The Principle of Democracy: Watered Down by the Federal Constitutional Court

By Florian Becker

A. Background to the Constitutional Court's Decision from 5 December 2002[1]

For historic reasons, the parliamentary legislator of North-Rhine-Westphalia assigned important public responsibilities concerning water supply and distribution in the areas of the rivers Lippe and Emscher to the public-law bodies *Lippeverband* and *Emschergenossenschaft*.[2] By law the compulsory members of theses bodies are the *Land* (federal state) North-Rhine-Westphalia, the municipalities situated in the respective territories, as well as private companies involved with water distribution or usage as well as companies profiting from the bodies' work or making it more difficult. In 1990 the organizational structure of the two bodies was reformed and participation rights of the respective work forces were introduced. They were granted the right to name representatives to the bodies' supervisory boards (councils) and the boards of directors, but not for the most powerful organs, the assemblies of the bodies' members.

In order to understand the constitutional implications of this organizational reform it is necessary to shed some light on the legal structure of the principle of democracy as it is laid down in the German Basic Law.

B. The Principle of Democratic Legitimation in the Basic Law

Article 20.2.1 of the *Grundgesetz* (Basic Law) says that "The Federal Republic of Germany is a democratic and social Federal state. All state authority emanates from the people. It is exercised by the people by means of elections and voting and by separate legislative, executive and judicial organs." The importance of these structural provisions for the German state[3] is underlined by Article 79.3 of the Basic Law, which prohibits any amendment or alteration of the principles laid down in Article 20. Despite the obvious importance of the

[1] Decision of 5th December 2002 (2 BvL 5/98 und 2 BvL 6/98) (see: www.bverfg.de). In the following text I refer to the decision by citing its paragraphs.

[2] See only Wolfgang Loewer, Wasserverbandsrecht, in: Besonderes Verwaltungsrecht, para. 17 (Norbert Achterberg / Guenter Puettner / Thomas Wuertenberger eds., 2000).

[3] The provisions are also binding for the state structure of the Laender (Article 28.3 of the Basic Law); see BVerfGE 9, 268 (281); 83, 60 (71); 93, 37 (66).

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principle of democracy, it has taken German scholars and courts quite a long time to start a broad discussion about its detailed structures. But conflicts about subject matters such as the establishment of governmental departments not submitted to ministerial instructions,[4] electoral rights of foreigners[5] and worker participation in the public service[6] have ignited a fierce dogmatic discussion about the principle of democracy and its shape under the Basic Law. The outcome of this discussion has been strongly influenced by several decisions of the Federal Constitutional Court[7] and a famous article written by one of its distinguished judges.[8]

By establishing that all state authority emanates from the people, the Basic Law imposes a demanding concept of legitimation for the state's exercise of public power or for the exercise of public power that has been delegated by the legislator to other actors.

In order to understand this concept, one has to distinguish between the object and the subject of democratic legitimation. As for the first point, democratic legitimation has at least to be established for all *amtliches Handeln mit Entscheidungscharakter* ("official acts" making final and binding conclusions). This notion does not only comprise binding acts directed by the state and its branches towards individual citizens, but also acts internally preparing those binding decisions and participating in them (object of legitimation). There has to be an "unbroken chain of legitimation"[9] from "the people" to the individual or the group of individuals finding the authoritative decision as representatives of public power. Hereby, legitimation is not a static concept, but it can be fulfilled to greater or to a lesser degree.

In order to evaluate the degree to which democratic legitimation is fulfilled in a concrete decision, two factors have to be taken into account: the personal and the factual aspect of

[4] Eckart Klein, Die verfassungsrechtliche Problematik des ministerialfreien Raumes (1974); Janbernd Oebbecke, Weisungs- und unterrichtungsfreie Raeume in der Verwaltung (1986); about the specific problem of the Bundesbank: BVerwGE 41, 334 (354 et seq.); Frauke Brosius-Gersdorf, Deutsche Bundesbank und Demokratieprinzip, Berlin 1997; Klaus Stern, Das Staatsrecht der Bundesrepublik Deutschland Vol. II, p. 491 et. seq. (1980).

[5] BVerfGE 83, 60; 83, 37; Brun-Otto Bryde, 1989 JZ p. 257; Josef Isensee, in Staat, Kirche, Wissenschaft in einer pluralistischen Gesellschaft. Festschrift zum 65. Geburtstag von Paul Mikat (in: Dieter Schwab / Dieter Giesen / Joseph Listl / Hans-Wolfgang Straetz eds., 1989) p. 705; Helmut Quaritsch, 1983 DÖV 1983 p. 1; Helmut Rittstieg, 1991 DuR p. 10; Hans Heinrich Rupp, 1989 ZRP 1989 p. 363.

[6] BVerfGE 9, 268 (281 et seq.); 93, 37 (66); Wolfgang Daeubler, 1988 PersR p. 65 et seq.; Jens Kersten 2002 ZBR 2002 p. 28; Helmut Lecheler, 1986 NJW p. 1079; Walter Leisner, Mitbestimmung im oeffentlichen Dienst (1970); Fritz Ossenbuehl, Grenzen der Mitbestimmung im oeffentlichen Dienst (1986). About the specific questions concerning co-determination in publicly owned companies: Florian Becker, 2001 ZögU p. 1; Dirk Ehlers, 1987 JZ p. 218 (225), Fritz Ossenbuehl, 1996 ZGR p. 504; Guenther Puettner, 1984 DVBl. p. 165 (166); Ralf Schaefer, Mitbestimmung in kommunalen Eigengesellschaften (1988).

[7] BVerfGE 44, 125; 47, 253; 83, 37 and 60; 89, 155; 93, 37.

[8] See Ernst-Wolfgang Boeckenfoerde, in Handbuch des Staatsrechts Vol. I, § 22 (Josef Isensee / Paul Kirchhof eds., 2nd ed., 1995)

[9] See BVerfGE 83, 60 (73); 93, 37 (67).

democratic legitimation. This mixture reflects the conclusion that any public decision-making is made up of two components: It is exercised by an individual or individuals on the basis of a conferred legal power (an entitlement which is regularly conferred upon the decision-maker by statute). While the first aspect demands that the decision is made upon a legal basis, being itself (or in the case of delegated legislation or by-laws legislated on the ground of) a parliamentary statute, the latter aspect makes it necessary that the deciding individual be appointed to his office by another individual closer to parliamentary control than the appointee. This chain of personal legitimation has to end with an official (a minister) immediately responsible to the parliamentary forum. This closes the link between the appointment of every single individual exercising public power and the will and control of "the people". The parliamentary forum, to which the individualized end of the chain of legitimation is responsible, consists of Members of Parliament elected by "the people" as it is meant in Article 20.2.1. This notion refers to the totality of all citizens. At the same time it limits the electorate rights to them since any voting rights for non-citizens would diminish the influence "the people" as a whole have on the outcome of elections and furthermore on the composition of the parliamentary forum. Thus, by stating that all state authority emanates from "the people" the Constitution negatively expresses that there is no other source of legitimation for the exercise of state authority. If a public official is elected by a body only partially consisting of officials who are democratically legitimated themselves, it is necessary, in order to prevent the chain of legitimation from being cut off, that he be elected by a majority of democratically legitimated persons who are in the majority in the electing body (principle of double majority[10]). The two strains of democratic legitimation, the personal and the factual aspect, may even out each other, but they cannot wholly substitute each other (For example, when the chain of legitimation between the parliament and the actual official is quite long because there is a multitude of officials between them, this deficit can be compensated by a dense statute provision conferring legal power on this "last" official, though not leaving too much discretion to him).

C. The Principle of Democratic Legitimation and Self-Administrating Bodies

While there is no direct indication in the constitution that the demands of the principle of democratic legitimation would not have to be met in every single branch of public power (unless there is a constitutional justification for deviating from this concept), the Constitutional Court now claims that – although this principle has to be understood strictly in general – it applies to state and municipal administration in the first place, while up to now it has been left open whether, for the branches of "functional self administration",[11] the constitution leaves some scope for a less stringent form of democratic legitimation brought about by the influence of individuals and organs not personally legitimated themselves.[12]

[10] See BVerfGE 93, 37 (67 et seq.).

[11] About this topic see only Winfried Kluth, Funktionale Selbstverwaltung (1997).

[12] Para. 161 et seq. and para. 167 of the decision.

Entities of self-administration in general are public-law bodies which are organizationally independent from the system of state administration but are nonetheless an organizational part of the state and do exercise public power conferred upon them by the state, *vis a vis* their members.[13] These bodies are characterized by the fact that certain public affairs are self-administrated by those individuals who are interested in them to a higher degree than the rest of "the people." The state only has to ensure that the self-administrating body complies with its legal frame work.[14] The right of self-administration with regard to the municipalities is expressly guaranteed by Article 28.2.1 of the Basic Law. It is characterized by the fact that all people living together in a certain area should rule themselves with respect to all affairs of their community as long as the state has no prevailing interest for uniform rules. Hence this kind of territorial self-administration is linked to territorial concern by those submitted to it. In contrast to this, functional self-administration is based upon a concern for a certain subject matter shared by all obligatory members of the body.[15] For instance, all business-people are organized by law in a local chamber of commerce, or all manual workers are organized in a local trade association.

The entities at the core of the dispute – the *Lippeverband* and the *Emschergenossenschaft* – are granted the right to self-administrate questions in connection with water supply in the area of the two rivers within their legal framework. Although the possibility of establishing self-administrating bodies is not mentioned expressly in the Basic Law, it is beyond any doubt that they do not cause any constitutional problems in general – although their coherence with the principle of democratic legitimation has always been under discussion. In the judgment issued on 5th December 2002, the Federal Constitutional Court had to say something about the conditions the constitution sets out for the establishment of self-administrating bodies in general. The Court was also confronted with the fact that the work forces of the two self-governing bodies had been granted participation rights with regard to the bodies' work. Both aspects build up tensions with respect to the principle of democratic legitimation as set out in Article 20.2.1 of the Basic Law.

It is not evident under which conditions the parliament is allowed to establish a self-administrating body and make membership obligatory for a certain group of individuals that are united by a certain common interest. The Federal Constitutional Court assumes that the parliament has wide discretion on this point.[16] But in any case, there is a constitutional duty to regulate the internal organization of the body such that all organized interests have a

[13] Peter Unruh, 2001 VerwArch p. 531 (542).

[14] Ernst Thomas Emde, Die demokratische Legitimation der funktionalen Selbstverwaltung p. 366 (1991); Reinhard Hendler, Selbstverwaltung als Ordnungsprinzip p. 284 (1984); Matthias Jestaedt, Demokratieprinzip und Kondominialverwaltung p. 71 (1993); Unruh at p. 536, supra note 13.

[15] See Kluth at p. 12 et seq., supra note 12. Especially about the criteria of being affected by a certain subject matter: Roman Herzog, in Grundgesetz, Art. 20 II para. 59 (T. Maunz / G. Duerig et alt., 2003); Eberhard Schmidt-Aßmann, in Gedaechtnisschrift fuer Wolfgang Martens, 249 (253) (Peter Selmer / Ingo v. Muench eds., 1987).

[16] Para. 170 et seq. of the decision.

chance to be considered adequately. Furthermore, it is only sometimes contested that the parliament is not allowed to confer the administration powers upon the body concerning questions that are "essential" for the exercise of the body's members' fundamental rights.[17] For reasons of democratic responsibility, those affairs have to be regulated by the parliament itself. The Court itself stated, in an earlier decision, that only those tasks may be conferred upon self-administrating bodies that the state does not have to perform itself through its own administration.[18] As far as it was argued that all questions concerning water supply and distribution were to be administered under the direct influence of the state,[19] the Court was right to reject that idea. This is primarily because there are only a limited number of subjects that have to be exclusively governed by the state in a narrow sense – for example, defense or foreign policy.[20] But this is also because the tasks in question have traditionally been widely administrated by such bodies and no problems have arisen.[21]

The establishment of self-administrating bodies is understood to create a certain tension with respect to the principle of democratic legitimation set out above: as the latter is based upon the idea that the starting point of all democratic legitimation is that every citizen has the same right to determine all public affairs by casting his vote for the parliament, self-administrating bodies privilege a certain group of people, whose affairs are not (or not in a full scale) submitted to the determination of the general electorate. In contrast to the idea of democratic equality, the bodies' members are allowed to live under their own rules as long as they do not infringe upon outsiders' rights. Due to the limitating meaning of Article 20.2.1 of the Basic Law, it is quite clear that the individuals organized within a self-administrating body are not "the people" in the sense of the wording used in that provision. Hence, they are not a valid source of democratic legitimation for the decisions of the bodies of which they are members.[22] Although these decisions are emanations of state power conferred by law upon those bodies, their decisions are not made by personally legitimated individuals since these are elected by the bodies' assemblies (and not by another personally legitimated individual ranking higher in the "chain of legitimation"). They have no personal democratic legitimation in the constitutional sense.

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[17] See BVerfGE 33, 125 (158 et seq.); 34, 136 (192); 49, 89 (127); 83, 130 (142) and Hans Herbert v. Arnim, 1987 DVBl. p. 1241; Juergen Staupe, Parlamentsvorbehalt und Delegationsbefugnis p. 136 et seq. ; Dieter C. Umbach, Dieter, in Festschrift Hans-Joachim Faller p. 111 (Wolfgang Zeidler / Theodor Maunz / Gerd Roellecke eds., 1984).

[18] BVerfGE 38, 281 (299).

[19] That was said by the Bundesverwaltungsgericht which had laid the decision before the constitutional court; see BVerwG 106, 64 (77 et seq.).

[20] Hendler at p. 318, supra note 14; Hans Hugo Klein, in Festschrift fuer Ernst Forsthoff zum 70. Geburtstag p. 165 (179, note 71) (Roman Schnur ed., 1972); Ulrich Scheuner, in Gedaechtnisschrift fuer Hans Peters, p. 797 (815) (Helmut Conrad / Hermann Jahrreiß / Paul Mikat / Hans Carl Nipperdey eds., 1967).

[21] See e.g. BVerfGE 10, 89 (103); 24, 367; 58, 34; BVerwGE 3, 1.

[22] See the text at notes 33 et seq. of this article.

D. The Decision of the Court

In its decision the Federal Constitutional Court states that the principle of democratic legitimation, being established for state and municipal administration in the first place, may be "open" and "adjustable" in other contexts of public power.[23] Hence, although self-administrating bodies (*e.g.* by making by-laws) regularly are emanating state power conferred upon them,[24] the principle of democratic legitimation is not to be applied as stringently as in connection with state and municipal administration. Opposing the idea of a tension between democracy and self-administration, the Federal Constitutional Court is of the opinion that these two complement each other since both concepts realize the idea of the self-determining individual in a liberal constitutional order. Furthermore, the Court tries to strengthen its argument by pointing at the fact that self-administrating bodies are established by the central instrument of democratic government - the parliamentary statute.[25] Carrying further its train of thought about the "openness" and "adjustability" of the principle of democratic legitimation, the Court comes to the conclusion that even the rules about the co-determination by the work force does not breach the principle of democratic legitimation, as both are likewise attached to the idea of "participation".

In the concrete organizational shape of the bodies' organs, the representatives of the work force have no majority for their own, as they only form a third of the boards' members and a number of basic decisions are conferred on the assemblies of the bodies paying membership. The work force sends[26] its representatives only to the board of directors and to the councils of the bodies that *inter alia* elect the boards of directors. Insofar as the workers' representatives participate in decisions infringing private rights (for example, by issuing an order about the use of private land), they are in a minority position, and they are bound by the legal framework applicable for such an action. Furthermore such decisions are embedded in a complex system of controls, supervised by other institutions of the bodies in which the work force is not represented.

Obviously the Court sees that the work forces are not "the people" and thus are not a source of democratic legitimation, as referred to in Article 20.2.1 of the Basic Law. By sending representatives to the board of directors and the council, they take part in the exercise of the state power conferred to the self-administrating bodies without personal democratic legitimation. Nonetheless, according to the Court, a limited participation of the work force – in order to voice its needs and to influence its working conditions – can be justified under the

[23] Para. 167 of the decision.

[24] Expressly conceded in Para. 172 of the decision.

[25] Para. 168 of the decision.

[26] It has to be noted that the representatives of the working forces in the bodies organs are not directly elected by their fellows. A proposal of candidates has to be made by the regular workers representation body (existing in every branch of the public administration) consisting twice as many candidates as posts are to be staffed. Finally, the representatives of the working forces are elected by the assembly of members.

constitution. Although the work force is not originally responsible for the public tasks attached to the self-administrating bodies (the responsibility lies with its members), at least they participate in their fulfilment. Sending workers' representatives to the boards of directors and the councils and hereby influencing the bodies exercise of public power may improve the efficiency of the bodies' work. The parliament saw co-determination as a specific instrument to transfer knowledge from the work force to the executive level of the body. But it is neither entirely clear how this argument can justify anything other than the establishment of information channels between those two levels nor why co-determination comprises all subject-matters upon which the boards have to decide rather than being limited to those matters related to the working conditions of the work force. Thus, the parliament also stressed that co-determination means co-responsibility and that the latter improved the efficiency of the bodies work as well as industrial peace. Since the will of the parliament, as formulated in a statute, only becomes effective when implemented, anything strengthening this will by making its implementation more efficient is most welcome under the auspices of the principle of democratic legitimation.

For the constitutional court, these motives of the parliament are within its discretionary scope – although the decision gives a hint that the parliament may not go any further in varying the original sense of the principle of democratic legitimation.[27] But there is a certain degree of contradiction within the Court's train of thought. One the one hand, it stresses the importance of workers' representation within the managerial structure of the bodies for its performance. On the other hand, it tries to play down their influence on the bodies' decisions. In contrast to the findings of the Court, it has to be claimed that the decision raises serious doubts on different levels.

E. Critique

First of all, the reasoning of the decision does not make entirely clear the degree to which the object of democratic legitimation (here: the decisions of the bodies) has any influence on the mode and level of the legitimation that the constitution demands. The Court distinguishes between acts of the state administration and the municipal administration, on the one hand, and decisions made by the bodies of functional self administration, on the other hand. It should have become obvious that the concept of self-administrating bodies does not entirely comply with the concept of democratic legitimation as it is laid down in the Basic Law in general. By claiming the opposite, it seems that the Court does not distinguish between the principle of democratic legitimation in a constitutional sense and the political idea of democracy and individual self-determination on. It may be true that – since the central idea of establishing self-administrating bodies in cases in which the constitution does not make it obligatory anyway (such as 28.2.1 of the Basic Law) is the idea of participation[28] – this may lead to a close relationship between the democratic principle and the con-

[27] In Para. 184 of the decision the court says that this organisational modification of the self-administrating bodies is still within the framework of the constitution.

[28] See Hendler at p. 302 et seq., supra note 14.

cept of self administration.[29] Viewed this way, the concept of self-administration may even be understood as a way to implement and realize democracy,[30] because there are evident parallels between the two of them.[31] In particular they both aim at political participation in subject matters of interest for the individual. But the idea of self-administration, as far as it is based upon the political or even philosophical concept of democracy, is wrapped up in the democratic constitution of the state and is only meaningful for the distribution of competences among the several branches of state power.[32]

Even more, by referring to the establishment of the self-administrating bodies by statute as a realization of the democratic principle, the Court mingles the personal and the factual aspects of democratic legitimation.[33] But since neither the members of the self-administrating bodies[34] or its work forces[35] are alternate sources of democratic legitimation as demanded in Article 20.2.1 of the Basic Law, nor is there a another (autonomous) source of such democratic legitimation, the establishment of self-administrating bodies can only be justified by a modification of the principle of democracy, which may be based upon other constitutional

[29] Similarly Emde, supra note 14.

[30] See Winfried Brohm, Strukturen der Wirtschaftsverwaltung, p. 253 et seq.; Emde at p. 382 et seq., 316, supra note 14; see also Jestaedt at p. 492 et seq., supra note 14; M. Kleine-Cosack, Berufsstaendische Autonomie und Grundgesetz, S. 102 et seq., 117 et seq., 181 et seq.; Kluth at p. 236 et seq., supra note 11; Hendler at page 312 et seq., supra note 14; Ossenbuehl, in Handbuch des Staatsrechts Vol. III, § 66 para. 24 (Josef Isensee / Paul Kirchhof eds., 2nd ed., 1996); Matthias Papenfuß, Die personellen Grenzen der Autonomie oeffentlich-rechtlicher Koerperschaften p. 150 et seq. (1991).

[31] See Reinhard Hendler, in Handbuch des Staatsrechts Vol. IV, § 106 para. 48 et seq. (Josef Isensee / Paul Kirchhof eds., 2nd ed., 2000).

[32] Christian Starck, in Handbuch des Staatsrechts Vol. II, § 29 para. 35 (Josef Isensee / Paul Kirchhof eds., 2nd ed., 1998).

[33] By doing so, the court follows a new eyplanatory pattern for the democratic legitimation of self-administrating bodies established by W. Kluth at p. 373 et seq, supra note 11. If the idea of personal democratic legitimation rests upon the fact that the individual any public power is conferred upon has to be selected personally by another individual ranking higher in the chain of democratic legitimation, in cases of self-administrating bodies Kluth sees this act of selection already made by the establishing statute in an abstract manner. But his concept rests upon the idea that the parliament is allowed to waive its competences ("Verzichtstheorie", see Peter Badura, in Bonner Kommentar zum Grundgesetz, Art. 38 para 31 et seq. (Rudolf Dolzer / Klaus Vogel / Karin Graßhof eds. 1966); Klein at p. 197, supra note 4; against this theory: Emde at 309 et seq., supra note 14). Furthermore, it mingles the concepts of personal and factual democratic legitimation without justifying this step properly.

[34] It has been brought forward that the individuals united as members of such a body may be an alternate source of democratic legitimation as being a "people" in the sense of Article 20.2(1) of the Basic Law; see for this Brohm at p. 243 et seq., supra note 30; Emde, at p. 383 et seq., supra note 14; Herzog at para. 58, supra note 15; Kleine-Cosack at p. 117 et seq., supra note 30; Oebbecke at p. 88 et seq., supra note 4. Comprehensively against that idea: Jestaedt at p. 216 et seq., supra note 14.

[35] As the members of the bodies are not personally legitimated themselves they cannot transfer any personal legitimation to the representatives of the working forces even if they get elected by the members' assembly and not by the working forces themselves.

provisions.[36] Taking this into account, the most convincing solution seems to be that the framers of the Basic Law knew about the existence of a wide variety of self-administrating bodies in Germany with deep roots in the constitutional history and that there is no hint that they were to be abandoned - even more so as they are expressly mentioned in the text of the constitution (*see, e.g.* Article 87.2(1) of the Basic Law). Thus, the establishment of these bodies and the loosened framework of the principle of democratic legitimation in that subject matter is – under certain conditions – justified by the constitution itself and not by any "openness" or "adjustability" of the principle in general.

But if the Court would have followed this train of thought, it would have had serious difficulties because it uses "openness" or "adjustability" as an "emergency exit" for not having to test workers' co-determination against the principle of democratic legitimation. The constitutional acknowledgment of self-administrating bodies does not comprise any worker co-determination, as this was not known at the time of the drafting of the constitution. Thus, while the establishment of self-administrating bodies is compatible with the principle of democratic legitimation, under certain conditions any further modification of the principle, such as workers' co-determination, has to be justified by other constitutionally valid reasons.

In an earlier case dealing with a statute to expand workers' co-determination in the state administration of one *Land*, the Court found that the co-determination of decisions that are in need of democratic legitimation is possible but that there are two limits to it. On the one hand, co-determination may only apply to internal decisions within the administration as far as it is justified by the interests of the work force that are implied in their working relationship. On the other hand, the principle of democratic legitimation demands, for all decisions relevant for performance of the public functions, that the ultimate responsibility for decision-making power lies with those officials that are within the chain of personal democratic legitimation. The less a decision touches upon the performance of the public task assigned to the administrative branch and the more it touches upon the interests of its work forces, the further its co-determination may reach.[37]

To make this scale more operable, the Court specified its reach by a threefold distinction.[38] Firstly, there are decisions concerning the internal sphere of the working relationship, typically not having any repercussions on the performance of the public task. Obviously, in this case the possibility of co-determination is far-reaching, allowing for a merely factual democratic legitimation by the law, under the condition that a personally legitimated official is granted possibilities for intervention. Secondly, there are decisions concerning the internal sphere of the working relationship but also having effects on the performance of the public task. Here it is always necessary that, in the last resort, the decision be taken by a personally

[36] See Boeckenfoerde at para. 25, supra note 8; Klaus Stern, Das Staatsrecht der Bundesrepublik Deutschland Vol. I, p. 402 (2nd ed., 1984); Jestaedt at p. 552, supra note 14.

[37] BVerfGE 93, 37 (69).

[38] BVerfGE 93, 37 (71 et seq.).

legitimated individual (or a respective group of individuals). In these two categories the principle of double majority comes into play, since the parliamentary accountability implied in this context can only be realized when the deciding organs are structured according to that principle. But even that does not always help: even if the majority of individuals comprising an organ are personally legitimated, some of them may cooperate with the workers' representatives and hereby at least prevent a decision. Thirdly, there are decisions primarily concerned with the performance of the public task, but inevitably, at the same time, having an effect upon the interests of the work force. In that respect the parliamentary accountability must not be substantially restricted. As a consequence, any workers' co-determination may only take place in a non-binding manner.

In that specific decision the Court did not finalize the grounds on which this structure of the workers' co-determination in administrative branches is admissible as a limitation of the principle of democratic legitimation. There is no constitutional obligation to establish a system of co-determination in the administration,[39] especially not for reasons of equality between the public and the private sector – the latter being submitted to intensive rules of co-determination – since those two simply cannot be compared. It seems that it would be sensible to argue from two points: on the one hand, the principle of the welfare state (*Sozialstaatsprinzip*) as laid down in Article 20.1.1[40] of the Basic Law has the same normative value as the principle of democratic legitimation, although it is not as structured in a dogmatic sense as the former and thereby not a very good basis for deriving the constitutional duties of the parliament. But at least it can be used as an argument for the admissibility of co-determination, even in the public sector. On the other hand, the fundamental freedoms of the work forces' members (such as Articles 1.1[41] and 2.1[42] of the Basic Law) may also point in that direction[43] insofar as they prevent any individual from being treated by the state and its branches like an object, *i.e.* without regard to his or her interests and needs. But the specific design of the colliding rules – the principle of democratic legitimation, on the one hand, and the constitutional provisions bringing arguments to bear on co-determination, on the other hand – makes it necessary to find a solution equally respecting all concurring principles. From that point of view, there is no justification at all for any limitation of the principle of democratic legitimation by integrating individuals into the organisational structure of the bodies' organs if they are not a member of the work forces - as it is possible in the *Lippeverband* and the *Emschergenossenschaft*. Furthermore, it is difficult to understand why the Court allowed the parliament to deviate from the graded system of co-

[39] Lecheler at p. 1081 et seq., supra note 6.

[40] See about its meaning for the justification of co-determination in the public administration: BVerwGE 62, 55 (63); Gunter Kisker, 1985 PersV p. 137 (140 et seq.); Schmitt Glaeser, 1973 VVDStRL Vol. 31 (1973), p. 179 (232).

[41] „The dignity of man is inviolable.".

[42] „Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.".

[43] See only Ossenbuehl at p. 15 et seq., 26 et seq., supra note 6.

determination in the administrative sector invented in its earlier decision. The representatives of the work forces in the *Lippeverband* and the *Emschergenossenschaft* do not only promote the social interests of their fellows, they also participate in the decision-making of the body. This far-reaching participation can neither be justified by the workers' fundamental freedoms nor by the principle of the welfare state. It has to be said that any co-determination in the respective areas shifts the work forces from being the executors of the bodies' decisions to being its creators. This is why the system of co-determination as established in the *Lippeverband* and the *Emschergenossenschaft* does not comply with the demands of democratic legitimation. The Court was wrong to decide the opposite.