Subsidiarity and Judicial Review in German Federalism: The Decision of the Federal Constitutional Court in the *Geriatric Nursing Act* Case

By Markus Rau

A. Introduction

On October 24, 2002, the Second Senate of the *Bundesverfassungsgericht* (German Federal Constitutional Court) issued its ruling in the *Geriatric Nursing Act* case.[1] The eagerly expected judgment not only puts an end to the discussion on the Federation's legislative powers in the field of geriatrics, which has occupied German politicians and constitutional scholars since the mid-1980s, when the drop in the number of applicants for geriatric nursing jobs and the steady growth of the elderly population have led to calls for a standardization of the education for geriatric nurses at Federal level.[2] More importantly, the decision brings clarity to the question of the justiciability of the so-called *Erforderlichkeitsklausel* ("necessity clause") laid down in Article 72 para. 2 of the Basic Law.

According to this latter provision, the Federation has the right to legislate on matters within the concurrent legislative power "if and to the extent that the establishment of equal living conditions throughout the Federal territory or the maintenance of legal or economic unity in the national interest renders Federal regulation necessary."[3] Since its introduction into the Basic Law in 1994, the norm has been the object of considerable controversy in legal literature, some scholars arguing that the

[1] Bundesverfassungsgericht (BVerfG), judgment of 24 October 2002, 2 BvF 1/01. Reprinted in, 2003 DEUTSCHES VERWALTUNGSBLATT (DVBl.) 44; 2003 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 119. Also available at: <http://www.bverfg.de/cgi-bin/link.pl?entscheidungen>.

[2] A first draft for a law on geriatric nursing was presented by the Federal Government in 1990. *See*, BUNDESTAGS-DRUCKSACHE (BT-Drs.) 11/8012. The draft was rejected, however, by the *Bundesrat* (Council of Federal States - the second chamber of the German Parliament) because the *Länder* (German Federal States) rejected the competence of the Federal legislature over the matter. *See*, *ibid.*, at 21 et seq.

[3] Official translation in: BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY. Promulgated by the Parliamentary Council on 23 May 1949 and as amended up to 16 July 1998. Published by the Press and Information Office of the Federal Government, 1998.

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question of whether there is a need for Federal legislation is primarily a political one which is not subject to judicial review.[4] By deciding in favor of strict judicial scrutiny of the requirements of Article 72 para. 2, the Federal Constitutional Court rejected this approach, thereby significantly strengthening German federalism.

Moreover, given that Article 72 para. 2 of the Basic Law has sometimes been described as the "prototype of a legal implementation of the subsidiarity principle,"[5] the judgment is, *mutatis mutandis*, also of some interest for the ongoing constitutional debate in the European Union, in which the question of judicial review of compliance of secondary European law with the principle of subsidiarity, as enshrined in Article 5 of the EC Treaty, also plays a prominent role.[6]

B. Background

Before analyzing the decision of the Constitutional Court, a few remarks with respect to the background of the case are in order. This includes additional information on the *Altenpflegegesetz* (Geriatric Nursing Act), the petition of the applicant, and - most importantly - the necessity clause of Article 72 para. 2 of the Basic Law.

I. The Geriatric Nursing Act

The Geriatric Nursing Act was approved by the German *Bundestag* (Federal Parliament) in mid- 2000.[7] Its aim is to standardize the education in geriatric nursing at the Federal level. To this end, the Act lays down regulations on, *inter alia*, the permission to use the occupational title of a "geriatric nurse" (sections 1 and 2); the goals, the duration, and the nature of the education in geriatric nursing (sections 3

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[4] *See*, *infra* at B. III.

[5] Josef Isensee, *Subsidiarität als verfassungsrechtliches Auslegungsprinzip*, *in* SUBSIDIARITÄT ALS RECHTLICHES UND POLITISCHES ORDNUNGSPRINZIP IN KIRCHE, STAAT UND GESELLSCHAFT. GENESE, GELTUNGSGRUNDLAGEN UND PERSPEKTIVEN AN DER SCHWELLE DES DRITTEN JAHRTAUSENDS (Peter Blickle, Thomas O. Hüglin and Dieter Wyduckel eds.), 20 RECHTSTHEORIE BEIHEFT 199, 210 (2002). For the principle of subsidiarity in German federalism *see* (most recently), *e.g.*, Stefan Oeter, INTEGRATION UND SUBSIDIARITÄT IM DEUTSCHEN BUNDESSTAATSRECHT. UNTERSUCHUNGEN ZUR BUNDESSTAATSTHEORIE UNTER DEM GRUNDGESETZ (1998).

[6] The European Convention, the task of which is to invent and propose a machinery that will enable the European Union to face the challenges of enlargement, institutional reform and globalization and speak to the world with a single voice, has set up a working group on the principle of subsidiarity. In the meantime, the working group has presented its conclusions. *See*, *Report of the Chairman of Working Group I on the Principle of Subsidiarity to the Members of the European Convention*, Brussels, CONV 286/02, 23 September 2002, available at: <http://register.consilium.eu.int/pdf/en/02/cv00/00286en2.pdf>.

[7] 2000 BUNDESGESETZBLATT I (BGBl. I) 1510.

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to 9); the education for so-called *Altenpflegehelfer* ("geriatric nurse assistants") (sections 10 to 12); the relationship between learner and instructors (sections 13 to 23); and the costs for the learner's remuneration (sections 24 and 25). Before the adoption of the Act by the Federal Parliament, the education in geriatric nursing had been regulated by each of the *Länder* (German Federal States) individually. This situation led to enormous divergence in the educational system. Given the demographic trend in Germany, which has generated an ever-increasing need for qualified geriatric personnel,[8] the Federal Government decided to compensate for the deficiencies that resulted from the various state legislation by drawing up a single framework for the education for geriatric nurses, with the intention of trying to make the profession more attractive.

The entry into force of the Geriatric Nursing Act, which had originally been scheduled for August 1, 2001,[9] was delayed, however, due to an *einstweilige Anordnung* (temporary injunction) sought under the provisions of Section 32 of the *Bundesverfassungsgerichtsgesetz* (Federal Constitutional Court Act)[10] and issued by the Federal Constitutional Court on May 22, 2001.[11] The injunction, which continued to be renewed by the Constitutional Court on November 7, 2001 and April 29, 2002,[12] had been requested by the State Government of Bavaria. This latter had argued that the Geriatric Nursing Act was unconstitutional on the ground that the Federation lacked the legislative authority to enact it. In its order of May 22, 2001, the Federal Constitutional Court held that the disadvantages of allowing the law to enter into force would outweigh the disadvantages of delaying the entry into force of the law, and accordingly granted the request of the State Government.

II. The Application of the Bavarian Government

Given its doubts about the compatibility of the Geriatric Nursing Act with the Basic Law, the Bavarian Government had further initiated an *abstraktes Normenkontrollver-*

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[8] *See* (most recently), Deutscher Bundestag, *Schlussbericht der Enqûete-Kommission "Demografischer Wandel - Herausforderungen unser älter werdenden Gesellschaft an den Einzelnen und die Politik"*, BT-Drs. 14/8800, at 233 et seq.

[9] *See*, Article 4 of the Geriatric Nursing Act.

[10] For an introduction into the German Federal Constitutional Court's power to issue temporary injunctions pursuant to Section 32 of the Federal Constitutional Court Act, *see*, Andreas Maurer, *The Federal Constitutional Court's Emergency Power to Intervene: Provisional Measures Pursuant to Article 32 of the Federal Constitutional Court Act*, 2 GERMAN LAW JOURNAL No. 13 (1 August 2001) www.germanlawjournal.com.

[11] BVerfG, order of 22 May 2001, 2 BvQ 48/00.

[12] BVerfG, order of 7 November 2001, 2 BvQ 48/00; BVerfG, order of 29 April 2002, 2 BvQ 48/00.

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fahren ("abstract judicial review proceeding") pursuant to Article 93 para. 1 no. 2 or Article 93 para. 1 no. 2a of the Basic Law respectively,[13] before the Federal Constitutional Court. In its application, the Government claimed that short of an express or implicit Federal competence, under Articles 73 to 75 of the Basic Law, the Geriatric Nursing Act was not compatible with Article 70 of the Basic Law, which states that:

(1) The Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.

(2) The division of authority between the Federation and the Länder shall be governed by the provisions of this Basic Law respecting exclusive and concurrent legislative powers.

Alternatively, the State Government, arguing that Federal legislation was not necessary for the establishment of equal living conditions throughout the Federal territory or the maintenance of legal or economic unity, invoked Article 72 para. 2 of the Basic Law.[14] In particular, the non-uniformity of state law, the Government asserted, was not a sufficient ground for taking action at Federal level in the area of concurrent legislation, as legal plurality was generally considered legitimate under the Basic Law.

III. The Necessity Clause of Article 72 Para. 2 of the Basic Law

Apart from the question of whether there was a Federal competence for the adoption of the Geriatric Nursing Act, the case thus primarily concerned the necessity clause of Article 72 para. 2 of the Basic Law. More specifically, the Bavarian Government's application gave the Federal Constitutional Court, for the first time, the opportunity to consider the requirements and, at an even more fundamental level, the justiciability of the said norm, which had been introduced into the Basic Law only some years ago. Some brief information on Article 72 para. 2, the provision's history in particular, therefore seems to be in place.

Until 1994, Article 72 para. 2 of the Basic Law, which is the key norm for the adoption of Federal legislation in the area of concurrent competences, stipulated that:

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[13] Article 93 para. 1 nos. 2 and 2a of the Basic Law reads: "(1) The Federal Constitutional Court shall rule: [...] 2. in case of disagreement or doubt as to the formal and material compatibility of Federal or *Land* law with this Basic Law or as to the compatibility of *Land* legislation with other Federal legislation at the request of the Federal Government, a *Land* government or one third of the Members of the *Bundestag*; 2a. in case of disagreement as to whether a law meets the requirements of paragraph 2 of article 72 at the request of the *Bundesrat* or the government or legislature of a *Land*; [...]."

[14] For the wording of Article 72 para. 2 of the Basic Law, *see*, *supra* at A.

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The Federation has the right to legislate where

1. a matter cannot be effectively regulated by the legislation of individual Länder, or
2. regulation by a Land might prejudice the interests of other Länder or the country as a whole or
3. the maintenance of legal and economic unity, especially uniform living conditions beyond the territory of any one Land, calls for Federal legislation.

The provision was to a large extent the product of allied interventions in the course of the drafting of the Basic Law after World War II.[15] Before, the German constitutional law tradition had constantly proceeded from the idea of an *unconditioned* priority of the competence of the central authority in matters of concurrent legislation.[16]

After the entry into force of the Basic Law, however, the overwhelming majority of the German constitutional scholars argued that the requirements of Article 72 para. 2 were not subject to judicial review, given the political nature of the decision to take legislative action at Federal level.[17] In doing so, the scholars argued that they were in line with the majority within the *Parlamentarischer Rat* (Parliamentary Council – the West German "constitutional convention"), most members of which had been in favor of a strong preeminence of the Federal legislature.[18] Basically, the Federal Constitutional Court followed this approach,[19] even though it reserved for itself the right independently to review any *abuse* of the Federal legislature's discretion.[20] As a consequence, no Federal law was ever abrogated on the ground that it was not in line with the old Article 72 para. 2 of the Basic Law.

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[15] *See*, Christoph Neumeyer, DER WEG ZUR NEUEN ERFORDERLICHKEITSKLAUSEL FÜR DIE KONKURRIERENDE GESETZGEBUNG DES BUNDES (ART. 72 ABS. 2 GG). RENAISSANCE ALLIIERTER VERFASSUNGSPOLITIK, at 19 et seq. (1999).

[16] *See, e.g.*, Article 12 para. 1 (1) of the 1919 Weimar Constitution, which stated that: "The *Länder* shall have the right to legislate as long as and to the extent that the *Reich* does not exercise its legislative power."

[17] *See*, Neumeyer, *supra* note 15, at 82 et seq.

[18] *See*, *ibid.*, at 36 et seq.

[19] *See*, 2 BVerfGE 213, 224.

[20] *See*, 4 BVerfGE 115, 127.

Against the background of the consolidating federalism during the 1960s, the Constitutional Court's attitude regarding the justiciability of Article 72 para. 2 was increasingly criticized. In order to contain the development toward a "unitarian federal state",[21] more and more scholars pleaded for a re-activation of Article 72 para. 2.[22] Yet, given that a change in jurisprudence did not seem to be realistic anymore, the first calls for a constitutional amendment were raised in the 1970s.[23]

In 1994, the legislature reacted to these cries by enacting new Article 72 para. 2 of the Basic Law. At the same time, the second chamber of the German Parliament, the *Bundesrat* (Council of Federal States), as well as the governments and legislatures of the *Länder* were granted the right, under Article 93 para. 1 no. 2a of the Basic Law[24] to address the Federal Constitutional Court by way of an abstract judicial review proceeding in the event of disagreements as to whether a law meets the requirements of Article 72 para. 2. The issue of the justiciability of Article 72 para. 2 of the Basic Law nevertheless remained disputed, some commentators claiming that the terms used by the norm were still too vague as to allow for judicial review.[25]

C. The Ruling of the Constitutional Court

As mentioned at the beginning of this comment, the Federal Constitutional Court did not follow this approach. Rather, it held that the question of whether there is a need for Federal legislation in matters of concurrent competences, which the Court answered in the affirmative in the case at hand, was subject to strict judicial scrutiny. Before doing so, the Court made it clear that in adopting the Geriatric Nursing Act, the Federal legislature could, at least to a large degree, have viably relied on

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[21] Konrad Hesse, DER UNITARISCHE BUNDESSTAAT (1962).

[22] *See, e.g.*, Norbert Achterberg, *Die Entscheidung über das Bedürfnis für die Bundesgesetzgebung (Art. 72 Abs. 2 GG)*, 1967 DVBl. 213 et seq.; Hartmut Krüger, *Zur Bedeutung des Art. 72 Abs. 2 GG für die Gesetzgebungskompetenz des Bundes*, 1984 BAYERISCHE VERWALTUNGSBLÄTTER (BayVBl.) 545 et seq.

[23] *See, e.g.*, Gunter Kisker, *Neuordnung des bundesstaatlichen Kompetenzgefüges und Bund-Länder-Planung*, 1975 DER STAAT 169 et seq.

[24] For the wording of Article 93 para. 1 no. 2a of the Basic law see, *supra* note 13.

[25] For the discussion, *see, e.g.*, Markus Kettner, *Das Subsidiaritätsprinzip als Beweislastumkehrregel. Überlegungen zur Neufassung von Art. 72 II GG und zur Justitiabilität des Subsidiaritätsprinzips*, 1995 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 367 et seq.; Hubertus Rybak and Hans Hofmann, *Verteilung der Gesetzgebungsrechte zwischen Bund und Ländern nach der Reform des Grundgesetzes*, 1995 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 230 et seq.; Arndt Schmehl, *Die erneuerte Erforderlichkeitsklausel in Art. 72 Abs. 2 GG*, 1996 DÖV 724 et seq.; Gerold Schmidt, *Die neue Subsidiaritätsprinzipregelung des Art. 72 GG in der deutschen und europäischen Wirtschaftsverfassung*, 1995 DÖV 657 et seq.; Rupert Scholz and Klaus G. Meyer-Teschendorf, *Reduzierung der Normenflut durch qualifizierte Bedürfnisprüfung*, 1996 ZRP 404 et seq.

Article 74 para. 1 of the Basic Law, which embraces a list of subjects over which the Federation enjoys concurrent legislative authority with the *Länder*.

I. On the Federal Competence in the Field of Geriatrics

As regards the issue of whether the Federation's legislative power, under Articles 73 to 75 of the Basic Law extends to the area of geriatrics, it is not necessary to go into details here. The Constitutional Court, after an in-depth analysis both of the provisions of the legislation in question, *i.e.* the Geriatric Nursing Act, and the pertinent competence norms of the Basic Law, ruled that large parts of the Geriatric Nursing Act were covered by Article 74 para. 1 no. 19 ("admission to the medical or ancillary professions"), no. 12 ("labor relations"), and no. 7 ("public welfare") of the Basic Law. According to the Court, this holds particularly true for the provisions dealing with the profession of geriatric nurse itself, which the judges found was an "ancillary profession" within the meaning of Article 74 para. 1 no. 19. By contrast, the Court held that the Federation did not enjoy concurrent legislative authority in respect to the profession of geriatric nurse assistant, which the judges said could not be reasonably subsumed under Article 74 para. 1 no. 19.[26]

Two points merit further attention. First, the Court re-emphasized its consistent jurisprudence,[27] according to which, in interpreting the general subject areas listed in Articles 73 to 75 of the Basic Law, original history is of particular importance.[28] In other words: unlike in other fields of German constitutional law,[29] historical interpretation plays a key role in defining the scope of Articles 73 to 75. This approach may lead to a certain staticism. An early example of this is the *Television I* case,[30] in which the Constitutional Court held that the notion of "telecommunications" in Article 73 no. 7 only embraced those areas that the legislature had found to exist at the time of the drafting of the Basic Law. In subsequent cases, however, the Court

[26] Section C. I. of the decision.

[27] *See, e.g.*, 7 BVerfGE 29, 44; 33 BVerfGE 125, 152 et seq.; 42 BVerfGE 20, 29; 61 BVerfGE 149, 175; 68 BVerfGE 319, 328.

[28] Section C. I. 1. a) of the decision.

[29] For the methods of analysis referred to by the Federal Constitutional Court, *see* (most recently), *e.g.*, Albert Bleckmann, *Zu den Methoden der Gesetzesauslegung in der Rechtsprechung des BVerfG*, 2002 JURISTISCHE SCHULUNG (JuS) 942 et seq.; Horst Sendler, *Die Methoden der Verfassungsinterpretation - Rationalisierung der Entscheidungsfindung oder Camouflage der Dezision?*, *in* STAATSPHILOSOPHIE UND RECHTSPOLITIK. FESTSCHRIFT FÜR MARTIN KRIELE ZUM 65. GEBURTSTAG 457 (Burkhardt Ziemske, Theo Langheid, Heinrich Wilms and Görg Haverkate eds., 1997).

[30] 12 BVerfGE 205.

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made it clear that the emphasis on the element of the "traditional" did not preclude the legislature from further developing the law.[31] By the same token, the Constitutional Court, in the *Geriatric Nursing Act* case, now stressed that the Federal legislature was allowed to create new "ancillary professions" within the meaning of Article 74 para. 1 no. 19 of the Basic Law, as long as the boundaries of the said norm were not transgressed.[32] As already stated, the Court believed that with respect to the profession of geriatric nurse, this was not the case.

To argue so, the eight judges also relied on the idea of *Sachzusammenhang*, and this leads to the second observation. According to the principle of *Sachzusammenhang*, the Federation enjoys legislative power if a subject within its express legislative authority cannot be regulated without simultaneously regulating a subject not specifically within its competence. However, encroachment upon a subject matter not within the Federation's legislative authority must be a necessary condition for regulating a subject expressly within its power.[33] Now, in the *Geriatric Nursing Act* case, the Constitutional Court took the view that the Federal legislature had been allowed to follow a *ganzheitlicher Ansatz* ("holistic approach") to the profession of geriatric nursing, *i.e.* an approach that combined elements of *medizinisch-pflegerische Tätigkeit* ("medical nursing"), for which the Federation enjoyed concurrent legislative authority pursuant to Article 74 para. 1 no. 19 of the Basic Law, and elements of *sozial-pflegerische Tätigkeit* ("social nursing"), to which the Federal legislative power under Article 74 para. 1 no. 19 generally did not extend. According to the Constitutional Court, this resulted from the aforementioned idea of *Sachzusammenhang*, which in the case at hand granted the Federal legislature the right to spread to subject areas within the exclusive competence of the *Länder* as an indispensable requirement for enforcing the legislature's holistic understanding of the profession of geriatric nursing.[34]

One may doubt whether this reliance on the principle of *Sachzusammenhang* was necessary. As in the *Abortion III* case,[35] which has been rightly criticized in academic writing as blurring the distinction between written and unwritten competences,[36] it

[31] *See, e.g.*, 75 BVerfGE 108, 146.

[32] Section C. I. 1. a) of the decision.

[33] *See, e.g.*, 3 BVerfGE 407, 421; 26 BVerfGE 246, 256 et seq.; 98 BVerfGE 265, 299.

[34] Section C. I. 1. a) dd) (1) of the decision.

[35] 98 BVerfGE 265

[36] *See*, Christoph Degenhart, STAATSRECHT I. STAATSORGANISATIONSRECHT, at 56 et seq. (18th ed., 2002).

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might have been preferable to extensively interpret the pertinent competence norm, *i.e.* Article 74 para. 1 no. 19 of the Basic Law, so as to cover both areas in question. Yet, this would arguably have collided with the Constitutional Court's approach to interpret the subject areas listed in Articles 73 to 75 in light of the Basic Law's[37] proclamation that "[t]he exercise of governmental powers and the discharge of governmental functions shall be incumbent on the *Länder* insofar as this Basic Law does not otherwise provide or permit."[38] This would seem to mandate a narrow interpretation of the matters over which the Federation enjoys legislative power.

II. On the Necessity Clause of Article 72 para. 2 of the Basic Law

Having dealt with the Federation's legislative authority in the field of geriatrics, the Constitutional Court turned to the necessity clause of Article 72 para. 2 of the Basic Law. Two issues were at stake here: first, and most importantly, the Court had to decide whether the requirements of the norm were subject to judicial scrutiny. In case of an affirmative answer to this question, the Court would then have to pronounce on whether a need in terms of Article 72 para. 2 did in fact exist when the Federal legislature adopted the Geriatric Nursing Act.

1. The Justiciability of Article 72 para. 2

The Constitutional Court's answer to the question of justiciability of Article 72 para. 2 of the Basic Law has already been mentioned; the Court decided in favor of judicial review. What is interesting is that the Court based its finding primarily on a historical interpretation. According to the eight judges, the legislative history of Article 72 para. 2 clearly showed that the legislature, in amending old Article 72 para. 2 and providing for a special review procedure pursuant to Article 93 para. 1 no. 2a of the Basic Law, had pursued the goal of strengthening the position of the *Länder* and guaranteeing an effective constitutional control.[39]

From a methodical point of view, this account is not unproblematic. As noted previously, recourse to the historical argument usually is not the method of first resort for the Constitutional Court, the only exception being the interpretation of the subjects over which the Federation enjoys legislative authority under Articles 73 to 75

[37] Article 30 of the Basic Law.

[38] Section C. I. 1. a) of the decision. *See*, similarly 7 BVerfGE 29, 44; 33 BVerfGE 125, 152; 61 BVerfGE 149, 175.

[39] Sections C. II. 3. to 4. a) of the decision.

of the Basic Law.[40] As early as in 1952, the Constitutional Court stated that it was the "objective will" of the legislature, as manifested in the wording and the systematic and teleological context of a norm, which was decisive in judicial interpretation. By contrast, the original history of a provision was explicitly said to be of relevance only as an auxiliary means of lending support to a result already arrived at by other methods of interpretation or removing any remaining doubts as to the understanding of a norm.[41] It is true that in a subsequent decision, the Court found that especially with regard to very recent provisions, the "subjective will" of the legislature, as expressed in the preparatory work of the respective provision, was of significant importance. Here again, the Court added, however, that this only applied in case the grammatical, systematic and teleological interpretation left the meaning of a provision open.[42]

It is understandable that in the *Geriatric Nursing Act* case, the Constitutional Court departed from these generally accepted principles of judicial interpretation. There is in fact not the slightest doubt that in re-drafting old Article 72 para. 2 and introducing Article 93 para. 1 no. 2a of the Basic Law, the legislature intended to make Federal activity in matters of concurrent legislation subject to judicial review. Nonetheless, as already noted by Gustav Radbruch "the state does not speak through the personal opinions of those who drafted the law, but rather through the law itself."[43] Accordingly, arguments based on text, structure, and teleology should always be given priority over those based on history, even in the case that the original intent of the framers of a given norm is obvious.

The importance the Constitutional Court attached to the original history of Article 72 para. 2 is all the more regrettable because other forms of argument support the result the Court reached. As the Constitutional Court itself pointed out, Article 93 para. 1 no. 2a of the Basic Law would be a dead letter if the question of whether a need exists when the Federation takes action in the area of concurrent legislative competences was left to the legislature.[44] While the Court made mention of this only as a supplementary argument based on the teleology of Article 72 para. 2, reference to Article 93 para. 1 no. 2a actually is quite a strong *systematic*

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[40] *See*, *supra* at C. I.

[41] 1 BVerfGE 299, 312. *See*, 8 BVerfGE 274, 307; 11 BVerfGE 126, 129 et seq.; 20 BVerfGE 283, 293; 33 BVerfGE 265, 294; 47 BVerfGE 109, 127.

[42] 54 BVerfGE 277, 297 et seq.

[43] Gustav Radbruch, RECHTSPHILOSOPHIE, at 107 (Ralf Dreier and Stanley L. Paulson eds., 1999).

[44] Section C. II. 4. b) of the decision.

argument in favor of the justiciability of Article 72 para. 2.[45] In light of this, recourse to the "subjective will" of the framers of Article 72 para. 2, which certainly lends support to the result arrived at by the structural analysis, might have even been considered superfluous.[46]

Be that as it may, the Court rightly continued by stating that the definite *scope* of judicial review depended on two further issues. First, the possibility of concretizing the terms used by Article 72 para. 2 of the Basic Law.Second, the Federal legislature's discretion in determining facts and predicting future developments.[47] Regarding the first issue, the Court was anxious to provide for comprehensive definitions of the three - alternative - requirements of Article 72 para. 2, using the topos of *besondere bundesstaatliche Integrationsinteressen* ("particular integration interests in the federal state") as the starting point of interpretation.[48] The definitions the Court finally found cannot be reproduced here. Suffice it to mention that all in all, the Court's interpretation of the elements of Article 72 para. 2 appears to be rather restrictive. Thus, it contributes to the further strengthening of the position of the *Länder*. What is striking, however, is that in defining the requirements of Article 72 para. 2, the Court simply replaced *unbestimmte Rechtsbegriffe* (undefined legal terms) such as *gleichwertige Lebensverhältnisse* ("equal living conditions") and *gesamtstaatliches Interesse* ("national interest") with other undefined legal terms such as *Rechtszersplitterung mit problematischen Folgen* ("legal fragmentation with problematic consequences") and *erhebliche Nachteile für die Gesamtwirtschaft* ("considerable disadvantages for the entire economy").[49] One may therefore have doubts as to whether the Court really achieved its goal of sufficiently concretizing the terms used by Article 72 para. 2 so as to allow for comprehensive judicial review.

Concerning the second issue, the Court made clear that it did not feel bound by the determination of facts by the Federal legislature. Rather, its power of judicial re-

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[45] Similarly, *e.g.*, Bodo Pieroth, *in* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND - KOMMENTAR, Art. 93 para. 23a (Hans D. Jarass and Bodo Pieroth eds., 6th ed. 2002); Schmehl, *supra* note 25, at 728; Stefan Oeter, *in* DAS BONNER GRUNDGESETZ. KOMMENTAR, Vol. II, Art. 72 para. 114 (Hermann von Mangoldt, Friedrich Klein and Christian Starck eds., 4th ed., 2000).

[46] It has sometimes been contended though that recourse to Article 93 para. 1 no. 2a of the Basic Law was circular, as the norm *presupposed* the justiciability of Article 72 para. 2 but could not independently *justify* it. *See*, Neumeyer, *supra* note 15, at 158. From a systematic point of view, this argument is, however, misleading.

[47] Section C. II. 4. a) of the decision.

[48] Section C. II. 5 of the decision.

[49] Sections C. II. 5. a) and b) of the decision.

view also extended to an examination of the circumstances justifying the taking of action at the Federal level. According to the eight judges, a verdict of unconstitutionality nevertheless depended on whether there were no considerations at all that could justify Federal legislation in terms of Article 72 para. 2 of the Basic Law. In other words: a mistake in the determination of facts by the Federal legislature is not necessarily sufficient reason for abrogating the legislation in question.[50] As regards the prediction of future developments, the Court held that the Federal legislature was granted a certain margin of appreciation. Interestingly, however, the judges gave some guidelines concerning, for example, the procedure of prediction, which were explicitly said to be subject to constitutional control.[51] All in all, the Federal legislature thus seems to have been put on a rather short lead.

2. The Need for the Geriatric Nursing Act in Terms of Article 72 para. 2

In a final step, the Constitutional Court, applying the standards it had just developed to the case at hand, pursued the question whether there was a need, in terms of Article 72 para. 2 of the Basic Law, for the Geriatric Nursing Act. The Court's line of reasoning does not need not be comprehensively dealt with here. Suffice it to mention that the eight judges did not follow the argument put forward by the Federal Government that the adoption of the Geriatric Nursing Act was necessary for the establishment of equal living conditions throughout the Federal territory.[52] Instead, the Court invoked the concept of *Wahrung der Wirtschaftseinheit im gesamtstaatlichen Interesse* ("maintenance of economic unity in the national interest"), which in the opinion of the eight judges in fact rendered Federal regulation necessary. To so hold, the Court again resorted, *inter alia*, to the original history of Article 72 para. 2, which indicated that the fear of legal fragmentation in the area of professional education was one of the very reasons for re-introducing the notion of "economic unity" into the norm.[53]

Leaving aside the problems of historical interpretation, which were already addressed here,[54] the Court's holding is certainly quite convincing in that respect: as an important tool of overcoming the lack of qualified geriatric personnel, the Geriatric Nursing Act may in fact be considered a necessary means for maintaining

[50] Section C. II. 6. c) of the decision.

[51] *Ibid.*

[52] See section B. 5. b) of the decision.

[53] Section C. II. 7. of the decision.

[54] *See*, *supra* at C. II. 1.

economic unity in the national interest. In view of the Court's rigid approach to the requirements of Article 72 para. 2, a bit of a bitter taste is left, however, when the Court still finally upholds the legislation in question. It remains to be seen in future cases therefore how seriously the Court takes its own approach. Given the Court's thorough analysis in the case at hand,[55] the decision on the Geriatric Nursing Act nevertheless is a promising beginning of the Court's "new" task of reviewing the requirements of Article 72 para. 2.

D. Concluding Remarks

There can be no doubt about it: the judgment in the *Geriatric Nursing Act* case is one of the most important rulings the German Federal Constitutional Court has recently issued. The far-reaching implications the decision may have for German federalism become obvious when considering the impressive list of Federal laws adopted on the basis of Article 74 para. 1 of the Basic Law. These include, *inter alia*, the *Bürgerliches Gesetzbuch* (Civil Code), the *Strafgesetzbuch* (Criminal Code), the *Gerichtsverfassungsgesetz* (Judicature Act), the *Vereinsgesetz* (Associations Act), the *Versammlungsgesetz* (Assemblies Act), and the *Bundesimmissionsschutzgesetz* (Federal Emission Control Act), to name only a few. While the Court's ruling does not directly affect these laws as such, it is important to understand that Article 72 para. 2 of the Basic Law also applies to amendments to laws enacted on the basis of Article 74 para. 1. Accordingly, any change of legislation in the area of concurrent authority is subject to the requirements set up by Article 72 para. 2. Moreover, the Federation's concurrent legislative competences under Article 74 para. 1 are far from being exhausted.

As was seen, from a methodical point of view, the Court's holding regarding the justiciability of Article 72 para. 2 is not unproblematic, given the importance the Court attached to the provision's original history. The conclusion the Court reached in that respect can nevertheless be upheld under a structural analysis. As regards the definite scope of judicial review, however, one may doubt whether the Court succeeded in sufficiently concretizing the undefined legal terms used by Article 72 para. 2 so as to allow for *strict* judicial scrutiny. It might thus have been wiser for the Court to confine itself to an evidentiary control.

It may finally be noted that the judgment is likely to bring about a further politicization of the Federal Constitutional Court. This appears, however, to be only a natural consequence of the introduction of Articles 72 para. 2 and 93 para. 1 no. 2a into the Basic Law. One may wonder whether the principle of subsidiarity is better

[55] It may be noted in this context that the Court's decision in the *Geriatric Nursing Act* case comprises 152 (!) pages.

served by a clear and limited catalogue of subjects over which the Federation enjoys unconditioned priority powers. Yet, the legislature decided otherwise.

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