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The State's Dealing with the Poor before, in and after National Socialism

Continuities and Discontinuities
Part 2

Abstract

This article reconstructs the continuities and differences in the treatment of the poor and unemployed before, during, and after National Socialism. To this end, it takes as its starting point previous research on the socio-political history of poor relief from the late Middle Ages to the present, and on the persecution of the poor and unemployed between 1933 and 1945. The author illuminates in particular the role of the image of the poor and their mistreatment by welfare institutions. The reconstruction of continuities in these respects serves as a starting point for answering the question of whether the historically consolidated parameters of poor relief still have an impact in the twenty-first century. To answer this question, the author examines two current cases. The first is the efforts in the late 2010s to rehabilitate people who were persecuted and murdered as 'asocials' and 'professional criminals' during the Nazi regime. The second is a hitherto little-noticed peculiarity of social case law on sanctions for the unemployed since the mid-1990s: a divergence from the consolidated unanimous supreme court jurisprudence in Germany. It has resulted in the recipients of unemployed benefits being restricted with regard to their constitutional guarantee of legal recourse.

III. Social Disciplining during National Socialism and after

How is this history of the imprisonment and forced labour imposed on the poor for the purpose of their social disciplining relevant to the persecution of "asocials" during National Socialism? The Nazis did not need to invent the "asocials" as a group. They could build on the long history of stigmatisation and discrimination against the poor and continue the practices of poor relief established since the late Middle Ages: imprisonment, forced labour, physical and psychological violence for the purpose of social disciplining. Yet, they did not leave it at that – and this is the special feature of National Socialism that distinguishes it from other historical periods in Germany – but increased the disenfranchisement and violence, both qualitatively and quantitatively. Many historians have pointed this out since the late 1970s. In detail:

Propaganda against asocials of all 'kinds' and the deterrence practised with it began as early as in school, as the assignment reproduced in Ratzel's article shows.

> Arithmetical problem no. 97: A mentally ill person costs RM 4 a day, a cripple RM 5.50, a criminal RM 3.50. In many cases, a civil servant has only about RM 4, a clerk barely RM 3.50, an unskilled worker not yet RM 2 on his family's head. – (a) Illustrate these figures. According to conservative estimates, there are 300,000 mentally ill people, epileptics, etc. in institutional

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> care in Germany. – (b) What is the total annual cost of these at a rate of RM 4? – (c) How many matrimonial loans of RM 1,000 could be issued annually from this money – waiving later repayment?[1]

The various forms of forced labour that had already been established before 1933 were expanded under National Socialism. The comparatively mild compulsory welfare work (without internment) according to sections 19 and 20 RFV (duty of care ordinance) of 1924,[2] which had also been implemented in section 91 AVAVG (unemployment insurance act), was continued after 1933.[3] Voluntary Labour Service (FAD) being work education organised in camps had been added to the AVAVG by the Emergency Ordinance of 5 June 1931 in the form of section 139a.[4] Unlike after 1933, however, only a comparatively small proportion of the poor were affected by the measures. Before 1933, three per cent of welfare recipients were obliged to perform compulsory labour. After 1933, this figure rose to 100 per cent, as all welfare recipients who did not appear for compulsory work were completely deprived of their benefits, leaving only those welfare recipients in the statistics who had appeared for compulsory work.[5]

The harsh forms of forced labour (with internment and physical and psychological violence) established before 1933, i.e. since the late 16th century, were further intensified under National Socialism. The duration of placement of poor persons in workhouses for corrective detention, following the serving of a prison sentence, was delimited compared to the previous regulations. According to section 362 (2) of the RStGB (criminal code) of 1876,[6] the upper limit for placement in a workhouse after serving the actual sentence for begging, vagrancy, prostitution and homelessness, for claiming state support as a result of excessive "gambling, drinking or idleness" as well as for refusing "out of work-shyness […] to do the work assigned to him by the authorities which corresponds to his strength"[7] (as well as, from 1900, also pimping[8]) was two years. In contrast, section 42f of the Law against Dangerous Habitual Criminals and on Measures of Security and Correction (GgG) of 24 November 1933 stipulated that a sentence of "only" two years in a workhouse was only possible for first-time workhouse inmates, while for all others the placement was no longer subject to a specified upper limit, but lasted "as long as the purpose requires".[9] Persons could henceforth be interned in the workhouse with forced labour for life.[10] The delimitation of the period of forced residence in a workhouse, however, was not entirely new. In this respect, the "Measures of Security and Correction" of 1933 essentially adopted the draft for a new penal code that the Reich Ministry of Justice had already presented in 1927.[11]

1 *Mathematik im Dienste der nationalpolitischen Erziehung: mit Anwendungsbeispielen aus Volkswirtschaft, Geländekunde und Naturwissenschaft; ein Handbuch für Lehrer*, edited on behalf of the "Reichsverband Deutscher mathematischer Gesellschaften und Vereine" by Adolf Dorner (Frankfurt am Main: Diesterweg, 1935) 42, quoted in Ratzel. "Die Rolle der Verwaltung bei der Vernichtung 'asozialen' Lebens", 112.
2 See II.
3 Ayaß, *"Asoziale" im Nationalsozialismus*, 58.
4 Hörath, *"Asoziale" und "Berufsverbrecher"*, 62.
5 Cf. Hörath, *"Asoziale" und "Berufsverbrecher"*, 109. For more details on the transformation of the unemployment administration of the Weimar Republic into the combatant in the "Arbeitsschlacht", see Detlev Humann, "Ordentliche Beschäftigungspolitik? Unterstützungssperren, Drohungen und weitere Zwangsmittel bei der 'Arbeitsschlacht' der Nationalsozialisten", *Vierteljahrshefte für Zeitgeschichte*, no. 1 (2012): 33–67, https://doi.org/10.1524/vfzg.2012.0002.
6 Section 362 (2) RStGB (penal code) (RGBl. of 26.02.1876, no. 6, 39-120).
7 Secction 361 (1) nos. 3-8 RStGB.
8 Ayaß, "Die 'korrektionelle Nachhaft'", 194.
9 Section 42f GgG (RGBl. of 24.11.1933), https://alex.onb.ac.at/cgi-content/anno-plus?apm=0&aid=dra&datum=19330004&seite=00000995&zoom=2.
10 See also Ayaß, "Die 'korrektionelle Nachhaft'", 196–197.
11 Ibid., 196–197.

The fact that from 1934 onwards the admission figures for workhouse imprisonment declined continuously was not due to the fact that the law was not applied, but rather that the police increasingly rarely handed over homeless people and prostitutes they had apprehended to the justice system and instead deported them to the concentration camps as preventive prisoners of the criminal police.[12] This also occurred in particular in the context of the Arbeitsscheu Reich operation, being two arrest waves in April and June 1938, during which some 10,000 people were deported to concentration camps.[13]

Already in the first phase after the seizure of power, the concentration camps took over the previous function of workhouses and penitentiaries. In autumn 1934, for example, the Bavarian Ministry of the Interior officially recognised the Dachau concentration camp as a labour institution in the sense of section 20 RFV (duty of care ordinance) (after "work-shy" welfare recipients and "defaulters" had already been sent to the Dachau concentration camp).[14] The expansion of the denomination of concentration camps into (forced) labour institutions was also not devoid of logical consistency insofar as historians such as Jane Caplan, Nikolaus Wachsmann and Christian Goeschel see the conceptual origin of the concentration camp in the "institutions of the [pre-1933] disciplinary apparatus such as the workhouses or the camps of the Voluntary Labour Service (FAD), the prison system, the military and finally the paramilitary Freikorps associations".[15] The close genetic and conceptual link between prisons, penitentiaries, workhouses and concentration camps is also manifested in the fact that the camp regulations of early concentration camps were "not infrequently [modelled on] the house rules and regulations of the penitentiaries or workhouses".[16]

The conditions of imprisonment in concentration camps are also in continuity with those in forced labour institutions such as penitentiaries and workhouses, and here, too, concentration camps are characterised by the excess of violence at various levels compared to the institutions that existed earlier. Both in the history of the penitentiaries and workhouses and in that of the concentration camps, one finds harassment practices aimed at obliging the inmates to perform meaningless work or to make work unnecessarily difficult, i.e. to accelerate the process of wearing down the inmates.[17] However, the concentration camps differed from the penitentiaries and workhouses before 1933 in that the former institutions did not serve the system-

12 Wolfgang Ayaß, "'Ein Gebot der nationalen Arbeitsdisziplin'. Die Aktion 'Arbeitsscheu Reich' 1938", in *Contributions to National Socialist Health and Social Policy* vol. 6 (1988), 43–74, https://kobra.uni-kassel.de/handle/123456789/2007013116965. See for the increase in forced labour prisoners in Dachau concentration camp: Hörath, *"Asoziale" und "Berufsverbrecher"*, 116. The number of protective custody prisoners rose from 573 in December 1916 and 880 persons in July 1918 to 45,000 in March and April 1933 and 80,000 in the course of 1933 (Hörath, *"Asoziale" und "Berufsverbrecher"*, 62, with further evidence).

13 Ayaß, "'Ein Gebot der nationalen Arbeitsdisziplin'", 60.

14 Hörath, *"Asoziale" und "Berufsverbrecher"*, 110.

15 Cf. Jane Caplan, "Political Detention and the Origin of the Concentration Camps in Nazi Germany, 1933–1935/6", in *Nazism, War and Genocide*, ed. Neil Gregor (Exeter: University of Exeter Press 2005), 22–41, here: 29–36, 40 f., https://doi.org/10.5949/liverpool/9780859897457.001.0001; Christian Goeschel and Nikolaus Wachsmann, "Before Auschwitz: The Formation of the Nazi Concentration Camps, 1933–1939", in *Journal of Contemporary History*, vol. 45, issue 3 (2010), 515–534, here: 529–532, https://doi.org/10.1177/0022009410366554; Nikolaus Wachsmann, *KL: a history of the Nazi concentration camps* (New York: Farrar, Straus and Giroux 2015), 61–63; Hörath, *"Asoziale" und "Berufsverbrecher"*, 61.

16 Hörath, *"Asoziale" und "Berufsverbrecher"*, 63–64.

17 Rathmayr points out that rasping wood by hand, one of the main works of inmates in penitentiaries, could have more efficiently been done by windmills. According to Pingel, in concentration camps it occurred that inmates were forced to dig pits and fill them up again (Rathmayr, *Armut und Fürsorge*, 90; Falk Pingel, *Häftlinge unter SS-Herrschaft* (Hamburg: Hoffmann und Campe 1978, 38). See also Sachße and Tennstedt, *Geschichte der Armenfürsorge in Deutschland*, vol. 3, 17.

atic extermination of the inmates. To say it bluntly: the death of the inmates was no longer collateral damage, but intended.[18] For the corporal punishment often practised in the concentration camps, Heinrich Himmler referred to the Prussian penitentiary regulations of the years 1914 to 1918, which, according to Hörath, did indeed provide for corporal punishment, but whose regulations in this regard had been applied "only extremely rarely".[19]

There were also considerable continuities in ideological terms, but also significant differences. To focus on the continuities first: The guiding idea of social disciplining continued to serve as a justification for the internment of the poor under National Socialism, as the index to the files of the Partei-Kanzlei of the NSDAP shows.[20] As in the past, social disciplining pursued not only the task of relieving the public coffers, but also of harnessing all available labour, this time in the interest of the war economy.

Moreover, the Nazis also embraced the established idea that internment, this time in concentration camps, was suitable for labour education.[21] This is well illustrated in the draft of a lecture by SS-Oberführer Ulrich Greifelt, Chief of the Four-Year Plan Office under Himmler, held on 23 January 1939, in which he described measures used at his behest to recruit forced labourers (remarkable is the accumulation of grammatical passive constructions, which lends the political situation described by Greifelt the habitus of an almost automatic acting of unnamed agents):

> The objective to mobilise all labour forces inevitably also drew attention to the prisoners incarcerated in the prisons and penal institutions. In cooperation with the Reich Ministry of Justice, all employable prisoners were assigned to important work projects; also, the state-owned enterprises in the penal institutions were converted to carry out important work of the Four-Year Plan production. […] In view of the tense situation on the labour market, it was an imperative of national labour discipline that all persons who did not want to fit into the working life of the nation and who were vegetating as work-shy and asocial people and making large cities and country roads unsafe should be compulsorily registered and made to work. At the suggestion of the 'Four-Year Plan' office[22], the Secret State Police took action with all its energy. At the same time, vagrants, beggars, gypsies and pimps were apprehended by the criminal investigation department, and finally the malicious refusers of alimony were apprehended. Far more than 10,000 of such asocial forces are currently undergoing an education cure for work [Erziehungskur zur Arbeit] in the concentration camps, which are excellently suited for this purpose.[23]

18 Kolata, "Zwischen Sozialdisziplinierung und 'Rassenhygiene'", 337.

19 Himmler in a speech in January 1937 at a "Nationalpolitische Lehrgang" of the Wehrmacht on the "task of the SS and the police", according to Hörath, *"Asoziale" und "Berufsverbrecher"*, 64.

20 Helmut Heiber and Peter Longerich, *Akten der Partei-Kanzlei der NSDAP*, index to the volumes 1/2 and 3/4, two volumes (Munich et al. and Oldenbourg et al.: Saur et al., 1983 and 1992 respectively).

21 Cf. also Pingel, *Häftlinge unter SS-Herrschaft*, 39 ff. and 75 ff. On the history of the work education camps Nordmark and Oberlanzendorf: Detlef Korte, *"Erziehung" ins Massengrab. Die Geschichte des Arbeitserziehungslagers "Nordmark" Kiel-Russee 1944–1945* (Kiel: Neuer Malik-Verlag, 1991); Josef Prinz, "Erziehung zur Arbeit – Arbeit als Erziehung. Zum Stellenwert von Arbeitserziehung im nationalsozialistischen Lagersystem am Beispiel Oberlanzendorf bei Wien", in: *betrifft widerstand*, issue 6 (2005), 31–39, http://memorial-ebensee.at/content/stories/Medien/Zeitschriftenarchiv/pdf_bw73.pdf#page=30. On work education in the context of children's educational institutions, see Sieder and Smioski, *Der Kindheit beraubt*.

22 Ayaß interprets this formulation as proof that Greifelt was the initiator of the Arbeitsscheu Reich action (Ayaß, "'Ein Gebot der nationalen Arbeitsdisziplin'", 68).

23 "Disposition zum Vortrag des Amtschefs der Dienststelle 'Vierjahresplan' im Persönlichen Stab des Reichsführers SS, SS-Oberführer Greifelt (auf einer Tagung des gesamten Befehlsberichts Reichsführer SS) über 'Aus

Continuity is also evident in the fact that the deterrence was mainly directed against the 'normal' population outside the concentration camps, prisons and workhouses. The decree of the Reich Minister of Labour to "Combat Indiscipline in the Workplaces" of 22 November 1941 finally exerted direct pressure on all workers.

> If an administrative penalty [for violation of work discipline by an employee in a company] does not appear to be sufficient – especially in the case of a renewed recidivism – the facts of the case shall be clarified immediately and the offender, if the question of guilt is affirmed, shall immediately be sent to a work education camp with the assistance of the police.[24]

Unlike before 1933, however, – I now come to the ideological differences in the state's treatment of the poor before and during Nationalsocialism – the guiding principle of social disciplining was supplemented by a second imperative: that of *Ausmerze* [extermination], which, however, would not have become effective without the concept of the *Volksgemeinschaft* and the *Volkskörper* [the People's Community and the People's Body]. In National Socialism, Volksgemeinschaft and Volkskörper (as values in themselves) stood above the individual.[25] Furthermore, they constituted a conceptual frame, in which work was not only means to make one's living, but to generate community. Anyone who did not work was therefore alien or hostile to the community. From a systematic point of view, labour thus linked the ideological appreciation of the Volkskörper and Volksgemeinschaft (which inevitably went hand in hand with the disregard for the individual) with the guiding principle of social disciplining.

In what way the extermination imperative logically emerges from the guiding principle of social disciplining, Sachße and Tennstedt have comprehensibly explained: Racial hygiene began, so to speak, where social disciplining reached its limits. The (allegedly) threatening damage to the people's community by those who did not want to adapt to the norms of the society's 'centre' – neither in liberty nor in forced labour institutions – could, according to the implicit logic, only be prevented by extermination (sterilisation and eutanasia).[26] As early as 1934, the Münchner Neueste Nachrichten intertwined the idea of work education with community and racial policies in a report on the Bavarian government's decision to send "workshys" and "those who refused to pay child support" to the Dachau concentration camp:

> With this, a work is again set in motion which exclusively benefits the people and their community. At the same time, demands of racial hygiene with regard to the elimination of people's pests from its body and with regard to educational experiments are thus fulfilled.[27]

The implementation of the concept of racial hygiene was in turn spurred forward by socio-politically motivated legislative measures aimed at overcoming the social

dem Aufgabenkreis der Dienststelle 'Vierjahresplan' im Persönlichen Stab Reichsführer SS'", NO 5591, Institut für Zeitgeschichte, quoted after Ayaß, "'Ein Gebot der nationalen Arbeitsdisziplin'", 68–69.

24 Schnellbrief concerning the "Bekämpfung der Disziplinlosigkeiten in den Betrieben" of 22. 11. 1941, III b 23 336/41, printed in *Verfügungen, Anordnungen, Bekanntgaben*, vol. 2, ed. by Partei-Kanzlei (Munich: Zentralverlag der N.S.D.A.P., [ca. 1944]), 613–615, here: 614.

25 Sachße and Tennstedt, *Geschichte der Armenfürsorge in Deutschland*, vol. 3, 13.

26 Sachße and Tennstedt, *Geschichte der Armenfürsorge in Deutschland*, vol. 3, 16. Scherer, *'Asozial' im Dritten Reich;* Hörath, *"Asoziale" und "Berufsverbrecher"*, chap. 1, 35 ff. It is important to take into account that, as Hörath has pointed out, the racial hygienic ideologies were not an original creation of the Nazis, but had already been developed in the decades before 1933, especially since the 1880s.

27 "Alles für das Volk", in Münchner Neueste Nachrichten, 27. 10. 1934, quoted after Hörath, *"Asoziale" und "Berufsverbrecher"*, 114.

consequences of the world economic crisis. Sachße and Tennstedt accordingly describe the Great Depression as

> a period of comprehensive socio-political cutbacks, which included the reduction of material benefits, the weakening of the legal position of those entitled to them, the restriction of self-administration and the dismantling of democratic opportunities for participation. In many respects, the social policy of National Socialism was thus able to pick up on developments that had already begun before 1933.[28]

Hörath names further legislative measures that continued the tendency, which had already existed before the National Socialists came to power, to attach less and less importance to the rule of law[29] and that during National Socialism gradually, step by step limited the possibilities of control of the legislator and the executive by the judiciary and citizens who, in a state governed by the rule of law, initiate the control activities of the judiciary in the first place by filing a complaint. These measures that limited the mutual control of the state powers were the abolition or reduction of statutorily guaranteed legal remedies, the supplementation of clear and thus (in a constitutional state) enforceable statutory and constitutional rights with indeterminate, fuzzy legal terms and more or less unrestrictedly interpretable 'elements of the offence', as well as the expansion of the "preventive principle".[30] All these individual aspects favoured the "measure state", which, according to Hörath, was the actual specificity in the way the poor were dealt with under National Socialism.[31] Against this background of the aforementioned continuities and differences, Christoph Butterwegge quoting Michael Stolleis stated in 2014:

> There was no fundamental break with the existing social system: 'The National Socialist welfare state rather continued – albeit in an undoubtedly radicalised form – existing approaches; genuinely new elements in the social security system were hardly introduced during the Nazi period, but rather the welfare state structures [were] at best fitted into the specific system of rule of National Socialism.[32]

How does social policy and legislation regarding the treatment of the poor change after 1945? Although the concentration camps were closed or used as camps for DPs, the workhouse system and the concept of "corrective detention" continued to exist. According to Ayaß' research published in 1993, which focused on the Breitenau workhouse due to a lack of other sources, the prison was occupied again in April 1946 with prisoners serving 'corrective detention' after it had been completely cleared by US troops at the end of March 1945. 87 per cent of the prisoners were women. As in the past – during National Socialism and before –, the grounds for imprisonment in this workhouse were morality and prostitution. The possibility of permanent placement on the basis of the GgG of 1933 continued to exist.[33] Ayaß points out how little had changed after 1945:

28 Sachße and Tennstedt, *Geschichte der Armenfürsorge in Deutschland*, vol. 3, 18.

29 Ibid., 139.

30 Hörath, "Asoziale" und "Berufsverbrecher", 117. On the preventive principle: Adolph Wagner, *Lehr- und Handbuch der politischen Ökonomie. In einzelnen selbständigen Abtheilungen,* Erste Hauptabtheilung: "Grundlegung der politischen Oekonomie". Erster Teil: "Grundlagen der Volkswirthschaft". Zweiter Halbband (Leipzig: Winter 1893), 908–915, https://archive.org/details/bub_gb_dGACAAAAMAAJ/page/n5/mode/2up.

31 Hörath, *"Asoziale" und "Berufsverbrecher"*, 139–140.

32 Gabriele Metzler, *Der deutsche Sozialstaat* (Stuttgart: Deutsche Verlags-Anstalt 2003), 13, quoted after Christoph Butterwegge, *Krise und Zukunft des Sozialstaates* (2005) (Wiesbaden: Springer VS 2014), 60, https://doi.org/10.1007/978-3-531-19941-2.

33 Ayaß, "Die 'korrektionelle Nachhaft'", 199.

> The entire procedure of workhouse accommodation was described by the military government officials as medieval. It was possible that people disappeared forever in an institution without anyone knowing where they had stayed. The courts' review of the accommodation was insufficient, and if it had been carefully reviewed, the majority of the detainees would have had to be released. The only reason the workhouse inmates were kept in Breitenau for so long was to use them as agricultural labour. In February 1949 the American occupation authorities abolished the workhouses in the US zone,

which led to the liberation of over 2000 people.[34] The final abolition of the workhouses was by no means rapid or without obstacles. It is true that from 1954 to 1968 the number of people sent to the workhouse fell continuously from 908 to 233 in the Federal Republic of Germany at that time.[35] Nevertheless, workhouse imprisonment was enshrined both in the Federal Social Assistance Act (BSHG) of 30 June 1961, which replaced the Reich Principles on the Prerequisite, Nature and Measure of Public Welfare (RGr) and the Ordinance on the Duty to Provide Welfare (RFV), and in the federal government's (unimplemented) draft for a criminal law reform (draft StGB) of 4 October 1962. Thus, sections 24 and 73 BSHG continued to threaten people with internment in the workhouse, who "persistently [refused] to do reasonable work despite repeated requests" and were therefore dependent on state assistance for subsistence or did not meet their maintenance obligations. These norms also threatened people with internment, who were "endangered" because they could not "lead an orderly life in the community".[36]

According to the – unimplemented – draft of the StGB of 1962, people who had already served a prison sentence "for commercial bawdiness (section 223), enticement to bawdiness (section 224), begging (section 354) or vagrancy (section 356)" should be sent to a workhouse if there was a "danger" that they might "commit further offences" as a result of their "work-shyness" or their "inclination". A time limit was not specified here either.[37]

It was not until 1967 that section 73 BSHG, i.e. the compulsory placement of "at risk" adults in labour institutions, was declared invalid by the Federal Constitutional Court.[38] However, section 26 of the BSHG remained unaffected by the judgement for the time being. It was not until 1969 that workhouse imprisonment (as well as the differentiation between various forms of internment – penitentiary, workhouse, etc.) was finally abolished in the course of the accomplished criminal law reform.

However, the entry into force of the 1969 Criminal Code on 1 April 1970 by no means abolished forced labour. Article 12 (2) and (3) GG, according to which "no one may be forced to do a particular job" and to "forced labour" does explicitly not apply "in the case of a deprivation of liberty ordered by a court". This means that the amalgamation of internment and forced labour continues to exist in Germany in the context of prison sentences.

Remarkably, in a 1998 decision on the StGB of 16 March 1976, the Federal Constitutional Court explained the amalgamation with the established, social-disciplining oriented justification. Obligatory (i.e. forced) labour in a prison would serve to "reso-

34 Ibid., 199.
35 Ibid., 200.
36 Sections 24 and 73 BSHG, https://dejure.org/ext/ea48c93b38506d9f9916eac220afbf2f.
37 Section 84, Draft Criminal Code (StGB) E 1962, in: German Bundestag, 4th Election Period, Drucksache IV/650, 23; 212, https://dserver.bundestag.de/btd/04/006/0400650.pdf.
38 BVerfG, judgement of 18. 07. 1967, ref no. 2 BvF 3/62.

cialise prisoners" and enable them "to lead a life without criminal offences in the future in social responsibility (section 2 sentence 1 StVollzG [penal enforcement code])."[39]

Admittedly, the complainants in these proceedings before the Federal Constitutional Court were probably not (only) poor people – benefit recipients, beggars, homeless persons, vagabonds etc. – but convicted criminals. The logic of the values underlying the Federal Constitutional Court's reasoning, however, is the same as that which has existed with regard to the poor since the late Middle Ages: People would not commit crimes (or be poor) if they had the discipline, diligence and commitment to pursue regular work, and work imposed from outside was suitable to bring about the internalisation of work discipline as a prerequisite for a crime-free life after serving prison. The fact that in the case of white-collar criminality or homicide due to jealousy or injured 'honour', for example, there was no causal connection between work and a life free of crime, as the Federal Constitutional Court implied, remained outside the field of vision of Germany's highest court.[40]

IV. Administrative Practice and Legal Theory

If dealing with the poor in history since the early modern era has always been associated with "control, coercion and disciplinary measures" "alongside alimentation", as Butterwegge put it,[41] could the malfunctioning and harassment I had observed in the administrative actions of the Federal Employment Agency be explained in terms of the tradition of dealing with the poor?

Could it be that the staff of the employment agencies and job centres of the Federal Employment Agency were so used to negative ways of dealing with the unemployed that they did not notice when their "control, coercion and disciplinary measures" turned into sheer harassment? Does this explain the job centre's initial refusal to allow a benefit recipient move to a cheaper flat with central heating, i.e. with more comfort? Could it be that the compulsion to control is so pervasive from the staff's point of view that it does not occur to them that obliging unemployed people to attend appointments without a specific reason humiliates and incapacitates them? Does this explain the "automatically issued" calls for reporting?

At the turn of 2019, when I began to acquire knowledge about the history of the treatment of the poor before, during and after Nazism, I had recently filed a complaint with the Federal Social Court for non-admission to appeal, which explicitly called on the court to review the legality of calls for reporting with universally applicable empty formula justifications and thus implicitly raised the question of the treatment of the unemployed in Germany in the 21st century. This complaint had been the last step at that time in a court case that had already been running for five years by the end of 2018.

39 BVerfG judgement of 01. 07. 1998, ref no. 2 BvR 441/90.

40 Timo Stukenberg and Olaya Argüeso, "'Made in Germany' – Wer von der Arbeit in Gefängnissen profitiert", in *Correctiv*, 3 July 2021, https://correctiv.org/aktuelles/justiz-polizei/leben-im-gefaengnis/2021/07/21/made-in-germany-wer-von-der-arbeit-in-gefaengnissen-profitiert/. In the same vein, Christian Vinke, operator of the Prisonwatch platform and inmate at Sehnde Prison stated: "In the end, it is nothing other than forced labour." "Indeed, not all prisoners need work as a therapeutic measure, because they have no shortage here at all."

41 Butterwegge, *Krise und Zukunft des Sozialstaates*, 50. Similarly, Rein described the regulations under SGB III and II (unemployment insurance and social welfare) in 2009 as the continuation of the "motivational background, legal legitimation and practical design of forced labour assignments" since the AVAVG of 1927 (Rein, "Wer Vollbeschäftigung ruft, wird Arbeitsdienst ernten!", 244).

In what follows I will describe the course and legal fundament of this court case. I do this because legal knowledge is 'knowledge of domination' [Herrschaftswissen] and it is therefore advantageous for a democratic society based on the rule of law if legal knowledge is available to as many individuals and institutions as possible in order to appropriately distribute power. This and the following sections offer legal knowledge. Moreover, the case I will present is suited to show that the disadvantage of the poor and unemployed, manifesting itself in excessive social disciplining and moral education; stigmatisation/discrimination; (compulsory) labour; and a complex of punishment, harassment and excess of violence since late medieval times, is sustained in the 21st century not only by the legislature and executive, but to a considerable extent also by the judiciary – in the presented case by means of the misapplication of laws and constitutional principles.

In 2013/2014, I had contested the calls for reporting on the occasion of unemployment between two research projects. Before this legal step, I had compared 'my' call for reporting with the three calls for reporting that the Federal Employment Agency had sent to an employed person, i.e. a person who had not applied for unemployment benefits and was therefore not legally obliged to comply with calls for reporting, in 2010/2011. I had noticed that the justifications of the calls for reporting seemed to consist of very general text modules that did not reveal the reason for the obligation to attend the appointment at the Employment Agency. The justification just claimed that the staff wanted to "talk" with me about my "professional situation". Such a justification for restricting my freedom to decide for myself when I wanted to be where was clearly too general. That this was the case resulted from the following consideration: Regardless of the occupational situation in which 'invited' unemployed people including me were in each case, it was possible to talk to them (as with any other person of working age) about their professional situation. The formulation "conversation about the professional situation" did not even reveal whether the employment agency had "invited" me because it wanted and needed to pursue certain purposes that required my physical presence, or whether the call for reporting was issued blindly or arbitrarily (like the calls for reporting to the above-mentioned person who was employed in 2010/2011). Upon further analysis of the justification "conversation about the professional situation of the unemployed person", it had become clear to me that these requests for reporting were passe-partout formulations, formulas that were devoid of any justifying or explanatory content.

In light of this understanding, in 2013/2014 I had availed myself of an objection [Widerspruch], a statutorily guaranteed legal remedy available to residents in Germany, i.e. an important element in the rule of law, which, as Hörath had shown, had been increasingly eliminated under National Socialism. As part of my objection, I had informed the authority that I would not attend the scheduled appointment. I had explained in detail my concerns about the legality of the calls for reporting with passe-partout justification. I had expected that the staff of the Employment Agency would understand my reasons, apologise and send a corrected call for reporting giving a case-related reason or revoke the administrative act. Contrary to my expectations, the Employment Agency punished me and sent me the very next call for reporting again with a text module reason, which showed that they had not taken note of my reasons for non-appearance.

Yet, from a legal perspective, my objections were only too justified. According to ordinary legislation in Germany, administrative acts based on a legal provision that grants the authority discretionary powers, i.e. the choice between different legal consequences, must be justified by the authority by referring to the individual case. This

requirement applies to calls for reporting because section 309 (2) SGB III (unemployment insurance act), the norm that allows calls for reporting, states that "The call for reporting *may* be made for the purpose of …".[42] The word 'may' grants the authority to exercise discretion.[43] According to legal doctrine, 'granting discretion' means that the authority may not simply follow a standard procedure, but must inspect the files and make a case-by-case decision before issuing a call for reporting.[44] In the case of the Federal Employment Agency, this means that their staff must establish that they have a purpose that cannot be achieved by the usual means of communication such as e-mail, telephone or paper mail and without the presence of the unemployed person. Only then may they issue a call for reporting.

What however if the discretionary administrative act contained only text modules as justifications such as 'conversation about the unemployed's professional situation', i.e. a formulation that could be used for all unemployed persons at any times independent of their current situation – and independent from the staff of the employment agency checking the case's files? Federal courts and legal scholars in Germany, Austria and Switzerland agree that such a discretionary act is formally unlawful[45] because the empty formula justification is equivalent to the complete lack of a justification making the act suffer a particularly serious, formal legal error in the statement of reasons.[46]

This legal assessment is not just an abstract formalism, but the logical consequence of the constitutional rights that German residents can claim. Article 19 (4) GG (guarantee of legal recourse) provides that residents in Germany can take legal action against unlawful or unconstitutional interference by authorities.

42 My italics. Section 309 (2) SGB III states: "The request to report may be made for the purpose of 1. vocational guidance, 2. placement in training or work, 3. preparing active labour promotion activities, 4. preparing decisions in the benefit procedure, and 5. verifying the existence of the conditions for entitlement to benefits" (section 309 (2) SGB III of 24. 03. 1997, BGBl. I, 594, 595, in force since 01. 01. 1998, https://www.bgbl.de/xaver/bgbl/start.xav?start=//*%5B@attr_id=%27bgbl197s0594.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl197s0594.pdf%27%5D__1679999149772).

43 It should be noted that the duty to exercise discretion is not fulfilled by the authority simply selecting a purpose from the list in paragraph 2 of the legal norm. This cannot be the case, because according to legal doctrine, the discretionary activity of the administration should be aimed at choosing between different legal consequences - a request to report or a telephone call or a letter or email or no action at all. However, the list in the norm refers to the purposes to be pursued by means of the legal consequences to be chosen and about which the authority must have clarity in order to choose an appropriate legal consequence, i.e. a consequence that is suitable and necessary for pursuing the purpose.

44 For more details and further literature: Kutschke, "Universell einsetzbare Leerformelbegründungen", 279 ff.

45 Cf. in German legal theory: Dirk-Joachim Walcke-Wulffen, *Begründungszwang bei Verwaltungsakten* (Munich: no publisher 1974), 102; Till Müller-Ibold, *Die Begründungspflicht im europäischen Gemeinschaftsrecht und im deutschen Recht* (Frankfurt am Main et al: Lang 1990), 199; Friedhelm Hufen, *Fehler im Verwaltungsverfahren*, 4th ed. (Baden-Baden: Nomos 2002), 201; Uwe Kischel, *Die Begründung* (Tübingen: Mohr Siebeck 2003), 379; Ferdinand Kopp and Ulrich Ramsauer, *Verwaltungsverfahrensgesetz. Kommentar,* 7th ed. (Munich: C. H. Beck 2003), section 39, margin no. 19; Friedrich Schoch, section 80, in *Verwaltungsrecht VwGO* [administration court law], 40th ed., ed. Friedrich Schoch and Jens-Peter Schneider (Munich: C.H. Beck 2021), Section 80, margin no. 247, 248; Hubertus Gersdorf, section 80, in *BeckOK VwGO,* 58th ed., ed. Herbert Posser and Heinreich Amadeus Wolff (Munich: C. H. Beck 2021), section 80, margin no. 87, 88; Kutschke, "Universell einsetzbare Leerformelbegründungen"; in German case law: Federal Social Court (BSG), judgement of 23. 09. 1997, ref no. 2 RU 44/96; BSG, judgement of 18. 04. 2000, ref no. B 2 U 19/99 R; BSG, judgement of 22. 08. 2012, ref no. B 11 AL 53/12 B; Federal Court of Justice (BGH), decision of 16. 05. 2013, ref no. V ZB 44/12; Federal Administrative Court (BVerwG), decision of 10. 12. 2014, ref no. 1 C 11.14; BGH, decision of 26. 10. 2017, ref no. V ZB 143/17; BGH, decision of 21. 08. 2019, ref no. V ZB 100/18; BGH, decision of 20. 04. 2021, ref no. XIII ZB 36/20; in Austrian legal theory and jurisprudence: Magdalena Poeschl, "Section 192 – Gleichheitsrechte", in *Grundrechte in Österreich* (= Handbuch der Grundrechte in Deutschland und Europa, Vol. VII/1), ed. Detlef Merten and Hans-Jürgen Papier (Heidelberg and Vienna: C. F. Müller and Manz 2009), 251–318, here: 297; Constitutional Court (VfGH), finding of 22. 09. 2014, ref no. B130/2014; VfGH, finding of 09. 06. 2017, ref no. E 3235/2016-17; in Swiss legal theory and jurisprudence: Lorenz Kneubühler, *Die Begründungspflicht* (Bern, Stuttgart and Vienna: Paul Haupt 1998), 194; Federal Administrative Court (BVGer), judgements of 27. 12. 2013, ref no. E-6711/2013 and E-6714/2013). More details in Kutschke, "Universell einsetzbare Leerformelbegründungen".

46 For a detailed discussion and further literature: Kutschke, "Universell einsetzbare Leerformelbegründungen".

A call for reporting is such an intervention, because according to section 159 (1) no. 8 in conjunction with (6) SGB III, the Federal Employment Agency must penalise non-compliance with a call if it does not accept the reasons given by the penalised unemployed persons for missing the appointment. The unemployed persons must therefore have the possibility to appeal to a court in case of punishment by the state authority, and for this they must first come to the conclusion that the administrative act was unlawful or unconstitutional, and in order to decide this they must know the reasons, i.e. the legal basis and, in the case of a discretionary act, the case-related considerations of the authority on the basis of which the administrative act was issued.

In the standard calls for reporting of the Federal Employment Agency, however, the (pseudo) justification 'conversation about the professional situation' conceals the 'true' reasons of the Agency's staff to 'invite' an unemployed person. The wording is so general that the addressees (and later the judges in the event of a dispute over a call for reporting) are free to ascribe any (or no) meaning to it. Seen in this light, the concrete justification (instead of a rhetorically misleading pseudo-justification) is decisive if the judiciary is to review, i.e. confirm or deny, the legality of the contested administrative act while, if the statement of reasons in an administrative act is missing, the right to justice is indirectly curtailed.

This sounds hyper-complicated, but it basically prescribes what should be self-evident in a modern 21st century society: If an individual A (or a group of individuals) wants to make another individual B (or a group of individuals) do something that B does not want to do him/herself, A should give good reasons that convince B that A's demand is useful – ideally for A and B and the whole community.

Against this legal background, in 2013/2014, when I appealed to the social court after being punished for refusing to follow calls for reporting with inadmissible empty formula reasons, I trusted the judicial system and expected praise from the judges, since my refusal to follow the unlawful calls for reporting helped to correct a longstanding wrong practice. As I later found out, these calls for reporting with inadmissible empty formula justifications had in fact been sent out all over Germany since at least 1994, so that according to my calculation, more than 38 million of them must have been issued only since 2007.[47]

However, things turned out quite differently than was to be expected in view of the legal situation. First of all, my persistent refusal led to the cancellation of all my benefits. How was this possible? What was the legal basis?

V. The Punishment System

Residents who have registered at the employment service and receive (or expect to receive) financial support, but do not show up at a reporting appointment are penalised by losing significant parts of their current (or future) benefits. According to section 159 (1) no. 8 in conjunction with (6) SGB III, a missed appointment is punished with the loss of seven days of unemployment benefits being at the current general benefit rate up to 557.06 Euro at the maximum benefit amount of 2,387.53 Euro/

47 The number was derived from the unemployment figures ("Arbeitslosenquote in Deutschland im Jahresdurchschnit von 2005 bis 2021", ed. statista GmbH, Hamburg, https://de.statista.com/statistik/daten/studie/1224/umfrage/arbeitslosenquote-in-deutschland-seit-1995/). The number of calls for reporting issued is at least equal to the number of unemployed, because all unemployed people are asked to attend a reporting appointment at least once, usually several times, during their period of unemployment.

month.[48] Recipients of basic income being support at the subsistence level ('ALG II' or 'Hartz IV' in common parlance, since 1 January 2023 'Bürgergeld'), who were economically unable to acquire a basic right to unemployment benefits by means of payments into the unemployment insurance system, lose 50.02 Euro at the current standard benefit rate of 502 Euro/month according to section 32 (1) SGB II (social welfare code). Until 31 December 2022, the loss for those recipients was still three times the amount.

The fact that the sanctions for failure to report are by no means lenient can be seen, for example, in comparison to the significantly lower fines for road traffic offences, i.e. a context of action with a comparatively high risk of damage, in relation to which intervention-intensive sanctions can be justified by the legislator's assumption – rightly or wrongly – that there is a correlation between the amount of a sanction and its deterrent effect. The lack of necessity of the drastic sanction levels in SGB III and II also becomes apparent in a comparison with a similar constellation. In order to enforce library users to renew or return books on time by visiting the library (which is equivalent with participating in a reporting appointment), library managers in Germany consider reminder fees of an average of 2.50 Euro (per book) to be necessary for the first reminder.

So the sanctions for my refusal to attend a reporting appointment were based on section 159 (1) no. 8 in conjunction with (6) SGB III, which entitled the authority not to pay benefits for one week for each missed reporting date. On which standard did the authority then based the complete cancellation of the benefit decision? And what was the justification? Was this not a hidden double punishment (which would violate not only Article 3 (3) GG, but also Article 4 of the seventh ECHR additional protocol)? According to the jurisdiction of the Federal Social Court multiple failures to attend the appointments are "weighty evidence" of lack of 'subjective availability', under section 138 (1) no. 3 in conjunction with section 138 (5) nos. 3 and 4 SGB III.[49] The determination of the lack of subjective availability is interpreted as a "substantial change of circumstances" in terms of section 48 (1) no. 4 of the Tenth Book of the Social Code (SGB X). This in turn leads to the annulment of the decision on the granting of unemployment benefits with effect for the *future* under section 48 (1) no. 4 SGB X or even for the *past* under section 45 (1) and (2) sentence 2 no. 3 SGB X if the court reviewing the contested calls for reporting assumes, for example, that the benefit recipients already knew when applying for unemployment benefits that they would contest the legality of the calls for reporting (for instance, because they considered the text module justifications of the discretionary acts unlawful).[50]

Moreover, my lodged objection, the legal remedy guaranteed by law, turned out to be ineffective to protect me from the sanctions for not showing up at the reporting appointment. This was so because, in contrast to the general principle that an objection against an administrative act has a suspensive effect, section 336a (1) no. 3 SGB III denies the suspensive effect of objections against calls for reporting.

48 Bundesagentur für Arbeit. *Selbstberechnung Arbeitslosengeld (2023).* https://www.pub.arbeitsagentur.de/selbst.php?jahr=2023.

49 BSG, decision of 25. 02. 2014, ref no. B 4 AS 417/13 B, margin no. 27; on subjective availability: Katie Baldschun, section 138 SGB III, margin no. 322-326, in *Sozialgesetzbuch III – Arbeitsförderung – mit SGB II – Grundsicherung für Arbeitsuchende – Kommentar*, ed. Alexander Gagel, (Munich: C. H. Beck 2021), margin no. 324.

50 The economic loss due to failure to register can thus currently amount to up to 29,046.70 Euro (excluding lawyers' fees) if the unemployed person was eligible to receive the maximum rate of unemployment benefits for twelve months.

At that time, I still had confidence in the German legal system. However, there was no reason to do so, as I subsequently found out. In the three following trials about the sanctions and the total loss of unemployment benefits in the first and second instance, I met judges who – again with mere empty formulas – dismissed my complaints indifferently or openly aggressively. None of them remembered the legal doctrine that discretionary decisions such as calls for reporting according to section 309 (2) SGB III must prove the dutiful exercise of discretion by a case-related justification. None of them seemed to know that the reporting requests used text modules for justification. They did not do so, although notification requests with the always same universally applicable justification – "conversation about the professional situation", "offer of/for applicants" – had been examined by the social courts in numerous proceedings in numerous cities and federal states since 1994.

At the turn of 2019, when I discovered Hörath's monograph, I had just filed an appeal [Beschwerde] against the non-admission of the appeal [Revision] with the Federal Social Court. In the grounds for the appeal, I demonstrated that numerous higher courts of different disciplines in Germany – the Federal Administrative Court, the Federal Supreme Court and the Federal Social Court itself – agreed that empty formula justifications in discretionary administrative acts, i.e. in the type of administrative acts to which calls for reporting also belong, are inadmissible and unconstitutional. I had derived characteristics of empty formula justifications from these rulings and shown that the standard justifications used in the calls for reporting sent to me by the Employment Agency had all the characteristics, i.e. were perfect empty formula justifications.[51] In vain. The Federal Social Court rejected my complaint without much ado, without addressing my well-founded argumentation.

V. Contesting the Status Quo

Where are we today – 545 years since the enactment of the first order governing the poor, 468 years after the opening of the first workhouse, 427 years after that of the first penitentiary, and 78 years after the end of National Socialism?

What had happened in the meantime with regard to the failure to rehabilitate the asocials and professional criminals, to which DIE LINKE had drawn attention with its 'Small Question'? Contrary to my assumption, the documentation of the Scientific/scholarly Service initiated by the Small Question and the activities and publications by Allex and her comrades in the context of the transformation of the former labour camp Rummelsburg had not been ineffective. In April 2018, Julia Hörath, Sylvia Köchl, Andreas Kranebitter, Dagmar Lieske, and Frank Nonnenmacher had started a petition on change.org for the recognition of "'asocials' and 'professional criminals' as victims of National Socialism".[52]

51 For an in-depth discussion of the characteristics of the empty formula justifications of the calls for reporting and the legally erroneous case law of the Federal Social Court related to this, see Kutschke, "Universell einsetzbare Leerformelbegründungen" and Kutschke, "Binnen- und Außendivergenz der Sozialgerichtsbarkeit zu Ermessensverwaltungsakten mit universell einsetzbaren Leerformelbegründungen", *Sozialrecht aktuell*, nos. 4 and 5 (2023), 185–192 and 226–231.

52 Cf. Julia Hörath, Sylvia Köchl, Andreas Kranebitter, Dagmar Lieske, and Frank Nonnenmacher. petition: "Anerkennung von 'Asozialen' und 'Berufsverbrechern' als Opfer des Nationalsozialismus" (18 April 2018). www.change.org/p/deutscher-bundestag-anerkennung-von-asozialen-und-berufsverbrechern-als-opfer-des-nationalsozialismus.

In February 2019, Bündnis 90/Die Grünen and subsequently all other parliamentary groups had submitted a motion for the rehabilitation of this group of victims and, in February 2020, a majority of the German Bundestag had voted in favour of the motion of the then governing coalition CDU/CSU and SPD (which was broadly similar in content to the motion of the Green Party, but suited to create the appearance that the federal government had acted on its own initiative, not at the suggestion of an opposition faction).[53] The motto of the motions of all parliamentary groups was "No one was justly interned in a concentration camp" and, thus, seemed to draw on the slogan that Allex had coined in the context of her Rummelsburg activities and publications in 2009: "No human being is 'asocial'."[54]

Justice has thus been done to the victims of National Socialism wearing the black and green triangles – though too late, because with a few exceptions all victims have already died and the application period for compensation payments in symbolic amounts to former forced labourers by the foundation *"Erinnerung, Verantwortung und Zukunft"*, which was established by law in 2000, had already been closed at the end of 2001.[55] (The *Versöhnungsfond* in Austria, which was established around the same time for the same purpose, was closed on 31 December 2005.)

In order to achieve rehabilitation, numerous scholarly books and articles had to be published since the 1980s, an opposition party had to ask a 'small question', the Scholarly/Scientific Service of the German Bundestag had to write a report and almost 22,000 people had to sign a change.org petition with 124 initial signatories, including 110 professors and 22 members of the German Bundestag from all parliamentary parties, i.e. the network of petitioners from academia and politics.

But what about the thousands (or rather millions) of unemployed who have been sanctioned for not attending a reporting appointment, mostly on the basis of calls for reporting which since at least 1994 have been justified with empty formulas and, thus, were formally unlawful?

What I had not fully understood in winter 2018/2019 yet was the fact that it was the Federal Social Court itself that, in several decisions since 1996, had judged calls for reporting to be lawful[56] despite their universally applicable text module justifications. Deviating from legal doctrine and prevailing case law, it had created a divergence in case law which partially deprived unemployed their constitutional rights-based on Art. 19 (4) of the Basic Law – and no one had noticed this in the last almost 30 years, except one:

In 2013, just like me in late 2018, in a complaint about the non-admission of the appeal [Revision] a complainant had drawn the Federal Social Court's attention to its own legally wrong jurisdiction. He had – correctly – pointed out that the justifications of the contested calls for reporting could not be case-specific (as required by the law) because case specificity could not be achieved by means of the formulaic formulations that were used in almost all calls for reporting throughout Germany. The 4th Senate of the Federal Social Court entrusted with the case and chaired by Thomas Voelzke, the later vice-president of the BSG from 2017 to 2021, had demonstrated that it had understood the point by summarising the complainant's arguments:

53 See joh/aw/sas. "'Asoziale' und 'Berufsverbrecher' sollen als NS-Opfer anerkannt werden" (13 March 2020). https://www.bundestag.de/dokumente/textarchiv/2020/kw07-de-ns-verfolgte-680750.

54 Title of Allex, "Kein Mensch ist 'asozial'".

55 Interview with Günter Saathoff, former member of the foundation's board, 24 April 2009: https://www.zwangsarbeit-archiv.de/projekt/experteninterviews/saathoff/index.html.

56 BSG, judgement of 25.04.1996, ref no. B 11 RAr 81/95. The Federal Social Court had consolidated its rulings in 2010 and 2011: BSG, judgement of 9.11.2010, ref no. B 4 AS 27/10 R; BSG, judgements of. 25.08.2011 (a), ref no. B 11 AL 30/10 R.

> With regard to the reporting purposes of section 309 SGB III in conjunction with section 59 SGB II, the further legal question arises [in the view of the complainant] as to how a reporting purpose can be considered individual and related to a specific person without an error of reasoning if it is formulated in a formative manner and is used nationwide with identical wording in virtually all calls for reporting.[57]

The complainant had also pointed to the lack of discretion. However, the 4th Senate had rejected his complaint and the 14th Senate again chaired by Voelzke had again substantiated the Federal Social Court's opinion that calls for reporting with the used standard justifications – 'conversation on the professional situation' and 'applicant offer' – in two subsequent proceedings in 2015. In these cases, the judges had even carried out a check of discretionary errors for the first time, but – again believing that the universally-applicable text modules indicated case-related, specific purposes that the job centre pursued – concluded that the authority had perfectly exercised its discretion.[58] Following the case law of the Federal Social Court, the lower courts had adopted its opinion and covered up the logical mistakes by mostly quoting a passage from the Federal Social Court's judgement, which evaded the problem of empty formula reasoning by itself being an empty formula reasoning.

Furthermore, what is worrying about the Federal Social Court's approach is that – again in violation of legal provisions – it submited neither the complainant's 2013 case nor my 2018 case to its Grand Senate. This is worrying because a senate of the court is obliged under section 160 (2) SGG to do so if the senate intends to deviate from the established case law of the Federal Social Court(s): in this case, being the established case law that discretionary administrative acts with empty formula justifications are unlawful. If the extent of the Federal Social Court's divergence regarding calls for reporting was perhaps not yet fully apparent to the 4th Senate in the complaint about non-admission in 2013, I had fleshed out the divergence in detail in 2018. Nevertheless, the 11th Senate, which was entrusted with the case and chaired by Voelzke (again), did not proceed in accordance with the law. In fact, it concealed the case and the associated divergence from the Grand Senate.

Of course, I subsequently drew the attention of the Federal Constitutional Court as well as the ECtHR to the case law of the Federal Social Court, which has been questioning the legal unity in Germany and depriving the unemployed in Germany of their basic rights under the rule of law. Both times unsuccessful. The appeals were not accepted for decision and those decisions came of course without justification.[59] Without reasons, however, it is in principle impossible to tell whether a court has not understood the legal position and judicial grievances or whether the judges have not read the complaint at all.

What is to be concluded from the fact that none of the courts to which I brought the issue officially recognised that my complaints were justified? Two conclusions are logically possible and equally unsatisfactory. Either the supreme-court judges lacked sufficient knowledge of legal theory and legal doctrine that comprehensibly explain

57 Quoted after the decision of the BSG, decision of 23.05.2013, ref no. B 4 AS 295/12 B, margin no. 6.

58 BSG, judgements of 29.04.2015, ref nos. B 14 AS 19/14 R and B 14 AS 20/14 R, margin no. 33 ff.

59 Since an amendment to the Federal Constitutional Court Act (BVerfGG) in 1993, that added section 93d, the Federal Constitutional Court is no longer obliged to give reasons for non-acceptance decisions (BGbl., part I, no. 45 (19 August 1993), https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*[@attr_id=%27bgbl193s1473.pdf%27]#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl193s1473.pdf%27%5D__1679999594591).

why universally applicable justifications are unconstitutional and thus must be found inadmissible – or the bad reputation of unemployed people haunted me when, as an unemployed person, I objected to the calls for reporting. The latter interpretation would mean that while the judges saw the obvious, they did not want to concede this to me, the unemployed, in the tradition of disciplining, repression and harassment. I am grateful for comments from readers who favour one or the other or a third explanatory model: beate.kutschke@gmx.de.

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