FEDERAL CONSTITUTIONAL COURT

– 2 BvE 2/98 –

Pronounced
on 20 July 1998
Ankelmann
Regierungshauptsekretär
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings on the applications to declare

1. that the decision by respondent no. 2 of 8 May 1998 in the procedure under § 44b of the Act on Deputies (*Abgeordnetengesetz* – AbgG) as to the scrutiny of the applicant's work or political responsibility for the Ministry for State Security (*Ministerium für Staatssicherheit*)/Office of National Security (*Amt für Nationale Sicherheit*) of the former German Democratic Republic and the publication of the decision by respondent no. 1 as *Bundestag* document (*Bundestagsdrucksache)* 13/10893 violate the applicant's rights under Article 38.1 sentence 2 of the Basic Law (*Grundgesetz* – GG).

2. that respondent no. 2 violated the rights of the applicant as deputy under Article 38.1 sentence 2 GG, in particular his rights to the free exercise of his parliamentary mandate, equal treatment as a deputy and a fair procedure by

a) prolonging into the campaign for the *Bundestag* election of 1998 the procedure pursuant to § 44b AbgG initiated against the applicant on 9 February 1995,

b) not requesting information from the Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic as is done for all other procedures pursuant to § 44b AbgG, but instead requesting and accepting an expert opinion from the Federal Commissioner, followed by four further statements by the Federal Commissioner, and misusing the opinion and further statements of the Federal Commissioner for a succession of prejudgments against the applicant, thereby imposing on the applicant repeated public controversies and harming his reputation,

c) not making the basis of its deliberations the draft report of its secretariat from June 1997, which came to the conclusion that it could not be established that the applicant had worked for the Ministry for State Security. This was contrary to the practice followed in all other procedures under § 44b AbgG. Instead, the respondent adopted its preliminary findings from 24 March 1998, which were slightly modified after hearing the applicant and then became the definitive findings, based on a draft of 98 pages. This draft was forwarded to the members of respondent no. 2 around 11.30 a.m.; it had been drawn up by the rapporteurs of the CDU/CSU, SPD and Alliance 90/THE GREENS parliamentary groups without involving the rapporteurs of the FDP and PDS parliamentary groups and the secretariat of the committee. The draft was adopted in the committee's 30-minute session at 3.30 p.m. without deliberations on content and without amendment. The alternative drafts of the F.D.P. and the PDS, which both found that it could not be established that the applicant had worked for the Ministry for State Security, were refused without deliberating on their content,

d) leaving the final discussions with the applicant on 21 April 1998 to the rapporteurs, and thereby, and by selectively taking into account the statements of the applicant, in particular his statement of 26 March 1998, denying the applicant his right to be heard and violating the guidelines on procedure under § 44b AbgG.

Applicant: Dr. Gregor Gysi, Member of the German *Bundestag*,
Walter-Flex-Straße 3, Bonn,

– authorised representatives: 1. Prof. Dr. Helmut Rittstieg,
Klein Flottbeker Weg 66, Hamburg,

2. Rechtsanwälte Dr. Heinrich Senfft und Kollegen,
Schlüterstraße 6, Hamburg –

Respondents: 1. German *Bundestag*,
acting through its President,
Bundeshaus, Bonn,

2. Committee of the German *Bundestag* for the Scrutiny of Elections, Immunity and the Rules of Procedure (*Ausschuss des Deutschen Bundestages für Wahlprüfung, Immunität und Geschäftsordnung*),
acting through its chairman Dieter Wiefelspütz,
Bundeshaus, Bonn,

– authorised representative: Prof. Dr. Wolfgang Löwer,
Hobsweg 15, Bonn –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Limbach,

Graßhof,

Kruis,

Kirchhof,

Winter,

Sommer,

Jentsch,

Hassemer

held on the basis of the oral hearing of 30 June 1998:

Judgment:

1. Application no. 1 is rejected as unfounded.

2. Applications no. 2 are dismissed as inadmissible.

Reasons:

A.

The *Organstreit* [dispute between constitutional bodies concerning their rights and duties under the constitution] relates to the question of whether the order of the Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure of the 13th German *Bundestag*, forming the conclusion of the scrutiny of the applicant concerning work for the State Security Service (*Staatssicherheitsdienst*) of the GDR, violates 1

the constitutional status of the applicant. It is particularly a matter of the degree to which the concluding findings of scrutiny of a deputy in accordance with § 44b.2 of the Act on Deputies are subject to revision by a constitutional court.

I.

In accordance with § 44b.2 of the Act on the Legal Status of Members of the German *Bundestag* (*Gesetz über die Rechtsverhältnisse der Mitglieder des Deutschen Bundestages, Abgeordnetengesetz – AbgG,* Act on Deputies) […] members of the German *Bundestag* may be scrutinised without their consent for full-time or unofficial work or political responsibility for the State Security Service of the former German Democratic Republic if there are specific indications of suspicion of such work or responsibility. 2

The procedure to be carried out by the Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure (hereinafter referred to as: First Committee) is structured by the Guidelines for Scrutiny of Work or Political Responsibility for the Ministry for State Security (*Ministerium für Staatssicherheit*)/Office of National Security (*Amt für Nationale Sicherheit*) (*Bundestag* document, *Bundestagsdrucksache – BTDrucks* 12/1324, printed in Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 94, 351 <354-355> – hereinafter referred to as: Guidelines) and by an agreement to implement the Guidelines in accordance with § 44b of the Act on Deputies (*Bundestag* document 12/4613 pp. 8-9, printed in excerpt form in BVerfGE 94, 351 (355 ff.) – hereinafter referred to as: Agreement). The Guidelines and the Agreement were accepted by the 13th German *Bundestag* (minutes of plenary proceedings 13/1, p. 14 and minutes G 2 of the second meeting of the First Committee – Business matters – p. 4). The scrutiny procedure in accordance with § 44b.2 of the Act on Deputies was considered by the Federal Constitutional Court to be compatible with the status as a deputy by order of 21 May 1996 (BVerfGE 94, 351). 3

II.

The applicant is a member of the 13th German *Bundestag*. He was scrutinised for work or political responsibility for the Ministry for State Security/Office of National Security on the basis of an order of the First Committee of 9 February 1995 in accordance with § 44b.2 of the Act on Deputies. 4

To this end, the Federal Commissioner [for the Records of the State Security Service of the former German Democratic Republic] at the request of the First Committee in May 1995 submitted all documents of the Ministry for State Security relating to the applicant found to date, as well as an expert statement on these documents. […] 5

In June 1997, the applicant was heard in person by the First Committee [,] […] the final hearing of the applicant before the First Committee took place on 21 April 1998. 6

On 8 May 1998, the Committee conclusively found with the necessary majority that 7

in the case of the applicant unofficial work for the Ministry for State Security was proven. […] The final paragraph reads as follows:

"The following has been ascertained to the satisfaction of the First Committee: 8

In the time of his unofficial work, Dr. Gregor Gysi carried out instructions by his superior officers to influence his clients and concerning the performance of his work. He did not restrict himself to this, but also submitted his own proposals to the Ministry for State Security. Dr. Gysi used his prominent professional position as one of the few lawyers in the GDR in order to protect the political order of the GDR against his clients while working as a lawyer for internationally high-profile dissidents. In order to achieve this goal, he permitted himself to be involved in the strategies of the Ministry for State Security, even participating in operative activities against dissidents, and passed on important information to the Ministry for State Security. The State Security Service was in urgent need of this knowledge to prepare its subversion strategies. The goal of this work, including the contributions from Dr. Gysi, was to suppress the democratic opposition in the GDR as effectively as possible."

[…] 9

III.

The applicant challenges by means of the *Organstreit* proceedings the concluding findings and various procedural acts of the First Committee. In his view, they are in violation of the principles formulated in the ruling of the Federal Constitutional Court of 21 May 1996 (BVerfGE 94, 351) and hence violate his rights under Article 38.1 sentence 2 of the Basic Law (*Grundgesetz – GG*). 10

[…] 11

1.The report of 8 May 1998 is alleged to violate his rights under Article 38.1 of the Basic Law because it allegedly does not meet the requirements established by the Federal Constitutional Court for the formation of conviction and the reasoning of the outcome of evidence (a) and because the First Committee had exceeded its remit in drafting it (b). 12

a) aa) The First Committee may allegedly only regard unofficial work for the Ministry for State Security as proven without violating the constitutional rights of the deputy in question when reasonable doubt as to this finding is eliminated. It was not permitted for the subjective conviction of the Committee members to be relevant here because, otherwise, they would be able to hand down untrue, incriminating and almost arbitrary findings without any legal protection for the deputy in question. 13

To except the First Committee from judicial scrutiny in this manner would be incompatible with Article 19.4 of the Basic Law. The Committee was acting more or less in a judicial capacity and exercising sovereign power. In this situation, the Federal Constitutional Court also had to protect the fundamental rights of the deputy. The incriminating findings of the First Committee affected not only his position as a deputy, but also 14

affected him as an individual, and hence impaired his fundamental rights to informational self-determination, personal honour and freedom to exercise a profession. He could claim protection of fundamental rights against the impact of the report of the First Committee neither before another court nor by means of a constitutional complaint because of the connection with his position with regard to the official body. The Federal Constitutional Court must hence scrutinise whether the incriminating findings of the First Committee were well-founded in objective terms. It had to scrutinise whether the evaluation of the documents by the Committee were conclusive as such and did not permit alternative, exonerating interpretations.

bb) The First Committee had allegedly based the findings in the challenged order not on proof, but solely on presumptions. As a rule, the Committee had not accommodated or had simply rejected as not convincing exonerating interpretations of the documents, which were allegedly equally plausible or even more plausible than the interpretation it selected. […] 15

Furthermore, the First Committee had neither taken into account that the files of the Ministry for State Security had offered incomplete, unreliable and not yet completely evaluated evidence, nor had it allowed for the fact that there was no direct evidence in relation to the applicant, such as a declaration of undertaking or a hand-signed report. 16

[…] 17

Finally, the First Committee had not discussed core arguments and documents put forward by the applicant. […] 18

[…] 19

cc) Furthermore, the applicant opposes the evaluation contained in the end of the summary of the Committee's report of his motives for cooperation with the Ministry for State Security. He is of the opinion that the First Committee had not been entitled to reach such an evaluation because in accordance with § 44b of the Act on Deputies and the Guidelines issued thereon it was only required to determine whether the deputy had worked with the Ministry for State Security. Hence, his constitutional rights had been violated: He had to accept the impairment of his status associated with the scrutiny procedure only insofar as the First Committee was acting within its remit. 20

2.[…] 21

IV.

The respondents are of the view that the content of the Committee's report must remain largely free of review by the Federal Constitutional Court. The scrutiny procedure was comparable in its tasks and legal consequences with a parliamentary inquiry procedure. Facts lying in the past were investigated and evaluated. The study did not entail any legal consequences, but provided evaluated communications of 22

facts for the dispute in the political arena. This comparability suggested that Article 44.4 of the Basic Law, which states that the final reports of parliamentary committees of inquiry are not subject to judicial consideration, was applicable *mutatis mutandis* to the procedure in accordance with § 44b of the Act on Deputies. […]

Article 44.4 of the Basic Law however could not be transferred without modifications to the procedure in accordance with § 44b of the Act on Deputies. Since the scrutiny procedure affected the position of the deputy concerned with regard to the official body, the protection of the parliamentary mandate also had to be taken into consideration. The Federal Constitutional Court must be able to scrutinise adherence to the procedural requirements of the First Committee which were to be adhered to in order to protect the status as a deputy (see BVerfGE 94, 351). The First Committee had adhered to these requirements. 23

Admittedly, the challenged passage at the end of the report had to be justified against the investigation mandate in accordance with § 44b of the Act on Deputies. The passage was nevertheless permissible. The First Committee reported to the Plenary of the *Bundestag*, as would a committee of inquiry. It was recognised that committees of inquiry may also evaluate facts. In light of the fact that the report was addressed to the Plenary, an evaluation had been customary in the legislature, and could also not be refused to the First Committee. Were there to be no such valuation beyond the tangible facts, the necessary consequence would be that a plenary debate would take place on the report, in the course of which the evaluation was subsequently carried out under the explicit protection of Article 38.1 and of Article 46 of the Basic Law. 24

B.

The application […] is admissible insofar as the applicant alleges a violation of his status as a deputy by the published report of the First Committee of 8 May 1998 (*Bundestag* document 13/10893). […] 25

I.

In *Organstreit* proceedings, individual deputies may claim the alleged violation or endangerment of any right constitutionally related to their status. Their application is admissible if it cannot be ruled out from the outset that the opposing party has harmed or directly endangered the applicant's rights emerging from the constitutional law relationship between the parties by a measure that is relevant under the law (§ 64.1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*), see BVerfGE 94, 351 (362-363)). 26

II.

1.[…] Accordingly, the complaint is […] admissible insofar as the applicant alleges that the concluding findings of the First Committee of 8 May 1998 violate his position as a deputy. 27

a) The scrutiny procedure in accordance with § 44b of the Act on Deputies constitutionally must contain various securities to protect the status as a deputy (see BVerfGE 94, 351 (369 ff.)). These include requirements concerning the procedure leading to the concluding findings and to the forming of a conviction by the First Committee. The applicant claims that the challenged order did not meet all of these requirements. Hence, an impairment of his status as a deputy was not ruled out from the outset. 28

b) Where […] the applicant alleges the violation of his fundamental rights, this complaint is inadmissible. In *Organstreit* proceedings, a deputy may exclusively claim rights emerging from his position with regard to the official body within the meaning of Article 38.1 sentence 2 of the Basic Law (see BVerfGE 94, 351 (365)). The submission of the applicant concerning the relationship between the *Organstreit* proceedings and the constitutional complaint provides no reason to refrain from this. The relevant rulings of the Senate of 14 December 1976 and 29 June 1983 (BVerfGE 43, 142 (148-149); 64, 301 (312)) refer active deputies in all matters relating to their status as deputies to the channels of the *Organstreit* proceedings and reject the possibility of a constitutional complaint, even if they are additionally claiming that fundamental rights have been violated. Furthermore, in the case to be adjudicated, it does not need to be considered whether a measure targeting the status of the deputy in special exceptional cases may encroach on his or her privacy protected by fundamental rights and whether then the relevant fundamental right must be accommodated in any way in addition to the constitutional right as a deputy. The direct impact of the collegial inquiry carried out here is restricted to the status as a deputy. Where appropriate he can also challenge before the regular courts the further impact on his professional life and on his honour feared by the applicant. 29

2. […] 30-38

C.

The complaint […] as a whole, insofar as it is admissible, is not well-founded in the view of four Justices, which is reflected in the judgment's essential reasoning. Accordingly, the challenged report of the First Committee does not violate the applicant's rights (Article 38.1 of the Basic Law). Four Justices, whose view is not reflected in the judgment's essential reasoning, are of the opinion that the report of the First Committee exceeds the fact-finding mandate by means of statements on the goals pursued by the applicant, and in this respect violates the applicant's constitutional status. 39

I.

1. The basis for the deputy's constitutional status is Article 38.1 of the Basic Law. This norm protects not only the existence and the actual exercise of the parliamentary mandate (BVerfGE 80, 188 (218)). Over and above this, it guarantees that legitimisation of the deputy gained by means of election to represent the people in Parliament is respected by the other constitutional bodies. The status of a deputy is hence affect- 40

ed if the legitimacy of his mandate is denied in the context of a collegial inquiry (see BVerfGE 94, 351 (366-367)).

The freedom of the parliamentary mandate is however not granted without restriction. It may be limited by other legal interests with constitutional status. The representation and the functional freedom of Parliament are recognised as such legal interests (see BVerfGE 80, 188 (219, 222); 84, 304 (321)). In its order of 21 May 1996, the Federal Constitutional Court considered the integrity and political probity of the *Bundestag* to be a legal interest of constitutional status which in the special situation of the transfer from a dictatorship to democracy in the new *Laender* of the Federal Republic may certainly justify introducing procedures to scrutinise a deputy for previous work or political responsibility for the State Security Service (see § 44b AbgG) (see BVerfGE 94, 351 (367-368)). 41

The constitutional status of the deputy in question is however not entirely eclipsed by Parliament's right to carry out scrutiny for previous work for the State Security Service. Both rights are to be preserved as far as possible in this respect. The status of the deputy in question must hence be taken into account both in structuring and in implementing the scrutiny procedure. 42

2. In accordance with Article 38.1 of the Basic Law, the deputy has a right to the First Committee forming a secure conviction, taking account of the interests of the deputy and portraying this in reasons (a), as well as adhering to the context of the fact-finding mandate selected by the *Bundestag* (b). 43

a) In its ruling of 21 May 1996, the Senate listed the safeguards which in accordance with § 44b.2 of the Act on Deputies the scrutiny procedure must adhere to constitutionally to protect the deputy (BVerfGE 94, 351 (369-371)). These include first of all participation rights of the deputy which guarantee not only a legal hearing, but also enable the deputy in question to actively participate in the production of the evidential result. Furthermore, it must be guaranteed that the concluding finding takes account of the uniqueness of the selected procedure and of the permissible evidence. The Committee must gain such a secure conviction that the deputy is involved that also in light of the restricted evidentiary possibilities reasonable doubt as to the correctness of the finding is ruled out. To this end, it must evaluate the evidence and provide grounds for the result of the evidence. If the Committee is unable to reach this secure conviction, it is free to state the evidentiary situation in the reasons. It may not make presumptions (BVerfGE 94, 351 (370)). 44

b) The fact-finding mandate of the First Committee is limited by virtue of the protection of the exercise of the parliamentary mandate emanating from Article 38.1 of the Basic Law in conjunction with the guidelines re § 44b of the Act on Deputies. In accordance with no. 3 of these guidelines, the latter is restricted to determining whether full-time or unofficial work or political responsibility for the Ministry for State Security/ Office of National Security is to be regarded as proven ("involvement"). This finding is handed down by the First Committee exclusively on the basis of the communications 45

from the Federal Commissioner, the submission of the deputy in question and other documents transmitted to him or submitted by him.

The restriction of the fact-finding mandate results not only from the restriction of the means of evidence, but at the same time from the uniqueness of this collegial inquiry, which is permitted only in exceptional cases. The scrutiny of deputies for conduct prior to being elected is in principle not within Parliament's remit. The legitimisation of the deputy emerges from his or her election. Elections form the basis of Parliament's representative position and determine its action. If however Parliament receives its legitimisation only by election of its members, it may at best be permitted in special exceptional cases to derive doubts beyond the scrutiny of elections concerning the legitimacy of its members. 46

3. The rights emerging from the status as a deputy determine the range and intensity of revision by the Federal Constitutional Court. Article 38.1 of the Basic Law does not give rise to a right pursuable in the *Organstreit* proceedings to have the Federal Constitutional Court scrutinise the correctness of the content of the findings handed down by the First Committee. The content of the rights which may be asserted against Parliament in the *Organstreit* proceedings on the basis of the status as a deputy is to be interpreted against the background of parliamentary autonomy. This is not a matter of the customary tension between constitutional jurisdiction and Parliament in its function as a legislature. The differentiated standards of the intensity of scrutiny by the constitutional court developed in view of the examination of the constitutionality of statutes are hence not applicable here. The subject-matter of the constitutional court scrutiny sought after in these *Organstreit* proceedings is not a statute enacted by the *Bundestag*, but parliamentary scrutiny which does not impact the legal order, remaining instead in the political arena. In this context, too, the balance between Parliament acting autonomously and the Federal Constitutional Court, which is responsible for adherence to the constitutional framework, is however to be adhered to. This rules out the Federal Constitutional Court individually scrutinising the findings of the First Committee forming a conviction as to their correctness, and thereby becoming a scrutinising organ itself. 47

The legal concept of parliamentary autonomy, which found special expression for orders of parliamentary committees of inquiry in Article 44.4 of the Basic Law, does not rule out constitutional court control of the scrutiny report in accordance with § 44b of the Act on Deputies, but does restrict it. In principle, the Federal Constitutional Court must respect the outcome of a personnel inquiry carried out on the primary responsibility of Parliament. It may not substitute its considerations and its conviction as to whether the deputy has worked together with the State Security Service for those of Parliament or of the First Committee. The finding, evaluation and judgment of the facts by Parliament are not subject to constitutional court control. 48

By contrast, it is the task of the Federal Constitutional Court in the *Organstreit* proceedings to scrutinise adherence to the procedural standards which are constitution- 49

ally necessary to safeguard the rights under Article 38.1 of the Basic Law. This means that the court must scrutinise the findings of the First Committee using objective criteria in view of a violation, in excess of its scrutiny mandate, of procedural provisions that protect the mandate.

II.

By this standard, the applicant's rights under Article 38.1 of the Basic Law have not been violated by the scrutiny report of 8 May 1998 and the procedure leading to it where this is subject to subsequent scrutiny (1., 2.). In the view of Justices Graßhof, Kirchhof, Winter and Jentsch, which is reflected in the judgment's essential reasoning, this also applies in relation to adherence to the scrutiny mandate by the First Committee (3. a). Justices Limbach, Kruis, Sommer and Hassemer, whose view is not reflected in the judgment's essential reasoning in this respect, consider the last four sentences of the report (*Bundestag* document *loc. cit.*, p. 50) by contrast to be in excess of the scrutiny mandate which violates the applicant's status as a deputy protected by Article 38.1 of the Basic Law (3. b). 50

1. The complaints on which the applicant concentrates, with which he challenges the finding, evaluation and adjudication of the facts, are not subject to scrutiny by the constitutional court. […] 51

2. The procedural complaints are […] unfounded. The applicant had sufficient opportunities to participate in the investigations in the course of the scrutiny procedure. He availed himself of this opportunity by handing over his own documents, as well as by submitting his own assessments of the evidential situation. The time ultimately available to him for his declarations was sufficient. The fact that his information was unable to convince the majority of the committee, or at least was unable to unsettle their conclusively-formed conviction, does not imply a procedural error. […] 52

The applicant may also not derive anything for himself from the fact that not all members attended all meetings of the First Committee (see § 67 of the Rules of Procedure of the *Bundestag*, *Geschäftsordnung des Bundestages* – GOBT). It is sufficient that the members were able to form their conviction prior to the final ballot regarding the drafts of the report on the basis of the written documents and minutes collected (cf. § 73 of the GOBT). […] 53

3. Because of equal votes in the Senate, it cannot be ascertained that the First Committee has exceeded the scrutiny mandate with its report (§ 15.3 sentence 3 of the Federal Constitutional Court Act). 54

a) In the opinion of the four Justices whose view is reflected in the judgment's essential reasoning, the First Committee handed down findings that were proven according to its conviction […] in the context of its constitutionally determined and delimited investigation mandate. 55

aa) (1) The mandate of the First Committee in the procedure in accordance with § 56

44b of the Act on Deputies consists of “scrutiny for full-time or unofficial work or political responsibility for the State Security Service of the former German Democratic Republic”. This scrutiny mandate is justified by the purpose of increasing confidence in Parliament. The legislature enacting § 44b of the Act on Deputies considered this confidence to be disturbed particularly if representatives belonged to Parliament who were suspected of having supported a dictatorship and violated citizens’ freedom rights by observing political dissenters (see BVerfGE 94, 351 (368)). The scrutiny procedure is hence based on the premise that the previous work of a deputy for the State Security Service removed their legitimacy as a Member of the German *Bundestag*. Even if the finding of such involvement leaves unaffected the mandate and the ensuing rights, it may in rem lead to the verdict that the deputy in question is politically unworthy to belong to Parliament (BVerfGE 94, 351 (367)). Hence, the task of the Committee does not aim to simply describe historical events, but the formation of a responsible, well-founded parliamentary conviction of facts calling into question the legitimacy of the mandate. The scrutiny mandate is concerned with the finding of all facts which could provide the basis for the public being able to form a judgment concerning the involvement of the deputy in the Ministry for State Security, and hence his political worthiness to exercise a *Bundestag* mandate. The Committee hence hands down the finding of involvement, on which the public may base a political evaluation of the deputy’s conduct; however, the Committee may not arrive at this evaluation itself.

(2) This includes first of all circumstances which in the conviction of the Committee prove the existence of knowing cooperation with the Ministry for State Security. However, this finding by itself cannot always provide a sufficient basis for the evaluation of the legitimacy of a deputy’s mandate […]. 57

(2 a) This is also initially presumed by the Agreement implementing the Guidelines in accordance with § 44b of the Act on Deputies (see on this BVerfGE 94, 351 (355-356)). In no. 6 fourth indent, indeed, it explicitly requires proof of work to a degree permitting its evaluation. Also in the sixth indent, it requires from the Committee the evaluation of whether cooperation ascertained with the Ministry for State Security has burdened or disadvantaged third parties. 58

(2 b) Also, in the meantime the typical structures of cooperation with the Ministry for State Security have become known which per se permit the deliberate violation of private secrets in the manner in question to appear in a different light: In breach of the rule of law, in political criminal proceedings the working conditions of a lawyer in the GDR not infrequently entailed a risk to both the lawyer and the client if in exercising his mandate the lawyer rejected all cooperation with the Ministry for State Security or similar agencies. If in such cases a lawyer after weighing up the interests of the client, his professional duties and his justified interest in continuing to work as a lawyer – also to protect clients – worked with the Ministry for State Security in order to gain its trust and consequently to be able to pursue the interests of the client against competent agencies, he ultimately protected his clients against the GDR state. 59

Since however in accordance with the constitutionally unobjectionable evaluation of § 44b of the Act on Deputies the legitimacy of the mandate of a deputy is only called into question when he has gone behind citizens' backs and betrayed them (see BVerfGE 94, 351 (367)), these circumstances are also part of the finding of the external and internal facts which permit the public to form a judgment on whether a deputy is worthy to exercise a parliamentary mandate. If the Committee were required to refrain from such findings, the citizen would be more likely to presume from the mere finding of deliberate cooperation with the Ministry for State Security a breach of a lawyer's duty of confidentiality than to presume conduct ultimately protecting the client. The legitimacy of the deputy's mandate would also be placed in question if the documents consulted by the Committee per se permit the secure conclusion that the work of the person concerned served to safeguard the client. In such a case, the free exercise of the mandate guaranteed by Article 38.1 of the Basic Law prohibits restricting scrutiny in accordance with § 44b of the Act on Deputies to the formation of the conviction of deliberate cooperation, and hence to lead the public to make presumptions that the Committee knows to be unfounded. 60

(3) If a report is based on a highly extensive and detailed portrayal of individual findings, the scrutiny mandate justifies including these findings in context in the publication and summing them up as a determination or contradiction of the overall facts which give rise to involvement. By these means, the person concerned and the public can gain knowledge of the content and range of findings that both incriminate and exonerate. If the Committee satisfied itself with a portrayal of individual findings, the danger would exist of these leading to suppositions and to an overall evaluation not supported by the Committee's factual findings. 61

(4) Against a scrutiny mandate the content of which also covered the finding of goals pursued by actions, the objection can also not be put forward that their ascertainment entailed particular difficulties and had a special risk of error if the evidence is restricted to documents and to the information provided by the person concerned. 62

The incriminating discovery of a goal pursued by actions can, like any other internal fact to be ascertained, only be concluded by the Committee from external facts and from the information provided by the person concerned. It must form a secure conviction with regard to each of these facts. Also in this respect, it may not content itself with suppositions (see BVerfGE 94, 351 (370)). The restriction of the evidence may entail that this certain conviction may be more seldom reached from the goals of action of the deputy than that of the existence of deliberate cooperation with the Ministry for State Security. This circumstance however may not lead to the Committee having to refrain from such findings in general terms. 63

bb) In accordance with these standards, the First Committee in the context of its scrutiny mandate could not only make the individual findings in its report on nos. 2 to 7, but also the summarising findings regarding the goals pursued by actions of the applicant at no. 8. The Committee also bases these findings on reasons. 64

(1) Under no. 1, the Committee precedes its report (see *Bundestag* document loc. cit., p. 3) by the result that it considers with the required majority that unofficial work by the applicant for the Ministry for State Security of the former GDR has been proven. All following seven numbers serve to provide a basis for this result and adherence to the procedural rules established for this by the Committee. Here, at no. 8, in an overall view, the individual instances of the applicant working for the Ministry for State Security previously considered to have been proven in detail are portrayed in their significance for formation of the Committee's conviction that involvement had been proven. The summary findings handed down here are based on the individual findings described above and are restricted to the context of the scrutiny mandate. It does not contain a political evaluation of the applicant's involvement, especially since the last sentence of the scrutiny report describes the goals of the Ministry for State Security, and hence the work of the organisation with which the applicant worked according to the findings of the Committee. 65

(2) The reasoning given by the Committee is nuanced. 66

(2 aa) With its statements re 5.3, 6 and 7, the Committee makes and provides reasons for a number of individual statements with which in each concrete case it puts forward its secure conviction refuting the applicant's claim that in his case, not even the definition of having deliberately worked together with the Ministry for State Security was fulfilled and that the concrete information which the Ministry for State Security had had in relation to his clients had originated in particular in the Central Committee of the SED. These individual statements are included at no. 8 of the report in the summing up of the refutation of this submission by the applicant. 67

(2 bb) The Committee bases its conviction that the applicant had done the work which he disputes with the Ministry for State Security in the interest of said Ministry on a large number of individual ascertainments on the nature, type and kind and chronological sequence of reports and declarations by the applicant […] This concrete evidentiary outcome leads the Committee at no. 8 of its report to the summarising finding that the applicant's cooperation with the Ministry for State Security was such to the conviction of the Committee that the applicant had carried out instructions of the superior officers, and over and above this had made his own suggestions to the Ministry for State Security. From all this, the Committee draws the conclusion that the applicant did not only, as he claims, permit himself to be led in his work as a lawyer in order to protect his clients from the state of the GDR, who were accused of political offences. 68

b) aa) The other four Justices take the view that the content of the scrutiny mandate in accordance with the purpose and the structure of the procedure provided for in § 44b of the Act on Deputies and given concrete shape in the Guidelines is only the creation of a basis for fact from which a judgment can be given on political worthiness to continue to exercise a mandate, and not its political evaluation. Already the finding of circumstances described in § 44b.1 of the Act on Deputies impairs the position of 69

deputy with regard to the official body in accordance with Article 38.1 of the Basic Law (see BVerfGE 94, 351 (370)).

The factual finding also includes the internal element of a deliberate and desired action. The evaluation and valuation ("(…) to be regarded as proven (…)") is only appropriate here insofar as it is necessary to the subsume the ascertained circumstances under one of the finding criteria (such as signed declaration of undertaking, demonstrable reports on persons, acceptance of benefits and awards, see no. 6 of the Agreement). Accordingly, the Committee may only evaluate the admitted evidence as to whether it permits a conclusion of activity for the Ministry for State Security and proves this sufficiently. The First Committee may not effect an interpretation and evaluation of the factual material over and above this – in derogation from the range of the scrutiny mandate of a regular committee of inquiry – as desired by the legislature. Instead, it must permit the documents to speak. 70

Statements as to which long-term strategies the deputy pursued with the ascertained work for the State Security Service can be separated from the finding of the facts. They are also not a necessary element thereof. With such statements, the Committee itself is already entering into the controversial debate in the political-parliamentary arena in the legally specially ordered findings procedure, for which its findings are to create the basis. In this respect, the finding to be reached in the procedure and the political purpose of the scrutiny procedure should be distinguished (see on this also BVerfGE 94, 351 (367, 2nd para.)). 71

In the personnel inquiry to be adjudged in the case at hand, the legislature has refrained from linking legal consequences to an incriminating finding of the Scrutiny Committee. The Bundestag *may not even make a recommendation to the deputy to renounce his seat. The actual evaluation of the accusations, the evaluation of their political significance, was deliberately left to the public. By pronouncing a public opinion or in the framework of the next elections, the latter is to answer the question as to whether the burdened deputy is worthy to represent the people in Parliament. Accordingly, Committee Chairman Wiefelspütz declared in the debate on § 44b of the Act on Deputies: "(…) we make observations. The evaluation is to be carried out in the parliamentary groupings and groups and by the German public" (minutes of plenary proceedings of the German* Bundestag *12/64, p. 5369).* 72

The prohibition to express itself as a Committee also regarding the goals pursued by the deputy in the long term is also required directly by Article 38.1 of the Basic Law. Protection of the free exercise of the mandate guaranteed by this provision as a part of the legal position with regard to the official body can be only achieved by the deputy in comparison with measures of the entire organ Bundestag*, to which he belongs, by means of an action between official bodies. Statements by the* Bundestag *related to the conduct of the deputy outside the exercise of the mandate and prior to election can encroach not only on his fundamental rights position as a citizen – not at issue here – but at the same time also on his position as a mandate-holder. Were the* 73

Committee to be permitted in the procedure in accordance with § 44b of the Act on Deputies to make statements on the long-term goals pursued by the deputy with the work for the State Security Service claiming that they were to be regarded as proven on the basis of the admissible evidence, the deputy would be without protection against such attributions, although precisely these may particularly badly violate his status in his position with regard to the official body. The implementation of a personnel inquiry, which also covered such a mandate, would of necessity already encroach as such on Article 38.1 of the Basic Law.

bb) The final passage on 50 of the report of the First Committee ("Dr. Gysi used his prominent occupational position (…)") as an attribution of a strategic goal is an encroachment beyond the fact of work for the Ministry for State Security/Office of National Security no longer covered by the content of the scrutiny mandate. In the overall context of the report, the statements made therein can only be understood as an allegation of a gross violation of a lawyer's professional duties. Here, in their one-sidedness they do not sufficiently consider the special situation faced by counsel for opponents of the regime within a dictatorship. 74

The final passage goes beyond what is asked of the First Committee in accordance with § 44b of the Act on Deputies and the Guidelines and Agreements issued on this. It is not a part of the finding of conspirative cooperation with the State Security Service. The criteria named in no. 6 of the Agreement (printed in BVerfGE 94, 351 (356-657)) are restricted to demonstrable – and hence also refutable – findings with regard to actions. The statement that the applicant had misused his prominent professional position as one of the few lawyers in the GDR in order to protect the political order of the GDR against his clients describes more than an inner fact (such as purpose, intention). This sentence, the meaning of which is in the context of the three following sentences, is rather an attribution of long-term strategies. The final passage contains no findings, only suppositions. It is not worded in a descriptive, but in an attributive manner, and over and above this has a dual meaning. The point of restricting the work of the First Committee to findings is hence circumvented: The applicant cannot show that they are untrue. Rather, he is forced to seek a political debate with a statement which the Committee handed down, claiming a finding made on the basis of a legally-ordered scrutiny procedure. 75

The last four sentences of the report – as has been admitted by the opposing party in the oral hearing – are not summaries or evaluations of the preceding passages. Rather, they open up a new topic; the findings handed down before this on involvement are emphasised by the interpretation describing a strategy suggesting client betrayal. This verdict is justified neither by the internal parliamentary purpose of the collegial inquiry, nor can it be demonstrated to be in accordance with the rule of law in light of the deliberate restriction of the evidence. The final passage is hence rather more likely to nurture the suspicion that the scrutiny procedure will be used as a means of political debate to politically discredit the deputy in question. […] 76

The four sentences closing the report harm the deputy not only because they are difficult to refute, but also more seriously because they invalidate his professional ethics as a lawyer. Here, these statements do not take into account the working conditions under a dictatorship which may force a lawyer in proceedings with a political impact to make certain concessions to the state bodies in order to achieve something for his or her clients. 77

D.

The decision was passed unanimously – with the exception of re C. II. 3. 78

Limbach Graßhof Kruis

Kirchhof Winter Sommer

Jentsch Hassemer

Bundesverfassungsgericht, Urteil des Zweiten Senats vom 20. Juli 1998 - 2 BvE 2/98

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