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**Gloss on the Decision of the Federal Constitutional Court of
Germany of April 11, 2018¹ 1 BvR 3080/09, *Stadionverbot*²**

Access to a sports stadium is subject to the requirement of equal treatment under the Article 3(1) of the Basic Law. The indirect horizontal effectiveness of this provision results from the specific nature of the relationship between the stadium operator and the spectator in that one of the parties has the one-sided power to decide on access to a socially important event. Exclusion from participation in events opened by private entities for the general public cannot be arbitrary. Civil courts have a duty to assess whether the exercise of the property right does not infringe the principle of equal treatment. In particular, it is necessary to examine whether a person affected by a stadium ban has had the opportunity to express his or her views beforehand³.

The decision concerned in this gloss ends a nearly 10-year-long court battle before the civil courts and the Federal Court of Justice (FCJ) of Germany.

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³ The decision of the Federal Constitutional Court of Germany of April 11, 2018, 1 BvR 3080/09 – Stadionverbot; https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/04/rs20180411_1bvr308009en.html (24.10.2019).

It was issued by the First Senate of the Federal Constitutional Court (FCC), composed of eight judges, in response to a constitutional complaint alleging that the decisions of civil courts violated the “general right of personality” expressed in Article 2(1) in conjunction with the Article 1(1) of the Basic Law of Germany (BL).

According to the claimant, the violation consisted in the imposition of a general federal stadium ban on the claimant, and thus in the exclusion from participation in a socially important area of life, based merely on the suspicion that the claimant may in future disturb the smooth running of sporting events and without prior enquiry. In his view, the fact that he was identified as a football hooligan and thus deprived of social respect, which is connected to that sanction, is incompatible with the content of the “general right of personality”. The operator of the stadium, on the other hand, indicated in the first place his rights to rule the property resulting from the Article 14 of BL, as well as the statutory obligation related to the freedom of association (Article 9 of BL) to secure the property and the possessions of persons visiting the stadium.

In its 1 BvR 3080/09 decision the FCC extended the scope of the constitutional review beyond the issue of insufficient consideration by court judgments of the impact of general right of personality on private relationships, as indicated in the complaint. It considered it necessary to carry out an analogical inspection in the scope of Article 3(1) BL, providing a broad commentary on the conditions for imposing a stadium ban in such a way that it does not infringe the requirement of equal treatment.

The ruling which the gloss concerns deserves to be taken into consideration for several reasons. It addresses the important and controversial problem of the limits of private freedom to dispose of one’s property in the light of the constitutional principle of non-discrimination. The ban on arbitrary exclusion from “participation in socially important events” formulated by the Karlsruhe judges will also apply in the future to circumstances, other than sports competitions, related to opening one’s property to the general public. It should also be stressed that the *Stadionverbot* judgment is the most recent statement by the FCC on the indirect horizontal functioning of fundamental rights, the so-called *mittelbare Drittwirkung der Grundrechte*. The expansion of the existing *acquis constitutionell* consisted in the introduction – with re-

gard to the principle of equal treatment – of the concept of “specific constellations” in which it could be applied.

I. Factual Circumstances

The factual circumstances in case 1 BvR 3080/09 were as follows. The claimant, an FC Bayern fan, took part in a group fight with fans of another football club (MSV Duisburg), which resulted in damage to persons and property. He was subject to criminal proceedings, which were finally discontinued after six months due to minor social harm caused by the act. In the meantime, MSV Duisburg imposed a two-year national stadium ban on him. The claimant requested its abrogation in connection with the discontinuance, but the club maintained the ban. The same was done by the subsequent civil courts in Duisburg in their judgments of March 13, 2008⁴ and November 20, 2008⁵, as well as the FCJ in its judgment of October 30, 2009⁶. The said courts have considered the fundamental right of ownership of sports clubs as operators of stadiums under the Article 14 (1) of the Basic Law and the resulting freedom to manage property in the context of the right to respect for housing (*Hausrecht*). From the grounds for the Federal Court judgment it follows that the so-called house rules protected under the right to property proved to be essential for determining the legality of a stadium ban, even if it were to be imposed only on the basis of suspicion that criminal acts will be committed in the future. In addition, they based their refusal on the claim regarding the cessation of violations to property formulated in the second sentence of § 862(1) and the second sentence of § 1004(1) of the Civil Code. The last legal instrument which could have been used by the claimant in the pursuit of his defense was the constitutional complaint to the Federal Constitutional Court. After more than 8 years of waiting, a judgment was passed in which FCC declared the complaint to be unfounded.

⁴ Judgment of the District Court, Case No. 73 C 1565/07.

⁵ Judgment of the Regional Court, Case No. 12 S 42/08.

⁶ Case No. V ZR 253/08.

II. The Radiating Action of Fundamental Rights in Civil Law

In support of its rejection of the complaint, the FCC stated that the Federal Court “had taken sufficient account of the radiating effect of fundamental rights on private law” in relation to the principle of equality under the Article 3(1) of the BL. In this regard, it reiterated the most important components defining the so-called indirect *Drittwirkung*, i.e. the dogmatic construction which has been in force in the case-law since the well-known *Lüth* judgment of 1958⁷. While referring the reader to numerous positions in both German, English and Polish literature, as far as the circumstances of the judgment and its significance for the science of constitutional law are concerned⁸, let us indicate only those theses which are the most relevant for the 2018 decision concerned.

The decision challenged in the context of the constitutional complaint concerned a dispute between individuals as to the extent of civil property and ownership rights with respect to private individuals. According to the mentioned concept of the impact of fundamental rights on the private law system, in such relations it can only be indirect in nature. This is determined in the *a contrario* manner by the wording of the Article 1(3) of BL, which directly formulates the principle of direct binding by fundamental rights only in relation to the legislation, administration and the judiciary constituting public power⁹. Therefore, these rights are first of all defense rights serving the individual against the state (*Abwehrrechte*). At the same time, however, the provisions of the Basic Law on fundamental rights embody an objective order of values (*objektive Werteordnung*) that affects the entire system of law. Fundamental rights develop as constitutional values and radiate as “guidelines” in civil law¹⁰. The so-called *mittelbare Drittwirkung* (*Ausstrahlungswirkung*)

⁷ Judgment of January 15, 1958, 1 BvR 400/51, BVerfGE 7, 198 – *Lüth*.

⁸ H.C. Nipperdey, *Boykott und freie Meinungsäußerung*, “Deutsches Verwaltungsblatt” 1958, pp. 445–452; U. Preuss, *The German Drittwirkung Doctrine and Its Socio-Political Background*, [in:] *The Constitution in Private Relation: Expanding Constitutionalism*, eds. A. Sajo, R. Uitz, Utrecht, 2005, pp. 25–26; M. Florczak-Wątor, *Horyzontalny wymiar praw konstytucyjnych*, Kraków 2014, pp. 102–105.

⁹ V. Epping, *Grundrechte*, Berlin-Heidelberg 2015, p. 159.

¹⁰ *Lüth* – judgement. For instance: the decisions of the FCC of February 26, 1969, 1 BvR 619/63, BVerfGE 25, 256 – *Blinkfüer* and of April 23, 1986, 2 BvR 487/80, BVerfGE 73, 261 –

of fundamental rights, i.e. their indirect horizontal action, consists in taking their radiating influence into account in the interpretation of civil law general clauses and undefined phrases by common courts¹¹.

III. Private Autonomy vs. the Principle of Equal Treatment

How did the FCC apply these theoretical assumptions to the factual circumstances in the judgment concerned? First of all, it noted that the resolution of the conflict between the right to property and the requirement of equal treatment when reviewing the stadium ban, which was imposed in reference to the civil law norm guaranteeing respect for housing (§ 858, 903, and § 1004 of the Civil Code), is primarily the responsibility of civil courts. In principle, they are free to cite fundamental rights directly or indirectly. The only issue to be examined by the FCC is whether they have satisfactorily considered the importance of fundamental rights in their decisions. The Federal Constitutional Court intervenes only when errors of interpretation in this respect become apparent¹².

The stadium operator, just like any individual, is free to choose according to his or her own preferences, with whom he or she wishes to enter into contracts and under what conditions. The constitutional right of ownership under the Article 14(1) of BL allows him or her to freely decide who is allowed and who is denied access to the stadium. In principle, private entities have the right to treat other private entities unequally, unless this is prevented by a statutory regulation. The FCC stressed that there is no objective (and therefore absolutely binding) constitutional principle, according to which private-law relationships would have to be subject to the requirement of equal treatment

Sozialplan and the judgements of February 7, 1990, 1 BvR 26/84, BVerfGE 81, 242 – Handelsvertreter and of October 19, 1993, 1 BvR 567, 1044/89, BVerfGE 89, 214 – Bürgschaftsverträge.

¹¹ J. Schwabe, *Die sogenannte Drittwirkung der Grundrechte. Zur Einwirkung der Grundrechte auf den Privatrechtsverkehr*, München 1971; M. Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts*, Tübingen 2001; C.W. Canaris, *Grundrechte und Privatrecht*, Berlin–New York 1999; K.M. Lewan, *The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany*, “International and Comparative Law Quarterly” 1968, No. 17.

¹² The decisions of the FCC of February 14, 1973, 1 BvR 112/65, BVerfGE 34, 269 – Soraya and of February 11, 1992, 1 BvR 1531/90, BVerfGE 85, 248 – Ärztliches Werbeverbot.

under the Article 3(1) of BL, as this would be contrary to private autonomy. However, it considered that in the case of the dispute between the sports fan and the stadium operator, the circumstances were so specific that civil courts should have considered the requirements of the Article 3 of BL indirectly. More specifically, the aim was to examine whether the imposition of a stadium ban had material grounds or whether it was an arbitrary act in the light of the principle of equal treatment. Moreover, the courts should have clarified how to achieve the balance between the rights of stadium owners, the effectiveness of the stadium ban and the liability of the persons concerned.

IV. The “Specific Configuration” and Selective *mittelbare Drittwirkung*

The extent of indirect effects of fundamental rights depends on the circumstances of the individual case. In order to describe the circumstances of the present case the FCC used the term “specific configuration” (*spezifische Konstellation*). It was supposed to consist in the fact that in a formally private relationship between a spectator and a stadium operator, the latter had particularly large power, which made the equality typical of such relations and resulting from the model of private law, illusory. Such a fact makes the private relationship materially closer to the vertical relationship existing between the state and the individual. In previous jurisprudence, the occurrence of the factor of lack of approximate social balance of power justified the assignment of horizontal indirect effect to the BL norm. Indeed, the FCC has formulated the view that the intensity of a horizontal indirect effect depends on the degree of inequality between the parties of the legal relationship – it is the greater, the bigger is the need to protect personal liberty against extreme market power, economic or personal dependence¹³.

In its judgment in case 1 BvR 3080/09 the FCC stated that “the indirect horizontal effect of the requirement of equal treatment comes into play here because the stadium ban imposes – based on the right to enforce house rules – a one-sided exclusion from events, which the organizers, of their own volition, had opened up to a large audience without distinguishing between individual persons, and this ban has a considerable impact on the ability of the persons

¹³ The cited *Handelsvertreter* – and *Bürgschaftsverträge* – judgments.

concerned to participate in social life. By undertaking to organize such events, private actors also take on a special legal responsibility under constitutional law. They may not use their discretionary powers, which here result from the right to enforce house rules – in other cases they might potentially arise from a monopoly or a position of structural advantage – to exclude specific persons from such events without factual reasons”. The occurrence of a “specific constellation” in the case in question was therefore determined almost entirely by the elements characterizing the defendant, which directly translate into a significant reduction in the position of the other party to a formally equal relationship. First, the FCC stressed that the *Bundesliga* clubs, as organizers of sporting events, open their property to the general public of their own free will. Another important issue was the fact that they had a monopoly in the area of professional matches. No less important, although the FCC does not refer to this argument, was that football is the most popular sport in Germany. However, it has apparently taken account of the social importance of that sport, since it has pointed out that the exclusion of the claimant from the possibility of participating in the matches significantly limits his opportunities to participate in social life. It should be noted that, according to the interpretation of general law of personality in the German science of law in Article 2(1), in conjunction with the Article 1(1) of the BL, it also protects the social sphere, that is to say, the position of a person in society and how he or she is perceived by others¹⁴. The imposition of a stadium ban on a person stigmatizes him or her as a potential criminal. Additional support for the decision taken by the FCC was the reference to the right to participate in cultural life regulated in the Article 15(1a) of the International Covenant on Economic, Social and Cultural Rights and the opinion of the Committee on Economic, Social and Cultural Rights¹⁵.

¹⁴ In its earlier judgments, the FCC wrote in this context about the so-called claim for social significance (*Geltungsanspruch*), i.e. the possibility for an individual to decide independently how he or she wants to present himself or herself to others. The decision of February 8, 1983, BverfGE 63, 131 – *Gegendarstellung*.

¹⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), December 21, 2009, E/C.12/GC/21; <https://www.refworld.org/docid/4ed35bae2.html> (24.10.2019).

V. Material and Procedural Conditions for Imposing a Stadium Ban

As a consequence of the decision which the gloss concerns, the recognition of the legality of a stadium ban by civil courts will require a prior assessment of whether the principle of equal treatment has been respected. In the FCC's statement one can distinguish material and procedural conditions which must be fulfilled in order for a stadium ban not to be deemed arbitrary.

First of all, there must be a sufficient factual reason for exclusion. The FCC pointed out that from a constitutional and legal point of view, there are no obstacles to assume that this condition is met by the very "well-founded concerns that a person poses a risk of future disturbances". The FCC emphasizes that such an assessment must be based on objective facts and not only on subjective concerns about the possibility of risk. Moreover, no evidence of previous criminal proceedings against such a person is required, as stadium operators have a legitimate interest in ensuring the smooth running of football matches and are responsible for the safety of players and spectators. However, the FCC decided that the fact that an investigation was initiated by the prosecution may justify the imposition of a stadium ban, since under the law this type of investigation can only be initiated if there is a suspicion based on facts. At the same time, it is not necessary to wait for the investigation to be closed, since safety considerations at the stadium may require that remedial measures be taken more quickly. However, such a circumstance does not exempt organizers of events from the obligation to examine the credibility of the allegations against the person concerned so that criminal proceedings initiated in a manifestly arbitrary or erroneous manner or based on erroneous factual assumptions can be excluded.

For the procedural requirements to be met, it is necessary for the operators of stadiums to undertake "reasonable efforts to investigate the facts of the case". This notion of the FCC includes the obligation of prior questioning of persons who are to be affected by the stadium ban. In addition, it is required that upon the request of the parties concerned, a statement of reasons for the decision be provided so as to enable them to assert their rights. The FCC concluded that this requirement is met by the regulation of the "Stadium Prohibition Guidelines" (SVRL) of the German Football Association in its 2014 version, which states that a person has the right to be heard and

this must, in principle, take place before a stadium ban is imposed¹⁶. In case of the dispute in question, the FCC considered it sufficient for the condition to be met that in civil court proceedings the claimant had the opportunity, at least retrospectively, to address the reasons for the already expired stadium ban and to be heard.

VI. Summary: Common Sense Instead of Strict Dogmatics¹⁷

The decision which the gloss concerns has been undoubtedly the most important statement of the FCC regarding the constitutional and legal aspects of the stadium ban to date. The conditions of exclusion from participation in football matches by private stadium operators, as formulated in the decision, should be considered in the future by the organizers of all other sports competitions which involve opening their property to the general public. The very definition of a material and procedural framework for the use of private property must be seen as a reinforcement of the rights of the other party to the legal relationship, in this case, the spectators. However, when assessing the content of these restrictions, it seems that the FCC has correctly balanced the conflicting interests. As it pointed out in the wording of the decision, the property right should take into account not only the unilateral competence of the owner to determine the purpose of the property, but also the social aspect of ownership, expressed in the Article 14(2) of BL, according to which: “Ownership brings responsibility. The use of it should also serve the common good”. Consequently, the FCC not only strongly emphasized the importance of the property right, and more specifically house rules, by allowing exclusion from participation in sporting events on the basis of a mere (objectively established) suspicion as to the possibility of certain activities in the future, which means leaving the stadium operators with a broad scope for assess-

¹⁶ § 6(1) SVRL. The guidelines are an internal legal act, issued with the aim of introducing a uniform procedure for stadium bans. For more information on the legal nature of stadium bans, see: J.F. Orth, B. Schiffbauer, *Die Rechtslage beim bundesweiten Stadionverbot*, “RW” 2011, No. 2, pp. 184–185.

¹⁷ Phrase used by M. Ruffert, [in]: *Common sense statt strikte Dogmatik? Zutreffendes aus Karlsruhe zu Stadionverboten*, VerfBlog, 30.04.2018, <https://verfassungsblog.de/common-sense-statt-strikte-dogmatik-zutreffendes-aus-karlsruhe-zu-stadionverboten> (24.10.2019).

ment. At the same time, however, it imposed on them an additional condition – not formulated in the earlier judgment of the FCJ – in the form of an obligation to hear the person concerned prior to the imposition of a stadium ban. Therefore, it may be concluded that the ruling in case 1 BvR 3080/09 satisfies the rule formulated in the constitutional case-law and addressed, in principle, to common courts, which requires balancing the conflicting interests so as to ensure that all parties involved are able to exercise their rights as far as possible¹⁸. As noted by M. Ruffert, this time the FCC resisted the temptation to impose a collectivist concept of fundamental rights, focused not on the individual but on the social interest¹⁹.

However, from the perspective of constitutional law, the most interesting issue is the horizontal application of the constitutional principle of equal treatment. According to the FCC, it was justified by the special power position of football clubs. This argument falls within the framework of structural advantage (*strukturelle Überlegenheit*), already known in case law for several decades²⁰. In the present case, the aim is for the stadium operators to be able to decide to a large extent on the participation of other entities in social life, in this case in football matches, which are generally open to the general public. I believe that this criterion resembles to some extent the concept of a “public forum”, which was applied a few years ago in the *Bierdosen-Flashmob* case, referring, among other things, to the American case-law. The broad, material interpretation of this concept as a place which the owner makes available to others through his or her own decision was the justification for the FCC’s repeal of the ban on demonstrations in a private company’s square, imposed by civil courts²¹.

¹⁸ The decision of the FCC of July 19, 2011, 1 BvR 1916/09, BVerfGE 129, 78 – Anwendungserweiterung.

¹⁹ M. Ruffert, *op.cit.*

²⁰ The judgments cited in the footnote 12.

²¹ If a given space or facility meets the definition of a public forum, then its owner must respect the exercise of constitutional rights and freedoms. Interim Order of July 18, 2015, 1BvQ 25/15 in the *Bierdosen-Flashmob* case, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/07/qk20150718_1bvq002515.html (24.10.2019); I. Wróblewska, *The Publicization of Private Relations by Horizontal Application of constitutional Rights*, “Comparative Law Review” 2019, vol. 25, in print.

Finally, it is worth noting the characteristic comment that could be observed in the German literature in relation to the decision which the gloss concerns. Despite the recognition of dogmatic deficiencies in the argumentation to support the selective *Drittwirkung* in the area of the principle of equal treatment under Article 3(1) BL, it was considered that the decision taken by the judges to allow the imposition of a nationwide stadium ban subject to the fulfillment of certain conditions was deemed instinctively fair²² or consistent with the requirements of common sense²³. M. Munder has put it aptly when he wrote that common sense implies that “with great power comes great responsibility”²⁴.

²² M. Munder, *With Great Power Comes Great Responsibility*, “JuWissBlog” 2018, No. 41, 9.5.2018, <https://www.juwiss.de/41-2018> (24.10.2019).

²³ M. Ruffert, *op.cit.*

²⁴ M. Munder, *op.cit.*