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French Yearbook *of* Public Law

Issue 1, 2023

Presentation

The objective of the "French Yearbook of Public Law" is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model's exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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I. General overview of German administrative law

Traditionally, German legal scholars have developed the concept of administration, which gradually became a key concept of German public law in the 19th and 20th centuries. According to German doctrine, administrative law includes all actions which do not affect the individual citizen, or in the event that they do, remain within the scope of individual rights established by the laws in force. In general, the administration is responsible for regulating concrete or individual legal relationships.[1]

Under the Basic Law for the Federal Republic of Germany, enacted on May 23, 1949, the Federal Act on Administrative Procedure occupies an indispensable position in German administrative procedure. The *Verwaltungsverfahrensgesetz* (commonly abbreviated as: *VwVfG*), implemented on January 1, 1977, adopts the "dual perspective of the administration and the administered"[2] and provides the legal framework for administrative procedural law. Despite its ambitious nature and the numerous commentaries dedicated to it, the *VwVfG* does not succeed in unifying all procedural rules. It rather serves as a common core of a complex normative system in which federal legislation and the legislation of the *Länder* (the federal states) coexist. The *VwVfG* is of subsidiary application: as stated in section 1 §1, it is only applicable "where no federal law or regulation contains similar or conflicting provisions."[3] Procedural rules in special administrative law will therefore be lex specialis and take precedence over the application of the *VwVfG*. Moreover, the exclusive jurisdiction over this matter does not lie with the federal government (the *Bund*). To that end section 1, paragraph 3 clarifies that the Act "shall not apply to the execution of federal law by the Länder where the administrative activity of the authorities under public law is regulated by a law on administrative procedure of the Länder."[4] Therefore, if a *Land* adopts its own Act on Administrative Procedure, the federal law will not be applicable to the authorities of that particular state, even if they are executing federal laws. Generally, most *Länder* have incorporated the federal law into their state law, thus converting it into a "law formally attributed to the *Land* that promulgated it", while four *Länder* have enacted laws that refer to the federal law and only regulate situations that diverge from federal provisions, and two *Länder* have incorporated the federal law into a broader legal framework.[5]

1 Meyer, G., *Lehrbuch des deutschen Verwaltungsrechts*, 2. Ed., 1893, Leipzig, Duncker und Humblot, p. 2; see in general the contribution of Jouanjan, O., "La *Belle époque* du droit administratif. Sur la formation de la science moderne du droit administratif en Europe", in von Bogdandy, A., Cassese, S., Huber, P. M. (eds.), *Ius Publicum Europaeum* 2011, vol. 4 (*Verwaltungsrecht in Europa: Wissenschaft*), C.F. Müller, pp. 425-459, and "Fragmentierungen im Öffentlichen Recht: Diskursvergleich im Verfassungs- und Verwaltungsrecht", in *Fragmentierungen*, *VVDStRL* 2018, nº 77, De Gruyter, pp. 353-405.

2 Jacquemet-Gauché, A., Stelkens, U., "Caractères essentiels du droit allemand de la procédure administrative", in Auby, J.-B. (ed.), *Droit comparé de la procédure administrative/Comparative Law of Administrative Procedure*, 2016, p. 17; see also Bundestag, Drucks. 7/910, p. 28; Stelkens, U., "Kodifikationssinn, Kodifikationseignung und Kodifikationsgefahren in Verwaltungsverfahrensrecht", in Hill, H., Sommermann, K.-P., Stelkens, U., Ziekow, J. (eds.), *35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven*, 2011, Duncker & Humblot, p. 273.

3 Dieses Gesetz gilt [...] soweit nicht Rechtsvorschriften des Bundes inhaltsgleiche oder entgegenstehende Bestimmungen enthalten.

4 Für die Ausführung von Bundesrecht durch die Länder gilt dieses Gesetz nicht, soweit die öffentlich-rechtliche Verwaltungstätigkeit der Behörden landesrechtlich durch ein Verwaltungsverfahrensgesetz geregelt ist.

5 Jacquemet-Gauché, A., Stelkens, U. (2016), "Caractères essentiels du droit allemand de la procédure administrative",

Prior to the entry into force of the Federal Act in 1977, administrative jurisprudence relied on unwritten general principles to supplement the rare written norms. These principles were established by way of analogy, inspired by special laws and Articles 1(3) and 20(3) GG, which require the administration to be bound by and subject to the law. However, attempts to establish a coherent set of procedural rules were unsuccessful and eventually required the adoption of federal legislation in the 1960s.[6] The law that was ultimately enacted on May 25, 1976[7] was only slightly amended until 1996 to streamline authorization procedures. In 2002, further amendments were made to include electronic administration, and in 2008 and 2009 it was revised again to ensure compliance with the German transposition of the 2006 EU Services Directive.[8]

Art. 1 (3) GG establishes a direct connection between executive and administrative powers and fundamental rights. Art. 19, (4) GG is an integral part of this normative framework as it guarantees the justiciability of fundamental rights. Nevertheless, this constitutional innovation does not replace administrative institutions and practices that were established prior to the enactment of the constitution. Rather, it requires a restructuring of the administrative institutions particularly by recognizing new citizens' rights in relation to the administration or by deducing them from directly enforceable fundamental rights. The democratic legitimacy of the administration is also reinforced by the jurisprudential construction of the theory of substantive decision-making, which allows for a closer alignment of administrative with parliamentary law[9] without changing the traditional concept of the reservation of the law, which goes back to the German "*konstitutionell*" monarchy. While it would be exaggerated to argue that German administrative law underwent a complete overhaul after 1949, one may point out that there was a clear movement for "subjectivization of administrative law" initiated by Art. 19(4) GG, involving the "systemic decision for the provision of subjective jurisdictional protection".[10] Administrative law has evolved from being an "executive (and governmental) law originally geared towards the administration (administration law) into a jurisdictionalized law focused on the individual" and thus into a real "science of administrative law".[11] This movement of subjectivization and jurisdictionalization of administrative law corresponds to a decrease in the intensity of objective principles such as the principle of legality (*Grundsatz der Gesetzesmäßigkeit der Verwaltung*).[12]

op. cit., p. 23, for further details relating to the composite set of rules for non-contentious administrative procedure.

6 See the discussions at the meeting of the Association of German Professors of Public Law (*Vereinigung der deutschen Staatsrechtslehrer*): Bettermann, K. A., "Das Verwaltungsverfahren", in *VVDStRL* 1967, nº 17, De Gruyter, pp. 118 ff.

7 Fromont, M., "La codification du droit administratif par la loi du 25 mai 1976", Revue du droit public 1977, pp. 1285 f.

8 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

9 See e.g. Kremer, C. (ed.), *Die Verwaltungsrechtswissenschaft in der frühen Bundesrepublik (1949-1977)*, 2017, p. 287 f.; Schönberger, C., in Stoelleis, M. (ed.), *Das Bonner Grundgesetz*, 2006, p. 53 f.

10 Krebs, W., in *Festschrift für C.-F. Menger*, 1985, p. 191 and p. 197; Schmidt-Assmann, E., in *Festschrift für C.-F. Menger*, 1985, p. 107 ff. The application of Art. 19(4) FA as a "systemic decision for individual jurisdictional protection" is today a "common good" (*Allgemeingut*): Ziekow, J., in Kahl, W., Ludwigs, M. (eds.), *Handbuch des Verwaltungsrechts*, vol. 1, § 14, items 48 ff.

11 Wahl, R., Herausforderungen, 2006, p. 39 f.

12 Ziekow, J., in Kahl, W., Ludwigs, M. (eds.), *Handbuch des Verwaltungsrechts*, vol. 1, § 14 and § 25. Generally speaking, on the principle of legality, see the dossier in the *RFDA* 2022, nº 2.

The concept of "public power" (*öffentliche Gewalt*) referred to in Art. 1(3) and Art. 19(4) GG forms the foundation for the comprehensive application of fundamental rights to acts of public power. It was only with the decision of the German Federal Constitutional Court (*Bundesverfassungsgericht* or *BVerfG*) in *Fraport* in 2011[13] that all forms of administrative activity were comprehensively linked to fundamental rights, including those that do not constitute an exercise of public authority or acts comparable to private acts, such as profit-making and tax-related activity.[14] This results in a connection with the organization of competences, budgetary law, public law obligations imposed on state authorities, as well as on any administrative official regardless of the obligations imposed on them under private law.[15] However, the Federal Constitutional Court has so far not interpreted the concept of "public power" in Art. 19(4) GG as applying to any administrative act, even if it is a private law act.

II. German administrative law in front of the courts

A. Fundamental rights in the context of administrative law

1. Restrictions on the freedom of association for associations of public employers (BVerwG 8 C 8.19 of December 12, 2019)

Employers' associations are not entitled to the fundamental right protected by Art. 9(3) GG ("The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession"). The State Ministry of Labor in North Rhine-Westphalia determines, via regulations (*Rechtsverordnung*), which collective agreements are to be considered compliant with the State's public procurement law. The claimant, an employers' association operating at the federal level as a private law association (*Verein*), has contested the application of this regulation asserting a violation of freedom of association as guaranteed by Art. 9(3) GG. The applicant pursued legal action, but the claims have been dismissed by both the Administrative Court of Düsseldorf (*Verwaltungsgericht* Düsseldorf VG 6 K 2894/13 of April 30, 2015) and the Higher Administrative Court of Münster (*Oberverwaltungsgericht* Münster OVG 13 A 1328/15 of September 17, 2018).

The Federal Administrative Court, in its decision of December 12, 2019, upheld the ruling of the lower courts: public employer associations do not enjoy the basic right protected by Art. 9(3) GG and hence have no standing.

The significance of Art. 9(3) GG lies not in protecting an employers' association from competitive collective agreements but in protecting such relationships from state influence. Private law entities that are exclusively owned by legal persons governed by public law and mixed economy companies under private law, in which legal persons governed by public law hold more than half of the shares, are not entitled to the basic right guaran-

13 BVerfGE 128, 226.

14 See the remarks by Stelkens, U., "§ 5 Verwaltung von der Besatzungszeit bis zur Wiedervereinigung", pp. 223-260, and "§ 6 Verwaltung im wiedervereinigten Deutschland", pp. 263-304, in Kahl, W., Ludwigs, M. (eds.), *Handbuch des Verwaltungsrechts*, 2021, vol. 1, C. F. Müller.

15 Burgi, M., in Hoffmann-Riem, W., Schmidt-Assmann, E., Voßkuhle, A. (eds.), *Grundsätze des Verwaltungsrechts*, 2. Ed., 2012, vol. 1, § 18, item 45 ff.

teed by Art. 9(3) GG, unlike legal entities under public law. Their exclusion is based solely on the formal condition that they are owned by legal persons governed by public law, who are bound, as public authorities, to the fundamental rights enshrined in Art. 1(3) GG ("The fundamental rights set forth below shall bind the legislature, the executive, and the judiciary as directly applicable law").

According to Art. 19(3) GG "The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits.". This provision can apply to a legal person of private law, except if the majority or all of the shares are owned by legal persons governed by public law, as in the case of the public employer association that initiated the appeal. In dismissing the application and denying the association standing given the lack of an enforceable fundamental right, the Court relied on a longstanding argument advanced by constitutional judges. The Court's reasoning relies on the "confusion argument,"[16] a longstanding principle in the jurisprudence of the Federal Constitutional Court:[17] the State cannot simultaneously be both the debtor and creditor of fundamental rights. At the heart of this argument lies the question of the scope of the term "the state". The Court adopts a broad interpretation, which extends beyond traditional forms of statehood and public power to include indirect forms, such as associations of public employers. The Administrative Court follows the Federal Constitutional Court's reasoning as articulated in the "*Fraport*" decision, which affirmed that mixed economy companies which are predominantly in public ownership, as well as companies with full public ownership, existing in the private law order, are subject to fundamental rights.[18] The Federal Administrative Court leaves no room for ambiguity in its conclusion, stating that "publicly owned employers are directly bound to fundamental rights" and "cannot, as a component of the state that is bound to fundamental rights, simultaneously be the recipient and beneficiary of fundamental rights".[19]

Even if the regulation violates the substantive protection of the freedom of association under Art. 9(3) GG, the Federal Administrative Court cannot rule on personal protection because the claimant lacks standing in this case. This exclusion is based on the "overall responsibility of the state".[20] The plaintiff is an association primarily controlled by municipalities (*Gemeinden*), cities (*Städten*), and other communities (*Gebietskörperschaften*), which themselves do not enjoy fundamental rights[21] and, as such, cannot rely on

16 *Konfusionsargument*: the expression is attributed to Bettermann, K. A., "Juristische Personen des öffentlichen Rechts als Grundrechtsträger, *NJW* 1969, p. 1323 ff.

17 BVerfGE 15, 256, 262; see, critically, Merten, D., „Das konfuse Konfusionsargument", *DÖV* 2019, pp. 41-48, who does not hesitate to qualify it as a "dogmatic error of the Federal Constitutional Court" (*dogmatischer Irrtum des Bundesverfassungsgerichts*).

18 BVerfGE 128, 226, guideline 1; see, in French: Reinhardt, J., "Les conflits de droit entre personnes privées : de l'effet horizontal indirect à la protection des conditions d'exercice des droits fondamentaux", in Reinhardt, J., Hochmann, T. (dir.), *L'effet horizontal des droits fondamentaux*, 2018, preface by J. Masing, Éditions Pedone, p. 151 f., for whom the constitutional judge "tries to guarantee a material and conceptual continuity by making the traditional distinction between direct and indirect obligations".

19 § 26.

20 § 21 of the judgment, *Gesamtverantwortung des Staates*; references to the consistent case law of the Federal Constitutional Court: e.g., BVerfGE 147, 50; BVerfGE 143, 246.

21 Ludwigs, M., Friedmann, C., "Die Grundrechtsberechtigung staatlich beherrschter Unternehmen und juristischer Personen des öffentlichen Rechts. Kontinuität oder Wandel der verfassungsrechtlichen Dogmatik?", *NVwZ* 2018, p. 22 f.

the exceptional arrangements for radio and television institutions (which can rely on the freedom of opinion under Art. 5(1) GG), universities (which enjoy academic freedom under Art. 5(3) GG), and religious communities organized as public law institutions under Art. 140 read in conjunction with Art. 137 (5) of the Weimar Constitution (which exercise the freedom of belief, conscience, and profession of faith under Art. 4 (1-2) of the Constitution). As a freely constituted legal person under private law, the association's mission does not constitute an exercise of fundamental rights, nor does its activity serve the exercise of fundamental rights of other individuals.[22]

The critique of the "confusion argument"—the basis for the Federal Administrative Court's decision in this case—could potentially encourage Leipzig and Karlsruhe to adopt an alternative approach by cautiously departing from the exclusion of controlled legal persons from the ability to exercise the fundamental rights enshrined in the *Grundgesetz*.

2. Violation of fundamental rights by a foreign state and executive responsibility of the government (BVerwG, judgment of November 25, 2020 – 6 C 7.19).

The decision of the Federal Administrative Court on November 25, 2020, addresses widely known events - the civilian victims of the U.S. drone attacks in Yemen in 2012. The involvement of U.S. drones in German courts creates a "triangular constellation" (*Dreieckkonstellation*) that associates U.S. military actions in Yemen with the bilateral relationship between the United States and the Federal Republic of Germany, whose boundaries are not always transparent.[23]

The presence of American armed forces near Ramstein in Rhineland-Palatinate dates back to the 1950s when NATO decided to establish the Ramstein Air Base, which today plays a critical role in drone attacks in the Middle East. Command signals are transmitted directly by military personnel operating in the U.S. to the German base, serving as a relay station. With the approval of the German government, new constructions were set up in 2011. In 2014, Yemeni national residing in Yemen, Canada, and Qatar, filed a lawsuit against the Federal Republic of Germany in front of the Administrative Court of Cologne (*Verwaltungsgericht Köln*, 3 K 5625/14, judgment of May 27, 2015). They claimed that German authorities should have prevented the attacks which were facilitated by the presence of U.S. military forces in Ramstein and in their view violated international humanitarian law. The Administrative Court in Cologne dismissed the appeals, but the Higher Administrative Court of Münster (*Oberverwaltungsgericht Münster*, 4 A 1361/15, judgment of March 19, 2019) ruled that Germany must take appropriate steps to ensure that the use of the Ramstein base complies with international law. The Federal Administrative Court, however, did not see how this duty could give rise to an individual right for the applicants.

The central issue, in this case, is the violation of fundamental rights, specifically the right to life and physical integrity, by foreign states on the territory of another state. First and foremost, the extraterritorial nature of the violation and the different nation-

22 See to this effect Muckel, S., "Keine Grundrechtsträgerschaft eines Arbeitgeberverbandes öffentlicher Unternehmen", *JA* 2020, pp. 476-478, partly p. 477, see also Muckel, S., Schönberger, S., "Wandel des Verhältnisses von Staat und Gesellschaft - Folgen für Grundrechtstheorie und Grundrechtsdogmatik", *VVDStRL* 2020, vol. 79 (2019), pp. 245-346.

23 Payandeh, M., Sauer, H., "Staatliche Gewährleistungsverantwortung für den Schutz der Grundrechte und des Völkerrechts", *NJW* 2021, p. 1570 f.

ality of the perpetrators is objected to, although Germany—by ceding its territory— indirectly contributed to the violation of the right to life and physical integrity under Art. 2 (2) GG.[24]

According to the Federal Administrative Court, "the responsibility of public authority bound by the Basic Law, and therefore the scope of fundamental rights protection, generally ceases where an event is fundamentally shaped by a foreign power in accordance with its independent will, regardless of the actions of the Federal Republic of Germany".[25] The Court thereby follows the longstanding jurisprudence of the Federal Constitutional Court.[26] As a result, the Court rules out a constitutional responsibility of the Federal Republic for military operations on the territory of Yemen, as the requirements for an indirect infringement (*mittelbarer Grundrechtseingriff*) are not met in this case.[27]

The legal basis for the drone attacks in Yemen stems from the decision-making power of a foreign state, namely the United States. Therefore, the threat to the life and physical integrity claimed by the applicants cannot be attributed to the Federal Republic. From an argumentative standpoint, this solution appears to be satisfactory. However, this conclusion is not without difficulties, some of which are worth highlighting here. The provision of land for use by American forces is the result of several international treaties and agreements to which Germany is a party, including the Paris Agreements of October 23, 1954,[28] the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces of June 19, 1951, and the Additional Agreement of August 3, 1959, which was incorporated into domestic law by the NATO troop statute of August 18, 1961.[29] Despite the fact that the federal government is not involved in the decision-making of the United States or in the physical execution of the operation, it facilitates its implementation by permitting the use of German territory as a relay station, thereby enabling drone attacks, albeit only those that comply with German law.[30] The Court fails to address a significant aspect: German territory serves as an intermediary link between the American decision-making and operational process. Without the Ramstein air base these operations would have been impossible or the US would have been compelled to seek alternative solutions and territories. Germany's political decision-making authority in the international arena is consequently linked to fundamental rights in a "corollary" manner.[31]

To rule out the possibility of German responsibility for the American military opera-

24 "Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person ist unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden."

25 § 30 of the judgment: "Die verfassungsrechtliche Verantwortlichkeit der an das Grundgesetz gebundenen öffentlichen Gewalt, und damit auch der Schutzbereich der Grundrechte, enden daher grundsätzlich dort, wo ein Vorgang in seinem wesentlichen Verlauf von einer fremden Macht nach ihrem, von der Bundesrepublik Deutschland unabhängigen Willen gestaltet wird."

26 BVerfGE 66, 39, 62; BVerfGE 140, 317, 347, see on the latter decision, in French: Conseil d'Etat - Jurisprudence étrangère (Cour constitutionnelle fédérale, décision 2 BvR 2735/14 du 15 décembre 2015), *RIDC* 2016, pp. 547-550.

27 For a concise discussion of the concept of fundamental rights infringement (*Grundrechtseingriff*), see Voßkuhle, A., Kaiser, A.-B., "Grundwissen - Öffentliches Recht: Der Grundrechtseingriff", *JuS* 2009, pp. 313-315.

28 Federal Law Gazette, 1955 II, p. 253.

29 Federal Law Gazette, 1961 II, pp. 1183, 1190 f., 1218 f.

30 BVerwGE 154, 328, 6. April 2016.

31 Critically, Payandeh, M., Sauer, H., "Staatliche Gewährleistungsverantwortung für den Schutz der Grundrechte und des Völkerrechts", *NJW* 2021, p. 1571 f.

tions, the Court examines the use of buildings at Ramstein Air Base and determines that they exclude "threats to fundamental rights by drone operations that violate international law".[32] Even if the German government was aware of new constructions and modifications aimed at facilitating drone attacks, it is necessary to prove that American military personnel were aware of the "illegality under international law" of their actions.[33] The lack of this intangible element is exacerbated by the insufficiency of the tangible component. Despite the physical presence of military equipment on the territory, Germany cannot be held responsible for any violation of fundamental rights in this case, because protection obligations, arising from Art. 2(2) GG,[34] and consequently the obligation to act, only arises if the acts in question occurred on German soil and demonstrates a "relevant decision-making character" (*relevanten Entscheidungscharakter*) on the part of the German authorities.[35] This material limitation on fundamental rights protected by the Federal Constitution does not require a complex analysis. Despite the clear language of the Basic Law, it is not intended as a universal instrument of fundamental rights protection. If the violation does not stem from the actions or decision-making processes of the German government, the Federal Administrative Court cannot find an obligation to prevent such violations, which would be subject to judicial review. The Court's restrictive interpretation of the State's obligation to protect is further emphasized by the existence of a "practice of actions of the other State contrary to international law",[36] beyond "isolated cases",[37] thereby obliging Germany to intervene "on the basis of the duty to protect"[38] (§ 54 of the judgment). The Federal Government's margin of appreciation in international matters and the lack of assessment of drone operations under international law seem unconvincing (§§ 55 ff. of the judgment). The Court appears to be treading a fine line between legal and political matters, relying on the premise that the United States, as the authority overseeing the operations, bears exclusive responsibility for the decision-making process, and refraining from making a definitive statement regarding the German State's obligation to provide protection. However, this is not the end of the matter, as an individual constitutional appeal (*Verfassungsbeschwerde*) (2 BvR 508/2) was filed in March 2021 under Art. 93(1-4) of the Federal Law against the judgment of the Federal Administrative Court.

32 § 31: "Grundrechtsgefährdungen durch völkerrechtswidrige Drohneneinsätze".

33 Sachs, M., "Schutz gegen von Deutschland mitverursachte Grundrechtsverletzungen von Ausländern durch fremde Staaten im Ausland", *JuS* 2021, p. 805.

34 See generally Alexy, R., *Theorie der Grundrechte*, 1. Ed., 1985, Nomos, p. 414 f.; Klein, E., "Grundrechtliche Schutzpflicht des Staates", *NJW* 1989, p. 1633 f.

35 § 50 of the judgment.

36 "Praxis völkerrechtswidriger Handlungen des anderen Staates".

37 "isolierte Einzelfälle".

38 "aufgrund der Schutzpflicht".

B. Civil servants

1. Civil servants and the prohibition to strike (Federal Constitutional Court, decision of the Second Chamber of June 12, 2018, 2 BvR 1738/12).

In a ruling handed down on June 12, 2018[39] the Federal Constitutional Court conclusively settles the question of whether civil servants are allowed to exercise their right to strike. In line with settled case law, the Court's Second Chamber clarifies the restrictions and extent of the prohibition. This judgment does not come unexpectedly given that it is consistent with the German understanding of the civil service, notwithstanding some early reservations expressed by certain scholars.[40]

Four teachers each brought an individual constitutional complaint to the Court, challenging the disciplinary measures imposed on them after participating in various social movements, appealing unsatisfactory decisions of the lower administrative courts. Two central issues were raised: the constitutionality of the prohibition of the right to strike under Art. 9 GG on freedom of association,[41] and whether this prohibition was compatible with Art. 11 ECHR[42] and the case law of the European Court of Human Rights.[43] Without compromising Art. 9(3) GG or conflicting with European norms and case law, the Chamber relied on two justifications, an internal and an external, for the prohibition of the right to strike by civil servants.

Even during the Weimar era, the 1919 Constitution did not explicitly grant civil servants the right to strike. In 1922, President Friedrich Ebert enacted a regulation based on Article 48(2) of the Weimar Constitution, which prohibited civil servants of the *Reichsbahn* (Imperial Railway Company) from leaving their positions.[44] However, this provision remained isolated and neither the government nor the *Reichstag* took action to expressly prohibit strikes. It only emerged in case law as a principle derived from the systematic reading of civil service law.[45] The Basic Law does not explicitly recognize either the right or prohibition of strikes by civil servants. On state level, only one constitution, that of the

39 2 BvR 1738/12, points 1-191.

40 Already in the 1970s, voices were raised against this ban: see, in general, Isensee, J., *Beamtenstreik. Zur rechtlichen Zulässigkeit des Dienstkampfes*, 1971, Bonn, Godesberger Taschenbuch-Verlag, p. 11: "Das Streikverbot für Beamte [...] ist keine Selbstverständlichkeit mehr".

41 "All Germans have the right to form associations or societies. [...] The right to form associations for the preservation and improvement of working and economic conditions is guaranteed to all people and in all professions. Agreements which restrict or tend to restrict this right are null and void and measures taken to this end are illegal [...]".

42 "Everyone has the right to freedom of peaceful assembly and to freedom of association, including the right to form and join trade unions for the protection of his interests"; § 2: "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, the police or the administration of the State".

43 ECHR, 12. Nov. 2008, No. 34503/97, *Demir and Baykara v. Turkey*; ECHR, 21. April 2009, No. 68959/01, *Enerju Yapi-Yol Sen v. Turkey*.

44 "[...] die Einstellung oder Verweigerung der ihnen obliegenden Arbeit verboten."

45 BVerfGE (this decision), 147.

Saarland, explicitly prohibits civil servants from striking. According to Art. 115(5) of the Saarland Constitution of December 15, 1947, "the relationship between the civil servant and the state excludes the right to strike".[46] Neither the federal law on the civil service[47] nor the law on the status of civil servants explicitly prohibits the exercise of the right to strike. Given the ambiguity of the constitutional and legislative texts, the prohibition of civil servant strikes rather stems from a broad interpretation of Art. 33(4-5) GG, which states that "the exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law",[48] and that "the law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service".[49] When evaluating the constitutionality of the prohibition on the right to strike for civil servants, the Federal Constitutional Court differentiates between "particularly substantial"[50] principles and other principles that regulate public service: only the former should be taken into account by the legislature.[51] However, there is no entitlement to the retention of a particular configuration of civil service law. The legislature has the power to alter the contours of civil service law without affecting the guiding principles of public service.[52] There is no clear-cut answer to the question of which principles are traditional in nature, but there is a consensus on what could be considered the fundamental principles of public service. The adjective "traditional"[53] refers to the different regimes before the establishment of the Federal Republic of Germany. A principle is considered traditional not because of its normative form, but because of its substance. For a rule to be considered a traditional principle, it must satisfy two cumulative conditions: it must have been a stable part of the pre-constitutional background (before 1949), and its content must be compatible with the provisions of the Basic Law.[54] Some examples of traditional principles are the career system (*Laufbahnprinzip*), disciplinary law (*Disziplinarrecht*), the neutrality in the exercise of the function,[55] and the duty of loyalty (*Treuepflicht*).[56]

The prohibition of strikes found in Art. 33(4-5) GG and its categorization as a traditional autonomous principle of civil service do not fundamentally contradict the freedom of collective or individual association granted in Art. 9(3) GG. Pursuing better working conditions is part of wage agreements, and the right to strike is a necessary tool to balance parties' bargaining power. However, the conditions of public servants, including

46 "Die Stellung des Beamten zum Staat schließt das Streikrecht aus."

47 *Bundesbeamtengesetz* (*BBG*) of 1. Sept. 1953 and *Beamtenstatusgesetz* (*BeamtStG*) of 1. April 2009.

48 "Die Ausübung hoheitsrechtlicher Befugnisse ist als ständige Aufgabe in der Regel Angehörigen des öffentlichen Dienstes zu übertragen, die in einem öffentlich-rechtlichen Dienst- und Treueverhältnis stehen."

49 "Das Recht des öffentlichen Dienstes ist unter Berücksichtigung der hergebrachten Grundsätze des Berufsbeamtentums zu regeln und fortzuentwickeln."

50 "*besonders wesentlich*".

51 BVerfGE 8, 1, 16 f.; BVerfGE 71, 225, 268.

52 Lecheler, H., § 110 (*Der öffentliche Dienst*), in Isensee, J., Kirchhof, P. (eds.), *HStR*, 3. Ed., 2007, vol. 5, C.F. Müller, p. 561 f.

53 "Hergebracht".

54 For the Court, these "traditional" principles constitute the "core" (*Kernbestand*) of public service (this decision, § 118).

55 Battis, U., "Beamte", in Heun, M., Honecker, M., Morlok, M., Wieland, J. (eds.), *Evangelisches Staatslexikon*, 2006, Kohlhammer, p. 176.

56 Jellinek, W., *Verwaltungsrecht*, 2. Ed., 1929, Springer, p. 342, p. 344; BVerfGE 29, 334, 346 f.; BVerfGE 119, 247, 264.

their pay, are regulated by law. On the other hand, trade unions and professional associations participate in collective agreements on issues such as remuneration, benefits, and working conditions. Therefore, the legitimizing purpose of a strike is thus lacking in the case of civil servants, as the unilateral relationship they have with regard to their salary is not open to discussion between parties advocating opposing interests. The civil servant is an "agent" of public power, and as such, a strike could be seen as a violation of the legislature's freedom of decision and an attack on the principle of parliamentary democracy.

Art. 9(3) GG guarantees the fundamental right of association to all individuals, regardless of profession. This includes the right to establish an association to pursue specific aims, such as improving economic and professional conditions. The case law of the Federal Constitutional Court has consistently upheld this principle.[57] The scope of protection provided by Art. 9(3) GG is broad and applies to all professions, including civil service employees (*Angestellte*) and civil servants (*Beamte*), as has been confirmed by the Federal Constitutional Court.[58] The right of association is guaranteed without reservations, which does not mean that any restriction of its exercise cannot be "excluded in advance".[59] Fundamental rights may be restricted by the protection of the fundamental rights of third parties (the "collision of fundamental rights" hypothesis[60]) or by constitutional provisions containing rights that may limit them.[61]

In the Court's case law, there is no explicit account of the relationship between Art. 9(3) and Art. 33(5) GG.[62] A systemic and teleological interpretation leads to the conclusion that the traditional principles of public service constitute a constitutional norm that conflicts with the freedom of association and indirectly justifies its restriction, so that a balancing between the two constitutional provisions is not possible. To strike a balance between the two, the principle of practical concordance (*Prinzip der praktischen Konkordanz*)[63] should be applied. The latter requires taking account of the substance and scope of protection of both legal provisions, without undermining one in favour of the other.[64] The unity of the Constitution demands that constitutional norms be interpreted harmoniously. Therefore, the prohibition of strikes in Art. 33(4-5) GG and its characterization as a traditional autonomous principle of public service do not conflict with the freedom of collective or individual association in Art. 9(3) GG. The right to strike is necessary to ensure a balance of bargaining power between social parties. However, the professional conditions of civil servants, including the principle of compensation, are regulated by law, while trade unions and professional associations participate in collective agreements on remuneration, benefits, or working conditions. Therefore, the objective of a salary agreement,

57 BVerfGE 4, 96, 107; BVerfGE 17, 319, 333; BVerfGE 18, 18, 25 f.

58 BVerfGE 19, 303, 312, 322.

59 § 117: "Damit ist aber nicht jede Einschränkung von vornherein ausgeschlossen".

60 "Kollidierende Grundrechte Dritter".

61 § 117: "[…] [A]uch vorbehaltlos gewährleistete Grundrechte können durch kollidierende Grundrechte Dritter und andere mit Verfassungsrang ausgestattete Rechte begrenzt werden"; established case law: BVerfGE 28, 243, 261; BVerfGE 84, 212, 228; BVerfGE 92, 26, 41. The traditional principles guaranteed in article 33, paragraph 5 GG are likely to constitute such restrictions.

62 § 138: "[…] keine ausdrückliche Aussagen zum Verhältnis von Art. 9 Abs. 3 GG zu Art. 33 Abs. 5 GG".

63 Hesse, K., *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20. Ed., 1999, C.F. Müller, p. 28, for additional references: Alexy, R., *Theorie der Grundrechte*, 1. Ed., 1985, p. 75 f.

64 Morlok, M., Michael, L., *Staatsorganisationsrecht*, 4. Ed. 2019, Nomos, p. 62.

which legitimizes strikes, is missing in the case of civil servants.[65] Civil servants have a unilateral relationship with regard to their salary that is not subject to discussion between parties with opposing interests. The relationship between civil servants and their superiors is akin to the relationship of public authority (*besondere Gewaltverhältnisse*),[66] which deprives civil servants of their rights against the administration.[67]

Regarding the compatibility of the said prohibition with Article 11 of the European Convention on Human Rights (ECHR),[68] the BVerfG stresses that the Basic Law should be interpreted in a manner that is "favorable" to international law (*völkerrechtsfreundlich*), although the Convention holds an infra-constitutional status in the national legal system.[69]

The protection offered by Article 11 ECHR extends not only to workers, but also to public servants. Until 2008,[70] the Strasbourg Court's case law did not include the right to collective bargaining or the right to strike within the scope of the substantive protection[71] of freedom of association. However, the ECtHR has recently expanded the range of protection and established that trade unions operating within the public service have the right to strike. An absolute and general ban on this right thus violates the Convention.[72] Notably though, freedom of association and the right to strike under Article 11(2) ECHR may be limited, provided that the restrictions are imposed by law, if they are necessary in a democratic society and only for legitimate purposes such as national and public security, maintaining order, and protecting the rights and freedoms of others. In this regard, a restriction that satisfies the formal (law) and substantive (pursuit of legitimate aims) requirements of Article 11(2) does not constitute a violation of the Convention. Therefore, the "principle of freedom of association can be compatible with the prohibition of the right to strike of civil servants exercising functions of authority on behalf of the State", such as police officers and military personnel, as well as some diplomatic staff and persons with a ministerial mission.[73]

According to the definition provided by the Strasbourg Court, the German ban on the right to strike prima facie violates Article 11(1) ECHR, unless it has been laid down in a law, which states the legitimate aims of the measure. The BVerfG finds that the ban meets

65 § 140: "Da Beamte von der tariflichen Lohngestaltung ausgeschlossen sind".

66 Jesch, D., *Gesetz und Verwaltung. Eine Problemstudie zum Wandel des Gesetzmäßigkeitsbegriffs*, 1961, Tübingen, Mohr Siebeck, p. 175 f. and p. 206; Degenhart, C., *Staatsrecht I: Staatsorganisationsrecht*, 28. Ed., 2012, Heidelberg, C.F. Müller, p. 129: "Besondere Gewaltverhältnisse [...] sind Rechtsverhältnisse, in denen der Bürger in engeren Beziehung zur Verwaltung steht als im allgemeinen Staat-Bürger-Verhältnis [...]".

67 § 150.

68 "Everyone has the right to freedom of peaceful assembly and to freedom of association, including the right to form and join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article does not prohibit the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, the police or the administration of the State".

69 § 163 f.

70 ECHR, *Demir and Baykara v. Turkey*, op. cit. § 85 f.

71 ECHR, 15 Sept. 2009, nº 30946/04, *Kaya and Seyhan v. Turkey*, § 5 f.

72 ECHR, 21 April 2009, nº 34503/97, *Enerji Yapi-Yol Sen v. Turkey*, § 32: "Legal restrictions on the right to strike should define as clearly and narrowly as possible the categories of civil servants concerned".

73 ECHR, *Enerji Yapi-Yol Sen v. Turkey*, op. cit., § 32f.

both these formal and substantive requirements of the justification. Although there is no express law to that effect, the restriction is provided for by national law within the meaning of Article 11(2) ECHR. Federal and *Länder* civil service laws provide the legal framework for unauthorized leaving of service and the obligation to follow the superiors' instructions. Regarding the necessity condition, the German Court argues that due to the unique characteristics of the German civil service, such a restriction of the freedom of association is indispensable in a democratic society.[74]

Therefore, civil servants cannot participate in a strike under domestic law, and disciplinary sanctions imposed on the plaintiffs pursue legitimate aims, particularly in the case at hand the sanction had been central in ensuring education and a functional school system.[75]

2. Appeal of the rejected applicant for the civil service (Federal Administrative Court, judgment of 17 March 2021; BVerwG 2 B 3.21)

The concept of public service[76] is generally associated with the provision of services that can only be provided by public entities (such as the *Länder*, the *Bund*, and special institutions and bodies under public law), given that private companies—even public ones—do not have the authority to do so. The notion of civil service is, however, not restricted to civil servants in a strict sense, but may also include employees and workers under private law, regardless of the fact that the latter are not entitled to the protections afforded to civil servants.

Art. 33 GG is also known as the "civil servant article" (*Beamtenartikel*)[77] as it forms the basis for German civil service law. The wording of this provision, and particularly paragraph 4 thereof, allows for the possibility of non-permanent civil service jobs. Private law relationships are therefore not excluded. However, in both cases, the public employer is bound by Art. 33(2) GG, which lays down the principle of equal access of Germans to "any public office according to his aptitude, qualifications and professional achievements", as well as by the norms regarding access to public jobs (e.g. the law on equal treatment) and the respect of fundamental rights.

The Federal Administrative Court's ruling on March 17, 2021 aims to clarify which legal remedy is available to an applicant for a position in the public service: a position open to both civil servants (*Beamter*) and employees (*Angestellte/Tarifbeschäftigte*)[78] who are bound to their employer by means of a private law contract. All candidates who applied for the job were classified as employees: therefore, both collective agreements of the civil service and common labour law are applicable to them.[79] One candidate brought a claim

74 § 183.

75 § 179.

76 On the concept of public service: Jellinek, W., *Verwaltungsrecht*, 2. Ed., 1929, Springer, § 16.

77 Badura, P., "Artikel 33", in Maunz, T., Dürig, G., *Grundgesetz Kommentar*, 2017, C.H. Beck; Kunig, P., "Das Recht des öffentlichen Dienstes", in Schmidt-Aßmann, E., Schoch, F., *Besonderes Verwaltungsrecht*, 14. Ed., 2008, De Gruyter, § 6. For a short account: Kordeva, M., "Le Personnel - Allemagne", in Abderemane, K., Clays, A., Langelier, É., Marique, Y., Perroud, T., *Manuel de droit comparé des administrations européennes*, 2019, Bruylant, pp. 307-314.

78 Hebeler, T., *Verwaltungspersonal. Eine rechts-und verwaltungswissenschaftliche Strukturierung*, 2008, Nomos, p. 110 f.; Battis, U., "Beamtenrecht", in Ehlers, E., Gehling, M., Pünder, H. (eds.), *Besonderes Verwaltungsrecht*, 3. Ed., 2013, vol. 3, points 19 f.

79 Schmidt, T.-I., *Beamtenrecht*, 2017, Mohr Siebeck, p. 30.

to the administrative court, whose jurisdiction was only recognized in cases where a tenured public employee was dismissed from a recruitment process, whereas disputes arising from the relationship between employees and the administration were traditionally dealt with by labour courts (*Arbeitsgerichte*). However, in a ruling on January 15, 2021, the Bremen Higher Administrative Court recognized that an applicant who asserted his right under Art. 33(2) GG could appeal to the administrative court, even if the job was meant for an employee rather than a tenured civil servant. The Bremen Court also allowed an appeal to the Federal Administrative Court under Section 17a, paragraph 4 sentence 4 of the Law on the Organization of Justice, taking into account the peculiarities of a claim for a provisional order in this type of dispute.

The Federal Administrative Court has ruled that the right to apply for a public job under a recruitment procedure, compliant with Art. 33(2) GG, does not fall under either public law or civil law. Therefore, labour courts still have jurisdiction over this matter. However, the Court's analysis suggests that the right to a selection process under Art. 33(2) GG has a uniform public law character under Section 40 of the Administrative Jurisdiction Act (*Verwaltungsgerichtsordnung*), which states that "The administrative litigation route is open for all public law disputes that are not of a constitutional nature, to the extent that the disputes are not expressly assigned to another court by federal law".[80] This provision has been interpreted as to allow both civil servants and public service employees to appeal against the selection procedure for a public position. This ruling appears to depart from the Federal Labour Court's (*Bundesarbeitsgericht*) settled case law, which generally treats disputes arising from selection procedures as civil law matters within the jurisdiction of labour courts, even if the selected candidate is a tenured civil servant.[81]

This discrepancy between the highest courts may have necessitated a joint senate meeting of the federal supreme courts[82] in the event of a divergence in case law among the supreme courts, under Section 17a, paragraph 4 of the Law on the Organization of Justice (*Gerichtsverfassungsgesetz*). In such a scenario, the Federal Labour Court could have decided not to adopt the interpretation of the Federal Administrative Court. Therefore, this ruling on the competent court in a dispute between a candidate for public employment and a non-tenured employee or civil servant does not actually conflict with previous case law.

C. Administrative Institutions or Agencies

1. The discretionary power of the administration and the regulatory competence of the Federal Network Agency (Federal Administrative Court, judgment of 28 November 2007, 6 C 42/06).

Under German administrative law, the exercise of bound competences by the administration is the rule, while discretionary powers are the exception.[83] The decision-

80 Der Verwaltungsrechtsweg ist in allen öffentlich-rechtlichen Streitigkeiten nichtverfassungsrechtlicher Art gegeben, soweit die Streitigkeiten nicht durch Bundesgesetz einem anderen Gericht ausdrücklich zugewiesen sind.

81 E.g. Federal Labour Court, judgment of 5 Nov. 2002, 9 AZR 451/01-, BAGE 103, 212-217.

82 "Gemeinsamer Senat der obersten Gerichtshöfe".

83 Autexier, C., *Introduction au droit public allemand*, 1997, PUF, pp. 214-215; Fromont, M., *Droit administratif des Etats européens*, 2006, PUF, pp. 238 f.

making powers of the administration (which are not bound) are typically classified into three categories: general administrative discretion (*allgemeines Verwaltungsermessen*), planning discretion (*Planungsermessen*), and discretion in the assessment of facts (*Beurteilungsspielraum*).[84] Judicial review of these types of discretion is very limited if not even non-existent. This traditional distinction of discretionary powers has been extended by the introduction of the notion of regulatory discretion, which is implemented in the field of network industries (such as energy, telecommunications, and postal services). In its decision dated November 28, 2007,[85] the Federal Administrative Court upheld the existence of regulatory discretion exercised by the Federal Network Agency (*Bundesnetzagentur*, *BNetzA*) in imposing obligations for access to telecommunication networks that promote free competition, as provided for under Section 21 of the Federal Telecommunications Act (*Telekommunikationsgesetz*, *TKG*). Decision-making under the Telecommunications Act relies on complex assessments which go beyond the classical discretionary powers and tripartite categorization. Interestingly, the same level of discretion is said to be held by companies with significant market power in a particular competitive market.[86] The Federal Administrative Court's decision to recognize discretionary power in the exercise of regulatory activity rests on two central considerations. Firstly, the nature of the norms at issue, which must be combined with other provisions, meaning that the examination of the facts cannot be separated from the exercise of discretionary power. Secondly, the Federal Network Agency is a specialized administrative body with specific legitimacy in the exercise of its decision-making powers.

Based on the aforementioned case law, it is clear that regulatory discretion has evolved or even transformed into a cross-sector legal concept (*sektorenübergreifende Figur*).[87] This new legal concept has also been recognized by the Federal Court of Justice since 2014. The Federal Network Agency has been given a margin of discretion "that in some respects resembles a margin of discretion and in other respects a regulatory discretion power".[88]

The proper dogmatic classification of this new legal figure remains uncertain. Some scholars argue that it should be classified as a subcategory of planning discretion, although it is not entirely clear whether it can be equated with regulatory discretion. Others acknowledge the challenges of using existing categories and suggest combining the three types of discretion to define this new legal figure. Some have also suggested a "return" to a single systemic category of administrative discretion in German administrative science.[89]

84 Ludwigs, M., "Kontrolldichte der Verwaltungsgerichte", *DÖV* 2020, p. 405 f.

85 BVerwG, judgment of 28 Nov. 2007, 6 C 42/06.

86 BVerwG, decision (Urteil) of 11 Dec. 2013, 6 C 24/12; BVerwG, judgment of 5 May 2014, 6 B 46/13.

87 Ludwigs, M. (2020), "Kontrolldichte der Verwaltungsgerichte" op. cit., p. 407; Ludwigs, M., "Konvergenz oder Divergenz der Regulierung in den Netzwirtschaften - Zur Herausbildung allgemeiner Grundsätze im Recht der Regulierungsverwaltung", in Ludwigs, M. (ed.), *Festschrift für Matthias Schmidt-Preuß*, 2018, p. 706 f.; Ludwigs, M., Rechtsprechungsanalyse Wirtschaftsverwaltungsrecht", *VERW* 2016, p. 276 f.

88 Established case law: see, e.g., BGH, judgment of 12 Dec. 2017, EnVR 2/17.

89 Ludwigs, M., "Das Regulierungsermessen als Herausforderung für die Letztentscheidungsdogmatik im Verwaltungsrecht", *JZ* 2009, p. 292 f.; Hwang, S.-P., Wirksamer Wettbewerb durch offene Normen – Zum Funktionswandel der unbestimmten Rechtsbegriffe im Telekommunikationsrecht, *AöR* 2011, p. 553 f.; Proelß, A., "Das Regulierungsermessen – eine Ausprägung des behördlichen Letztentscheidungsrechts?", *AöR* 2011, p. 411 f.

2. Inadmissible appeal of a Landkreis against a decision regarding delegated competences (Federal Administrative Court, judgment of December 9, 2021 - 4 C 3/20).

At the end of 2021, the Federal Administrative Court issued its ruling on the objection (*Widerspruchsbescheid*) which overturned an administrative decision charging a property € 94.347,30 for the immediate execution of a demolition measure. The contested decision ordered the *Landkreis* (the administration of a municipality association) to pay the costs for continuing the legal proceedings to[90] and called for the appointment of a representative in the preliminary proceedings (*Vorverfahren*). The Federal Administrative Court rejected the appeal and thereby followed the lower instances which had equally rejected the claim. However, behind the technical nature of this case lies the protection of the principle of self-government (*Selbstverwaltung*) of municipalities and associations of municipalities, whose competence can generally not be touched by the federal administration. This principle[91] can also be traced down in other jurisdictions. Art. 72 of the French Constitution of October 4, 1958, for instance, states that "these communities [municipalities, departments, overseas territories] are freely administered by councils elected under the conditions laid down by law".[92] According to Art. 28(1) GG, citizens get to vote for their representatives at the municipal level, which gives the municipalities a sort of "double democratic legitimacy" - their legitimacy not only derives from parliamentary elections, but also from their "communal-administrative"[93] functions. Municipalities and associations of municipalities exercise "state power" (*staatliche Gewalt*)[94] and are "integrated" into the "state organization".[95]

In a standard scenario, the appeal against an objection does not pose any particular procedural difficulties. According to Section 73 of the Administrative Jurisdiction Act (*Verwaltungsgerichtsordnung*, *VwGO*), the ruling on an objection is an act subject to judicial review, even if the administrative authority that issued the decision annuls it or if it is a decision that actually favors the person concerned. If the decision is not annulled, then it applies "in the form" (*in der Gestalt*) of the ruling on the objection in accordance with Section 73, paragraph 1, first sentence of the *VwGO*.[96] Both cases concern the annulment of

90 There are 295 *Landkreise* or associations of municipalities in Germany. The Basic Law grants them a certain degree of autonomy. Pielow, J.-Ch., Groneberg, S.-Th., "Die deutschen Landkreise", *JuS* 2014, pp. 794-799, esp. p. 796.

91 Hendler, R., "§ 143 Das Prinzip Selbstverwaltung", in Kirchhhof, P., Isensee, J., *HStR*, 3. Ed., 2008, vol. 6 (*Bundesstaat*), C.F. Müller, pp. 1103-1140, in particular p. 1120 f.; see also Burgi, M., "Selbstverwaltung angesichts von Europäisierung und Ökonomisierung", in *VVDStRL* 2003, nº 62, p. 405; Püttner, G., "§ 144 Kommunale Selbstverwaltung", in Kirchhhof, P., Isensee, J., *HStR*, 3. Ed., 2008, vol. 6 (*Bundesstaat*), C.F. Müller, p. 1149 f.

92 The principle of free administration of local authorities has been recognized as a fundamental freedom by the Council of State in the context of an emergency procedure: CE, 18 Jan. 2001, *Commune de Venelles*, Rec. p. 18, applying article L. 521-2 of the Code of Administrative Justice, the administrative judge declares that the principle of free administration "is among the fundamental freedoms to which the legislature has thus intended to grant special jurisdictional protection".

93 Grzeszick, B., "Artikel 20", in Dürig, G., Herzog, R., Scholz, R., *Grundgesetz Kommentar*, 97th actualization, 2022, C.H. Beck, points 174-175: "[...] eine duale demokratische Legitimation [...]".

94 BVerfGE 61, 82, 103; BVerfGE 73, 118, 191; BVerfGE 83, 37, 53 f.

95 BVerfGE 83, 37, 54; BVerfGE 107, 1, 11.

96 "If the authority does not remedy the objection, a ruling on the objection shall be handed down" - *Hilft die Behörde dem Widerspruch nicht ab, so ergeht ein Widerspruchsbescheid.*

an administrative act. According to the "addressee theory" (*Adressatentheorie*)[97] the applicant, as the recipient of the decision, has the right to file a claim. However, if an administrative act that would have been favorable to the recipient is rejected by a decision of the competent authority, the "addressee theory" no longer applies. In such cases, standing is based on the potential violation of a norm as defined in Section 42, paragraph 2 of the Administrative Jurisdiction Act.[98]

The situation becomes more complicated when a favorable administrative act is revoked by the competent administration. The addressee's claim in this situation is not an action for the issuance of an individual administrative act (*Verpflichtungsklage*). Rather, the applicant will request the annulment of the objection.[99] This would lead to the re-application of the favorable measure that was previously revoked. However, in the case at hand, the ruling on the objection is addressed to the administration of a *Landkreis*. If the latter, as the competent authority, has acted within the scope of its authority by exercising its right of self-government in accordance with Art. 28(2) GG ("Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility within the limits prescribed by the laws"),[100] the annulment of the objection decision by another authority would violate the right of self-government of the district administration. Therefore, the initially competent authority has the possibility, as a public entity, to file an action for annulment and is entitled to do so under Art. 28(2) GG. Therefore, the addressee theory cannot be applied because this is not a violation of the general freedom of action protected by Article 2(1) GG ("Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law"), but a violation of the right of self-government under Art. 28(2) GG. On the other hand, if the administration acts within the framework of delegation, it is only implementing tasks delegated by the state. The decision then becomes an extraneous act, and an action for annulment can be declared admissible. This finding however only applies if the contested measure, taken within the framework of a delegation, also affects the autonomy of the appellant administration.

According to the Court, "a district, as an association of municipalities, is entitled, in the context of legal protection before the administrative court, to assert its right to self-government (Art. 28(2) GG) with regard to the district's municipal tasks".[101] Additionally, "the right to carry out tasks as one's own responsibility according to Article 28(2) GG concerns only those tasks assigned by law within the district's own sphere of action". This

97 Hüttenbrink, J., "Klagearten", in Kuhla, W., Hüttenbrink, J., *Verwaltungsprozess*, 3. Ed., 2002, C.H. Beck, points 59-60: addressee theory dictates that the addressee of an administrative act always has an interest in acting, because he is concerned by the act. However, in case of collective regulations (*Allgemeinverfügungen*) this theory does not automatically apply.

98 "Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission" - Soweit gesetzlich nichts anderes bestimmt ist, ist die Klage nur zulässig, wenn der Kläger geltend macht, durch den Verwaltungsakt oder seine Ablehnung oder Unterlassung in seinen Rechten verletzt zu sein.

99 Hufen, F., *Verwaltungsprozessrecht*, 12. Ed., 2021, § 14, point 18.

100 See on article 28 GG: Schwarz, K.-A., "Artikel 28", in v. Mangoldt, H., Klein, F., Starck, C., Grundgesetz Kommentar, 7. Ed., 2018, vol. 2, C.H. Beck, pp. 580-651; Dreier, H., "Artikel 28", in Dreier, H., *Grundgesetz Kommentar*, 3. Ed., 2015, vol. 2, Mohr Siebeck, pp. 657-762.

101 § 11 of the decision.

sphere of action must be distinguished from the delegated sphere of action: "there can be no rights of the district resulting from the tasks delegated to it".[102] If the task falls within the scope of the Federation, it is no longer a matter of municipal or district self-government.

In the present case, the law of the *Land* of Saxony-Anhalt, provides that if a district, acting as a planning control authority, decides to demolish a building in danger of collapse through direct execution, the district effectively exercises delegated powers. Costs associated with such demolition accordingly also fall within the scope of delegated powers. Therefore, the annulment of a decision on costs can therefore not constitute a violation of the rights of the *Länder*, in particular the right of self-government. This case must be distinguished from a case arising from ordinary or constitutional law, which is protected from potential interference and thus represents a "right defendable against the State" (*abwehrfähig*).[103] A situation that enjoys legal protection would arise if delegated power would interfere with a competence that belongs to associations of municipalities, such as their right of ownership or right of self-government. However, if the directly enforced measure is unlawful, there is no such legal protection. In other words, the legality of the measure implies the right to reimbursement of the costs incurred.

The Federal Administrative Court eventually concluded that there is no constitutionally protected legal interest in this case. Art. 28 GG does not cover all municipal revenue and expenditure within the scope of the right to self-government. However, the Court acknowledges that associations of municipalities require adequate financial resources to carry out delegated tasks. Such associations may object to the execution of delegated tasks if the financial means provided are insufficient. However, in the present case, the resources were deemed adequate by the higher administrative court, and the financial burden of the objection was not disproportionate to the delegated power.

Although the facts of this case are not exceptional, they do provide an opportunity to address a problem of administrative procedural law that is not frequently discussed in case law: the admissibility of actions brought by local authorities against state authorities. Communities and associations operate outside the purview of the state, and therefore, an action for annulment is only admissible if there has been a violation of the right to self-government or other rights arising from ordinary law or the constitution. As for delegated power, standing will only be granted if the measure affects the administrative autonomy of the communities.

D. Public contracts

1. Qualification of a service contract to cover the accommodation and heating costs of refugees and asylum seekers (Federal Court of Justice, BGH [VIII. Zivilsenat], judgment of February 9, 2021 - Aktenzeichen VIII ZB 20/20).

In contrast to France, German public contracts are governed by civil law, which is based on the principle of equality between the contracting parties and the principle of

102 § 11 of the decision; BVerwGE 165, 33; BVerwGE 19, 121, 123.
103 § 13 of the decision.

"*pacta sunt servanda*".[104] Historically, the involvement of the administration in contractual relationships was considered unnatural and Otto Mayer's statement that "valid state contracts in the field of public law are absolutely inconceivable"[105] is often cited to explain the challenges encountered in incorporating the concept of contract in German public law.

The principle of the legality of public law contracts is enshrined in Section 54 of the VwVfG: "A legal relationship under public law may be constituted, amended or annulled by agreement (agreement under public law) in so far as this is not contrary to legal provision. In particular, the authority may, instead of issuing an administrative act, conclude an agreement under public law with the person to whom it would otherwise direct the administrative act."[106] However, it is important to note that this provision does not provide a comprehensive description of these contracts. According to Section 1(1) the provision applies only to the "administrative activities under public law of the official bodies".[107] Section 9 in turn further clarifies that "administrative procedure" includes those activities of the authorities "having an external effect and directed to the examination of basic requirements, the preparation and adoption of an administrative act or to the conclusion of an administrative agreement under public law."[108] Accordingly, only those contracts which are concluded by the administration have the quality of a public contract provided that they produce effects outside the administration.[109] Contracts that do not fall within the scope of public law are not considered by the administration as a means of action, but rather as instruments that illustrate the difficulties in defining the boundaries of public law.[110] In addition to this *summa divisio*, contracts related to social services are subject to a special regime that falls under the jurisdiction of the social court (Sections 53 to 61 of the Social Code, *Sozialgesetzbuch*, *SGB*). It is important to note, however, that there is a clear distinction between public law contracts (*öffentlich-rechtliche Verträge*) and

104 This Latin phrase is found in Article 1103 of the French Civil Code, "Contracts legally formed take the place of law to those who have made them", but also in German law of obligations (§§ 241 and 242 of the German Civil Code, *Bürgerliches Gesetzbuch*, *BGB*); Stelkens, U., "‚Pacta sunt servanda' im deutschen und französischen Verwaltungsvertragsrecht," *DVBl* 2012, pp. 609-615.

105 Mayer, O., "Zur Lehre vom öffentlichrechtlichen Verträge", *AöR* 1888, p. 42: "[…] wahre Verträge des Staates auf dem Gebiete des öffentlichen Rechtes überhaupt nicht denkbar".

106 „Ein Rechtsverhältnis auf dem Gebiet des öffentlichen Rechts kann durch Vertrag begründet, geändert oder aufgehoben werden (öffentlich-rechtlicher Vertrag), soweit Rechtsvorschriften nicht entgegenstehen. Insbesondere kann die Behörde, anstatt einen Verwaltungsakt zu erlassen, einen öffentlich-rechtlichen Vertrag mit demjenigen schließen, an den sie sonst den Verwaltungsakt richten würde". Critically on this provision: Jacquemet-Gauché, A., Stelkens, U., "Caractères essentiels des droits nationaux de la procédure administrative en Allemagne", in Auby, J.-B. (ed.), *Droit comparé de la procédure administrative*, 2016, Bruylant, p. 15 f.

107 „Gilt für die öffentlich-rechtliche Verwaltungstätigkeit der Behörden".

108 „Das Verwaltungsverfahren […] ist die nach außen wirkende Tätigkeit der Behörden, die auf […] den Erlass eines Verwaltungsaktes oder auf den Abschluss eines öffentlich-rechtlichen Vertrags gerichtet ist".

109 Jacquemet-Gauché, A., *Droit administratif allemand*, 2022, PUF, p. 187.

110 The literature on the subject is immense. To mention only a few examples: Hoffmann-Riem, Schmidt-Aßmann (eds.), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen*, 1996; and generally Bonk, Neumann, Siegel, "§ 54 Zulässigkeit des öffentlich-rechtlichen Vertrags", *in* Stelkens, Bonk, Sachs, *Verwaltungsverfahrensgesetz Kommentar*, 9. Ed., with bibliographic and case law references; see also the classic Mayer, O., "Zur Lehre vom öffentlichrechtlichen Verträge", *AöR* 1888, pp. 3-86.

administrative contracts (*Verwaltungsverträge*).[111] The term "administrative contracts" refers to all contracts concluded by the administration, not only those governed by public law.[112]

The facts of the case leading to the judgment of February 9, 2021 are as follows. The plaintiff runs six homeless shelters in Berlin. The available places are regularly updated and communicated to the *Land*, which then assigns the refugees and asylum seekers based on need. For four of the six shelters, the plaintiff concluded operating agreements (*Betreiberverträge*) with the defendant, which obliged him to provide and properly operate these shelters with a certain capacity for the temporary accommodation of refugees and asylum seekers. The defendant, in turn, undertook to compensate the plaintiff with a daily amount for each person placed during the period of the declaration of meeting the costs in settlement of the contractual services. On June 21, 2017, Berlin terminated all contracts. A statement of meeting the costs (*Kostenübernahme*) was issued to the refugees and asylum seekers in one of the centers by the employment agency. The plaintiff provided a place in one of the centers after verifying this certificate, which explicitly stated that it did not create "a contractual relationship between the State of Berlin [...] and the operator of the accommodation centers".

The applicant filed a claim against the *Land* for payment of €21.116,96 for the accommodation of refugees from September to December 2017. The question that thus arose was whether the case falls under the jurisdiction of the ordinary or social courts. After the district court (*Landgericht*) had initially affirmed the jurisdiction of the ordinary court, the *Land*'s appeal was rejected by the Higher Regional Court of Berlin. The *Land* was granted permission to appeal to the Supreme Court on the grounds of fundamental importance, which was eventually successful, and the case was referred to the Social Court of Berlin.

In the absence of a specific provision concerning jurisdiction, the decision of whether a dispute falls under public or civil law is to be made in light of the objective nature of the legal relationship from which the claim arises.[113] It should be noted that the administration may use private law means to perform public tasks, as long as there are no public law principles prohibiting such use. In disputes about the execution of the contract, it is not its legal but the manner of its execution that is decisive.[114]

Under Article 13 of the *Gerichtsverfassungsgesetz* (Law on the Organization of the Judiciary), the jurisdiction of the ordinary courts includes "civil law disputes, family matters, and matters of voluntary jurisdiction, as well as criminal cases for which the jurisdiction of administrative authorities or courts is not established or for which special courts authorized under provisions of federal law are not established". The present case concerns

111 On administrative contracts (*Verwaltungsverträge*), see generally Bauer, H., "Verwaltungsverträge", in Hoffmann-Riem, W., Schmidt-Aßmann, E., Voßkuhle, A., Grundlagen des Verwatlungsrechts, 2. Ed., 2012, vol. II (Informationsordnung, Verwaltungsverfahren, Handlungsformen), C.H. Beck, in particular on the diversity of contractual relations in administrative law (pp. 1283 f.); Imboden, M., Der verwaltungsrechtliche Vertrag, 1958, Helbing & Lichtenhahn.

112 Jacquemet-Gauché, A., *Droit administratif allemand*, 2022, PUF, p. 184 f.; Cossalter, P., "Les modèles de contractualisation", *RFDA* 2018, pp. 15-21; Schröder, H., *Le contrat de l'administration en droit européen. French and German law in interaction with European Union law*, 2022, Bruylant, forthcoming; Stelkens, U., Schröder, H., "Allemagne/ Germany", in Noguellou, R., Stelkens, U., (eds.), *Droit comparé des droits publics/ Comparative Law on Public Contracts*, 2010, Bruylant, pp. 307 f.

113 Established case law: GmS-OBG, BSGE 37, 292; BGHZ 97, 312 [313 f.]; GH, BGHZ 89, 250 [251]; BGHZ 204, 378.

114 BVerwGE 76, 71 [73 et seq.]

a dispute under public law regarding basic insurance for jobseekers.[115] A legally binding declaration by a public provider who assumes the housing costs of a person entitled to a benefit can be categorized as a declaration under either public or private law. Under public law, such a declaration of intent may form part of a public law contract, but it may equally stand alone and take the form of a unilateral promise to perform (a "commitment by the public authority to assume obligations" [*hoheitliche Selbstverpflichtung mit Bindungswillen*]).[116] Under private law, the declaration in dispute may be classified as a promise to provide security, a release from a debt, or a commitment to pay a debt.

The dispute at hand falls within the scope of public law, due to the involvement of the Berlin employment agency in the care of refugees and asylum seekers. As the Court emphasizes, the right to assistance for refugees or asylum seekers and the public body's obligation to provide such assistance are two distinct issues. The public entity could have carried out this task by itself, but chose to engage a third party, which does not imply a failure to fulfill its obligation. To the contrary: in this case, the *Land*, via the employment agency, made a declaration which constitutes a performance obligation under public law. There is no indication of a contractual relationship under private law.

In a decision dated 28 October 2008 (BSGE 102, 1, points 15 ff.), the Federal Social Court ruled that the financial assumption of assistance is provided for if the social welfare agency is unable to fulfill "the obligations incumbent upon it with regard to the person concerned",. The decision to grant such assistance is then treated as an "administrative act with private law effects".[117] The latter has legal effects that are essentially in the realm of private law.[118] This legal concept emerged shortly after World War I. While it is generally accepted that these administrative acts govern situations, rights, or relations of private law for reasons of public interest,[119] the concept remains rather under-studied. Either way, in the case at hand, the administrative court does not even consider this specific administrative act.[120] The *Land* of Berlin not only issued a decision to grant aid to refugees and notified the applicant, but also issued a certificate for the costs resulting from the aid granted to the refugees, which the latter was free to forward to the respective shelter.[121] By doing so, the public entity established a contractual relationship with the applicant as the provider of the services in question.

115 Specifically the coverage of housing and heating needs as provided in Sections 19, paragraph 1, third sentence, and 22 of the German Social Code.

116 This judgment, § 20; BVerwGE 96, 71 [75 f.].

117 „P*rivatrechtgestaltender Verwaltungsakt*"; Jacobi, E., *Grundlehren des Arbeitsrechts*, 1927, p. 27 f.; Kroeber, W., *Das Problem des privatrechtsgestaltenden Staatsakts*, 1931, p. 13 f. More recently: Tschentscher, A., "Der privatrechtsgestaltende Verwaltungsakt als Koordinationsinstrument zwischen öffentlichem Recht und Privatrecht", *DVBl* 2003, pp. 1424-1437.

118 Stelkens, U., "§ 35", in Stelkens, Bonk, Sachs, *Verwaltungsverfahrensgesetz Kommentar*, 10. Ed., 2023, C.H. Beck, point 217: "Privatrechtsgestaltende Verwaltungsakte sind gestaltende Verwaltungsakte mit einer Regelung, die auf dem Gebiet des Privatrechts Rechtswirkungen entfaltet"; Erichsen, H.-U., in Erichsen, H.-U. (ed.), *Allgemeines Verwaltungsrecht*, 11. Ed., 1998, § 12; Manssen, G., *Privatrechtsgestaltung durch Hoheitsakt. Verfassungsrechtliche und verwaltungsrechtliche Grundfragen*, 1994, Mohr Siebeck, p. 20 f.

119 Wertenbruch, W., Zum privatrechtsgestaltenden Verwaltungsakt, in Seidl, E., (ed.), *Aktuelle Fragen aus modernem Recht und Rechtsgeschichte. Gedächtnisschrift für Rudolf Smend*, 1966, p. 97.

120 §§ 34-35 of the judgment.

121 § 38 of the judgment.

To qualify the contract, the Court firstly sought to determine whether its object falls under public or private law and whether it is in "a close and insoluble relationship to the fulfillment of public tasks"[122] "according to its purpose".[123] The Court ultimately classified the contracts as public law contracts: first of all, their purpose is the collective accommodation of refugees and asylum seekers, and, secondly, the entity bearing the costs resulting from this task is public. Furthermore, the *Land* of Berlin has the right to unilaterally determine (*einseitig zu bestimmen*)[124] the conditions of operation of these centers. The Court goes on to find that "contracts in which the public service providers and the service recipients" define "the content, scope, and quality" of the services as well as the remuneration are "typically" (*regelmäßig*) classified as "public law contracts" (*öffentlich-rechtliche Verträge*).[125] In accordance with Section 53 paragraph 1, first sentence of the German Civil Code, an operating contract (*Betreibervertrag*) falls within the scope of public law contract: "a legal relationship in the field of public law can be established, modified or terminated by contract (public law contract) unless prohibited by law."[126]. Cases of public law dispute accordingly fall within the jurisdiction of the ordinary court, especially the courts of social affairs, unless the case has a constitutional law character. In the present case, the court hence referred the matter to the competent social court in Berlin.[127]

E. Public liability

1. State liability for unconstitutional law (Unrecht) (BVerfG, judgment of June 30, 2022, 2 BvR 737/20).

The issue of state responsibility is not dealt with extensively in the German legal literature, and the discrepancies with French law seem difficult to reconcile, unless a suitable basis for comparison can be found.[128]

In a decision recently issued by the BVerfG on June 30, 2022, the Court was given an opportunity to address the issue of state liability.[129] The case concerns an operator of a nuclear power plant who filed a tax return under the Nuclear Fuel Tax Act (*Kerbrennstoffsteuergesetz*), which resulted in a tax amount of approximately € 55.000. The Osnabrück tax authorities considered the tax calculation provisional given that the authorities had doubts concerning the lawfulness of the act and wished to initiate a normative review procedure (*Normenkontrollverfahren*) pursuant to Art. 100(1) GG. The latter provision allows a court to suspend the proceedings and refer a question regarding a violation of the

122 „Ob er nach seinem Zweck in enger, unlösbarer Beziehung zur Erfüllung öffentlicher Aufgaben steht".

123 § 41 of the judgment.

124 § 42 of the judgment.

125 § 43 of the judgment; BGH, judgments of 11 April l 2019 - III ZR 4/18, item 17; BGHZ 205, 260, item 23.

126 "E*in Rechtsverhältnis auf dem Gebiet des öffentlichen Rechts kann durch Vertrag begründet, geändert oder aufgehoben werden (öffentlich-rechtlicher Vertrag), soweit Rechtsvorschriften nicht entgegenstehen*".

127 § 45 of the judgment.

128 See, for example, in French, the thesis of Jacquemet-Gauché, A., La responsabilité de la puissance publique en France et en Allemagne, 2013, LGDJ, 614 p.; Cossalter, P., Schubert, F., "La responsabilité du fait des lois inconstitutionnelles ou inconventionnelles : Allemagne", *RFDA* 2019, n°3, pp. 404-420. In German, refer in general to Ossenbühl, F., Cornils, M., Staatshaftungsrecht, 6. Ed., 2013, Beck.

129 Referred to as "unlawfulness" or "*Unrecht*".

Basic Law to the *BVerfG*.[130] On July 25, 2016, the petitioner paid the tax debt and subsequently challenged (*Einspruch*) the setting of the nuclear fuel tax. However, in the absence of a response, the applicant did not appeal to the Hamburg Finance Court (*Finanzgericht*).

On April 13, 2017, the *BVerfG* declared the Nuclear Fuel Tax Act unconstitutional in its entirety, leading to the annulment of the tax decision made by the Osnabrück tax authorities and the reimbursement of the tax amount previously paid by the applicant. However, the plaintiff sought further compensation in the form of 0.5% interest per month for the ten months between the date of tax payment, and the date of refund by the tax authorities. While there is no legal basis for such a claim, the plaintiff appealed the tax authorities' decision not to grant the interest claim. The Hamburg Finance Court subsequently dismissed this appeal.

In an individual constitutional complaint filed under Art. 93(1- 4a) GG, alleging a violation of the applicant's rights under Articles 14(1)[131] and Art. 3(1)[132] in conjunction with Art. 19(4),[133] the applicant argues that the tax refund alone is not sufficient to compensate the violation of fundamental rights resulting from the collection of a tax that was declared unconstitutional. The question is thus whether there is a possible legal remedy against an unconstitutional law. The *BVerfG* declared the complaint admissible but ultimately rejected it as unfounded.[134]

The Second Chamber of the Karlsruhe Court considers the tax on nuclear fuel collected under an unconstitutional law to be a violation of the general freedom of action under Art. 2(1) GG,[135] which includes the right of individuals to be subject only to taxes in accordance with normative provisions that are materially and formally compatible with the Basic Law. In this analysis, the reimbursement of the unconstitutional tax satisfies the applicant's right under Art. 2(1) GG. However, this does not exclude the possibility that other rights might arise from such violations.[136] State responsibility for an unlawful law (*Unrecht*) goes beyond the principle of legality and involves fundamental rights, which serve as the basis for the state's obligation to provide compensation for the violation. If it is not possible to stop or prohibit the violation, compensation can be granted in the form of damages (*Schadensersatz*), compensation (*Ausgleichsansprüche*) or reparation (*Entschädi-*

130 "Hält ein Gericht ein Gesetz, auf dessen Gültigkeit es bei der Entscheidung ankommt, für verfassungswidrig, so ist das Verfahren auszusetzen und, wenn es sich um die Verletzung der Verfassung eines Landes handelt, die Entscheidung des für Verfassungsstreitigkeiten zuständigen Gerichtes des Landes, wenn es sich um die Verletzung dieses Grundgesetzes handelt, die Entscheidung des Bundesverfassungsgerichtes einzuholen. Dies gilt auch, wenn es sich um die Verletzung dieses Grundgesetzes durch Landesrecht oder um die Unvereinbarkeit eines Landesgesetzes mit einem Bundesgesetze handelt..."

131 "Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt."

132 "Alle Menschen sind vor dem Gesetz gleich."

133 "Wird jemand durch die öffentliche Gewalt in seinen Rechten verletzt, so steht ihm der Rechtsweg offen. Soweit eine andere Zuständigkeit nicht begründet ist, ist der ordentliche Rechtsweg gegeben. Artikel 10 Abs. 2 Satz 2 bleibt unberührt."

134 BVerfG, judgment of 30 June 2022, 2 BvR 737/20, § 57 and § 68.

135 "Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt." § 82: "Art. 2 Abs. 1 GG gewährleistet die allgemeine Handlungsfreiheit in einem umfassenden Sinne"; established case law: BVerfGE 6, 32, 36; BVerfGE 80, 137, 152; BVerfG 97, 332, 340.

136 §§ 72 f. of the judgment.

gungsansprüche). However, a specific secondary right (*Sekundäranspruch*), such as the right to interest, cannot be derived. The legislature needs to further define and concretize the nature and extent of the derived rights related to fundamental rights: "The nature and scope of derived rights directly related to fundamental rights require further configuration and concretization by the legislature."[137]

For the first time, the Court thus examined whether the absence of a right to compensation on the basis of an unconstitutional provision constitutes a violation of fundamental rights. The guarantee of derived fundamental rights does not oblige the legislature to retroactively eliminate the effects of constitutional violations, but allows a margin of discretion and assessment that requires classifications to operationalize such derived rights. The legislature may decide whether the right to interest should be included in a financial compensation scheme that effectively remedies the consequences of taxes collected under a law which is subsequently declared unconstitutional. However, the legislature does not have to provide a right to interests for the period in which the unconstitutional law was enforced against potential claimants.

Art. 19(4) GG cannot serve as the basis for such a request, as it does not provide a substantive guarantee for legally protected situations, but presupposes their existence prior to judicial proceedings. The Court furthermore stressed that the refusal to grant a comprehensive compensation including financial interests calculated over the period of unconstitutionality of the norm violating fundamental rights is not contrary to the European Convention on Human Rights. The Court refers to the ECHR to support its interpretation of the national fundamental right, highlighting that even under the ECHR violations are not automatically compensated given that a case-by-case examination is required to determine the appropriate amount.

According to the constitutional judge, denying the applicant the right to receive interest does not violate the general principle of equality under Art. 3(1) GG.[138] The principle of equal treatment does not require identical treatment, but rather demands that substantially identical situations be treated equally, while substantially different situations be treated differently.

In the present case, the principle of equality does not require the legislature to treat differently refund cases resulting from the annulment of an unconstitutional law (*Nichtigerklärung eines verfassungswidrigen Gesetzes*), and those resulting from a "mere" (*bloßen*) declaration of incompatibility of an unconstitutional law (*Unvereinbarkeitserklärung eines verfassungswidrigen Gesetzes*), according to the logic that interest on the amounts paid on the basis of the law should be granted to all persons concerned without distinction.[139] The annulment of the unconstitutional law is not linked to a particularly serious and manifest violation of the law. The declaration of incompatibility, on the other hand, does not

137 § 88: "Art und Umfang grundrechtlicher Sekundäransprüche bedürfen vielmehr der Ausgestaltung und Konkretisierung durch den einfachen Gesetzgeber"; see also BVerfGE 91, 93, 111 f.; BVerfGE 125, 175, 224; BVerfG, judgement of 18 November 2020, 2 BvR 477/17, point 30.

138 On the principle of equality: Nußberger, A., "GG Art. 3 [Gleichheit vor dem Gesetz]", in Sachs, M., (ed.), Grundgesetz Kommentar, 9. Ed., 2021, C.H. Beck; Boysen, S., "GG Art. 3 [Gleichheit vor dem Gesetz]", in von Münch, I., Kunig, P., Grundgesetz Kommentar, 7. Ed., 2021, C.H. Beck; Heun, M., "GG Art. 3 [Gleichheit]", in Dreier, H., Grundgesetz Kommentar, 3. Ed., vol. 1, Mohr Siebeck. Generally on the principle of equality before the law in German law: Jouanjan, O., *Le principe d'égalité devant la loi en droit allemand*, 1992, Economica.

139 § 46 of this judgment.

characterize an insignificant violation of constitutional provisions. The Court found that there was nothing related to the intensity of the constitutional violation that could justify a difference in treatment between these two situations.

The Second Chamber, therefore, concludes that the absence of the possibility of collecting interest and the application of the law by the courts in this sense are merely a confirmation of the rule of law. According to the latter, the judge is bound by the law and must respect the choices made by the legislature, rather than substituting them with his "own conceptions of justice" (*eigene Gerichtigkeitsvorstellungen*).

State liability for unconstitutional law (*Haftung für staatliches Unrecht*)[140] is the consequence of the violation of fundamental rights. These rights guarantee derived rights proportionate to the infringement and are implemented by the legislature in the exercise of its margin of appreciation and assessment.

140 Guideline sentence 1 of the decision of 30 June 2022.