Headnotes

to the judgment of the First Senate of 24 April 1991

– 1 BvR 1341/90 –

1. **The fundamental right to freedom of occupational choice guaranteed by Article 12.1 of the Basic Law protects the individual in his or her decision to take up, retain or give up a concrete possibility of employment in his or her chosen occupation. However, this freedom of choice does not imply that a right to a place of work of an individual's own choice is available.**

2. **If a provision encroaches upon the freedom of occupational choice with an effect similar to that of an objective bar to admission, it is permissible only to protect a sufficiently important public interest, preserving the principle of proportionality.**

3. **The provision in the Unification Treaty by which, where public institutions are to be wound up, employment contracts are suspended and restricted to a specified period is incompatible with the Basic Law and void to the extent that it violates the termination provisions of maternity protection law. The special situation of disabled persons, older employees, single parents and other persons affected in a similar way must be taken into account when filling vacancies in the public service.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 1341/90 –

Pronounced
on 24 April 1991
Achilles
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Ms A(…) and a further 303 complainants

– authorised representative:

Rechtsanwalt Johannes Zindel, Airport Center, Hugo-Eckener-Ring, Frankfurt Main 75

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Herzog
Henschel,
Seidl,
Grimm,
Söllner,
Dieterich,
Kühling,
Seibert

held on the basis of the oral hearing of 12 March 1991:

Judgment:

1. **The constitutional complaint is rejected as unfounded.**

2. **The Act of 23 September 1990 on the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity - Unification Treaty Act - and on the Agreement of 18 September 1990 (*Gesetz vom 23. September 1990 zu dem Vertrag vom 31. August 1990 zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands - Einigungsvertragsgesetz - und der Vereinbarung vom 18. September 1990*, Federal Law Gazette, *Bundesgesetzblatt* II p. 885) is incompatible with Article 12.1 in conjunction with Article 6.4 of the Basic Law and void to the extent that Annex 1 chapter XIX subject area A part III number 1 subsection 2 sentences 2 and 5 and subsection 3 of the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (*Vertrag vom 31. August 1990 zwischen der Bundesrepublik Deutschland und der Deutschland Demokratischen Republik über die Herstellung der Einheit Deutschlands - Einigungsvertrag* (Federal Law Gazette 1990 II p. 889 [at p. 1140]) violates the termination provisions of maternity protection law.**

3. **The Federal Republic of Germany shall reimburse one-third of the claimants' necessary expenses.**

Reasons:

A.

The constitutional complaint relates to the provision in the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity of 31 August 1990 (*Vertrag zwischen der Bundesrepublik Deutschland und der Deutschland Demokratischen Republik über die Herstellung der Einheit Deutschlands vom 31. August 1990* - Unification Treaty (Federal Law Gazette 1990 II p. 889 [at p. 1140]) under which, in particular circumstances, the contracts of employment of persons working in the public service of the German Democratic Republic are suspended and terminated. Above all, the complainants want their employment to continue. 1

I.

The Unification Treaty was signed by the federal government and the government of the German Democratic Republic on 31 August 1990. The *Bundestag* (lower house of the German parliament) and the *Bundesrat* (upper house of the German parliament) approved this Treaty, the Protocol, the Annexes I to III and the agreement of 18 September 1990 by the Act of 23 September 1990 - the Unification Treaty Act (Federal Law Gazette II p. 885). 2

The transfer of institutions of public administration and administration of justice of the German Democratic Republic to the Federal Republic of Germany is governed by Article 13 of the Unification Treaty. This Article reads as follows: 3

(1) Administrative bodies and other institutions serving the purposes of public administration or the administration of justice in the territory specified in Article 3 of this Treaty shall pass under the authority of the government of the *Land* (state) in which they are located. Institutions whose sphere of activities transcends the boundaries of a *Land* shall come under the joint responsibility of the *Länder* concerned. Where institutions consist of several branches, each of which is in a position to carry out its activities independently, the branches shall come under the responsibility of the government of the *Land* in which they are located. The *Land* government shall be responsible for the transfer or winding up. Section 22 of the *Länder* Establishment Act *(Ländereinführungsgesetz)* of 22 July 1990 shall remain unaffected. 4

(2) To the extent that before the accession took effect the institutions or branches mentioned in the first sentence of subsection (1) above performed tasks that are incumbent upon the Federation according to the distribution of competence under the Basic Law, they shall be subject to the competent supreme federal authorities. The latter shall be responsible for the transfer or winding up. 5

(3) Institutions under subsections 1 and 2 above shall also include 6

1. cultural, educational, scientific and sports institutions; 7

2. radio and television establishments 8

which come under the responsibility of public administrative bodies. 9

In the Protocol to the Unification Treaty (Federal Law Gazette *loc.cit.* p. 905), the parties gave the following clarifications on these provisions: 10

On Article 13: 11

Institutions or branches which, until the accession took effect, performed tasks that in future are no longer to be performed by the public administration will be wound up as follows: 12

(1) To the extent that there is a factual connection with public-sector tasks, the institutions or branches shall be wound up by the body that is responsible for these public-sector tasks (federal government, *Land* or *Länder* jointly). 13

(2) In the other cases, the institutions or branches shall be wound up by the federal government. 14

In cases of doubt, the *Land* in question or the federal government may apply to an agency that is formed by the federal government and the *Länder*. 15

On Article 13.2: 16

To the extent that institutions are transferred in whole or in part to the federal government, suitable personnel shall also be transferred in accordance with the requirements for performing the tasks. 17

With regard to the legal position of the employees of the public service at the date of accession, Article 20.1 of the Unification Treaty refers to Annex 1 of the agreed transitional arrangements. Chapter XIX subject area A part III number 1 of the Annex (Federal Law Gazette II p. 1140) provides as follows in this connection: 18

(1) For the employees of the public administration of the German Democratic Republic, including the part of Berlin in which the Basic Law did not previously apply, at the time when the accession became effective, the terms of employment that applied to them on the day before the accession came into effect shall continue to apply to them subject to the conditions of this Treaty, in particular subject to subsections 2 to 7. Provisions that conflict with or deviate from these conditions shall not be applied. The conditions of employment applicable to the public service in the remainder of the territory of the Federal Republic of Germany shall apply only if and to the extent that the parties to collective pay agreements agree this. 19

(2) To the extent that institutions under Article 13.2 of the Treaty are transferred in whole or in part to the federal government, the employment contracts of the persons employed there under subsection 1 shall be contracts with the federal government; the same shall apply in the case of transfer to federal corporations, institutions and foundations under public law. The employment contracts of the other employees shall be suspended from the day when the accession becomes effective. During the period when the contract of employment is suspended under sentence 2 above, the employee shall be entitled to a monthly inactive status payment in the amount of 70 per cent of the average monthly salary of the past six months; in calculating this, no account shall be taken of non-recurring or special payments. The employer, in cooperation with the employment service, shall encourage the further training or retraining measures that may be necessary for further employment to be possible. If the employee's employment is not continued within six months, if necessary in a different area of administration, the contract of employment shall end at the end of this period; if the employee has reached the age of 50 on the day the accession takes effect, the period shall be nine months. Any earned income or wage compensation payments received elsewhere shall be counted towards the monthly inactive status pay to the extent that the sum of this income and the inactive status pay exceeds the basis on which the inactive status pay is calculated. Irrespective of sentence 1 and sentence 5 above, the contract of employment shall end when the employee reaches retirement age. 20

(3) Subsection (2) above shall apply *mutatis mutandis* to the employees at institutions that perform duties of the *Länder*, of the *Land* of Berlin for the part of Berlin in which the Basic Law did not previously apply, or joint federal government and *Länder* tasks under Article 91b of the Basic Law. 21

(4) Termination of an employment contract in the public administration by notice 22

shall also be permissible if

1. the employee does not satisfy the requirements for lack of professional qualification or personal suitability or 23

2. the employee can no longer be used because no employees are needed or 24

3. the previous place of occupation has been wound up without replacement or, in the case of merger, incorporation or a material change in the structure of the place of occupation, the previous or a different employment is no longer possible. 25

To the extent that no inactive status pay was awarded, in the cases in numbers 2 and 3 above severance pay may be given; the amount and duration of this shall correspond to the monthly inactive status pay under subsection (2) above. Subsection 2 sentence 6 shall apply *mutatis mutandis*. The termination periods shall be governed by section 55 of the Labour Code of the German Democratic Republic of 16 June 1977 (Law Gazette of the German Democratic Republic, *Gesetzblatt der Deutschen Demokratischen Republik* I number 18 p. 185), most recently amended by the Act on the Amendment and Supplementation of the Labour Code *(Gesetz zur Änderung und Ergänzung des Arbeitsgesetzbuches)* of 22 June 1990 *(Law Gazette of the German Democratic Republic I number 35 p. 371)*. The instruction in Annex II chapter XIX subject area B part III number 2 letter b shall apply *mutatis mutandis* to corresponding provisions for dismissals in the area of the Ministry of the Interior and the customs administration. This subsection shall become inoperative after the expiry of a period of two years after the accession becomes effective. 26

(5) A compelling reason for summary termination exists in particular if the employee 27

1. has infringed the principles of humanity or the rule of law, in particular the human rights guaranteed in the International Covenant on Civil and Political Rights of 19 December 1966 or the principles contained in the Universal Declaration of Human Rights of 10 December 1948 or 28

2. worked for the former Ministry for State Security/Office of National Security, 29

and for this reason it cannot be reasonably expected that he or she remains in this employment relationship. 30

(6) Notice of termination under subsections 4 and 5 above may also be given in the cases under subsections 2 and 3. 31

(7) Judges and public prosecutors shall be governed by the special provisions under chapter III subject area A part III number 2. 32

The following footnote 2) shall be added to subsection 2 sentence 2 of this provision: 33

If a decision under article 13.2 cannot be made before the day when accession becomes effective, it may be provided that the decisive date under sentence 2 is to be 34

postponed by up to three months. Until this date, sentence 1 shall apply.

The public administration of the German Democratic Republic had a centralistic structure. It consisted of central state institutions and institutions of local administration (various types of districts: *Bezirk*, *Landkreis*, *Stadtkreis*, and towns or municipalities incorporated in a *Kreis*). In addition there were special administrations with their own substructure, such as, for example, the railway (*Reichsbahn*) and the post office. In addition to those employed by municipalities, rail and post office, approximately 1.75 million people worked in the administration of the German Democratic Republic. There were no *Länder* from 1952 on. Only in the year 1990 was a federal structure reintroduced. [...] 35

II.

Until 2 October 1990 inclusive, the complainants were employed at institutions of the public administration of the German Democratic Republic, which were wound up under Article 13 of the Unification Treaty. Until now, none of the complainants has been given continuing employment. At present they are without work. 36

In their constitutional complaint, based on a violation of Article 1.1, Article 2.1, Article 3.1, Article 12.1, Article 14, Article 19.4, Article 20.1 and 20.3, Article 33.2, Article 72 and Article 75 of the Basic Law, they challenge Article 1 of the Unification Treaty Act, to the extent that it consents to the provision in Annex 1 chapter XIX subject area A part III number 1 subsection 2 sentences 2 and 5 and subsection 3 of the Unification Treaty. […] 37

[…] 38-43

III.

1. The federal German government, at all events, regards the constitutional complaint as unfounded. No fundamental rights of the complainants have been violated. […] 44

[…] 45-48

2. The *Deutscher Gewerkschaftsbund* (German Federation of Trade Unions) regards the constitutional complaint as well-founded. […] 49

[…] 50-54

B.

The constitutional complaint, which directly challenges the Unification Treaty Act, is admissible. […] 55

C.

The constitutional complaint is unfounded. Chapter XIX subject area A part III number 1 subsections 2 and 3 of Annex 1 to the Unification Treaty is, however, incompati- 56

ble with the Basic Law to the extent that this provision also applies to women whose contracts of employment, under maternity protection law, ought not to have been terminated at the date on which their employment contracts were to be suspended. In other respects, the provisions challenged are compatible with the Basic Law if they are interpreted in conformity with the Constitution.

I.

The complainants have presented sufficient *prima facie* evidence that their employment agreements are covered by the provision challenged. [...] 57

II.

The constitutional complaint does not make it necessary to decide the questions as to whether the provision challenged is covered by Article 143.1 of the Basic Law and whether this constitutional norm is compatible with Article 79.3 of the Basic Law. Even without the norm amending the constitution, the provision is essentially compatible with the Basic Law. To the extent that it is found that there was a violation of the constitution, Article 143.1 of the Basic Law does not apply, because the deviation from the Basic Law is not justified as the consequence of different circumstances in the two parts of Germany. 58

III.

The provision challenged is essentially compatible with Article 12.1 of the Basic Law. 59

1. Article 12.1 sentence 1 of the Basic Law guarantees the free choice of an occupation and also the free choice of the place of work. The free choice of an occupation relates to the decision of the individual as to the field in which he or she intends to exercise an occupation, and the choice of the place of work relates to the decision as to where he or she wishes to exercise the chosen occupation. The choice of a place of work is therefore subordinate to the choice of an occupation and puts it into concrete terms. Conversely, it has priority over the exercise of an occupation, which takes place only at the place of work that has been chosen. But this term may not be understood solely or even only in the first place in a spatial sense. On the contrary: choosing a place of work means deciding in favour of a concrete possibility of working or a specific employment relationship. The subject of the fundamental right to a free choice of the place of work is therefore in the first instance the decision of the individual to take up a concrete possibility of working in the chosen occupation. In the case of employees, this includes in particular choosing the party with whom the employee enters into a contract of employment, together with the necessary conditions, in particular access to the labour market. Just as the free choice of an occupation does not consist solely of the decision to take up an occupation, but also comprises continuing and terminating an occupation, the free choice of a place of work comprises not only the decision to take up a concrete occupation, but also the intention of the individual 60

to continue in this place of work or to leave it. The protection given by the fundamental right, therefore, is protection against all government measures that restrict this freedom of choice. This is above all the case if the state hinders the individual from obtaining a place of work that is available, forces him or her to accept a particular place of work or requires him or her to give up a place of work. On the other hand, freedom of choice does not entail either a right to have a place of work of the individual's own choice made available or a guarantee that the place of work chosen will continue to be available. Similarly, the fundamental right does not give direct protection against the loss of a place of work on the basis of private arrangements. In this respect, the state merely has a duty of protection arising from Article 12.1 of the Basic Law, and the provisions on termination of employment in force take this sufficiently into consideration. Direct state intervention in existing employment relationships, however, must always be commensurate with the fundamental right to a free choice of the place of work.

This also applies to places of work in the public service. It is true that in this area there may be special provisions by analogy to Article 33 of the Basic Law that override the effect of the fundamental right under Article 12.1 of the Basic Law. In particular, the number of places of work is subject to the state's power of organisation (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts*, BVerfGE 7, p. 377 [at p. 398]; 39, p. 334 [at pp. 369-370]; 73, p. 280 [at p. 292]). However, this does not give rise to any restriction of the scope of protection of the free choice of a place of work. As set out above, Article 12.1 of the Basic Law gives no claim to the creation or retention of places of work. It does not, therefore, encroach upon the power of organisation of the state as an employer. Furthermore, this is not a question relating to acts by of the power of organisation of the federal government and the *Länder*. The complainants' constitutional complaint is not directed against the decisions affecting them with regard to the winding up of the institutions at which they worked. 61

2. The provision in the Unification Treaty encroaches upon the complainants' fundamental right to free choice of the place of work. 62

The federal government believes that there was no encroachment because, at the date on which the Basic Law was put into force in the territory of the German Democratic Republic, the complainants had already lost their places of work. The employment relationships did not come to an end because the entity with which the complainants originally contracted, the German Democratic Republic, ceased to exist. The Unification Treaty itself makes it clear that the federal and *Länder* governments are to take over the existing contracts of employment (Annex 1 chapter XIX subject area A part III number 1 subsection 2). In this respect, therefore, the Federal Republic of Germany is the successor in title to the German Democratic Republic. 63

The encroachment consists in the fact that the provision challenged causes the contracts of employment to be suspended and leads to their termination on a specific key 64

date unless continued employment is offered before that date. The loss of the place of work occurs immediately by operation of law as the consequence of the decision to wind up an institution.

3. However, the encroachment is essentially compatible with the Basic Law. 65

Although Article 12.1 sentence 2 of the Basic Law expressly contains provisions only for the exercise of an occupation, and not also provisions for the choice of an occupation and a place of work, the legal situation with regard to the choice of place of work is no different than that with regard to the choice of an occupation. It too is subject to statutory restrictions, which must, however, take into account the high priority of freedom of choice, as expressed in Article 12.1 of the Basic Law (cf. BVerfGE 7, p. 377). According to this, legislation must meet not only the general requirements that apply to statutes restricting fundamental rights. If a provision encroaches upon the freedom of choice of a place of work with the same effect as an objective bar to admission that encroaches upon the freedom of occupational choice, it is permissible only to protect a correspondingly important public interest and preserving the principle of proportionality. 66

a) The encroachment is not unconstitutional merely because - as the complainants believe - the federal government lacked legislative competence with regard to the provision challenged. It may be left undecided whether the federal government has such a competence under Article 75 number 1 in conjunction with Article 72 of the Basic Law. Under Article 23 sentence 2 of the Basic Law, the German federal legislature had to create the requirements for the accession of the former German Democratic Republic (cf. BVerfGE 82, p. 316 [at pp. 320-321]). With regard to the urgent legislative tasks this unavoidably entails, this also gives rise to a power to legislate that follows from the nature of the matter. 67

This is the situation in the present case. The employees' employment relationships in the public service had to be legislated for without delay. The new *Länder* in eastern Germany (on the territory of the German Democratic Republic) were not in a position to do this in a reasonable time, because they did not yet have any legislative bodies and were therefore unable to act. 68

b) Nor is the encroachment unconstitutional because the provision challenged is imprecise. Its effect is just adequate to satisfy the constitutional requirements of the definiteness of norms (cf. for example BVerfGE 60, p. 215 [at p. 230]; 81, p. 70 [at p. 88]). The principle that a norm should be definite does not force the legislature to describe the elements in terms of precisely identifiable characteristics. The provisions need only be as definite as is possible, depending on the specific nature of the facts to be legislated for, taking account of the purpose of the norm. The fact that a norm needs to be interpreted does not prevent it from being definite. It is sufficient if the persons concerned recognise the legal situation and can adapt their behaviour as appropriate (BVerfGE 78, p. 205 [at p. 212] with further references). 69

The provision challenged sufficiently specifies the jurisdiction of the federal government and the *Länder* with regard to the institutions of the former German Democratic Republic. The definition may cause difficulties in detail, because not all the tasks that were undertaken in the German Democratic Republic by state institutions can be classified straightforwardly according to the system of competencies of the Basic Law (Article 13.2 of the Unification Treaty). But, in view of the peculiarities of a centralistic state with a managed economic system, these difficulties could scarcely have been avoided, and at all events they can be overcome through a correct interpretation of the Unification Treaty. The same applies to the imprecision of the term "public service" (*öffentlicher Dienst*), which had a different meaning in the former German Democratic Republic than in the Federal Republic of Germany. In this respect too, interpretation is a means to achieve sufficient clarity. 70

What is a cause for more concern is the fact that the Unification Treaty does not state the conditions in which an institution may be wound up. Article 13 of the Unification Treaty merely provides that the federal government, or the *Länder* in whose jurisdiction an institution falls, shall provide for its "transfer or winding up". This provision would indeed be too imprecise if it were to be understood to mean that winding up or continuing the institution were left to the free decision of the new legally responsible body. If the body legally responsible for an institution decides that the institution is to be wound up, this decision has immediate legal effects on the persons employed there: their employment relationships are suspended and given a time limit. Such an encroachment must have a legal basis that is sufficiently definite in its contents, purpose and extent (BVerfGE 8, p. 274 [at p. 325]; 9, p. 137 [at p. 147]). 71

The complainants and the *Deutscher Gewerkschaftsbund* have set out that in practice the provision challenged is implemented arbitrarily. They have given concrete indications of a winding-up of numerous institutions whose tasks in fact continue to be carried out. In their opinion, the provision challenged is in many cases misused for a general cutback in personnel regardless of social hardship and circumventing the protection against unfair dismissal under labour law. However, this does not require any further investigation. For even from such misuse it could not be inferred that the provision is imprecise. The substantive requirements for a winding up can be determined from this term and its statutory context. 72

The winding up of an institution requires that it is dissolved. This is the meaning of the term in legal usage. In this sense, "winding up" (*Abwicklung*) has the same meaning as "termination in due form". Examples of entities that are wound up or liquidated are commercial companies after they have been dissolved (cf. § 145.1, § 161.2 of the German Commercial Code; § 66.1 of the German Private Limited Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, GmbHG; § 264.1 of the Stock Corporation Act, *Aktiengesetz*, AktG). The Basic Law also uses the term "winding up" in this sense. Under Article 130.1 sentence 2 of the Basic Law, the "institutions that serve the public administration or the administration of justice" to be taken over by the Federal Republic of Germany on its foundation were to be transferred, 73

dissolved or wound up. It is recognised that this did not lay down a choice between three alternatives. On the contrary, there was only the alternative between a transfer and a winding up after a prior dissolution (cf. Maunz in Maunz/Dürig, commentary on the Basic Law, Article 130 marginal number 25). The Unification Treaty follows this use of language. Admittedly, it does not make particular mention of dissolution as a necessary first step before winding up, but it recognisably means the same as Article 130.1 of the Basic Law.

It is also sufficiently defined what is to be understood by the dissolution of an institution. At all events, this leads to the institution ceasing to exist as an organisational unit. Thus, for example, a transfer to another organ of sovereign power cannot be understood to be a dissolution if the institution in fact continues to exist. Here too, if the provision is interpreted analogously, there can be no doubt. It should also be clear that the term "institution" (*Einrichtung*) is not a synonym of "authority" (*Behörde*), but that it may also have sub-units, provided they are functional units that can be organisationally delimited. Individual points may need clarification. In particular, a precise definition of the term "institution" may in individual cases cause difficulties. However, these problems can be solved by the authorities and courts with traditional methods of interpretation. 74

Finally, the definiteness of the provision challenged is also not impaired by the fact that the Unification Treaty and its annexes contain no provisions on the form of the decision to wind up, on its announcement and on the procedure. It was not necessary to make provision for the procedural questions in the Unification Treaty, in particular since the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) came into force on the date of accession (Annex 1 chapter II subject area B part III number 1). 75

c) The provision challenged serves to protect a paramount public interest. For such a purpose, the legislature may even encroach upon the free choice of an occupation by creating objective bars to admission (BVerfGE 7, p. 377 [at pp. 407-408]). It is therefore unnecessary to consider whether the protection of the freedom of choice of one's place of work should perhaps be given lower priority. After the accession of the German Democratic Republic, a modern and effective administration working in accordance with constitutional standards must be established there as soon as possible. Without this, an efficient infrastructure cannot come into existence nor can the economy recover. Many of the existing administrative institutions are no longer needed. According to the assessment of the federal government, which is decisive in this respect, there is substantial overstaffing; without a reduction of personnel, the financial efficiency of the federal and *Länder* governments would be endangered as a result of overburdening (cf. Dr. Schäuble, Federal Minister, in the first reading of the Unification Treaty Act in the German *Bundestag* [record of plenary session, 11/ 222, p. 17493]). It is a goal of overriding importance to avoid this. It is plain that the danger is not exaggerated. The budget situation is difficult. In the next few years, substantial amounts of public funds need to be spent to create a modern infrastructure, to promote industry and on social measures in the new *Länder*. If these tasks are to be 76

managed without making excessive demands on the economy and on taxpayers, it will be necessary to be thrifty with public funds. In principle, this situation also justifies encroachments upon the right to a free choice of the place of work.

d) If interpreted in conformity with the Basic Law, the provision challenged essentially satisfies the requirements of the principle of proportionality. 77

aa) There is no doubt that the provision challenged is capable of achieving its purpose. It puts the federal government and the governments of the new *Länder* in a position to close down the institutions of public administration of the former German Democratic Republic that are no longer needed without having to issue individual notices of termination and, if necessary, defend them in judicial proceedings. In this way, the reorganisation can be carried out more rapidly and economically. 78

bb) The provision challenged is necessary. There is no less burdensome means of promoting the desired goal with equal effectiveness. Without an immediate suspension of the employment relationships, the institutions no longer needed could not have been wound up anything like as rapidly and effectively. Every less invasive encroachment upon the places of work of those employed there would have been substantially more expensive and cumbersome. It would have been necessary to consider individual cases with regard to the grounds for dismissal. The administrative resources necessary for this purpose would first have had to be established. This would have led to considerable delay and an additional burden by way of personnel costs. In many cases, only after the persons involved had taken legal action would it have been finally and non-appealably certain that terminations issued in this way were effective. It would have been virtually impossible to avoid a backlog of legal proceedings, especially since an efficient system of labour courts has yet to be established in the new *Länder*. 79

cc) When weighing up the public interest which the provision serves against the severity of the encroachment, the provision is found to be (only just) reasonable in general. 80

However, the statutory provision creates a heavy burden for the complainants. If the German Democratic Republic had continued to exist, their employment relationships would indeed probably have safeguarded their livelihood to a certain degree. Legally, there was no employment for life nor protection against dismissal that could be judicially enforced, but labour law was designed to avoid dismissals (cf. Nägele, *Der Betriebs-Berater* 1990, supplement 9, p. 1), and in practice it appears that the protection of workplaces clearly had priority over considerations of effectiveness. It cannot otherwise be explained why the public service was overstaffed. 81

On the other hand, however, the workplaces were endangered, even before unification, by the economic decline in the German Democratic Republic. From the end of 1989 at the latest, it was clear that far-reaching reforms would have to be made. The old administration could not have continued to exist with its full staff. In consequence, 82

Article 26.3 of the Treaty Establishing Monetary, Economic and Social Union between the Federal Republic of Germany and the German Democratic Republic (*Vertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik*) of 18 May 1990 (Federal Law Gazette II p. 537) provided for a reduction of personnel. In this respect, the employees of the public service of the German Democratic Republic share the general fate of their fellow-citizens: in the enterprises too, it became clear even before the accession that a large number of workplaces were unprofitable and could not be maintained in the long term. In the commercial sector too, unemployment has now attained dramatic proportions. At the time when the German Democratic Republic was crumbling, the livelihoods of very many citizens were endangered.

In view of this situation, the legislature was able to provide for a general termination of employment relationships after suspension for several months for employees in institutions that were no longer needed, if social hardships were softened. Subject to the restrictions set out below, therefore, the persons affected must accept this measure. 83

An important factor is the fact that the Unification Treaty itself contains measures that alleviate the situation of those affected. One of these measures is the inactive status pay. This applies even if in individual cases it is not quite as much as unemployment benefit, for in every case it postpones the beginning of a subsequent period of unemployment with the effect that unemployment benefit is paid that much longer. It is also an advantage that other income is only to be counted towards the inactive status pay if together with the inactive status pay it exceeds the former income. Measures of further training or retraining are to be encouraged. If there is a temporary possibility of employment, for example for duties in connection with winding up, then at least fixed-term contracts of employment should be entered into. In addition, fixed-term job-creation schemes are provided for in the public sector. The employment offices are to be reinforced in personnel and organisation, in order to ensure that the public are given intensive advice and assistance and carry out more placing. To the extent that there is a need, training is also to be offered at or under the auspices of the public administration departments (explanatory notes on chapter XIX subject area A part III number 1 of Annex 1 of the Unification Treaty [Records of the *Bundestag* 11/7817, p. 180]). This care is essentially sufficient to make the provision challenged appear reasonable. 84

However, the provision has particularly drastic effects for some persons affected. These include in particular the severely disabled, older employees and single parents. They have very little chance of finding a new place of work. At all events, this applies to single parents as long as there are not enough facilities for child care available. The provision challenged takes no account of this. With regard to these groups, the provision can only be justified if the state makes particular efforts to reintegrate the persons involved into working life. Opportunities for further training and retraining are not adequate for this purpose. Unless grounds for termination exist under Annex 85

1 chapter XIX subject area A part III number 1 subsection 5 of the Unification Treaty, they can be expected to accept dismissal from their employment and the encroachment upon their freedom of occupation this entails only if they are offered reliable prospects of a new employment in the public service. Adequate account must therefore be taken of this when vacancies are filled.

For a large number of those affected, the devaluation of their previous qualifications is particularly hard. They need to be retrained if they are to work in the administration of a state governed by the rule of law, with other tasks and different goals. Many have no choice but to look for jobs in private enterprises. This requires an even more radical reorientation. Under the pressure of unemployment and poverty, these constraints are particularly hard to bear. They may have an adverse effect on a person's self-esteem and personality. These consequences of the provision challenged are acceptable only if the persons involved are effectively helped to cope with their situation. Possibilities offered for further training and retraining of the persons dismissed may therefore not come to an end when the contracts of employment expire. It remains the task of the public authorities who are now responsible for the institutions that were wound up to assist these people in their efforts to be reintegrated in working life. Only in this way can the consequences of the drastic encroachment upon the freedom to choose a place of work be reduced to a justifiable degree. Furthermore, in the case of persons who lack formal proof of qualification under the law now in force, a decision must be made as to their ability, knowledge and experience. The details of this procedure are to be laid down by the competent public authorities. 86

4. However, the provision challenged is incompatible with Article 12.1 in conjunction with Article 6.4 of the Basic Law and void to the extent that it violates the provisions on termination of employment in the area of maternity protection law. The provision challenged creates unreasonable hardship to pregnant women and women who have given birth. Nor can the encroachment be justified with regard to them on the basis of the matters of paramount public interest which are protected by the provision challenged. They themselves are particularly in need of protection. Article 6.4 of the Basic Law gives them a right to the protection and care of the community (cf. BVerfGE 32, p. 273 [at p. 277]; 52, p. 357 [at p. 365]). The legislature was not entitled to terminate their contracts of employment automatically and from one day to the next put them in a situation which is at least close to unemployment. 87

The current maternity protection law takes account of Article 6.4 of the Basic Law by way of prohibitions on termination. Contrary interests of employers must to a large extent take second place (cf. BVerfGE 52, p. 357 [at p. 367]). How far these individual provisions are required under constitutional law may be left undecided. At all events, pregnant women and women who have given birth may not be allowed to be without effective protection against dismissal under labour law. Article 6.4 of the Basic Law requires this. 88

The federal legislature was not entitled to override this out of consideration for the 89

extreme burdens on the public budgets and the need for a further-reaching restructuring of public administration in the new *Länder*. In principle, employers are expected to protect the workplaces of pregnant women and women who have given birth even in difficult economic circumstances for a company. The federal and *Länder* governments are similarly subject to this duty. This cannot give rise to an appreciable additional burden on public budgets. Article 143.1 of the Basic Law does not conflict with this result; for even in view of the different circumstances in the old and new *Länder*, it was easily possible to avoid the above-mentioned departure from the Basic Law.

The partial invalidity of the provision challenged has the result that it does not apply to the employment relationships of women who at the date when their employment relationships were to be suspended were protected by maternity protection law against dismissal. The key date in this connection is 3 October 1990 or the later date that follows from footnote 2) to subsection 2 sentence 2 of the provision challenged. Maternity protection law applies subject to the provisions of the Unification Treaty (cf. Article 8 of the Unification Treaty in conjunction with Annex 1 chapter VIII subject area A and Annex 11 chapter VIII subject area A part III number 1 b). 90

IV.

In contrast, Article 14 of the Basic Law is not violated. Here, it is overridden by Article 12.1 of the Basic Law, because the latter is the fundamental right with a closer relationship to the situation. [...] 91

V.

Nor does the provision challenged violate the general principle of equality before the law (Article 3.1 of the Basic Law). […] 92

[…] 93-94

VI.

Nor is there a violation of the human dignity of the complainants. […] 95

VII.

Nor is the complainants' right to effective legal protection violated. 96

1. In this connection they complain that legislation directly encroached upon their individual rights and thus it was made impossible for them to contest these encroachments in court. This objection too is unfounded. It is not necessary to discuss here whether Article 19.4 of the Basic Law prohibits direct legislative encroachments upon individual rights if fundamental rights can be granted only if the administrative authorities and the courts carry out a review of the individual case (on this, cf. BVerfGE 24, p. 367 [at pp. 401 *et seq*.]; 45, p. 297 [at pp. 333-334]). For the provision challenged is, as set out above (III 3 d bb), also compatible with the fundamental rights of the complainants to the extent that it encroaches upon their right to a free choice of the 97

place of work without respect of person. These aspects also, in this case, justify the termination of the contracts of employment by statute and the reduction of legal protection contingent thereon.

2. Finally, to the extent that the complainants see it as an inadmissible restriction of their legal protection that they were not properly notified of the winding up of their institutions, this is not a failing of the Unification Treaty. It is true that acts of state cannot have legal effects as against the citizen until they are notified to him or her in person or in a proper form in public. This follows from the principles of legal certainty and protection of public confidence, which are embodied in the requirement of a state governed by the rule of law in Article 20.3 of the Basic Law (cf. e.g. BVerfGE 30, p. 392 [at p. 403]), and moreover is also laid down in ordinary law (cf. §§ 41, 43 of the Administrative Procedure Act, *Verwaltungsverfahrensgesetz*). It was not necessary for the Unification Treaty to repeat such general rules of procedure. This has already been pointed out in a different connection (III 3 b). 98

VIII.

The constitutional complaint is rejected as unfounded, because the complainants' fundamental rights have not been violated by the provision challenged. There are no women who by reason of maternity protection should not have been dismissed among the complainants. 99

The decision on the necessary expenses to be reimbursed is based on § 34 a.3 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*). [...] 100

This decision is made unanimously. 101

Herzog Henschel Seidl

Grimm Söllner Dieterich

Kühling Seibert

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