

Comparative Section

This Section of the Yearbook offers our readers an overview of the principal administrative, constitutional, legislative and jurisprudential developments of the past year across a selection of legal systems. For this issue, the survey extends to both the national level (France, Germany, Italy, Spain, the United Kingdom and the United States) and the European and global dimensions of administrative law.

Germany

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A. Introduction

Last year's report on German public law by Philippe Cossalter and Maria Kordeva already emphasised the special importance of the right to a judicial remedy enshrined in Article 19(4) Basic Law, which also plays a role in German administrative law.¹ Compared to other administrative law systems, the norm has led to a considerable judicialisation of German public law. The intensity of review by the Federal Constitutional Court and the German administrative courts is comparatively high.² The legal concept of acts of government (*actes de gouvernement*), which are in principle exempt from review, plays almost no role (see B. I.); the interpretation and application of undefined legal concepts by the administration are fully reviewed by the administrative courts (see B. II. and III.).³ The constitutionalisation of German administrative law is closely linked to the right to a judicial remedy and judicialisation.⁴ Even if the famous quote of the third president of the Federal Administrative Court, according to which administrative law is the concretisation of constitutional law, is certainly exaggerated from today's perspective,⁵ it cannot be denied that constitutional law influences many administrative court decisions. This is also reflected in the following decisions, which are presented below: these pertain to the right to strike and the duty of neutrality of civil servants (C.), as a method of policing and related issues of administrative procedural law (D.), as well as the question of whether terminally ill persons have a constitutional right to assisted suicide (E.).

B. Judicial Review: Justice-free acts of sovereignty and the discretion of public authorities

I. Introduction: *Actes de gouvernements* in comparison to letters of congratulations from the Federal President as presidential acts (*Federal Administrative Court, decision of November 09, 2023, 10 C 4.22*)

The Federal Administrative Court's decision on access to letters of congratulation sent by the German Federal President to heads of state of other countries only very indirectly concerned the issue of government acts that are not subject to review (*actes de gouvernement*).⁶ In the aforementioned case, a journalist requested that the Federal President's Office transmit a congratulatory telegram that the German Federal President had sent to the President of the Islamic Republic on the occasion of Iran's National Day. In doing so, he relied on the

1 Cossalter, P. & Kordeva, M., 'Germany', FYPL 1 (2023), 311 (313 f, 324 ff).

2 For a detailed comparative law analysis, see Unger, S., in: v. Bogdandy, A., Huber, P. M. & Marcusson, L. (eds.), *Handbuch Ius Publicum Europaeum - Band IX*, 2021, Section 148.

3 On this topic: Cossalter, P. & Kordeva, M., 'Germany', FYPL 1 (2023), 311 (324 ff).

4 On both phenomena from a historical perspective: Wahl, R., *Herausforderungen und Antworten: Das Öffentliche Recht der letzten fünf Jahrzehnte*, 2006.

5 On this and the citation: Reimer, P., 'Wechselwirkungen von Verfassungs- und Verwaltungsrecht', in: Kahl, W. & Ludwigs, M. (eds.), *Handbuch des Verwaltungsrechts Band I*, 2021, Section 10 para. 6.

6 Federal Administrative Court, NJW 2024, 849 f.

provisions of the Federal Freedom of Information Act (*Informationsfreiheitsgesetz* or *IFG*). As had been determined in previous instances, the Federal Administrative Court concluded that such a claim did not exist. The court based its decision on Section 1(1) IFG, which limits the scope of the Act to federal authorities and other federal institutions that carry out administrative activities. In the opinion of the court, the sending of congratulatory telegrams by the Federal President does not constitute the exercise of administrative activities. It thus follows that there is no entitlement to access, given that the scope of application of the IFG has not been opened. The background to the decision, however, was the unspoken question of whether and to what extent the actions of the Federal President in dispute should be subject to scrutiny by the public and the courts at all.

The latter is exemplified by a decision rendered by the Higher Administrative Court of Berlin-Brandenburg, which also addressed a journalist's complaint against the Federal President.⁷ The journalist sought access to information regarding the pardons (ie the issuing of legally binding sentences) issued by the Federal President in accordance with Article 60(2) Basic Law. The plaintiff's claim was not founded upon the Federal Freedom of Information Act, but rather upon the fundamental right to freedom of the press as set forth in Article 5(1) Basic Law. However, the scope of this press right is also limited to administrative activity in the material sense. In this respect, the court posits that the exercise of the right of clemency constitutes a constitutional act in the sense of a special kind of organisational power, rather than a mere exercise of law enforcement. In this context, it is also noteworthy that these acts of clemency are among the very rare cases of executive action that, according to the case law of the Federal Constitutional Court, are in principle not subject to judicial review.

Perhaps also because this case law of the Federal Constitutional Court on the right of clemency is increasingly criticised in the legal literature,⁸ the Federal Administrative Court relies solely on the wording of the Federal Freedom of Information Act. Unsurprisingly, however, this is precisely the point at which the criticism of the decision begins: the court is accused of accepting presidential acts, which are not subject to judicial review.⁹ Such acts of government (*actes de gouvernement*) are on the decline in comparative law;¹⁰ in Germany they have almost completely disappeared.¹¹ It remains to be seen whether these decisions will be the last word

II. Indexing of works of art that are harmful to minors, 'Bushido' (Federal Constitutional Court, decision of October 20, 2022, 1 BvR 201/20)

In its ruling of October 20, 2022, the Federal Constitutional Court dismissed a constitutional complaint unlikely to succeed and clarified two controversial legal issues. Firstly,

7 High Administrative Court of Berlin-Brandenburg, *NJW* 2024, 2054.

8 Schneider, J.-P., in: Schoch, F. & Schneider, J.-P., *Verwaltungsgerichtsordnung*, Section 40 para. 119 ff.

9 Heinemann, P., *NVwZ* 2024, 508 (509).

10 Kayser, M., in: v. Bogdandy, A., Huber, P. M. & Marcusson, L. (eds.), *Handbook Ius Publicum Europaeum - Vol. IX*, 2021, Section 146 para. 86 f.

11 Schneider, J.-P., in: Schoch, F. & Schneider, J.-P., *Verwaltungsgerichtsordnung*, Section 40 para. 118.

the court defined the limits to which artistic freedom is subject in the area of the protection of minors and which conflicting legal interests must be appropriately weighed in an indexing decision. Secondly, the court confirmed the change in the Federal Administrative Court's case law regarding the scope of assessment of the Federal Review Board for Media Harmful to Young Persons (BPjM).

The plaintiff in the proceedings, the rapper known as 'Bushido', filed a constitutional complaint with the Federal Constitutional Court. The basis of his complaint was the indexing of his music album, entitled 'Sony Black', which falls within the genre of 'gangsta rap'. The plaintiff asserted that this action violated his artistic freedom under Article 5(3)(1) Basic Law. In accordance with Sections 15-19 of the Youth Protection Law (*Jugendenschutzgesetz* or *JuSchG*), the BPjM may include a work in the list of media harmful to young people following a review procedure (indexing). As a result, the work is subject to significant restrictions on distribution, display, dissemination, sale, and advertising. The prerequisite for this indexing is that the work is likely to endanger the development of children or adolescents or their upbringing as responsible and socially competent individuals.¹² In the case of Bushido, the decision to index his album was based on a number of factors, including the lyrics, which were deemed to be misogynistic, homophobic, and to glorify violence. Furthermore, they were also considered to have a harmful influence on the development of young people.¹³

The plaintiff raised two main objections. First, he argued that the provisions of the Youth Protection Law failed to account for the evolving patterns of music consumption on the Internet. This, he asserted, rendered the legislation unconstitutional. Second, he challenged the constitutionality of the act of indexing his entire album, claiming that it did not adequately respect his fundamental right to artistic freedom. Instead, it would have been sufficient to index only the individual tracks of the album, which would have been a less intrusive measure. The plaintiff also raised concerns about the appropriateness of indexing as a means of protecting minors, given that indexed works are also accessible on the Internet. For its part, the Federal Constitutional Court rejected this argument and clarified that during the process of indexing, the artistic freedom of the creator of the work is constrained by the rights of the parents (Article 6(2) Basic Law), the protection of the mental health of young people (Article 2(2) Basic Law) and the principle of the welfare state (Article 20(1) Basic Law), which serve to safeguard the interests of minors. In each case, the aforementioned legal interests must be weighed against one another.¹⁴ In the case of 'gangsta rap', which is a highly suggestive art form,¹⁵ it is particularly important to carefully assess the interests of young people, given the increased risk of inspiration and imitation.¹⁶ Sections 15-19 *JuSchG* provide a constitutional framework for this balancing act. In particular, with regard to proportionality, it is not a question of whether the means chosen by the legislator are the most effective means of ensuring comprehensive protection of minors; rather, the question is whether indexing promotes the legiti-

12 Federal Administrative Court, decision of Oct. 30, 2019 - 6 C 18/18, *NVwZ* 2020, 233 (236).

13 Federal Constitutional Court, decision of Oct. 20, 2022 - 1 BvR 201/20, *GRUR-RS* 2024, 33942 para. 5.

14 Federal Constitutional Court, decision of Oct. 20, 2022 - 1 BvR 201/20, *GRUR-RS* 2024, 33942 para. 26 et seqq.

15 Details on the genre 'Gangsta-Rap': Oglakcioglu, M. T. & Rückert, C., 'Anklage ohne Grund - Ehrschutz contra Kunstfreiheit am Beispiel des sogenannten Gangsta-Rap', *ZUM* 2015, 876-883.

16 Federal Administrative Court, decision of Oct. 30, 2019 - 6 C 18/18, *NVwZ* 2020, 233 (236).

mate purpose of protecting minors.¹⁷ The absence of comprehensive protection on the Internet does not render the existing protective measures inherently unsuitable.¹⁸ Finally, the artist's assertion that a shift in music consumption patterns and the potential for circumventing the indexed album have rendered the provisions unconstitutional was not demonstrated.

The second noteworthy aspect of the decision concerns the confirmation of the change in case law by the Federal Administrative Court regarding the intensity of judicial scrutiny vis-à-vis the decision by the BPjM.¹⁹ The latter is a pluralistic and independent body comprising 12 individuals with specialised expertise from diverse sectors of society. It issues an administrative decision in determining the indexing of a medium (Section 19(1)-(5) JuSchG), whereby a two-thirds majority is required for a decision (Section 19(6) JuSchG). To index a work, the committee must ascertain whether a work may be deemed *harmful to minors* (Section 18(1) JuSchG). This term is a so-called *undefined legal term*, that is to say, a term whose content is not filled in by a clearly defined set of facts. Rather, it requires clarification when applying the law in individual cases.²⁰ The use of undefined legal terms in a provision is a legislative strategy that avoids the creation of an ultimately binding regulation. Instead, it allows for the interpretation and formulation of the law to be delegated to the authorities responsible for its implementation. This ensures the necessary flexibility of the law, as it is not feasible for the legislature to anticipate and preclude every conceivable application of a provision.²¹ The decisive question is to what extent the implementation of undefined legal concepts by the executive branch is subject to judicial scrutiny. This essentially depends on where the undefined legal term is located: on the 'if-side' of a conditionally formulated ('if...', then') provision, which lays down the conditions for the authority to act, or on the 'then-side', where the legislator has conferred discretion upon the administration with regard to the choice of legal consequences.²² In the event that a provision affords the administration discretion with respect to the legal consequences, the exercise of such discretion by the relevant authorities can only be subject to limited judicial review. In principle, discretionary powers afford the authority the prerogative to determine what conduct is deemed appropriate.²³ The role of the courts is to ascertain whether the authority in question has erred in its judgment. In this context, a distinction is drawn between instances where the authority has exceeded the limits of its discretion, misjudged the appropriate scope of discretion to be exercised, or exercised discretion regarding irrelevant considerations.²⁴ The situation differs, however, when it comes to the judicial review of undefined legal terms

17 Federal Constitutional Court, decision of Oct. 20, 2022 - 1 BvR 201/20, *GRUR-RS* 2024, 33942 para. 18.

18 Federal Administrative Court, decision of Oct. 30, 2019 - 6 C 18/18, *NVwZ* 2020, 233 (238).

19 Critical comment on the decision: Beisel, D., *NVwZ* 2020, 233 (241 ff).

20 Federal Administrative Court, decision of Nov. 25, 1993 - 3 C 38/91, *NVwZ* 1995, 707 (707).

21 Detterbeck, S., *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht*, 21st edition 2023, para. 307; Guckelberger, A., *Allgemeines Verwaltungsrecht*, 11th edition 2023, section 14 para. 26.

22 For this distinction in German Law: Marsch, N. & Tümsmeyer, V., 'The Principle of Proportionality in German Administrative Law', in: Ranchordas, S. & de Waard, B. (eds.), *The Judge and the Proportionate Use of Discretion*, 2016, p. 18 f and 35 f.

23 Detterbeck, S., *Allgemeines Verwaltungsrecht*, op. cit., para. 326.

24 Detterbeck, S., *Allgemeines Verwaltungsrecht*, op. cit., para. 328 ff; Guckelberger, A., *Allgemeines Verwaltungsrecht*, op. cit., Section 14 para. 42.

on the if-side of a provision. In principle, interpretations of such terms by the administration are fully justiciable.²⁵ The prevailing view is based upon Article 19(4) Basic Law, which grants the individual a right to effective legal protection.²⁶ Furthermore, the separation of powers (Article 20(2), (3) Basic Law) gives the courts the authority to oversee the executive power.²⁷ The closer the judicial review, the more effective the legal protection guaranteed by Article 19(4) Basic Law.²⁸ The scope of judicial review is constrained when the administration is accorded a margin of appreciation.²⁹ In such a case, the courts are limited to examining whether the administration has fully and correctly determined the underlying facts and has complied with the requirements of administrative procedure law.³⁰ It is therefore the task of the legislator to resolve the conflict that exists between the guarantee claim under Article 19(4) Basic Law and the decision-making autonomy of the authority closest to the matter. The question of whether an undefined legal term grants the administration a margin of appreciation must be determined by interpretation.³¹ In only a few exceptional cases, the legislator expressly standardises a margin of discretion for the administration.³² The assumption of a margin of discretion is particularly justified in cases where the statutory decision-making programme is vague and its case-by-case application proves to be particularly difficult, since a large number of assessment factors have to be identified, weighted and set in relation to one another, for which it is also necessary to make forecasts that are difficult to calculate.³³

Notwithstanding the Federal Administrative Court's assertion that the BPjM possesses special expertise,³⁴ it nevertheless denied that the administration has any margin of appreciation that cannot be reviewed by the courts with regard to Section 18(1) JuSchG. The assessment of whether a work has harmful effects on minors is no longer the sole responsibility of the BPjM's panel of twelve; it is now subject to *full* judicial review.³⁵ The reason for this is that the assessment of the harmfulness to minors is not a 'particularly challenging' task.³⁶ The Federal Constitutional Court confirms this shift in case law by stating that 'the specialised courts (...) are constitutionally obliged to comprehensively weigh up all conflicting interests of artistic freedom and the protection of minors when reviewing

25 Established jurisprudence of the Federal Administrative Court: BVerwGE 158, 387 para. 29; BVerwGE 147, 244 para. 25; BVerwGE 100, 221 (225).

26 Established jurisprudence of the Federal Administrative Court: BVerwGE 158, 387 para. 29 with further evidence; exemplary also: Schmidt-Aßmann/Schenk, in: Schoch, F. & Schneider, J.-P. *Verwaltungsrecht*, Vol. I, 44th edition 2023, Introduction para. 186.

27 BVerfGE 35, 382 (401).

28 Detterbeck, S., *Allgemeines Verwaltungsrecht*, op. cit., para. 359.

29 On the casuistry: Riese, K.-U., in: Schoch, F. & Schneider, J.-P. *Verwaltungsrecht*, Vol. II, 44th edition. 2023, Section 114 VwGO para. 114 ff.

30 Established jurisprudence of the Federal Administrative Court: cf. BVerwGE 153, 129; BVerwGE 156, 75.

31 Established jurisprudence of the Federal Administrative Court: BVerfGE 84, 34 (49 f).

32 In the area of regulatory administrative law, the legislator expressly grants the Federal Network Agency a margin of judgment in Section 10(2) Telecommunications Act: 'The Federal Network Agency shall, within the scope of the margin of judgment to which it is entitled (...), define telecommunications markets which are eligible for regulation (...).'

33 Established jurisprudence of the Federal Constitutional Court: BVerfGE 84, 34 (49 f); BVerfGE 129, 1 (22 f).

34 Federal Administrative Court, decision of Oct. 30, 2019 - 6 C 18/18, NVwZ 2020, 233 (235).

35 Federal Administrative Court, decision of Oct. 30, 2019 - 6 C 18/18, NJW 2020, 785 para. 18 f.

36 Federal Administrative Court, decision of Oct. 30, 2019 - 6 C 18/18, NVwZ 2020, 233 (235).

an indexing on grounds of the protection of minors. In particular, they cannot rely on the fact that decisions of the BPjM, whose panel of 12 is particularly qualified to assess the youth-endangering character or artistic significance of a work of art, can only be reviewed to a limited extent due to a margin of appreciation or decision-making priority.³⁷

III. Is there a right to early school enrolment? (*Higher Administrative Court of Bremen, decision of July 27, 2023, 1 B 179/23*)

The decision rendered by the Higher Administrative Court of Bremen on July 27, 2023, illustrates that the question of whether an authority has a margin of appreciation is not always easy to answer. In court, the parents petitioned for an early school enrolment for their child. During an initial school examination, the paediatrician from the public health department concluded that—from a medical standpoint—the child’s school enrolment was feasible. Nevertheless, the primary school refused to enrol the child at an early age. After meeting the child, the school concluded that it would be beneficial for him to remain in the day care centre for another year. This would allow him to acclimate to the school environment in a way that would not overwhelm him emotionally and would also facilitate the further development of his physical coordination and gross motor skills. As the applicant’s child had not yet reached the age of six, he was not yet subject to compulsory schooling in accordance with Section 53(1) and (2) of the Bremen School Act (*Bremisches Schulgesetz* or *BremSchulG*). Against this backdrop, the Higher Administrative Court of Bremen had to decide whether the primary school had a margin of discretion in assessing school readiness, which would then be binding for the court, or whether the decision to enrol a child in school was subject to comprehensive judicial review. According to Section 53(3) *BremSchulG*, it is the school’s responsibility to determine that the child in question is not overburdened by the demands of the curriculum and the school environment with regard to his or her linguistic, cognitive and social abilities. The term ‘*ability to attend school*’ is therefore an undefined legal term whose application is based on a comprehensive pedagogical assessment.³⁸ According to the court, such an assessment is the responsibility of the school’s specially qualified staff and therefore cannot be replaced by the courts based on legal criteria alone.³⁹ The Higher Administrative Court of Bremen also stated that a favourable medical assessment of school readiness cannot supersede the school’s own prognosis.⁴⁰ The optimal time to start school aims to avoid excessive age differences in classes to meet the physical and psychological development of the child in the new environment, to avoid the risk of compromising the educational work, and to ensure that all children in the class are supported as equally

37 Federal Constitutional Court, decision of Oct. 20, 2022 - 1 BvR 201/20, *GRUR-RS* 2024, 33942 para. 21; see also Riese with reference to the special significance of the conflicting fundamental rights positions, Riese, K.-U., in: Schoch, F. & Schneider, J.-P. *Verwaltungsrecht*, Vol. II, 44th edition. 2023, Section 114 *VwGO* para. 137.

38 High Administrative Court of Bremen, decision of July 27, 2023 - 1 B 179/23, *NVwZ-RR* 2024, 150 para. 14.

39 High Administrative Court of Bremen, decision of July 27, 2023 - 1 B 179/23, *NVwZ-RR* 2024, 150 para. 14.

40 High Administrative Court of Bremen, decision of July 27, 2023 - 1 B 179/23, *NVwZ-RR* 2024, 150 para. 17.

as possible within the framework of their respective individual abilities.⁴¹ The decision to admit a potential pupil to school at an earlier age is therefore rightly made by the authority closest to the child and is legally limited to a review of whether the school's decision was arbitrary.

C. Civil service law: The right to strike and the principle of neutrality

While civil servants are entitled to fundamental rights as any other private individual,⁴² they are nevertheless subject to certain restrictions imposed by civil service law. The background to this is represented by the principles of civil service deriving from Article 33(5) Basic Law.⁴³ These principles of the professional civil service entail many privileges for individual civil servants. For instance, civil servants are entitled to lifelong tenure and an appropriate salary, which they may also enforce through legal action.⁴⁴ To give an example, the Federal Constitutional Court has already ruled on several occasions that the salaries of certain professional groups in certain federal states have fallen below the constitutional minimum.⁴⁵ Conversely, civil servants are also subject to certain restrictions that ensure the functioning of the state apparatus and its institutions. The following three court decisions provide a brief overview of the variety of possible restrictions to which civil servants are subject when exercising their civil liberties.

I. No right to strike for public school teachers (*ECtHR (Grand Chamber), decision of December 14, 2023, 'Humpert and others v. Germany', App. No. 59433/18*)

The ban on strikes for civil servant teachers exemplifies a restriction under fundamental rights. The right of employees to engage in industrial action is enshrined in Article 9(2) Basic Law. The question of whether this right extends to public school teachers has been the subject of litigation before the German administrative courts for several years. On June 12, 2018, the Federal Constitutional Court ruled (in a decision that was the subject of last year's report by Philippe Cossalter and Maria Kordeva⁴⁶) that a ban on strikes for

41 High Administrative Court of Bremen, decision of July 27, 2023 - 1 B 179/23, NVwZ-RR 2024, 150 Ls.

42 Pieper, S. U., in: Schmidt-Bleibtreu, B., Hofmann, H. & Henneke, H.-G. GG, Article 33 para. 46 ff, in particular: para. 132; Battis, U., in: Sachs, M. GG, Article 33 para. 74.

43 Battis, U., in: Sachs, M. GG, Article 33 para. 74.

44 See Pieper, S. U., in: Schmidt-Bleibtreu, B., Hofmann, H. & Henneke, H.-G. GG, Article 33 para. 147 ff.

45 For example, for the federal state of Berlin, see: Federal Constitutional Court, decision of May 04, 2020 - 2 BvL 4/18, NVwZ Supplement 2020, 90; or for the federal state of North Rhine-Westphalia: Federal Constitutional Court, decision of May 04, 2020 - 2 BvL 6/17, 2 BvL 7/17, 2 BvL 8/17.2020 - 2 BvL 6/17, 2 BvL 7/17, 2 BvL 8/17, NVwZ Supplement 2020, 112; the administrative courts of other federal states have also submitted the provisions on civil servant salaries to the Federal Constitutional Court for review, see currently, for example, for the federal state of Hamburg: Administrative Court of Hamburg, decision of May 08, 2024 - 20 B 14/21; 20 B 2223/21; 20 B 2157/21; 20 B 4571/21; 20 B 6288/21; 20 B 14/24, FD-ArbR 2024, 810779.

46 Cossalter, P. & Kordeva, M., 'Germany', FYPL 1 (2023), 319 ff.

civil servant teachers is constitutional.⁴⁷ Although the national bans on strikes interfere with the freedom of association as set forth in Article 9(2) Basic Law, the restrictions are justified by interests of sufficient weight and constitutional protection. In particular, the Federal Constitutional Court qualified the ban on strikes as an independent traditional principle of the civil service, derived from Article 33(5) Basic Law.⁴⁸ In its decision, the Federal Constitutional Court also addressed the implications of Article 11 ECHR. In this regard, the court stated that the decisions of the ECtHR, beyond their *inter partes* effect, determine an interpretive tendency for domestic law.⁴⁹ The Court is of the opinion, that in Article 11(2)(2) the ECHR provides for a justification that allows for the lifting of the national ban on strikes for public school teachers.⁵⁰

On December 14, 2023, the ECtHR rendered a comparable decision in response to a complaint filed by three public school teachers. The plaintiffs were employed at public schools in Germany and were members of a trade union. After protesting against the working conditions of public-school teachers during their service, they were subjected to disciplinary proceedings that resulted in reprimands or sanctions. Their subsequent appeal to the domestic courts was unsuccessful, prompting their recourse to the ECtHR, where they alleged a violation of Article 11 ECHR.

Following the oral hearing, the ECtHR determined that Article 11 ECHR had not been breached. The ban on strikes for civil servants, including public school teachers, constitutes a serious infringement, as it affects an essential aspect of trade union freedom.⁵¹ However, strikes are not the only means by which unions and their members can defend their professional interests. In this context, the court mentioned the possibility of joining or forming trade unions and the guarantee of staff representation as a form of co-determination.⁵² In addition, states are in principle free to determine the measures they deem appropriate for ensuring compliance with Article 11 ECHR, provided that the restrictions do not render trade union freedom meaningless. In Germany, public school teachers enjoy a number of benefits, including security of tenure and adequate pay.⁵³ Consequently, the ban on strikes does not render the freedom of civil servants to organise without substance. It can therefore be concluded that the essential core elements of trade union freedom under Article 11 ECHR are not violated and can be exercised by public school

47 Federal Constitutional Court, decision of June 12, 2018 - 2 BvR 1738/12, 2 BvR 1395/13, 2 BvR 1068/14, 2 BvR 646/15, NVwZ 2018, 1121 f; see also Jacobs/Payandeh, 'The Ban on Strike Action by Career Civil Servants under the German Basic Law: How the Federal Constitutional Court Constitutionally Immunised the German Legal Order Against the European Convention on Human Rights', *German Law Journal* 2020, 223 et seqq.

48 Federal Constitutional Court, decision of June 12, 2018 - 2 BvR 1738/12, 2 BvR 1395/13, 2 BvR 1068/14, 2 BvR 646/15, NVwZ 2018, 1121 para. 142 ff.

49 Federal Constitutional Court, decision of June 12, 2018 - 2 BvR 1738/12, 2 BvR 1395/13, 2 BvR 1068/14, 2 BvR 646/15, NVwZ 2018, 1121 para. 173; Kaiser, 'Streikrecht für Beamte, Folge einer Fehlrezeption?', *AöR* 2017, 417 ff.

50 Federal Constitutional Court, decision of June 12, 2018 - 2 BvR 1738/12, 2 BvR 1395/13, 2 BvR 1068/14, 2 BvR 646/15, NVwZ 2018, 1121 para. 181 ff.

51 ECtHR (Grand Chamber), decision of Dec. 14, 2023 - 59433/18 (*Humpert and others v. Germany*), NVWZ 2024, 221 para. 108.

52 ECtHR (Grand Chamber), decision of Dec. 14, 2023 - 59433/18 (*Humpert and others v. Germany*), NVWZ 2024, 221 para. 128 ff.

53 ECtHR (Grand Chamber), decision of Dec. 14, 2023 - 59433/18 (*Humpert and others v. Germany*), NVWZ 2024, 221 para. 128 ff.

teachers despite their prohibition to strike. Following a proportionality test,⁵⁴ the ECtHR concluded that the maintenance of the right to strike to ensure a stable state administration outweighed the interests of the civil servants and that the interference with the strike ban was therefore justified under Article 11(2)(1) ECHR.

II. No civil service employment because of tattoos (*Koblenz Higher Administrative Court, decision of December 08, 2022, 2 B 10974/22*)

To ensure the functioning of state institutions, the character of civil servants is also closely scrutinised. In order to maintain public confidence in the integrity of those who hold office, officials must demonstrate that they are able to set aside their individuality in the performance of their duties and, where necessary, to present themselves to the public in a manner that reflects their status as representatives of the State.⁵⁵ For example, a police commissioner candidate was deemed unsuitable for the role on account of concerns pertaining to his character, which ultimately led to his rejection as a civil servant. The individual in question challenged this decision in court, invoking his general right of personality (*Allgemeines Persönlichkeitsrecht* or *APR*) under Article 2(1) Basic Law in conjunction with Article 1(1) Basic Law. The reason for the concern about the applicant's character was the conspicuous and prominent tattoo on his shoulder, which contained the words 'Loyalty', 'Honor', 'Respect' and 'Family' written in the Old English font. On December 8, 2022, the Koblenz Higher Administrative Court ruled that the recruitment of civil servants must be evaluated in accordance with Article 33(2) Basic Law, which stipulates that all Germans are entitled to equal access to every public office based on aptitude, ability, and professional performance (so-called principle of best selection).⁵⁶ The assessment of the applicant is reserved to the employer and encompasses a prognostic decision as to whether the applicant will be able to fulfil the tasks and duties incumbent upon him or her. Here, the employer has a margin of appreciation.⁵⁷ The court emphasises the necessity for rigorous standards of conduct among those seeking to join the police force, given the critical role of law enforcement in preventing and prosecuting criminal activities. In this respect, an applicant's tattoo may present an impediment to recruitment if the content of the tattoo is deemed to be in contravention of the future civil service obligations. In this case, the employer may conclude from the applicant's tattoo that he lacks the ability and inner will to perform his official duties in accordance with the principles of the Constitution, in particular to protect the civil liberties of citizens and to comply with the rule of law.⁵⁸ Hence, the court found grounds to question the applicant's suitability for the position in question. According to the court, the decisive factor was the resemblance

54 ECtHR (Grand Chamber), decision of Dec. 14, 2023 - 59433/18 (*Humpert and others v. Germany*), NVWZ 2024, 221 para. 122 ff.

55 Pieper, S. U., in: Schmidt-Bleibtreu, B., Hofmann, H. & Henneke, H.-G. GG, Article 33 para. 46 ff, in particular: para. 57.

56 High Administrative Court of Koblenz, decision of Dec. 08, 2022 - 2 B 10974/22.OVG, NVwZ 2023, 363 para. 11.

57 Further information on the scope for judicial review of the actions of public authorities can be found in Part B of this paper.

58 High Administrative Court of Koblenz, decision of Dec. 08, 2022 - 2 B 10974/22.OVG, NVwZ 2023, 363 para. 14.

between the tattoo font, 'Old English', and the lettering used by the forbidden anti-constitutional group 'Blood and Honor'. The Higher Administrative Court agrees with the assessment of the Court of First Instance that, when considering the tattoo as a whole and the specific font used, it is plausible that the applicant, on the basis of his personal values, attaches greater importance to the concepts of 'loyalty' and 'honour' than to the civil liberties of citizens.⁵⁹ As a result of the aforementioned circumstances, the police commissioner candidate's complaint was rejected.

Although recent case law has demonstrated a tendency towards a more lenient approach to tattoos on individuals seeking public office,⁶⁰ it is of the utmost importance that such adornments do not impede the assessment of character suitability. In such cases, the APR of the prospective civil servant must be subordinated to the interests of the state.

III. Disciplinary action for WhatsApp group messages (*Federal Administrative Court (2nd Military Service Senate), decision of January 28, 2022, 2 WDB 7/21 (TDG)*)

Even if an applicant has successfully qualified for civil service, this does not exempt him from the requirement of loyalty to the Constitution, as shown by a decision of the Federal Administrative Court on January 28, 2022, which dismissed a soldier from the German Armed Forces (*Bundeswehr*) due to comments made in a WhatsApp group. If external characteristics already influence the suitability of character, it stands to reason that this must apply with even greater force to *statements* made by the office holder. In their capacity as representatives of the state, civil servants are duty-bound to adhere to the principles of the free democratic basic order (*freiheitlich demokratische Grundordnung* or *FDGO*), which is commonly referred to as the 'duty of loyalty'.⁶¹ The decision of the Federal Administrative Court shows that this also applies to statements made in private chat groups. In the aforementioned case, the Federal Administrative Court had to deal with 23 objectionable statements made by a soldier in a private chat group and to decide whether statements such as '*the Federal Minister of Defense is part of the Jewish military subversion conspiracy*' or '*I'd give the (then) Inspector General of the Bundeswehr a blow on the head with my carbine, and then he'd be chased off the premises!*' violated the FDGO. The court initially established that the concept of the FDGO in Section 8 of the Soldiers Act (*Soldatengesetz* or *SG*) is identical to that which has been outlined by the Federal Constitutional Court in Article 21(2) Basic Law. In light of this, the FDGO is limited to those principles that guarantee a constitutional system of rules based on the self-determination of the people according to the will of the respective majority and on freedom and equality, excluding any rule of force and arbitrariness.⁶² This leads to a concentration on a few, central basic principles

59 Administrative Court of Trier (7th Chamber), decision of Sept. 27, 2022 -7 L 2837/22.TR, BeckRS 2022, 36884 para. 14.

60 Eibenstein, H., 'Verfassungsrechtliche Überformung der Eignungsbewertung tätowierter Amtsbewerber', *NVwZ* 2023, 309 (311).

61 Pieper, S. U., in: Schmidt-Bleibtreu, B., Hofmann, H. & Henneke, H.-G. GG, Article 33 para. 46 ff, in particular: para. 157.

62 Federal Constitutional Court, decision of Jan. 17, 2017 - 2 BvB 1/13, *NJW* 2017, 611 para. 531.

that are essential for a liberal constitutional state. At the *heart* of these principles is human dignity.⁶³ It is incumbent upon the professional soldier to recognise these principles in accordance with Section 8 SG and to uphold them throughout their entire conduct.

To answer the question of whether the soldier's statements violated his duty of loyalty to the FDGO or merely expressed his sense of humour, the court considered both the objective appropriateness of the statements and the subjective attitude of the person making them. After a comprehensive assessment of the circumstances of the individual case,⁶⁴ the court concluded that the objectively unconstitutional statements also reflected the soldier's attitude with a sufficient degree of probability.⁶⁵ The Federal Administrative Court was not convinced by the fact that the soldier made the statements 'spontaneously' or 'just for fun'. Rather, only people with nationalist, racist, and antisemitic prejudices could find the comments amusing. According to the Federal Administrative Court, the statements showed that the soldier identified with Nazi ideas. This was especially true since the soldier had an e-mail account with the password 'HITLER'.⁶⁶ Thus, the freedom of expression under Article 5(1)(1) Basic Law, which guarantees civil servants the right to express themselves freely in their private lives, is also limited by the duty of loyalty to the FDGO.

D. Police law: Racial profiling

The issue of police measures based on the grounds of ethnic origin⁶⁷ has been a subject of debate in case law and literature for some time. For its part, the Federal Administrative Court rejected two complaints about the non-admission of an appeal, the facts of which cases pertained to the issue of 'racial profiling'.⁶⁸ Before that rejection, however, the court had partly allowed one of the complaints, on the ground that the higher administrative court had failed to establish the facts underpinning the presumption that the district in which the identity check was carried out constituted a high-crime area, thereby breaching Section 86(1) of the Rules of the Administrative Courts (*Verwaltungsgerichtsordnung* or *VwGO*).⁶⁹

I. The special 'follow-up' interest in the judgment

On October 18, 2022, the ECtHR ruled that Germany had violated the Convention in a

63 Federal Administrative Court (2nd Military Service Senate), decision of 28 Jan. 2022 - 2 WDB 7/21 (TDG), NVwZ 2022, 798 para. 23.

64 Federal Administrative Court (2nd Military Service Senate), decision of Jan. 28, 2022 - 2 WDB 7/21 (TDG), NVwZ 2022, 798 para. 22 ff.

65 Federal Administrative Court (2nd Military Service Senate), decision of Jan. 28, 2022 - 2 WDB 7/21 (TDG), NVwZ 2022, 798 para. 25.

66 Federal Administrative Court (2nd Military Service Senate), decision of Jan. 28, 2022 - 2 WDB 7/21 (TDG), NVwZ 2022, 798 para. 29.

67 With further references: Pettersson, P., ZAR 2019, 301 (301).

68 Federal Administrative Court, decision of the Sixth Senate, Sept. 26, 2022, 6 B 10.22; Federal Administrative Court, decision of the Sixth Senate, Sept. 21, 2022, 6 B 11/12.

69 Federal Administrative Court, decision of the Sixth Senate, Dec. 13, 2019, 6 B 30/19.

case pertaining to the practice of ‘racial profiling’.⁷⁰ The applicant in the case was a German national of Indian origin who, together with his daughter, was subjected to an identity check under Section 23(1)(3) of the Federal Police Act (*Bundespolizeigesetz* or *BPolG*) on a train which had just crossed the border from the Czech Republic to Germany. The applicant argued that the police had checked his and his daughter’s identity papers due to their dark skin colour. The Dresden Administrative Court⁷¹ and the Saxony Administrative Court of Appeal⁷² both dismissed his legal action as inadmissible based on the grounds that they could not identify any legitimate ‘follow-up’ interest in the judgment (*Fortsetzungsfeststellungsinteresse*). The domestic courts declared that an identity check, which did not result in the retention of any data, constituted a minor infringement of the applicant’s right to self-determination. Ultimately, the Constitutional Court declined to consider a constitutional complaint.⁷³ In contrast, the ECtHR found that the domestic courts had *failed* to take the necessary evidence of the discriminatory claim made by the applicant. Accordingly, the court declared a violation of Article 14 ECHR in conjunction with Article 8 ECHR.

In order to put this issue into context, it should be noted that identity check measures often give rise to difficulties in establishing a legitimate interest in a declaratory judgment due to their rapid termination. If an administrative act, such as an identity check, is terminated prior to the commencement of legal proceedings, the traditional legal remedy of annulment, as set out in Section 42(1) VwGO, loses any prospect of success.⁷⁴ Instead, should the individual in question wish to contest the administrative act, they are obliged to submit a ‘follow-up’ declaratory suit (*Fortsetzungsfeststellungsklage*) analogous to Section 113(1)(4) VwGO. Alternatively, should the termination occur subsequent to the filing of the suit, the claim must be adjusted to align with such an action, as outlined in Section 113(1)(4) VwGO. In addition to the required right of action under Section 42(2) VwGO, Section 113(1)(4) VwGO mandates a ‘follow-up’ interest in the judgment. As such, the jurisprudence has delineated four categories of cases: (1) specific risk of repetition, (2) vindication interest, (3) compensation process, and (4) *grave* infringement of a fundamental right.⁷⁵ The last group is frequently combined with a ‘time requisite’. Accordingly, the termination must typically occur in such a brief period that a judicial challenge to the administrative act becomes untenable. This raises the question of whether the ‘time requisite’, considered by itself, ie *without* the requirement of a *substantial* infringement of a fundamental right, is sufficient to justify an interest in the judgment. Just recently, this question became a controversial topic at the Federal Administrative Court level due to a decision of the Eighth Senate, in which the court determined that the plaintiff had a ‘follow-up’ interest based on the premise that the disputed administrative act typically terminated in a brief timeframe.⁷⁶ Against this backdrop, the Sixth Senate subsequently referred the question to the Eighth Senate inquiring whether, in cases of typically short-term measures, a *grievous* encroachment on a fundamental right was a prerequisite for

70 ECtHR, *Basu v. Germany*, decision of the Third Section, Oct. 18, 2022, App. No. 215/19.

71 Administrative Court of Dresden, decision of the Sixth Chamber, May 20, 2015, 6 K 961/13.

72 Saxony Administrative Court of Appeal, decision of the Third Senate, Nov. 17, 2015, 3 A 440/15.

73 Constitutional Court, decision of the First Senate of the First Chamber, June 19, 2018, 1 BvR 3196/15.

74 Pietzcker, J. & Marsch, N., in: Schoch, F. & Schneider, J.-P., *Verwaltungsrecht*, Section 42 para. 86.

75 Wolff, H. A., in: Sodan, H. & Ziekow, J., VwGO, Section 113 para. 269.

76 Federal Administrative Court, decision of the Eight Senate, Jan. 27, 2021, 8 C 3/20.

declaring a ‘follow-up’ interest in the judgment.⁷⁷ In its reply, the Eighth Senate stated that it had *not* formulated any general criterion for the application of Section 113(1)(4) VwGO, but instead, it had merely adjudicated the specific case at hand.⁷⁸

II. ‘One ill weed mars a whole pot of pottage’ (*Higher Administrative Court for the state of North Rhine-Westphalia (Fifth Senate), decision of August 7, 2018, 5 A 294/16*)

Despite the absence of a landmark decision by the Federal Administrative Court on the matter of ‘racial profiling’, it must be highlighted that German administrative justice has, over time, evolved a discrimination-sensitive jurisprudence⁷⁹ on this issue. In this regard, a decision rendered by the Higher Administrative Court for the state of North Rhine-Westphalia stands out. This case arose in the context of an identity check carried out at the central station ‘C’. It is pertinent to mention that the court upheld the ‘follow-up’ interest in the ruling, given that the identity verification constituted a police procedure that ‘*typically* concludes within a timeframe where legal challenges are no longer feasible’. Thus, if rejected, the judgment would have created a legal vacuum that would have been incompatible with the rule of law and the right to effective judicial protection.

The plaintiff, a 38-year-old German citizen with *dark* skin colour, claimed that the motivation for the measure was based on his skin colour, while the police presented a range of potential motives. Firstly, the police referred to the plaintiff’s ‘suspicious behaviour’ on the day in question. From the police’s perspective, the plaintiff’s actions upon entering the train station ‘C’ and observing the officers were perceived as a display of evasive behaviour manifested in his decision to cover his head with the hood of his jacket. Then, as he walked past the officers at a closer distance, he continued to pull the hood of his jacket down over his face. Subsequently, the police asserted that the plaintiff was situated behind an elevator shaft, which led them to conclude that the individual was attempting to evade their detection. Secondly, the police added that, based on the available data, most of the perpetrators of property offenses operating at the central station were males of North African descent, typically in their early 20s to mid-30s. Thirdly, the main station ‘C’ was notorious for being a hub for crimes associated with illegal entry. In addition, in 2013, evidence indicated an increase in travel activity by Islamist extremists, many of whom stayed at that train station ‘C’. Notwithstanding the fact that this principal station was no longer classified by the Federal Police Directorate as a ‘permanently endangered object’, the police added that its location was situated between two train stations that were classified as such. Finally, according to the Police, it is also known that at station ‘C’, offences against the narcotics law were mainly committed by people with dark skin. In response to the plaintiff’s inquiry as to the reason for his identity check, the police cited the prevailing crime situation at the central station ‘C’. In addition, the officers informed the applicant that some of the offences committed at central station ‘C’ were committed by persons of North African origin. They also noted a recent increase in the number of cases involving illegal travel by persons from that region.

77 Federal Administrative Court, decision of the Sixth Senate, Nov. 29, 2023, 6 C 2/22.

78 Federal Administrative Court, decision of the Eight Senate, Jan. 29, 2024, 8 AV 1/24, 6 C 2/22.

79 Barskanmaz, C., ‘Basu/Deutschland’ (Urteilsanmerkung), NVwZ 2022, 1886 (1887).

According to the first instance, the identity check conducted at the train station was considered to be within the bounds of the law. From their perspective, it is generally acceptable for law enforcement to consider factors beyond situational knowledge and behaviour when evaluating individuals, including their outward appearance and skin colour. The plaintiff successfully appealed the decision. Following the higher court, the police were justified in assuming that a dangerous situation was imminent, given the prevailing crime situation at the train station and the plaintiff's suspicious behaviour. Nevertheless, since the plaintiff's skin colour constituted one of the factors that prompted the identity check, the latter was subjected to an analysis in accordance with Article 3(3) (1) Basic Law. According to Art. 3(3)(1) Basic Law, individuals may not be discriminated against or given preferential treatment on the basis of, inter alia, their 'race', otherwise there is a 'prohibited' discriminatory practice. Such a 'prohibited' discriminatory practice may also exist where the measure in question is linked, inter alia, to one of the 'prohibited' characteristics. It is only when the forbidden criterion is *one* of the motives for the measure that the latter can be justified. Given the seriousness of this type of discrimination, the police are held to a higher standard of proof (*Darlegungslast*) in justifying why a link to a prohibited criterion is necessary to ensure an effective response to the threat. Therefore, law enforcement agencies are required to provide evidence that there is a significant risk of criminal activity among certain demographic groups, based on situational images (*Lagebilder*) of the surrounding area or location. In the specific case under consideration, the court was unable to conclude that the police had discharged their burden of proof. Therefore, the measure was deemed unlawful.

E. Narcotics law: Assisted suicide

I. Authorisation for the purchase of narcotics with a view to the commission of suicide *in prospect* (*Federal Administrative Court (Third Chamber), decision of March 02, 2017, C 19/15*)

On March 02, 2017, the Federal Administrative Court set a milestone in the field of assisted suicide by holding out the prospect of allowing the purchase of narcotics for suicide under *certain* circumstances. The plaintiff in the case No. C 19/15 was the *husband* of a woman who had applied to the Federal Institute for Drugs and Medical Devices (*Bundesinstitut für Arzneimittel und Medizinprodukte* or *BfArM*), based on of Section 3(1) of the Narcotics Act (*Betäubungsmittelgesetz* or *BtMG*) for the purchase of 15 grams of the narcotic sodium pentobarbital (NaP) to commit suicide. As a result of an accident, the woman was paralyzed from the neck down, required artificial respiration, depended on constant medical care, and suffered frequent convulsive seizures. Because of her unbearable and ignominious situation, she wanted to end her life. For its part, the BfArM declined to approve her request. Before the authority had ruled on an objection to the decision, the woman travelled to Switzerland with her immediate family members, where she obtained assisted suicide. In the aftermath of the woman's death, the question of whether the husband could legally challenge the BfArM refusal became complicated due to the requirements set forth in Section 42(2) of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung* or *VwGO*). This section stipulated that the husband was obliged to present evidence indicating that the contested denial had potentially infringed upon *his* subjective rights. The Administrative Court of Cologne was unable to identify any subjective

right of the husband that might have been infringed by the BfArM's refusal, either under Article 6 Basic Law or under Article 8 ECHR. Besides, the plaintiff was precluded from asserting a potential legal violation on behalf of his wife, given the highly personal nature of the claim. Hence, his actions were rejected on grounds of admissibility.⁸⁰ On June 22, 2007, the Higher Administrative Court for the State of North Rhine-Westphalia rejected the husband's request for appeal.⁸¹ Ultimately, the Federal Constitutional Court declined to consider the complaint of unconstitutionality.⁸² In contrast, the ECtHR found that the refusal of the domestic courts to consider the merits of the husband's application violated *his* right to respect for his private life, as enshrined in Article 8 ECHR, and therefore ordered the German courts to rule on the merits of his application.⁸³ The following action of restitution, however, was deemed baseless by the Cologne Administrative Court and the Higher Administrative Court for the State of North Rhine-Westphalia.⁸⁴ Hence, the applicant petitioned the Federal Administrative Court for a review, which determined that the action was *partially* substantiated.

According to Section 3 (1) BtMG in conjunction with Section 1 (1) and Annex III BtMG, the acquisition of NaP requires a licence from the BfArM. In principle, the provisions of the BtMG do not provide for access to narcotics for suicide. This is evident from an examination of the wording, the underlying rationale of the norm, ie inter alia, the protection of health and lives,⁸⁵ and the systematic approach outlined in Section 5(1)(6) and 13(1) BtMG. Therefore, the purchase of anaesthetics with the intent to commit suicide is *generally* prohibited. According to the court, this non-exceptional restriction interferes with the general right to personality derived from Article 2(1) Basic Law in conjunction with Article 1(1) Basic Law (*allgemeines Persönlichkeitsrecht* or *APR*)—in terms of both the duty to respect and the duty to protect—of seriously and incurably ill persons to decide, on the basis of their own will, how and when they wish to die. Against this background, but *exceptionally*, Section 5 (1)(6) BtMG is to be interpreted as permitting access to narcotics for the purpose of committing suicide if the applicant is in a situation of extreme distress (*extreme Notlage*). In such a scenario, the purchase of narcotics to commit suicide would be deemed an exception to the norm. Three conditions, which the BfArM must analyse in detail, must be met for such an extreme situation of distress to be considered. First, the applicant's serious and incurable illness must cause severe physical suffering that reaches an intolerable level of suffering that cannot be adequately alleviated. Second, the applicant must be of sound mind and have freely and seriously decided to end his or her life. Third, and finally, there must be no other reasonable means for the applicant to realise his or her wish to die. In the specific case, the BfArM's refusal was found to be unlaw-

80 Administrative Court of Cologne, decision of the Seventh Chamber, Feb. 21, 2006, 7 K 2040/05.

81 Higher Administrative Court for the State of North Rhine-Westphalia, decision of the Thirteenth Senate, June 22, 2007, 13 A 1504/06.

82 Federal Constitutional Court, decision of the First Senate of the First Chamber, Nov. 04, 2008, 1 BvR 1832/07.

83 ECtHR, 19 July 2012, no. 497/09, *Koch v Germany (Fifth Chamber)*. For an analysis in French, see: Bachelet, O., *Dalloz actualité* 4 Sept. 2012; Hauser, J., *RTD Civ.* 2013, p. 354; Marguénaud, J.-P., *RTD Civ.* 2012, p. 700; Puppinck, G., 'La Cour européenne construit un droit individuel au suicide assisté', *ZENIT*, 24 July 2012. Available at: <https://bit.ly/3BrbszW> (consulted on 23 Sept. 2024).

84 Administrative Court of Cologne, decision of the Seventh Chamber, May 13, 2014, 7 K 254/13; Higher Administrative Court for the State of North Rhine-Westphalia, decision of the Thirteenth Senate, Aug. 19, 2015, 13 A 1299/14.

85 Bundestag printed paper 8/3551, p. 23.

ful because the authority did not verify the possible situation of extreme distress of the plaintiff's wife. However, without a factual verification, the court was unable to determine whether the BfArM was obliged to approve the narcotic in this particular case. Since the woman was already deceased, the action was *partially dismissed* as unfounded.

Strictly speaking, Decision No. C 19/15 did not establish a precedent. Nevertheless, it provided a potential avenue for access to state-financed narcotics to commit suicide, provided that the condition of 'extreme distress' was met.⁸⁶ To counter this trend, the Minister of Health (at the time: Mr. *Spahn*) issued a non-application decree (*Nichtanwendungserlass*) to the BfArM. Consequently, all applications were rejected.⁸⁷ In addition, and in support of this position, a legal opinion was submitted indicating that Decision No. C 19/15 was in violation of constitutional law.⁸⁸ By way of background, non-application decrees are common in *tax* law, but are only permitted in exceptional cases.⁸⁹ They are used by the tax administration to respond to *deplored*⁹⁰ landmark decisions of the Federal Finance Court by instructing their inapplicability in similar cases. Despite their tension with the rule of law, non-application decrees are generally accepted in cases of *manifestly unlawful decisions*,⁹¹ provided that the decree is *published*,⁹² a *rationale* is given,⁹³ and, in cases where a tax assessment notice is issued on the basis of the non-application decree, an *indication* is given.⁹⁴ And of course the possibility of appealing to a court cannot be excluded by a non-application decree. In the field of health law, and especially in the context of assisted suicide, however, the usage of a non-application decree is highly problematic, as it affects strictly personal rights. In addition, due to the applicant's situation of suffering, the procurement of narcotics for the purpose of committing suicide is a matter of particular urgency. Finally, the inadequate administrative enforcement apparatus, which essentially consists of the imposition of a fine (see Section 172 VwGO), which ul-

86 Weilert, A. K., 'Anmerkung zu BVerwG, Urt. v. 02.03.2017 – 3 C 19.15 – Staatliche Erlaubnispflicht zum Erwerb tödlicher Betäubungsmittel zum Suizid', *DvBl* 2017, 910 (913).

87 Müller-Neuhof, J., 'Gesundheitsminister ignoriert Urteil Jens Spahn verhindert Sterbehilfe', *Tagesspiegel*, 19 Feb. 2019. Available at: <https://bit.ly/3XTMAtA> (consulted on 23 Sept. 2024).

88 Di Fabio, U., 'Erwerbserlaubnis letal wirkender Mittel zur Selbsttötung in existenziellen Notlagen', Nov. 2017. Available at: <https://bit.ly/4eCgaJL> (consulted on 23 Sept. 2024).

89 Krüger, A., *Die Bindung der Verwaltung an die höchstrichterliche Rechtsprechung*, p. 133.

90 Lange, H.-F., 'Die Nichtanwendung von Urteilen des BFH durch die Finanzverwaltung – Nichtanwendungserlass und Nichtveröffentlichung', *NJW* 2002, 3657 (3657); Spindler, W., 'Der Nichtanwendungserlass im Steuerrecht', *DStR* 2007, 1061 (1061).

91 Ruf, S., 'Der Nichtanwendungserlass im Gesundheitsrecht', *DÖV* 2021, 961 (966); Spindler, W., 'Der Nichtanwendungserlass im Steuerrecht', *DStR* 2007, 1061 (1064).

92 Desens, M., *Bindung der Finanzverwaltung an die Rechtsprechung*, p. 397 ff, p. 403.

93 Desens, M., op. cit., p. 403 ff; Lange, H.-F., 'Die Nichtanwendung von Urteilen des BFH durch die Finanzverwaltung – Nichtanwendungserlass und Nichtveröffentlichung', *NJW* 2002, 3657 (3659 f); Ruf, S., 'Der Nichtanwendungserlass im Gesundheitsrecht', *DÖV* 2021, 961 (966); Spindler, W., 'Der Nichtanwendungserlass im Steuerrecht', *DStR* 2007, 1061 (1064 f).

94 Desens, M., op. cit., p. 447 ff; Lange, H.-F., 'Die Nichtanwendung von Urteilen des BFH durch die Finanzverwaltung – Nichtanwendungserlass und Nichtveröffentlichung', *NJW* 2002, 3657 (3660); Ruf, S., 'Der Nichtanwendungserlass im Gesundheitsrecht', *DÖV* 2021, 961 (966); Spindler, W., 'Der Nichtanwendungserlass im Steuerrecht', *DStR* 2007, 1061 (1064).

timately goes to the state budget, allows for a delay to the detriment of the applicant.⁹⁵

On November 19, 2019, the Administrative Court of Cologne suspended several lawsuits regarding the purchase of narcotics for the purpose of committing suicide pursuant to Article 100(1) Basic Law in order to refer the question of the compatibility of Section 5(1)(6) BtMG with the fundamental right of the APR to the Federal Constitutional Court. According to the referring court and contrary to the view of the Federal Administrative Court, the provision in question *unexceptionally restricts* access to narcotics for the purpose of committing suicide.⁹⁶ However, since the Federal Constitutional Court had declared Section 217 of the German Criminal Code (*Strafgesetzbuch* or *StGB*), which prohibited the commercial promotion of suicide, to be unconstitutional in 2020,⁹⁷ the reasoning for the order for reference was not sufficient to demonstrate the unconstitutionality of the submitted provision of the BtMG. The action was therefore dismissed as inadmissible.⁹⁸

II. Refusal to authorise the purchase of narcotics for the purpose of suicide (*Federal Administrative Court (Third Chamber), two decisions of November 07, 2021, C 8/22 and 9/22*)

In light of the recent declaration of unconstitutionality of Section 217 StGB,⁹⁹ the Federal Administrative Court rejected two appeals and thus upheld the decisions of the Court of First Instance, which rejected the application to purchase 15 grams of NaP from the BfArM for the purpose of committing suicide. The court found that although the prohibition in Section 3(1)(1) BtMG in conjunction with Section 5(1)(6) BtMG to provide access to narcotics for the purpose of committing suicide encroaches on the right to determine one's own death, which includes the choice of the means of committing suicide, the infringement is justified. Firstly, the BtMG serves a number of legitimate purposes. In this case, these include the prevention of abuse and misuse of lethal narcotics and the protection of people in vulnerable positions and conditions against making unfree decisions regarding suicide. Moreover, following the Federal Constitutional Court's ruling on the unconstitutionality of Section 217 StGB, people with suicidal ideation were given the opportunity to obtain prescription drugs for the purpose of committing suicide with the assistance of medical professionals. Notwithstanding the burdens associated with this alternative, the court determined that the denial of access to NaP served to protect important public interests. In this context, the question of whether the second interest of protecting vulnerable persons is sufficient to justify the proportionality test in the strict sense is left open, since the interest of preventing the abuse and misuse of lethal drugs passes the proportionality test in any case.

The question of whether the BfArM is legally obliged to provide access to a lethal dose of narcotics for the purpose of committing suicide in cases of 'extreme distress' remains

95 Ruf, S., 'Der Nichtanwendungserlass im Gesundheitsrecht', *DÖV* 2021, 961 (966 f).

96 Administrative Court of Cologne, decision of the Seventh Chamber, Nov. 11, 2019, 7 K 8461/18, 7 K 13803/17, 7 K 14642/17, 7 K 8560/18, 7 K 1410/18, 7 K 583/19.

97 Federal Constitutional Court, decision of the Second Senate, Feb. 26, 2020, 2 BvR 2347/15.

98 Federal Constitutional Court, decision of the Second Chamber of the First Senate, May 20, 2020, 1 BvL 2/20.

99 Federal Constitutional Court, decision of the Second Senate, Feb. 26, 2020, 2 BvR 2347/15.

a matter of contention. Nevertheless, following the declaration of Section 217 StGB as unconstitutional, it is now possible to obtain access to prescribed medication through medical assistance. Accordingly, it is difficult to imagine a scenario in which the third criterion for a situation of ‘extreme distress,’ ie the absence of viable alternatives to suicide, will ever be met. In *practice*, however, since Section 217 StGB was declared unconstitutional, there has been a lack of a legal concept regulating the process of assisted suicide.¹⁰⁰ As a consequence, the exercise of the right to determine one’s own death remains truncated.¹⁰¹ Moreover, it is difficult to see when this legal loophole will ever be closed, given the current majorities in Parliament.¹⁰²

The issue of euthanasia is inherently controversial. In addition, in the German context, the shadow of the Nazi past still lingers on. During this period of darkness, the concept of annihilating lives deemed ‘unworthy of existence’¹⁰³ (*lebensunwertes Leben*) resonated with the Nazi racist ideology that led to the systematic murder of hundreds of thousands of sick and disabled people, including children, across Europe. It is estimated that between 200,000 and 300,000 people were murdered as a result of this ideology.¹⁰⁴ In a *macabre* way, these killing operations were named after the euphemism ‘*euthanasia*’ (*Euthanasie*), a terminology that evokes the bleak past of the Nazi regime and thus remains stigmatised to this day.¹⁰⁵

100 As the XV Conference ASADIP and the General Congress of the International Academy of Comparative Law showed, the regulation of assisted suicide is also contentious in other legal systems.

101 Baldauf, A., ‘Wir brauchen endlich Klarheit’, LTO, 6 July 2023. Available at: <https://bit.ly/4dggPPJ> (consulted on 23 Sept. 2024).

102 See documents from the German Bundestag. Available at: <https://bit.ly/4gzgcnq> (consulted on 23 Sept. 2024).

103 Binding, K. & Hoche, A., *Die Freigabe der Vernichtung lebensunwerten Lebens*, 1922.

104 BPB, ‘Vor 80 Jahren: Beginn der NS-‘Euthanasie’-Programme’, 15 Aug. 2019. Available at: <https://bit.ly/3XWBblv> (consulted on 23 Sept. 2024).

105 Woellert, K. & Schmiedebach, H.-P. (eds.), *Sterbehilfe*, p. 18; Opinion of the German Ethics Council, ‘Selbstbestimmung und Fürsorge am Lebensende’, p. 49.