Headnotes

to the Judgment of the Second Senate of 24 July 2018

2 BvR 309/15

2 BvR 502/16

1. **a) The use of physical restraints on patients constitutes an interference with their fundamental right to freedom of the person (Art. 2(2) second sentence in conjunction with Art. 104 of the Basic Law).**

   b) Both the use of five-point and seven-point restraints that goes beyond mere short-term application constitutes a deprivation of liberty within the meaning of Art. 104(2) of the Basic Law that is not covered by a judicial order of confinement in a psychiatric hospital. A short-term application can generally be presumed where it is foreseeable that the measure will not last longer than approximately half an hour.

2. **The regulatory duty following from Art. 104(2) fourth sentence of the Basic Law obliges the legislature to enact provisions that specify the requirement of a judicial decision in procedural terms in order to give consideration to the specific characteristics of the different contexts in which deprivations of liberty are applied.**

3. **In order to ensure the protection of the persons deprived of their liberty by the use of physical restraints, it is necessary that on-call judges be available on all days of the week from 6:00 a.m. to 9:00 p.m.**

FEDERAL CONSTITUTIONAL COURT

– 2 BvR 309/15 –

– 2 BvR 502/16 –

Pronounced
on
24 July 2018
Fischböck
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I.

of Rechtsanwalt Horst Leitenberger,
Asperger Straße 55, 71634 Ludwigsburg,

as guardian *ad litem (Verfahrenspfleger)* for the person concerned Mr S(...),

a) directly against

the Order of the Ludwigsburg Local Court (*Amtsgericht*)
of 4 February 2015 – 5 XIV 29/15 L –,

b) indirectly against

§ 25(3) of the Baden-Württemberg Act regarding Assistance and Protective Measures for Persons with Mental Illnesses (*Baden-Württembergisches Gesetz über Hilfen und Schutzmaßnahmen bei psychischen Krankheiten* – PsychKHG BW)

– 2 BvR 309/15 –,

II.

of Dr. G(…),

– authorised representative: Rechtsanwalt Dr. Rolf Marschner,
Friedrichstraße 13, 80801 München –

against a) the Final Judgment (*Endurteil*) of the Munich Higher Regional Court (*Oberlandesgericht*) of 4 February 2016 – 1 U 2264/15 –,

b) the Final Judgment of the Munich I Regional Court (*Landgericht*) of 27 May 2015 – 15 O 21894/11 –

– 2 BvR 502/16 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski

held on the basis of the oral hearing of 30 and 31 January 2018:

Judgment:

1. **The proceedings are combined for joint decision.**

   2. a) § 25 of the Baden-Württemberg Act regarding Assistance and Protective Measures for Persons with Mental Illnesses (Baden-Württemberg Law Gazette, *Gesetzblatt* 2014 p. 534) is not compatible with Article 2(2) second and third sentences in conjunction with Article 104(1) and (2) of the Basic Law (*Grundgesetz* – GG) to the extent that it concerns the ordering of the use of physical restraints as a special safety measure.

   b) The Order of the Ludwigsburg Local Court of 4 February 2015 – 5 XIV 29/15 L – violates person concerned no. I's fundamental right under Article 2(2) second and third sentences in conjunction with Article 104(1) and (2) of the Basic Law.

3. a) The Judgment of the Munich Higher Regional Court of 4 February 2016 – 1 U 2264/15 – violates complainant no. II's fundamental right under Article 2(2) second and third sentences in conjunction with Article 104(1) and (2) of the Basic Law. The Judgment of the Munich Higher Regional Court of 4 February 2016 – 1 U 2264/15 – is reversed. The matter is remanded to the Munich Higher Regional Court.

b) […]

4. Pursuant to § 35 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the following is ordered:

a) In the *Land* Baden-Württemberg, physical restraint measures on persons confined under public law in psychiatric hospitals remain permissible until 30 June 2019 pursuant to § 25 of the Baden-Württemberg Act regarding Assistance and Protective Measures for Persons with Mental Illnesses.

b) In the Free State of Bavaria, physical restraint measures on persons confined under public law in psychiatric hospitals remain permissible until 30 June 2019 to the extent that they are indispensable to avert an immediate and serious danger posed by the persons concerned to themselves or to significant legal interests of others.

c) The following applies with regard to both *Länder*: The use of five-point or seven-point restraints is subject to the requirement that a judicial decision be obtained pursuant to Article 104(2) first sentence of the Basic Law, unless the restraints are only applied for a short period of time, where it is foreseeable that the measure will not last longer than approximately half an hour. After any such physical restraint measure has ended, the persons concerned must always be informed about the possibility of seeking a subsequent judicial review of the measure.

5. The *Land* legislatures of Baden-Württemberg and of Bavaria must take steps to ensure conformity with the Constitution by 30 June 2019.

6. […]

R e a s o n s:

A.

The constitutional complaints, combined for joint decision, concern the constitutional requirements regarding the ordering of the use of physical restraints on persons confined under public law in psychiatric hospitals. In particular, they raise the question whether the use of physical restraints – strapping the persons concerned, who 1

are on their back, to a hospital bed by using a special type of straps in order to largely or completely restrict their ability to move – constitutes a deprivation of liberty (*Freiheitsentziehung*) that requires a judicial decision (*Richtervorbehalt*).

I.

[Excerpt from press release no. 62/2018]

[I.] Regarding constitutional complaint 2 BvR 309/15, the person concerned was confined in a closed psychiatric hospital and subjected to a five-point restraint – i.e. strapped to a hospital bed, with restraints securing all limbs and the stomach – based on repeated doctors' orders over the course of several days. The complainant, the guardian *ad litem* (*Verfahrenspfleger*) of the confined person, directly challenges the local court order authorising the use of physical restraints, and indirectly challenges § 25(3) of the Baden-Württemberg Act regarding Assistance and Protective Measures for Persons with Mental Illnesses (*Baden-Württembergisches Gesetz über Hilfen und Schutzmaßnahmen bei psychischen Krankheiten* – PsychKHG BW), on which the court order was based.

[II.] Regarding constitutional complaint 2 BvR 502/16, the complainant was subjected to a seven-point restraint – i.e. strapped to a hospital bed, with restraints securing both arms, both legs, the stomach, chest and forehead –; the use of restraints was ordered by a doctor, lasted for eight hours, and took place while the complainant was confined in a psychiatric hospital for the duration of approximately twelve hours altogether. The Bavarian Confinement Act (*Bayerisches Unterbringungsgesetz* – BayUnterbrG), which served as the legal basis for the temporary confinement of the complainant, does not contain specific provisions providing legal authorisation for ordering the use of physical restraints. The complainant took legal action against the Free State of Bavaria, seeking material damages and damages for personal suffering in relation to injuries caused by the physical restraint measure. The action was unsuccessful. His constitutional complaint challenges the decisions rendered in the liability proceedings against the state (*Amtshaftungsverfahren*).

[End of excerpt]

[…] 2-13

II.

1. The constitutional complaint in proceedings 2 BvR 309/15, lodged by complainant no. I in his own name and in the name of the person concerned, directly challenges the order of the Ludwigsburg Local Court (*Amtsgericht*) of 4 February 2015, and indirectly challenges § 25(3) of the Baden-Württemberg Act regarding Assistance and Protective Measures for Persons with Mental Illnesses. The complainant essentially claims a violation of Art. 2(2) second sentence in conjunction with Art. 104(1) and (2) of the Basic Law (*Grundgesetz* – GG) and Art. 3(1) GG. 14

[…] 15-16

2. Complainant no. II claims that the challenged judgments of the Munich I Regional Court (*Landgericht*) of 27 May 2015 and of the Munich Higher Regional Court (*Oberlandesgericht*) of 4 February 2016 violate his fundamental rights and rights equivalent to fundamental rights (*grundrechtsgleiche Rechte*) under Art. 1(1) and (3), Art. 2(1) and (2) second sentence, Art. 20(3) and Art. 104(1) and (2) GG. 17

[…] 18-21

III.

The German *Bundestag*, the *Bundesrat*, the Federal Government (the Federal Chancellery, the Federal Ministry of the Interior and the Federal Ministry of Justice and Consumer Protection), the Ministry of Justice and Europe of the *Land* Baden-Württemberg, the Bavarian State Ministry of Justice, the Baden-Württemberg *Landtag* (state parliament), the Bavarian *Landtag*, all *Land* governments, the German Association for Psychiatry, Psychotherapy and Psychosomatics (*Deutsche Gesellschaft für Psychiatrie und Psychotherapie, Psychosomatik und Nervenheilkunde e.V.* – DGPPN) and the Federal Association of Persons Having Experienced Psychiatric Treatment *(Bundesverband Psychiatrieerfahrener e.V.*) were given the opportunity to submit statements. 22

[…] 23-41

IV.

[…] 42-48

B.

[…] 49

C.

With regard to the challenged decision of the Munich I Regional Court, the constitutional complaint of complainant no. II is inadmissible. For the rest, the constitutional complaints are admissible. 50

I.

The constitutional complaint in proceedings 2 BvR 309/15 is not inadmissible because, based on a reasonable interpretation, complainant no. I has lodged the constitutional complaint in his own name for the person concerned (1.), or because the person concerned was discharged from hospital after the constitutional complaint was lodged (2.). 51

1. In his capacity as guardian *ad litem* in the confinement proceedings, complainant no. I is entitled to exercise, in his own name, rights of person concerned no. I, including for the purposes of constitutional complaint proceedings, as a procedural party by 52

virtue of his office (*Partei kraft Amtes*).

a) Constitutional complaint proceedings are, in principle, only admissible where complainants assert their own rights in their own name (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 10, 229 <230>; 21, 139 <143>; 27, 326 <333>; 51, 405 <409>; 65, 182 <190>). However, it is established that in exceptional cases, rights on behalf of others can be asserted in one's own name also in constitutional complaint proceedings (cf. BVerfGE 10, 229 <230>; 21, 139 <143>; 27, 326 <333>; 51, 405 <409>; 65, 182 <190>). This holds true, in particular, in cases where otherwise there would be a risk that judicial decisions could never be challenged by means of a constitutional complaint (cf. BVerfGE 77, 263 <269>). 53

Due to the serious mental illness of person concerned no. I, such a risk is ascertainable in the present case. 54

[…] 55-57

2. The fact that the order authorising the use of physical restraints was rendered moot when person concerned no. I was discharged from hospital does not cancel the recognised legal interest in bringing constitutional complaint proceedings (*Rechtsschutzbedürfnis*). 58

The admissibility of a constitutional complaint requires that there is a recognised legal interest in seeking a reversal of the challenged act of public authority or, at the very least, a finding of unconstitutionality (cf. BVerfGE 81, 138 <140>). The recognised legal interest must persist at the time when the Federal Constitutional Court renders its decision (cf. BVerfGE 21, 139 <143>; 30, 54 <58>; 33, 247 <253>; 50, 244 <247>; 56, 99 <106>; 72, 1 <5>; 81, 138 <140>). This is the case where a serious interference with fundamental rights results in severe detriment and the direct impact of the challenged act of public authority is limited to such a short period of time that it would hardly be feasible, given the regular course of proceedings, to obtain a timely decision from the Federal Constitutional Court (cf. BVerfGE 81, 138 <140 and 141>; 107, 299 <311>; 110, 77 <85 and 86>; 117, 244 <268>; 146, 294 <309 para. 24>; established case-law). Otherwise, the protection of fundamental rights of the person concerned would be unreasonably curtailed (cf. BVerfGE 34, 165 <180>; 41, 29 <43>; 49, 24 <51 and 52>; 81, 138 <141>). Serious interferences with fundamental rights are, most notably, interferences – like the deprivation of liberty challenged in the present proceedings – for which the Basic Law itself directly provides for the requirement of a judicial decision, in this case under Art. 104(2) GG (cf. BVerfGE 96, 27 <40>; 104, 220 <233>). The use of physical restraints, which, by its nature, will often already be terminated before a judicial review can take place, amounts to such a serious interference with fundamental rights. 59

II.

[…] 60

III.

[…] 61

D.

To the extent that the constitutional complaints are admissible, they are well-founded. 62

The challenged decisions violate the fundamental rights of person concerned no. I and of complainant no. II under Art. 2(2) second and third sentences in conjunction with Art. 104(1) and (2) GG. In proceedings 2 BvR 309/15, § 25 PsychKHG BW does not satisfy the requirements of Art. 104(1) first sentence GG to the extent that it does not provide for an obligation to inform the persons concerned about the possibility of seeking a subsequent judicial review of the physical restraint measures. In proceedings 2 BvR 502/16, a statutory basis for the use of physical restraints and functionally equivalent measures is lacking altogether, contrary to the relevant requirement under Art. 104(1) GG. Moreover, in both proceedings, the physical restraint measures at issue constitute deprivations of liberty within the meaning of Art. 104(2) GG, yet the respective *Land* laws fail to specify a requirement that a judicial decision be obtained, as required under constitutional law. 63

I.

The use of physical restraints on patients constitutes an interference with their fundamental right to freedom of the person (Art. 2(2) second sentence in conjunction with Art. 104 GG) (1.). Both five-point and seven-point restraint measures that go beyond mere short-term application constitute a deprivation of liberty within the meaning of Art. 104(2) GG (2.). This also applies in cases where the persons concerned are already subject to a deprivation of liberty by way of confinement in a psychiatric hospital (3.). 64

1. Art. 2(2) second sentence GG states that freedom of the person is “inviolable”. This fundamental constitutional decision enshrines the right to freedom as a particularly high-ranking legal interest; interferences can only be justified by important reasons (cf. BVerfGE 10, 302 <322>; 29, 312 <316>; 105, 239 <247>). This right protects the actual physical freedom of movement, as provided for in the existing general legal order, against state interference (cf. BVerfGE 94, 166 <198>; 96, 10 <21>), that means against arrest, detention or similar measures that entail direct coercion (cf. BVerfGE 22, 21 <26>; 105, 239 <247>). 65

An interference with the personal (physical) freedom is contingent only upon the actual, natural will of the person concerned (cf. BVerfGE 10, 302 <309 and 310>). Lack of mental capacity does not preclude the protection of Art. 2(2) GG (cf. BVerfGE 58, 66

208 <224>; 128, 282 <301>); this protection is also guaranteed to persons with mental illnesses and persons who lack full legal capacity (cf. BVerfGE 10, 302 <309>; 58, 208 <224>). Mentally ill persons, in particular, often perceive restrictions of their liberty, the necessity of which cannot be conveyed to them, as especially threatening (cf. BVerfG, Order of the Second Chamber of the Second Senate of 10 June 2015 - 2 BvR 1967/12 -, juris, paras. 16 and 17).

2. a) Art. 2(2) second sentence GG protects against both restrictions of liberty (*freiheitsbeschränkende Maßnahme*; Art. 104(1) GG) and deprivations of liberty (*freiheitsentziehende Maßnahme*; Art. 104(2) GG); the case-law of the Federal Constitutional Court distinguishes between the two types of measures based on the intensity of the interference (cf. BVerfGE 105, 239 <248>). An act constitutes a restriction of liberty if someone is prevented by public authority, against their will, from going to a place, or staying at a place, which would otherwise be (factually and legally) accessible to them (cf. BVerfGE 94, 166 <198>; 105, 239 <248>). An act constitutes a deprivation of liberty, the most serious form of liberty restriction, (cf. BVerfGE 10, 302 <323>) if it cancels the freedom of movement – that would generally exist under the relevant factual and legal circumstances – in every respect (cf. BVerfGE 94, 166 <198>; 105, 239 <248>). Deprivation of liberty is characterised by the particular weight of the interference as well as by the duration of the measure, which goes beyond mere short-term application (cf. BVerfGE 105, 239 <250>; BVerfG, Order of the Third Chamber of the Second Senate of 21 May 2004 – 2 BvR 715/04 –, juris, para. 20; Order of the First Chamber of the First Senate of 8 March 2011 – 1 BvR 47/05 –, juris, para. 26; [...]). 67

b) At least the use of five-point or seven-point restraints, which entails that all limbs of the person concerned are strapped to a bed, constitutes a deprivation of liberty within the meaning of Art. 104(2) GG, unless it is only applied for a short period of time. A short-term application can generally be presumed where it is foreseeable that the measure will not last longer than approximately half an hour. In the event that the person concerned is strapped to the bed by way of five-point or seven-point restraints, their freedom of movement is completely cancelled, taking away the remaining freedom to move within the closed psychiatric ward – or at least within the respective patient room –, a freedom that had still been available while they were confined in a psychiatric hospital. This type of physical restraint is imposed to keep the persons concerned in their hospital beds, completely unable to move. 68

3. Where all limbs are physically restrained, and not merely for a short period of time, this qualifies as a separate act of deprivation of liberty due to the particular weight of the interference, even if the person concerned is already subjected to an ongoing deprivation of liberty; this type of restraint thus requires a separate judicial decision under Art. 104(2) first sentence GG. In the context of enforcing a confinement, the judicial order authorising the deprivation of liberty in the form of confinement does, in principle, cover disciplinary measures such as detention (cf. BVerfG, Order of the Second Chamber of the Second Senate of 8 July 1993 – 2 BvR 213/93 –, juris, para. 10) as well as special safety measures such as the confinement in a 69

smaller restricted area within the institution; by resorting to stricter means, these measures merely change the manner in which the deprivation of liberty already imposed is enforced (cf. BVerfGE 130, 76 <111>; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 2, 318 <323>).

However, compared to those measures, both five-point and seven-point restraints constitute interferences of such weight that they are not covered by the judicial order of confinement; and it is hence justified to qualify them as separate acts of deprivation of liberty (cf. Federal Court of Justice, *Bundesgerichtshof* – BGH, Order of 15 September 2010 – XII ZB 383/10 –, juris, para. 27; Order of 12 September 2012 – XII ZB 543/11 –, juris, para. 14; [...]). When these types of physical restraints are used, the freedom of movement of the persons concerned is completely cancelled in every respect. As a result, the freedom of movement is curtailed beyond the restrictions resulting from the confinement in a closed institution, i.e. the restriction of movements to the premises of the institution where the person is confined. 70

In the case of five-point or seven-point restraints, the particular intensity of the interference furthermore follows from the fact that the persons concerned experience an intentional interference with their freedom of movement as all the more threatening, the more the relevant situation makes them feel helpless and powerless (regarding coercive medical treatment cf. BVerfGE 128, 282 <302 and 303>). In addition, interferences that take place during confinement will often affect persons who, due to their psychological constitution, will be particularly sensitive to measures disregarding their will (cf. BVerfGE 128, 282 <302 and 303>). Furthermore, the persons concerned are completely dependent on timely assistance provided by care staff to deal with their bodily needs. Compared to other coercive measures, they therefore generally perceive the use of physical restraints as particularly harmful […]. In addition, even if restraints are applied correctly, there is a risk that the persons concerned suffer damage to their health, such as deep vein thrombosis or pulmonary embolism, due to the prolonged immobilisation […]. 71

II.

The legislature may, in principle, permit serious interferences with fundamental rights such as the use of physical restraints (1.).Yet the fundamental right to freedom of the person, in conjunction with the principle of proportionality, gives rise to strict requirements regarding the justification of such interferences: the statutory basis for the interference (Art. 104(1) GG) must be sufficiently specific (2.) and satisfy the relevant substantive (3.) and procedural requirements (4.) in order to protect the fundamental rights of confined persons. These requirements are in line with the relevant provisions of international law, in particular with the European Convention on Human Rights (ECHR) (5.). 72

1. a) Freedom of the person is such a high-ranking legal interest that interferences with it are only permissible for particularly weighty reasons (cf. BVerfGE 22, 180 73

<219>; 45, 187 <223>; 130, 372 <388>; established case-law). The restriction of this freedom must thus always be subjected to a strict review based on the principle of proportionality (cf. BVerfGE 58, 208 <224>; 128, 326 <372>). This applies in particular to preventive interferences that do not serve the purpose of retribution in terms of criminal justice. Such interferences are generally only permissible if they are necessary for the protection of others or the general public (cf. BVerfGE 90, 145 <172>; 109, 133 <157>; 128, 326 <372 and 373>).

b) However, the protection of the persons concerned themselves may also justify a restriction of freedom of the person. The fundamental right to life and physical integrity not only affords individuals a subjective right against state interferences with these legal interests. It also constitutes an objective decision on values enshrined in the Constitution that gives rise to duties of protection on the part of the state. Accordingly, the state is obliged to protect and promote the individual's right to life (cf. BVerfGE 39, 1 <42>; 46, 160 <164>; 90, 145 <195>; 115, 320 <346>; 142, 313 <337 para. 69>). Art. 2(2) first sentence GG also provides protection against impairments of physical integrity and health (cf. BVerfGE 56, 54 <78>; 121, 317 <356>; 142, 313 <337 para. 69>). It is for the legislature to decide on a concept of protection and to implement it through legislation; even where the legislature is obliged to take measures to protect a legal interest, it still enjoys, in principle, a margin of appreciation and evaluation as well as a leeway to design (cf. BVerfGE 96, 56 <64>; 121, 317 <356>; 133, 59 <76 para. 45>; 142, 313 <337 para. 70>). The duty of care incumbent upon the state and society may thus include the authority to confine persons with mental illnesses in a closed institution against their will, and to physically restrain them, if this is absolutely necessary to avert imminent and serious damage to their health; this applies where persons with mental illnesses are, due to their condition and the resulting lack of mental capacity, not able to comprehend the seriousness of their illness and the necessity of treatment, or if their illness prevents them from accepting treatment despite their understanding of the situation (regarding confinement cf. BVerfGK 11, 323 <329>). 74

c) According to these standards, the use of physical restraints on confined persons may be justified to avert imminent and serious damage to the health of the persons concerned themselves or other persons such as care staff or doctors. 75

2. Under Art. 104(1) first sentence GG, restrictions of the freedom guaranteed by Art. 2(2) second sentence GG require a formal statutory provision and must observe the formal requirements set out therein (cf. BVerfGE 58, 208 <220>; 105, 239 <247>). The formal guarantees of Art. 104 GG are inextricably linked to the substantive guarantee of freedom under Art. 2(2) second sentence GG (cf. BVerfGE 10, 302 <322>; 58, 208 <220>; 105, 239 <247>). 76

a) The general requirement under the rule of law (Art. 20(3) GG) that legal provisions be sufficiently specific already entails that the legislature must make provisions as specific as possible with regard to the particular nature of the subject matter to be regulated and in consideration of the legislative objective pursued (cf. BVerfGE 49, 77

168 <181>; 59, 104 <114>; 78, 205 <212>; 103, 332 <384>; 134, 141 <184 para. 126>; 143, 38 <60 and 61 paras. 55 et seq.>). […]

[…] 78

b) Art. 104(1) first sentence GG sets out more detailed standards regarding the requirement of legal specificity deriving from the principle of the rule of law and reinforces the requirement of a statutory provision already contained in Art. 2(2) third sentence GG (cf. BVerfGE 29, 183 <195>; 134, 33 <81 para. 111>). In particular, the constitutional provision obliges the legislature to specify, in a sufficiently clear manner, the cases in which a deprivation of liberty is to be permissible. Deprivations of liberty must be regulated in a predictable manner that allows for evaluation and review (cf. BVerfGE 29, 183 <196>; 109, 133 <188>; 131, 268 <306>; 134, 33 <81 para. 111>). In this regard, it must be taken into account that the interference with the fundamental right under Art. 2(2) second sentence GG resulting from preventive deprivations of liberty is as serious as the interference resulting from prison sentences (cf. BVerfGE 134, 33 <81 para. 111>). To this extent, the requirement of specificity provided for under Art. 104(1) GG is comparable to the one in Art. 103(2) GG (cf. BVerfGE 29, 183 <196>; 78, 374 <383>; 96, 68 <97>; 131, 268 <306>; 134, 33 <81 para. 111>). 79

3. The principle of proportionality gives rise to substantive requirements regarding the content of the relevant statutory basis. Physical restraints may only be used as an ultima ratio where less restrictive means are not available (anymore) (regarding coercive medical treatment cf. BVerfGE 128, 282 <309> with further references). In this respect, it must be taken into account that placing the persons concerned in seclusion may not always be considered a less restrictive means, since the intensity of its effects in the specific case can be equal to those of five-point or seven-point restraints. If persons placed in seclusion are not sufficiently monitored, seclusion also entails the risk of considerable damage to their health [...]. 80

4. The fundamental rights guarantees, in conjunction with the principle of proportionality, also give rise to procedural requirements for the authorities and the courts (cf. BVerfGE 51, 150 <156>; 52, 380 <389>; 52, 391 <407>; 101, 106 <122>; 128, 282 <311>; established case-law). In this respect, the requirements developed by the Federal Constitutional Court for ordering coercive medical treatment (cf. BVerfGE 128, 282 <311 et seq.>) largely apply accordingly to ordering the use of physical restraints. 81

a) Where persons confined in a closed institution are to be subjected to physical restraints, they are particularly in need of procedural safeguards with respect to their right to freedom of the person. The fact that the person concerned is confined in a closed institution and that for all parties involved, the possibility to rely on external support and assistance is limited creates an environment where confined persons are extremely vulnerable and in need of particular protection. In particular, they must be protected against the risk that only insufficient consideration is given to their funda- 82

mental rights, for instance due to vested interests of the institution or staff members – in particular in situations where staff members are overwhelmed when caring for patients that may at times be challenging –; due to a lack of adequate staffing to fulfil the tasks at hand; or due to the work routines in the respective institution (regarding coercive medical treatment cf. BVerfGE 128, 282 <311, 315>).

b) In order to ensure compliance with the principle of proportionality, it is indispensable that the use of physical restraints on persons confined in a closed psychiatric institution be ordered and supervised by a doctor (regarding coercive medical treatment cf. BVerfGE 128, 282 <313>; 129, 269 <283>; 133, 112 <138 para. 67>). This is also imperative for satisfying the requirements under international law, international human rights standards and the professional standards of psychiatry (cf. Art. 27(2) Recommendation No. R (2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorder of 22 September 2004; according to this recommendation, the use of physical restraints requires medical supervision […]). At least the use of five-point or seven-point restraints in confinement generally requires one-to-one supervision by medical or care staff for the entire duration of the measure, given the weight of the interference and the health risks associated with it. As a special safety measure for averting a danger posed by the persons concerned to themselves or others due to an underlying medical condition, the use of physical restraints must be closely linked to the psychiatric treatment provided in confinement in relation to the underlying medical condition. The necessity of such measures must be assessed in consideration of the psychiatric treatment measures – for instance prospects of success of talking to the patient or of providing medication – and must be reviewed in short intervals. 83

c) In order to pre-emptively safeguard the guarantee of effective legal protection under Art. 2(2) second and third sentences in conjunction with Art. 104(1) first sentence GG, it is necessary to document information on the ordering of the use of physical restraints against the natural will of confined persons; the relevant reasons for the measure; its implementation; its duration; and the type of supervision provided (regarding documentation requirements following from fundamental rights in other contexts cf. BVerfGE 65, 1 <70>; 103, 142 <160>; 128, 282 <313 and 314> with further references). On the one hand, documentation serves to ensure that legal protection is effective [...]. On the other, it also ensures that the interference is proportionate. Professional and proportionate conduct can only be ensured on the basis of detailed documentation, especially in environments, typical of hospitals, where the staff responsible for the measure frequently changes (cf. BVerfGE 128, 282 <314>). This holds true in particular for measures carried out over a longer period of time, which only satisfy the principle of proportionality if their effects are closely monitored and the necessary consequences are drawn from the resulting observations. In addition, documentation is also an indispensable means for systematic quality assurance and evaluation aimed at improvement (cf. BVerfGE 128, 282 <314>; 146, 294 <312 para. 33> with further references). 84

d) In addition, the fundamental right to freedom of the person (Art. 2(2) second and third sentences in conjunction with Art. 104(1) first sentence GG) gives rise to the obligation to inform the persons concerned about the possibility of having a court review the permissibility of the use of physical restraints after the measure has ended. [...] 85

5. The requirements set out above are in accordance with the European Convention on Human Rights, which serves as a guideline for interpretation when determining the content and scope of fundamental rights (cf. BVerfGE 111, 307 <317 and 318>; 142, 313 <345 para. 88>). The UN Convention on the Rights of Persons with Disabilities also does not give rise to a different conclusion. 86

a) The European Court of Human Rights measures the use of physical restraints on persons with mental illnesses against Art. 3 of the European Convention on Human Rights (ECHR) (cf. ECtHR <GC>, Jalloh v. Germany, Judgment of 11 July 2006, No. 54810/00, §§ 79, 106; ECtHR, Wiktorko v. Poland, Judgment of 31 March 2009, No. 14612/02, § 55), which includes an absolute prohibition of torture and inhuman or degrading treatment (cf. ECtHR <GC>, Labita v. Italy, Judgment of 6 April 2000, No. 26772/95, § 119; ECtHR <GC>, Kudła v. Poland, Judgment of 26 October 2000, No. 30210/96, § 90; established case-law), irrespective of the conduct of the person concerned (cf. ECtHR, Raninen v. Finland, Judgment of 16 December 1997, No. 152/1996/771/972, § 55; ECtHR <GC>, Labita v. Italy, Judgment of 6 April 2000, No. 26772/95, § 119; ECtHR <GC>, Kudła v. Poland, Judgment of 26 October 2000, No. 30210/96, § 90; ECtHR, Nevmerzhitsky v. Ukraine, Judgment of 5 April 2005, No. 54825/00, § 79; established case-law). 87

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of protection of this provision. In this regard, the circumstances of the case, in particular the duration of the treatment, its physical or mental effects, the sex, age and state of health of the persons concerned must be taken into account (cf. ECtHR, Raninen v. Finland, Judgment of 16 December 1997, No. 152/1996/771/972, § 55; ECtHR <GC>, Labita v. Italy, Judgment of 6 April 2000, No. 26772/95, § 120; ECtHR <GC, Kudła v. Poland, Judgment of 26 October 2000, No. 30210/96, § 91; ECtHR <GC>, Jalloh v. Germany, Judgment of 11 July 2006, No. 54810/00, § 67; established case-law). Treatment is degrading where it arouses in the persons concerned feelings of fear, anguish and inferiority, which goes beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment; the question whether the purpose of the treatment was to humiliate or debase the person concerned is a further factor to be taken into account (cf. ECtHR <GC>, Labita v. Italy, Judgment of 6 April 2000, No. 26772/95, § 120; ECtHR <GC>, Kudła v. Poland, Judgment of 26 October 2000, No. 30210/96, § 92; EGMR, Keenan v. The United Kingdom, Judgment of 3 April 2001, No. 27229/95, § 110; ECtHR, Price v. The United Kingdom, Judgment of 10 July 2001, No. 33394/96, § 24; ECtHR, Mouisel v. France, Judgment of 14 November 2002, No. 67263/01, § 37). 88

According to the ECtHR's case-law, in respect of persons deprived of their liberty, recourse to physical force which is not strictly necessary due to their own conduct diminishes human dignity (cf. ECtHR <GC>, Labita v. Italy, Judgment of 6 April 2000, No. 26772/95, § 120; ECtHR, Keenan v. The United Kingdom, Judgment of 3 April 2001, No. 27229/95, § 113; ECtHR, Bureš v. The Czech Republic, Judgment of 18 October 2012, No. 37679/08, § 86). In the context of detention, the ECtHR held that it is up to the public authorities to justify the use of restraints on a detained person. The ECtHR further held that the use of restraining belts in cases of aggressive behaviour on the part of the persons concerned requires that checks be periodically carried out on the health and welfare of the persons concerned. The use of such restraints must be necessary and its length must not be excessive (ECtHR, Wiktorko v. Poland, Judgment of 31 March 2009, No. 14612/02, § 55; ECtHR, Bureš v. The Czech Republic, Judgment of 18 October 2012, No. 37679/08, § 86). These requirements do not go beyond the standards deriving from Art. 2(2) second sentence GG. 89

b) The provisions of the UN Convention on the Rights of Persons with Disabilities (CRPD) does also not suggest a different conclusion. Firstly, these provisions only have the rank of a federal statute (cf. Act on the Convention of the United Nations of 13 December 2006 on the Rights of Persons with Disabilities as well as on the Optional Protocol of 13 December 2006 to the Convention of the United Nations on the Rights of Persons with Disabilities of 21 December 2008, Federal Law Gazette, *Bundesgesetzblatt* – BGBl II p. 1419). Secondly, they do not generally rule out the permissibility of the use of physical restraints that goes beyond mere short-term application in substance. Both persons with mental illnesses and persons with drug addictions are persons with disabilities within the meaning of Art. 1(2) CRPD [...]. Therefore, coercive measures directed at them fall within the scope of application of the Convention. However, the Federal Constitutional Court has already established that the provisions of the Convention – in particular Art. 12 CRPD –, which aim to safeguard and strengthen the autonomy of persons with disabilities, do not give rise to a general prohibition of measures carried out against the natural will of the persons concerned and tied to their limited capacity for self-determination resulting from their illness (regarding coercive medical treatment cf. BVerfGE 128, 282 <306 and 307>; 142, 313 <345 para. 88>). Nevertheless, the Convention requires States parties to create appropriate safeguards protecting the persons concerned against conflicts of interest, abuse and disrespect of their rights, and to ensure proportionality (cf. BVerfGE 128, 282 <307>; 142, 313 <345 para. 88>). Pursuant to Art. 12(4) second sentence CRPD, these safeguards also include that such [coercive] measures "apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body". In addition, pursuant to Art. 15(2) CRPD, States parties must take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment. 90

In its concluding observations on the initial report of Germany, the Committee on the 91

Rights of Persons with Disabilities recommended that Germany carry out a review with a view to formally abolishing all practices regarded as acts of torture, namely prohibit the use of physical and chemical restraints in institutions for persons with disabilities (cf. UN document CRPD/C/DEU/CO/1 of 13 May 2015, p. 6 § 34). In this respect, the Committee refers to the view of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Juan E. Mendéz, according to which any use of restraints – even for a short period of time – can be considered an act of torture and ill-treatment (cf. the report of the UN Special Rapporteur of 1 February 2013, which calls for an absolute ban on the use of physical restraints [UN Doc. A/HRC/22/53, p. 16, 26], available at www.ohchr.org). However, according to Arts. 34 et seq. CRPD, the Committee has no mandate to issue binding interpretations of the text of the Convention. It is also not competent to further develop international conventions beyond the agreements and practices of the treaty parties (cf. Art. 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, UNTS 1155, 331 <340>, BGBl II 1985 p. 926, affirming customary international law; [...]). While its statements have significant weight, they are not binding on international tribunals or domestic courts (cf. BVerfGE 142, 313 <346 para. 90> with further references).

92 In respect of an immediate danger posed by persons with mental illnesses to the life and physical integrity of themselves and of third parties, the blanket assumption that qualifies any type of physical restraint as torture or degrading and inhuman treatment seems to go too far. The medical practitioners who testified in the oral hearing before the Court all agreed that it was not possible to completely forgo the use of physical restraints or functionally equivalent measures in certain situations of immediate danger. The Committee, which also rejects other safety measures such as sedation and seclusion, does not provide any answers, based on its interpretation of the text of the Convention, to the question of how to deal with persons who cannot (or no longer) be reached by means of communication and who pose an immediate danger to themselves or others – in this regard, the Committee mirrors its approach regarding coercive medical treatment (cf. BVerfGE 142, 313 <347 and 348 para. 91>). In any case, the strict requirements under constitutional law for the use of physical restraints on confined persons – i.e. a sufficiently specific legal basis, procedural safeguards and strict compliance with the principle of proportionality – ensure that the Federal Republic of Germany can meet its obligations under Art. 12(4) in conjunction with Art. 15 CRPD.

III.

93 1. For measures amounting to a deprivation of liberty, Art. 104(2) GG adds the additional procedural requirement that a judicial decision be obtained; this requirement, which is not subject to legislative discretion, applies in addition to the requirement of a (formal) statutory provision applicable to interferences with the fundamental right to inviolable freedom of the person under Art. 2(2) third sentence GG (cf. BVerfGE 105, 239 <248>).

Art. 104(2) fourth sentence GG obliges the legislature to enact provisions that specify the requirement of a judicial decision in procedural terms. The effectiveness of the protection of fundamental rights afforded by the requirement that a judicial decision be obtained depends, to a significant extent, on the procedural regulations governing the respective subject area […]. In order to give consideration to the specific characteristics of the different contexts in which such measures are applied, the legislature must provide for a procedural regime that is tailored to the respective measure of deprivation of liberty. It must also ensure that before the deprivation of liberty is enforced, persons concerned are afforded all safeguards deriving from the rule of law that are provided in judicial proceedings (cf. BVerfGE 83, 24 <32>). 94

Even though Art. 104(2) GG already contains a directly applicable legal guarantee (cf. BVerfGE 10, 302 <329>; on Art. 13(2) GG see also BVerfGE 51, 97 <114>; 57, 346 <355>), the legislature's regulatory duty to set out the requirement of a judicial decision following from Art. 104(2) fourth sentence GG is by no means obsolete. For reasons of legal certainty, this particularly applies where it is necessary to distinguish between a mere restriction of liberty or an existing deprivation of liberty that is only further intensified on the one hand, and a (new) deprivation of liberty on the other hand. If this distinction is not specified in a legal provision, it will be left to the attending doctors as private actors to determine whether the use of physical restraints requires a judicial decision. Where the legislature fails to fulfil its constitutional duty and, as a consequence, a statutory legal basis does not include provisions setting out the requirement of a judicial decision, which would be required under constitutional law, the legal provision is unconstitutional (cf. BVerfGE 141, 220 <294 para. 174>). 95

2. The requirement that a judicial decision be obtained serves to strengthen and safeguard the fundamental right of Art. 2(2) second sentence GG (BVerfGE 105, 239 <248>). It aims at preventive oversight of the measure by an independent and neutral body (on Art. 13(2) GG cf. BVerfGE 57, 346 <355 and 356>; 76, 83 <91>; 103, 142 <151>). The Basic Law rests on the assumption that judges are the best and most reliable guarantors for ensuring that the rights of the persons concerned are respected in the individual case, due to the personal and professional independence of judges and the fact that they are bound only by the law (Art. 97 GG) (cf. BVerfGE 77, 1 <51>). It is incumbent upon all state organs to ensure that the requirement that a judicial decision be obtained, as a means of safeguarding fundamental rights, takes effect in practice (cf. BVerfGE 103, 142 <151 and 152>; 105, 239 <248>). As a result, the state is obliged under constitutional law to guarantee that a competent judge is available – at least during daytime hours – and to provide the judges with the means to adequately exercise their judicial functions in this regard (cf. BVerfGE 103, 142 <156>; 105, 239 <248>; 139, 245 <267 and 268 paras. 62 et seq.>; […]). 96

Pursuant to Art. 104(2) first sentence GG, only judges are allowed to decide whether a deprivation of liberty is permissible and whether it may be continued. The term "decision" entails that judges take complete responsibility for the measure (cf. BVerfGE 10, 302 <310>; 22, 311 <317 and 318>). […] As a neutral oversight body, they are 97

obliged to ensure, within the limits of what is possible and reasonable, that the interference with fundamental rights remains subject to evaluation and review, including in terms of its duration and intensity (cf. BVerfGE 103, 142 <151>). This also applies if the deprivation of liberty is ordered by private actors, as in the present case.

3. The deprivation of liberty must, in principle, be authorised by prior judicial order (cf., e.g., BVerfGE 10, 302 <321>; 22, 311 <317>; 105, 239 <248>; […]). Seeking a judicial decision only after the measure has already begun is permissible solely in cases where the deprivation of liberty serves a legitimate constitutional goal that could not be achieved if a judicial decision had to be obtained first (cf. BVerfGE 22, 311 <317>; 105, 239 <248> with further references). Yet this will frequently be the case where the use of five-point or seven-point restraints is ordered to avert an immediate danger posed by the persons concerned to themselves or others. 98

4. In such cases, Art. 104(2) second sentence GG requires that a judicial decision be obtained without undue delay (*unverzüglich*) (cf. BVerfGE 10, 302 <321>; 105, 239 <249>). The constituent element “without undue delay” must be interpreted as requiring that a judicial decision be obtained without any delay not justified by factual reasons (cf. BVerfGE 105, 239 <249>; […]). Delays that cannot be avoided are, for instance, delays caused by distances, difficulties regarding transport, fulfilling the necessary registration and documentation requirements, or disruptive behaviour of the persons concerned (cf. BVerfGE 105, 239 <249>; BVerfGK 7, 87 <99>; […]). 99

Factual reasons justifying delays in obtaining a judicial decision may also arise from necessary procedural safeguards that serve to protect the person concerned. In confinement proceedings, the persons concerned must be heard in person (§ 319 of the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction, *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* – FamFG). The guardian *ad litem* must generally be involved (§ 315(2) FamFG). In the interests of the persons concerned, family members or other close persons may also be involved (§ 315(4) FamFG). Other parties to the proceedings must also be heard (§ 319 and 320 FamFG). In some cases, it may be necessary to provide an interpreter for the hearings. Where the use of five-point or seven-point restraints subjects persons already confined to an (additional) deprivation of liberty, these procedural safeguards must apply accordingly. If a doctor orders, on permissible grounds, the use of physical restraints during night time without obtaining a prior judicial decision, it will therefore generally only be possible to obtain a subsequent judicial decision without undue delay the following morning (from 6:00 a.m.). In this context, on-call duty performed by judges on all days of the week is imperative for ensuring the protection of the persons concerned; taking guidance from § 758a(4) second sentence of the Code of Civil Procedure (*Zivilprozessordnung* – ZPO), the judicial on-call duty must cover the time period from 6:00 a.m. to 9:00 p.m. (cf. BVerfGE 105, 239 <248>; 139, 245 <267 and 268 para. 64>, still referring to § 104(3) of the Code of Criminal Procedure, *Strafprozessordnung* – StPO). 100

5. A judicial decision is not required (anymore) in cases where it is foreseeable at the beginning of the measure that a decision cannot be obtained in time before the reason for the measure becomes moot. The same holds true where the measure will have been terminated before a decision can be obtained and it is not expected that the measure will be repeated [...]. In such a case, compliance with the procedure set out in Art. 104(2) GG would not put the persons concerned in a better, but rather in a worse position, since a deprivation of liberty no longer justified by a factual reason would be prolonged due to the necessity of obtaining a subsequent judicial decision (cf. BVerfGE 105, 239 <251>). A subsequent judicial decision under Art. 104(2) second sentence GG concerns the question whether the deprivation of liberty may be continued; it does not, however, serve to only provide an *ex-post* review of the non-judicial order of a deprivation of liberty that has become moot […]. […] 101

Accordingly, in cases where five-point or seven-point restraints are used on patients beyond mere short-term application (cf. para. 68 above), hospitals have to take the necessary steps for obtaining a judicial decision without undue delay unless it is clearly foreseeable that the use of restraints will be terminated before a judicial decision can be obtained. If hospital staff, after having applied for a judicial decision, finds that further restraining is no longer necessary to avert a danger posed by the patient to him or herself or others, and if the restraint measure is thus terminated, the application to the court can be withdrawn [...]. Art. 104(2) second sentence GG aims to achieve subsequent oversight without undue delay of an – ongoing – deprivation of liberty; such oversight can no longer be achieved by means of a judicial decision once the measure is terminated because the factual reason justifying it no longer exists […]. 102

This interpretation of Art. 104(2) GG is in accordance with the European Convention on Human Rights and the case-law of the European Court of Human Rights. The Convention does also not require that retroactive legal protection in respect of deprivations of liberty be provided *ex officio.* This is illustrated by the fact that Art. 5(4) ECHR guarantees a judicial review regarding the lawfulness of a deprivation of liberty only on the initiative of the person concerned (cf. ECtHR, Shchebet v. Russia, Judgment of 12 June 2008, No. 16074/07, § 77: […]). 103

6. Nonetheless, the persons concerned are not precluded from having a court retroactively review the lawfulness of the measure as the recognised legal interest in bringing judicial proceedings persists in cases of serious interferences with fundamental rights (see para. 59 above). The persons concerned must furthermore be informed about the possibility of having a court review the permissibility of the use of physical restraints after the measure has ended (see para. 85 above). 104

IV.

According to these standards, the constitutional complaints are well-founded. The decision of the Local Court on the basis of § 25 PsychKHG BW violates the fundamental right of person concerned no. I arising from Art. 2(2) second and third sen- 105

tences in conjunction with Art. 104(1) first and second sentences GG (1.) The decision of the Higher Regional Court on the basis of Art. 12(1) in conjunction with Art. 19 BayUnterbrG violates the fundamental right of complainant no. II arising from Art. 2(2) second and third sentences in conjunction with Art. 104(1) first and second sentences GG (2.).

1. For the most part, § 25 PsychKHG BW satisfies the requirements of Art. 2(2) second and third sentences in conjunction with Art. 104(1) first sentence GG (a). However, § 25 PsychKHG BW does not set out any requirement that the person concerned be informed, upon termination of the use of restraints or a functionally equivalent measure, about the possibility to seek a judicial review of the lawfulness of the relevant measure (b). Moreover, the legislature did not fulfil its regulatory duty deriving from Art. 104(2) fourth sentence GG to the extent that even for five-point or seven-point restraints, § 25(3) PsychKHG BW requires only a doctor's order, rather than a judicial decision (c). The decision of the Local Court rejecting the action seeking a declaration that the doctor's order authorising the use of five-point restraints was unlawful violates the fundamental right of person concerned no. I under Art. 2(2) second and third sentences in conjunction with Art. 104(1) first and second sentences GG, since there was no constitutional statutory basis for the use of five-point restraints on the person concerned (d). 106

a) § 25 PsychKHG BW does not fully satisfy the formal and substantive requirements deriving from Art. 2(2) second and third sentences in conjunction with Art. 104(1) first sentence GG and the principle of proportionality. 107

aa) The provision governs the restriction of liberty based on an important reason. [...] The safety of the institution, and in particular the required protection of the life and physical integrity of the person concerned or third parties, would not be sufficiently guaranteed if hospital staff were not allowed to restrict the personal freedom of the person concerned where necessary. 108

bb) Moreover, the requirement of an immediate and serious danger in § 25 PsychKHG BW sets a high threshold for interferences. [...] 109

cc) The procedural provisions of § 25(3) and (4) PsychKHG BW – namely the requirement that physical restraint measures be ordered by a doctor, the documentation requirements and the requirement that the measure be accompanied by direct, personal and, in principle, constant supervision by means of visual and voice contact to the person concerned (cf. Baden-Würtemberg *Landtag* document, *Landtagsdrucksache* – LTDrucks 15/5521, p. 44) – satisfy the requirements arising under the principle of proportionality. 110

b) Contrary to the obligation arising from the fundamental right to freedom of the person, however, § 25 PsychKHG does not set out any requirement that the person concerned be informed, upon termination of the use of restraints or a functionally equivalent measure, about the possibility to seek a judicial review of the lawfulness of the 111

relevant measure. In this respect, § 25 PsychKHG BW does not satisfy the requirements of Art. 2(2) second and third sentences in conjunction with Art. 104(1) first sentence GG.

c) Furthermore, the Baden-Württemberg legislature did not fulfil its constitutional regulatory duty under Art. 104(2) fourth sentence GG, since it has not enacted provisions regarding judicial orders authorising the use of physical restraints that amount to a deprivation of liberty. Even [...] for five-point and seven-point restraints, insofar as they constitute a deprivation of liberty within the meaning of Art. 104(2) first sentence GG (see para. 68 above), the Baden-Württemberg legislature only provided for the requirement of a doctor's order, rather than for the requirement of a judicial decision. To that extent, § 25 PsychKHG BW is not compatible with Art. 2(2) second and third sentences in conjunction with Art. 104(2) GG. 112

d) According to these standards, the challenged order of the Ludwigsburg Local Court in proceedings 2 BvR 309/15 violates the fundamental right of person concerned no. I under Art. 2(2) second and third sentences in conjunction with Art. 104(1) and (2) GG, because the use of physical restraints on him, which the court had confirmed as lawful, was not based on a constitutional statutory basis. It is primarily incumbent upon the regular courts to also review the compatibility of the invoked legal basis with the Basic Law, to grant preliminary legal protection where necessary and, if the outcome of the review [of constitutionality] is negative, to refer the matter to the Federal Constitutional Court by way of an application for specific judicial review of statutes (*konkrete Normenkontrolle*, Art. 100(1) GG). […] 113

The Local Court expressly pointed out that the Baden-Württemberg legislature had granted doctors of recognised institutions the authority to order special safety measures but, in contrast to the provisions governing coercive medical treatment in § 20 PsychKHG BW, had not provided for the requirement of a judicial decision in relation to special safety measures. The court held that it could therefore only review the use of physical restraints, as a measure in the context of enforcing a confinement pursuant to § 327(1) FamFG, as to whether the doctors had observed the provision of § 25 PsychKHG BW when ordering the measure in question. It thus only reviewed whether the ordering of the use of restraints had been lawful on the part of the doctors without calling into question the constitutionality of the legal basis on the grounds that it did not provide for a requirement of a judicial decision. 114

2. The challenged decision of the Munich Higher Regional Court on the basis of Art. 12(1) in conjunction with Art. 19 BayUnterbrG violates the fundamental right of complainant no. II arising from Art. 2(2) second and third sentences in conjunction with Art. 104(1) and (2) GG. Contrary to the view of the Higher Regional Court, Art. 12(1) in conjunction with Art. 19 BayUnterbrG provides no sufficient statutory basis for using physical restraints on complainant no. II, since the provisions neither satisfy the requirements of legal specificity under Art. 104(1) GG (a), nor require a judicial decision for the deprivation of liberty resulting from the use of seven-point restraints in the 115

present case (b).

[…] 116-118

E.

I.

The fact that § 25 PsychKHG BW is partially unconstitutional as regards the use of physical restraints does not lead to the provision being partially void. Under the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the unconstitutionality of a law does not always result in the law being void (§ 95(3) first sentence BVerfGG); rather, it also allows for a mere declaration that the law is incompatible with the Basic Law (§ 31(2) third sentence BVerfGG). A declaration of incompatibility, together with an order to temporarily continue the application of the unconstitutional provision, may be considered in cases where the immediate invalidity of the objectionable provision would eliminate the basis for the protection of paramount public interests, or of interests on the part of the persons concerned or third parties protected by fundamental rights, and the outcome of a balancing of these interests against the affected fundamental rights suggests that the interference be tolerated for a transitional period (cf. BVerfGE 85, 386 <400 and 401>; 141, 220 <351 para. 355>). 119

This is the case here. The use of physical restraints generally serves to counter, in exceptional circumstances, an immediate and serious danger to the life and physical integrity of the persons concerned and third parties. For this purpose, it may be permissible where the person concerned poses such a danger to him or herself or others and it is not possible to handle the situation without the use of physical restraints. If § 25 PsychKHG BW, insofar as it concerns the ordering of physical restraints, were declared void with immediate effect, this would result in such measures no longer being permissible in Baden-Württemberg under any circumstances until a legal basis that satisfies the constitutional requirements was enacted, leaving the legislature and professionals in the field no possibility to adapt to the new situation and to develop alternative means providing equivalent protection. This would result in a gap in protection as it would put at risk the fundamental rights of confined persons, hospital staff and other patients, and would likely impair them during this period. 120

When balancing the constitutional shortcomings of § 25 PsychKHG BW against the constitutional shortcomings resulting from the lack of protection of life and physical integrity in the event that physical restraints could not be used on a confined person posing an immediate danger to him- or herself or others, the protection of the legal interests under Art. 2(2) first sentence GG prevails. The shortcomings of the Baden-Württemberg Act regarding Assistance and Protective Measures for Persons with Mental Illnesses […] concern the procedural requirements of a measure that is, in principle, permissible in substantive terms. If the provision was declared partially void, the substantive protection of the fundamental rights of the persons concerned and 121

third parties as such would be jeopardised. Therefore, the ordering of the use of physical restraints on the basis of § 25 PsychKHG must be tolerated for a transitional period subject to the transitional arrangements set out by the Court (see paras 124 et seq. below).

II.

There is no basis for reversing the order of the Ludwigsburg Local Court of 4 February 2015. The challenged order became moot when person concerned no. I was discharged from hospital. [...] 122

The judgment of the Munich Higher Regional Court of 4 February 2016 is reversed. The matter is remanded to the Munich Higher Regional Court (§ 95(2) BVerfGG). 123

III.

1. In the *Land* Baden-Württemberg, the requirement that a judicial decision be obtained, deriving from Art. 104(2) GG and applicable at least to five-point and seven-point restraints, must be directly applied during a transitional period until 30 June 2019. During this period, the procedural regulations in §§ 312 et seq. and §§ 70 et seq. FamFG can be applied accordingly. […] 124

In addition, during the transitional period, the fundamental right to freedom of the person (Art. 2(2) second sentence in conjunction with Art. 104 GG) directly imposes an obligation on the attending doctors to inform the persons concerned about the possibility to seek a judicial decision after the end of the measure. 125

2. In the Free State of Bavaria, there is currently no constitutional statutory basis at all for ordering the use of physical restraints on persons confined under public law in a psychiatric hospital. Nevertheless, the use of such measures may be permissible during a transitional period until 30 June 2019. 126

a) The Federal Constitutional Court may temporarily tolerate an unconstitutional situation in order to avoid a situation that would be even more at odds with the constitutional order than the current situation (cf. BVerfGE 33, 1 <12 and 13>; 33, 303 <347>; 41, 251 <267>; 45, 400 <420>; 48, 29 <37 and 38>; 85, 386 <401>). 127

As long as the Bavarian legislature has not yet decided how it intends to remedy the situation of unconstitutionality and whether it wants to continue the practice of using physical restraints as a special safety measure, a gap in protection would also arise in the Free State of Bavaria given the lack of a statutory basis authorising such measures in the context of confinement under public law [...] (see para. 120 above). In that respect as well, it is necessary to balance the established constitutional shortcomings against the consequences of an immediate ban on physical restraints: in this regard, the interest in permitting, temporarily, the use of physical restraints for the purposes of protecting the legal interests deriving from Art. 2(2) first sentence GG prevails. [...] 128

b) However, this does not mean that, during the transitional period, it would be permissible to use physical restraints on confined persons at will in the Free State of Bavaria. Rather, given the high value attached to the fundamental right to freedom of the person, any use of physical restraints must be subject to close monitoring with regard to whether and how long the measure is indispensable to avert an immediate and serious danger posed by the persons concerned to themselves or to significant legal interests of others. Additionally, at least for the use of five-point or seven-point restraints, the requirement deriving from Art. 104(2) GG that a judicial decision be obtained is directly applicable, as set out above for the *Land* Baden-Württemberg (see para. 124 above). The persons concerned must also be informed about the possibility of seeking a judicial review of the measure after it has ended (see para. 125 above). 129

IV.

The fundamental right to freedom of the person requires a strict limitation of the transitional period (cf. BVerfGE 109, 190 <239>). Therefore, the legislatures of both *Länder* are obliged to ensure conformity with the Constitution as soon as possible, at the latest by 30 June 2019 (cf. BVerfGE 85, 386 <402>). 130

V.

[…] 131

Voßkuhle Huber Hermanns

Müller Kessal-Wulf König

Maidowski

Bundesverfassungsgericht, Urteil des Zweiten Senats vom 24. Juli 2018 - 2 BvR 309/15, 2 BvR 502/16

Zitiervorschlag BVerfG, Urteil des Zweiten Senats vom 24. Juli 2018 - 2 BvR 309/15, 2 BvR 502/16 - Rn. (1 - 131), http://www.bverfg.de/e/rs20180724_2bvr030915en.html

ECLI ECLI:DE:BVerfG:2018:rs20180724.2bvr030915