

Comment: The Legalization of Cannabis in Germany

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I. *The current legal position*

1. Criminal liability today

a) The universal problem of criminalizing “soft” drugs

The criminalization of so-called “soft” drugs, like cannabis,¹ which are considered not to be as harmful and addictive as other substances, is a very controversial subject in South Africa. This is also the case in Germany. It was very interesting for me to learn that in South Africa, as in Germany, it was not the legislature, but rather a higher court that laid down (at least certain) limitations on criminal liability.

In 2019, the “Cannabis Decision” of the German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) marked its 25th anniversary. In 1994, the BVerfG determined that the ban on cannabis did not violate the German Constitution (*Grundgesetz* – GG), thereby declaring the German Narcotics Act (*Betäubungsmittelgesetz* – BtMG) constitutional in this regard. However, as I will show, the Court did set restrictions at the procedural level on the basis of constitutional law. This judgment has been in doubt ever since, and discussions regarding the general legalization of cannabis have continued to intensify in recent years. Proponents of legalization argue that the prohibition policy of the German *Bundestag*, the German federal parliament, does not fulfil its purpose.² One of these proponents, Prof. Dr. Lorenz Boellinger, addressed a petition to parliament in 2013.³ In this petition, 122 German criminal-law professors raised their doubts about the prohibition policy and demanded that a commission be established to evaluate the current criminal law on drugs. This petition (which I also signed) emphasized the need for substantial reforms to the BtMG and the prosecution of cannabis offenses. There are also increasing numbers of opposition parties in parliament campaigning for the legalization of cannabis, as I will show towards the end of my contribution.

1 For an instructive historic overview of Cannabis prohibition in Germany see *Böllinger*, NK 2018, 281; see also *Heinrich* and *van Bergen*, JA 2019, 321.

2 *Nestler*, 5 StV 2019, I.

3 *Böllinger*, NK 2014, 115.

b) Introducing the BtMG

The BtMG refers to various drugs. This includes both “hard” drugs, such as heroin, cocaine or amphetamines, as well as “soft” drugs, like cannabis. According to Section 1(1) BtMG, a detailed listing of the relevant narcotics can be found in Annexes I to III BtMG. It sets out several criminal offenses, especially Section 29 BtMG.⁴

Interestingly, and contrary to the legal position in South Africa, the use of drugs is not itself punishable under the BtMG. This indicates that the purpose of the act is not primarily the protection of consumer health by criminalizing the self-destructive behaviour of adults.⁵ Rather, the main purpose is the general protection of public health, especially with regard to children and young people, who should not be tempted to use cannabis in the first place.

For this reason, amongst other things, not only dealing in, but also (and more importantly for present purposes) the mere possession of cannabis are criminal offenses. The relevant penalties apply equally to all narcotic substances mentioned in the three Annexes to the BtMG and do not distinguish between the danger and the addictive potential of the drug in question. There is deliberately no distinction between “hard” and “soft” drugs⁶ with regard to the question of criminalization. However, this distinction becomes relevant to sentencing.

4 Section 29 BtMG [Criminal Offenses]:

“A term of imprisonment of up to five years or a fine shall be imposed on any person who
illicitly cultivates, produces and trades in narcotic drugs or, without engaging in their trade, imports, exports, sells, supplies, otherwise places them on the market or acquires or procures them in any other way,
produces an exempt preparation (Section 2 subsection 1 number 3) without a license pursuant to Section 3 subsection 1 number 2,
possesses narcotic drugs without being in possession of a written license for their acquisition,
[...]

The court may refrain from imposing punishment pursuant to subsections 1, 2 and 4 if the offender cultivates, produces, imports, exports, carries in transit, acquires, otherwise procures or possesses narcotic drugs merely in small quantities for his personal use.”

5 *Kaspar*, Grundrechtsschutz und Verhältnismäßigkeit im Präventionsstrafrecht (2014), 500 et seq.

6 *Patzak*, in: Körner, Patzak and Volkmer (eds.), Kommentar zum Betäubungsmittelgesetz (9th ed. 2019), § 29, para. 5.

Even though the possession of cannabis is generally prohibited, a court can refrain from imposing punishment in minor cases with small quantities for personal use, according to Section 29(5) BtMG.

Section 31a BtMG⁷ constitutes an extension of Section 29(5) BtMG by waiving the court's approval. The provision shifts the decision to the public prosecutor's office as to whether a case is prosecuted or not. However, the requirements in Section 31a BtMG are stricter than those in Section 29(5) BtMG. In addition to the small quantity of cannabis, there must only be a minor degree of guilt involved. Furthermore, there must be no public interest in pursuing the prosecution.⁸

c) The term "small quantities"

In applying BtMG, the term "small quantities" (which appears in both Sections 29(5) and 31a BtMG) has proven problematic. Since the refusal to prosecute or the judicial abolition of punishment depends on this requirement, a lively debate about its interpretation has developed over the years. To date, the legislature has not further detailed the term. This is unfortunate, as there would be more clarity and legal certainty if it did so. In addition, this would eliminate the different standards applied in the federal states.⁹

"Small quantities" is defined as a small amount needed for occasional use and which the user regularly carries in his or her pocket, without having to create a drug supply at home. As already indicated, the various states handle the term quite differently, although the standards have at least converged over time, as the following overview indicates.

7 Section 31a BtMG [Refraining from prosecution]:

"If the subject matter of the proceedings is an offence pursuant to Section 29 subsection 1, 2 or 4, the public prosecutor's office may refrain from prosecution if the offender's guilt could be regarded as minor, if there is no public interest in a criminal prosecution and if the offender cultivates, produces, imports, exports, carries in transit, acquires, otherwise procures or possesses narcotic drugs in small quantities exclusively for his personal use. Prosecution should be refrained from if the offender possesses narcotic drugs in a drug consumption room in small quantities exclusively for his personal use, which may be tolerated pursuant to Section 10a, without being in possession of a written licence for acquisition."

8 Patzak, in: Körner, Patzak and Volkmer (eds.), *Kommentar zum Betäubungsmittelgesetz* (9th ed. 2019), § 31a, para. 5.

9 Patzak, in: Körner, Patzak and Volkmer (eds.), *Kommentar zum Betäubungsmittelgesetz* (9th ed. 2019), § 31a, para. 4.

This is a summary of the procedural closing limits applicable in the different states as of January 2018¹⁰:

| | Procedural closing limits | Regulation changed on | Previous limits |
|-----------------------------------|---------------------------|-----------------------|-----------------|
| <i>Baden-Württemberg</i> | 6g | 31.12.2016 | 6g |
| <i>Bavaria</i> | 6g | | |
| <i>Berlin</i> | 10g/15g | 26.3.2016 | 6g/15g |
| <i>Brandenburg</i> | 6g | | |
| <i>Bremen</i> | 6g | 26.5.2008 | 8g |
| <i>Hamburg</i> | 6g | 28.11.2006 | 10g |
| <i>Hesse</i> | 6g | 6.5.2008 | 6g/15g |
| <i>Mecklenburg-West Pomerania</i> | 6g | | |
| <i>Lower Saxony</i> | 6g | 7.12.2012 | 6g |
| <i>North Rhine-Westphalia</i> | 10g | 18.5.2011 | 6g |
| <i>Rhineland-Palatinate</i> | 10g | 15.2.2012 | 6g |
| <i>Saarland</i> | 6g | 25.9.2007 | 6g/10g |
| <i>Saxony</i> | 6g | 15.8.2011 | 6g |
| <i>Saxony-Anhalt</i> | 6g | | |
| <i>Schleswig-Holstein</i> | 6g | 25.7.2006 | 30g |
| <i>Thuringia</i> | 10g | 20.12.2016 | 6g |

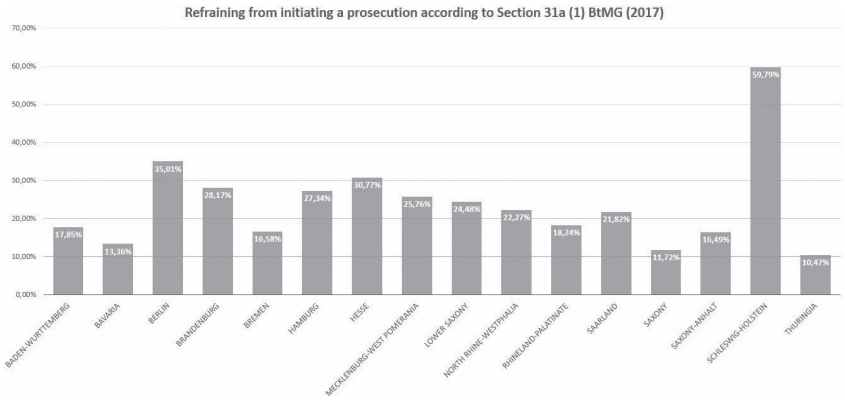
In a study published in 2006 by *Carsten Schäfer* and *Letizia Paoli*, 2011 individual cases against suspects of narcotic drug offenses in six states and a total of 24 district courts were evaluated.¹¹ The study showed particularly significant differences between the states in the closing of proceedings in cases against minors and adolescents. In Bavaria, only 20 percent and, in Berlin and Saxony, less than 40 percent of proceedings were closed

10 *Patzak*, in: Körner, Patzak and Volkmer (eds.), *Kommentar zum Betäubungsmittelgesetz* (9th ed. 2019), § 31a, para. 43.

11 *Schäfer* and *Paoli*, *Drogen und Strafverfolgung* (2006), 37 et seqq.

without conditions, whereas in Schleswig-Holstein and several Hessian judicial districts, more than 80 percent of proceedings were closed without imposing any penalty.¹²

If one compares the closing of proceedings in accordance with Section 31a (1) BtMG to the total number of criminal offenses committed, the following figures result for the different states in 2017 and 2018¹³:



Despite the BVerfG’s “Cannabis Decision” in 1994, these significant differences between the states still exist today. At that time, the BVerfG already put forward a different way of handling the concept of small quantities and therefore appealed to the legislature for a uniform structure to eliminate the differences – this has not happened to date. Below, the BVerfG’s judgment will be dealt with in more detail.

2. The “Cannabis Decision” of the BVerfG

a) Background

In 1994, the BVerfG addressed the question of whether Section 29 BtMG was unconstitutional. The question was originally submitted by the county court of Stuttgart, and the district courts of Lübeck, Hildesheim

12 Schäfer and Paoli, *Drogen und Strafverfolgung* (2006), 384.

13 Own calculation using figures from Statistisches Bundesamt, *Rechtspflege Staatsanwaltschaften 2017* (2018) and Bundeskriminalamt, *Rauschgiftkriminalität – Bundeslagebild 2017* (2018) and *Bundeslagebild 2018* (2019).

and Frankfurt, in connection with a constitutional complaint against a previous judgment of the BVerfG.¹⁴ The BVerfG was confronted with the question of whether the BtMG was constitutional and whether punishing minor offenses was proportionate, specifically with reference to the basic rights, namely human dignity (Article 1(I) GG), personal freedom (Article 2(I),(II) GG), equality (Article 3 GG), and due process (Article 20 GG). The BVerfG also considered whether German citizens had a constitutional “right to be intoxicated” that had to be respected by the courts.

b) The judgment of the BVerfG

In its judgment, the BVerfG stated that the purposes of Section 29 BtMG, such as the protection of the population (especially minors) against health hazards arising from drug use, including the risk of addiction, could justify punishment. In addition, it found that punishment should primarily affect the criminal organizations that dominate the drug market. Furthermore, the BVerfG clarified that the GG does not guarantee the “right to be intoxicated”.¹⁵ The aspect of human dignity or privacy rights was not considered to be relevant in this regard so, again, there is an important difference in relation to the South African position.

However, the BVerfG also explicitly commented on the term “small quantities”: the risk posed by cannabis was not significant if the purchase or possession was limited to small amounts for one’s own occasional use only. The public interest in punishment was correspondingly low in such cases. The punishment of these perpetrators could lead to inappropriate and (from the perspective of rehabilitation) rather disadvantageous results, such as an undesirable drift into the drug scene. With regard to Section 29(5) BtMG, the BVerfG held that its application would be strongly advised (if not mandatory) where a casual user procured or owned a small amount of cannabis exclusively for his own use and therefore did not constitute an external danger.¹⁶

In particular, the BVerfG Senate criticized the differences in the practical application of the term “small quantities” across different states. Different approaches to closing proceedings against perpetrators had already been recognized in the late 1980s. The BVerfG held that the states inter-

14 *Ambos*, 78 *MschKrim* 1995, 47.

15 BVerfG, Judgment of 9 Mar 1994, BVerfGE 90, 145, para. 184.

16 *Ibid.*, para. 189.

preted the term differently in relation to the quantity of the substance, which in turn led to significant differences in applying the provision. Therefore, the Senate appealed to the legislature and the states to ensure a substantially uniform procedure for prosecuting offenders under the BtMG.¹⁷

c) Criticism

The BVerfG's mere appeal to establish a uniform practice regarding the term "small quantities" can be criticized above all. The Senate did not order the legislature, as many had demanded, to correct or amend the existing provisions of substantive criminal law to counteract the violation of the right to liberty and the principle of proportionality which it had found.¹⁸ In the Senate's opinion, the legislature complied with its duty simply by restricting the obligation to prosecute, while upholding criminalization as such. This so-called "procedural solution", which the BVerfG approved, was described in 1995 as having little effect¹⁹ and is still criticized today. As indicated above, the procedure for the prosecution to drop charges varies significantly from one state to another, especially as regards assessing what constitutes a "small quantity". This has led to the divergent treatment of occasional users depending on whether the offender lives in a rather conservatively-governed, or less-conservatively-governed, state. As a result, the Senate's finding does not meet the requirements of Article 103 GG, which are legal certainty and legality. Given the circumstances, an individual cannot be expected to understand the law sufficiently clearly, so that he or she knows on which conditions he or she will be criminally liable.²⁰ Prosecution largely depends on law-enforcement authorities – prosecutors and judges. However, the principles of Article 103 GG explicitly require that the legislature decide on the prosecution and punishment of certain conduct. In addition, the BVerfG neglects the relevance of an ongoing threat of punishment to a suspect.²¹

Critics also expected further disputes to come before German courts, as the BVerfG's decision did not provide sufficient clarity regarding the

17 *Ibid.*, para. 190.

18 *Ambos*, 78 *MschKrim* 1995, 47, 48.

19 *Ambos*, 78 *MschKrim* 1995, 47, 48.

20 *Ibid.*, 48.

21 *Ibid.*, 49.

application of the BtMG.²² Furthermore, its judgment seems quite contradictory. On the one hand, the BVerfG considered criminal punishment for possessing cannabis appropriate, since this was (in its view) blameworthy and punishable behaviour. On the other hand, it later held that, in certain individual cases, it was not.²³ This contradiction is based on the questionable assumption that punishment can generally be threatened even if its imposition is, in many cases, ultimately impermissible.²⁴

Boellinger's criticism is that the Senate's judgment dissolves the *ultima ratio* principle (punishment as a last resort to enforce legal peace)²⁵ with the result that nothing stands in the way of the unrestrained use of criminal law.²⁶ Also, in my opinion, the principle of proportionality is violated if minor cases are criminalized. A mere (and relatively vague) procedural solution is not an adequate remedy in this regard.²⁷

3. Drug offenses under Section 29 BtMG between 2007 and 2018

In Germany, there has been a steady increase in the number of drug offenses under the BtMG in recent years, as the following overview illustrates²⁸:

22 *Kreuzer*, NJW 1994, 2400.

23 *Nelles*, NStZ 1994, 366, 367.

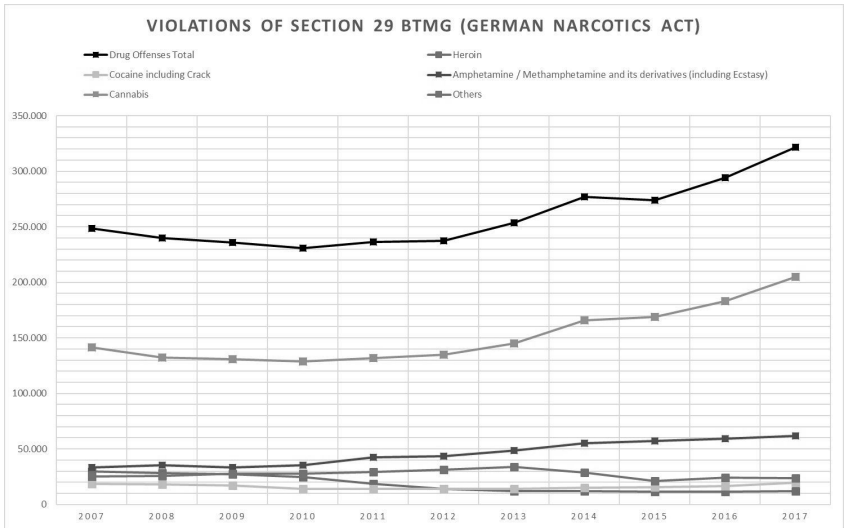
24 *Ibid.*, 367.

25 *Böllinger*, KJ 1994, 405.

26 *Ibid.*, 419.

27 *Kaspar*, Grundrechtsschutz und Verhältnismäßigkeit im Präventionsstrafrecht (2014), 511 et seqq; Recently, another constitutional complaint has been filed against Section 29 BtMG; so far, the BVerfG has not yet decided upon its admissibility, see <https://www.lto.de/recht/hintergruende/h/cannabis-normenkontrolle-richtervorlage-ag-bernaeu-bverfg-entkriminalisierung-zulaessigkeit-legalisierung/> (last visited 07 Oct 2020).

28 Cf. Bundeskriminalamt, Polizeiliche Kriminalstatistik 2007–2018 (available at www.bka.de).



Cannabis clearly stands out (see the second bar from the top). The percentage of cannabis offenses compared to all drug law offenses has always been above 55 percent since 2007, rising to approximately 64 percent in 2018. Cannabis offenses are by far the most common offenses on the German drug scene. While around 128,000 cannabis-related offenses were detected in 2010, their total number was more than 218,000 in 2018. And these are just the official figures: the majority of offenses are very likely to remain unrecorded and therefore unknown.

II. Approaches to legalization

It is no surprise that, under these circumstances, an entirely different approach to cannabis is called for. In the view of several German opposition parties, the leading parties' prohibition policy has failed. Therefore, various approaches have been discussed, which should lead to a complete or partial legalization of cannabis. In addition to these discussions, the German parliament passed a law in 2017, which allows for the partial legalization of cannabis in the medical field.

1. Criticism

The increase in cannabis offenses has been taken as an indication that prohibiting drugs has no effect on their use. Juveniles and young adults in particular are not protected by the current policy, as there has been a steady increase in cannabis use among these two specific groups.²⁹ Critics observing the current approach to cannabis therefore often raise the following points:

The current approach leads to a stigmatizing and harmful criminalization of occasional users. In addition, the German state incurs costs for prosecutions and criminal proceedings. The amounts spent in the executive and judicial branches are therefore often criticized as a waste of resources, as these are more urgently needed in other areas. Several police entities have shown their support. Quite remarkably, the Confederation of German Criminal Investigators is aiming for a complete decriminalization of cannabis users.³⁰ The German Police Union has considerable concerns about the legalization of the drug, but also points out that a significant amount of police work in this field is considered to be completely in vain.³¹

Finally, the ban on cannabis also creates a black market that cannot be controlled (for example, in terms of the quality of the drugs), which in turn has an impact on users and also leads to large amounts of illegal proceeds.

2. Cannabis allowed as medicine

In 2017, the German Bundestag adopted an amendment which led to a partial legalization of cannabis in the field of (palliative) medicine. Prior to this decision, exemptions had been granted in a few cases by the Federal Institute for Pharmaceuticals and Medical Products, which permitted the legal cultivation of cannabis at home. However, costs incurred by the

29 See Bundesministerium für Gesundheit, *Drogen- und Suchtbericht* (2018), 86.

30 See *Keilani*, “Berliner Kripo-Beamte fordern Cannabis-Legalisierung” (6 Feb 2018), <https://www.tagesspiegel.de/berlin/drogenpolitik-berliner-kripo-beamte-fordern-cannabis-legalisierung/20929716.html> (last visited 7 Oct 2020).

31 See Deutsche Polizeigewerkschaft, “Drogenpolitik/Legalisierung von Drogen”, <https://www.dpolg.de/ueber-uns/positionen/drogenpolitik/> (last visited 7 Oct 2020).

patient were not reimbursed. In addition, patients were obligated to document strictly their illness and prior therapy.³²

Since March 2017, patients with severe illnesses may receive drugs at pharmacies with the active ingredient, THC, in standardized quality. This is however subject to strict prerequisites. First, the cannabis treatment must be diagnosed and prescribed by a doctor. Secondly, it must be determined that there are no alternative therapies available. The purpose of the amendment is to enable patients to access medicines to alleviate their suffering if other methods of medical treatment provided, or any other available medicinal products, do not succeed. The amendment also led to civil-law changes: in narrowly-limited cases, patients with statutory health insurance are entitled to be reimbursed their costs (vgl. BT-Drs. 18/8965). To be reimbursed, patients must meet the following conditions (Section 31(6), Book V of the Social Code (*Sozialgesetzbuch V – SGB V*):

- They have a serious illness.
- There are no other treatments apart from cannabis.
- There is a prospect of a noticeably positive influence on the course of the disease or on serious symptoms.
- The patient participates in anonymized accompanying research.

According to the Federal Ministry of Health, cannabis should be used as an alternative treatment for patients in individual cases of serious disease if it is expected that there will be a noticeably positive effect on the course of the disease or on serious symptoms. This may be the case, for example, in pain therapy, certain chronic diseases, or severe loss of appetite and nausea.³³

3. Further approaches to legalization

a) The “Cannabis Control Act” – Green Party

In 2017, the Green party in the German Bundestag introduced a bill according to which the cultivation and use of cannabis would be allowed,

32 See Die Bundesregierung, “Cannabis für Schwerkranke auf Rezept” (10 Mar 2017), <https://www.bundesregierung.de/breg-de/aktuelles/cannabis-fuer-schwererkrankte-auf-rezept-485740> (last visited 7 Oct 2020).

33 Bundesministerium für Gesundheit, “Cannabis als Medizin” (19 Jan 2017), <https://www.bundesgesundheitsministerium.de/ministerium/meldungen/2017/januar/cannabis-als-medizin.html> (last visited 7 Oct 2020).

leading to a decriminalization of the drug. This so-called “Cannabis Control Act” was also supported by the Left Party in parliament. On June 2, 2017, the bill was rejected by the majority in parliament. The bill had already been submitted in the previous legislative period, where it was rejected as well.³⁴

The main contents of the bill were as follows:

- The term “small quantities” would be set at 30g. Possession of more than 30g would be punishable. The term allowed the limited stockpiling of acquired cannabis and prevented the unnecessary criminalization of private users.
- The sale of cannabis by specialized shops would be allowed.
- Further points regarding:
 - implementing legalization;
 - provisions on dealing in, cultivating and possessing cannabis; and
 - youth protection.
- A new excise tax would be introduced (the “Cannabis Tax Law”).

To justify their bill, the Green Party highlighted the following:

- Cannabis is by far the most used illegal drug despite the ban by the BtMG in Germany.
- There are fewer health risks for adults than for adolescents.
- The ban on cannabis does not prevent adolescents from using cannabis, as several studies show – the policy of deterrence is not effective and the prohibition simultaneously undermines any other protection for minors.
- The threat of punishment constitutes serious interference, without any justification, with the general freedom to act.
- In its decision in 1994, the BVerfG requested the states to ensure a substantially uniform procedure for prosecuting offenders under the BtMG. The states did not comply with this request. The states have indeed issued guidelines. However, these vary from state to state, which ultimately leads to a wide discretionary scope for prosecutors.
- The cannabis market is expanding instead of being curtailed by the current policy.
- Legalization does not automatically lead to an increase in use, according to studies in other countries. In countries where cannabis possession and dealing are legal, use is about the same.

34 BT-Drs. 18/4204 and BT-Drs. 19/819.

b) Motions by the Free Democratic Party and the Left Party

The Free Democratic Party (FDP), also known as the liberals, made a motion in 2017 dealing with the legalization of cannabis products. The FDP requested that the government set up and support model projects to investigate the controlled provision of cannabis as a consumable.³⁵

The FDP cited the following reasons for this demand:

- The controlled provision of cannabis could contribute to protecting the population's health:
 - By doing this, the quality of cannabis products could be officially adjusted and controlled. Users would not be exposed to the risk of contamination or defective products.
 - Furthermore, by taxing cannabis products, substantial revenues could be generated, which could then be used for addiction prevention and education programs.
- Legalization would relieve the police, prosecutors and the judiciary. This would lead to significant cost savings.

The Left Party also made a formal request to the German Federal Government in this matter.³⁶ They requested that the government draft a bill to concretize the term “small quantities” in Section 31a BtMG. In addition, there should be no criminal prosecution where the perpetrator carries up to 15g for his or her own use. In general, the Left Party is calling for a review of the possibilities for legal access to cannabis to counteract the black market.

c) The Federal Government's view

In the previous legislative period, the ruling parties had already commented in detail on the Green Party's draft bill and on the use of cannabis in general.³⁷ The union parties (CDU/CSU) argued that the debate on the legalization of cannabis among the general public, and especially among adolescents, gives the impression that cannabis is harmless, which it is not. Legalization will not ensure the protection of the youth. Also, legalization will not lead to a decline in black-market operations. However, the

35 BT-Drs. 19/515.

36 BT-Drs. 19/832.

37 BT-Drs. 18/12476.

CDU/CSU does acknowledge the growing number of drug-related deaths and drug offenses in the past few years. Therefore, they do intend to refine drugs policy. A specified amount of cannabis for personal use at a low level should be introduced. The German Chancellor, Angela Merkel, does not think much of a general legalization of cannabis. She has said that there is a limited scope of legal application in healthcare, beyond which she does not favour any changes.³⁸

The Federal Ministry of Health points out that international studies over the past 10 years have shown that the use and abuse of cannabis could be associated with a number of serious short- and long-term risks, especially among young people. Psychological disorders (for example, schizophrenia), organ-related medical effects (such as cardiovascular complications), and neurocognitive impairments (such as impairments in learning, attention and memory) have been mentioned. Child psychiatrists in Germany and in the Anglo-American area have concluded that cannabis use in childhood should be avoided. Therefore, according to the Ministry, the protection of minors must be given primacy.³⁹

The Social Democratic Party of Germany (SPD) has expressed itself to be more open regarding the legalization of cannabis. From its point of view, an explicit orientation towards decriminalization and model projects must be undertaken. First of all, experiences must be derived through the regulated and state-controlled provision of cannabis to defined groups of people. Overall, much more international experience (such as from Uruguay or Switzerland) must be taken into account.⁴⁰

III. Discussion and conclusion

As this short overview has shown, the problem of at least partially decriminalizing “minor cases” of cannabis offenses is a universal one that must

38 See *Ewert and Geisenhanslüke*, “Frau Merkel, sehen wir nach der Wahl die Freigabe von Cannabis?” (26 Aug 2017), <https://www.noz.de/deutschland-welt/politik/artikel/942392/frau-merkel-sehen-wir-nach-der-wahl-die-freigabe-von-cannabis> (last visited 7 Oct 2020).

39 See Bundesministerium für Gesundheit, “Fragen und Antworten zum Gesetz ‘Cannabis als Medizin’” (9 Mar 2017), <https://www.bundesgesundheitsministerium.de/service/begriffe-von-a-z/c/cannabis/faq-cannabis-als-medizin.html> (last visited 7 Oct 2020).

40 See BT-Drs. 18/12476. A lack of empirical knowledge in the ongoing debate is stated by *Duttge* and *Steuer*, *MedR* 2015, 799. The authors are opposed to a general decriminalization of Cannabis, see *Duttge* and *Steuer* *ZRP* 2014, 181.

be tackled in several countries,⁴¹ with Germany and South Africa among them. Whereas a complete legalization is not on the political agenda at the moment, Germany has seen partial decriminalization in the past. As in South Africa, a higher-court decision on the basis of constitutional law was influential in this regard. The BVerfG saw the difficulty arising from interfering with citizens' basic rights through the overall criminalization of cannabis, at least in "minor cases", specifically cases of possessing small quantities for personal use. Unlike in South Africa, the BVerfG did not refer to personality rights or the right of privacy, but to general liberty rights. Taken together with the fact that German criminal law prohibits dealing in and possessing, but not consuming cannabis (again unlike the position in South Africa), this is probably why, in the German discussion, the question of location ("private" versus "public" character of the offense) does not play a role. The same is true for the question of work-related use – "minor" cases of possessing small quantities of cannabis for personal use can possibly also arise in a work-related setting. The exemption from criminal liability at the procedural level (Section 29(5) or 31a BtMG) also applies in this case – the worker might breach his duties and face consequences under labour law, but the criminal law would probably react just the same. As has been illustrated, the "solution" to the problem on the procedural level is problematic in several ways.⁴² The decisive concept of a "small quantity" is not defined by law, so it is no surprise that we should see remarkable differences in how these provisions are applied from state to state, which is an obvious problem with regard to equality (Article 3 GG) and legal certainty (Article 103(II) GG). Furthermore, the question of avoiding a disproportionate intrusion on the right to liberty should be answered by a provision of substantive criminal law. If particular conduct is not dangerous and blameworthy enough to be punished by criminal law, then the state should decriminalize it and not let the offender rely merely on the (relatively uncertain) possibility that the public prosecutor will close the proceedings. In my eyes, this aspect of the basic right to liberty is the decisive argument here, not saving state resources, which should just be a welcome side-effect. Further steps towards decriminalization should be considered. We must learn from the experience of other countries in this regard – South Africa being one of them.

41 For a Swiss approach making use of administrative sanctions („Ordnungsbussen“) see *Albrecht*, NK 2016, 48.

42 See also *Harrendorf*, in: Drenkhahn et al. (eds.), *Festschrift für Dünkel* (2020), 351, 377.

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