepping stone. The tendency to move on to harder drugs is noticeable particularly in young people. With this substance the entry into the world of drugs is achieved. The precise biochemical processes in the human body which are triggered by the taking of this drug are still largely unknown. Intensive research is currently being conducted into this subject and it is to be expected that concrete results will have been achieved within about five years. In particular, there is still very little known about the side-effects which result from ongoing use of this drug. On the basis of research which American pharmacologists have conducted on pregnant rats it is even suspected that the drug can result in genetic defects. This drug has little medicinal significance.

On the basis of the *Geneva Convention* of 19 February 1925, which is binding on the Federal Republic of Germany in terms of the law of 26 March 1959 (*Federal Gazette* II page 333), Cannabis and its resin (Hashish) were subjected to the controls of the *Opium Act*. Because it has no medical significance Hashish was subjected to the absolute ban imposed by s 9 of the *Opium Act*. This Bill retains this legal approach. Given the scientific evidence currently available, it would be irresponsible, particularly from the viewpoint of health policy, to release this drug from the system of controls created by the *Opium Act* and to permit it to become freely available for mass

consumption as various voices are demanding. If the drug is freed from controls the result is sure to be advertising which would drive the mass consumption of the drug to such levels that it would reach every person who is particularly vulnerable to drug-taking because of their psychological tendencies. It is true that the damage which the "integration" of this drug would cause to the public cannot be adequately calculated in advance given the current uncertain state of information on the subject, but on a rough estimate it will be very high.

In particular it is impossible to predict the extent of harmful side-effects which could arise from the mass consumption of this drug, particularly since the drug has not been subjected to sufficient pharmacological and clinical tests for mass consumption. The correct approach is to wait for the results of the research which has begun. It would be irresponsible to release the drug at this stage.

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A further point is that the drug has been subject to the control system of the *Opium Act* for decades without any complaints. There are thus no constitutional problems with a ban. We refer to the decision of the Bavarian Supreme Court of 27 August 1969 - RReg 4a St 81/69 (NJW number 51 of 1969 p 2297) and the decision of the Federal Constitutional Court of 17 December 1969."

This evaluation is also the basis of the government's explanatory notes to the *Intoxicating Substances Act* of 1981 which is currently in force (See BTDrucks. 8/3551 page 24):

> "The health risks arising from the use of Cannabis products have been emphasised repeatedly by research, or at least it is not possible to prove that it is harmless. In addition, it is accepted by the vast majority of those who serve in the committees of the United Nations which deal with issues relating to drugs that the abuse of Cannabis is damaging to the user's health. (See most recently the Annual Report of the International Drug Control Office for 1978.)"

c) Today the legislature's original assessment of the health risks is contentious. However the assumption that Cannabis is not dangerous which forms the basis of the decisions in the courts below is also without a firm scientific basis.

c 1) The raw material for Cannabis products are the herb-like plants of the species Cannabis (Hemp). The best-known of these is the one-year fibrous hemp (Cannabis Sativa L). In addition there is the more intoxicating Indian Hemp (Cannabis Sativa Varia Indica L) which is found particularly in India and the whole of the Orient. The chemical content of both the Indian and the European varieties is the same so long as they are cultivated under comparable conditions. The oily, psychotropic active elements are contained in the resin which oozes from small, spherical gland-ends. The plant can be processed into various Cannabis products:

- Cannabis weed (Marihuana)
- Cannabis resin (Hashish)
- Cannabis concentrate (Hashish oil)

The simplest way of preparing it for consumption is to roll the dried and shredded leaves mixed with fragments of the blossoms and stalk

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into a "joint" using a cigarette paper. In Germany, as in other European Countries, Cannabis resin (Cannabis extracta resinae tincturae), known as "Hashish" is even more commonly smoked than Marihuana. On the other hand the more potent Hashish oil has, up to the present, been more rare on the European market.

c2) The current state of scientific knowledge of the effects of consuming Cannabis is described in the literature as follows [references omitted]:

(1) Although the use of Cannabis as an intoxicant has long been known, Cannabis products, and in particular Marihuana, first became an aspect of youth culture at the beginning of the 1960's in the USA as part of the "Flower Power" movement. Since 1967/68 a similar group of consumers of the Hemp drug has developed in Europe. In the last 20 years or so the market for Cannabis products in the Federal Republic of Germany has remained more or less unchanged, while the use of so-called hard drugs has increased [reference omitted].

(2) According to the author Geschwinde [reference omitted] estimates of the current number of users in Germany vary between 800 000 and two million, according to Koerner [reference omitted] between three and four million. However, these are for the most part occasional consumers. According to a representative sample of people questioned by the Federal Ministry of Health in 1990 56,7% of the consumers who were questioned said that they had used the drug between one and five times in the previous year (See schedule 3 to the opinion of the Federal Minister of Health which was submitted in case 2 BvL 43/92).

(3) the primary active ingredient of the resin of the Hemp plant is Delta 9 Tetrahydrocannabinol (THC). Since it was first synthesised

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(1964/65) it has usually been used in laboratory experiments as the sole active ingredient. In contrast, natural Cannabis is supplemented by a large number of additional active ingredients and aromas which also influence the effect it has [references omitted]. The level of concentration of the active ingredient can vary greatly depending on origin and processing methods. In Cannabis weed (Marihuana) the concentration is under 2% if the weed is of poor quality, 2-4% if of average quality, and 5% or more if of good quality. In Cannabis resin (hashish) the concentration is under 5% if of poor quality, 5-8% if of average quality, and 10% or more if of good quality. Extract of Hashish oil has a concentration of under 15% (poor quality) and up to 70% (very good quality) [references omitted].

(4) In Germany Cannabis products are usually mixed with tobacco and smoked. In addition Cannabis can also be drunk as a "tea" or can be dissolved in tea, used as a spice in food or baked in biscuits. If it is taken orally it only takes effect about one hour after consumption, but if smoked it acts within minutes and reaches its maximum within 15 minutes. About 30 to 60 minutes after smoking it the effect begins to ebb and after about three hours it has largely dissipated. In contrast, if it is taken orally the effect can last up to twelve hours. The effect of Cannabis depends not only on the dose but also, to a greater extent than other psychotropic substances, on the psychological state of the person taking it and the social setting in which it is taken [references omitted].

(5) The specific psychological and physical effects of both a one-off use and ongoing consumption of Cannabis are described differently by different writers [references omitted]. The result is, that the estimation of the dangers

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posed to the individual and to society by consumption of Cannabis also differs [references omitted].

There is a widespread consensus that Cannabis products do not cause a physical addiction [references omitted] and that, except in cases of chronic consumption of high doses, they do not cause a tolerance to develop [references omitted]. In addition, the direct damage to the individual's health is considered to be minor in cases of moderate use [references omitted]. On the other hand

there is little dispute about the fact that a psychological may result [references omitted]. However the potential for addiction to Cannabis products is considered to be very small [reference omitted]. These findings are corroborated by the large number of occasional users who go unnoticed and the large number of users who confine themselves to the consumption of Hashish. It is also said that ongoing consumption of Cannabis products can lead to behavioural disturbances, lethargy, indifference, feelings of anxiety, depression and loss of a sense of reality [references omitted] and that this may in particular cause lasting disturbances in the development of the personalities of young people. On the other hand the cause of the so-called amotivational syndrome is disputed. This is a condition which is characterised by apathy, passivity and euphoria. Some researchers take the view that Cannabis products cause this syndrome [reference omitted] while others argue that the consumption of Cannabis is rather a consequence of a

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pre-existing attitude to life [references omitted]. There is however a strong consensus that the amotivational syndrome is only found in cases of constant consumption of Cannabis in high doses. Current research generally rejects the view that Cannabis serves as an introduction to harder drugs in the sense of having some physical quality which has this effect [references omitted]. This view corresponds to the findings of the survey of 1990 [reference omitted] which found that only 2,5% of Hashish users also used other drugs which fall under the *Intoxicating Substances Act*. However, this does not rule out the possibility that in an indeterminate number of cases the consumption of Cannabis may lead users to change over to hard drugs. However, this is due not so much to becoming accustomed to intoxication as to the fact that the market in illegal drugs is a single market (Cannabis users usually obtain their Hashish from dealers who also deal in "hard" drugs). (This appears also to be the conclusion reached in the opinion presented by the Federal Ministry of Health.) Finally, it is not disputed that acute intoxication with Cannabis impairs the ability to drive [references omitted].

3. The conclusion is that the threat to health posed by Cannabis products is today seen as being smaller than the legislature was assuming when it passed the Act. However, even according to the current body of information there remain not insignificant dangers and risks. This means that the overall approach of the act in relation to Cannabis products remains valid from a constitutional point of view. This is supported by the expert opinions which the court has obtained from the

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Federal Ministry of Health and the Federal Criminal Police and also by the relevant literature which this court has reviewed (which extends beyond the overviews which have been cited). The approach of the Act is to subject all dealings with Cannabis products other than consumption to comprehensive state control because of the dangers to the individual and to the general public which flow from the drug and the trade in drugs. To enforce this state control it imposes comprehensive penalties on illegal dealings with Cannabis products. Given this content the penal provisions of the *Intoxicating Substances Act* are suitable to limit the distribution of the drug in society and thus limit the dangers which flow from it as a whole. The penal provisions are thus generally a suitable instrument to promote the aim of the Act.

4. In undertaking repeated amendments to the *Intoxicating Substances Act* and in acceding to the 1988 *Intoxicating Substances Convention* the legislature has repeatedly re-considered its view and has repeatedly come to the conclusion that to achieve the aims of the Act it is necessary to have a prohibition of illegal dealings in Cannabis backed up by penalties. This view is also not objectionable from a constitutional point of view. Even on the basis of the current state of scientific knowledge, which is adequately revealed by the sources reviewed above (point 3), the view of the legislature, that there is no means other than criminal penalties which would be equally effective in attaining the Act's aims while being less intrusive, is arguable. It is not a satisfactory answer to say

that the prohibition of Cannabis products to date has not been able to fully achieve the aims of the Act and that the unbanning of Cannabis would be a milder instrument with better chances of achieving those aims. The criminal policy discussion as to whether a reduction in the consumption of Cannabis can better be attained through the general preventative effect of the criminal law, or through the unbanning of Cannabis in the hope that this would lead to a separation in the markets for various types of drugs, remains open. There is no scientifically based information

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indicating firmly that the one view or the other is correct. The international conventions, to which the Federal Republic of Germany has acceded, rely increasingly heavily on the use of penal measures in combating the abuse of drugs and the illegal trade in drugs. Taking into account this international legal development, it is at least open to question whether it would be possible to achieve a separation of the drug markets in the national context by unbanning Cannabis products, or whether such action would not rather have the effect of turning Germany into a new centre of international drug trafficking. It is equally uncertain that a reduction in Cannabis consumption would be achieved by removing the "attraction of the illicit" or by instituting information campaigns to publicise the dangers of using Cannabis. In these circumstances if the legislature remains of the view that a general ban on Cannabis backed up by criminal penalties will scare off more potential users than will a suspension of the criminal penalties, and that therefore criminal penalties are better suited to protecting legal interests, then this must be accepted from a constitutional point of view. In making the choice between several potentially suitable means of attaining the aim of legislation the legislature has the prerogative of forming a view and making a decision (see BVerfGE 77, 84 at 106). It is indeed possible in certain circumstances to imagine cases in which clear criminological evidence is so strong that, in examining the constitutionality of a particular piece of legislation, the court will conclude that the legislature is obliged by the constitution to follow a particular course in dealing with a problem, or at least that the course chosen by the legislature is unacceptable (see BVerfGE 50, 205 at 212 and following). However the conclusions of the debate over a criminally sanctioned ban of all dealings with Cannabis products have not reached such a level of clarity.

5. The next step is to decide whether the penal provisions of the *Intoxicating Substances Act* which have been presented for constitutional review infringe against the requirement of proportionality in the narrower sense to the extent that they apply to dealings with Cannabis products. In making this judgement it is necessary to distinguish between the general prohibition of dealings with Cannabis products

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and its enforcement by the threat of criminal penalties for the various types of infringement against the ban. The general approach adopted by the legislature, to comprehensively ban dealings with Cannabis products subject to a few very narrow exceptions, is in itself not a violation of the principle of proportionality in the narrower sense. It is justified by the goals which it aims to attain. These are to protect the population, especially the young, from the health risks emanating from the drug and from the danger of a psychological dependency on the drug, and therefore above all to take steps against the criminal organisations which dominate the drug market and the damage which they cause to the public good. These important public interests are not balanced by interests of equal weight in favour of unbanning dealings in the drug. Essentially the same applies to the extent that the legislature uses the instrument of criminal sanctions to enforce the ban. Infringements against the ban on dealings with Cannabis products are not simply a case of disobedience in the face of administrative rules. Rather such acts pose a threat to important public interests which the legislature is aiming to protect. The legislature thus has clear and justified reasons for taking the view that such infringements deserve and require punishment.

there is also essentially no constitutional objection to the fact that in protecting the named interests

(above at 2a) the legislature has shifted the focus from a concrete danger or violation into the realm of abstract threats. The offences relating to illegal dealings with Cannabis products extend the protection comprehensively to all types of behaviour which, generally speaking, have a tendency to bring about the abovementioned dangers. This is justified as a general preventive measure.

However, it is in the nature of such a comprehensively conceived protective criminal statute that the offences cover a wide range of behaviour

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in which there are significant differences in relation to the nature and extent of the danger posed to the interests which the statute aims to protect. The same applies to the range of individual wrongfulness and culpability. Depending on the characteristics and effects of the drug, the amount involved in the specific case, the nature of the relevant infringement, and all the other relevant facts, the danger posed to the protected public interests may be so slight that the considerations of general prevention which justify a general threat of criminal penalties may lose their force. In such cases, having due regard to the right of the affected individual to freedom, the individual guilt of the defendant and the related considerations of criminal policy which aim at prevention in the case of the specific individual, the punishment constitute a disproportionate and therefore unconstitutional sanction.

The consideration of this issue is not excluded merely because the general concept of the legislation, namely to subject illegal dealings with Cannabis to comprehensive penalties, is to be regarded as a suitable and necessary means of ensuring the protection of interests which the legislation aims to safeguard. It is precisely the purpose of the third step in the test for proportionality to subject measures which have been recognised as suitable and necessary to the stated aim to a further check. This further check requires consideration of whether the means which are being employed are, from the point of view of the affected individual, still in proportion to the protection of legal interests which can be achieved by the measures. In considering this due regard must be had to the resulting limitation of fundamental rights. The test of proportionality in the narrower sense can thus lead to the conclusion that a means of protecting legal interests which is in itself suitable and necessary may not be resorted to because the resulting infringement of the fundamental rights of the affected person significantly outweighs the increased protection of legal interests which is thereby achieved, with the result that the use of the protective measure is disproportionate. From this it follows that under certain circumstances the protective aim, the pursuit of which is in itself legitimate, must take second place. This will be so if the measure being relied on would lead to a disproportionate infringement of the rights of the affected individual.

a) The criminal sanction which s 29 para 1 sentence 1 number 1 of the *Intoxicating Substances Act*

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prescribes for trafficking in Cannabis products does not, in the light of these principles, run contrary to the principle of proportionality. Trafficking primarily andtypically presents a greater threat to the interests of others than do the consumption-related offences of s 29 para 1 *Intoxicating Substances Act.* This alone would suffice to make it the most dangerous form of illegal dealing with drugs. Trading arouses and sustains the demand for Cannabis products, exploits the weakness and dependency of others and leads to the uncontrolled distribution of the drug to, amongst others, the most vulnerable groups. Furthermore it is mostly in the hands of international organised crime. In the light of this not only the prohibition of trafficking but also the threat of punishment to prevent it is proportionate in the narrow sense.

b) The same conclusion follows with the respect to the supply of Cannabis products other than for gain and not for the purpose of promoting trade, which is threatened with penalties by s 29 para 1

sentence 1 number 1 *Intoxicating Substances Act.* Supply other than for gain also promotes the distribution of Cannabis products and thus creates a threat to the interests of others. It is true that the danger flowing from this type of offence is clearly to be regarded as smaller than that flowing from trafficking. This is so because the cases in which Cannabis products are given as a gift are of lesser importance than cases in which ownership is passed in exchange for some consideration if only because they are much less frequent. Nevertheless it is legitimate for the legislature to start from the assumption that this sort of behaviour gives rise to a danger. The giving of the drug as a gift not infrequently takes place in a social context in which particularly vulnerable people, such as the young or psychologically weak or chronic users are likely to be affected. The giving of the drug leads to a communal experience which can lead people who previously did not belong the class of consumers to become drug consumers. Alternately it may strengthen an existing psychological dependency on the drug. In view of these considerations the imposition of penalties for the supply of Cannabis products to third persons is justified by the public interest in hindering the uncontrolled distribution of the drug. It is within the bounds of a proportionate and reasonable sanction for the person to whom the prohibition is directed,

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particularly given that the varying weight of specific offences can in general be adequately taken into account within the broad punitive framework of s 29 para 1 *Intoxicating Substances Act*. In addition there is the procedural possibility of refraining from prosecution in cases of little culpability and where the public interest does not require prosecution (see ss 153 and 153a of the *Criminal Procedure Regulations*).

c) The provision in s 29 para 1 sentence 1 number 1 *Intoxicating Substances Act* which imposes penalties for the illegal procurement of Cannabis products does not violate the constitutional requirement of proportionality. The same applies to the prohibition in s 29 para 1 sentence 1 number 3 which imposes penalties for the illegal possession of this drug.

c1) Trading in Cannabis products or supplying them other than for profit are not the only offences which create a danger for third parties in the abstract in that they create the possibility of the drug being passed on. Illegal procurement and illegal possession of the drug also present a threat to the interests of others if only because they open up the possibility of the drug being passed on to third parties without any control. The danger of the drug being passed on in this way exists even if the intention of the perpetrator in procuring and possessing the drug is merely to prepare the way for his own consumption of it. A further consideration is that the very act of procurement for the purposes of private consumption creates the demand for the drug which constitutes the demand side of the drugs market. In view of the estimates, which put the current number of consumers somewhere between 800 000 and 4 million people, most of whom are occasional users (see above at 2c), this cannot be dismissed as insignificant. It is therefore consonant with the constitutional requirement of proportionality in the narrower sense to also, as a general rule, subject the illegal procurement and possession of Cannabis products for private consumption to criminal penalties, since it is a wrong deserving and requiring punishment. This is justified as a general preventive measure. However it is precisely in these cases that the extent of individual culpability and the threat to other legal interests emanating from the individual act may be petty. This is especially likely to be the case if Cannabis products are procured and possessed only in small amounts for occasional

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personal use. These cases make up a not insignificant part of the acts which are punishable under the *Intoxicating Substances Act.* According to the *Report of the Federal Government concerning the jurisprudence on the penal provisions of the Intoxicating Substances Act in the period 1985 to 1987* which was published on 11 April 1989 (*Bundestagsdrucksachen* 11/4329 page 15) about a quarter of all prosecutions which are initiated because of an drugs offence are discontinued either on the

initiative of the State Prosecution Service or on the initiative of the court. About 80 to 90% of the discontinued cases concern Cannabis offenders with small amounts for personal consumption who fall within the parameters of s 29 para 1 *Intoxicating Substances Act*. There is good reason for believing that these discontinued prosecutions are to a significant extent cases of illegal procurement and possession since these offences also form the basis of 51% of convictions according to the *Report of the Federal Government* (at page 12). According to the representative survey published by the Federal Ministry of Health in 1990, 56,7% of the Cannabis users who were questioned said that they had consumed Cannabis between one and five times in the previous twelve months. In the light of all these factors the individual contribution of the small consumer to the realisation of the dangers which the prohibition of dealings with Cannabis is intended to ward off is limited. This is so despite the great significance with the total number of small consumers collectively has for the illegal drug market. However the situation will be different if, for example, the way in which the drug is consumed will tend to lead young people to use it. If the procurement or possession of Cannabis products is limited to small amounts for occasional personal use, then as a general rule, the concrete danger that the drug will be passed on to a third person is not very significant. The public interest in the imposition of penalties is then correspondingly limited. Imposing criminal penalties on those who are merely sampling the drug or who are occasional consumers of small amounts of Cannabis products can lead to results which are disproportionate in their effect on the individual offender. From the point of view of discouraging the specific individual from breaking the law the penalty may do more harm than good, for example by pushing the individual into the drugs culture and causing him to develop a sense of solidarity with it.

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c2) Even taking into account such scenarios, the general provision of penalties for the illegal procurement and possession of Cannabis products, which is justified as a general preventative measure, does not violate the constitutional requirement of proportionality in the narrower sense. The legislature has satisfied this requirement by making it possible for the authorities responsible for implementing the Act to take account of the limited wrongfulness or culpability of the offence in individual cases by refraining from prosecution or the imposition of a penalty. In addition to the generally applicable provisions of s 153 and 153a *Criminal Procedure Regulations* which permit the discontinuation of a prosecution if the blameworthiness of the defendant is minor and there is no public interest in continuing the prosecution, there are also ss 29 para 5 and 31a *Intoxicating Substances Act* to take into account. In terms of s 29 para 5 *Intoxicating Substances Act* the court can refrain from imposing a penalty under s 29 para 1 if the defendant cultivates, manufactures, imports, exports, procures or in some other way obtains or possesses drugs or transports them through the country only for his personal consumption and only for his personal use. The application of this provision is particularly appropriate in those cases in which a person who is merely sampling Cannabis or is an occasional user procures or possesses a small amount of Cannabis, which is less dangerous than other available drugs, thereby causing no danger to third parties. From the point of view of the authorities charged with implementing the law this provision has added practical significance in that s 153b *Criminal Procedure Regulations* makes it possible to discontinue proceedings up until the beginning of the main trial if the requirements of s 29 para 5 *Intoxicating Substances Act* are fulfilled.

In addition, since 16 September 1992 the new s 31a *Intoxicating Substances Act* also applies. This makes special provision for refraining from prosecution in cases where s 29 para 5 *Intoxicating Substances Act* applies if the guilt of the offender is to be regarded as petty and there is no public interest in prosecution. s 31a *Intoxicating Substances Act* differs from the provision for discontinuance of proceedings in s 153b *Criminal Procedure Regulations* read with s 29 para 5 *Intoxicating Substances Act* in that s 31a expressly requires that the culpability of the offender should be petty and that there should be no public interest in prosecuting. These requirements will in general be satisfied in cases of

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occasional personal use of Cannabis not involving any danger to third parties. This means that the authorities responsible for enforcing the law, in particular the Public Prosecutors, who until the offender is charged have absolute control of proceedings, must refrain from prosecuting the offences listed in s 31a *Intoxicating Substances Act* in the light of the requirement of proportionality in the narrower sense. On the other hand, if the offence involves danger to third parties, for example, because it takes place in a school, young persons home, army barracks or similar institution, or if it is committed by someone charged with the supervision of young people, or by a teacher, or a public officer who is charged with the enforcement of the *Intoxicating Substances Act* and is likely to encourage others to imitate the offence, then there may be sufficient culpability and a public interest in prosecution.

However, since both s 31a *Intoxicating Substances Act* and ss 153 ff *Criminal Procedure Regulations* involve decisions in accordance with legal rules [references omitted] it would be a cause for concern if, after the introduction of s 31a, the widely divergent attitudes to discontinuation of proceedings in the different States of the Federation which were identified in the report of the Federal Government for the years 1985 to 1987 [reference omitted] should persist. Differing approaches have been noted, particularly with respect to the decision as to what constitutes a "small amount" of the drug. Principles to guide this decision have already been laid down in the jurisprudence on s 29 para 5 *Intoxicating Substances Act* [references omitted]. Another area of significant divergence is the approach to repeat offenders [references omitted]. s 31a *Intoxicating Substances Act* gives the State Prosecution Service a wide discretion as to whether to discontinue proceedings without consultation with the court. However, in doing so it creates scope for directing the practice of the State Prosecution Service with respect to discontinuation by means of administrative guidelines. In this respect the States of the Federation have a duty to ensure that the practice of the State Prosecution Services in respect of discontinuance of proceedings is substantially uniform [see also BVerfGE 11, 6 at 18 and BVerfGE 76, 1 at 77]. This duty is particularly important in view of the fact that at issue is criminal prosecution, which places a particularly grave burden on the individual affected. An essentially uniform approach to enforcement would

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no longer be guaranteed if the authorities in the States were to insist on, or prohibit, the prosecution of certain types of behaviour in significantly different ways by reference to abstract and general considerations. As yet there is still no clear evidence concerning the application of s 31a *Intoxicating Substances Act* which would allow the conclusion to be drawn that this provision too will be dealt with in different ways on an ongoing basis in the various States. It is legitimate for the legislature to wait and see whether the newly created s 31a *Intoxicating Substances Act*, which is specially designed to deal with consumer offences in drugs law, leads to an essentially uniform application of the law in this area, or whether further statutory provisions setting out the circumstances in which proceedings should be discontinued are necessary.

c3) The decision of the legislature to take account of the diminished wrongfulness and culpability of certain acts primarily by limiting the obligation to prosecute is compatible with the constitution.

There are two approaches open to the legislature to take account of the limited wrongfulness and culpability involved in certain groups of cases in compliance with the principle of proportionality in the narrower sense. One possibility is to deal with the issue through the substantive law. This could involve limiting the applicability of the general penal provision, for example by recognising privileged cases, or allowing for special sanctions in cases involving petty offences. However it can also adopt a procedural solution, ie, limit the duty to prosecute and make it more flexible. In principle both approaches are consistent with the constitutional principle of proportionality (see BVerfGE 50, 205 at 213 ff). The procedural solution also does not infringe the constitutional

principles which flow from Article 103 para 2 *Basic Law*. The prohibition on retrospective provisions creating criminal liability or increasing the penalties for it is obviously not infringed. The principle that penalties must have a legal basis is satisfied. The limits of punishable behaviour are determined by the statute as are the limitations on the duty to prosecute. The fact that the duty to apply the law in individual cases rests on the authorities responsible for enforcement is irrelevant. Finally, the principle that a provision imposing penalties must be clear and certain is satisfied if the

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individual can, with sufficient certainty, determine from the statute under what circumstances he can expect to be punished and what the potential punishment is. These requirements are satisfied in this case.

d) There is no problem from the point of view of proportionality in the narrower sense with subjecting the illegal import of Cannabis products to penalties in terms of s 29 para 1 sentence 1 number 1 *Intoxicating Substances Act*. There can be no constitutional objection to the legislature in this respect relying on a predominating criminal- and health-policy interest in ensuring that no illegal drugs be brought into the national territory. There can also be no constitutional objection to the legislature seeing the particular wrongfulness of illegal importation as being based on the fact that the trade in drugs, which poses a particular threat to the interests which the *Intoxicating Substances Act* seeks to protect, is an international activity and that therefore illegal cross-border transactions in drugs are one of its typical permutations. Every state which, like the Federal Republic of Germany, has acceded to the international conventions combating the trade in drugs, must in particular make special efforts to fulfil its obligations to prevent illegal cross-border trafficking, thus showing the solidarity with its neighbouring states which is necessary to effectively combat the international drug market. As far as the importation of small amounts of Cannabis products for personal use is concerned, the points made above (at I.5.c) should be referred to.

e) As far as the imposition by s 29 para 1 sentence 1 number 5 *Intoxicating Substances Act* of penalties on the illegal transport of drugs through the national territory is concerned the conclusion is the same. Although the illegal transportation of drugs through the national territory harms intra-state communal interests to a lesser extent than illegal importation, the legitimate interest of the state in an effective control of the international trade in drugs legitimates the imposition of penalties as far as the principle of proportionality in the narrower sense is concerned. The Federal Republic of Germany has undertaken an obligation to exercise such control in the interests of effectively combating, together with other states, the international drug market.

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In this respect too the provisions of the *Intoxicating Substances Act* provide sufficient opportunities to give due consideration to limited wrongfulness and culpability in individual cases.

f) Finally, the provisions of s 29 para 3 sentences 1 and 2 number 4 of the *Intoxicating Substances Act* in the version which was in force until 21 September 1992 are compatible with the requirement of proportionality in the narrower sense insofar as they concern trading in amounts of Cannabis products which are not insubstantial. The same applies to the provision in s 30 para 1 number 4 of the Act.

As has been set out above, the imposition of penalties by s 29 para 1 sentence 1 number 1 *Intoxicating Substances Act*, insofar as it is concerned with trading in Cannabis products, is compatible with Article 2 para 1 and Article 2 para 2 sentence 2 of the *Basic Law*. Taking this as a starting point there can be no constitutional objection to the fact that as a general rule the Act regarded illegal trading with not insignificant amounts of Cannabis products as specified in the old version of s 29 para 3 sentence 2 number 4 *Intoxicating Substances Act* as a particularly serious case

of trading with drugs and provided in s 29 para 3 sentence 1 *Intoxicating Substances Act* for a penalty of imprisonment for at least one year. Since trading in large amounts of Cannabis products presents a significantly greater danger to the interests which the *Intoxicating Substances Act* seeks to protect the legislature is entitled to react to it with a more severe minimum penalty. In this context there is no need for a consideration of the question whether the jurisprudence of the higher courts which defined "a not insignificant amount" of Cannabis products as meaning an amount containing over 7,5 grams of the active ingredient THC thereby called into question the proportionality of the mimimum penalty of one year's imprisonment provided for in s 29 para 3 sentence 1 *Intoxicating Substances Act*. This is so because this determination of the minimum amount does not arise from the content of the Act itself but from its interpretation by the criminal courts. If, in view of the minimum sentence, this interpretation is incompatible with the principle of proportionality there is nothing to stop any criminal court from interpreting and applying the provision in a way which is compatible with the constitution. Furthermore, the

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sentencing framework of s 29 para 3 sentence 1 is, as such, not the object of an admissible application for constitutional review.

For similar reasons the qualified offence created by s 30 para 1 number 4 *Intoxicating Substances Act* does not violate the principle of proportionality insofar as it relates to the importation of Cannabis products in not insignificant amounts. Here too the dangers arising from the increased amount justify the creation of a qualified offence with an increased penalty. As far as the interpretation of the concept of "a not insignificant amount" is concerned he same applies as in the case of the old version of s 29 para 3 sentence 2 number 4 *Intoxicating Substances Act* Furthermore, here too the sentencing framework has not been made the object of an admissible application for constitutional review.

6. In the 1992 *Amendment Act to the Intoxicating Substances Act* the legislature initiated a "reform of the currently predominantly repressive legislation on the abuse of drugs by withdrawing the prosecution of addicted users" (*Bundestagsdrucksachen* 12/934 page 1). Correspondingly it differentiated more strongly between dealers and consumers in the criminal law. In the light of the open nature of the debate, both from the perspective of criminal policy and of scientific research, about the dangers presented by the consumption of Cannabis and the correct way of combating them (see above under I.2.c and 4), the legislature has a duty to monitor and check the effects of the laws currently in force, having due regard to experiences in other countries (see BVerfGE 50, 290 at 335; BVerfGE 56, 54 at 78; BVerfGE 65, 1 at 55 and following; BVerfGE 88, 203 at 309 and following). In doing so it should in particular form an opinion on the question whether and to what extent a legalisation of Cannabis could lead to a separation of the market in drugs, and thus to a reduction in drug consumption as a whole; or whether on the contrary only resistance to the drug market as a whole and the organised crime which determines it, backed up by criminal penalties, offers reasonable chances of success.

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II

The imposition of penalties on illegal dealings with Cannabis products is not a violation of Article 2 para 2 sentence 1 of the *Basic Law*.

The arguments which the courts below used to justify the view that there was a violation of this provision of the constitution fail from the start because misunderstand the scope of the right.

Article 2 para 2 sentence 1 of the *Basic Law* protects the individual against interventions by the state

against his life and his physical integrity. In addition, when read with Article 1 para 1 sentence 2 *Basic Law*, it places an obligation in the state to protect and promote these interests. Above all this means it must protect these interests from illegal infringement by third parties (see BVerfGE 39, 1 at 42; BVerfGE 88, 203 at 251 and numerous other decisions). Since the prohibition of dealing with Cannabis products does not force anyone to resort to other intoxicants such as alcohol which are not subject to the *Intoxicating Substances Act* there is no infringement by the state of the legal interests protected by Art 2 para 2 sentence 1 *Basic Law*. Rather, the decision to damage his own health by abusing intoxicants of this sort which are freely available is the responsibility of the consumer himself. To demand of the legislature that dealings with Cannabis products should not be punished merely because other intoxicants which are not subjected to the *Intoxicating Substances Act* can in some circumstances present greater health risks would be to stand the state's duty to protect the interests in life and physical integrity on its head.

III

The inclusion of Cannabis products in schedule I to s 1 para 1 *Intoxicating Substances Act*, with the result that illegal dealing with these substances is subjected to the penal provisions of the Act, does not violate Article 3 para 1 *Basic Law* merely because alcohol and nicotine are regulated differently.

1. The principle of equality forbids the decisionmaker to treat essentially similar situations differently

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and demands that he treat essentially different situations differently, having due regard to the differences between them. In applying this principle it is essentially for the legislature to single out the situations to which it attaches the same legal consequences, ie, those which from the legal point of view it wishes to regard as similar (See BVerfGE 53, 313 at 329). It is not possible to rule generally and in the abstract on which choices are objectively justifiable and which are unjustifiable in terms of the principle of equality. Instead this can only be done in the context of the specific characteristics of the specific subject matter which is to be regulated (See BVerfGE 17, 122 at 130; BVerfGE 75, 108 at 157 and numerous other cases). In the field of penalties relating to drugs which is the issue here the legislature could, without violating the constitution, answer in the affirmative the question whether there were reasons of such a nature and of such weight as to justify applying different rules to the regulaton of Cannabis products on the one hand, and alcohol and nicotine on the other, with differing legal consequences for those affected.

2. The principle of equality does not demand that all drugs which are potentially equally harmful should be equally prohibited or tolerated. In the interests of legal certainty the *Intoxicating Substances Act* follows the approach of drawing up a positive list, ie, all substances and preparations which are banned in accordance with the laws on drugs are expressly listed in the schedules to the Act. In s 1 paras 2 and 3 the *Intoxicating Substances Act* provides a procedure for adding to the positive list or making exceptions to the general prohibition if certain specified legal pre-conditions are satisfied. However, in following this procedure it is not necessary that the extent of the risk posed to health should be the only relevant criterion for placing something on the positive list. Apart from the different effects of the substances the legislature can, for example, also take into account factors such as:

- the various uses to which they may be put (for example the abuse of the most diverse chemicals such as adhesives, solvents and petrol for "sniffing" comes to mind);
- the significance to society of the various uses;
- the legal and practical chances of acting against abuse with any prospect of success; and
- the possibilities and

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demands of international co-operation in regulating and combating drugs and the criminal organisations which deal with them. These considerations alone suffice to make the point that the general principle of equality does not prescribe that all drugs should be equally released to the public merely because other substances which pose a risk to health are permitted. As far as the comparison between Cannabis products and Nicotine is concerned, the fact that nicotine is not a drug (intoxicant) is by itself a sufficient reason for treating them differently. There are also important reasons for the differing treatment of Cannabis products and alcohol. It is indeed accepted that the **abuse** of alcohol brings with it dangers both for the individual and for society which are equal to or even greater than those posed by Cannabis products. However, it must be borne in mind that alcohol can be used in many ways. There are no comparable uses for the products and parts of the Cannabis plant. Products containing alcohol serve as a source of nourishment and pleasure. In the form of wine they are also used in religious ceremonies. In all cases the dominant use of alcohol does not lead to states of intoxication. Its intoxicating effect is generally known and is generally avoided by means of social controls. In contrast, the achievement of an intoxicated state is usually the main aim when Cannabis products are used. Furthermore the legislature finds itself in the situation that it cannot effectively prevent the consumption of alcohol because of traditional patterns of consumption in Germany and the European cultural sphere. However this does not mean that Article 3 *Basic Law* requires the legislature to refrain from prohibiting Cannabis.

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IV

The failure of the legislature to draw a distinction in the *Intoxicating Substances Act* between so-called soft and hard drugs in accordance with the relative dangerousness of the individual drugs is also not a violation of Article 3 para 1 *Basic Law*. The Act does not cause hard drugs such as Heroin and soft drugs such as Cannabis products to be treated the same in criminal law in a way which could be considered arbitrary in the light of the differing degrees of danger posed by the drugs. It is true that the legislature has created uniform penal provisions for all forms of drugs.

However, within the limits set by Article 103 para 2 of the *Basic Law*, the legislature has empowered the courts to take account of the differing levels of wrongfulness and culpability in individual cases, and thus also to take account of the dangerousness of each of the drugs in question, by requiring the exercise of discretion with respect to certain elements of the offence, by setting a wide sentencing framework, and by authorising the courts to refrain from prosecuting or sentencing.

The same applies to taking account of the differing levels of wrongfulness and culpability involved in the various forms of the offence of illegal dealings with drugs which are listed in the Act.

V

The application to have the Act declared unconstitutional has thus not shown any material grounds for doing so. The sentencing of the applicant for ongoing trading in not insignificant amounts of Hashish to imprisonment for two years and six months in terms of s 29 para 1 sentence 1 number 1 and of s 29 para 3 sentences 1 and 2 number 4 of the unamended version of the *Intoxicating Substances Act* is not a violation of his constitutional rights. As has already been shown, the imposition of penalties by s 29 para 1 sentence 1 number 1 of the *Intoxicating Substances Act* is consistent with the *Basic Law* to the extent that it is concerned with trading in Cannabis products. The same applies to the provisions of s 29 para 3 sentences 1 and 2 number 4 of the unamended version of the *Intoxicating Substances Act*. There is no need in the context of the application for constitutional review to go into the question of whether the jurisprudence of the higher courts, which defines the lower limit

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of "not insignificant amounts" of Cannabis products as 7,5 grams of THC, has set the limit at a level which is compatible with the constitutional requirement of proportionality in the light of the minimum sentence of one year. This is so because the application of s 29 para 3 sentences 1 and 2 number 4 of the unamended version of the *Intoxicating Substances Act* cannot be open to constitutional objections in a case such as the present given that the court below found that the applicant had traded 6 kilograms of Hashish. There are also no other constitutionally relevant defects in the interpretation or application of the penal provisions, either in respect of conviction or sentencing.

Signed by Justices Marenholz, Boeckenfoerde, Klein, Grasshof, Kruis, Kirchhof, Winter and Sommer.

Judgment of Justice Grasshof dissenting against some of the majority's reasoning but not against its findings ....

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