Chapter 8
Inconsistent Legislation

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Abstract. In a number of rulings, the German Federal Constitutional Court has called on the legislature to show consistency, and has declared null and void statutes which it considered to be inconsistent. This "principle of consistency" helps to strengthen the rationality of the law, at least as a reflex, but also to fortify the position of the Federal Constitutional Court within the structure of the constitutional bodies. It focuses on the self-obligation of the legislature: It is to be tied to a selected regulatory concept to such a degree that any deviation is to be classified as contradictory, and hence at the same time as unconstitutional. The paper portrays the development of the constitutional court case-law on the "principle of consistency", and then goes on to criticise it vehemently: Firstly, a "principle of consistency" confuses the relative standard of equality rights with the absolute standard of freedom rights. Secondly, it causes the law to transform from an object into a yardstick for constitutional review, thereby turning it into a standard reviewing itself. Thirdly, the "principle of consistency" helps to radicalise the legal system because political consistency is now required where practical concordance was previously called for. However inconsistent proportionate legislation may at times be, consistent legislation tends to be disproportionate. Fourthly, it remains unclear how the regulatory or protective concept of a statute can be determined which is to serve as a standard for the law as a whole. Fifthly, and finally, the separation of powers between the legislature and the Federal Constitutional Court stands opposed to the idea of a principle of consistency. Democratic legislation is always also inconsistent legislation. A principle of consistency may therefore only be understood as an item on the political and legislative wishlist, but not as a principle underlying the rule of law.

Keywords: consistency, latitude of legislator, democratic legislation

In a number of rulings, the German Federal Constitutional Court has called on the legislature to show consistency, and has declared null and void statutes which it considered to be inconsistent. In addition to collision rules derived from the system of federal competences and from the democracy principle, as well as from the primarily rule-of-law-based *topos* of ensuring that the legal system is free from contradictions, a further element is now evident in recent case-law in the shape of a "principle of consistency". This principle helps to strengthen the rationality of the law, but also to fortify the position of the Federal Constitutional Court within the structure of the constitutional bodies. This "principle of

consistency" focuses on the self-obligation of the legislature as much as it ties the legislature to a selected regulatory concept to such a degree that any deviation can be classified as contradictory, and hence unconstitutional.

The current chapter charts the development of the principle of consistency within constitutional court case-law, and then goes on to criticise it vehemently on the following grounds: First, a "principle of consistency" confuses the relative standard of equality rights with the absolute standard of freedom rights, and, second, it causes the law to become a yardstick for constitutional review, thereby turning it into a standard reviewing itself. It consequently enables the legislature at the same time to exert an influence on this standard. Third, the "principle of consistency" helps to radicalise the legal system because political consistency is now required where practical concordance was previously called for. However inconsistent proportionate legislation may at times be, consistent legislation tends to be disproportionate. Fourth, it remains unclear how the regulatory or protective concept of a statute can be determined which is to serve as a standard for the law as a whole. The burden of explanation and reasoning cannot make the situation any clearer here because it cannot be determined in the political-pluralist genesis of the law *who* the responsible legislator actually is. It furthermore remains unresolved whether it is the wording of the law or the grounds for a statute that should serve as the yardstick for consistency. Fifth, and finally, the separation of powers between the legislature and the Federal Constitutional Court stands opposed to the idea of a principle of consistency. Strictly speaking, it is not the law that becomes a standard review itself, but its interpretation by the Federal Constitutional Court. As the review gains in depth, the risk grows that the Federal Constitutional Court will hand down rulings which are reserved for the legislature, particularly since, in a Senate comprised of eight legal experts, rationality aspects based on the rule of law have always played a more prominent role than democratically-decided prioritisation.

1 Recent rulings

In many recent rulings, the Federal Constitutional Court requires the legislature to be consistent. The headnotes of the ruling on the Bavarian State Lottery Act (*Staatslotteriegesetz*) for example read as follows:

> "A state monopoly on sports betting shall only be deemed to be compatible with the fundamental right freely to choose an occupation or profession stipulated by Art. 12

> para. 1 of the Basic Law if it is consistently orientated towards the goal of combating the dangers of addiction."[1]

In the view of the Federal Constitutional Court, the Act was not so orientated given that it remained unclear how a state monopoly could restrict betting fervour and combat betting addiction if, at the same time, the State had a considerable fiscal interest in offering monopolised sports betting, and hence could succumb to the temptation to use, and even misuse, its monopoly in such a way as to not only restrict betting fervour, but also to ensure a steady revenue stream. Were the State however not to consistently implement the concept of restricting betting fervour and combating betting addiction, it would actually not be justified in completely excluding private providers from offering sports betting.

In another ruling on the protection of non-smokers in Baden-Württemberg and Berlin, the Federal Constitutional Court again demanded consistent legislation albeit this time in somewhat different wording:

> "If the legislature, given its particular latitude, has decided on a specific assessment of the potential risk, assessed the interests concerned on this basis and selected a regulatory concept, it must also pursue this ruling consistently. Risk assessments are not conclusive if different weights are allotted to identical risks in the same Act."[2]

What did the Federal Constitutional Court mean by this? In order to obtain a better understanding, let us briefly call to mind that the *Land* legislatures have not issued an absolute smoking ban for pubs and restaurants, but rather they have provided exceptions from the smoking ban for separate adjoining rooms and for outdoor catering. Having said that, it is not possible for factual reasons for all pubs and restaurants to benefit from such legal exceptions. The qualified ban contained in the non-smoker protection laws therefore has had the effect of an absolute ban for those pubs and restaurants, and for such "corner pubs". The accusation which the Federal Constitutional Court has levelled at the legislature, and which has led to rulings on the unconstitutionality of the law, emanates from the fact that the health hazards caused by passive smoking took on a different weight in the weighing up process vis-à-vis the right of innkeepers freely to choose their occupation or profession.

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[1] BVerfGE 115, 276 (headnotes & 310).

[2] BVerfG NJW 2008, 2409 (2415).

To put it figuratively: the legislature had not sufficiently considered all aspects of the protection of life and health, even though this would have been possible in terms of the Constitution given that the protection of the population from dangers to life and limb constitutes a prominently important, common and good-related interest. Rather, it balanced it up opposing interests, such as the right of innkeepers freely to choose their occupation or profession and the right of smokers to pursue a pastime – rights that are both protected by the general freedom of action. And as an outcome of this process of weighing up, the legislature decided to allow exceptions – a decision which appeared not only to be constitutionally unobjectionable, but which brought about a practical concordance between several contradictory fundamental right positions in a practically exemplary way. The Federal Constitutional Court, however, concluded from this equalisation that the legislature had only in a limited way pursued the protection of life and limb. And for this reason the legislature should be permitted to take into consideration only this reduced weight when weighing up health protection against the interests of operators of one-room pubs and discotheques – anything else was said to be incoherent, inconsistent, and hence disproportionate and unconstitutional.

In particular, therefore, the ruling on non-smoker protection raises the question of whether there are constitutional principles of coherence and consistency, disregard for which leads to laws being unconstitutional.

Were this indeed to be the case, a whole number of further statutory provisions would be unconstitutional because of inconsistency. An example that one might mention is the provisions contained in the German Freedom of Information Act (*Informationsfreiheitsgesetz*). This Act provides as a matter of principle every citizen with the entitlement to obtain all their personal data that is available to the administration. However, this fundamental right of access is in turn restricted by a number of exceptions. For instance, in accordance with section 5 of the Act, access to personal data may only be granted where the applicant's interest in obtaining the information outweighs the third party's protected interests warranting preclusion from access to the information, or where the third party has provided his or her consent. In other words, a process of weighing up takes place between the interests of the data subject, which – in terms of fundamental rights – is protected by the right to informational self-determination, and the applicant's interest in the information. By contrast, in accordance with section 6 of the Freedom of Information Act, business or trade

secrets are always precluded from the right of access to information without there being a need in individual cases for any weighing up. This is already inconsistent in the sense that the right to informational self-determination is more closely linked to human dignity than is the protection of business or trade secrets, so that as such this right would require more intensive protection. However, according to the prevalent constitutional understanding, the configuration of different levels of protection can still fall within the freedom of the legislature to shape legislation. Things would look different were one to apply the principle of consistency to exemption clauses. One could then argue that it would be inconsistent to lend primacy to the interest in gaining access with regard to personal data than with regard to business or trade secrets, so that the provisions would be unconstitutional in this regard.

2 Consistency and freedom from contradictions in the legal system

If the intention is therefore to examine whether inconsistent laws are always also unconstitutional, the subject-matter of the investigation must be initially restricted and delimitated. There is, for example, a need to delimitate the principle of consistency, with its demand for laws that are coherent and consistent, from the freedom from contradiction of the legal system as a whole.

Contradictions in the overall legal system can be differentiated and systematised according to a variety of different criteria. A distinction is, for instance, made in jurisprudence between the following:

- technical legislative contradictions which arise as a result of non-uniform linguistic usage, and particularly from an uncoordinated use of terms;
- conflicting regulations where two provisions create different legal consequences for the same offence;
- contradictions of values where new provisions neglect the values underlying the applicable law;

- teleological contradictions which occur when the achievement of the purpose pursued by a provision is prevented by other provisions;
- and contradictions between principles, i.e. between the fundamental principles that are relevant to a provision.[3]

This will not be pursued further at this point. The vital issue is to stress the difference between contradictions between laws and inconsistencies within laws.

2.1 Contradictions between laws within the legal system

2.1.1 Collision rules

Contradictions between laws are largely remedied with the aid of the rules on collision. Such contradictions can for instance occur in relation to the legal acts of other public authorities, such as in the relationship between *Land* law and Federal law, or in a comparison between the law of Member States and EU law. Attempts are made to avoid such contradictions by attributing competences as precisely as possible and otherwise to resolve them via "*lex superior derogat legi inferiori*" reasoning – according to which higher-ranking law prevails over lower-ranking law.

Contradictions between laws can however also occur between legal acts emanating from the same public authority. The *lex specialis* or the *lex posterior* principle is applied here.

The legal nature of these conflict resolution rules may be controversial. They are characterised in some cases as general legal principles, as interpretation rules, as legally-logical principles or as presumption rules.[4] What is decisive is, ultimately, the question of whether they are legally binding. In this regard, at least for the *lex superior* rule, it is possible to invoke Art. 1 para. 3 and Art. 20 para. 3, as well as Art. 31 and Art. 93 para. 1 No. 2 of the Basic Law, which virtually constitute the entire national hierarchy of statutes. And with regard to the *lex posterior* rule, it is possible to refer to the principle of democracy, which would be insignificant if subsequent generations were unable to change the rules of previous ones.

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[3] cf. on the following *Müller,* 2006, pp. 175.

[4] cf. the summary in *Vranes*, ZaöRV 65 (2005), 391 (393).

2.1.2 Freedom from contradictions in the legal system

The Federal Constitutional Court for a time juxtaposed the topos of freedom from contradictions in the legal system with the collision rules. In accordance with the relevant ruling, waste charges under *Land* law and municipal packaging taxes, because of their steering function, contradicted the cooperation principle which the Federal legislature stipulated as a fundamental decision in the Federal Imission Control Act (*BImSchG*) and in the Act for Promoting Closed Substance Cycle Waste Management and Ensuring Environmentally Compatible Waste Disposal (*KrW-/AbfG*). The legislature handing down tax legislation was not permitted to falsify the rulings for cooperative, indirect forms of steering made by the legislature handing down legislation on the subject-matter by means of steering regulations the implications of which would run counter to the cooperation principle.[5] As far as one can tell, this legal figure has however not been taken up by the Federal Constitutional Court since then, or at least not to the degree as to make it decisive in a dispute.

2.2 Consistency within laws

There is little benefit to be gained from discussing further consistency between laws given that the principle of consistency – at least as it is described in the ruling on non-smoker protection – is not concerned with the freedom from contradiction in the overall legal system, but – much more modestly – merely about the consistency of a single statute. If not the entire legal system, at least each statute should be intrinsically consistent.

The principle of consistency is nothing new. Already in first volume of the collection of its rulings, the Federal Constitutional Court ask

> "whether specific provisions of a certain Act [on the reorganisation of the *Länder* Baden, Württemberg-Baden and Württemberg-Hohenzollern] are contradict one antoher, and hence [are] null and void."[6]

The causality expressed in the wording, "contradict one another, and hence [are] null and void" voices the actual question: is inconsistent legislation *per se* null and void? The Federal Constitutional Court did not have to answer this question at that time and the first

[5] Taken up once more, but found not to be decisive to the dispute, is the principle of freedom from contradictions in the legal system in BVerfGE 116, 164 (186).
[6] BVerfGE 1, 15 (45).

Reorganisation Act (*Neugliederungsgesetz*) was found null and void for other reasons. The court did subsequently find a multi-faceted answer to this question, however.

Before we go on to discuss this a second ruling should first of all be mentioned, also from the first volume, in which the Federal Constitutional Court made fundamental statements on the shaping of the election law. According to these statements, which remain valid today, the Basic Law, in the underlying case of the then *Land* Statute for Schleswig-Holstein, leaves it up to the legislature to arrange electoral law according to the principle of majority voting or proportional representation. [...] Within each stage of the election [however] consistency must prevail." It was hence said to be inappropriate to justify unequal utilisation of the votes in the balancing of the proportion of votes by arguing that the parties would be placed at a quite different disadvantage in a majority vote.[7]

This wording, firstly, sets the basic pattern which is also expressed in Goethe's saying, "In the first we are free, in the second slaves to the act." The principle of consistency reveals itself in this regard as a typical type of self-binding on the part of the legislature.[8] Secondly, however, it is already stated here that the principle of consistency does not apply in absolute terms, but is obviously not breached if adequate *de facto* reasons justify not complying with it.

In later rulings, the Federal Constitutional Court applied the principle of consistency to highly-varied fields of law, including to social insurance law, the law on unemployment assistance and to economic law, and made it more specific in doing so. On the one hand, the Federal Constitutional Court enhanced the significance of the principle of consistency by making clear that if the legislature did not consistently hold on to a principle once it had been selected, it was said to breach the inherent rules which it itself had determined. On the other hand, however, the Federal Constitutional Court weakened the significance of the principle of consistency in that it attenuated the question that was raised in the first volume as to the consequences of a *systemic caesura. Systemic caesuras* – understood as breaches of the principle of consistency – are said not to be simply non-permissible and not to always lead to unconstitutionality, but to indicate only a case of unequal arbitrariness. In other words, they trigger an obligation to justify, but they also provide an opportunity to justify.

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[7] BVerfGE 1, 208 (246).

[8] cf. on this *Meßerschmidt*, 2000, pp. 30.

2.3 Justice of the system; consistency of the system

This understanding of the principle of consistency was also prevalent in the literature which prepared the way for the concept of systematic consistency, and which commented on it over a period of several decades. Later, released from the burden of the term "justice", only the term 'systematic consistency' was used.

It was *Canaris* in particular who played a vital role in this process. He did not leave the "ideal of the century" of the great unity of all legal rules and terms – as had been developed in the nineteenth century from the civilistic dogma – as a general scientific and theoretical, hermeneutic postulate, but linked it with the constitutional tying of the legislature to the principle of equality.[9] In his view, a *system caesura* will as a rule constitute a breach of the constitutional principle of equality.[10] The consequence is that statutory contradictions of values were understood not merely as constituting a disturbance in terms of legal theory and legislation, as an object of interpretation skills or as postulates of legal policy, but were also penalised with the sanctions applying to unconstitutionality, and hence as a matter of principle were declared null and void.

Other renowned authors also devoted themselves to the topos of consistency. *Forsthoff* for instance spoke of the legal obligation incumbent on the State to remain consistent, and *Denninger* derived from the principle of equality a conditional constitutional mandate in the sense of "in for a penny, in for a pound", i.e. one might as well undertake the whole job, as just a part of it.

The question arose sooner or later in all these debates of whether the concept of consistency took on a substance going beyond that of the general principle of equality. This principle of equality, given that it was both founded in the rule of law and guaranteed in terms of fundamental rights, demanded with binding constitutional force, that – as a matter of principle – the legislature must regulate identical circumstances equally and may not arrange differences arbitrarily. In this regard it is necessary to stress that *Canaris*, as with the Federal Constitutional Court, also considered the violation of the principle of equality to lie in the violation of the ban on arbitrariness. It was not overlooked that the Basic Law provides a subjectively-demandable fundamental right to equal treatment in the shape of the general

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[9] cf. the assessment of *Battis*, in: Stödter/Thieme (eds.), Festschrift für Hans Peter Ipsen, 1977, p. 11 (15).
[10] *Canaris*, 1969, p. 128.

principle of equality which prohibits arbitrarily treating as unequal that which is essentially equal – this prohibition also, and in particular, applies to the legislature. In this regard, the question always arose as to whether the principle of consistency was able to lend itself to the general principle of equality, which initially was simply a ban on arbitrariness, a new and more precise standard.

2.4 Fiscal law

This was and is the case in fiscal law, where the principle of consistency assumed, and continues to have, particular significance. In addition to the principle of ability to pay, as a rule it is used as a constitutional standard by which taxable events must be measured. This is understandable but it is also, however, surprising. It is understandable in the sense that fiscal law suggests system-transcendental comparisons at the intersection between public and private law. It is surprising in the sense that one may ask oneself *which system* underlies fiscal law that should be realised consistently. It is sufficient to be a taxpayer, and not a fiscal law specialist, to realise that the applicable fiscal law has no system whatsoever[11]. Cynics therefore also claim that the *entirety* of fiscal law would have to be declared unconstitutional if one were to apply the concept of consistency to it.

Fiscal law indeed offers numerous examples of inconsistent legislation, in particular in the fields of transport and consumer taxes.[12] The fact that there is still a coffee tax, but no longer a tea tax, might be just about acceptable but there are no obvious reasons why coffee, on the one hand, is taxed by this special consumption tax, whilst on the other hand it is only taxed at the reduced rate of value-added tax, i.e. 7%.

This one example admittedly does not hold up where there are inconsistencies between the various taxes and different laws, so that the principle of consistency does not apply with regard to the requirement of applying it only to a single statute. However, firstly, distinguished figures demand that in fiscal law consistent derivations should be permitted across different taxes[13], and secondly there are also examples where the principle of

[11] Accurately *Battis*, (footnote 9), p. 11 (18).
[12] cf. for instance *Tipke*, 2008, pp. 9.
[13] *Tipke* (footnote 12), p. 9 (23).

consistency, related to an individual tax or tax exemption, has led to unconstitutionality. The declaration of nullity of the newly-worded commuter tax allowance is one such example:

> "The general exclusion of these travel expenses from the element of work-related expenses while ordering that the costs for distances from 21 kilometres onwards be treated "like" work-related expenses and assessing a mileage allowance for it which is unrelated to expenditure actually incurred is characterised by a contradictory connection and interlinking of different regulatory contents and objectives, and is not based on a comprehensive concept."[14]

This ruling hints at two different issues. The first is that it indicates a collateral problem of the principle of consistency, namely that it makes it more difficult for the legislature to deviate from a concept once it has been selected. I will come back to this. The ruling, however, goes on to also make clear the particular consequences of the connection between the principle of consistency and the general principle of equality; the commuter tax allowance failed due to the inconsistent application of the factory gate principle, because of the unequal treatment of the first 20 kilometres of the journey to work and of journeys above this. Had the legislature been more courageous and abolished the commuter tax allowance altogether, this would not have led to unconstitutionality in this regard.

3 Consistency as a constitutional principle

Despite the particular significance of the principle of consistency in fiscal law, the question arises whether the principle of consistency is a general constitutional principle, with the consequence that compliance with it can be reviewed by the Federal Constitutional Court and its violation can lead to the unconstitutionality of the law in question.

3.1 Consistency as a general legal principle

The principle of consistency is understood to a certain degree as a general legal principle. Reference is made here to the figure of the "*venire contra factum proprium*", and a ban on contradictory conduct on the part of the legislature is also arrived at, a "*venire contra factum proprium legislatoris*"[15].

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[14] BVerfGE 122, 210 (230).

[15] Positioning himself as a sceptic, Lerche (1961, p. 273) regards the small number of possible (extreme) cases as being adequately covered by the principle of predictability.

Admittedly, there are considerable reservations when it comes to basing far-reaching obligations on the legislature on an undetermined general legal principle, and thereby further restricting the principle of democracy beyond the written constitution. In this regard, it may be possible to derive parallels with, and political postulates from comparisons with, the ban on contradictory conduct; this cannot however lead to the establishment of a constitutionally binding effect.

3.2 The principle of the rule of law

Insofar as the principle of consistency aims to bring about adequate determinateness and legal certainty, it is furthermore subsumed under the principle of the rule of law. *Lerche*, who played a major role in establishing this school of thought, is primarily concerned in his much consulted book "*Übermaß und Verfassungsrecht*" (Excess and Constitutional Law) with the concept of predictability, and also demands consistency from the legislature in the sense that a sudden change of track towards another guideline could be constitutionally questionable. At the same time, however, he also warned that neither every legislature of the moment may be bound by the ideas of its predecessors, nor that considerations of expediency may indiscriminately advance to become legal issues.[16]

3.4 Consistency as a standard of equality rights

The principle of consistency is predominantly understood as an expression or part of the general principle of equality, the question being unresolved, however, as to the degree to which it enriches it or lends it concrete form. A ruling from 1959 with regard to the question of whether headache tablets may be sold in drugstores contains the following wording:

> "It is left up to the legislature whether to take action against advertising for medicines, or to restrict their sale, in order to combat medicine abuse, or to take both measures. If it restricts itself to a ban on sales, at best it may not act entirely consistently, but certainly not arbitrarily."[17]

The Federal Constitutional Court had to rule in the same year on the permissibility of the age limit for midwives. It ruled at that time:

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[16] *Lerche* (footnote 15), p. 272.

[17] BVerfGE 9, 73 (81).

> "If the law ensures [...] a minimum standard of midwifery services, it is legitimate that it also attempts to fully guarantee the ability of midwives to perform, an age limit being one way to achieve this. The principle of equality then does not force one to either restrict this guarantee by foregoing the age limit or to extend it to include midwifery provided by physicians, even if such an extension would make the provision for good legislation more perfect."[18]

This wording makes it clear that the Federal Constitutional Court did not initially regard consistency as constituting a constitutional standard, but in fact only the ban on arbitrariness was applied as a constitutional standard. As has already been stated, the Federal Constitutional Court later at least regarded inconsistent legislation as constituting an indication of the a violation of the general principle of equality.

With the "New Formula" in 1980 the Federal Constitutional Court increased the value of the principle of consistency to a certain extent from a dogmatic point of view. According to the New Formula, if a statutory system is violated, and if this violation takes on a certain intensity, it can only be justified by interests related to the common good which are appropriate in proportion to the unequal treatment.[19]

3.5 Consistency as a standard for freedom rights

If the principle of consistency is therefore attributed as such to the general right to equality, the particular significance of the ruling of the Federal Constitutional Court on non-smoker protection is explained. This significance lies in the fact that the principle of consistency was not applied – as in fiscal law – within the scope of the right to equality, but as a standard in reviewing a freedom right, namely the right freely to choose an occupation or profession, and that -ultimately- it has even caused a provision to be ruled unconstitutional.

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[18] BVerfGE 9, 338 (353).

[19] BVerfGE 55, 72 (88): "Accordingly, this fundamental right [Art. 3 para. 1 of the Basic Law] is violated above all if a group of addressees of the provision is treated differently from other addressees of the provision although no differences of such a nature and weight exist between the two groups such that they could justify the unequal treatment (cf. BVerfGE 22, 387 [415]; 52, 277 [280]). The Federal Constitutional Court in fact emphasised the regulatory content of Art. 3 para. 1 of the Basic Law in connection with attempts to derive from the legislature inherent rules made by the law itself that is binding on the legislature and *to complain about the fact of being incompatible with the system as a violation of the principle of equality* (BVerfGE 34, 103 [105])." (author's emphasis). cf. also BVerfGE 46, 97 (107 ff.). Further *Stern*, in: Stern, Staatsrecht, III/2, § 96 IV 9, p. 1830: "All in all, the principle of equality is intended to ensure objectiveness, expedience, system constancy and consistency of legislative action with regard to fundamental matters."

We may recall that the violation of the Constitution was founded not on a violation of the right to equality, at least with regard to "corner pubs", but on a violation of the right to freely choose an occupation or profession. The inconsistent weighting and, moreover, the allegedly inconsistent weighting of health protection, was said to lead to a lack of proportionality in the strict sense of the word.

The literature reacts in various ways to the transfer of the principle of consistency to freedom rights, if this transfer is consciously registered at all. Similar to in the discussion on systematic justice and systematic consistency, two sides face one another, and the old arguments are brought out once more.

Three functions are stressed in this regard which, in parallel, are considered to constitute advantages of the consistent application of the principle of consistency to the evaluation of statutes. [20]

Firstly, a consistency verification of the regulatory concept underlying a statute is called for particularly if this regulatory concept acts as a brake on fundamental rights and is hence in need of justification. No arbitrary encroachment on fundamental rights is in need of justification when in isolation, but a justifying effect is said to be developed only by an "inherently consistent overall concept".

What is more, a rights-affirming function also attaches to the principle (a function which other consider to have adverse effects). Self-contradictions are said to weaken the legitimatisation of the law, which is materially based on acceptance and recognition. The fact of ruling out inconsistent legislation by virtue of consistently observing the principle of consistency is said to once more strengthen confidence in the law.

Finally, it is also considered an advantage that the combination of the ban on excessiveness and the principle of consistency require the legislature to provide adequate grounds in future, thus obliging it to be accountable both to itself and to citizens.

To sum up, proponents of the principle will presumably recognise a general principle of consistency as constituting a major step towards "rationality as a standard of legislation"[21]. In

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[20] *Lindner*, ZG 2007, 188 (195).

[21] Comprehensively *Schulze-Fielitz*, 1988, pp. 454; cf. also the individual contributions in *Schäffer/Trifterer* (eds.), 1984.

this sense, "freedom from contradiction in terms of wording and values"[22] is identified as a criterion for rational legislation. The doctrine of good legislation,[23] the obligation to enact good laws,[24] also accommodates these criteria.

4 Objections to a transfer to freedom rights

Considerable doubts are however justified vis-à-vis the almost joyful consent to rulings of the Federal Constitutional Court, as they ignore the political aspect of democratic legislation. The transfer of the principle of consistency from equality rights to freedom rights, the consideration of this principle when weighing up individual interests protected by fundamental rights, and the politically-defined interest of the public good carried out within the review of proportionality, are to be vigorously rejected. Six reservations, in particular, may be put forward and which can be seen to some degree in the dissenting opinions of judges *Bryde* and *Masing* (below).

4.1 Confusion of equality and freedom rights

Firstly, the inclusion of the principle of consistency in freedom rights blurs the distinction between equality and freedom rights. It hence fails to do justice to the different levels of protection granted by the different types of fundamental right. Whilst equality rights in fact only offer relative protection, freedom rights offer absolute protection.

Whilst such dogmatic reservations alone should normally not be decisive, the distinction between equality and freedom rights nonetheless also, and in fact especially, manifests itself in the consequences of the finding of unconstitutionality. Whilst, as a rule, violations of freedom rights lead to the nullification of statutes, the Federal Constitutional Court is cautious when it comes to the finding of nullity because of the violation of equality rights in consideration of the scope of the legislature to shape legislation. As is known, the latter the legislature can solve a breach of equality in three different ways, i.e. by treating the previously badly-treated group in the same way as the better-treated one in future; by treating the previously better-treated group worse in future; or by treating both groups in a new

[22] *Schulze-Fielitz* (footnote 21), p. 515.
[23] Federal Ministry of the Interior (publisher), 2002; *Schuppert*, ZG Sonderheft 2003.
[24] *Burghart*, 1996, passim.

manner. This is also shown in the non-smoker ruling, in which the Federal Constitutional Court unambiguously communicated to the *Land* legislatures that they could also resolve the violation of equality by imposing an absolute smoking ban.

Secondly, there is no need at all to tighten up the standard of the review of proportionality for freedom rights. The significance of the principle of consistency for the application of equality rights to fiscal laws is not to questioned, but at the same time there should be an awareness of *why* this significance exists: Since the Federal Constitutional Court operated for many years using the presumption and in some aspects still presumes, that the collection of taxes does not constitute an encroachment on the freedom of ownership, there simply is no adequately-determined constitutional standard by which to evaluate the constitutionality of taxes. The general principle of equality can be considered as a standard, but with its arbitrariness formula it provides little protection against the parliament enacting the fiscal legislation. There was, hence, a need with the principle of consistency in fiscal law to find a more precise constitutional standard. But there is no need to find a more precise constitutional standard to other laws, to pertinent laws, considering that there is a very precise constitutional standard available here, namely the standard of freedom rights.

4.3 From the object to the standard of constitutional review

A second objection turns against the interests that are to be equalized: If the Federal Constitutional Court leaves it up to the legislature to determine the value and weight of the public interest in cases in which this interest is protected by the Constitution itself, as for instance with regard to the protection of life and limb of the population, the Federal Constitutional Court surrenders to the legislature.[25] The legislature would then not only be able to place into perspective the objective being pursued by the provision by means of a large number of exceptions, thus weakening it, but conversely it could also increase its status by selecting a protection concept that was as stringent and uncompromising as possible, which would then be self-supporting.

It is then only a short step from the constitutionality of statutes to the lawfulness of the Constitution. In this regard Masing, who considered in a dissenting opinion that the constitutional weight of health protection is not a consequence of statutory values, but in fact

[25] Related to the determination of the starting point of consistency in fiscal law cf. *Tipke* (footnote 12), p. 9 (10).

creates their standard, may be concurred with.[26] Otherwise, the principle of consistency would have considerable potential to place freedom at risk.

If, for instance in the sports betting judgment, the review of proportionality in the strict sense failed because the law lacked the consistency needed to achieve its objective, this can, conversely, also be read such that a provision is always (and already) proportionate in the strict sense only if the purpose is pursued consistently. The Federal Constitutional Court does not carry out any weighing up at all in the ruling between the interest that is placed at a disadvantage by the objective-achieving measure – in this case the interests of a private sports betting provider – and the objective to be achieved – the fight against betting addiction. Rather, it replaces the principle of proportionality in the stricter sense with the figure which is indifferent in terms of weighing up, i.e. the consistent pursuance of the objective.[27]

This consideration is admittedly only theoretical, and – probably incorrectly – draws conclusions as well as reverse conclusions from an individual ruling to possible future rulings. However, the risk of too strongly emphasising the objective in the framework of reasonableness cannot be dismissed. If the principle of consistency were to be included in the review of proportionality at all, it makes more sense to, for instance, locate it at the first level, for example at the level of the suitability of resources. Firstly, it is the encroachments on fundamental rights, that is the means, which are reviewed for their consistency, and secondly the possibility remains within the framework of necessity and suitability for correcting the outcomes of the weighing up process.

4.3 The radicalisation of the legal system

Probably the strongest objection to the transfer of the principle of consistency to freedom rights lies in their potentially radicalising effect. This idea was in the *obiter dictum* of the ruling, according to which an absolute smoking ban is said to be constitutional but not the graduated concept.

It can however also be expressed, somewhat exaggeratedly, in the hypothesis that the inclusion of the principle of consistency in the review of proportionality calls for political consistency where practical concordance was previously called for. If proportionate

[26] *Masing*, BVerfG NJW 2008, 2409 (2421).
[27] *Lindner*, (footnote 20), p. 188 (194).

legislation is inconsistent, as in the case of the non-smoking laws, then consistent legislation tends to be disproportionate.

Also put somewhat exaggeratedly, the consistency principle focuses too much on the consequences, that is on the second step. What is the point of being consistent or, in other words, what is the point of being correct in terms of the logical conclusion, if the premise is wrong? "Wrong but consistent" in this regard seems to come closer to the principle of consistency than "correct but inconsistent".[28]

4.4 The concrete purpose

To address a fourth objection, which is not quite so serious, it is therefore decisive) that the first step be precisely examined, given that, according to the principle of consistency, it operates as a standard for the second step. Adjudging the protective concept of a statute however causes considerabe problems. With all due respect for majority voting in a collegial panel of judges, the two dissenting opinions of judges *Bryde* and *Masing* show how difficult reaching a consensus decision can be. The Federal Constitutional Court was furthermore also not able to do so, as will be shown below.

The literature considers tightening up the burden of proof and the obligations incumbent on the legislature to provide grounds in order to make the system and the first step easier to understand, which then serves as a standard of consistency.

There is however room for doubt here. Firstly, the legislature is tempted, and would also be well advised, to secure its rulings via several grounds, that is in a multi-final way. It must do so because, unlike the administration in some cases – it cannot subsequently provide reasoning for its rulings. This is already frequently the rule, given that it is not always simple to crystallise the actual motives for a statutory provision.

Such obligations to provide grounds however do not hold up. There has also been disagreement in this regard for quite some time as to whether, to what degree and with what

[28] The precise opposite, however, *Bulla*, 2009, pp. 321:, *same author*, ZJS 2009, 585 (590): As the principle of proportionality in the shape of the new formula is said to impact the dogma of equality rights, conversely, the principle of consistency is said to impact the dogma of the principle of proportionality, and hence the freedom rights. To put it another way, as disproportionate unequal treatment triggers a violation of equality rights, a violation of the principle of consistency is said to lead to a disproportionate encroachment and hence to a violation of freedom rights based on fundamental rights.

consequences a statute must be reasoned. That the legislature owes nothing but the law, and thus in particular that it does not have to provide grounds, is one of the extreme positions put forward in this regard. On the other hand, there are legal policy demands for obligatory reasoning that would be far-reaching, in some cases constituting criminal offences. There is no contesting the fact that such grounds are expedient and may also take on constitutional significance in particular to determine legislative competence and to adjudge proportionality. The problem, however, starts with the question of who actually is the legislature and who is it that must therefore provide grounds for the law, and continues with the question of what is the standard of consistency – the wording of the law or the grounds of the law In any case, the grounds may not advance so far as to set the standard for the wording of the law.

Even though grounds may be welcome for this reason, they will contribute little towards the desired clarity for statutory purposes. In a possible examination by the Federal Constitutional Court, the singular purpose or the plural objectives of a statute are left to interpretation by the Court. It is then the wording of the law that remains decisive, as is also proven by the judgment on the non-smoker protection laws. The two *Land* statutes which have so far been reviewed state in their grounds the effective protection of the life and limb of non-smokers, but nevertheless, the Federal Constitutional Court reads from the individual statutory provisions a relativized protection concept.

4.5 The separation of powers

A fifth argument may be otlined at this juncture[29] – it relates to the separation of powers between the legislation and the Federal Constitutional Court. The principle of consistency tends to amplify the density of review of the Federal Constitutional Court, and increases the danger of the Federal Constitutional Court promoting itself to become an *ersatz* legislature. This danger is all the greater given that it will be much simpler for a panel made up of eight judges to design a cohesive overall concept for a statute, or at least to advertise it as such, than is the case in democratic decision-making in legislative bodies. Since, furthermore, all its

[29] By the time of going to press a large numbers of articles have been published which take a closer look at this aspect, cf. *Bumke*, Der Staat 49 (2010), pp. 77, *Dann,* Der Staat 49 (2010), pp. 631; *Payandeh,* AöR 136 (2011), pp. 578, as well as the reports by *Lienbacher* and *Grzeszick* at the 71st Annual Conference of the Association of German Constitutional Law Teachers 2011 in Münster.

members are lawyers, rule-of-law rationality aspects will certainly be more likely to play a role here than democratic determinations of priority.

4.6 The principle of democracy

The democracy principle is the final argument put forward in the shape of the hypothesis that democratic legislation is inconsistent legislation.

This result does not yet emerge from the principle of a limited period of governance since the principle of consistency has (so far) been applied within statutes and, as a rule, does not cover any legislation lasting more than one parliament.[30] It also does not emerge *per se* from the fundamental concept of democratic legislation given that democratic primacy, too, is governance that is tied into the constitutional state. Democratic legislation is not free, it is bound by the Constitution and it is above all subject to fundamental rights.

In reality, the result that democratic legislation is inconsistent legislation emerges from the essence of democratic legislation and from its concrete development. Contradictions in statutes are in fact frequently the outcome of compromises, and compromises are a sign of democratic legislation.[31] Any assertion, in contrast, that democratic legitimisation does not constitute an empowerment to hand down irrational rulings[32], does not hold up. Rationality is not a standard for evaluating democratically-legitimated rulings, or at least not a legal one. If the legislature's political latitude for action is not to be restricted even further, rationality requirements over and above constitutional ties should only be attached to legislative activity extremely cautiously. The scope for political design is in any case already restricted by a European and a global flow of regulation. If in this interdependent relationship between the various regulatory levels additional rationality wishes are enriched with legal obligations, not only the democratic design process is paralysed, but the law conversely also runs the risk of losing its binding effect for a lack of practical enforceability. In this regard, the principle of consistency can and should be understood as politically and logistically desirable in terms of policy and legislation, but not as a rule-of-law principle. The ambition of the inventive spirit

[30] In this regard, the application of the principle of consistency to amending statutes is said to contrast with further problems which once more, however, have resulted in the question of who determines the purpose of the statute which is to become a standard of itself, and when this takes place.

[31] Equally *Bryde*, BVerfG NJW 2008, 2409 (2420).

[32] cf. *Frenzel*, 2004, p. 107; referring to *Öhlinger*, in: same author (ed.), Methodik the legislation, 1982, p. 1.

of jurisprudence and constitutional case-law should be reigned in, and should focus more closely on recognising the political dimension of democratic legislation.

Klaus Meßerschmidt observes on this that "scholarly creativity [...] is frequently proven by the refinement of constitutional law, frequently also via theories which culminate in an intensification of the constitutional commitment of the legislature to the Constitution".[33] A constitutional principle of consistency would hence be a further example of a theory, a doctrine which "tends more to prevent than to open up the scope for political action".[34] This is all the more serious given that a consistent principle of consistency would have a highly-preservative effect not only for a new statute, but in particular also for any legal amendments. This is because the principle of consistency makes it more difficult for the legislature to leave a course once it has been set and to change direction. In the concrete case of the Non-Smokers Act, *Masing* also points beyond legal considerations to the fact that stipulations of consistency in fact stipulate market forces.[35]

5 The significance of the premises for consistency

Anyone who is bound by the second step should consider the first. This is the structure of the principle of consistency. It however also applies to the Federal Constitutional Court. Unlike the ruling quoted from the first volume, the Federal Constitutional Court was not clever enough to recognise that the issue of consistency is first and foremost also a matter of the premise.[36] It thus based its ruling on an incorrect assessment of the Non-Smokers Act.

In order to explain this it is necessary to refer once more to the image of weighted interests since this can help to illustrate where the error of the ruling of the Federal Constitutional Court lies. The Court accuses the legislature of allotting different evaluations to the protection of life and limb within the same statute; it was said not to throw the full weight onto the scales for this extremely important community asset, but used only a very limited version of the notion.

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[33] *Messerschmidt* (footnote 8), p. 424.

[34] For instance *Bryde*, 1982, p. 215; cf. also *Messerschmidt* (footnote 8), p. 24.

[35] *Masing* (footnote 26), p. 2422.

[36] BVerfGE 1, 15 (46).

This presumption is however not correct. The legislature particularly did not? (does not) presume a reduced weight of health protection, but assigned to it the full weight allotted by the Constitution. The reduced weight is a result only of the weighing up with contrasting interests; it is an outcome of the weighing up.[37] In this sense, it is particularly not consistent to now place on the scales this attenuated weighting of the protection of life and limb against commercial interests, such as those of the landlords of one-room pubs or of discotheques. Rather, this new weighing up makes it necessary once more to attach the full weight to the protection of life and limb – and such protection would probably have very clearly asserted itself vis-à-vis other interests, as the Federal Constitutional Court made recognisable in an *obiter dictum*.

What is paradoxical about the ruling is, therefore, that in order to guarantee alleged equal treatment regarding exceptions from the fundamental smoking ban, the Federal Constitutional Court itself became guilty of unequal treatment. When it comes to one-room pubs, the Federal Constitutinal Court attached less importance to the protection of life and limb than it did when considering other kinds of pubs and restaurants. It is not the legislature that attaches differing degrees of importance to an identical hazard, but the Federal Constitutional Court; it is not the legislature's allegedly inconsistent concept of protection which leads to the unconstitutionality of the law, but its incorrect evaluation by the Federal Constitutional Court.

If the ruling is therefore an incorrect ruling, a mistaken ruling, it can be hoped that the Federal Constitutional Court will apply the principle of consistency without being consistent[38] In these terms, this article should be regarded not only as a plea for inconsistent legislation, but in particular also for inconsistent constitutional case-law. This does not question the fact that the consistency of statutes can and should be something that is desirable in political and legislative terms[39]. However, inconsistent law can and should only be corrected by political means on this side of a contravention of the general principle of equality.

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[37] Judge *Bryde* recognised this and indeed expressed it in his dissenting opinion: "I am unable to recognise that the *Land* legislatures had placed the goal of non-smoker protection into perspective, so that protection of life and limb could also be placed into perspective as a weighing up position vis-à-vis commercial interests."

[38] For instance the finding on the application of the concept of systematic consistency, cf. *Battis* (footnote 9), p. 11 (14), with further references

[39] For instance in relation to an obligation to enact a good or indeed perfect law *Meßerschmidt* (footnote 8), p. 787.

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