The FRAPORT Case of the First Senate of the German Federal Constitutional Court and its Public Forum Doctrine: Case Note

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A. Introduction and Facts of the Case

The application of constitutionally granted communication-related rights assumes the existence of public space as a basic requirement for human encounters. Mass media, such as television, internet, radio, or journals, does not completely satisfy people's general communicative needs. Instead, people need actual places where they have the opportunity to confront other individuals face to face with their opinion. Indeed, some forms of communication require a more spacious area than is owned by individuals, or can only fulfill their purpose at specific locations. Protest marches or rallies, for example, are important in raising public awareness and encouraging a broader exchange of opinions with a wider circle of recipients. Public space is the site to exchange ideas and opinions and thus the location for individuals to confront the public with political disputes, societal conflicts, and other matters. Traditionally, market places, pedestrian areas, public streets, and squares offered such sites. They are not only seen as places for consumption and means of transportation, but also as places of communication and human encounters. Hence, in this capacity, public space is the prerequisite for the actualization of the freedom of assembly and general communication-related rights, which on their part—and thereby also the existence of public forums—are the foundations of democratic decision-making and can be seen as a constituting element of a free democratic basic order.[1]

Due to the objectively legal dimension of fundamental rights, the State is obliged—within a wide margin of appreciation—to ensure the continued existence of the prerequisites to exercise fundamental rights. The question is, however, what happens if the State privatizes the places where an exchange of opinions is traditionally carried out. Increasingly, pedestrian areas in the inner city are replaced or supplemented on a large scale by roofed, privately-held shopping arcades or shopping malls on the outskirts of the city. Further,

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[1] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 233/81, 1 BvR 341/81, BVerfGE 69, 315, 344 *et seq.* (May 14, 1985).

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train stations, airports, and other places[2] are no longer operated by the State but by private companies.

New urban centers arise, such as the envisioned district "Gateway Gardens" in Frankfurt am Main: The so called "prototypical city of tomorrow"[3] whose management consists of three privately-financed partners in cooperation with the city of Frankfurt am Main.[4] The phenomenon of privately held districts and even cities is also not foreign to other legal systems. In particular the United States has a long tradition of privatizing public spaces as demonstrated in the concept of the company town.[5] Company towns initially seem like ordinary cities because of their infrastructural and architectural commonalities; they both have, for example, streets, sidewalks, post offices, libraries, housing, schools, churches, and shops. Regardless of these commonalities, a company town is entirely held by an individual, normally a private company. Thus, even the Sheriff is paid by the owning company.[6]

Through privatization the whole legal regime changes. Instead of public law, private law is applicable. Specifically, the Assemblies Act (*Versammlungsgesetz*), the Public Road Law (*Straßen- und Wegerecht*), and the Police Law (*Polizei- und Ordnungsrecht*) are replaced by proprietary rights and house rules as well as general civil law rules. These let the owners generally rule freely about their property. Instead of police officers, who are only allowed to act within their legal competence and against whom specific legal remedies are available, private security firms govern the safety and order. Private law also includes the right to refuse entry to disagreeable "users" who do not fit into the owners marketing concept of traffic and consumption.[7] But is it indeed possible that through privatization of public places the constitutionally granted communication-related rights are no longer applicable?

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[2] For example, the Sony Center at Potsdamer Platz, Berlin.

[3] *See* FRANKFURTRHEINMAIN, http://www.frankfurt-rhein-main.net/en/node/465 (last visited Aug. 28, 2014).

[4] *See* GATEWAY GARDENS, http://www.gateway-gardens.de/?p=projektpartner (last visited Aug. 28, 2014).

[5] In 1645, the company Braintree Iron Works established the first company town in the United States. *See* MARGARET CRAWFORD, BUILDING THE WORKINGMAN'S PARADISE: THE DESIGN OF AMERICAN COMPANY TOWNS 2 (1995). At the height of company towns, 2,500 were owned privately and inhabited by approximately 3% of the population in the United States. HARDY GREEN, THE COMPANY TOWN: THE INDUSTRIAL EDENS AND SATANIC MILLS THAT SHAPED THE AMERICAN ECONOMY 3, 6 (2010); *Marsh v. Alabama*, 326 U.S. 501, 508 (1946) [hereinafter *Marsh*].

[6] *Marsh*, 326 U.S. 501, set a precedent for the right to exercise communication rights on the sidewalk of privately owned company. The Supreme Court ruled that a privately owned company town is a functional equivalent to a public town and thus this distribution of leaflets cannot be prohibited.

[7] *See* Carsten Gericke, *"Territorien des Wohlfühlens" durch sozialen Ausschluss*, FORUM RECHT (2002), *available at* http://www.forum-recht-online.de/2002/302/302gericke.htm.

The First Senate of the Federal Constitutional Court (FCC) (*Bundesverfassungsgericht – BVerfG*) examined this question in the Fraport case. The complainant, an activist of the "Initiative against Deportations," intended to protest in front of the check-in counter of Deutsche Lufthansa in the departure hall of the Frankfurt am Main Airport. The protest was aimed against concrete imminent deportations and the German practice of deportation in general.

The operating company of Frankfurt am Main Airport, Fraport AG, is an incorporated company and is also the owner of the airport premises. At the time of the protest, the State Hesse, the City of Frankfurt am Main, and the Federal Republic of Germany together owned approximately 70% of the shares, while the rest were privately held.[8] The operating company regulates the use of the airport premises by air passengers and other customers through its regulations for the use of the airport. The regulations contained, among other provisions, the following provision: "Collections, advertisements and the distribution of leaflets and other printed matter require the consent of the airport operator."[9] Later regulations also expressly prohibited assemblies in the airport buildings.[10]

The complainant, together with five other activists, entered Terminal One of the airport to speak to some Lufthansa employees and to distribute leaflets regarding a forthcoming deportation. Employees of the defendant and federal border guards terminated the activities. Fraport AG imposed an "airport ban" on the complainant and informed her that it would initiate a criminal complaint against her for unlawful entry in accordance with § 123 of the German Criminal Code (*Strafgesetzbuch – StGB*), should she "again be found to be on the airport premises without justification."[11]

The complainant brought an action before the Civil Court, aiming to remove the ban on expressions of opinions and demonstrations. The Local Court, as a court of competent jurisdiction and first instance, dismissed the action. It reasoned that Fraport AG, as owner of the airport, was entitled to undisturbed possession, which is regulated in §§ 858 *et seq*., 903, and 1004 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*).[12] It did not consider Fraport AG to be directly bound by the fundamental rights, so Fraport AG did not have to tolerate expressions of opinion or demonstrations on its premises.[13]

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[8] At the time of the decision the federal shares of the company had been sold and the State Hesse and the City of Frankfurt am Main together owned 52% of the shares.

[9] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 699/06, BVerfGE 128, 226, para. 6 (Feb. 22, 2011).

[10] *Id*. at para. 7.

[11] *Id*. at para. 10.

[12] BVerfG, Case No. 1 BvR 699/06, at para. 11.

[13] *Id*.

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The appeal was dismissed as unfounded in all instances.[14] In response, the complainant lodged a constitutional complaint before the FCC and alleged a violation of her fundamental rights, namely freedom of assembly[15] and freedom of expression,[16] through the civil courts' appellate judgment.

B. Reasoning of the FCC

The FCC was confronted with fundamental issues which had not been addressed by the constitutional jurisdiction and which had been controversially discussed within constitutional doctrine. Until then, a high court had not made a decision concerning whether or not enterprises owned both by private shareholders and the state (*gemischtwirtschaftliche Unternehmen*) are directly bound by fundamental rights. Furthermore, the scope of the freedom of assembly had to be specified regarding geographical terms.

I. Binding Force of Fundamental Rights

Article 1 Section 3 of the *Grundgesetz* (hereinafter: Basic Law)[17] determines that only the state is directly bound by the fundamental rights. The citizen herself, in contrast, is merely bound by an indirect third-party effect (*mittelbare Drittwirkung der Grundrechte*), which is based on the further development of the law by judges (*richterliche Rechtsfortbildung*).[18] An indirect third-party effect is implied when the scope of application of general civil law leaves room for interpretation in terms of the fundamental rights to assure a balance of the colliding civil liberties. In the case of assemblies on private premises, the proprietor can exercise her right of undisturbed possession in accordance with §§ 858 *et seq*., 903, and 1004 of the German Civil Code. In fact, § 1004 (2) of the German Civil Code offers the

[14] *Id*. at para. 13.

[15] Article 8.1 of the *Grundgesetz* (hereinafter *Basic Law*) reads: "All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission." GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.).

[16] Article 5.1, first clause, of the Basic Law reads: "Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources." *Id.*

[17] Article 1.3 of the Basic Law reads: "The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law." *Id.*

[18] See the seminal decision in the Lüth case, Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 400/51, BVERFGE 7, 198, 205 *et seq.* (Jan. 15, 1958); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 487/80, BVERFGE 73, 261, 269 (Apr. 23, 1986). *See also* Jacco Bomhoff, *Lüth's 50th Anniversary: Some Comparative Observations on the German Foundations on Judicial Balancing*, 9 GERMAN L.J. 121–124 (2008), *available at* http://www.germanlawjournal.com/article.php?id=900.

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opportunity to balance colliding fundamental rights.[19] In contrast to the state, the citizen has the right to claim an infringement on Article 14 of the Basic Law—the fundamental right to property—in order to inhibit the use of her private property by others. Then, through practical concordance, a balance between Article 14 of the Basic Law and Article 8 of the Basic Law has to be established. Thus far, though, the assumed indirect third-party effect between citizens led to the result that Article 14 of the Basic Law prevailed against Article 8 of the Basic Law. Hence, the private owner did not have to tolerate an assembly on her property.

The state, in contrast, cannot invoke fundamental rights such as the right to property, which are first and foremost civil defensive rights against state interference. Therefore, the indirect third-party effect of fundamental rights towards private law subjects is weaker in its result than the direct binding force in relation to the state. In conclusion, in principle, the state has to tolerate assemblies in public places. A private owner is not subject to such an obligation, which in turn means that privatization of a public place inevitably leads to a restriction of the ability to exercise fundamental rights.

Should the court in the Fraport case indeed only apply an indirect third-party effect on private law subjects? Or is it more appropriate to apply a direct binding force? To be able to assess the problem, three different possibilities have to be distinguished.

Initially the state can solely organize public enterprises in the forms of private law, which are completely in public ownership but with the operational responsibilities remaining on the side of the state. This case recognizes that both the state authorities responsible for the respective enterprise and also the enterprise itself are directly bound by the fundamental rights.[20] This recognition ensures an effective binding force of the fundamental rights irrespective of the state's organizational choice. No refuge can be sought in private law by obtaining private entity treatment and an exemption from the application of the fundamental rights.

However, there are also numerous public-private entities, which are organized in the forms of private law and owned both by private shareholders and the state.

The FCC set a precedent with the Fraport case regarding the cases in which the state is the majority shareholder: It ruled that an enterprise which is owned both by private shareholders and the state—as it was the case with Fraport AG—is directly and entirely

[19] Philipp-L. Krüger, *Versammlungsfreiheit in privatisierten öffentlichen Räumen*, *in* DÖV 837, 842 (2012).

[20] BVerfG, Case No. 1 BvR 699/06, at para. 50; Bundesverwaltungsgericht [Federal Administrative Court – BVerwG], Case No. 1 D 88/97, BVERWGE 113, 208, 211 (Mar. 18, 1998); Horst Dreier, *Commentary on Article 1.3 BL*, *in* 1 GRUNDGESETZ KOMMENTAR, para. 69 (Horst Dreier ed., 2013).

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bound by the fundamental rights if it is controlled by its public shareholders.[21] Also, it is acceptable for an effective fundamental rights protection to inhibit the state to seek refuge in private law.

The FCC reasons that the direct binding of the enterprise itself applies in addition to the binding force of the fundamental rights on the public owners of the companies. This view corresponds to the enterprise's nature as a single operating entity.[22] According to the court, the controlling influence as a criterion is regularly met if more than half of the shares of the enterprise in question are held by public shareholders.[23] In this context, the court stressed that the state cannot withdraw from its duty to serve the public interest.

Any additional criteria to the controlling influence—for instance any specific public functions the company in question is entrusted with or its duty to act in public interest—cannot be obtained from the Fraport decision.[24] Moreover, in the court's opinion it is irrelevant if and how far the actual influence of the public shareholder ranges on the day-to-day management.[25] Fraport AG is thus directly bound by the fundamental rights, with more than 50% of the shares held by public owners, according to the court's decision.

Because the FCC assumed a controlling influence of the state over Fraport AG, it did not have to answer the rather complex question if it is also applicable to assume a direct binding force of the fundamental rights for enterprises, the majority of whose shares are privately held. In accordance with the hitherto existing dogmatic principles of Article 1 Section 3 of the Basic Law, a direct binding force of the fundamental rights for privately operated forums would be excluded and only the indirect third-party effect of the fundamental rights could be considered. However, in an *obiter dictum* the court remarks that under specific circumstances an extension of the scope of the indirect third-party effect may be required. Following this statement, the indirect binding force of the fundamental rights on private persons can be reinforced to the point that it may come closer to or even be the same as the binding force of the fundamental rights on the state. That should be the case when the state itself—as a consequence of privatization—cannot provide sufficient environmental conditions for the citizen to exercise her fundamental rights of communication, which in turn means that the exercise of the fundamental rights depends on the possibility to recourse to privately operated public premises. [26] In these

[21] BVerfG, Case No. 1 BvR 699/06, at para. 52.

[22] *Id*.

[23] *Id*. at para. 53.

[24] *See* Horst Dreier, *Commentary on Article 1.3 BL*, *in* 1 GRUNDGESETZ KOMMENTAR, para. 72 (Horst Dreier ed., 2013).

[25] *Cf.* BVerfG, Case No. 1 BvR 699/06, at paras. 113 *et seq.* (Schluckebier, J., dissenting).

[26] BVerfG, Case No. 1 BvR 699/06, at para. 59.

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cases, the appreciation of values between freedom of assembly and the fundamental right to property shifts in favor of the former.

II. Public Forum

Just because Fraport AG is directly bound by the fundamental rights due to its public-private organizational form does not necessarily lead to the result that the complainant may gather together with other people for the purpose of a rally at terminal 1 of the Frankfurt am Main Airport. Article 8 Section 1 of the Basic Law not only covers the right to assemble but also, in principle, the general right of choice of location. This applies in particular if the topic of the assembly has a specific relation towards the actual location of the gathering.[27] The freedom to assemble, however, does not constitute a right to generally access places that serve purposes other than public traffic.[28] Whether a specific location organized by public authority may be used is traditionally determined by designating that exact location with a purpose (*Widmungszweck*). The state thereby determines for what purpose a specific location may be used. The use for the purpose of an assembly in accordance with Article 8 of the Basic Law may in principle not be prohibited, when it is a place that is designated for general traffic. This generally holds true for public street space (streets, pedestrian areas, squares, etc.):

> Public street space is the natural forum that citizens have used historically to express their concerns especially effectively in public and to thus prompt communication. Local streets and places in particular are regarded today as locations where people may exchange information and views and cultivate their personal contacts. This applies even more so in the case of pedestrian precincts and reduced-traffic areas; the allowance of general traffic for communication purposes is the main purpose of such domains . . . . The law of assembly is based on this function . . . . It provides public assemblies and marches with the conditions they need for voicing their demands publicly and quite literally carrying their protests or dissatisfaction "to the streets".[29]

[27] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 233/81, 1 BvR 341/81, BVERFGE 69, 315, 343 (May 14, 1985).

[28] BVerfG, Case No. 1 BvR 699/06, at para. 65.

[29] *Id*. at para. 67.

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However, if, from the beginning, the use has been limited to a specific purpose, then the individual has no right to access that space for the purpose of a gathering. Therefore, conducting of assemblies in buildings used for administrative purposes, hospitals, and swimming pools is not permitted, as the use of these locations is limited to a specific purpose.[30] For the first time, the FCC recognized in its Fraport decision the right to assemble at locations outside of general traffic, at so called public forums. The FCC includes within the term public forums any locations other than public street space that are similarly open to public traffic and where places of general communication develop:

> If today the communicative function of public streets and places is supplemented to an increasing extent by other forums such as shopping centres, shopping malls or other meeting places, the traffic areas of such facilities cannot be exempted from freedom of assembly insofar as the fundamental rights are directly binding or private persons can be burdened through the indirect effect of the fundamental rights between private parties.[31]

The question is: When exactly can a public space of communication be deemed as such in order for the freedom of assembly to apply? In order to get a general picture of the terminology used, the FCC explicitly broadened its isolated, purely national perspective to an international context to be inspired by the public forum doctrine drafted by the U.S. Supreme Court.[32] "A public forum is characterized by the fact that it can be used to pursue a variety of different activities and concerns leading to the development of a varied and open network," where through a combination of different services, shops, and recreational services, a place for people to spend time and meet is created.[33] By being made available for the coexistence of different uses, including communicative uses, these places become a public forum where political debate in the form of collective expression of opinion through public debate cannot be prohibited.[34] Especially when public life no longer primarily takes place in public traffic but increasingly shifts towards the above-described places, the right to rely on the fundamental freedom of assembly has to shift in the same way.[35]

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[30] Bundesverwaltungsgericht [Federal Administrative Court – BVerwG], Case No. 7 C 34/91, BVERWGE 91, 135 (Oct. 29, 1992).

[31] BVerfG, Case No. 1 BvR 699/06, at para. 68.

[32] *Id.* at 70 (quoting the Supreme Court of the United States, Int'l Soc'y for Krishna Consciousness (ISKON) v. Lee, 505 U.S. 672 (1992)).

[33] *See* BVerfG, Case No. 1 BvR 699/06, at para. 70.

[34] *Id.*

[35] *Id.*

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Nevertheless, this does not apply for locations, which, due to external circumstances, are only available to the general public for specific purposes and which are designed accordingly.[36]

In addition to the criterion of the coexistence of different usage possibilities for the means of communication, the FCC adopted the view that places of general traffic can be used for conducting assemblies if they are open and accessible to the general public. But, locations that are restricted by an individual entry control are to be excluded from the scope of the definition of a public forum.[37]

Based on these assumptions, the court concluded that the terminal of the Frankfurt am Main airport, besides the traffic function, also fulfills the criteria of a public forum.[38] It should be noted, however, this is not assumed for the airport in its entirety. The court suggested organizing the space available into different "zones." There may be a differentiation between a "land side," which is open to the public as multi-functional traffic area, and an "air side," which serves as special operational area and is primarily accessible for airline passengers.[39] The air side includes safety areas such as security gates leading to the departure halls. Each individual is checked upon entry to assure only passengers with valid tickets are granted access to their departure gates as well as to areas that are designated for specific purposes, such as the baggage claim areas. Consequently, such areas are not open to general traffic and thus the fundamental right of freedom of assembly cannot be invoked in such places.[40] Then, the court found that the airport has large land sides, which are open to the general public and thus can be qualified as places for strolling and socializing. The court not only pointed to the variety of different activities and services offered, but primarily to the advertising statements of Fraport AG. Fraport AG views itself as the "City in the City" and advertises on the internet "Airport shopping for all!"[41] According to the court, this shows that airports can be operated beyond their original traffic function and can also be operated as shopping malls.[42] Fraport AG cannot exempt itself from its own decision to open space to the public and then prohibit use of

[36] *See id.* at para. 119.

[37] *Id.* at paras. 69 *et seq*.

[38] *Id.* at para. 72. *But see* BVerfG, Case No. 1 BvR 699/06, at para. 120 (Schluckebier, J., dissenting).

[39] BVerfG, Case No. 1 BvR 699/06, at para. 92.

[40] *Id.* at paras. 69, 72.

[41] *Id.* at para. 72. Meanwhile, the wording is more cautious. *See* FRANKFURT AIRPORT, http://www.frankfurt-airport.com/content/frankfurt_airport/en/shop_enjoy0/Shopping-Areas/Public-Area/airport-city-mall.html (last visited Aug. 28, 2014).

[42] BVerfG, Case No. 1 BvR 699/06, at para. 72.

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the public space for communication.[43] If airport areas have been made available to the general public in such a manner, they qualify as public forums and as such are open to the conduct of assemblies.[44]

In the context of the specific threats and risks accompanying assemblies in the area of an airport, the court focused on the question if limitations to the right of assembly are permitted. "Outdoor assemblies" can be restricted due to a law reservation within Article 8 Section 2 of the Basic Law, whereas other assemblies only find their limitations through evident barriers within the constitution. It should be noted that, even prior to the Fraport decision, the term "outdoor assembly" could not be construed narrowly as a reference to a place not covered by a roof. [45] Instead Article 8 Section 2 of the Basic Law allows the legislature to ward off the less controllable potential dangers that come along with a collective expression of opinion in public which—in contrast to assemblies held shielded from the public—necessitate a direct confrontation with uninvolved members of the public.[46] Correspondingly, the proviso of legality of Article 8 Section 2 of the Basic Law is also true for assemblies held at the terminal of the airport—or any other public forum for that matter—as the assemblies are not intended to be conducted in separate areas which are shielded from the other passengers, despite the existence of a roof and lateral boundaries.

Another fundamental stand is taken on by the court in its examination of the proportionality of the airport ban. The court views an airport as a complex logistics system with a particular set of challenges and a specific susceptibility to failure. On this basis, it approves the possibility to apply less stringent conditions to measures taken that restrict freedom of assembly than would be the case for a similar assembly in public street space.[47] The court does not subject assemblies to a general proviso that permission by Fraport AG is required. An imposition of a notification duty not only to the administrative authority but also to the operator of the premises is appropriate. The notification duty, though, will only be appropriate if its applications allow for exceptions such as spontaneous assemblies or ones that have to be held urgently, and a breach of the notification does not automatically result in a ban on the assembly.[48]

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[43] *Id.* at para. 68.

[44] *Id.* at para. 72.

[45] *See, e.g.*, H. Schulze-Fielitz, *Commentary on Article 8 BL*, 1 Grundgesetz Kommentar, para. 66 (H. Dreier ed., 2013).

[46] BVerfG, Case No. 1 BvR 699/06, at para. 77.

[47] *Id.* at paras. 88 *et seq*.

[48] *Id.* at para. 89.

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Based on these considerations, an airport owner is permitted to combat the special danger, assemblies in an airport harbor, by restricting the right of freedom of assembly based on the right of the owner to undisturbed possession. To ensure the safety and operability of the air traffic, the owner can consider the specific territorial setting and the functionality of an airport.[49] It might be possible, for example, to limit the number of participants due to the confined space of the terminal, to exclude big demonstrations, or to generally prohibit assemblies in the check-in areas. Furthermore, assemblies with a certain noise level can be more easily restricted due to the necessity of important announcements. In conclusion, in general the right to freedom of assembly applies to all areas that are available to the general public as long as the operability of the airport is ensured. In this specific case, the court affirmed that the airport ban issued by the defendant encroached on the complainant's freedom of assembly. As far as places were opened for the purpose of public communication, Fraport AG was not allowed to generally prohibit the use of communication rights.[50]

The court also noted that Article 5 Section 1 of the Basic Law—freedom of expression—does not grant an individual a right of access to places to which she may otherwise not have access, but indeed applies to all places where citizens actually have access. Thus, citizens can rely on the right of freedom of expression on the premises of the Frankfurt airport:

> For in contrast to freedom of assembly which is a right exercised collectively, the exercise of freedom of expression as the right of an individual does not as a general rule imply a particular need for space, and also does not initiate traffic of its own that usually results in a nuisance. Instead freedom of expression and the right to disseminate opinions that derives from it have no specific geographical connection. As a right of the individual, citizens are fundamentally entitled to it wherever they happen to be at a given moment.[51]

In this case the freedom of expression cannot be countered by a public interest, especially not "the wish to create a 'feel-good atmosphere' . . . which is strictly reserved for consumer purposes and which remains free from political discussions and social conflicts . .

[49] *Id.* at paras. 91 *et seq*.

[50] *Id.* at para. 68.

[51] *Id.* at para. 98.

. . The state may not restrict fundamental rights in order to ensure that the carefree mood of citizens is not disturbed by the misery of the world."[52]

Hence, the airport ban against the complainant was also an infringement of Article 5.1, first clause, of the Basic Law.

C. Comment

Seminally, the FCC decided in the Fraport case not only that an enterprise which is owned both by private shareholders and the state is directly bound by the fundamental rights if it is controlled by its public shareholders, but it also decided to extend the scope of protection of the freedom of assembly to those places where space is opened for the purpose of public communication. Through the introduction of "public forum" as a new concept, the court emphasizes the democratic function of such places as it is implicated in the historic forums Agora and Allmende. This deviates from the previous geographically/objectively used term "public space" by the German legal system. In reference to the public forum doctrine of the Anglo-American legal system, the judges of the FCC show that they are aware of the fact that they are not alone in this world, but rather know about the high level of importance of judicial interaction. To resolve difficult and novel conflicts, inspiration is sought from other legal systems and accordingly teachings and experiences of foreign legal systems are adopted and implemented with the aim to make these effective for the national law.[53] The practice of a comparative law approach is not new; for example, in the Lüth decision dating from 1958, the FCC developed the pioneering theory of the indirect third party effect for the German judicial doctrine on fundamental rights underpinned by the reasoning of the U.S. Supreme Court.[54] The FCC appears to seek assurance in other legal systems for its reasoning, particularly whenever new judicial solutions or changes in the constitutional dogmatic conception are evaluated.

[52] BVerfG, Case No. 1 BvR 699/06, at para. 103.

[53] With regards to judicial globalization and increasingly global constitutional jurisprudence, see ANNE-MARIE SLAUGHTER, *Judges: Constructing a Global Legal System*, *in* A NEW WORLD ORDER 65 *et seq.* (2004). She suggests—among other things—that these principles are explicitly written down in newer constitutions. For example, Section 9 (Interpretation of Bill of Rights) of the new South African Constitution requires the South African Constitutional Court to "consider international law" and permits the Court to consult foreign law in its human rights decisions. *Id.*

[54] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 400/51, BVERFGE 7, 198, 205 *et seq.* (Jan. 15, 1958). Here, the FCC reasoned with the frequently cited formulation from Justice Cardozo in *Palko v. State of Connecticut* in order to demonstrate the special significance of the freedom of opinion for a free and democratic state: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." Palko v. State of Connecticut, 302 U.S. 319, 327 (1937)

It is to be welcomed that the FCC has clarified that public-private entities are directly bound by the fundamental rights if they are controlled by their public shareholders, and that it has extended the scope of protection of the freedom to assembly to public forums. The prospected strengthening of the direct binding force of the freedom to assembly in relation to private persons for public forums is also promising. It may be possible that henceforth the freedom of assembly prevails against the right to undisturbed possession if the place is privately organized.

The Fraport decision was not exclusively met with approval. It received strong criticism in the dissenting opinion of Justice Schluckebier. He observed, among other things, the lack of differentiation in regard of the criterion of controlling influence as an attribute for enterprises owned both by private shareholders and the state being directly bound by the fundamental rights. He queried if indeed a controlling influence can be assumed when the controlling shares are held by several holders of public authority at various state levels—as it was the case in the Fraport decision—which themselves may pursue divergent, possibly even opposite, interests, especially since they may be influenced by politically different majorities.[55] Controlling influence can then only be justified if a synchronization of interests is ensured. Although these preconditions are fulfilled in the Fraport case through the consortium agreement between the Federal Republic of Germany, the State Hesse, and a holding company of the City of Frankfurt, the necessity for a legally binding agreement to coordinate influence potential should, according to Schluckebier, have been specified.[56]

While Justice Schluckebier criticizes the Fraport decision as too far-reaching with regards to the extension of the scope of protection of the freedom of assembly into the terminals of the airport as a public forum, remaining issues and unanswered questions may be articulated diametrically: Yet even after the Fraport decision, it may be suspected that the protection of communication rights in the context of privatization of public space is not adequately secured. There are already signs of insecurities and ambiguities shown by the lower courts on how to use the concept of public forum developed by the FCC. The Administrative Court of Stuttgart *(Verwaltungsgericht Stuttgart* – VG), for instance, had to rule on a provisional relief (*Einstweiliger Rechtsschutz*) if it is permitted to form a rally at Stuttgart Central Station, which is operated by the 100% state-owned company DB Station&Service AG. The central station offers a variety of shops and cafés and the DB Station&Service AG also advertises the central station as a "vibrant market place" where public events such as concerts, exhibitions, and theater performances take place on a regularly basis.[57]

[55] BVerfG, Case No. 1 BvR 699/06, at paras 113 *et seq*.

[56] The FCC seems to have been aware of the fact that the criterion of controlling influence might not be sustainable: "Whether or not this criterion should be expanded on in special cases does not need to be decided here." *See* BVerfG, Case No. 1 BvR 699/06, at para. 53.

[57] STUTTGART HAUPTBAHNHOF, http://www.einkaufsbahnhof.de/de/stuttgart/erleben/ (last visited Aug. 28, 2014).

Nevertheless, although the Administrative Court of Stuttgart concerned itself specifically with the Fraport case, in its decision it expresses strong reservations regarding the central station being a public forum. The court reasons that the space has not been opened to the general public but for the designated purpose of traveling.[58] The activities of the operating company of the train stations, though, include not just the operation of the train stations as traffic hubs but, according to their own admission, also the development and marketing of station facilities. This goes hand in hand with the extensive modernization of larger railway stations to transform existing railway stations into profitable "malls and urban entertainment centers with a rail connection"[59] which in turn compete directly with pedestrian areas and shopping arcades of the inner city. The character of train stations gravitates more and more towards the character of a public place in the inner city, thus exceeding its original function as a traffic hub.

There is substantial evidence that, through the creation of a varied open network where people spend time and meet, railway stations, privately owned by the DB Station&Service AG, can also be recognized as a place for general traffic. The doubts expressed by the Administrative Court of Stuttgart regarding the character of a public forum do not seem to be justified in the light of the Fraport case.[60]

Above all, another challenge, which due to the lack of relevance has only been discussed as a secondary matter in the Fraport case, requires a more specific elaboration for the future: The binding force of fundamental rights—especially the scope of the freedom of assembly—when public forums are owned and operated by a private majority or are exclusively private, such as shopping malls.

The FCC noted that in the present case an indirect binding force of fundamental rights equivalent or similar to the direct binding force applied to the State may be conceivable. It remains uncertain what that means regarding a specific individual situation, and how far the indirect binding force should in fact reach. It is even more difficult to answer when

[58] Verwaltungsgericht Stuttgart [VG – Administrative Trial Court], Case No. 5 K 691/12 (Mar. 2, 2012). Also assumed for Frankfurt am Main airport. BVerfG, Case No. 1 BvR 699/06, at para. 120 (Schluckebier, J., dissenting) (Feb. 22, 2011).

[59] Carsten Gericke, *"Territorien des Wohlfühlens" durch sozialen Ausschluss*, FORUM RECHT (2002), *available at* http://www.forum-recht-online.de/2002/302/302gericke.htm.

[60] Recently other administrative courts have started to use the term public forum but without further specifying the concept. *See* Verwaltungsgericht Braunschweig [VG – Administrative Trial Court], Case No. 5 A 100/10 (Oct. 6, 2011) (stating that the area Federal Research Institute for Rural Areas, Forestry and Fisheries is not accessible for general traffic); Verwaltungsgericht Berlin [VG – Administrative Trial Court], Case No. VG 1 L 102.12, (May 19, 2012) (stating that public green areas are only available for limited designated purposes); Verwaltungsgericht Augsburg [VG – Administrative Trial Court], Case No. Au 1 S 13.1314 (Sept. 2, 2013) (stating that Park & Ride parking lots are not a forum for communication).

exactly the preconditions for such an extension of the scope of an indirect binding force are met. This applies especially for the decisive question, in which situation the exercise of the fundamental rights depends on the recourse to privately operated public forums. The criterion contains the potential for considerable conflict as indicated by the dissenting opinion of Justice Schluckebier. In Justice Schluckebier's opinion the required preconditions are undoubtedly not met at the present time.[61]

There is an urgent need for specified criteria in order to determine when private owners are obligated by an extension of scope of the indirect binding force of fundamental rights. Additionally, it would be necessary to clarify in which area the lack of availability of publicly operated places made accessible for general traffic has to be demonstrated (e.g., the area of a specific city? State?).

Finally, it needs to be considered if an extension of the scope of the freedom of assembly to public forums could not indeed result in an overall realignment of the German judicial doctrine on fundamental rights regarding Article 8 Section 1 of the Basic Law. In light of the importance of such forums as space for communication and the basis of a democratic society, it may be possible to accept an absolute binding force beyond the conventional fundamental rights doctrines regarding Article 1 Section 3 of the Basic Law. In other words, a direct binding force of fundamental rights could be applied for public forums irrespective of the fact of the owner's public or private legal status.[62]

It also remains to be seen how the FCC will handle the public forum doctrine in the future and how the lower courts will incorporate the constitutional decision-making practice. There is no simple answer to the outstanding questions. The Fraport case rather emphasizes the need for an appropriate constitutional handling in regards of public space, a thorough consideration of legal principles, and careful conception of new approaches.

[61] BVerfG, Case No. 1 BvR 699/06, at para. 122.

[62] This argument was brought up by the complainant´s representatives in the Fraport case.

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