

## Childlike sex dolls

In an order published today, the Second Senate of the Federal Constitutional Court rejected two constitutional complaints challenging § 184I of the Criminal Code (*Strafgesetzbuch* – StGB), which imposes criminal punishment for the sale, purchase or possession of childlike sex dolls.

The complainants assert that the challenged provision violates, inter alia, their general right of personality in the form of the right to sexual self-determination under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law (*Grundgesetz* – GG) and contend that § 184I of the Criminal Code is substantively unconstitutional.

The constitutional complaints are unsuccessful. In particular, the interference with the general right of personality resulting from the challenged provision is justified. In its order, the Senate holds that – while the prohibitions under § 184I of the Criminal Code do affect the scope of protection of the general right of personality in the form of the right to sexual self-determination – they do not affect the core of private life, as to which a balancing of interests cannot justify an interference. Balancing the interests affected by the challenged provision shows that the requirements under the proportionality test are met. The considerable severity of the interference must be balanced against the protection of physical, psychological and sexual integrity of children, which are legal interests of paramount importance and which the state is not only authorised, but obliged to protect. In this respect, the legislator made use of its margin of appreciation in a tenable manner.

The decision was taken with 6 : 2 votes. Justice Offenloch filed a dissenting opinion.

## Facts of the case:

§ 184I of the Criminal Code was introduced by the Act to Combat Sexual Violence Against Children (*Gesetz zur Bekämpfung sexualisierter Gewalt gegen Kinder*) on 1 July 2021. The prohibition of childlike sex dolls was enacted against a backdrop of intense social and political debates on improving the protection of children from sexual abuse.

Various views were expressed during the legislative process on whether the use of childlike sex dolls increases the danger of a user actually abusing a child. Due to a significant lack of empirical data, only limited scientific insights were available on the effects of the existence and use of childlike sex dolls.

To the extent that there were relevant scientific publications, some of these supported the prohibition of childlike sex dolls or, in any case, emphasised the risks that such dolls pose. However, certain publications were (generally) sceptical about such a prohibition and highlighted the need for more research. On the recommendation of the *Bundestag* Committee on Legal Affairs and Consumer Protection, the *Bundestag* gave its consent to the bill introducing § 184I of the Criminal Code.

The complainants contend that § 184I of the Criminal Code is substantively unconstitutional. With their constitutional complaints, they, in particular, assert a violation of their general right of personality in the form of the right to sexual self-determination.

### **Key considerations of the Senate:**

§ 184I of the Criminal Code is compatible with the Basic Law. In particular, this provision does not violate the complainants' general right of personality.

1. It is true that the scope of protection of the general right of personality in the form of the right to sexual self-determination is affected by the provision. However, the prohibitions under § 184I of the Criminal Code do not affect the core of private life, as to which a balancing of interests cannot justify an interference. The core of private life generally includes the freedom to keep preferred types of sexual expression to oneself. However, the absolute protection of the core of private life does not extend to sexual activity which encroaches on another person's sexual self-determination or physical integrity.

It was permissible for the legislator to assume that using childlike sex dolls for sexual acts suffices to put children at risk and, in particular, that such use may increase the risk of a user actually abusing a child. The use of childlike sex dolls – even when in private and outside the presence of others – thus has an effect on other people's right of personality, and therefore social implications which removes it from the core of private life.

2. Each of the offences listed under § 184I of the Criminal Code interferes with the general right of personality. However, this interference is justified and, in particular, it is proportionate.

a) In line with the legislator's objective intent, the challenged provision serves to protect children against sexualised violence. This corresponds to a constitutional duty to protect which requires the legislator to safeguard children against sexual abuse. The purpose of § 184I of the Criminal Code is to counter two possible risks.

aa) First, the provision is intended to prevent that the use of childlike sex dolls contributes to lowering inhibitions regarding sexual violence against children. In this respect, the legislator considers there to be a risk that using the childlike sex dolls may bring about or intensify the desire to perform the sexual acts for which the dolls are used by abusing real children. This assumption is tenable under the relevant standards.

The existing scientific studies do not yield unequivocal findings as to effects of paedophile or hebephile people using childlike sex dolls. The studies include indications that the use of childlike sex dolls may increase the risk of actually abusing a child as well as indications that using them may reduce such risk. Under these circumstances, it is constitutionally unobjectionable that the legislator decided to prohibit the use of such dolls under § 184I of the Criminal Code in order to guarantee child protection. It was permissible for the legislator to base its risk assessment on the assumption that the use of childlike sex dolls lowers inhibitions to actually abuse a child, even if such an effect cannot be assumed to necessarily be automatic or to apply to the majority of users.

bb) Second, the prohibitions are intended to prevent the objectification and sexualisation of children and thus also prevent the gradual normalisation of sexualised acts involving children and the lowering of inhibitions to commit sexualised offences generally, i.e. not just among (potential) users of these dolls. The aim of the prohibition is to prevent any (supposed) social acceptance of the sexualisation of children from materialising or spreading and thus to protect children from assault and safeguard their dignity.

All these purposes are constitutionally legitimate and – at least in combination – suitable to justify the challenged interference with fundamental rights.

b) Criminalising the use of childlike sex dolls is suitable, necessary and, in particular, appropriate, to achieve the intended purpose.

It is constitutionally unobjectionable for the legislator to assume that the use and distribution of childlike sex dolls increases the risk of actual child abuse and leads to objectifying children as sexual objects available to anybody at anytime. On this basis, it is not ascertainable which less restrictive and less effective, but nonetheless suitable preventive means the legislator could have adopted other than prohibiting the potentially dangerous use of childlike sex dolls.

The complainants argue that there would be simple ways of countering the risk of accidentally being confronted with childlike sex dolls e.g. on distributions sites; they contend that one such possibility to protect minors would be a general advertising and sales ban to minors. These arguments, at most, only partly address the purposes of the criminal provision at issue. §

184I of the Criminal Code aims not to protect children and adolescents from their own sexuality, but from sexualisation by others who violate the respect due to children by perceiving them as sexual objects.

The severity of the interference with the affected individuals' general right of personality and right to liberty of the person is not disproportionate to the purpose pursued in terms of child protection. The legislator – in considering the severity of the interference with the right to sexual self-determination – made use of its margin of appreciation in a tenable manner.

It is true that the prohibitions under § 184I of the Criminal Code intrude deeply into the private sphere of the persons affected – in particular, the direct effect of these prohibitions on potential users of childlike sex dolls, given the consequences that these prohibitions have in terms of masturbation behaviour and the significant forward shift of the point in time in which criminal punishment is imposed. As the prohibitions, however, apply to a type of behaviour which is externally perceptible, the assumption that § 184I of the Criminal Code prohibits thoughts and ideas is not tenable. § 184I of the Criminal Code merely prevents specific kinds of masturbation behaviour. There is no reliable premise for the assumption that the prohibitions would deprive (potential) users of childlike sex dolls from any possibility of sexual fulfillment.

The considerable severity of the interference must be balanced against the protection of the physical, psychological and sexual integrity of children – legal interests which are of paramount importance and which the state is not only authorised but obliged to protect. In fact, the state's duty to protect children's physical and psychological integrity especially applies when children have no means of defence, which typically applies in cases of sexual violence. The duty to protect also applies to the self-determination of children, who are not just objects of protection and care but themselves holders of fundamental rights. Children and adolescents have a right to the free development of their personality. But they require protection and assistance to develop into self-reliant persons in society. The state thus has the special obligation to protect children's self-determination by preventing children from becoming the means and objects of adult sexuality.

### **Key considerations of the dissenting opinion of Justice Offenloch**

I am unable to agree with the Senate majority. In my view, § 184I of the Criminal Code is legislation of morality which lacks a sufficient rational basis.

1. Unlike the Senate majority, I consider that prohibiting the personal use of childlike sex dolls encroaches on the inviolable core of private life.

Autoerotic acts which are conducted in private and outside the presence of other persons are a textbook example of a type of behaviour that falls within the core of private life. Masturbation, typically, does not affect others.

The Senate majority incorrectly assumes that the use of childlike sex dolls has social implications which removes it from the core of private life. There is a clear boundary between engaging in masturbation using childlike sex dolls outside of the presence of others and actually sexually assaulting a child. This is because future conduct that crosses the line to assault rests on a further and generally voluntary decision to commit a sexual offence taken by the offender in that particular case. This clear boundary is decisive because it leads to the conclusion that masturbation as such does not 'intrinsically' affect social life or the needs of society – a standard that the Federal Constitutional Court applies in its established case-law; rather, masturbation only has such effect if the offender in a particular case takes a further and generally voluntary decision.

2. To the extent that the prohibitions under § 184I of the Criminal Code do not affect the core of private life which enjoys absolute protection, the considerations by the Senate majority likewise cannot justify the interferences with the complainants' general right of personality.

a) Given the lack of any reliable risk assessment, I consider that the objectives identified by the Senate majority are not legitimate legislative purposes. There is insufficient basis for assuming that the use of childlike sex dolls may contribute to lowering inhibitions to commit acts of sexualised violence against children. In previous cases in which the risk assessment was unclear, the Federal Constitutional Court applied the standard of whether the legislator engaged with expert sources during the legislative process. In the present case, it is not ascertainable that the legislator undertook any serious efforts in this respect.

b) Furthermore, I consider the assumption that there is a sufficiently serious danger that the use of childlike sex dolls may contribute to materialising or spreading a (supposed) social acceptance of sexualising children and thereby increase the risk of children becoming victims of sexual violence to be strained. In this respect, it must be taken into account that in the perception of the general public, sexual contact between adults and children is considered an absolute taboo. The severe criminal punishments for the sexual abuse of children, which are entirely justified, clearly express the exceptional disapproval of any such abuse in social, ethical and generally preventive terms. To me it is far-fetched to assume, as the Senate majority does, that this taboo – despite the decidedly strong legal provisions which enforce it – is (seriously) at risk when dolls are in circulation which are suitable and intended for sexual use and which resemble children's bodies in a way that is obvious to everyone as artificial.

c) Finally, even combining the considerations of the Senate majority does not result in the legislative purpose being legitimate. To me, it is not in the least understandable why legislative purposes which cannot justify interferences with fundamental rights in their own right should – in combination – form a sound basis for legitimising interferences with fundamental rights.