CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 71630/01
by Albrecht WENDENBURG and others
against Germany

The European Court of Human Rights (Third Section), sitting on 6 February 2003 as a Chamber composed of

Mr I. CABRAL BARRETO, *President*,
Mr G. RESS,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs H.S. GREVE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 21 May 2001,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Albrecht Wendenburg and seventeen others, are German nationals. Their names and personal details are listed in the Annex at the end of this decision. They are represented before the Court by Mr Wolfgang Peukert, a lawyer practising in Karlsruhe, Germany. The respondent Government are represented by Mr Klaus Stoltenberg, *Ministerialdirigent*.

The facts of the case, as submitted by the parties, may be summarised as follows.

1. Factual and legal background

The applicants enjoyed exclusive rights of audience (*Singularzulassung*) in German courts of appeal pursuant to section 25 of the Federal Barristers Act (*Bundesrechtsanwaltsordnung*) of 1 August 1959.

Under section 25, no barrister with exclusive rights of audience in a court of appeal was entitled to such a right in any other court. This meant that in civil matters, they could not appear before the lower courts, while lawyers with exclusive rights of audience in the lower courts could not appear in the courts of appeal.

Section 25 was held unconstitutional by a decision of the Federal Constitutional Court of 13 December 2000.

The applicants, most of whom have families and children to support, had previously worked on some 100 to 500 appeals per year, which brought in 90% or more of their annual income and covered between 40% and 50% of their office expenses.

2. Decision of the Federal Constitutional Court of 13 December 2000

In its decision of 13 December 2000, the Federal Constitutional Court, following a complaint lodged by a lawyer with an exclusive right of audience in the lower courts, reached the following conclusions:

> "1. Section 25 of the Federal Barristers Act is incompatible with Article 12 § 1 of the Basic Law. The provision is valid in respect of existing rights of audience until 30 June 2002. As from 1 January 2002, barristers enjoying a right of audience in the courts of appeal may, on application, at the same time acquire rights of audience in district and regional Courts with jurisdiction in the place in which their practice is located.

2. In so far as it is confined to the *Länder* mentioned therein, Section 226 § 2 of the Federal Barristers Act shall cease to apply on 1 July 2002.

3. The remainder of the constitutional complaint is rejected.

4. The Federal Republic of Germany shall pay the applicant's costs.

Grounds:

A.

The applicant, a barrister and notary who has practised in Münster, where he has his chambers, for over five years, directs his constitutional complaint against the fact that, under section 25 of the Federal Barristers Act, he does not also have a right of audience in the Hamm Court of Appeal since the provision concerning exceptions contained in section 226 does not apply to North-Rhine Westphalia.

I.

Most recently amended by the law entailing the application of the EC Directive in the field of the law governing the exercise of the profession of barrister of 9 March 2000 ..., the Federal Barristers Act ... of 1 August 1959 ... in its second chapter sets out in its second schedule a comprehensive regulation of barristers' admission to bars affiliated to courts. Every barrister must be admitted to a bar affiliated to a specific court of ordinary jurisdiction and is required to establish his practice within the area to which such authorisation extends (Sets. 18, 27 of the Federal Barristers Act). Any barrister admitted to a court of appeal bar may not combine such right with a similar admission to any other court bar (... Section 25 of the Federal Barristers Act). In contrast, any barrister admitted to a district court bar may, on request, be admitted to the regional court bar in whose area the said district court has its seat (Section 23 of the Federal Barristers Act). In addition, Section 226 § 2 of the Federal Barristers Act in the text of the Law of 2 September 1994 (... hereinafter referred to as BRNOG) on the New System for the exercise of the profession of barrister and patent lawyer opens up the possibility of lawyers becoming admitted to both regional court bars and court of appeal bars (combined rights of audience), albeit not in the *Länder* of Brandenburg, Hesse, Mecklenburg-Vorpommern, Lower Saxony, North-Rhine Westphalia, Rhineland-Palatinat and Schleswig-Holstein. The relevant provisions of the Federal Barristers Act read as follows:

‘Section 25

Exclusive nature of admissions restricted to the court of appeal bar

No barrister admitted to the court of appeal bar shall be entitled to admission to the bar of any other court.

Section 226

Concurrent admissions to a district court bar and a court of appeal bar

(1) ...

(2) Barristers admitted to a regional court bar in the *Länder* of Baden-Württemberg, Bavaria, Berlin, Bremen, Hamburg, Saarland, Saxony, Saxony-Anhalt and Thuringia may, on request, at the same time be admitted to a court of appeal bar if they have previously been admitted to a court of first instance bar for five years.’

Barristers with rights of audience in the courts of ordinary jurisdiction were originally restricted when participating in proceedings to appearing before the court to whose bar they had been admitted. Since 1 January 2000, section 78 of the Code of Civil Procedure has extended rights of audience to all proceedings before the district and regional courts. As previously, only duly accredited barristers may be admitted to the bars of the higher courts ...

Barristers may appear before the Labour-, Finance-, Social - and Administrative Courts, as well as - in criminal matters - before the courts of ordinary jurisdiction in all proceedings and at all levels of jurisdiction regardless of their court of registration.

The Federal Barristers Act of 1959 aimed to restore the legal unity of the law governing the exercise of the profession of barristers ... After the Second World War, differing regulations had emerged in the occupation zones and subsequently in the *Länder*. In a number of courts of appeal, by way of deviation from the principle of exclusive rights of audience, there had already been an optional combined right of audience in the regional court and the court of appeal, this being the case in Hamburg, Munich, Bamberg,

Zweibrücken, Brunswick and Oldenburg. This practice was later introduced in Karlsruhe, Stuttgart and Tübingen. Subsequently, the question as to whether exclusive rights of audience should be preserved or give way entirely or at least in certain fields to combined rights of audience exercised the minds of the German *Bundestag* and its committees as well as those of the Federal Council over two legislatures ... Finally the Federal Barristers Act, which entered into force on 1 October 1959, provided for an ongoing combined right of audience to the courts of appeal only for barristers admitted to the bars of the Berlin, Bremen and Saarbrücken Regional Court, subject, however, in each case to a waiting period of five years. Furthermore, this right was extended to barristers who already enjoyed combined rights of audience. In Bavaria consideration was given to a combined right of audience for a transitional period.

Ten years later, Hamburg (cf. Section 1 § 51 of the Law on the Amendment of the Federal Barristers Act and the Law on Patent Lawyers of 13 January 1969 ...), followed a further three years later by Baden-Wurttemberg and Bavaria (cf. Section 1 of the Law on the Amendment of the Federal Barristers Act and the Federal Regulation on Scales and Fees for Barristers and other prescriptions of 24 October 1972 ...), was included in the circle of *Länder* in which lawyers enjoyed combined rights of audience. In Hamburg no sufficiently strong body of barristers had managed to develop within the Court of Appeal. When the occasion arose, barristers attached to the regional courts would have themselves sponsored by a colleague admitted to the local court of appeal bar in order to be able to appear before that court themselves (cf. Record of the 328th Session of the Legal Affairs Committee of the Federal Council (*Bundesrat*) of 13 March 1968, p. 16 with further reference; cf. Summary Record of the 96th Session of the Legal Affairs Committee of the 5th German Bundestag of 24 October 1968, p. 10 and the Written Report of said Committee, ...). In Baden-Wurttemberg and Bavaria, the co-existence of exclusive and combined rights of audience had led to distortions in competition. The experience of barristers with combined rights of audience was considered positive (... cf.. also the Resolution of the 87th Session of the Legal Affairs Committee of the 6th Bundestag of 9 June 1972, p. 16, 33 et seq.).

Barristers in the new *Länder* who were entitled to appear before the latters' courts continued to enjoy rights of audience in all courts, even after the Treaty of Unification (Law on Barristers of 13 September 1990 ... ; Treaty of Unification, Appendix II, Chapter III, Subject Matter A, Paragraph III, No. 1 ...). Under the Law on the Adaptation of the Administration of Justice in the Acceding Areas of 26 June 1992 ..., it was left to the new *Länder* to choose which of the two systems of rights of audience - exclusive or unrestricted - they preferred. The Federal legislature had no wish to give pride of place to one or the other ... Saxony, Saxony-Anhalt and Thuringia opted in favour of the system of unrestricted rights of audience, whereas Brandenburg and Mecklenburg-West Pomerania preferred exclusive rights of audience. Before the relevant *Länder* law had taken effect in practice, the law of 2 September

1994 on the reorganisation of the exercise of the profession of barrister and patent lawyer, contrary to a planned nation-wide freedom of choice for *Länder* to decide themselves as to the form of admission ... , left Section 25 of the Federal Barristers Act untouched and only the new *Länder* which had opted for unrestricted rights of audience were included under Section 226, subset. 2 of the Federal Barristers Act.

II.

The applicant applied in 1995 to the President of the Hamm Court of Appeal for an unrestricted right of audience to that court after having practised as a barrister for more than five years. His appeal to the Court of Lawyers of the *Land* of North-Rhine-Westphalia against the decision to reject his application proved unsuccessful. Like the Court of Lawyers, the Federal Court of Justice, in its decision of 18 November 1996 upholding the latter's view, found that the legislature had not written into Section 25 of the Federal Barristers Act impugned by the applicant any disproportionately restrictive interference in his freedom to exercise his profession. The Regulations on the Exercise of the Profession (*Berufsausübungsregelung*) were in conformity with the Constitution ... . The system of exclusive rights of audience served the common good in so far as, after the decision of first instance, the subject matter of the proceedings when laid before a fresh barrister should be examined and judged by him uninfluenced by what had gone on before (principle of two pairs of eyes). Despite the exceptions in Section 226 subsection 2 of the Federal Barristers Act, the law did not breach Article 3 § 1 of the Basic Law either. To the extent that exceptions apply also to a part of the new *Länder*, this is constitutionally acceptable having regard to their weight as grounds conducive to the accession of the new *Länder*.

III.

In his constitutional complaint the applicant contests the breach of Article 12 § 1 and Article 3 § 1 of the Basic Law as a result of the adverse decisions of the President of the Hamm Court of Appeal, the Court of Lawyers and the Federal Court, together with sections 25 and 226 of the Federal Barristers Act. Hitherto deemed to be in conformity with the Constitution, the rules, so it is argued, have been superseded by amendments to the law on the exercise of the profession of barrister and by the evolution that has taken place in the practical relations between practitioners. They are said to lead to distortions in competition that are not only a bar to equality but also incompatible with the freedom of choice and the freedom of exercise of the profession.

It was claimed that there was a restriction on the freedom to exercise one's profession affecting the very choice of a profession. The applicant contended that he could be admitted to the Hamm Court of Appeal Bar by abandoning his solicitor's practice in Münster. The principle of the two pairs of eyes was not so much in the general interest as to justify the interference. Its observance was exclusively a matter of the internal organisation of a law practice. Even in

Länder with the system of exclusive rights of audience it has broadly lost its validity. This was said to be the consequence of the introduction authorised in the meantime of mixed practices encompassing two or more localities in which barristers specialised and could also appear in respect of appeals before the courts of appeal. Given the great number of barristers admitted to the regional courts, those with exclusive rights of audience would always be able to find a partner. Should the legislature allow barristers with exclusive rights of audience to gain access to all the regional courts situated in the district of the court of appeal through partnerships with colleagues practising in cases of the first instance before the regional courts, it would then have to enable barristers admitted to the regional court bars to gain access to the courts of appeal. For the specialisation of barristers, what was decisive was the size of the practice and not whether they enjoyed exclusive rights of audience. Given the considerable disadvantages for barristers not admitted to the court of appeal bar, the interference was however disproportionate. A barrister not able to appear before the court of appeal seemed to be less qualified than his colleague; this in itself was a competitive disadvantage. The effect of this was particularly felt along the frontiers between *Länder* with different systems. For example, barristers from Hamburg or Bremen with unrestricted rights of audience were fully successful in the surrounding area where the system of exclusive rights of audience was in force.

Unequal treatment within the Federal Republic was also said to run counter to Article 3 § 1 of the Basic Law. To that extent a more stringent measure should be included in the law of the Constitution, since the diversity of legal situations affected Article 12 of the Basic Law. The legislature had no overriding reasons for this unequal treatment; in 1994, he had rather merely accepted it because no majority had emerged in favour of any alternative rule. The legislature was unable to take purchase on the principle of two-pairs-of-eyes because, had it carried weight, it could not have been confined to individual regions. Regional peculiarities could no longer be invoked as a justification. Such peculiarities might have existed in the historical development of the City *Länder* and the southern *Länder*; however, they were totally absent in the new *Länder*. Moreover, as early as 1972, when the unrestricted rights of audience in courts was reintroduced in the *Länder* of Baden-Wurttemberg and Bavaria, the legislature had considered the system of unrestricted rights of audience as objectively better attuned to legal policy and the requirements of competition.

IV.

The Federal Ministry of Justice on behalf of the Federal Government, the Lower Saxony State Chancellery, the President of the Hamm Court of Appeal, the Federal Order of Barristers, the German Bar Association and the Association of Barristers with exclusive rights of audience in the Courts of Appeal took a stand on the matter and added further detailed comment at the hearing.

They conclude and largely concur that the impugned decisions and the norm on which they are based are compatible with the Basic Law.

In a *Land* the legislature is entitled to take account of regional particularities resulting from the historical development of the West and from the special situation of rebuilding an effective legal system in the East.

The principle of two pairs of eyes was necessary for the administration of justice, as could be confirmed by statistics. In civil actions, the principle of the production of evidence applied. A change of barrister protected parties against possible failure to discover opportunities for an effective defence. The compulsory change in barrister provided a possibility of a further examination of the case and an improvement in its factual basis. Not having been involved in the trial proceedings, the new barrister was not under pressure to win the case or to justify himself. The system of exclusive rights of audience, so it is argued, facilitates specialisation by barristers in procedural law and substantive law, thus being conducive to a more thorough examination of the case. This specialisation, it is claimed, matches that of the Specialised Divisions of Courts of Appeal. Section 59a of the Federal Barristers Act cannot be read as being in favour of abandoning the principle of two pairs of eyes. Mixed practices of barristers with differing rights of audience had always been available. Despite the increase in the number of these so-called mixed practices, the principle of exclusive rights of audience had not been abandoned in practice. In court districts with the system of exclusive rights of audience, changeover of barristers handling cases continues to take place. Such a practice cannot be achieved in areas with unrestricted rights of audience; there is especially no way of ensuring that the appeal lawyer is equally familiar with the case-law of the appeal court. The bench also values the improved quality resulting from the ‘principle of two pairs of eyes’.

Should the system of exclusive rights of audience be abandoned, constitutional reasons would require a transitional solution. Barristers, it is claimed, would have been encouraged by the decision of the Chamber of the Constitutional Court of 13 July 1993 ... to expect the right to continue to remain valid. This discontinuation of the system of exclusive rights of audience would not allow the survival of the specialisations of barristers vested with such rights. This would have resulted in a devaluation of their legal practice, for the colleagues dealing with cases in the first instance would as a rule no longer pass on to them the representation of clients in proceedings before the court of appeal. A transitional solution would first and foremost have to take account of the fact that the great majority of barristers enjoying exclusive rights of audience did not possess a source of clients of their own among persons seeking justice. Their continued existence would depend on the development of a practice dealing with cases of first instance and general legal advice. Therefore, only a transitional arrangement laying down a deadline on the prohibition of exclusive unrestricted rights of audience

unilaterally in favour of barristers hitherto enjoying exclusive rights of audience in the court of appeal and allowing only them to appear before regional courts and courts of appeal would seem suitable. A 10-year period would be appropriate.

B.

The constitutional complaint is in essence well-founded.

The system of exclusive rights of audience as laid down in Section 25 of the Federal Barristers Act is not compatible with Article 12 § 1 of the Basic Law. There is thus no need for an examination on the basis of Article 3 § 1 of the Basic Law. The constitutional complaint is to be rejected, in so far as it is directed against the impugned decisions, as the hitherto applicable right continues to be available to the applicant.

I.

The impugned decisions and their underlying regulations limit the applicant's exercise of his profession. A sector of professional activity is closed to him, whereas it is generally open to barristers in other *Länder*, while in North-Rhine Westphalia, for example, it is reserved for barristers admitted to the Court of Appeal Bar. ... At the same time, other barristers who - like the applicant - are not admitted to the Court of Appeal Bar are excluded from forensic activity in the Court of Appeal in proceedings where the presence of a barrister is mandatory.

Such legislative regulations over the exercise of a profession have been held by the Constitutional Court's constant case-law to be admissible when they are justified on cogent grounds as being in the general interest, when the chosen means is in accord with the aim sought and when an overall weighing of the degree of the interference and the grounds serving to justify it do not exceed the limit of what is reasonable ... . The more the practitioner suffers hindrance in the exercise of a profession, all the greater has to be the weight of the general interest that the arrangement is designed to serve ... . The impugned decision does not suffice to meet these constitutional requirements.

1. The institution of exclusive rights of audience was originally based on a variety of concerns for the general interest. These included the legal tradition and the existence of a counterpart to the institution in civil-law procedures ... , and the advantages for the administration of justice resulting from an easier access to qualified barristers and from the furtherance of a climate of mutual trust between the Court and the barristers established in its area of jurisdiction ... . The legislature also relied on the last of these grounds to justify Section 78 of the Code of Civil Procedure, previous version, during the period when it was in force. The right of practice restricted to cases of the first instance was designed to expedite proceedings before the Civil Courts, to further trust-based co-operation between Bench and Bar and to enhance the quality of

advice given by barristers thanks to a knowledge of the local habits and traditions. However, in the process of reforming the regulation of the profession of barrister, the legislature itself did not hold this aim to be defensible as a justifiable means of imposing restrictions on the right of audience to the regional court bars ... .

(a) Technological progress has prompted the legislature to cease to attach great weight to the disadvantages that might arise for the Courts as a result of the acceptance by barristers of cases from outside areas. Increased mobility brought about by improved means of transport and the emergence of modern means of communication (such as portable telephones, facsimile, laptops), together with the ability to transmit large quantities of documents to law practices and increasingly to the Courts, offers a reliable mode for contacting a barrister provided he continues to be required to have his practice in the district where he is registered. In all other jurisdictions, the fixing of dates of hearings has long been successfully achieved without recourse to locally based barristers and this is now also the case in civil matters with district and regional courts. The courts of appeal show no special features that could stand in the way of the general interest. The frequency of travel to outside hearings will depend on how much importance the client or the barrister attaches to attendance in person, the responsibility assumed by the barrister in the specific case and his ability to adjust various hearing dates to one another ... . Dates for hearings before the courts of appeal can also be fixed effectively and swiftly with barristers with unrestricted rights of audience.

(b) In civil matters before district and regional courts, the legislature has also abandoned the aim of a trust-based personal contact between barrister and judge as a requirement for the administration of justice ... . It is not clear that the viewpoint was a decisive reason in upholding exclusive rights of audience in the courts of appeal.

(c) Neither can the specialisation of barristers pleading before them be relied on to justify the system of exclusive rights of audience in the courts of appeal as being a matter of public interest. This applies to both specialisation in individual fields (bb) and a thorough acquaintance with the case-law of a particular court (aa). The weight attaching to matters referred to as being in the general interest has diminished so much in this area that they can no longer serve to justify the exclusive rights of audience in the courts of appeal. These general-interest arguments were based on circumstances and conditions that no longer exist. Moreover, the legislature has made it clear through the revised rules of procedure and organisation of the profession of barrister that these approaches no longer carry any weight.

(aa) True, a knowledge of the case-law of a given court and features peculiar to a locality may be of advantage to the client. However, such knowledge does not come into play at the appeal stage first of all, but is made much use of at the court of first instance, since it may provide a means of avoiding recourse to appeal. In any case, such circumstances were more

relevant in matters dealt with by the administrative courts of the second instance which would usually reach a final decision based on the law of the *Land* than they were in matters falling under the jurisdiction of the civil courts. However, rights of audience in administrative appeal procedures was never restricted to a small circle of barristers possessing such a right.

(bb) In the meantime, the specialisation of barristers outside the area where they enjoy exclusive unrestricted rights of audience has become much more widespread with the support of the legislature (cf. Sets. 59 a, 59 b subset. 2 Nr. 2 and Section 59c of the Federal Barristers Act).

In so far as a specialised corpus of barristers had already developed at an early stage, this was not the result of exclusive rights of audience. First of all, specialisation in matters dealt with by the courts of appeal requires a corresponding distribution of labour in the court of appeal concerned, which was only the case of the larger courts of appeal. The views uttered by the President of the Hamm Court of Appeal do not apply uniformly to places such as Brunswick, Oldenburg, Rostock or Zweibrücken. Specialisation as a rule requires above all that barristers be able to work in large practices where the work is divided among them, thus enabling them to specialise. As a result of changes in the laws governing the barristers' profession such large practices have grown up on a broad scale, as was to be foreseen when the Federal Barristers Act came into force in 1959. Barristers joined forces in various structures and worked across the borders of the local area of jurisdiction and those between *Länder* in practices comprising barristers enjoying either of the two types of rights of audience and members of other professional groups. This development clearly shows that the services of barristers specialised in various areas of the law were already in great demand at the stage of preliminary advice and first instance and not only as the result of their enjoying exclusive rights of audience in the Court of Appeal.

2. The only common-interest arguments that the legislature continued to view as relevant were the improved quality of legal advice and the ability to reach an independent assessment of the prospects of the success of an appeal thanks to the principle of two pairs of eyes. However, this principle and the expectations to which it gives rise do not suffice to justify the interference in barristers' professional freedom.

(a) It is already unclear whether the legislature continues to look upon the system of exclusive rights of audience as an appropriate and necessary means of improving the administration of justice.

(aa) Granted, there are many pointers to the effect that, against the background of the sources of information then available, the legislature of 1959 saw in exclusive rights of audience a particularly suitable means of securing an administration of justice of high quality on the basis of the principle of two pairs of eyes.

The principle of exclusive rights of audience was the practice in the great majority of appeal-court districts and was such as to give the legislature the impression that, in conjunction with the strong local concentration of the capacity to conduct first-instance proceedings as per section 78 of the Code of Civil Procedure, it represented a principle of proven practical value. Decisions of appeal courts were published less frequently, so that the case-law of these courts may have increasingly tended to develop in different directions. In addition, practices were small and were not allowed to operate in more than one locality. Barristers were more dispersed and far less specialised. There were practically no specialist lawyers and no reported emergence of pools of special skills. Experience of Labour-, Financial -, Social - and Administrative jurisdictions where restrictions on rights of audience had been waived from the outset was seldom to be found.

(bb) However, it is to be doubted whether the 1994 legislature continued to abide by his assessment having regard to changes in real-life situations.

Already in 1972 the rapid and readily accepted spreading of the system of unrestricted rights of audience in Baden-Wurttemberg and Bavaria showed that the legislature did not consider that the experience so far acquired endangered the administration of justice if an amendment to the law offered a means of ending competitive pressures among barristers. However, it would appear from the legislative history prior to the authorisation of mixed practices in 1994 that there were doubts as to the suitability of exclusive rights of audience as a means of achieving the desired aims.

When preparing the Federal Barristers Act in 1959 the legislature still considered a ban on such practices as an additional measure indispensable for the preservation of the principle of two pairs of eyes (cf. In extenso Report of the 15th Session of the Legal Affairs Committee of the 3rd German Bundestag of 27 March 1958, p. 4 et seq. Such a ban could not be executed at this stage (cf. In extenso Report of the 33rd Session of the Legal Affairs Committee of the 3rd German Bundestag of 6 November 1958, p. 14 et seq.; Report of the Plenary Session of the German Bundestag of 1989 February 1959, 3rd WP, 62nd Session, p. 3359; Report of the Plenary Session of the German Bundestag of 18 March 1959, 3rd WP, 66th Session, p. 3532); however, practices operating in more than one locality were not viewed as admissible ... . A relevant connection between the forms of law firms, the restricted capacity to conduct proceedings before the courts of first instance and the exclusive right of audience to the appeals courts also featured prominently in the Report of the Commission on Deregulation of 15 March 1991 (cf. p. 109 of the Report).

It was only in 1994 that the legislature reacted with section 59 of the Federal Barristers Act to the changes that had in fact taken place and to the case-law of the Federal Court that had moved in a similar direction. At the same time, it abandoned linkage of the capacity to conduct proceedings and the nation-wide professional localisation for civil proceedings before the Regional and Family

Courts (Section 78 of the Code of Civil Procedure in the wording of Section 3, Nr. 1 BRNOG). Last but not least, doubt was occasionally expressed in the debates about the amendment as to whether the principle of two pairs of eyes required the existence of a system based on exclusive rights of audience (cf. ... the Report of the 106th Session of the Legal Affairs Committee of the 12th German Bundestag of 12 January 1994, p. 28 about talks at the Federal Ministry of Justice).

(cc) Further, In Section 1 of the First Law on the amendment of the Law on the Implementation of the Directive of the Council of the European Communities of 22 March 1977 on greater flexibility of the practical exercise of their services by barristers of 14 March 1990 (... hereinafter referred to as the...), the legislature found another means of compulsorily adhering to the principle of two pairs of eyes without the need for exclusive rights of audience ... . According to the third sentence of Section 3 § 1 of the Law on the Exercise of Barristers' Services, barristers from member States of the European Communities are entitled to appear before the civil chambers of appeal courts even without exclusive rights of audience according to section 25 of the Federal Barristers Act, provided however that it has been ascertained that such barristers have not acted as full legal representatives in the initial proceedings.

Already in 1990, the legislature had thus demonstrated that there was an alternative and less demanding way of ensuring the free exercise of the profession and of implementing the principle of two pairs of eyes, merely by prescribing a changeover in staff from one instance to the other. This solution, which was favourable to barristers from EU member States, failed to obtain majority support from barristers authorised to practise in Germany during the debates on the amendment of sections. 25 and 226 of the Federal Barristers Act (cf. Verbatim Record of the 106th Session of the Legal Affairs Committee of the 12th German Bundestag of 12 January 1994, p. 28; the matter was not taken up again later), although the system of exclusive rights of audience is less conducive to the observance of the principle of two pairs of eyes. Thereafter, the legislature, contrary to what was laid down in Section 3 of the Law on the Exercise of Barristers' Services (henceforth section 27.1 of the Law on the Professional Activities of European Barristers in Germany), has ceased to consider the changeover of staff as indispensable.

(dd) It Is consequently to be noted that, overall since 1990, the legislature has increasingly and clearly distanced himself from 'its initial assessment that the system of exclusive rights of audience was on the whole more necessary for the administration of justice than unrestricted rights of audience.

The basis for this clearly lay in the recognition that grew up in a number of *Länder* and in other branches of the judiciary of the capacity of the administration of justice to function on the basis of a system of unrestricted rights of audience, as well as in advantages that accrued to the administration of justice, especially from the clients' standpoint. Foremost among these

advantages was the special relationship of trust between barrister and client underpinned not only by the knowledge of the case-file in a specific case, but also by long-standing advice and successful co-operation concerning all the legal business involving the client. For a client who has won his case in the first instance, a mandatory change of barrister can be disturbing. Although the consequences of such a change may be offset to some extent by bringing into the appeal proceedings the barrister already fully conversant with the case when tried in the first instance, additional costs would be entailed.

Hence the marked reticence shown by the legislature in the 1992 Administration of Justice Revision Act and its failure to decide itself whether the administration of justice would be better served by a system of exclusive rights of audience or a system of unrestricted rights of audience ... . The idea was first of all to offer the new *Länder* an opportunity of deciding according to their own preferences. A corresponding freedom of choice was then thrown open to all the *Länder* in the initial draft reform of 1994 ... . This was to make clear the fact that, under Federal legislation, neither unrestricted nor exclusive rights of audience were to enjoy precedence before the Appeal Court. The Legal Affairs Committee of the German *Bundestag* rallied to this view of the law at its hearing of 1 December 1993 ... .

(b) These doubts in the legislature's mind as to the suitability and the necessity of the system of exclusive rights of audience as a means of improving the quality of the administration of justice were strengthened by the body of experience acquired in the Federal Republic. According to Section 25 of the Federal Barristers Act, exclusive rights of audience are no longer required for the achievement of the desired aims and are in breach of Article 12 § 1 of the Basic Law.

Neither have any drawbacks emerged in the administration of justice when, further to the introduction of unrestricted rights of audience, the client has himself decided whether he wishes a change of barrister for the appeal proceedings and himself determines what he deems to be the relevant criteria, such as geographical proximity, specialisation and size of the law firm, familiarity with the case-law of the competent chamber of the court or perhaps merely dissatisfaction with his previous legal representative.

The principle is clearly not a requirement for the formation of a body of specialised barristers which the association of barristers enjoying exclusive rights of audience, together with the President of the Hamm Appeal Court, consider to be in the common interest. There are barristers specialising in Labour -, Financial -, Social - and Administrative law and who appear before all levels of jurisdiction in those sectors. Specialist barristers also work on an appreciable scale in practices which associates with rights of audience in appeal courts are allowed to join. It is thus irrelevant whether the rights of audience in the particular sector are exclusive or unrestricted. In certain appeal courts barristers enjoying exclusive rights of audience belong without exception to mixed practices with some members specialising in specific areas

in which they are particularly qualified. In addition, in the new *Länder* with the system of exclusive rights of audience, no law firms dealing exclusively in appeal court proceedings have so far been formed. No need for barristers specialising in appeal matters has been felt, as was already clearly the case at an early stage in the City *Länder* and other places with unrestricted rights of audience.

Significant advantages that might flow from the system of exclusive rights of audience are not to be seen. True, the figures that have been presented do reveal deviations in the frequency and the success of appeals as well as fluctuations over the years and in results as between individual *Länder*. However, since the performance of barristers is expressed in terms of numbers and results of judgments, no clear view of the pros and cons of either system can be obtained. Judgments handed down by independent courts can hardly be attributed to the preparatory work by barristers appearing before appeal courts or to the applicable right of audience.

True, judges have always favoured the system of exclusive rights of audience since it facilitates their task. On the other hand, clients gain a greater freedom of choice when barristers enjoy unrestricted rights of audience. Evidence that they often have no wish to change barristers is to be seen in a long-standing avoidance of the rule restricting admission to a single bar. Restrictions on the exercise of the profession must take account of the fact that above all else barristers have a duty to their clients as an independent adviser and representative ... . Restrictions on the free exercise of their activity by barristers cannot be required solely on the ground that they are looked upon as objectively useful by the appeal courts and judges in the districts where the system of exclusive rights of audience holds sway.

If, over the course of the years, the legislature restricts the freedom to exercise the profession only in a part of Germany without this entailing either greater drawbacks where greater freedom prevails or significant advantages where that freedom is more restricted, then it is clear that the restrictions were not needed.

II.

Although section 25 of the Federal Barristers Act is not in tune with Article 12 § 1 of the Basic Law, the prescription is to continue to abide by the measures clearly arising out of the operative part until 30 June 2002. The barristers concerned in the *Länder* that are not identified in Section 226.2 of the Federal Barristers Act need a certain period of adjustment.

The time-scale first of all serves to help barristers appearing before appeal courts on the basis of the system of exclusive rights of audience to prepare to obtain admission to the relevant district and regional courts and to establish contacts with fellow-professionals. Many of them will also need to consider the matter of the siting of their practices for all or some of their partners.

Planning and implementation will require appreciable time. For barristers who have been involved in first-instance proceedings for over five years (Section 20.1, Nr. 4 of the Federal Barristers Act) the question arises of their concurrent admission to the appeal-court bar. Clients with their roots in a local community situated in the larger *Länder* will be able to use the period of transition in order to decide whether they wish to consider one or other of the barristers who have served them before the courts of first and second instance as possible permanent legal representatives for the future.

Since it was argued in the proceedings that barristers enjoying exclusive rights of audience in appeals courts have so far been kept at full stretch by their forensic activity, it would then seem questionable to allow them throughout the transitional phase to take on the additional work resulting from their rights of audience to the courts of first instance with the shift of the centre of gravity of their activity this would entail, notwithstanding that the unconstitutional nature of the norms bar any new granting of exclusive rights of audience. The better barristers so far appearing exclusively before courts of second instance succeed in their reorientation, the more energy they will have to devote to first-instance cases and to advising new clients, so that cases still to be pleaded by them before the appeal courts could no longer continue to receive the same degree of care as hitherto. Since, however, it should not be overlooked that the reorientation will entail greater difficulties for second-instance barristers than for those who have so far acted exclusively at first-instance level, it is proper to stagger the opening of the system of unrestricted rights of audience. Barristers who have so far enjoyed exclusive rights of audience in the appeal courts can have additional rights of audience in courts of first instance as from 1 January 2002, whereas barristers who have so far appeared exclusively at first instance will be able to be accredited to the appeal courts at the earliest on 1 July 2002.

III.

As a consequence of the transitional regulations, the applicant will also have to wait until mid 2002 in order to achieve his aim. The constitutional complaint is thus rejected in so far as it is directed against the decisions of the Federal Court, the Court of Lawyers and ruling of the President of the Hamm Appeal Court. These decisions remain valid for the past. The applicant will have to lodge a fresh application.

IV.

Inasmuch as the constitutional complaint succeeded as regards the norm underpinning the decisions, it appears appropriate to award the applicant the necessary costs (Section 34 a, subsections 2 and 3 of the Federal Constitutional Court Act).”

3. Statistics on the working methods of lawyers specialised in appeals matters

The system of exclusive rights of audience at courts of appeal applied in seven of the sixteen *Länder*.

Statistical material on lawyers with such a restricted right of audience is available for the *Länder* Lower Saxony (for the year 2000) and for Brandenburg, Hesse, Mecklenburg-West Pomerania, North-Rhine Westphalia, Rhineland-Palatinate and Schleswig Holstein (March/April 2002):

- In Lower Saxony, ninety-two lawyers had restricted rights of audience at the Celle Court of Appeal; twenty (24 %) of them worked on their own or with other lawyers specialised in appeals matters and seventy worked in mixed partnerships. All lawyers with restricted rights of audience at the Braunschweig Court of Appeal and the Oldenburg Court of Appeal worked in mixed partnerships.
- In Brandenburg, seventy-two lawyers had restricted rights of audience at courts of appeal, thirty (42%) worked in regional partnerships, thirty-two (44 %) in mixed partnerships and ten lawyers (14%) worked on their own.
- In Hesse, all lawyers with a restricted right of audience at the Frankfurt/Main Court of Appeal worked in mixed partnerships. Of the sixty-five lawyers with a restricted right of audience at the Kassel Court of Appeal, fifty-nine worked in mixed partnerships and six in an individual practice.
- In Mecklenburg-West Pomerania, two of the 103 lawyers with restricted rights of audience at the Rostock Court of Appeal did not work in mixed partnerships.
- In North-Rhine Westphalia, 330 lawyers had restricted rights of audience at the Düsseldorf Court of Appeal. Ninety-five of them worked as single lawyers or in practices with other appeals lawyers. The majority were titular or syndicate lawyers not forensically active, or had merged with mixed partnerships. Most of the lawyers with restricted rights of audience at the Cologne Court of Appeal worked in mixed partnerships. No update information was available for the situation with regard to lawyers with restricted rights of audience at the Hamm Court of Appeal.
- In Rhineland-Palatinate, sixty-two lawyers had restricted rights of audience at the Koblenz Court of Appeal and the Zweibrücken Court of Appeal. Twenty-five worked in practices with other lawyers specialised in appeals matters, while thirty-seven worked in mixed partnerships.

– In Schleswig-Holstein, six of the thirty-eight lawyers with restricted rights of audience at the Schleswig Court of Appeal worked in mixed partnerships.

With regard to *Länder* where a combined right of audience already applied in the past, no statistical information on the number of lawyers specialised in appeals matters is available.

4. Proceedings before the Federal Constitutional Court

According to Article 93 § 1 (4a) of the Basic Law, the Federal Constitutional Court rules on constitutional complaints which may be lodged by any person who considers that the public authorities have infringed one of his or her fundamental rights or one of his or her rights as guaranteed under Articles 20 (4), 33, 38, 101, 103 and 104 of the Basic Law.

The composition and functioning of the Federal Constitutional Court are governed by the Federal Constitutional Court Act. Sections 90 to 96 of that Act concern constitutional complaints lodged by individuals.

According to section 90 (1), any person who claims that one of his basic rights or one of his rights under Articles 20 § 4, Articles 33, 38, 101, 103 and 104 of the Basic Law has been violated by public authority may lodge a complaint of unconstitutionality with the Federal Constitutional Court. These rights include rights regarding the fairness of proceedings and the rule of law, and the right to freedom of profession, i. e. the right to exercise the profession of your choice.

5. Ensuing legislation concerning the legal representation before courts of appeal

On 23 July 2002, the legislature changed the law governing the legal representation before courts of appeal (*Gesetz zur Änderung des Rechts der Vertretung durch Rechtsanwälte vor dem Oberlandesgericht*), namely Section 78 of the German Code of Civil Procedure. While before, lawyers admitted to the bar of a certain court of appeal could only plead before that court of appeal, they may now plead before any German court of appeal, regardless of which bar they are admitted to.

COMPLAINTS

1. The applicants complained under Article 1 of Protocol No. 1 that the change of law abolishing exclusive rights of audience in the courts of appeal had deprived them of their means of existence, thereby violating their right to property.

2. They also complained under Article 8 of the Convention that this measure hindered them in the exercise of their profession and adversely affected their family life.

3. Finally, the applicants claimed that their rights under Articles 6 and 13 of the Convention had been violated since the change of law had been brought about by a decision of the Federal Constitutional Court, for which no effective remedy was available in any court.

4. In further submissions of 18 September 2002, the applicants extended their complaints under Article 1 of Protocol No. 1 and Article 8 of the Convention to the new law governing the legal representation before courts of appeal.

THE LAW

1. The applicants complained that by suspending the system of exclusive rights of audience in courts of appeal, the Federal Constitutional Court had deprived them of their livelihood, thus violating their right to property. The applicants invoked Article 1 of Protocol No. 1, which, as far as relevant, reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest..."

The Government submitted that the applicants had not furnished any proof that the representation of clients in appeal proceedings constituted their main source of income, noting that they had failed to adduce evidence such as lists of clients and their actual financial losses. The Government pointed out that since 1 January 2002, the applicants had also been entitled to appear before courts of first instance, so that they had had other sources of income since that date.

Referring to the Court's case law, the Government maintained that the negative consequences suffered by the applicants by the change of law constituted a loss of future income that was not protected by Article 1, which only applied to existing possessions or valuable assets or claims where an individual had a "legitimate expectation" that they would be realised (see *Dallmann et al. v. Austria*, no. 30633/96, decision of 26 February 1997).

Even if in principle, a legal practice and its clientele enjoyed the protection of Article 1 of Protocol No. 1, the Government submitted that suspending the system of exclusive rights of audience in courts of appeal had not affected the applicants' rights to enter into and perform commercial transactions or depleted valuable assets created by the lawful use of personal funds and abilities in economic life. The increase in competition occasioned by the change of law and the potential loss of clients formed part of a general entrepreneurial risk; at the same time it led to an expansion of the applicants' field of professional activities.

According to the Government, the applicants' clientele was not protected by Article 1, as it constituted an advantage gained solely from a legal position (created by Section 25 of the Federal Lawyers Act, which was declared unconstitutional by the Federal Constitutional Court in its decision), and not from the applicants' own economic activities (see *Döring v. Germany,* no. 67595/97, decision of 9 November 1999). The decision of a legislature or court to end that exclusive advantage came within the broad margin of appreciation accorded to Member States in questions regarding the use of property. Furthermore, the Government were not convinced that abolishing the system of exclusive rights of audience in courts of appeal would necessarily result in the applicants losing the clientele they had allegedly built up mostly on the basis of recommendations by lawyers with rights of audience in the lower courts. On the contrary, clients, in particular companies and public bodies, tended to seek out their own lawyers for appeal proceedings. This could be seen by the successful reorientation of some of the applicants whose firms had merged with other law practices.

The Government submitted that the abolition of an unconstitutional system was not arbitrary, but necessary to protect the rights of other lawyers. The abolition of the system thus did not interfere with any of the rights protected by the Convention or its Protocols, notably Article 1 of Protocol No. 1.

The Government further argued that even if the Court were to assume that an interference within the meaning of Article 1 had taken place, that interference would be justified. For a series of reasons which were set out in the Federal Constitutional Court's decision, the system of exclusive rights of audience in courts of appeal was no longer considered necessary to promote the administration of justice, so that the breach of the Basic Law it

occasioned was no longer justified. Statistics showed that in the seven *Länder* that still used the system of exclusive rights of audience in courts of appeal, the system had of late been circumvented by mixed partnerships consisting of lawyers with rights of audience in the lower courts and lawyers with rights of audience in the courts of appeal. According to statistics that had been published in April 2002, only 10% to 25% of the lawyers with formerly restricted rights of audience in the courts of appeal did not work in mixed partnerships, with the jurisdictional territory of the Schleswig Court of Appeal providing the only exception (about 85% of lawyers with rights of audience in the courts of appeal were not in mixed partnerships). Those statistics reflected the findings of a report submitted by the Federal Chamber of Lawyers in the constitutional court proceedings of 1998. As the system of exclusive rights of audience in courts of appeal had been abolished in order to create a uniform system of admissions in the whole State, the Government considered that abolition was in the general interest.

Due to the transitional phase ordered by the Federal Constitutional Court, the Government considered that abolishing the system of exclusive rights of audience in courts of appeal was a proportionate means of achieving the above-mentioned aim. The transitional phase took into account the general interest in changing an unconstitutional practice while having regard to the temporary disadvantages a change of law occasioned lawyers with exclusive rights of audience in the courts of appeal. The interests of such lawyers had been preserved by according them a longer transitional period than other lawyers so that they would have sufficient time to merge their practices or establish regional partnerships. According to the Government, the Federal Constitutional Court had adopted an accommodating approach by agreeing to that transitional period, as in the past changes of law with similar consequences had been effected without transitional periods. They submitted that the length of the transitional period was adequate. A ten-year transitional phase, as suggested by the applicants, would have unduly prolonged the prior unconstitutional situation and would thus not have been justified. It would also have given lawyers with exclusive rights of audience in the courts of appeal considerable competitive advantages over their colleagues working under the system of unrestricted rights of audience. Contrary to the applicants' allegations, the majority of lawyers' associations heard before the Federal Constitutional Court had not supported a ten years' transitional period.

In this context, the Government submitted that no transitional arrangements had been envisaged in past instances of legislative changes. In this respect they refer to Section 25 of the Federal Barristers' Act, which extended the application of the system of restricted rights of audience at the courts of appeal in 1959. Moreover, in 1969 Hamburg, followed by Baden-Württemberg and Bavaria in 1972, and, following the German unification,

some of the new *Länder* changed from systems of restricted rights of audience to systems of combined rights of audience without a transitional period.

The applicants reiterated that suspending the system of exclusive rights of audience in the courts of appeal had deprived them of their main source of income and thus of their livelihood. They contested the Government's allegations that they had succeeded in reorienting their practices, as the mere fact that most of them now worked in mixed partnerships did not mean that they still had enough cases to work on.

As regards the applicability of Article 1, the applicants argued that their position as lawyers with exclusive rights of audience in the courts of appeal did not constitute an advantage over other lawyers, as it was combined with a waiver of a right of audience in the lower courts. Nor was it a privilege based solely on a statutory regulation, as they only became eligible to practice in the courts of appeal after a minimum of five years' work experience.

As regards the clientele lost through the change of law, the applicants reiterated that in the past, they had largely relied on recommendations by lawyers practising in the lower courts for clients. That source of income had now been lost due to the change of law, as those lawyers now also had rights of audience in the courts of appeal and in most cases continued to represent their clients.

According to the applicants, it was not in the general interest to abolish the system of exclusive rights of audience in the courts of appeal. The new system violated the applicants' rights while not improving the administration of justice, as in appeal proceedings, clients no longer had any guarantee that they would be represented by specialised lawyers. The applicants referred to a recent decision in which the Federal Court of Justice had expressly upheld the system of exclusive rights of audience in that court.

The applicants also denied that the system of exclusive rights of audience in courts of appeal violated the rights of lawyers with rights of audience in district and regional courts, as such lawyers had a larger clientele to begin with and were not barred from applying for a right of audience in the courts of appeal if they agreed to waive their right to plead before the lower courts. They protested that the change of law would lead to a disproportionate number of lawyers being permitted to plead in appeals matters.

The applicants maintained that in the proceedings before the Federal Constitutional Court, all the legal associations who had given evidence on the issue had been in favour of a ten-year transitional period. The Federal Constitutional Court had not given any reasons in its decision for deviating from that consensus. The applicants did not consider a transitional phase to be a favour, but rather a necessity in the interests of proportionality. They referred to two cases, where a change of law was accompanied by a

transitional period - in one case in 1994, the legislature decided to change the representation before courts of first instance - whereas before, lawyers admitted to the bar of a certain district or regional court could only plead before that court, the change of law allowed them to plead before all first instance courts in Germany. A transitional period was fixed until 2000.

The other case involved the restructuring of a jurisdictional territory of a regional court in 1997. A constitutional court judge ordered a ten-year transitional phase.

The Court reiterates that "Article 1 in substance guarantees the right of property...". It comprises "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property by enforcing such laws as they deem necessary in the general interest ... However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, *inter alia*, *Olbertz v. Germany* (dec.), no. 37592/97, ECHR 1999-V).

Referring to its previous case law, the Court notes that insofar as it concerns a loss of future income, the applicants' complaint falls outside the scope of Article 1 of Protocol No. 1, which is not applicable to future earnings, but only to existing possessions, that is to say income once it has been earned or where an enforceable claim to it exists (*Denimark v. the United Kingdom,* no. 37660/97, decision of 26 September 2000; *Ian Edgar [Liverpool] Ltd. v. the United Kingdom,* no. 37683/97, decision of 25 January 2000; see also *Van Marle and Others v. the Netherlands*, judgment of 26 June 1986, Series A no. 101, p. 13, §§ 39-41). The applicability of Article 1 however extends to law practices and their clientele, as these are entities of a certain worth that have in many respects the nature of a private right and thus constitute assets and therefore possessions within the meaning of the first sentence of Article 1 (see *Olbertz v. Germany* and *Döring v. Germany*, both cited above; see also *Van Marle and Others v. the Netherlands* cited above, p. 13, § 41).

In this context, it does not matter whether the applicants acquired the possessions by taking advantage of a favourable position, or solely through their own activities. When dealing with the protection of privileges accorded by law, the Convention is applicable where such privileges lead to a legitimate expectation of acquiring certain possessions. That is the case here.

The Court is not entirely persuaded that the Federal Constitutional Court's decision interfered with the applicants' possessions within the meaning of Article 1 of Protocol No. 1. As pointed out by the Government in their submissions, the applicants have not submitted any concrete evidence that they depended on other lawyers' recommendations for most of their clientele, e.g. by furnishing the Court with lists of clients or the like. However, the Court is not required to resolve this problem as, even assuming an interference with their property rights, such interference was justified under the second paragraph of Article 1 of Protocol No. 1.

The interference was lawful as it was based on a decision of the Federal Constitutional Court, which, according to Section 31 of the Federal Constitutional Court Act, has the force of law. In complaint proceedings brought before it by a lawyer with a restricted right of audience before district and regional courts, the Federal Constitutional Court felt that the former legal system of restricted rights of audience in courts of appeal was incompatible with the freedom of profession as guaranteed by the Basic Law.

As to the purpose of the interference, the Court observes that originally, the system of exclusive rights of audience in the various courts was thought to be in the general interest, since it was consistent with the domestic legal tradition and facilitated access to qualified lawyers, thus improving the administration of justice.

In the decision concerned, the Federal Constitutional Court, referring to technological and other changes and the flexibility of lawyers, said that it was no longer regarded as a necessity for lawyers to be specialised in appeal cases. In several *Länder*, especially those in the former German Democratic Republic, a system of unrestricted rights of audience had already been operating for several years without any negative consequences. This had led to different systems being used in different *Länder* – lawyers possessing exclusive rights of audience in certain courts had a competitive advantage over their colleagues practising in *Länder* that adhered to the system of unrestricted rights of audience, as the latter had to compete for clients in appeal cases with lawyers possessing rights of audience in other courts. In this respect, the system of restricted rights of audience in the court of appeals differed from the system restricting the rights of audience in the Federal Court of Justice, which is uniform for all lawyers practising in Germany. At the same time, the system of exclusive rights of audience in courts of appeal was being circumvented by the creation of so-called mixed partnerships, where lawyers with rights of audience in district and regional courts worked together with lawyers possessing rights of audience in the courts of appeal. Thus, in all seven *Länder* but one where the system of exclusive rights of audience in courts of appeal was in force, between 85% and 90% of all lawyers with rights of audience in the courts of appeal worked in such partnerships.

Under these circumstances, the Federal Constitutional Court's decision declaring exclusive rights of audience in courts of appeal unconstitutional, that is to say in breach of the liberty of profession, and setting a transitional period, served the general interest.

With regard to the proportionality of the measure to the intended aim, the Court notes that a fair balance must be struck between the demands of the general interest and the requirements of the individual's fundamental rights (*Sporrong and Lonnröth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 29, §69).

As to the aim pursued by the Federal Constitutional Court in this case, the Court notes that, as stated in the *Denimark v. the United Kingdom* case, national authorities enjoy a wide margin of appreciation in determining the necessity of a measure of control (*Denimark v. the United Kingdom,* cited above). In principle, the legislature's judgment in this connection will be respected unless it is manifestly arbitrary or unreasonable (*Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A, no. 102, p. 51, § 122; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III, § 75).

The Court finds that the decision of the Federal Constitutional Court, according to which the existing legislation was no longer in line with a modern interpretation of the constitutional rights of others, cannot be regarded as arbitrary or unreasonable.

In its decision, the Federal Constitutional Court took into account both the general interest in the proper administration of justice, the interests of the legal profession and the interests of the applicants.

The Federal Constitutional Court fixed a transitional period enabling lawyers to adapt to the new situation. Having regard to all material before it including pleadings for a lengthy transitional period favouring lawyers with a restricted right of audience in courts of appeal, it decided that the new system should have effect on 1 January 2002 for lawyers with restricted rights of audience in courts of appeal and on 1 July 2002 for lawyers with restricted rights of audience before district and regional courts. According to the Federal Constitutional Court, it was proper to stagger the implementation of the new system in this way, as it considered that lawyers with formerly restricted rights of audience before courts of appeal would have greater difficulties in adapting to the situation than other lawyers. At the same time, the Federal Constitutional Court was aware of the fact that this would occasion a considerable increase in work for lawyers with formerly restricted rights of audience in courts of appeal, possibly to the detriment of their appeals work.

The Court notes that the applicants were favoured in that they were granted a longer transitional phase than lawyers with formerly restricted rights of audience in district and regional courts.

Moreover, the Court has noted the Government's argument that past legislative changes concerning the restrictive rights of audience at courts of appeal were not accompanied by transitional arrangements. The two instances in 1994 and 1997 referred to by the applicants dealt with different situations of dubious relevance.

As can be seen in the statistics submitted to the Court, in all *Länder* but one, 75 to 90 % of the lawyers with formerly restricted rights of audience in courts of appeal had since become engaged in "mixed practices". It thus appears that the transitional arrangements permitted these lawyers to reorientate their professional activities.

The Court further attaches weight to the Government's submission that a lengthier transitional period would have been unacceptable, as it would have prolonged a situation that had been declared unconstitutional by the Federal Constitutional Court.

Having regard to all circumstances and bearing in mind that the Court should not substitute its evaluation for that of the national authorities, the Court finds that there is nothing to show that the transitional arrangements did not achieve a fair balance between the competing interests.

Consequently, the Federal Constitutional Court's decision of 13 December 2000, if viewed as an interference with the applicants' rights under Article 1 of Protocol No. 1, was proportionate and thus justified under the second paragraph of Article 1.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be declared inadmissible in accordance with Article 35 § 4.

2. The applicants also complained under Article 8 of the Convention that the change of law had adversely affected their professional and private life.

The Court finds that this complaint does not raise any new issues. It therefore does not find it necessary to examine this complaint separately and declares it likewise manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be declared inadmissible in accordance with Article 35 § 4.

3. The applicants also maintained that as the law was changed by a decision of the Federal Constitutional Court and not by the legislature, their rights under Articles 6 and 13 were violated, as they were not heard before the decision was taken and had no effective national remedy against a decision of that court.

Article 6 § 1, as far as relevant, reads as follows:

> "In the determination of civil rights and obligations, ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ..."

Article 13 reads as follows:

> "Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government said that the applicants had been given an opportunity to be heard before the impugned decision was issued, as an association of lawyers with exclusive rights of audience in courts of appeal had made representations to the Federal Constitutional Court along with other lawyers' associations. They denied that a mere appeal to the legislature to change the law would have been an adequate means of dealing with the situation, as that procedure only applied to cases in which there had been a breach of the principle of equality, as in such cases there were various courses of action available to the legislature to remedy the situation. That, however, did not apply to violations of the liberty of profession, for which the only solution was to abolish an unconstitutional practice.

The applicants contended that the legal associations heard by the Federal Constitutional Court did not officially represent them, but were rather loosely coordinated groups of lawyers, or representatives of lawyers as a whole. They submitted that they could have lodged a constitutional complaint with the Federal Constitutional Court if the whole matter had been transferred to the legislature.

The Court recalls that proceedings come within the scope of Article 6 § 1 of the Convention, even if they are conducted before a Constitutional Court, where their outcome is decisive for civil rights and obligations (see, *inter alia*, *Süssmann v. Germany* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 41).

The Court notes that in the proceedings before the Federal Constitutional Court, the complainant, a lawyer with a restricted right of audience in the lower courts, disputed the constitutionality of the legal provision imposing the restricted right of audience in the court of appeals, alleging its incompatibility with the constitutional freedom of profession. To that extent, the proceedings involved a dispute about a civil right. Moreover, having regard to the *erga omnes* effect of the Federal Constitutional Court's ruling to declare the legal provision concerned unconstitutional, the applicants may be regarded as affected in the exploitation of their law practices (see above the Court's considerations under Article 1 Protocol No. 1). These proceedings could therefore be regarded as "decisive for civil rights and obligations" of the applicants for the purposes of Article 6 § 1 (see the Kraska judgment cited above).

When examining the applicants' access to these proceedings, the Court has considered the special role and status of a Constitutional Court, whose task is to ensure that the legislative, executive and judicial authorities

comply with the Constitution and which may afford additional legal protection to citizens at a national level in respect of their fundamental rights guaranteed in the Constitution (see *Süssmann v. Germany* judgment cited above, § 37).

It is true that, given the particular features of the individual complaint proceedings before the Federal Constitutional Court, the applicants were barred from appearing individually before that court. However, the Court has already held that in proceedings involving a decision for a collective number of individuals, it is not always required or even possible that every individual concerned is heard before the court (see *Lithgow and Others v. the United Kingdom*, cited above, p. 71, § 196). In the present case, the legislative change resulting from the Federal Constitutional Court's decision affected the position of numerous lawyers. The Court considers that, given the practical implications, the Federal Constitutional Court had sufficiently fulfilled the requirements of Article 6 of the Convention by hearing associations defending the professional interests of lawyers on all matters including the transitional arrangements.

Finally, the Court finds that the absence of remedies against decisions of the Federal Constitutional Court does not raise an issue under Article 13 of the Convention.

For these reasons, the applicants' submissions on the procedural aspects of the present application do not disclose any appearance of a violation of their rights under Articles 6 and 13 the Convention.

It follows that this part of the application is likewise manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be declared inadmissible in accordance with Article 35 § 4.

4. In their submissions of 18 September 2002, the applicants raised complaints about a new act amending the rules of representation before courts of appeal, which now determines that lawyers admitted to the bar of a certain court of appeal may now plead before all German courts of appeal, whereas before they were only allowed to plead before the court where they were admitted. They maintained that the violations of their Convention rights caused by the decision of the Federal Constitutional Court were enhanced by the above act.

The Government submitted that the applicants had not exhausted the remedies available under German law with regard to this point. As they now complained of a legal regulation, the applicants should first have lodged a constitutional complaint with the Federal Constitutional Court. Such a complaint would not necessarily have been ineffective.

The Government stated that this new Act deals with the abolition of a geographical limitation of the rights of audience, which was different from the subject matter of the impugned Federal Constitutional Court decision. This decision had abolished the restricted rights of audience in courts of

appeal. While it may have been an incentive for the legislature to change the law regarding the geographical limitation of appeals lawyers, there is no actual causal link between the two.

Even assuming exhaustion of domestic remedies, the Court finds that the applicants failed to substantiate the alleged violation of their rights under the Convention and its Protocol with regard to this extension of their original complaints. This part of the application is therefore likewise manifestly ill-founded.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President

Annex

No	NAME	DATE OF BIRTH	ADDRESS (Court of Appeal)
1	WENDENBURG Albrecht	02.04.1942	Celle
2	BRAUER Joachim	28.05.1942	Celle
3	SCHÜNEMANN Hermann	01.03.1953	Celle
4	BOCHMANN Rudolf	19.07.1945	Celle
5	GRABITZ Winfried	29.09.1937	Hamm
6	v. BOESELAGER Michael	04.09.1960	Hamm
7	FÄRBER Ursula	09. 09.1942	Hamm
8	HERMANN Burkhard	23.03.1940	Koblenz
9	HOLTKAMP Wolfgang	25. 09. 1947	Düsseldorf
10	FASSNACHT Jürgen	03. 02. 1956	Düsseldorf
11	SCHERFF Wolfgang	24. 06. 1940	Cologne
12	DIETZ Klaus W.	13. 08. 1945	Schleswig
13	GOTZMANN Klaus	02. 10. 1937	Cologne
14	MÜHLE Hans-Jochen	27. 09. 1946	Cologne
15	HIRTZ Bernd	18. 05. 1954	Cologne
16	KÖLBEL Christoph	16. 05. 1964	Cologne
17	BARSCH Marion	29. 05. 1953	Brandenburg
18	TERBILLE Michael	---	Hamm