Headnotes

to the Order of the Second Senate of 29 January 2019

– 2 BvC 62/14 –

1. **The exclusion from voting rights does not rule out the ability to initiate electoral complaint proceedings (*Wahlprüfungsverfahren*) pursuant to § 48(1) of the Federal Constitutional Court Act if the complaint concerns this exclusion.**

2. **Where the complainant only asserts a violation of subjective rights in electoral complaint proceedings, it is not necessary to also demonstrate that electoral irregularities impacted the allocation of seats in Parliament (*Mandatsrelevanz*).**

3. **The exclusion from the right to vote may be justified under constitutional law if a certain group of persons must be considered not sufficiently capable of participating in the communication process between the people and state organs.**

4. **§ 13 no. 2 of the Federal Elections Act fails to satisfy the constitutional requirements regarding statutory categorisation, since the group of persons affected by the exclusion from voting rights is determined in a manner that runs counter to the right to equality without sufficient factual reasons.**

5. **§ 13 no. 3 of the Federal Elections Act is not suitable for identifying persons who are generally incapable of participating in the democratic communication process.**

FEDERAL CONSTITUTIONAL COURT

– 2 BvC 62/14 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the electoral complaint

1. of Mr K..., 2. of Mr K..., 3. of Mr S..., 4. of Mr W..., 5. of Ms K..., 6. of Ms B..., 7. of Mr S..., 8. of Mr O...,

– authorised representatives: 1. Rechtsanwältin Dr. Anna Luczak,
Kottbusser Damm 94, 10967 Berlin
(for nos. 1, 2, 3, 4, 5),

2. Rechtsanwalt Dr. habil. Helmut Pollähne,
Rechtsanwaltskanzlei Joester & Partner,
Willy-Brandt-Platz 3, 28215 Bremen
(for nos. 6, 7, 8),

3. Rechtsanwalt Dr. Jan Oelbermann,
kanzlei am gleisdreieck, engels, heischel, oelbermann,
Flottwellstraße 16, 10785 Berlin
(for nos. 6, 7, 8) –

against the Decision of the German *Bundestag* of 9 October 2014
– WP 202/13 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held on 29 January 2019:

1. **§ 13 no. 2 of the Federal Elections Act (*Bundeswahlgesetz*) in the version of the Act Reforming the Law Governing Custodianship and Care for Adults (*Gesetz zur Reform des Rechts der Vormundschaft und Pflegschaft für Volljährige* – Guardianship Act, *Betreuungsgesetz*) of 12 September 1990 (Federal Law Gazette I, *Bundesgesetzblatt* I p. 2002) is incompatible with Article 38(1) first sentence and Article 3(3) second sentence of the Basic Law (*Grundgesetz*).**

2. **§ 13 no. 3 of the Federal Elections Act in the version of the Seventh Act Amending the Federal Elections Act (*Siebtes Gesetz zur Änderung des Bundeswahlgesetzes*) of 8 March 1985 (Federal Law Gazette I, p. 521) is incompatible with Article 38(1) first sentence and Article 3(3) second sentence of the Basic Law and void.**

3. **The exclusion from voting rights of complainants nos. 1, 2, 4 and 5 pursuant to § 13 no. 2 of the Federal Elections Act in the version of the Act Reforming the Law Governing Custodianship and Care for Adults of 12 September 1990 (Federal Law Gazette I, p. 2002) and of complainants nos. 6 to 8 pursuant to § 13 no. 3 of the Federal Elections Act in the version of the Seventh Act Amending the Federal Elections Act for the elections to the 18th German *Bundestag* on 22 September 2013 violates the rights of complainants nos. 1, 2 and 4 to 8 under Article 38(1) first sentence, which are equivalent to fundamental rights (*grundrechtsgleiche Rechte*), and their fundamental right under Article 3(3) second sentence of the Basic Law.**

4. **The electoral complaint of complainant no. 3 is inadmissible.**

5. **The Federal Republic of Germany must reimburse the necessary expenses of complainants nos. 1, 2 and 4 to 8.**

R e a s o n s :

A.

[…] 1

I.

[*Excerpt from Press Release no. 13/2019 of 21 February 2019*]

§ 13 no. 2 of the Federal Elections Act (*Bundeswahlgesetz* – BWahlG) provides for the exclusion from voting rights of persons who are placed under full guardianship in cases where guardianship is not merely temporary following a preliminary injunction.

§ 13 no. 3 BWahlG excludes persons from exercising the right to vote who are confined in a psychiatric hospital pursuant to § 63 of the Criminal Code (*Strafgesetzbuch* – StGB), after having committed an offence in a state in which they were exempt from criminal responsibility within the meaning of § 20 StGB. Complainants nos. 1, 2 and 4 to 8 partly belong to the group of persons affected by § 13 no. 2 BWahlG, and partly to the group affected by § 13 no. 3 BWahlG, and, based on this fact, were not allowed to participate in the elections to the 18th German *Bundestag* on 22 September 2013. Following an unsuccessful complaint against the validity of the election lodged with the German *Bundestag*, they challenge their exclusion from voting rights in the electoral complaint (*Wahlprüfungsbeschwerde*) under review here, claiming a violation of the principle of universal suffrage (*Grundsatz der Allgemeinheit der Wahl*) under Art. 38(1) first sentence of the Basic Law (*Grundgesetz* – GG) and the prohibition of disadvantaging under Art. 3(3) second sentence GG.

[*End of excerpt*]

[…] 2-10

II.

[…] 11-18

III.

[…] 19-23

B.

In respect of complainants nos. 1, 2 and 4 to 8, the electoral complaint is admissible. In respect of complainant no. 3, however, it is inadmissible. 24

I.

The Federal Constitutional Court's competence for complaints against decisions of the *Bundestag* in electoral complaint proceedings follows from Art. 93(1) no. 5 in conjunction with Art. 41(2) and (3) GG, § 18 of the Law on the Scrutiny of Elections (*Wahlprüfungsgesetz* – WahlPrüfG) and § 48 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). […] 25

In this respect, the Federal Constitutional Court is also competent to decide on the complainants' application to declare § 13 nos. 2 and 3 BWahlG void. In the context of electoral complaints, the Court not only reviews whether the competent electoral organs and the German *Bundestag* observed federal election law but also whether federal election law is compatible with the Constitution (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 16, 130 <135 and 136>; 121, 266 <295>; 123, 39 <68>; 132, 39 <47 para. 22>). 26

II.

Complainants nos. 1, 2 and 4 to 8 have legal ability to lodge a complaint despite their exclusion from voting. According to the wording of § 48(1) BVerfGG, only “individuals who are entitled to vote” may lodge an electoral complaint. However, this does not rule out the ability to lodge a complaint if the complaint concerns precisely the entitlement to vote, given that a review of voting rights in terms of substantive law would otherwise not be possible at all. Therefore, it must be presumed that the complainants are entitled to vote when assessing the admissibility of such complaints (cf. BVerfGE 132, 39 <44 para. 12, 46 para. 20>). The ability of complainant no. 3 to lodge a complaint is not in doubt, given that he was entitled to vote in the elections to the 18th German *Bundestag*. 27

III.

Complainants nos. 1, 2 and 4 to 8 have standing to lodge a complaint (see 1.). This does not apply with regard to complainant no. 3 (see 2.). 28

1. Complainants nos. 1, 2 and 4 to 8 have standing to lodge a complaint because they asserted a violation of their own rights in a manner that does not make such a violation seem implausible from the outset. It is irrelevant that they did not state in their electoral complaint whether the challenged electoral irregularities can impact the allocation of seats in the *Bundestag*, which would then require that the challenged *Bundestag* elections be declared invalid. 29

[…] 30-33

2. Complainant no. 3 lacks the necessary standing to lodge a complaint. According to his own submission, he voted in the *Bundestag* elections; a violation of subjective rights due to exclusion from voting rights is thus ruled out from the outset. He does not assert a violation of other subjective rights. He also does not challenge the validity of the elections to the 18th German *Bundestag*. 34

IV.

The electoral complaint has not become moot on the grounds that the 18th parliamentary term has ended. 35

[…] 36-38

C.

To the extent that the electoral complaint is admissible, it is well-founded. The exclusion from voting rights pursuant to § 13 nos. 2 and 3 BWahlG violates the principle of universal suffrage under Art. 38(1) first sentence GG and the prohibition of disadvantaging on the basis of disability under Art. 3(3) second sentence GG. Since § 13 nos. 2 and 3 BWahlG are unconstitutional, the complainants’ exclusion from voting based on these provisions violates their rights. 39

I.

Specific constitutional requirements relating to the permissibility of statutory exclusions from voting rights follow from the principle of universal suffrage under Art. 38(1) first sentence GG (see 1.) and the prohibition of disadvantaging on the basis of disability under Art. 3(3) second sentence GG (see 2.). These requirements are in conformity with the obligations of the Federal Republic of Germany under international and European law (see 3.). 40

1. The principle of universal suffrage guarantees all citizens the right to vote and to stand for elections (see a). The legislature can only exercise the mandate, conferred on it in Art. 38(3) GG, to shape [the electoral system] in a way that restricts the principle of universal suffrage if there are reasons that are recognised as legitimate under the Constitution and that have at least the same weight as the principle of universal suffrage. In this respect, it is entitled to simplify and categorise (see b). 41

a) Like the principle of equal suffrage (*Grundsatz der Gleichheit der Wahl*), the principle of universal suffrage guarantees equality of citizens, as required by the principle of democracy, with regard to political self-determination (cf. BVerfGE 99, 1 <13>; 132, 39 <47 para. 24>). Their equal treatment in respect of their ability to vote and to stand for elections is an essential pillar of the state order (cf. BVerfGE 6, 84 <91>; 11, 351 <360>; 132, 39 <47 para. 24>). In its positive dimension, the principle of universal suffrage guarantees the entitlement of all citizens to vote and to stand for elections (cf. BVerfGE 36, 139 <141>; 58, 202 <205>; 132, 39 <47 para. 24>). It requires that anyone can generally exercise their right to vote in as equal a manner as possible (cf. BVerfGE 58, 202 <205>; 99, 69 <77 and 78>). In its negative dimension, it prohibits the unjustified exclusion from participating in elections of individual citizens (cf. BVerfGE 36, 139 <141>; 58, 202 <205>) as well as the exclusion of certain groups for political, economic or social reasons (cf. BVerfGE 15, 165 <166 and 167>; 36, 139 <141>; 58, 202 <205>). Like the principle of equal suffrage, the principle of universal suffrage must be understood as requiring strict and formal equality regarding eligibility for elections to the German *Bundestag* (cf. BVerfGE 28, 220 <225>; 36, 139 <141>; 129, 300 <319>; 132, 39 <47 para. 24>); within the scope of the principle of universal suffrage, which is a specific manifestation of the general guarantee of the right to equality, resorting to Art. 3(1) GG is ruled out (cf. BVerfGE 99, 1 <8 *et seq*.> […]). 42

b) aa) The principle of universal suffrage is not subject to an absolute prohibition of differentiation. […] Differentiations regarding the right to vote or to stand for elections must always be justified by specific reasons that are recognised as legitimate under the Constitution and that have at least the same weight as the principle of universal suffrage (cf. BVerfGE 42, 312 <340 and 341>; 132, 39 <48 para. 25>; cf. regarding the principle of equal suffrage BVerfGE 95, 408 <418>; 120, 82 <107>; 129, 300 <320>; 130, 212 <227 and 228>), qualifying them as “compelling reasons” (cf. BVerfGE 1, 208 <248 and 249>; 95, 408 <418>; 121, 266 <297 and 298>). 43

bb) Reasons that can justify restrictions of the principle of universal suffrage, and thus differentiations between voters, include in particular the objectives, pursued by way of democratic elections, of safeguarding the function of elections as integrative processes for the formation of the political will of the people (*Integrationsfunktion der Wahl*) and of guaranteeing the proper functioning of the parliament to be elected (cf. BVerfGE 95, 408 <418>; 120, 82 <107>; 129, 300 <320 and 321>; 132, 39 <50 para. 32>). The first objective encompasses the safeguarding of the function of elections as a communication process (cf. BVerfGE 132, 39 <50 para. 32>). 44

Provided that democracy should not be limited to a mere formal link between those governing and those governed, it depends on free and open communication (cf. BVerfGE 132, 39 <50 para. 33> with further references). […] Otherwise, elections cannot develop the integrative effects assigned to them. Exclusions from the right to vote may thus be justified under constitutional law if a group of persons must be considered not sufficiently capable of participating in the communication process between the people and state organs (cf. BVerfGE 132, 39 <51 para. 34>). 45

cc) It is generally incumbent upon the legislature to balance the principle of universal suffrage against conflicting constitutional interests (cf. BVerfGE 95, 408 <420>; 121, 266 <303>; 132, 39 <48 para. 26>). In this respect, the Federal Constitutional Court only assesses whether the limits of the narrow latitude of the legislature have been overstepped; it does not assess whether the legislature's solutions are expedient or legally and politically desirable (cf. BVerfGE 6, 84 <94>; 51, 222 <237 and 238>; 95, 408 <420>; 121, 266 <303 and 304>; 132, 39 <48 para. 27>). To justify restrictions of universal suffrage, differentiating arrangements must be suitable and necessary for pursuing their objectives (cf. BVerfGE 6, 84 <94>; 51, 222 <238>; 71, 81 <96>; 95, 408 <418>). The permissible extent of such restrictions also depends on how intense the interference with voting rights is (cf. BVerfGE 71, 81 <96>; 95, 408 <418>). The legislature must be guided by political reality, rather than abstract scenarios, regarding its assessments and evaluations (cf. BVerfGE 7, 63 <75>; 82, 322 <344>; 95, 408 <418>). A strict standard must be applied when assessing whether a restriction of voting rights is justified (cf. BVerfGE 120, 82 <106>; 129, 300 <317, 320>; 132, 39 <48 para. 25>). 46

However, the legislature is entitled to simplify and categorise when setting out the entitlement to vote, in consideration of the limits to its latitude resulting from the significance of voting rights and the stringent notion of democratic equality (cf. BVerfGE 132, 39 <49 para. 28>). […] 47

[…] In principle, the legislature can base [its legislation] on the typical case, and does not have to accommodate every particular constellation by enacting corresponding special provisions (cf. BVerfGE 82, 159 <185 and 186>; 96, 1 <6>; 145, 106 <146 para. 107>). However, statutory generalisations must have the broadest possible basis and include all groups concerned and matters to be regulated (cf. BVerfGE 122, 210 <232 and 233>; 126, 268 <279>; 133, 377 <412 para. 87>). In 48

particular, the legislature must not opt for an atypical case as the model for statutory categorisations; rather, it must reflect reality by standardising the typical case (cf. BVerfGE 116, 164 <183>; 122, 210 <233>; 126, 268 <279>; 137, 350 <375 para. 66>; 145, 106 <146 para. 107>). Moreover, categorisations are only permissible if the hardship linked to them can only be avoided with difficulty (cf. BVerfGE 84, 348 <360>; 87, 234 <255 and 256>; 100, 59 <90>), merely affects a relatively small number of persons, and if the unequal treatment does not have great weight (cf. BVerfGE 63, 119 <128>; 84, 348 <360>; 100, 59 <90>; 143, 246 <379 para. 362>). Hardship clauses may be necessary to avoid intolerable burdens. Furthermore, the advantages arising from categorisation must be in adequate relation to the unequal treatment it necessarily entails (cf. BVerfGE 110, 274 <292>; 117, 1 <31>; 120, 1 <30>; 123, 1 <19>; 133, 377 <413 para. 88>; 145, 106 <146 para. 108>).

2. In addition to the principle of universal suffrage, exclusions from voting rights must be measured against Art. 3(3) second sentence GG (see a), which prohibits disadvantaging of persons on the basis of disability (see b). Notably, this prohibition is not without limitations. Disadvantaging persons with disabilities, however, requires compelling reasons (see c). 49

a) The principle of universal suffrage under Art. 38(1) first sentence GG and the prohibition of disadvantaging set out in Art. 3(3) second sentence GG, as a specific manifestation of the general guarantee of the right to equality, apply concurrently (see aa). This also applies to electoral complaint proceedings (see bb). 50

[…] 51-53

b) Art. 3(3) second sentence GG prohibits any disadvantaging on the basis of disability. The reasons for disability are irrelevant in this respect. Rather, it is decisive whether a person’s ability to lead their lives individually and independently is impaired in the longer term. Persons with disabilities include mentally ill persons if they have a longer-term impairment affecting them in such a way that they are prevented from fully, effectively and equally participating in society (cf. BVerfGE 128, 282 <306 and 307> with reference to Art. 1(2) of the Convention on the Rights of Persons with Disabilities, CRPD). 54

An exclusion by public authority of persons with disabilities from possibilities of development and participation amounts to disadvantaging within the meaning of Art. 3(3) second sentence GG if the exclusion is not adequately compensated by disability-specific support measures (cf. BVerfGE 96, 288 <303>; 99, 341 <357>; 128, 138 <156>). Accordingly, persons with disabilities are disadvantaged if state measures compound their situation compared to the situation of persons without disabilities. This is the case if they are denied possibilities of development and participation that are available to others (cf. BVerfGE 96, 288 <302 and 303>; 99, 341 <357>). Ultimately, any form of unequal treatment that places persons with disabilities at a disadvantage is prohibited (cf. Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG, Orders of the Second Chamber of the First Senate of 24 March 2016 – 55

1 BvR 2012/13 –, juris, para. 11 and of 10 June 2016 – 1 BvR 742/16 –, juris, para. 10; see also BVerfGE 99, 341 <357>). This also includes indirect disadvantaging where the exclusion of persons with disabilities from possibilities of participation is not intended, but a typical incidental consequence of a measure taken by public authority […].

In addition to the prohibition of disadvantaging, Art. 3(3) second sentence GG also includes a mandate to support persons with disabilities. It grants a claim to equal participation within the limits of the financial, staff, factual and organisational resources available (cf. BVerfGE 96, 288 <308>). 56

c) However, Art. 3(3) second sentence GG, too, is not absolute (cf. BVerfGE 99, 341 <357>). Disadvantaging persons with disabilities by law is only permissible if it is justified by compelling reasons (cf. BVerfGE 85, 191 <206 and 207>; 99, 341 <357>; additionally BVerfG, Order of the Second Chamber of the First Senate of 10 June 2016 – 1 BvR 742/16 –, juris, para. 10 […]) 57

There is a compelling reason within the meaning set out above if persons, precisely because of their disability, lack certain intellectual or physical abilities that are indispensable for exercising a right. If persons lack the necessary mental capacity due to their disability, and if this cannot be remedied by suitable assistance systems, the exclusion of a person from a right requiring this capacity does not amount to discrimination on the basis of disability within the meaning of Art. 3(3) second sentence GG (cf. BVerfGE 99, 341 <357 […]). 58

Other than that, unequal treatment on the basis of disability can only be justified by virtue of a balancing with conflicting constitutional law (cf. BVerfGE 92, 91 <109>; 114, 357 <364>) and on the basis of a strict proportionality test […]. In that regard, the unequal treatment must be suitable, necessary and appropriate for protecting another constitutional interest that is at least of equivalent weight. The legislature's latitude is narrow in this respect. Thus, in the present context, the requirements for justifying a restriction of the prohibition of disadvantaging persons with disabilities under Art. 3(3) second sentence GG correspond to the strict requirements for an interference with the principle of universal suffrage under Art. 38(1) first sentence GG. 59

3. The standards set out above meet the obligations of the Federal Republic of Germany under international law. While the Basic Law must be interpreted in a manner that is open to international law (see a), the international law provisions that are relevant in relation to the challenged exclusions from voting rights do not give rise to requirements that go beyond the constitutional demands set out above (see b). 60

a) Domestically, obligations arising from international treaties do not have constitutional rank (cf. BVerfGE 111, 307 <317>). The federal legislature approved the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of Persons with Disabilities (CRPD) and the European Convention on Human Rights (ECHR) including its Optional Protocols through acts 61

of parliament pursuant to Art. 59(2) GG […]. They thus have the rank of federal law in the German legal order (cf. BVerfGE 74, 358 <370>; 111, 307 <316 and 317>; 128, 326 <367>; 141, 1 <19 para. 45>; 142, 313 <345 para. 88>; 148, 296 < 127>).

62 Nonetheless, these provisions have constitutional significance as guidelines for the interpretation of the content and scope of fundamental rights and rule-of-law principles of the Basic Law (cf. BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <316 and 317, 329>; 120, 180 <200 and 201>; 128, 326 <367 and 368>; 142, 313 <345 para. 88>; 148, 296 <128>). Their use as guidelines is a manifestation of the Basic Law's openness to international law – the Basic Law does not oppose the Federal Republic of Germany's involvement in international and supranational contexts and its further development, but rather requires and expects such involvement. As laid down in its preamble, the Basic Law seeks the Federal Republic of Germany's integration into the legal order of free and peaceful states as an equal partner (cf. BVerfGE 111, 307 <319>). Where possible, the Basic Law must be interpreted in such a way as to avoid a conflict with Germany's international law obligations (cf. BVerfGE 111, 307 <317 and 318>; 141, 1 <27 para. 65>).

63 However, the reference to international law provisions as guidelines for interpretation does not aim to schematically align individual constitutional concepts in parallel to international law (cf. BVerfGE 137, 273 <320 and 321 para. 128>; 141, 1 <30 para. 72> with further references). Rather, also under an interpretation in a manner that is open to international law, similarities in the wording of legal provisions must not cover up differences that arise from the context of legal orders (cf. BVerfGE 148, 296 <131>). Furthermore, an interpretation of the Constitution in a manner that is open to international law may not exceed the recognised methods of interpretation of statutes and of the Constitution (cf. BVerfGE 111, 307 <329>; 128, 326 <371>; 141, 1 <30 para. 72>; BVerfGE 148, 296 <133>). To the extent that there is room for interpretation and assessments within the scope of recognised methods of interpretation, German courts are obliged to give precedence to an interpretation that is in accordance with international conventions and treaties. However, it is not contrary to the aim of openness to international law if international treaty law is not observed in exceptional cases, provided this is the only way to avert a violation of fundamental constitutional principles (cf. BVerfGE 111, 307 <319>; BVerfGE 148, 296 <133>).

64 When invoking the ECHR as a guideline for interpretation, the Federal Constitutional Court takes into account decisions of the European Court of Human Rights (ECtHR) even if they do not concern the same subject matter. This follows from the function of the ECtHR's case-law, which – at least *de facto* – provides direction and guidance for interpreting the ECHR, also beyond the individual case at issue (cf. BVerfGE 111, 307 <320>; 128, 326 <368>; 148, 296 <129>). Therefore, the domestic impact of ECtHR decisions is not limited to the obligation to take them into account with regard to the specific circumstances they concern (cf. BVerfGE 111, 307 <328>; 112, 1 <25 and 26>; 148, 296 <129>). Invoking the ECtHR's case-law as a guideline for interpretation of constitutional law beyond individual cases serves to give effect to

the guarantees of the ECHR in Germany as comprehensively as possible and may also help avoid violations of the Convention by the Federal Republic of Germany (cf. BVerfGE 128, 326 <369>; 148, 296 <130>). According to Art. 46 ECHR, the Contracting Parties have undertaken to abide by a final judgment of the ECtHR in any case to which they are parties (cf. BVerfGE 111, 307 <320>). However, beyond the scope of application of Art. 46 ECHR, the specific circumstances of the case must be given particular consideration to provide for contextualisation when invoking the ECtHR's case-law as a guideline (cf. BVerfGE 148, 296 <132>).

While statements from committees or similar treaty bodies have significant weight, they are not binding on international or domestic courts (cf. BVerfGE 142, 313 <346 para. 90>; BVerfG, Judgment of the Second Senate of 24 July 2018 – 2 BvR 309/15 *inter alia* –, juris, para. 91). This also applies to the reports (Art. 39 CRPD), guidelines (Art. 35(3) CRPD) and recommendations (Art. 36(1) CRPD) concerning the interpretation of the provisions of the Convention and the legal situation in Germany issued by the Committee on the Rights of Persons with Disabilities pursuant to Art. 34 CRPD (cf. BVerfGE 142, 313 <345 and 346 para. 89>; BVerfG, Judgment of the Second Senate of 24 July 2018 – 2 BvR 309/15 *inter alia* –, juris, para. 91). 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, Federal Law Gazette, *Bundesgesetzblatt* – BGBl II 1985 p. 939). In the context of an interpretation of domestic law that is open to international law, domestic courts should address the view of such treaty bodies; they do not, however, have to endorse it (cf. BVerfGE 142, 313 <346 and 347 para. 90>; see also – regarding decisions of international tribunals – BVerfGE 111, 307 <317 and 318>; 128, 326 <366 *et seq*., 370>; established case-law). 65

b) The provisions of Art. 25 letter b ICCPR (see aa), Art. 29 letter a CRPD (see bb) and Art. 3 of Protocol No. 1 to the Convention (see cc) do not require any modification of the constitutional standards for exclusions from voting rights set out above. 66

aa) Art. 25 ICCPR does not go beyond the requirements for restricting the entitlement to vote under Art. 38(1) first sentence and Art. 3(3) second sentence GG, given that it does not contain an absolute prohibition of any exclusion from voting rights. The applicable parts of the provision read as follows: 67

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions
>
> a) (…)
>
> b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

c) (…)

According to its wording, the provision thus protects voting rights against “unreasonable restrictions”. The ICCPR’s Human Rights Committee stated that it does not unreasonably restrict Art. 25 letter b ICCPR if the exercise of voting rights is restricted by a law on grounds that are objective and reasonable (cf. ICCPR Human Rights Committee, General Comment No. 25, 12 July 1996, UN Doc CCPR/C/21/Rev. 1/Add. 7, paras. 4 and 10). At the same time, it expressly pointed out that Art. 29 letter a CRPD does not merit a different conclusion since this provision does not rule out exclusions from voting rights on grounds that are reasonable and objective either (cf. ICCPR Human Rights Committee, Concluding observations on the 3rd periodic report of Hong Kong, China, 29 April 2013, UN Doc CCPR/C/CHN-HKG/CO/3, para. 24; Concluding observations on the 3rd periodic report of Paraguay, 29 April 2013, UN Doc CCPR/C/PRY/CO/3, para. 11). This plausible interpretation of Art. 25 letter b ICCPR does not give rise to stricter standards than the standards laid down in Art. 38(1) first sentence GG and Art. 3(3) second sentence GG since the protection of constitutional interests of equal value always meets the requirement of an objective and reasonable ground. 68

bb) Neither does Art. 29 letter a in conjunction with Art. 12(2) CRPD merit a modification of the constitutional standards set out above, in particular regarding Art. 3(3) second sentence GG. 69

(1) Art. 29 letter a CRPD reads as follows: 70

> States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:
>
> a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
>
> i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
>
> ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
>
> iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.

Neither a general prohibition of exclusions from voting rights nor a prohibition of exclusions specifically of persons with disabilities can be inferred from this provision. Exclusions from voting rights, which equally affect persons with disabilities and persons without disabilities, are not within the scope of application of the provision given that the provision guarantees persons with disabilities participation in public and political life, including the right to vote, “on an equal basis with others”. 71

Yet even if an exclusion from voting rights affects only or primarily persons with disabilities, an absolute prohibition of exclusions from voting rights cannot be inferred from Art. 29 letter a (iii) CRPD. According to the provision, States Parties to the CRPD shall guarantee the “free expression of the will” (French: libre expression de la volonté) of persons with disabilities as electors and, where necessary, allow assistance in voting by another person to this end. Accordingly, the provision is aimed at the non-discriminatory development of the free electoral will by persons with disabilities. However, this requires the ability to form and express an independent electoral will. Thus, the persons concerned must have the cognitive skills necessary to make a free and self-determined electoral decision […]. If, even when using all possible means of assistance, persons lack the ability to participate in the democratic communication process and to make a self-determined electoral decision on this basis, a corresponding exclusion from voting rights does not violate Art. 29 CRPD, even though the provision does not expressly address justifications for restricting voting rights of persons with disabilities […]. 72

(2) Art. 12 CRPD does not merit a different conclusion. That provision reads as follows: 73

> (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
>
> (4) Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

Thus, voting rights are also within the provision’s scope of protection. However, the recognition under Art. 12(2) CRPD of legal capacity of persons with disabilities on an equal basis with others is not absolute. This follows from the regulatory context of Art. 12(2) CRPD and Art. 12(4) CRPD, which specifically refers to measures restricting the exercise of legal capacity of the persons concerned. The Convention does not 74

prohibit such measures in general; rather, it restricts their permissibility, including by obliging the States Parties to the Convention under Art. 12(4) CRPD to provide for appropriate safeguards protecting the persons concerned against conflicts of interests, abuse and disrespect of their rights, and to ensure proportionality (cf. BVerfGE 128, 282 <307>; 142, 313 <345 para. 88>; BVerfG, Judgment of the Second Senate of 24 July 2018 – 2 BvR 309/15 *inter alia* –, juris, para. 90). In light of the above, the Court has already decided that the provisions of the Convention, although they aim to safeguard and strengthen the autonomy of persons with disabilities, do not generally prohibit measures that are carried out against those persons' natural will and which relate to their limited capability for self-determination due to illness (cf. BVerfGE 128, 282 <307>; 142, 313 <345 para. 88>; BVerfG, Judgment of the Second Senate of 24 July 2018 – 2 BvR 309/15 *inter alia* –, juris, para. 90). The same must also apply to exclusions from voting rights specifically of persons with disabilities if such exclusions are tied to the inability to participate in the democratic discourse and the resulting inability to make a self-determined electoral decision. They do not violate Art. 12 CRPD if the requirements of Art. 12(4) are satisfied, that is if the respective arrangement is proportionate, tailored to the circumstances of the persons concerned, applies for the shortest time possible, is subject to regular review and if appropriate and effective safeguards to prevent abuse are in place. Within these limits, Art. 12 CRPD does not require an interpretation of Art. 29 letter a CRPD to the effect that it contains an absolute prohibition of any exclusion from voting rights of persons with disabilities […].

(3) Ultimately, the fact that the Committee on the Rights of Persons with Disabilities has a different legal view in this regard does not merit a different conclusion (see a). Neither is this view binding under constitutional law nor is it convincing in substance (see b). 75

(a) In the Committee's opinion, full and effective participation of persons with disabilities requires the unlimited recognition of their legal capacity. According to the Committee, this is guaranteed by Art. 12(2) CRPD, which does not leave any scope for restrictions linked to a lack of decision-making ability. Accordingly, exclusions from voting rights cannot be justified by a lack of decision-making ability of persons with disabilities (cf. Committee on the Rights of Persons with Disabilities, General Comment No. 1, Article 12: Equal recognition before the law, 19 May 2014, UN Doc CRPD/C/GC/1, para. 12 *et seq*., 48). Given that, in the Committee's view, electoral rights of persons with disabilities can neither be restricted nor excluded (cf. Committee on the Rights of Persons with Disabilities, Communication No. 4/2011, 20 September 2013, UN Doc CRPD/C/10/D/4/2011, para. 9.4), it considers exclusions from voting rights pursuant to § 13 nos. 2 and 3 BWahlG to be in breach of the Convention (cf. Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Germany, 13 May 2015, UN Doc CRPD/C/DEU/CO/1, paras. 53 and 54). This is also the legal view taken in a study of 21 December 2011 published by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities (UN Doc A/HRC/19/36 […]). 76

(b) However, the Committee on the Rights of Persons with Disabilities has no mandate to issue binding interpretations of the CRPD (cf. BVerfGE 142, 313 <346 and 347 para. 90>; BVerfG, Judgment of the Second Senate of 24 July 2018 – 2 BvR 309/15 *inter alia* –, juris, para. 91). Such a mandate could only be considered if the practice of the States Parties followed the Committee's view. Yet this is not the case, since only a clear minority of the States Parties to the CRPD has inclusive voting rights without any differentiations […]. Moreover, the view of the Committee on the Rights of Persons with Disabilities contradicts the position of the ICCPR Committee. Even though the ICCPR Committee expressly found that exclusions from voting rights can be justified by objective and reasonable grounds even in consideration of Art. 29 letter a CRPD (cf. ICCPR Human Rights Committee, Concluding observations on the 3rd periodic report of Hong Kong, China, 29 April 2013, UN Doc CCPR/C/CHN-HKG/CO/3, para. 24; Concluding observations on the 3rd periodic report of Paraguay, 29 April 2013, UN Doc CCPR/C/PRY/CO/3, para. 11), the Committee on the Rights of Persons with Disabilities did not address this finding. It also did not make any statement on the fact that France and Romania have issued declarations of interpretation regarding the CRPD according to which exclusions from voting rights are permissible within the scope of Art. 29 CRPD if the conditions of Art. 12(4) CRPD are observed […]. Above all, the legal view of the Committee on the Rights of Persons with Disabilities does not sufficiently take into account Art. 12(4) CRPD. The Committee only infers from Art. 12 CRPD the obligation of States Parties to create effective safeguards to guarantee persons with disabilities the actual exercise of their legal capacity. According to the Committee, the provision does not provide a basis for restrictions of legal capacity. This, however, fails to sufficiently accommodate the regulatory content of Art. 12(4) CRPD. The provision requires "appropriate and effective safeguards for all measures that relate to the exercise of legal capacity" to prevent abuse. Art. 12(4) second and third sentences CRPD then describes the conditions of safeguards that are in conformity with the Convention, particularly requiring the observation of the principle of proportionality. Thus, the provision clearly assumes that there is a possibility of taking measures that restrict the exercise of legal capacity if these conditions are observed (cf. BVerfGE 128, 282 <307>; 142, 313 <345 para. 88>; BVerfG, Judgment of the Second Senate of 24 July 2018 – 2 BvR 309/15 *inter alia* –, juris, para. 90). 77

(cc) Additional requirements for the permissibility of exclusions from voting rights under constitutional law also do not follow from Art. 3 of Protocol No. 1 to the Convention, which reads as follows: 78

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

According to the case-law of the ECtHR, which is competent to interpret the ECHR and its Protocols pursuant to Art. 32 ECHR, the right to free elections at reasonable 79

intervals by secret ballot guaranteed by Art. 3 of Protocol No. 1 is not guaranteed without limitations. Rather, the Contracting States must be granted a wide margin of appreciation when shaping electoral law. However, restrictions of voting rights must serve a legitimate aim and observe the principle of proportionality (cf. ECtHR, Mathieu-Mohin and Clerfayt v. Belgium, Judgment of 2 March 1987, No. 9267/81, § 52; ECtHR <GC>, Hirst v. The United Kingdom <No. 2>, Judgment of 6 October 2005, No. 74025/01, § 62).

If all prisoners are indiscriminately stripped of their voting rights, this amounts to a general, automatic and blanket restriction of voting rights, which exceeds the margin of appreciation of the Contracting States and is thus incompatible with Art. 3 of Protocol No. 1 (cf. ECtHR <GC>, Hirst v. The United Kingdom <No. 2>, Judgment of 6 October 2005, No. 74025/01, § 82; see also ECtHR, Anchugov and Gladkov v. Russia, Judgment of 4 July 2013, No. 11157/04 and 15162/05, §§ 93 *et seq*.). According to the ECtHR, an individual judicial decision is generally suitable to guarantee the proportionality of voting rights restrictions. However, it cannot be assumed that a restriction of voting rights is disproportionate merely because it was not ordered by a judge (cf. ECtHR <GC>, Scoppola v. Italy <No. 3>, Judgment of 22 May 2012, No. 126/05, § 99). 80

The ECtHR recognised that restricting participation in elections to persons capable of assessing the consequences of their decisions is a legitimate aim that can generally justify exclusions from voting rights (cf. ECtHR, Alajos Kiss v. Hungary, Judgment of 20 May 2010, No. 38832/06, § 38). Nonetheless, in a case in which the order of partial guardianship already led to an exclusion from voting rights, the ECtHR considered this arrangement a violation of the principle of proportionality. In this regard, the court referred to the CRPD, pointing out that the Contracting States' margin of appreciation for shaping electoral law was narrower in respect of groups of persons that had faced considerable discrimination in the past (cf. ECtHR, Alajos Kiss v. Hungary, Judgment of 20 May 2010, No. 38832/06, § 44). 81

Overall, an absolute prohibition of exclusions from voting rights for persons with disabilities cannot be inferred from the ECtHR's case-law. The ECtHR's recognition of exclusions from voting rights that serve a legitimate aim and observe the principle of proportionality as well as the emphasis on the Contracting States' margin of appreciation in the context of Art. 3 of Protocol No. 1 do not entail stricter requirements than those applying to restrictions of voting rights under Art. 38(1) first sentence GG and Art. 3(3) second sentence GG. 82

II.

Exclusions from voting rights of persons placed under full guardianship pursuant to § 13 no. 2 BWahlG (see 1.) and of criminal offenders confined in a psychiatric hospital for lack of criminal responsibility pursuant to § 13 no. 3 BWahlG (see 2.) are unconstitutional. 83

1. The exclusion from voting rights of persons who have an appointed guardian to attend to all their affairs where this is not merely a temporary situation following a preliminary injunction (§ 13 no. 2 BWahlG) violates both the principle of universal suffrage under Art. 38(1) first sentence GG (see a) and the prohibition of disadvantaging on the basis of disability under Art. 3(3) second sentence GG (see b). 84

a) § 13 no. 2 BWahlG restricts the principle of universal suffrage (see aa); yet this interference does not protect constitutional interests of equal value in a manner that sufficiently satisfies the constitutional requirements for statutory categorisations (see bb). 85

aa) § 13 no. 2 BWahlG provides for the exclusion from voting rights of persons who have an appointed guardian to attend to all their affairs, thus affecting the guarantee that all citizens can equally exercise their right to vote (cf. BVerfGE 28, 220 <225>; 36, 139 <141>; 58, 202 <205>; 59, 119 <125>; 99, 69 <77 and 78>; 132, 39 <47 para. 24>). 86

bb) This interference with the principle of universal suffrage is not justified. § 13 no. 2 BWahlG aims to protect a constitutional interest that is of the same value as universal suffrage (see 1).It is already doubtful whether the provision is at all suitable for achieving this aim (see 2). In any case, it violates the constitutional requirements regarding statutory criteria for categorisations given that it is designed in such a way that it is incompatible with the right to equality (see 3). 87

(0) (a) By way of § 13 no. 2 BWahlG as amended on 12 September 1990, the legislature seeks to exclude persons from voting rights who lack the mental capacity to understand the nature and significance of elections; it thus seeks to safeguard the function of elections as integrative processes for the formation of the political will of the people. 88

[…] 89-90

(b) Other grounds that are recognised as legitimate under the Constitution and which could justify the interference with the principle of universal suffrage are not ascertainable. 91

(aa) This applies in particular to the constitutional interest of protecting the integrity of elections against manipulation and abuse. […] 92

(bb) Nor can the interference with the regulatory content of Art. 38(1) first sentence GG that is linked to exclusions from voting rights be legitimated by the submission that such exclusions on the basis of “mental ailments” were a “traditional restriction” of universal suffrage (see, however, BVerfGE 36, 139 <141 and 142>; 67, 146 <147>; see also Bavarian Constitutional Court, *Bayerischer Verfassungsgerichtshof* – BayVerfGH, Decision of 9 July 2002 – Vf. 9-VII-01 –, juris, para. 43 […]). Under the Constitution, tradition is not recognised as a legitimate ground […]. 93

(2) § 13 no. 2 BWahlG is only suitable for achieving the aim of safeguarding the 94

function of the election as an integrative process if the provision concerns a group of persons that is not sufficiently able to participate in the democratic communication process. Yet this is not the case here.

(bb) Concerns in this regard arise from the fact that mental capacity and capacity for communication required to make a self-determined electoral decision are not assessed in the procedure to appoint a guardian pursuant to § 1896(1) first sentence of the Civil Code (*Bürgerliches Gesetzbuch* – BGB). […] The right to vote is a highly personal right; its exercise by a guardian is impermissible under constitutional law […], and appointment of a guardian thus cannot pertain to this right from the outset […]. Therefore, the ability to participate in the democratic formation of the political will is irrelevant for the assessment and the outcome of the procedure to appoint a guardian. […] 95

In addition, the considerable regional differences in respect of exclusions from voting rights on the basis of guardianship must be considered when determining whether § 13 no. 2 BWahlG is suitable for identifying persons unable to participate in elections. […] 96

(cc) The appointment of a guardian for all affairs is subject to strict statutory requirements. To appoint such a guardian, it is required to establish a need for full guardianship as well as the specific need that a guardian take care of all affairs of the person concerned [because their needs cannot be met by other means] […]. Appointing a guardian for all affairs can only be considered if an adult cannot attend to any of their own affairs due to illness or disability […]. 97

[…] The total share of persons excluded from voting rights under § 13 no. 2 BWahlG is 1.3‰ of those who were entitled to vote in the 2013 *Bundestag* elections […]. 98

The legislature's assumption that the appointment of a guardian for all affairs typically relates to cases in which persons lack the mental capacity required to participate in the democratic communication process is at least not implausible. 99

(3) Ultimately, however, it is irrelevant whether § 13 no. 2 BWahlG is suitable for identifying persons who lack the mental capacity required to exercise their voting rights. This is because the provision fails to satisfy the constitutional requirements regarding statutory categorisation since the group of persons affected by the exclusion from voting rights pursuant to § 13 no. 2 BWahlG is determined in a manner that violates the right to equality without sufficient factual reasons. 100

(a) § 13 no. 2 BWahlG provides for the exclusion from voting rights of persons who are not only unable to attend to their own affairs because of illness or disability, but who have also been placed under full guardianship for this reason. Yet the principle of necessity (*Erforderlichkeitsgrundsatz*) that applies universally to guardianship law prohibits the appointment of a guardian if the need for guardianship of the person concerned can be met by other means […]. This is the case in particular if the person concerned has completed a lasting power of attorney or an advance directive or is 101

still capable of completing them and if there is a person who is willing and suitable to perform this task and enjoys the trust of the person concerned […]. The same applies if the person concerned gets sufficient care from their family […] or otherwise […].

(b) If no guardian is actually appointed despite the need for full guardianship, § 13 no. 2 BWahlG is not applicable. […] 102

(c) […] Thus, whether or not persons are deprived of their voting rights ultimately depends on whether a guardian is appointed based on the specific need for guardianship, or whether no such appointment is necessary. This circumstance, which is coincidental in practice, does not constitute a reason inherent in the matter which could justify the unequal treatment under electoral law of persons who are equally in need of guardianship (see also Constitutional Court of Austria, *Österreichischer Verfassungsgerichtshof*, Decision of 7 October 1987 – G 109/87 – para. 2.2.1, regarding the 1971 Regulations for National Council Elections). 103

(d) In light of this, it cannot be asserted that the legislature ties its decision to a strictly formal criterion that is clear, simple to determine and particularly practical for organising elections (cf. on this BayVerfGH, Decision of 9 July 2002 – Vf. 9-VII-01 –, juris, para. 47). 104

[…] The legislature must realistically base generalising provisions on the typical case (cf. BVerfGE 116, 164 <182 and 183>; 122, 210 <233>; 126, 268 <278>; 132, 39 <49 para. 29>; established case-law). Furthermore, the advantages arising from categorisation must be in adequate proportion to the unequal treatment linked to it (cf. BVerfGE 110, 274 <292>; 117, 1 <31>; 120, 1 <30>; 123, 1 <19>; 133, 377 <413 para. 88>; 137, 350 <375 para. 66>; 145, 106 <146 para. 108>). This requirement is only met if the hardship and injustices resulting from categorisation can only be avoided with difficulty, merely affect a relatively small number of persons and if the extent of unequal treatment is limited (cf. BVerfGE 63, 119 <128>; 84, 348 <360>; 133, 377 <413 para. 88>; 145, 106 <146 and 147 para. 108>). 105

This is not the case here. In the 2013 *Bundestag* elections, a total of 81,220 persons under full guardianship was excluded from voting pursuant to § 13 no. 2 BWahlG […]. The share of persons under full guardianship in relation to the total number of persons who are incapable of attending to all their affairs cannot be established. The legislature did not address this issue (cf. *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 11/4528, pp. 188 and 189). It cannot be ruled out that the group of those in need of full guardianship who do not have an appointed guardian as this is not deemed necessary given their circumstances is not significantly smaller, or is even larger, than the group of those actually placed under full guardianship, who are excluded from exercising the right to vote. The interference with the right to equality is not minor, given that, due to their exclusion from voting rights, the persons concerned are permanently deprived of the most noble right conferred on citizens in a democratic state (cf. BVerfGE 1, 14 <33>). In light of this, claiming that there are no practical alternatives to § 13 no. 2 BWahlG is not sufficient for legitimising the disad- 106

vantaging of persons under full guardianship in relation to persons with a comparable need for guardianship [who do not have an appointed guardian].

b) In addition to violating the principle of universal suffrage, § 13 no. 2 BWahlG also violates the prohibition of disadvantaging on the basis of disability pursuant to Art. 3(3) second sentence GG given that the provision results in unfavourable treatment of persons with disabilities (see aa) which is not justified by compelling reasons (see bb). 107

aa) The persons concerned are disadvantaged within the meaning of Art. 3(3) second sentence GG because the exclusion from voting rights pursuant to § 13 no. 2 BWahlG entails a restriction by public authority of the possibilities of development and participation of those affected by the provision (cf. BVerfGE 96, 288 <303>; 99, 341 <357>; 128, 138 <156>). 108

This disadvantaging also occurs because of disability. According to its wording, § 13 no. 2 BWahlG is tied to the appointment of a guardian for all affairs. However, pursuant to § 1896(1) first sentence BGB, such an appointment requires a “mental illness or physical, mental or psychological disabilities”. […] As these are impairments that do not only temporarily hinder the full and effective participation in society of the persons concerned on an equal basis with others (Art. 1(2) CRPD), “mental illnesses” as referred to in § 1896(1) first sentence BGB are covered by the concept of disability within the meaning of Art. 3(3) second sentence GG (cf. in this respect BVerfGE 96, 288 <301>; 99, 341 <356 and 357> […]). The exclusion from voting rights pursuant to § 13 no. 2 BWahlG thus only targets persons with disabilities. 109

The objection that the exclusion from voting rights is not based on disability or illness, but on the resulting inability to decide one’s own affairs […] does not merit a different assessment. Art. 3(3) second sentence GG also protects against indirect impairments. Ultimately, any form of unequal treatment that places persons with disabilities at a disadvantage is prohibited (cf. BVerfG, Orders of the Second Chamber of the First Senate of 24 March 2016 – 1 BvR 2012/13 –, juris, para. 11, and of 10 June 2016 – 1 BvR 742/16 –, juris, para. 10). 110

bb) The interference with the prohibition of disadvantaging persons with disabilities under Art. 3(3) second sentence GG is not justified. To be justified, this interference would require a compelling reason; the specific design of the provision would have to take into consideration the constitutional requirements for statutory categorisation and would have to be imperative for accommodating the particular situation resulting from disability (cf. BVerfGE 99, 341 <357>), and for excluding persons from voting rights who are not sufficiently capable of participating in the democratic communication process due to their disability in order to safeguard the function of the election as an integrative process. These requirements are not satisfied: the provision determines the group of persons who are excluded from voting rights on the basis of lack of mental capacity resulting from their disability in a fragmentary manner and without sufficient factual reasons; this violates the right to equality. The fact that persons who 111

do not have an appointed guardian merely because it is not necessary [due to their personal situation] retain their voting rights leads to a disadvantaging of those affected by § 13 no. 2 BWahlG that cannot be justified by reasons relating to the nature of voting rights. In that respect, the considerations set out with regard to Art. 38(1) first sentence GG apply accordingly to Art. 3(3) second sentence GG.

2. § 13 no. 3 BWahlG also violates the constitutional requirements regarding the exclusion from voting rights. The exclusion from voting rights of persons who are confined in a psychiatric hospital based on an order issued pursuant to § 63 in conjunction with § 20 StGB is neither compatible with the principle of universal suffrage under Art. 38(1) first sentence GG (see a) nor with the prohibition of disadvantaging on the basis of disability under Art. 3(3) second sentence GG (see b). 112

a) § 13 no. 3 BWahlG interferes with the regulatory content of the principle of universal suffrage (see aa), and this interference is not justified by compelling reasons (see bb). 113

aa) The principle of universal suffrage guarantees that all citizens can equally exercise their right to vote (cf. BVerfGE 28, 220 <225>; 36, 139 <141>; 58, 202 <205>; 59, 119 <125>; 99, 69 <77 and 78>; 132, 39 <47 para. 24>). This guarantee is restricted when persons who are confined in a psychiatric hospital based on an order issued pursuant to § 63 in conjunction with § 20 StGB are excluded from voting rights pursuant to § 13 no. 3 BWahlG. 114

bb) This interference with the principle of universal suffrage is not justified. § 13 no. 3 BWahlG is not suitable for identifying persons who are generally incapable of participating in the democratic communication process (see 1). Moreover, the provision arbitrarily disadvantages persons affected by the provision (see 2). 115

(1) Regarding § 13 no. 3 BWahlG, too, the only compelling reason that might justify the interference with the scope of protection of Art. 38(1) first sentence GG is the aim of safeguarding the function of elections as integrative processes for the formation of the political will of the people. Thus, it would be necessary that the provision, by way of permissible statutory categorisation, concerns a group of persons that is not sufficiently capable of participating in the communication process between the people and state organs. This, however, is not the case. A relevant lack of the mental capacity required to exercise voting rights can neither be generally inferred from an exemption from criminal responsibility established for the time a crime was committed and from the illnesses underlying it pursuant to § 20 StGB (a), nor from the fact that the other requirements for ordering confinement in a psychiatric hospital pursuant to § 63 StGB are met (b). […]. 116

(a) Under § 20 StGB, persons are exempt from criminal responsibility if they are incapable of appreciating the unlawfulness of their actions or of acting accordingly due to a pathological mental disorder, a profound consciousness disorder, mental deficiency or any other serious mental disorder. It is, however, not evident that the men- 117

tal capacity required for exercising voting rights is typically lacking under these circumstances.

[…] 118-122

(aa) In addition, “exemption from criminal responsibility” within the meaning of § 20 StGB is not a permanent condition independent of a criminal offence, but only describes the mental condition of a person at the time they committed the offence […]. It is sufficient that mental capacity, or even just the capacity of control, which means the ability to act according to one’s appreciation of the unlawfulness of a crime, are impaired at the time the crime is committed. § 20 StGB does not require a permanent impairment; the finding that a person is exempt from criminal responsibility only refers to the time of the actions relevant under criminal law. 123

For instance, psychotic episodes or withdrawal syndrome with or without delirium are temporary phenomena which go into remission when treated adequately, and which thus cannot affect a lack of ability to make electoral decisions […]. This shows that it is not possible to infer from the finding that a person was exempt from criminal responsibility at the time a crime was committed that mental capacity to appreciate the nature and significance of elections is typically lacking. 124

(b) To the extent that reference is made to the other constituent elements for ordering confinement in a psychiatric hospital pursuant to § 63 StGB for justification under constitutional law […], this does not lead to a different conclusion. 125

(aa) [For ordering confinement,] § 63 StGB requires that persons exempt from criminal responsibility at the time they committed a crime can be expected to “commit serious unlawful acts in the future” as a consequence of their condition and that they therefore present a danger to the general public. Accordingly, these persons’ mental or psychological health must be impaired for a longer time period also affecting the future. However, that does not alter the finding, set out above in relation to § 20 StGB, which also applies to this case, that the determination of illnesses underlying such impairments cannot justify the assumption that the person concerned generally lacks the ability to make electoral decisions. 126

(bb) In addition, it follows from the case-law of the Federal Court of Justice (*Bundesgerichtshof* – BGH) that, for finding that a disorder persists after a crime was committed, it is material whether a person’s professional or social ability to act has been restricted in everyday life, aside from the offences they have been charged with. However, it is sufficient for ordering confinement in a psychiatric hospital that the longer-term condition is such that even everyday events can trigger the acute and considerable impairment of criminal responsibility (cf. BGH, Judgment of 10 August 2005 – 2 StR 209/05 –, juris, para. 17; Judgment of 17 February 1999 – 2 StR 483/98 –, juris, para. 32). Yet if confinement can also be ordered in cases where criminal responsibility is not acutely impaired, but where it is merely possible that the impairment may be triggered by everyday events, it is even less possible to conclude on 127

this basis that a person confined pursuant to § 63 in conjunction with § 20 StGB is incapable of participating in the political communication process and of making a self-determined electoral decision.

(cc) Likewise, the reference to the danger confined persons pose to the general public […] does not merit a different assessment. […] This aspect is irrelevant for the ability of confined persons to make (electoral) decisions. According to the legislature's assessment, too, the danger posed by confined persons to the general public does not generally allow the conclusion that they lack the ability to make electoral decisions. This already follows from the fact that persons confined pursuant to § 63 in conjunction with § 21 StGB are excluded from the scope of application of § 13 no. 3 BWahlG […]. Also in cases of diminished criminal responsibility, in which confining persons in a psychiatric hospital pursuant to § 63 StGB requires that they pose a danger to the general public, this confinement does not impact their voting rights. 128

(c) […] 129

(2) In addition, § 13 no. 3 BWahlG violates the principle of universal suffrage because the provision leads to unequal treatment for which factual reasons are not discernible. Ultimately, the group of persons affected by the provision is determined arbitrarily, without sufficiently taking into consideration their ability to participate in the democratic communication process […]. 130

Persons exempt from criminal responsibility retain their voting rights if confinement in a psychiatric hospital is not ordered merely because there is no risk that they will commit considerable criminal offences. Yet in those cases, it cannot be ruled out that mental capacity and ability to make electoral decisions are limited to an equivalent degree or even to a higher degree than the capacity of persons excluded from voting rights pursuant to § 13 no. 3 BWahlG. The same applies to persons who have no criminal record and are confined pursuant to the respective *Land* law provisions because they endanger themselves or others. In those cases, too, voting rights remain unaffected, even though the diagnosis may be comparable. In cases in which the competent court orders both confinement in a psychiatric hospital and imprisonment, and determines pursuant to § 67(2) StGB that all or part of the prison sentence be served before the confinement measure, the persons concerned in fact retain their voting rights during the prison sentence; they are only deprived of these rights as soon as their confinement in a psychiatric hospital begins although their mental capacity has not changed; a sound justification under electoral law in that regard is not discernible. If confinement in a psychiatric hospital is suspended pursuant to § 67b or § 67d(2) StGB, § 13 no. 3 BWahlG does not apply (anymore), given that the provision requires that the person concerned "is in" a psychiatric hospital. However, if the suspension is revoked pursuant to § 67g StGB, the persons concerned forfeit their voting rights once again. In this regard, the ability to vote is irrelevant for the decision on suspending confinement and revoking the suspension. Voting rights of persons exempt from criminal responsibility who are confined in a psychiatric hospital are also 131

restored if these persons are subsequently transferred to an addiction treatment facility pursuant to § 67a StGB. If they are retransferred to a psychiatric hospital afterwards, however, they are deprived of their voting rights yet again.

All this shows that the group of delinquent persons lacking the mental capacity required to exercise voting rights cannot be adequately determined by linking their exclusion from voting rights to confinement in a psychiatric hospital for lack of criminal responsibility; thus, the constitutional requirements regarding statutory criteria for categorisation are not satisfied. 132

b) § 13 no. 3 BWahlG also violates the prohibition of disadvantaging on the basis of disability under Art. 3(3) second sentence GG. 133

aa) The exclusion from voting rights pursuant to § 13 no. 3 BWahlG disadvantages the persons affected by the provision given that it deprives them of their essential democratic participation right. This disadvantaging also occurs because of disability within the meaning of Art. 3(3) second sentence GG given that exemption from criminal responsibility requires a physical, mental, psychological or sensory impairment, and the order of confinement in a psychiatric hospital additionally requires that the impairment persist for a longer time period […]. Therefore, only persons with disabilities are affected by the provision. 134

bb) Given the insufficient justification of this interference, the above assessments regarding the interference with the principle of universal suffrage apply to this interference as well. There is no compelling reason for the disadvantaging by law of persons exempt from criminal responsibility who are confined in a psychiatric hospital. Such a reason is already ruled out because the provision is not suitable for identifying persons who typically lack the mental capacity required to participate in the democratic communication process. Moreover, the determination of the group of persons excluded from voting rights leads to arbitrary unequal treatment of persons whose mental or psychological health is equally impaired. 135

III.

§ 13 no. 2 BWahlG is incompatible with Art. 38(1) first sentence GG and Art. 3(3) second sentence GG; § 13 no. 3 BWahlG is void. 136

1. Incompatibility with the Basic Law generally renders the relevant provision void (cf. BVerfGE 128, 326 <404>). This also applies to electoral complaint proceedings, to which § 78 first sentence, § 95(3) second sentence BVerfGG apply accordingly (cf. BVerfGE 129, 300 <343>). 137

The situation is different if declaring a provision void resulted in a situation which was even farther from the constitutional order than the situation prevailing until that point (cf. BVerfGE 99, 216 <243 and 244>; 119, 331 <382 and 383>; 125, 175 <256>; 132, 372 <394>). In addition, a law is generally not to be declared void if the violation of the Constitution results from a violation of the general guarantee of the 138

right to equality. This is because it is for the legislature to decide how to remedy the violation of the right to equality. In those cases, the Federal Constitutional Court limits itself to declaring the provision that violates the right to equality incompatible with the Basic Law in order not to predetermine the legislature's decision (cf. BVerfGE 99, 280 <298>; 105, 73 <133>; 117, 1 <69>; 122, 210 <245>; 126, 400 <431>; 135, 238 <245 para. 24>). To the extent that it was found to be incompatible with the Basic Law, the provision may then no longer be applied by courts and administrative authorities (cf. BVerfGE 126, 400 <431>; 135, 238 <245 para. 24>).

2. a) Based on these considerations, § 13 no. 2 BWahlG is declared incompatible with Art. 38(1) first sentence and Art. 3(3) second sentence GG. It is for the legislature to decide how to remedy the unconstitutional unequal treatment under electoral law of persons with an equal need for guardianship, while balancing the principle of universal suffrage and the aim of safeguarding the function of the election as an integrative process for the formation of the political will of the people. Reasons based on which it would be permissible to exceptionally declare that § 13 no. 2 BWahlG shall continue to apply (cf. in this regard BVerfGE 93, 121 <148>; 105, 73 <134>; 117, 1 <70>; 126, 400 <431 and 432>) are not ascertainable. 139

b) § 13 no. 3 BWahlG is void because it violates Art. 38(1) first sentence and Art. 3(3) second sentence GG. The complete abolition of the exclusion from voting rights of persons exempt from criminal responsibility who are confined in a psychiatric hospital does not lead to a situation that is farther from the constitutional order than the current situation. Nor does the declaration of voidness curtail the legislature's latitude. In order to satisfy the principle of universal suffrage and the prohibition of discrimination under Art. 3(3) second sentence GG, new legislation regarding the exclusion from voting rights must not exclude persons who are confined in a psychiatric hospital based on an order issued pursuant to § 63 in conjunction with § 20 StGB given that a relevant lack of the mental capacity required to exercise voting rights cannot generally be inferred from this constituent element. 140

IV.

Since complainants nos. 1, 2 and 4 to 8 were excluded from the 2013 *Bundestag* elections on the basis of § 13 nos. 2 and 3 BWahlG, their rights under Art. 38(1) first sentence GG, which are equivalent to fundamental rights, and their fundamental right under Art. 3(3) second sentence GG were violated. 141

D.

[…] 142

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ECLI ECLI:DE:BVerfG:2019:cs20190129.2bvc006214