

FEDERAL CONSTITUTIONAL COURT

- 1 BVR 1778/01 -

**In the proceedings  
on  
the constitutional complaint**

1. of Ms. B. . . .

and of another 89 complainants,

. . . .

- Professor Dr. Jan Ziekow,  
Gartenstraße 3, 67361 Freisbach -

against the Gesetz zur Bekämpfung gefährlicher Hunde (Fight  
against Dangerous Dogs Act) of 12th April, 2001 (Bundesgesetzblatt [BG-  
Bl, Federal Law Gazette] I, p. 530) and § 11 of the Tierschutz-  
Hundeverordnung (Animal Protection Decree on Dogs) of 2nd May, 2001  
(BGBl I, p. 838)

here: Motion for a temporary injunction concerning the complainants bringing the  
constitutional complaints 1 to 41

the Second Chamber of the First Senate of the Federal Constitutional Court,  
through Judges

Jaeger  
Hömig, and  
Bryde

unanimously decided . . . on 23rd November, 2001:

The motion for a temporary injunction is rejected as being unfounded.

**Extract from grounds:**

The subject matter of the proceeding is a motion by dog breeders to suspend, for  
the time being, the application of the *Gesetz zur Bekämpfung gefährlicher Hunde*  
(Fight against Dangerous Dogs Act) of 12th April, 2001 (*Bundesgesetzblatt* [BGBl,  
Federal Law Gazette] I, p. 530) and of § 11 of the *Tierschutz-Hundeverordnung* (Ani-  
mal Protection Decree on Dogs) of 2nd May, 2001 (BGBl I, p. 838).

1

**I.**

1. The *Gesetz zur Beschränkung des Verbringens oder der Einfuhr gefährlicher  
Hunde in das Inland (Hundeverbringungs- und -einfuhrbeschränkungsgesetz - Hund-  
VerbrEinfG; Act Restricting the Introduction of Dangerous Dogs from Member States*

2

of the European Union and Third Countries into the Domestic Territory) has been enacted as Article 1 of the Fight against Dangerous Dogs Act. Pursuant to § 2.1, sent. 1 of the HundVerbrEinfG, dogs of the breeds that are listed in this sentence may not be introduced into the territory of the Federal Republic of Germany from member states of the European Union and from third countries. Pursuant to § 2.1, sent. 2 of the HundVerbrEinfG, dogs that belong to other breeds the dangerousness of which is presupposed in the regulations of the *Land* (federal State) in which the dog will be permanently kept may not be introduced into this *Land* from abroad. Apart from this, the . . . Act contains provisions that concern the control of the fulfilment of the duties that result from the Act or from decrees that are issued on the basis of the Act; moreover, the Act contains: (1) provisions as to offences that are punishable by imprisonment, fines or administrative fines; and (2) a regulation on the confiscation of dogs and other objects that are connected with corresponding acts.

Article 2 of the Fight against Dangerous Dogs Act has amended the *Tierschutzgesetz* (TierSchG, Animal Protection Act). Pursuant to this Article, § 11b.2.a of the Animal Protection Act (new version) prohibits to breed vertebrate animals, or to modify them by way of biotechnological measures or genetic engineering, if it can be expected that their offspring will show: (1) hereditary behavioural disturbances that involve suffering; or (2) a hereditary increase in aggressiveness. § 11b.5 of the Animal Protection Act empowers the competent Federal ministry: (1) to specify the hereditary modifications and behavioural disturbances and the hereditary increase in aggressiveness under §§ 11b.1 and 11.b.2 of the Animal Protection Act, and (2) to impose a ban, or restrictions, on the breeding of vertebrates that belong to specific species, breeds, or lines if breeding can result in infringements of §§ 11b.1 and 11b.2; the Federal Ministry may do so by way of decrees that require the consent of the *Bundesrat* (the council of *Länder* Governments). Pursuant to § 11, sent. 3 of the Animal Protection Decree on Dogs of 2nd May, 2001 (BGBl I, p. 838), which was enacted, *inter alia*, on this basis, a hereditary increase in aggressiveness under the terms of § 11b.2 of the Animal Protection Act can be presupposed in the case of Pit Bull Terriers, Staffordshire Bull Terriers, American Staffordshire Terriers, Bull Terriers and crossbreeds with such animals.

Finally, Article 3 of the Fight against Dangerous Dogs Act has inserted a new § 143 in the *Strafgesetzbuch* (the German Criminal Code). Pursuant to § 143, breeding and trading dangerous dogs contrary to a ban imposed by way of regulations under *Land* law will be punished by up to two years' imprisonment or a fine. The same measure of punishment applies if a dangerous dog is kept without the required permit or contrary to an enforceable ban.

2. By way of their constitutional complaint that they have filed simultaneously, the complainants, who breed dogs that are covered by the challenged regulations, and some of whom intend to introduce such dogs into the Federal territory from third countries, claim that the challenged Act infringes Article 2.1, Article 3.1, Article 12.1, Article 13, Article 14.1 and Article 103.2 of the Basic Law.

## II.

By way of their motion for a temporary injunction, the applicants assert that the constitutional complaint is neither inadmissible nor patently unfounded. They further argue that it cannot be expected that the Federal Constitutional Court will pronounce its decision in the constitutional complaint proceeding so speedily that this can avert the serious detriment that already threatens the applicants at present. In the complainants' opinion, the weighing of consequences that is therefore required shows a clear predominance of the negative effects that would arise in the event that the temporary injunction is not issued.

6

## III.

The motion is admissible but unfounded.

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1. Pursuant to § 32.1 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG, Federal Constitutional Court Act), the Federal Constitutional Court may, in a dispute, deal with a matter provisionally by means of a temporary injunction if this is urgently required to avert serious detriment, to prevent imminent violence or for any other important reason of public interest. When doing so, the Federal Constitutional Court must, in principle, leave the reasons that are given to substantiate the allegation of the unconstitutionality of the challenged Act out of consideration unless the constitutional complaint, from the outset, proves to be inadmissible or patently unfounded. If the outcome of the constitutional complaint proceeding could go in either direction, the Federal Constitutional Court must weigh (1) the consequences that would arise in the event that a temporary injunction is not issued but the underlying constitutional complaint were eventually granted against (2) the negative effects that would arise if the requested temporary injunction is granted but the underlying constitutional complaint is later unsuccessful. A particularly strict standard is to be applied in such weighing of consequences when, as in the case at hand, a legal regulation is supposed to be suspended (cf. BVerfGE [Decisions of the Federal Constitutional Court] 94, p. 334 [at pp. 347-348]; 96, p. 120 [at pp. 128-129]). The Federal Constitutional Court may only with utmost restraint make use of its power to suspend a law (cf. BVerfGE 82, p. 310 [at p. 313]) because a temporary injunction against a law is always a considerable intervention in parliament's legislative discretion.

8

2. In the case at hand, the matter can be decided without having to resolve whether and to what extent the constitutional complaint is admissible. The same applies to the question whether the constitutional complaint is patently unfounded. This is because the result of the required weighing of consequences clearly goes against the applicants.

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a) If the requested temporary injunction is not granted but the underlying constitutional complaint later on proves to be well-founded, the provisions of the Fight against Dangerous Dogs Act and of § 11 of the Animal Protection Decree on Dogs are applicable until the decision in the constitutional complaint proceeding is pronounced.

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This means first and foremost that the breeders of dogs that are specified in the regulations will temporarily suffer economic disadvantages, in particular due to: (1) the ban under § 2.1 of the HundVerbrEinfG on introducing specified dogs from member states of the European Union and third countries into the domestic territory; and (2) the ban on breeding that results from § 11b.2 of the Animal Protection Act in conjunction with § 11 of the Animal Protection Decree on Dogs; according to the applicants' statements, the disadvantages will be considerable in the case of some breeders. According to the applicants' statements, it can also not be precluded that, in the event that the constitutional complaint is successful, it will, in many cases, no longer be possible to continue breeding with the existing dogs if no temporary injunction has been issued. In this respect, it must, however, be taken into account that: (1) despite the applicants' statement that their economic existence is threatened, all applicants, with the exception of the applicants bringing the constitutional complaints 9, 10, and 37, have indicated, as their occupations, activities other than that of a dog breeder; and that (2) the sales revenues that are stated in the application, current expenses and payable taxes deducted, would, as a general rule, not by themselves be sufficient for securing the affected persons' livelihood. Contrary to the applicants' opinion, a considerable public interest in maintaining the biodiversity of the animals that are designated as dangerous dogs in the Act, which could be impaired by the reduction in genetic potential that would result from the above-mentioned bans, is not apparent at present.

Apart from this, the provisions under §§ 3 to 7 of the HundVerbrEinfG that concern: (1) the control of compliance with the Act; and (2) offences that are punishable by imprisonment, fines or administrative fines will, for the time being, continue to be applicable if no temporary injunction is issued. It is therefore possible that, for instance, the premises of dog owners who are obliged to furnish information that is required for implementing the Act and decrees that are based on the Act will be entered by persons who are authorised to do so by the competent authorities . . . , . . . that measures of prosecution of criminal offences will be taken against persons who, contrary to § 2.1 of the HundVerbrEinfG, introduce dogs from member states of the European Union or third countries into the domestic territory, or that dangerous dogs will be confiscated. The obligation to furnish, for the time being, information to the competent authorities that serves: (1) to implement the Act Restricting the Introduction of Dangerous Dogs from Member States of the European Union and Third Countries into the Domestic Territory; and (2) to implement the decrees that have been issued on the basis of the Act, however, affects the applicants' interests and the interests of other breeders of dogs that are listed in the respective regulations considerably less than the ban on introducing such dogs into the domestic territory. Apart from this, the above-mentioned right to enter premises is only valid in the framework of the obligation to furnish information pursuant to § 3.1 of the HundVerbrEinfG, which means that the exercise of this right can be counteracted by duly furnishing information and producing the corresponding documents.

To the extent that: (1) §§ 5 and 6 of the HundVerbrEinfG contain warnings that by failing to fulfil duties that result from the Act Restricting the Introduction of Dangerous Dogs from Member States of the European Union or Third Countries to the Domestic Territory and from decrees that refer to the Act, a person may render himself or herself liable to imprisonment, fines or administrative fines; and to the extent that (2) § 7 of the HundVerbrEinfG makes it possible to confiscate the dogs and other objects that are connected with corresponding criminal offences, dog owners and breeders can prevent, by complying, for the time being, with the relevant regulations, that they are affected by the regulations that impose sanctions. The same applies to measures of prosecution of criminal offences under the new § 143 of the German Criminal Code. 13

To the extent that the challenged regulations, in the applicants' opinion, violate Community law, the competent courts and public authorities are, in principle, obliged to give precedence to the application of Community law with direct effect - irrespective of whether the requested temporary injunction is issued - over domestic regulations of the type that is challenged here (cf. ECJ, European Court Reports 1964, p. 1251 [at pp. 1269 *et seq.*]; BVerfGE 31, p. 145 [at pp. 173 *et seq.*]; 73, p. 339 [at pp. 374-375]; 75, p. 223 [at pp. 244-245]; 85, p. 191 [at p. 204]; BVerwGE [Decisions of the Federal Administrative Court] 110, p. 140 [at pp. 150-151]). From this it follows that exactly on the basis of the applicants' interpretation of the law, the effective validity of Community law is not called into question even if the temporary injunction is not issued . . . 14

b) If, however, the temporary injunction is granted but the underlying constitutional complaint is later unsuccessful this has far-reaching consequences for the general public and, potentially, for every individual. 15

According to the statement given by the Federal Government in support of the bill (cf. *Bundestagsdrucksache* [BTDrucks, Records of the *Bundestag*] 14/4451 p. 1, 8 under A I), the Fight against Dangerous Dogs Act is supposed to complement the regulations that are issued by the *Länder* (under the competence of which the resistance to threats falls first and foremost) by regulations in the Federal sphere of competence that serve to protect human beings from dangerous dogs or from the irresponsible acts of specific dog owners. From this it follows that the Act, at any rate, also serves to protect the legal interests of human life and human health, which fall under Article 2.2.1 of the Basic Law. The statement in support of the bill put forward that the recent increase in the occurrence of attacks on human beings by dangerous dogs gave rise to the bill. The statement particularly mentioned an incident in Hamburg in which a Pit Bull Terrier and a Staffordshire Terrier atrociously killed a six-year-old child in a schoolyard. 16

If the temporary injunction were issued, the ban on the introduction of dangerous dogs into the domestic territory from member states of the European Union and third countries would not be applicable for the time being, so that such dogs could be intro- 17

duced into the Federal territory until the decision in the constitutional complaint proceedings is pronounced, and this alone would increase the threat to human life and human health that, in the opinion of the parliament, emanates from such dogs. Because it was not possible for the *Länder* to issue a ban on the introduction of dangerous dogs that is: (1) valid in the entire Federal Republic; (2) enforceable, at any rate to some extent, by border controls; and that is (3) connected with the threat of a prison sentence of up to two years, the suspension of § 2 of the HundVerbrEinfG would, against the background of the legislative concept of the Act, result in a marked reduction of the protection from dangerous dogs.

The same applies, as far as the result is concerned, to a suspension of the ban on breeding that is the consequence of § 11b.2 of the Animal Protection Act in conjunction with § 11 of the Animal Protection Decree on Dogs. Also these regulations can reduce the number of dogs that the parliament regards as dangerous. It is true that similar regulations to this effect exist on the *Länder* level. They, however, cannot provide a comparable protection in all respects if for no other reason than that the wording of some of the regulations is less strict. For instance, § 1.2 of the police decree on the keeping of dangerous dogs of 3rd August, 2000, issued by the Ministry of the Interior and the Rural Area Ministry of the *Land* Baden-Württemberg (*Gesetzblatt* [GBl, Law Gazette], p. 574), states only in the form of an assumption that the characteristic features of a fighting dog apply to the breeds American Staffordshire Terrier, Bull Terrier and Pit Bull Terrier (which means that the statement can be refuted). Pursuant to § 1.3 of this decree, Staffordshire Bull Terriers can (only) on a case-by-case basis be classified as fighting dogs, *i.e.*, if they show signs of increased aggressiveness and dangerousness towards human beings or animals. On the other hand, the ban on breeding pursuant to §§ 11b and 13a.2 of the Animal Protection Act in conjunction with § 11 of the Animal Protection Decree on Dogs does not provide, as regards the species of dogs listed above, the necessity or the possibility of checking the dangerousness of a dog on a case-to-case basis.

18

In the view of the threat to human beings that emanates from the specified animals, the new § 143 of the German Criminal Code introduces penalties in connection with the bans on breeding, keeping and trading dangerous dogs that exist under *Länder* law in order to effectively enforce such bans (cf. Records of the *Bundestag* 14/4451, p. 8 under A IV). A suspension of this provision would mean that its preventive effect would cease, which would render the enforcement of the above-mentioned bans under *Länder* law considerably more difficult.

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Finally, a temporary injunction would intervene with the legislative discretion of the Federal parliament because the legislative concept that the Federal parliament pursues by means of the Fight against Dangerous Dogs Act . . . could not be implemented for the time being.

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c) A comparison of the negative consequences of a temporary injunction with the negative effects that would arise in the event that the temporary injunction is not is-

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sued shows a predominance of the negative effects that would result from the issuance of the temporary injunction. If a temporary injunction were issued, measures that: (1) serve the protection of human life, which constitutes a value of paramount importance within the constitutional order (cf. BVerfGE 49, p. 24 [at p. 53]); and that (2) serve to protect physical integrity could not be implemented for the time being. On the basis of the parliament's interpretation, it must be assumed that there will be an increased probability of new incidents that involve attacks on human beings by dangerous dogs. In many cases, the damage to human life and health that could result from such attacks would be irreversible and would carry considerable weight. In comparison, the negative effects that could occur if no temporary injunction is issued would be far less serious. This applies in particular with a view to the applicants' economic interests and to those of comparable dog breeders (cf. BVerfGE 6, p. 1 [at p. 6]).

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22

Jaeger

Hömig

Bryde

**Bundesverfassungsgericht, Beschluss der 2. Kammer des Ersten Senats vom  
23. November 2001 - 1 BvR 1778/01**

**Zitiervorschlag** BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 23. November 2001 - 1 BvR 1778/01 - Rn. (1 - 22), [http://www.bverfg.de/e/rk20011123\\_1bvr177801en.html](http://www.bverfg.de/e/rk20011123_1bvr177801en.html)

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