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Siedentopf / Sommermann / Hauschild

THE RULE OF LAW IN PUBLIC ADMINISTRATION: THE GERMAN APPROACH

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The Rule of Law in Public Administration: The German Approach

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PREFACE

The papers collected in this volume were submitted in a dialogue seminar which took place in Bangkok from the 17th to the 21st of August 1992. The seminar was organized by the Office of the Juridical Council of Thailand and the Post-Graduate School of Administrative Sciences in Speyer, under the direction of Professor Dr. Dr. h.c. *Heinrich Siedentopf*. This meeting was the first in a series of three seminars sponsored by the Konrad Adenauer Foundation to be realized between 1992 and 1994, and covering subsequently the areas of administrative procedure, of law reform and law drafting and of administrative justice. The objective of the first dialogue seminar was, in particular, to define the rule of law in Public Administration and to discuss the principles of administrative law which may finally lead to a codification of the administrative procedure in Thailand.

When preparing the seminar, the German participants realized that, although there is a growing demand for such texts, only a few publications about German Public Administration and German administrative law exist in English. The contributions contained in this volume can only serve as a first general introduction to the topic. However, they might be helpful to others who are confronted with the task to convey basic elements of German Public Administration and administrative law to foreigners. Due to the different legal cultures of the "germano-phone" and the "anglo-phone" worlds, the main difficulties often lie in the translation of German legal terms into English. With the kind permission of the publishing house Butterworths (London), we were able to reproduce in the appendix the English translation of the German Law of Administrative Procedure of the year 1976, which was first published in the book "Legislative Drafting: A New Approach" by William Dale in 1977. The translation was up-dated, corrected and completed by *Patricia Fay Magiera*, M.A., to whom we express our acknowledgement and gratitude. We are also thankful for her kindness in proof-reading the contributions of the authors.

The bibliography at the end of the present volume does not cover all and partly goes beyond some of the questions treated in the preceding contributions. It is meant to give general information about English publications in the field of German Public Administration and public law.

Finally, we wish to thank the Research Institute for Public Administration at the Post-Graduate School of Administrative Sciences Speyer for the technical support. Special thanks go to *Elisabeth Lerchenmüller* who made the texts ready for printing.

Speyer, June 1993 *The Authors*

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THE PRINCIPLE OF THE RULE OF LAW

Univ.-Prof. Dr. Dr. h.c. *Heinrich Siedentopf*

INTRODUCTION

The German term "Rechtsstaat" designates a state governed by the rule of law. This principle finds its expression in the Constitution (Basic Law) of the Federal Republic of Germany. The rule of law was also the guiding concept when public administration was rebuilt after World War II.

The Basic Law, which entered into force on 23 May 1949, is the highest source of German law and forms the legal basic order of the Federal Republic of Germany. The Basic Law is not the first German Constitution influenced by the rule of law. Although the idea was not mentioned expressly, the Weimar Constitution of 1919 and – earlier – the Constitution of the German Empire of 1871, contained certain principles based on the rule of law. The rule of Law in the Weimar Constitution was reflected mainly in the principle of the separation of powers, as well as in the principle of the legality of the administration. The Weimar Constitution was also the first German Constitution to include a catalogue of fundamental rights. However, these rights were not inalienable. Based on National State of Emergency Article 48, the President of the Reich could "partially or completely suspend" many of them. Thus, the Weimar Constitution was based on a concept which is often described as a "formal" Rechtsstaat in contrast to a "material" concept, which means a state based on the idea of justice which guarantees certain inviolable rights to its citizens. The "material" Rechtsstaat has been described as a state governed by the law of reason, the state that realises, in and for human coexistence, the principles of reason embodied in the theoretical tradition of the law of reason (Böckenförde). The Basic Law established

a state based on the material concept. This not only includes such principles as the separation of powers, the legality of the administration or recourse to the courts. The Basic Law guarantees to all Germans a catalogue of inviolable human rights. Moreover, the Federal Constitutional Court held that the Basic Rights are not only defensive rights of the people as subjectives opposed to the state. They establish an objective value system. According to Art. 1 of the Basic Law, the highest value herein is the dignity of man.

It is well known that after 1933, Germany turned into a centralized dictatorship. Although the Weimar Constitution was never formally repealed, it proved to be too weak to stop Hitler and his National Socialist Democratic Party. A so-called "Empowering Act" gave them practically limitless power. The government reversed the separation of powers, banned all other parties and constantly violated basic human rights.

THE RULE OF LAW UNDER THE BASIC LAW

In view of the constant abuse of law under Hitler's National regime, the authors of the Basic Law laid the emphasis on the rule of law. Although the term "Rechtsstaat" is mentioned only in Art. 28 of the Basic Law which deals with the constitutional order in the States (Länder), the rule of law is grounded in Art. 20 of the Basic Law. Art. 20 defines Germany as a "democratic and social federal state". Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice. (cf. Art. 20).

According to Art. 79 para. 3 of the Constitution, any modification of fundamental law which might touch the principles laid down in Art. 20 is forbidden. This means that the Constitution itself does not allow a revision of the Constitution concerning certain fundamental principles.

Under the Basic Law, the principle of the Rule of Law is mainly reflected in the following constitutional principles:

1. THE PRINCIPLE OF THE SEPARATION OF POWERS

Art. 20 para. 2 of the Basic Law states that all state authority shall be exercised by specific legislative, executive and judicial organs. Legislation, executive power and the administration of justice are exercised by autonomous organs. The separation of powers shall guarantee the political distribution of powers and the resulting moderation of the State's power. However, exceptions to the above-mentioned rule exist. In the democratic system established by the Basic Law, the legislative power at federal level is exercised by the House of Parliament (Bundestag). According to Art. 80 of the Basic Law, the Federal Government, a Federal Minister or the State governments may be authorized by a law to issue ordinances having the force of statutory orders (Rechtsverordnungen). The content, purpose, and scope of the authorization so conferred must be set forth in such law.

The principle of the rule of Law requires that a legislative enabling act must be defined in such a way that what can be expected from the citizen is recognizable and foreseeable from the legislation itself, and not just from the ordinance based on it.

2. THE PRINCIPLE OF THE LEGALITY OF THE ADMINISTRATION

According to Art. 20 of the Basic Law, the executive and the judiciary shall be bound by law and justice. Two important aspects of this principle must be mentioned.

a) The Precedence of the Law

On the one hand, the will of the State as expressed in the form of law takes precedence over any other expression of the State's will, e.g., ordinances.

b) The Subjection to the Law

Germany does not belong to the countries with a Common Law tradition. As in other continental European countries, the German law is primarily contained in general codifications (Gesetzbücher). More specific legislation results in acts (Gesetze). Current German law is generally manifested in written statutes- unwritten law plays only a minor role in the German legal system. All important questions have to be decided by democratic legislation. That is to say, in certain fundamental areas- such as the protection of the Basic Rights- administrative action is only legitimate if it is authorized by formal law. Administrative action is strictly bound by the existing (written) laws and principles of justice. This leads not only to the positive effect that administrative activity can be foreseen and controlled. The result is also a "flood of norms".

3. THE BASIC RIGHTS

The Basic Law contains a catalogue of basic rights.

All state authorities, including the Executive, are bound by these rights laid down in the first section of the Basic Law.

Article 1 states that "the dignity of man shall be inviolable. To respect and protect shall be the duty of all state authority". Part of the basic rights are also such classic liberties as freedom of faith and creed, of expression, assembly and movement, postal privacy and the right to property, as well as the right to choose a profession or the inviolability of a person's home. All the basic rights are immediately valid in law. They are binding upon the legislature as well and they may be restricted only

to a limited extent and only as expressly permitted. Art. 19 states that if a basic right may be restricted by or pursuant to a law, such law must apply generally and not solely to an individual case. In no case, however, may the essential content of a basic right be encroached upon. Several important individual rights, however, are not mentioned in the Constitution. They have been developed by the Federal High Court, for instance, a general right to privacy, to protect the personal sphere of privacy under conditions of electronic data processing.

4. RECOURSE TO THE COURT

As already mentioned, Art. 20 para. 3 states that the executive shall be bound by law and justice. Legal control of the administration is therefore of particular importance under the Basic Law. Art. 19 para. 4 lays down that one can claim the protection of rights in the court if he/she feels these rights have been violated by public authority. In Germany, five branches of courts have been established:

a. ordinary courts (jurisdiction in criminal and civil matters)
b. administrative courts
c. finance courts
d. labour courts and
e. courts of social matters

These courts are independent of each other and equal in rank. The judges are appointed for life, they are independant and subject only to the law. In addition to the above-mentioned courts, the Federal Constitutional Court (Bundesverfassungsgericht) exercises jurisdiction in constitutional matters. In German constitutional history, this court is unique. The court is often described as "the guardian of the Constitution". Its judgements have legal force. According to Art. 93 para. 1 sec. 4., the court shall decide "on complaints of unconstitutionality which may be

entered by any person who claims that one of his basic rights has been violated by public authority".

The court also decides on disputes between the Federal Government and the states and also in certain cases between federal organs. However, giving substance to the basic rights is the most important part of the courts's work.

5. THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality serves as a limitation of state action. The principle has its main importance in the field of discretionary decisions. Public Administration may restrict a citizen's right only if

- it is strictly necessary to obtain a legal purpose
- the means of intervention are commensurate
- the intervention does not burden the individual excessively.

All administrative courts have the duty of seeing that the prinicple of proportionality is upheld by the administration.

6. THE PRINCIPLE OF THE CERTAINTY OF LAW

Legal certainty means primarily confidence in the law. The principle of legal certainty shall guarantee that a citizen can foresee possible State action affecting him and act accordingly. As in other continental European countries, the German law is primarily contained in general codifications. Thus, the above-mentioned principle requires that the written law is clear and precise so that the individuals concerned may know what is expected of them. At the same time, deregulation efforts take place. Obviously, a reduced number of laws enhances legal certainty. These efforts started in 1983, when the Federal Government appointed a com-

mittee to deal with the problem of over-regulation. The committee looked at over 1,500 regulations and abolished some of them. In 1989, new guidelines were issued in order to reduce the number of laws and to simplify the administrative procedure. Furthermore, the principle of legal certainty requires, as well, that state measures should not, as a rule, be retrospective.

7. STATE LIABILITY AND OFFICIAL LIABILITY

In addition to the principle of the legality of the administration, the principle of state liability has to be mentioned. Art. 14, which deals with the protection of property, establishes the principle of compensation in case of expropriation. Expropriation shall be permitted only in the public weal. According to Art. 14, expropriation may be effected only by or pursuant to a law which shall provide for the nature and extent of the compensation.

Art. 34 of the Basic Law, in connection with sect. 839 of the Civil Code, states that the Federal Republic of Germany is obliged to grant compensation if an office-holder acting in his official capacity wrongfully fails in a duty specifically towards a citizen. In the case where the office-holder (civil servant) is only guilty of negligence, the official liability of the State only arises when the injured party cannot achieve compensation in any other way. The duty of the State to grant compensation does not arise if the injured party could have taken a legal remedy.

8. THE RULE OF LAW IN THE EUROPEAN COMMUNITY LEGAL SYSTEM

The present German law can no longer be seen as an isolated legal system. As a general applicable source of law, the law of the European

Communities (EC) has to be considered. In creating the European Community, the member-states have opened their national legal systems to a new legislative authority. The European Court of Justice has clearly stated that Community Law prevails over national law.

As far as Germany is concerned, Art. 24 allows that sovereign powers may be transferred by legislation to inter-governmental or supranational institutions. There are, however, absolute limits to the transfer of powers which guarantee that the principle of the rule of law will never be abandoned. Art. 79 para. 3 provides that it is unlawful to change the Basic Law in a way that this principle might be affected. It is clear that such a change may not be achieved by transferring competences to the European Community.

It is because of this that the question has to be raised whether the rule of law is established on the European Community level. The EC-Treaty contains certain freedoms such as the free movement of workers and goods and the freedom to provide services. Furthermore, Art. 7 states the prohibiton of any discrimination on grounds of nationality, and Art. 119 of the Treaty provides for equal pay without discrimination based on sex. The treaty does not include a catalogue of human rights. However, in 1969, the European Court of Justice held that the European Community legal system contains certain fundamental rights which form an important part of the general principles of Community Law. In a number of judgements, the European Court of Justice made clear that the Convention for the Protection of Human Rights, as well as a European Court of Human Rights, have been set up to guarantee these rights.

As a result, in 1986, the German Constitutional Court held – in contrast to a former decision – that the protection of human rights on the Community Level is in substance similar to the standard of protection of fundamental rights required in the German Constitution.

Moreover, the legal system of the Community itself guarantees certain principles derived from the rule of law. These principles have been developed by the European Court as unwritten sources of community law and are derived mainly from principles and conceptions which are

common to the legal systems of the member-states. The principle of legality of administrative action and the principle of proportionality, for instance, have long been recognized by the European Court of Justice.

In summary, it can be said that the rule of law is established in the European Community legal system.

THE CHANGING FUNCTIONS OF PUBLIC ADMINISTRATION: THE DISTINCTION BETWEEN INTERVENTIVE AND COMMUNITY SERVICE ADMINISTRATION

Dr. *Christoph Hauschild*

I. INTRODUCTION

The distinction between interventive and community service administration touches upon our basic understanding of public administration, i.e., the organization, procedures and relationship between public authorities and citizens. A look into the history of public administration shows that, in continental European countries (administrative-law countries), public administration has undergone a relatively similar development in the last two centuries. With the evolvement of the modern state, public administration gained acceptance as an institution in its own right. In Germany, the later development was marked, in particular, by the concept of the constitutional state in which any administrative act involving the citizen is regarded as an application of law. It is the law that authorizes the administration to regulate the relationship between citizens and the state.

At the turn of the 18th century, the scope of public tasks was quite limited. Throughout Germany, the tasks of the administration were maintaining public security and order, and protection against natural catastrophes. Public administration was authorized to intervene in the case of disobedience to the law and the disturbance of public security and could take the necessary measures in the case of natural

catastrophes. The general competence of maintaining law and order became more specialized with industrial development. Commerce and trade, as well as the construction of buildings were put under the supervision of public administration to the extent that public risks or damage through such private activities had to be prevented.

The competence to issue licences or to inspect has, in the first place, an interventive nature. The citizen or private company concerned is subject to an administrative action. The legal instrument to regulate this relationship – the administrative act – comes into force by a unilateral act. The enforcement of an administrative decision is normally achieved by unilateral administrative action as well.

In short, the basic assumptions of the traditional "interventive" approach may be described in the following way:

- The primary purpose of public administration is the implementation of laws.
- The implementation of laws is considered, from the traditional perspective, a mechanical act of administration.
- The most important training for administrators is legal training.

II. THE "BUREAUCRATIC MODEL"

In order to comply with these functional requirements, bureaucratic rational structures with detailed administrative requirements and procedures were conceived for the internal organization. Accordingly, public administration is based on offices, official duties, the lifelong appointment of civil servants who have their spheres of responsibility, and on continual internal and external control.

These patterns had been identified by *Max Weber* in his design of an ideal type of bureaucracy. His model was influenced by traditional elements of continental European and, in particular, German administration. It did not reflect the administrative reality of Weber's time, but

was an ideal type created in order to contrast deficiencies in the administrative practice he had studied.

The following chart shows the elements of the "bureaucratic model" and indicates its advantages and disadvantages.

Bureaucratic model	Advantages	Disadvantages
1. **Hierarchy of positions**	maintaining unity of command and coordination of activities	blocks individual initiative and participation, centralization of decision-making
2. **System of rules and regulations**	ensures uniformity and legal control	useless procedures, red tape
3. **Functional spezialization**	increase in efficiency and productivity	impedes communication between spezialized units, development of parallel powers
4. **Impersonal relationships**	impartial treatment, objective judgement of all citizens	insufficient attention to the rights and needs of individual citizens

III. THE SERVICE ASPECT IN PUBLIC ADMINISTRATION

By indicating the advantages and disadvantages of the bureaucratic model, it becomes apparent that its effectiveness is highly interdependent on the specific administrative function to be fulfilled. It has its roots in a time when the prime task was to ensure that society's internal and external law and order were upheld. Since then, the administration's role and tasks have developed in different directions. Through the emergence of the welfare state, the administration has become deeply involved in the financial and social affairs of the population.

Public administration has played a key role in developing society's infrastructure. The administration's activities and involvement have allowed for a pooling of national resources in order to carry through economic developments and the operation of transport infrastructure, such as roads, railways, ports and airports.

In a modern-day mixed economy, the public sector has tasks which surpass this. Administration contributes directly or indirectly through cooperation with the private sector to the overall creation of values. In Germany, the share of the public sector in the GNP is 60 %. Still, management, through rules and budgets, continues to be a prime element in administration. With the necessary reservation, one can classifiy the activities of administration into the following categories:

- secretariat for the political leadership (preparation of political decisions and legislation)
- exercising and enforcement authority
- producer and performer of services.

Public administration is today more pluralistic in its orientation than ever before and different forms of organization and action should apply to different tasks and functions. A single organizational model cannot meet all the divergent orientations. In particular, when the service orientation dominates, the disadvantages of the bureaucratic model as described in the above chart, become apparent. For this reason, it is

increasingly believed that organizational and procedural rules in service administration should have a different design than the rules applied in the "classical" interventive administration.

IV. HOW TO ORGANIZE SERVICE ADMINISTRATION

Service administration takes up a very large part in public administration with regard to manpower, as well as to public expenditure. Social and employment policies, health services and education are the most common examples of public services. Public enterprises also belong to the category of service administration. The citizen is customer or user of these services. Managing these services so that they are rendered in the most efficient way is a constant question and concern.

In a comparative perspective, the efficient use and management of public services is of widespread interest. Within the OECD, questions of administrative management have become an increasingly important field of activity. According to comparative research done by the Public Management Committee (PUMA) in the OECD-Member States, the current issues in the management of public services are:

- A need for a cost-efficient public sector to improve the national economy.
- A more efficient and more public-oriented production of public services.
- More emphasis on performance budgeting.
- A better grasp on management and personnel policy.
- Active use of information technology in order to further administrative modernization.
- Better management of the formulation of rules and regulations.
- Improvement in the ways of measuring performance and the consequences of administrative reforms.

However, in Germany, these different issues are not taken up in order to initiate a large scale administrative reform. In a "case by case" approach, organizational readaptation measures are designed for certain branches of public administration or single authorities. By such an approach, it is taken into account that the multifarious activities of modern public administration require adaptive organizational solutions. Keeping that general reservation in mind, the following administrative principles apply, in a general way, to service administration:

1. Expertise and authority should rest with those who are closest to the customers or users.
2. Administrative actions should be user-oriented.
3. Competition between services should be allowed and institutionalized.
4. Internal organization should follow a managerial approach by efficient use of financial and personnel resources.

The essential point seems to be that administration should develop a profound service orientation. Service orientation means to focus on the person to whom services are delivered. In such a perspective, the person to whom services are delivered is referred to as a "customer" or "client". There is a strong debate whether the term "customer" can be applied to public administration. The term "customer" reflects a new perspective on the relationship between administration and citizens. The citizen is no longer the "administered person" subject to administrative action but someone whose interests and needs have to be carefully regarded and treated in administrative procedures.

The discussion about service orientation not only concerns the external relationship but the cooperation amongst the civil service as well. Due to the highly specialized organizational set-up of public administration, administrative actions often require a number of decisions by several administrative units or authorities. The service orientation could also help to improve the relationship between the different administrative authorities concerned. Internal procedures might be more effective

and less time consuming when the other civil servant involved is regarded and treated as "customer" or "client".

Accordning to an OECD study, the civil servant has to comply with the following guiding principles when services are delivered to clients:

- be comprehensible
- engage their participation
- satisfy their needs
- be accessible
- ask them whether they are satisfied.

In Germany, a service orientation in the above-described sense is developing more and more at the local level. In a comparative perspective, the German administration operates on a highly decentralized basis. The long tradition of local self-government in Germany provides communities with a considerable scope for managing their own affairs. There are two levels of local self-government: the municipalities (Gemeinden) and the counties (Kreise). These two levels function on the principle of subsidiarity, i.e., responsibility for local matters lies with the municipality, but when the municipality cannot fulfil its tasks, it is the county that undertakes the responsibility. Besides local self-government tasks, local authorites carry out public tasks on behalf of the state.

Citizens judge the performance of local administration according to its effectiveness, responsiveness and whether the administration is acting in a cost-effective manner. In the same way, private business companies judge the administrative capacities of a local administration when they plan an investment of capital. Citizens, as well as private business companies, compare the administrative capabilities of one city or community with neighboring cities or communities. Thus, local administration works in a much more competitive environment than many other sectors of public administration.

In Germany, some major cities are engaged in large scale administrative reforms. These reforms concern the budgeting process, human resources development and new organizational approaches, such as public-

private partnership. These reforms are intended to implement a clear service orientation in local government.

V. CONCLUDING REMARKS

An administration which corresponds to the actual size, complexity and technological mission displays a variety and wide range of functions. New patterns of organization and procedure develop in order to adapt administration to the changing environment. As the brief look into the modern history of public administration has shown, the development of administration has always been dynamic in its nature. In order to comply with the current demands put forth by the public, on the one side, and by the political leadership on the other side, a further emphasis on service orientation promises an increase in efficiency and responsiveness.

PART II

ADMINISTRATIVE LAW AND PROCEDURE

BASIC ELEMENTS OF GERMAN ADMINISTRATIVE LAW

Dr. *Karl-Peter Sommermann*

I. SOME HISTORICAL REMARKS

In Germany, modern administrative law emerged as a result of two philosophical currents that dominated or, at least, became dominant in the 19th century: liberalism and legal positivism. The first current refers to political theory, the second to theory of law.

Liberalism, based on the ideas of *Immanuel Kant* and *Wilhelm von Humboldt*, emphasized the individual liberty of the citizen and the necessity to reduce the power of the state to the task of guaranteeing and protecting the legal rights and liberties of the individual, in short: the creation of a state governed by the rule of law (*Rechtsstaat*). The state, understood as the totality of governmental bodies, should intervene in society as rarely as possible. To that end, the spheres of the state on the one hand, and of the community of citizens, i.e., society, on the other, were to be clearly distinguished. The distinction between state and society fostered, in turn, the equivalent separation in the legal sphere: public law on the one hand, and private law on the other. Whereas private law contains the rules applicable to the legal relations between the individuals in the sphere of society, public law refers to the legal relations between the individual and the state, at least when the latter acts in his capacity as bearer of sovereign power. According to this classical separation, private law is primarily coordinating law, public law, in essence, subordinating law. However, as we shall see later on, during the last decades of our century, the concept of public law has also been shifting more and more to the idea of coordination law. From the 1860s onward, the most evident expression of the separation of private and public law

was the creation of specialized administrative courts in the different *Länder*, according to the federal organisation of Germany. This separation, still valid today, marks an important difference to the juridical and judicial tradition of the common-law countries.

Legal positivism was the other significant theoretical current that promoted modern administrative law. Two of its main authors were *Carl Friedrich von Gerber* and *Paul Laband*. According to this theory, governments should no longer be able to invoke principles derived from an ambiguous natural law or metaphysical postulations that, in the last resort, could be interpreted by the sovereign at his discretion in order to justify his interference in society. There should be clear legal rules that determined and put limits to state action. The codification of public law became as important as the codification of private law. The result of the codification, however, should not be a uniform code comprising private and public law, but different laws. In the famous Prussian Code of Common Law of 1794 for instance, which was one of the first important codifications in Germany influenced by the Enlightenment, but still a product of absolutism, both subjects were still joined together.

Nevertheless, it took a long time, until administrative law (as the most extensive part of public law) was systematically developed and enshrined in formal law. In the beginning, a lot of laws were enacted, each regulating only selected areas of public law. It was up to the law scholars and to the jurisprudence of the administrative courts to elaborate on the general principles of administrative law. The most influential among them was *Otto Mayer* (1846-1924). As a professor in Straßburg and teaching in German and French, he knew modern French administrative law very well. On the basis of his comparative knowledge, he formed the fundamental institutions and concepts of German administrative law in his book "Deutsches Verwaltungsrecht", published in 1894, and other writings. Although he was strongly inspired by the French system, he not only copied its elements, but integrated the institutions known from German-Roman private law in his conception, adapting them to the purposes of public law, and thus distinguishing them clearly from their position in private law. Concepts like the personal public right (*subjektives öffentliches Recht*), public property

(*öffentliches Eigentum*) and public enterprise (*öffentliche Unternehmung*) are characteristic of this kind of adaptation. When Otto Mayer described the administrative act (*Verwaltungsakt*), a translation of the French *acte administratif*, he had, of course, above all, the interventive administration in mind. The basic principles of the community service administration, which became more and more important in the course of the 20th century, were developed later on, in particular by *Ernst Forsthoff*.

For the further considerations, it must be kept in mind that German administrative law differs considerably from the common law conception. Although it belongs to the family of Continental-European law and was originally inspired by French public law, nowadays it has to be regarded as a proper system. While in former times, French public law was considered to be the most modern system, today many scholars in Europe point out that this situation has been changing in favour of German Public law. But the question "Who has the most modern administrative law?" is useless and futile. What remains important is the fact that we have a fruitful competition in Europe and that every state contributes its best to the construction of a common European administrative law that is emerging in step with European integration.

II. THE IMPACT OF CONSTITUTIONAL LAW ON ADMINISTRATIVE LAW

1. "Administrative Law as Constitutional Law put in concrete terms"

What is the essential characteristic of German administrative law? I think it is the fact that German administrative law, since World War II, has been and is being deeply determined and shaped by German constitutional law. This does not mean that we have a very extensive constitutional law which regulates the activity and functioning of the Administration in detail. Quite the reverse: the Basic Law of the Federal Re-

public of Germany of 1949 is – compared to the Constitutions of other countries – very reticent with regard to the regulation of the details, and often modest in its wording because it does not want to make promises it cannot keep. However, it has – and that is what I refer to – a powerful binding force. After the experiences of the failure of the Weimar Constitution and the gross violations of human rights under the totalitarian régime of National Socialism, the drafters of the Basic Law were eager to provide for a Constitution of high normativity, that is, of highest binding force on all state organs. Arbitrary state action and the violation of human rights should be banned once and for all. Article 1 para. 3 of the Basic Law reads as follows:

> "The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law."

According to their intention to make the new constitutional order work in reality, the drafters did not confine themselves to the stipulation of the normativity of the constitutional principles but moreover, provided at the same time for vigorous instruments which were to enforce the binding character of the Constitution. Under the Basic Law, the individual affected by state action may not only rely upon an effective and complete control of all state acts by the courts, but also upon the protection by a specialized Constitutional Court, in case that the ordinary courts do not remedy the matter. Never before in German history had the Constitution played such an important role in the regulation and application of administrative law and in the development of a democratic and pro-citizen orientated Public Administration. Ten years after the Basic Law came into force, in 1959, the then President of the Federal Administrative Court in Berlin, *Fritz Werner*, could characterize the administrative law as "constitutional law put into concrete terms" ("Verwaltungsrecht als konkretisiertes Verfassungsrecht")[1]. And this saying conveys best our way of thinking.

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1 *F. Werner*, Verwaltungsrecht als konkretisiertes Verfassungsrecht, DVBl. 1959, S. 527.

2. The Relevant Constitutional Principles

What are the main constitutional principles that determine our administrative law?

a) First, I have to mention the fundamental rights enshrined in Articles 2 to 19 of the Basic Law. These rights protect the sphere of individual liberty in all its forms against all kinds of intrusions by the state. If the special liberties (as freedom of expression or freedom of assembly) are not applicable, the individual may invoke the *lex generalis* of Article 2 para. 1 (right to free development of one's personality), which the courts interpret as a "collecting right", comprising all manifestations of liberty which are not mentioned expressly in one of the special liberty-rights. As a consequence of this complete protection of the sphere of the individual, each restriction of individual liberty by a state organ must find its justification in the Constitution itself. Individual liberty may be restricted only to the extent, and in the way provided for in the Constitution. Therefore, it is indispensable that a restriction of liberty may only be enacted on the basis or – in other cases – pursuant to a formal law adopted by the legislative bodies of the Federation or of the *Länder*. The prerequisite of a formal law basis for the restriction of fundamental rights is also valid – according to the Federal Constitutional Court – for persons of a special administrative status, such as prisoners, agents of the public service, or pupils. Without an expressly formal legal authorization, the Executive is not entitled to regulate the obligations and duties of those persons.

Since the Federal Constitutional Court interprets the catalogue of fundamental rights not only as rights of the individual but also as an order of values inspiring the application and interpretation of the whole legal order, the Public Administration must always take into account the fundamental rights when it applies, interprets or creates legal rules. Special attention must be paid by the administrative agents to the observance of the principle of equality before the law (Article 3): The Administration must decide parallel individual cases according to the same criteria, irrespective of sex, parentage, race, language, homeland and origin, faith or religious or political opinion of the respective person.

b) Secondly, the general principles enshrined in Articles 20 and 28 have to be observed by the Administration, above all the principles of rule of law and of social justice. The latter principle obliges the state organs to remove social and economic inequalities and to provide for social security and for appropriate living conditions with regard to the pursuance of the individual liberties; it plays an important role as an interpretative directive.

As to the rule of law, one key element can be found in Article 20 para. 3:

> "Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice."

This stipulation lays down the obligation of the Administration to act in full accordance with the (formal) laws and not to impose a burden on the individual if there is no authorization by a formal law.

Another important principle which is generally deduced from the rule of law but not mentioned expressly in the Constitution is the principle of reasonableness or proportionality in the broad sense. This principle has become one of the outstanding criteria for judicial control of the action of state organs. Be it an act of a legislative body or be it an act of the Administration, the act will only be regarded as constitutional or legal, respectively, and thus remain valid, if it is suitable for the achievement of the purpose aimed at (principle of suitability), if there is no other measure equally suitable but less affecting the individual (principle of necessity), and if the burden imposed does not weigh heavier than the benefits, that is, if the disadvantages to the individual do not outweigh the advantage to the community (principle of proportionality in the narrow sense).

A further principle derived from the rule of law is the measurability of law. The interference of the administration in the sphere of personal rights must be foreseeable and calculable and legitimate expectations must be protected.

c) As a special manifestation of the modern rule of law, we have to consider the provision of Article 80:

> "The Federal Government, a Federal Minister or the Land governments may be authorized by a law to issue ordinances (statutory orders; "Rechtsverordnungen"). The content, purpose and scope of the authorization so conferred must be set forth in such law. This legal basis must be stated in the ordinance."

Thus, contrary to the French constitutional order, independent statutory orders of the government do not exist in Germany. The executive may only legislate to the extent it is expressly authorized to do so by the original legislative bodies, that is to say, the Federal Parliament or the Parliaments of the Länder. However, these bodies are not entitled to delegate the exercise of their legislative competences to the Federal Government or the Länder Government at their free discretion. As Article 80 stipulates, they have to determine precisely the content, purpose and scope of the authorization. Furthermore, the Federal Constitutional Court deduced from the democratic principle and the rule of law, both enshrined in Article 20, that Parliament has to regulate by itself, all essential issues, such as rules affecting individual rights, and is not allowed to delegate the regulation of these crucial questions to governmental bodies.

d) If we deal with German Public Administration, we always have to bear in mind that Germany is a Federal State where the Federation as well as the Länder have their own legislative power. This polycentric approach forms part of the system of checks and balances in the Federal Republic of Germany. While the Federation holds the most important legislative competences, the Länder have more executive competences, i.e., in administrative matters. That is why scholars often speak of "executive federalism". As a rule, it is also up to the Länder to execute federal laws. Article 83 stipulates:

> "The Länder shall execute federal laws as matters of their own concern in so far as this Basic Law does not otherwise provide or permit."

Besides the federal government, there is a proper federal administration, for example, in the fields of foreign service or customs.

e) Self-government of the local communities, the communes, constitutes another element in the system of checks and balances in the Federal Republic of Germany. Article 28 of the Basic Law guarantees their autonomy, that is, their right to regulate in their own responsibility all the affairs of the local community within the limits set by the law. The tasks of the communes comprise, among others, urban planning, construction and maintenance of communal hospitals, supply of water and energy, waste management, and many other issues. It is important to keep in mind that the Administration in the Länder not only consists of a graded state-Administration of generally three levels, but also of autonomous local governments that constitute the communal or municipal Administration, and are subjected to state control only with regard to the legality of their administrative action.

III. THE SUB-CONSTITUTIONAL SOURCES OF ADMINISTRATIVE LAW

The sources of administrative law in Germany are diverse. In the hierarchy of legal norms, we find under the Constitution the following sources of written law:

- Formal law: the totality of laws (statutes) enacted as such by Parliament, more precisely by the federal and Länder legislative bodies (Bundestag and Bundesrat on the one hand, and the Länder Parliaments on the other hand). On the federal level, 3,990 laws were enacted between 1949 and 1987.
- Statutory orders (ordinances): formal regulations enacted by the executive power, especially by the government or a minister of the Federation or of a Land. As mentioned before, a statutory order may only be enacted on the basis of a formal law. As a derivative legal source, it mostly regulates the details left open by the authorizing law. On the federal level, 12,639 statutory orders were enacted between 1949 and 1987.

- By-laws (autonomous legislation): formal regulations enacted by a public body vested with the right of self-government, especially regulations of the local communities.

Among these written regulations, enumerated according to their ranking in the hierarchy of legal norms, the regulation of a lower rank can only be valid if it does not contravene a regulation of a higher rank. Therefore, if the wording of a legal provision leaves room for different interpretations, the administrative agent has to choose the interpretation which is compatible with the higher ranking regulations. In case of a collision between a legal norm of a Land and a regulation of the Federation, the latter will prevail (see Basic Law, Article 31).

Because of the high degree of codification of administrative law, which has entailed a dense network of legal norms, the sources of unwritten law have become less and less important. It is extremely rare that courts, in lack of codified law, have to refer to customary law or unwritten general principles of administrative law. Nowadays, many of the general principles of administrative law are laid down in the Law on Administrative Procedure. But the role of the jurisprudence of the administrative courts has not diminished at all. Courts have the difficult task to make effective and give coherence to a law which is continually becoming more sophisticated. The supranational EC-law is contributing to the increasing complexity of law; EC-law overrides, overlaps and daily urges modifications and reinterpretations of national law. However, we hope that, later on, EC-law will foster a countercurrent: the reduction of complexity on the European scale.

Speaking of sources of law, I still have to mention the administrative regulations ("Verwaltungsvorschriften"). These are general orders directed by a higher authority to subordinate authorities and regulating questions of procedure, interpretation of legal norms and so on. They are not considered to be real law because their addressees are only agents of the Public Administration and not "external" individuals. At any rate, Courts are not bound by administrative regulations when they interpret the law. Indirectly, however, administrative regulations can produce personal public rights: If a law leaves a certain decision up to

the discretion of the Administration and the Administration specifies its criteria of decision by guidelines, that is, administrative regulations, the individual may invoke his or her right to equality before the law, if the Administration deviates in his or her case from the criteria established in the guidelines. We say here that the Administration is binding itself by its own regulations. Of course, these regulations can be altered, but only with general effect, and not for the purpose of a pending individual case.

IV. THE FORMS OF ACTION OF THE PUBLIC ADMINISTRATION

The Public Administration may act in different forms. Leaving aside the legislative functions (statutary orders and By-laws) and looking at the action in individual cases, the most important form is still the administrative act. I shall deal with it extensively in my next presentation. While the administrative act is – at least in its "classical form" – a sovereign unilateral measure corresponding to the old scheme of subordination, between the state and the individual, a form of action corresponding to the scheme of coordination also exists: the agreement under public law. Here, the obligations of both sides are negotiated and fixed in a formal agreement.

Other forms of action are the simple sovereign action (such as the giving of information or driving an official car) and administrative planning. As we shall see later on in this seminar, plans and planning are becoming more and more important in our welfare state. Furthermore, a planning procedure can be necessary to prepare carefully the administrative decision on large-scale projects such as the construction of an airport, of a nuclear power station, or of a road. In such cases, the planning procedure must ensure that all affected interests of the individuals and of the community are considered and carefully weighed against each other. The prerequisite of a reasonable balancing of interests is the

complete knowledge of all relevant factors and the hearing of the affected persons.

Besides the forms of action under public law, there are forms of action under private law. While the first ones are compulsory in the field of interventive administration, the choice of a form of action under private law is often suitable and useful in the sphere of community service administration. The Administration may carry out public tasks, such as the provision of water or the means of transport, using forms of private law. It goes without saying that the Administration cannot get rid of its legal obligations in choosing private forms of action. The specific constitutional and legal obligations, for example, the principle of equal treatment, remain valid whenever the Administration carries out public tasks.

V. "DISCRETIONARY" AND "BOUND" ADMINISTRATION

As to the margin of appreciation left by the law to the administrative agents, we distinguish "bound administration" from "discretionary administration". If, for example, somebody asks for recognition as a conscientious objector or applies for a building permit, the competent authority is obliged – if all legal prerequisites are fulfilled – to grant the recognition or the permit respectively because the applicant may invoke, in the last resort, his or her fundamental rights established in the Constitution, Articles 4 or 14. No room for discretion remains and the administrative courts can fully review the decision of the authority. We find this kind of "bound administration" whenever the individual has a personal right to administrative action. Those personal rights ("subjektive öffentliche Rechte") cannot only be derived from the Constitution, but from all kinds of legal norms. It has to be examined in each case whether the respective regulation protects not only public interests, but interests of a definable group of persons to which the applicant belongs.

Even if the legislation leaves room for discretion, which is only admissible within the limits of constitutional law, the competent authorities

are not completely free to decide. It would be a case of excess of discretion if the administrative authority acted in a way which goes beyond the limits of the enabling law, and it would be a case of abuse of discretion if the administrative authority ignored the purpose of the enabling law[2], or did not observe the general principles, such as equal treatment, proportionality and protection of the legitimate expectation.

Discretion refers to the margin of appreciation left to the administrative authority as to the decisions or measures to be taken. Scholars have debated the question whether it can be argued that a margin of judgement as to the legal prerequisites of administrative action might exist as well. Some scholars held that there is such a margin of judgement if the law uses indefinite legal concepts such as "public safety", "public interest", "reliability", "unreasonablness" or "urgency". However, as a rule, the courts did not recognize a margin of judgement in the case of indefinite legal concepts. They generally exercise their review to the full extent, thus shaping the indefinite legal concepts to more concrete terms by their case-law. Restrictions of judicial review are only recognized with regard to decisions of highly personal nature, such as the assessments of pupils, students or public agents by teachers, professors, superiors or special committees because the situation of the examination cannot be reconstructed before the court. In these cases, the courts confine their judicial review to formal and procedural issues and to the question whether the authority based its judgment on wrong facts, did not observe the generally applicable principles of valuation, or took irrelevant considerations into account.

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2 Cf. Art. 40 of the Law of Administrative Procedure of 1976: "If an administrative authority is authorized to act in its discretion, it has to exercise its discretion in consonance with the purpose of the authorization and has to observe the legal limits of the discretion." See also Art. 114 of the Law on Administrative Courts 1960: "So far as the administrative authorities are authorized to act in their discretion the courts also examine whether the administrative act or its refusal or omission is illegal because the statutory limits of the discretion have been exceeded or because the discretion has not been exercised for the purpose of the authorization."

BASIC ELEMENTS OF ADMINISTRATIVE PROCEDURE

Dr. Karl-Peter Sommermann

I. THE CONCEPT OF ADMINISTRATIVE PROCEDURE AND ITS LEGAL BASIS

Administrative procedure can be defined as the activity of an administrative authority aimed at the taking of a decision or another measure, or at the conclusion of an agreement. This broad definition comprises numerous different procedures, according to the different kinds of measures being enacted (statutory orders, administrative acts, agreements, physical acts and other measures) and to the different branches of administrative law (such as building law, police law, communal law or tax law). Since "administrative procedure" necessarily deals with an activity of administrative authorities, it does not include, however, the procedure in the administrative courts.

Compared to this general definition, the Federal Law of Administrative Procedure of 1976 starts from a narrow concept of administrative procedure as do the equivalent laws of the Länder which are, for the most part, congruent and even identical in their wording. Section 9 of the Federal Law of Administrative Procedure of 1976 reads as follows:

> "For the purpose of this Law, administrative procedure shall be the activity of authorities having an external effect and directed to the examination of basic requirements, the preparation and the issuing of an administrative act or to the conclusion of an administrative agreement under

> public law; it shall include the issuing of the administrative act or the conclusion of the agreement under public law."

Two points have to be emphasized in this definition: The first one is the requirement of an external effect of the activity, thus excluding, for example, the preparation and giving of internal orders to a subordinate authority or agent. The second one refers to the forms of action: Only the procedures leading to the issuing of an administrative act or to the conclusion of an agreement under public law are regulated in the Law of Administrative Procedure. The Law gives a definition of the administrative act in Section 35:

> "Administrative act is every order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and which is intended to have a direct, external legal effect. A general order (*Allgemeinverfügung*) is an administrative act which addresses a category of persons who are determined or are determinable by common characteristics or which concerns the public law quality of a thing or its use by the general public."

Hence, the main elements of an administrative act are: It must be a unilateral measure issued by an administrative authority in pursuance of public law; the measure must be taken in an individual or at least concrete case; it must aim at the regulation of this case, that is, have legal effect and this legal effect must be an external one, that is, become real for an individual beyond the sphere of the Administration. By their consequence for the addressee, we can distinguish disadvantageous administrative acts (acts imposing a burden) from beneficial administrative acts (acts bestowing a benefit), and by the character of the legal effect the administrative act may be divided into commanding, formative and declaratory acts. Naturally, we shall often find administrative acts that show elements of different characteristics at the same time. At any rate, the administrative act is still the most important form of action of the Public Administration in the execution of the laws.

As to the second form of action regulated in the Law of Administrative Procedure, Section 54 stipulates:

> "A legal relationship under public law may be constituted, amended or annulled by agreement (agreement under public law), in so far as this is not contrary to legal provision. In particular, the authority may, instead of issuing an administrative act, conclude an agreement under public law with the person to whom it would otherwise direct the administrative act."

From this provision, we can deduce that the agreement under public law may serve the administrative authority to foster a legal relationship with the citizens which is characterized by coordination instead of subordination. In case the Administration has the choice to issue an administrative act or to conclude an agreement (as provided for in the second sentence of Section 54), there is, however, no real relationship of coordination because the administrative authority may always fall back upon the issuing of an administrative act if it cannot reach an agreement with the citizen. Fortunately, there remains a large area of application for the real coordinate agreement under public law. Moreover, other forms of cooperation between the Administration and the citizens have emerged in administrative practice and many scholars nowadays proclaim cooperative administrative action as the new model for the performance of public tasks. It goes without saying that such new forms of action had not yet been taken into account by the drafters of the Law of Administrative Procedure.

Despite the fact that the Law of Administrative Procedure by far does not regulate all forms of administrative action, its role must not be underestimated: On the one hand, a wide area of application still remains, on the other hand, it declares and establishes basic principles which are also valid in those fields of public administration and procedure that are regulated in particular laws. We may say that the general law is a model for all kinds of administrative procedure so that the particular laws might modify details, but never the essence of the basic principles contained in the general law.

II. BASIC PRINCIPLES OF THE ADMINISTRATIVE PROCEDURE

The administrative procedure is never an end in itself, it merely helps to put into effect or to implement the material law. We have to keep this in mind when we talk about administrative procedure. If personal rights, especially fundamental rights, are involved, the administrative authority is obliged to proceed in the way that best promotes, protects or takes care of these rights, respectively. Anyway, it must choose a proceeding that imposes the least burden on the individuals concerned. We can also derive this requirement, in the last resort, from the general principle of proportionality.

But let us look in detail at the main principles reflected in the Law of Administrative Procedure:

1. Acting ex officio or at the instance of a citizen

According to Section 22 of the Law of Administrative Procedure, the proceedings will commence ex officio or upon application. This depends on the relevant law which is the legal basis of the administrative action. Even if the law leaves the instigation of the proceedings to the discretion of the Administration – as it is often the case with police law – the administrative authority can be obliged to take up an administrative procedure in order to protect fundamental rights or other constitutional or legal values that are jeopardized by particular events. We call this situation in which an administrative authority is obliged to act and thus can also be compelled by the courts to act – despite the discretionary powers conferred by the enabling law – the "reduction of discretion to one possibility", that is, there are individual cases in which solely one alternative of behaviour on the part of the administrative authority will meet the requirements of the individual case.

2. Inquisitorial Principle

Section 24 of the Law of Administrative Procedure provides that the administrative authority investigates the relevant facts *ex officio*. This obligation derives from the rule of law, especially from the principle of legality. Only if the administrative authority knows the facts exactly, can it apply the law correctly. Therefore, it is not enough to rely upon the information given by the interested individuals. It is, in the last resort, the authority who is responsible for the correctness of the administrative decision and not the individual. The latter, of course, might be requested to give all the relevant information and evidence at his or her disposal. However, he or she cannot be forced to cooperate more intensely, above all to appear before the authority, unless the law explicitly so provides (see Section 26 para. 2).

3. Duty to Give Information and Advice

In a state governed by the rule of law, no citizen shall lose his or her rights because of a lack of knowledge, help or experience. Therefore, the administrative authority is under the obligation to care for the individual who is a participant of the administrative procedure. Pursuant to Section 25 of the Law of Administrative Procedure, it must inform the participant about his/her rights and duties and give advice about necessary steps to take or statements to be made. In order to guarantee fair proceedings, the participant has even a right to inspect the records (see Section 29), which enables him/her to defend his/her rights and interests effectively. While these rights to information and advice are dependent on the position as a participant of the procedings, that is, to the fact of being an applicant or a person to whom the authority wants to address the administrative act, there is a tendency to grant information rights also to persons who are not directly affected by the administrative proceedings. Soon, a right to receive information on all relevant environmental data from the competent authorities will be given to all persons having a general interest in those matters. This right will be enshrined in a particular law which implements a directive of the Euro-

pean Community. This is a good example of how EC Law can enlarge the sphere of rights of the European citizens.

4. Hearing of the Participants

A procedure may only be considered to be fair and a decision balanced if the persons affected in their rights and legally protected interests had the opportunity to express themselves on the facts. The right to be heard can be deduced directly from the rule of law. The Law of Administrative Procedure puts it forward in Section 28 para. 1:

> "Before an administrative act affecting the rights of a participant may be executed, the latter must be given the opportunity of commenting on the facts relevant to the decision."

Paragraphs 2 and 3 of Section 28 stipulate exceptions to the right to be heard before the issuing of an administrative act. Only under these particular circumstances may the administrative authority abstain from hearing the affected person.

If the administrative act only affects one person or a small group of individuals, there is generally no need for creating particular procedural rules for the hearing. An oral hearing must take place only in those cases where the law prescribes a formal administrative procedure (see Section 67 of the Law of Administrative Procedure). However, far-reaching requirements for the hearing are necessary if the administrative act affects a large number of people as in the case of a permit for road construction, an incinerating plant or an airport. In such cases, the exercise of the right of hearing of the individuals has to be coordinated. That is why the legislator created particular rules which integrate the hearing in a complex and graded planning procedure. Section 73 of the Law of Administrative Procedure gives a first impression of the hearing procedure within the framework of planning proceedings.

5. Obligation to Notify the Administrative Act and to Give Written Statements of Grounds and of Legal Remedy

An Administrative Act can only become effective if notification is made to the person for whom it is intended or who is affected by it (see Section 43 and 41 of the Law of Administrative Procedure). As a rule, a written administrative act has to be accompanied by a statement of the chief material and legal grounds which have caused the authority to take its decision (see Section 39 of the Law of Administrative Procedure). Both requirements – the notification and the statement of grounds – are essential elements in the system of the protection of rights of the citizens. Only if the affected individual knows the exact content of the administrative decision and its principal grounds can an effective defense against it be made. Furthermore, the administrative act has to state the appropriate legal remedy, i.e., the administrative or the judicial remedy, respectively. Otherwise, as the Law of Procedure in the Administrative Courts stipulates, the act will remain subject to appeal for one year. When accompanied by a correct statement of legal remedy, it becomes non-appealable after one month.

III. CONSEQUENCES OF A DEFECTIVE ADMINISTRATIVE PROCEDURE

What happens when the procedure leading to an administrative act turns out to be defective? I think everybody will agree that procedural defects must have some consequences in order to motivate the Administration to comply with the procedural requirements. One would be too credulous if one thought that the mere legal stipulation of certain requirements guarantees the full compliance with them in practice. On the other hand, sanctions against the Administration cannot be an end in itself; they always have to aim at a better safeguard and promotion of the legitimate rights and interests of the citizens. The Law of Administrative

Procedure provides for different consequences, corresponding to different classes of defects.

1. Invalidity (Nullity) of the Administrative Act

Pursuant to Section 44 of the Law of Administrative Procedure, an administrative act is null and void if it suffers from a specially grave defect and such defect is evident to the appreciation of all the surrounding circumstances. An example is the issuing of an administrative act in written form without showing the issuing authority. Generally speaking, the consequence of invalidity of an administrative act because of procedural, formal or material defects is very rare.

2. Appealability (Voidability) of the Administrative Act

As a rule, a defective and thus illegal administrative act – be it on procedural, formal or material grounds – is valid until it is annulled by the issuing authority, the superior authority or the administrative court upon the request of the affected individual. However, certain defects do not necessarily entail the voidability of the administrative act.

3. Curing of defects

The first exception refers to the curing of defects. Section 45 of of the Law of Administrative Procedure provides that certain elements of the administrative proceedings, such as the necessary statement of grounds or the required hearing of a participant, can be made up after the act. If the hearing is held afterwards, there must be at least a chance that the administrative act will be altered in favour of the affected participant. Otherwise, the hearing would be reduced to a mere formality without any content.

Another kind of curing of defects is laid down in Section 47 of the Law of Administrative Procedure: The conversion of a defective administrative act into another administrative act, if it has the same ob-

ject, could be legally taken by the issuing authority using the form and procedure that has been followed and the requirements for its issue have been fulfilled.

4. Irrelevance of defects

Under special circumstances, defects in procedure and form do not have any consequences. Section 46 of the Law of Administrative Procedure establishes that the application for annulment of an administrative act cannot be made solely on the ground that it came into being through the infringement of regulations governing procedure, form or local competence, where no other decision could have been made in the matter. According to the criterion of "only one possible decision", this regulation does not apply to discretionary administrative acts. In the rare case of totally "bound" administrative decisions, however, the non-observance of formal requirements that do not have an influence on the content of a decision cannot infringe any right of the participants.

5. Easier Requirements for the Withdrawal of an Illegal Administrative Act

Finally, I have to mention one internal consequence of the illegality of an administrative act: The principle of legality can serve the administrative authority as an important argument to withdraw *ex officio* a defective decision. While the principle of legality will not enter into conflict with the rights or interests of the individual in case of disadvantageous administrative acts (acts imposing a burden), a conflict between the principle of legality and the principle of protection of legitimate expectations might arise in case of beneficial administrative acts (acts bestowing a benefit). Here both positions – the public interest in the withdrawal of the illegal act on the one hand, and the private interest in the maintenance of the beneficial act on the other hand, have to be weighed against each other. Section 48 of the Law of Administrative Procedure lays down criteria for the balancing of both interests. A comparison with

Section 49 of the Law of Administrative Procedure shows that it is easier, anyway, to withdraw an illegal beneficial act than to revoke a legal one. The explanation is obvious: In the latter case, i.e., the revocation of a legal beneficial act, the principle of legality no longer collides with the principle of protection of legitimate expectations but aims at the same direction so that the revocation is admissible only under extraordinary conditions.

IV. THE DIFFERENT TYPES OF ADMINISTRATIVE PROCEDURE

The Law of Administrative Procedure refers to four types of administrative proceedings which can be considered as basic models for all branches of administrative law, even if the respective procedures are regulated in particular laws.

1. The General or Informal Administrative Procedure

The general administrative procedure is governed by the principle of informality (see Section 10 of the Law of Administrative Procedure). However, "informality" does not mean that the above-mentioned procedural principles do not apply. On the contrary, it merely means that the proceedings are not subject to formalities other than the general principles and that the general procedure is less formal than the particular types of proceedings.

2. The Formal Administrative Procedure

The formal administrative procedure, regulated in Sections 63 to 71 of the Law of Administrative Procedure, is governed by additional formal and procedural requirements. The cornerstone of the formal proce-

dure is the previously- mentioned formalized oral hearing, which is modelled on a trial.

3. Planning Proceedings (Procedure for Planning Decision)

A specialized formal procedure is defined in Sections 72 to 78 of the Law of Administrative Procedure concerning planning decision. This strongly formalized procedure is primarily meant for large-scale projects of environmental impact, such as the construction of roads, railways, airports or installations for garbage disposal. In most cases, only single provisions of the general law are applicable because most of the respective particular administrative laws contain similar or parallel procedural regulations. However, in essence, they correspond to the same model.

The planning decision at the end of the proceedings is characterized by two effects: First, it establishes the admissibility of the project, including the necessary measures subsequently to be taken in connection with other arrangements (formative effect); second, it replaces all other administrative decisions, particularly public law approvals, grants, permissions, authorizations, agreements or planning approvals (effect of concentration). These principles are laid down in Section 75 of the Law of Administrative Procedure.

4. Appeal Procedures (administrative objection proceedings)

To complete the picture, I still have to mention the proceedings to follow if a person enters an appeal against the administrative act. Generally, before filing a suit for invalidity, the legality and expediency of an administrative act have to be examined in administrative objection proceedings. Only if the administrative act is not annulled or modified by the superior administrative authority, in accordance with the objection of the affected person may the latter go to the court. – Perhaps another seminar will provide the opportunity to discuss this special administrative procedure in connection with the topic of judicial review of administrative action.

THE CODIFICATION OF THE ADMINISTRATIVE PROCEDURE

Dr. *Karl-Peter Sommermann*

I. HISTORICAL OUTLINE OF THE CODIFICATION OF THE ADMINISTRATIVE PROCEDURE IN GERMANY

The history of the discussions about the codification of the general administrative law, and especially the administrative procedure, can be traced back to the 1920s. In Austria, where legal positivism – brilliantly represented by such scholars as *Hans Kelsen* and *Adolf Merkl* – was at the peak of its influence, the discussion led to the famous Federal Law on General Administrative Procedure of 1925, while in Germany, the debate did not produce any general codification. The Administrative Code of Thuringia of 1926 did not concentrate on the general administrative law but contained a mixture of organisational and procedural rules for the Administration, as well as for administrative justice and regulations concerning the police, and the enforcement of administrative action. As a model for modern codifications, the draft code of Württemberg on general administrative law, accompanied by the draft of a law on administrative procedure, was far more important. Until the sixties, this carefully elaborated draft code served the courts as a source of confirmation of unwritten general principles of administrative law.

The decisive debate leading to the codification of our law of administrative procedure began after the new Constitution, the Basic Law of 1949, came into force. In the fifties and sixties, the topic was discussed in the competent governmental bodies and in Parliament, as well as in all important law associations. But whilst the regulations of the procedure

in the administrative courts were laid down in a federal law in 1960, the Federal Law on Administrative Procedure was enacted, after several phases of drafting, only in 1976. When we ask for the reason why, we have to consider the federal structure of Germany and its system of distribution of competences between the Federation and the Länder. Pursuant to Article 74 of the Basic Law, the Federation has (concurrent) legislative power in the field of organization and procedure of courts, but there is no equivalent federal legislative power in the field of administrative procedure. Therefore, the Federation may only legislate on the administrative procedure of the federal administrative authorities. Its legislative power as to proceedings of the administrative authorities of the Länder is confined to specific cases provided for in the Constitution. Generally, the Federation is not authorized to regulate the procedure of the Länder authorities and it is up to the Länder to put forward their own procedural law, even if they execute federal laws. This is one important consequence of our "executive federalism".

Being aware of the plurality of legislators in the field of administrative procedure (the federal legislator and the different Länder legislators), many lawyers feared that the codification of the administrative procedure would entail divergent laws on the different federal and territorial levels and thus mean the renouncement of a uniform procedural law, which then seemed to be guaranteed more or less by the precedents of the administrative courts. The insecurities and doubts caused by the lack of legal regulations seemed, in contrast, to be more easily acceptable.

Fortunately, however, the debate finally inclined to the arguments put forward for the codification and, at the same time, the deliberations on the Federal Law of Administrative Procedure, in which representatives of the Länder took part. This led to a far-reaching consensus in favour of a harmonization of the federal and Länder laws, in order to guarantee equal procedural conditions to the citizens beyond the boundaries of any one Land. So when we deal with the Federal Law of Administrative Procedure, we can generally assume that the same is true for the equivalent laws of the Länder which are, for the most part, even identical in their wording.

Let us have a look now at the arguments put forward in the debate about the codification of the principles of administrative procedure. For the purposes of our seminar, it does not seem to me very useful to elaborate on the reasoning that emanates from the specific federal structure of Germany. So I shall leave aside this part of the argument. Moreover, I shall not give an account of the discussion about the question which details are to be regulated in the law, and which ones left open. Perhaps we can touch on this problem in our debate. I shall concentrate on the fundamental "pros" and "cons" which might be interesting for the argument in your country, as well.

II. ARGUMENTS AGAINST THE CODIFICATION

The arguments of the opponents to a codification of the general administrative law, and the procedural law in particular, can be summed up as follows:

- Compared to civil law, administrative law is a "young" branch of the law. Therefore, it is still developing very quickly. A codification which can only reflect a particular stage of the development would soon become either obsolete or a serious hindrance to progress.
- The essential general principles of administrative law are laid down in the Constitution and put into more concrete terms by the administrative courts. The codification of further rules would restrict the flexibility of administrative action and entail a loss of efficiency.
- Not all administrative action can be put into procedural terms. The enactment of a Law of Administrative Procedure would mean an unnecessary fixation with procedural thinking.
- In most cases, the procedural rules cannot be separated from the underlying material regulations. The procedural law has to take into account the particularities of the respective subject-matter. It would be artificial to create an abstract system of general procedural rules.

III. ARGUMENTS FOR THE CODIFICATION

The proponents of a codification objected to this view as follows:

- A codification of the law of administrative procedure is indispensible in order to ensure certainty of the law in procedural matters. It is a requirement of the rule of law.
- Clearly defined rules enshrined in a general code give more transparency to the action of the administrative authorities and thus contribute to a higher acceptance and legitimation of administrative action among the population. They help to improve the legal position of the citizens in relation to the Administration.
- A codification of general procedural principles produces an effect of simplification which is of benefit to all state authority: With regard to the executive, the fixing of general rules reduces the complexity of the administrative proceedings and helps to rid the daily work of procedural doubts and arguments. The legislator, in turn, is released from the necessity to re-establish anew the rules of general character in each particular law. He can concentrate on the specific procedural requirements of the respective subject-matter. Finally, the judiciary, that is the administrative courts, are discharged from the task to elaborate unwritten principles of administrative law for lack of codified regulations.
- A general Code on Administrative Procedure constitutes a common basis for the education and training of all civil servants. It conveys a coherent picture of the administrative procedure which does not exist as long as manifestations of general principles have to be searched for among numerous rules scattered in different laws.
- The codification of general procedural principles does not entail a loss of flexibility if it does not go too far into detail and leaves room for different procedural arrangements adapted to the requirements of the individual case. On the contrary, there is more flexibility and more efficiency than in a situation where the administrative proceedings are determined by a multitude of heterogeneous laws.

IV. EVALUATION OF THE GERMAN EXPERIENCE

The Federal Law of Administrative Procedure, model for the corresponding laws of the Länder, has been in force now for more than 15 years. These years of experience might enable us to give a first evaluation of its working, and of its positive as well as negative aspects in practice.

1) First of all, we have to confirm the statement that no codification is perfect. Even a carefully elaborated law like the Law of Administrative Procedure, which was based on the experience and knowledge of many experts and on a rich jurisdiction, i.e., precedents of the administrative courts, shows certain defects and inconsistencies as soon as it is applied in practice. While the administrative courts were largely discharged from the necessity of elaborating unwritten principles of administrative law, they were confronted, at the same time, with a new far-reaching task – to interpret the new law in such a way that it did not lose the consistency intended by its drafters, also in cases which they had not foreseen. In the meantime, most disputes about the interpretation of single provisions have been settled. However, as many scholars point out, some critical issues remain which will have to be resolved by a modification of the law sooner or later. Nevertheless, taken altogether, the law has worked out well, with regard to both its juridical techniques and its effective formation of the administrative proceedings in practice.

2) Secondly, it might be interesting to ask whether the hopes and expectations of the drafters as to the unifying and simplifying force of the Law of Administrative Procedure have come true. As I have already pointed out, it was an explicit objective of the law to make superfluous as many procedural regulations in particular laws as possible. However, when we look at the reality today, we have to state that this objective has only been achieved to a modest extent. Above all, with respect to planning decisions, there are still numerous procedural regulations in particular laws, and according to the rule *lex specialis derogat legi generali*, these regulations prevail. Section 1 (para. 1 and 2) of the Law of Administrative Procedure stipulates explicitly that the Law applies to the

administrative activities only to the extent a Federal law or regulation does not contain similar or conflicting provisions (the so-called "subsidiarity" of the Law of Administrative Procedure).

We even find new laws which extensively regulate administrative proceedings in a special field of public law. An example is the Federal Law for Protection Against Emission or the Law on Asylum Procedure, which plays a great role in Germany since the individual right to asylum of persons persecuted on political grounds is enshrined in our Constitution without any pre-condition (Article 16 para. 2, second sentence of the Basic Law). In the last seven months (from January to July 1992) 233,904 persons applied for asylum in Germany, more persons than in all other European countries taken altogether. As you might know, a discussion is going on in Germany whether the constitutional right of asylum should be restricted or left untouched. A modification of the Constitution would require a two-thirds majority in both Chambers of the Federal Parliament.[1]

While there are good reasons for a different regulation of the proceedings in certain subject-matters, such as asylum procedure, one cannot discover valuable arguments in other cases. It is debatable, for instance, if it was really necessary to put the general provisions concerning the environmental impact assessment of large-scale projects into a particular law. The regulations of this law, which execute a directive of the European Community, might have been integrated into the Law of Administrative Procedure. The same consideration is valid for the forthcoming enactment of a law on the right of access to environmental data, which will implement another EC-directive.

3) Finally, it has to be mentioned that some scholars in Germany deplore the fact that the Law of Administrative Procedure confines itself to the regulation of two forms of action of the administrative authorities: the administrative act and the agreement under public law. They point out that, during the last decades, the Public Administration has been

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1 Postscript: On July 1, 1993, a constitutional amendment entered into force which abrogated the second sentence of Art. 16 para. 2 and introduced an Article 16a which allows a more restrictive implementation of the right to asylum.

undergoing great changes with regard to its tasks and to new forms of acting. The new leading term is "cooperative administrative action" which will foster a relationship of coordination between the state and the citizen. I think, however, it is still too early to lay down these emerging forms of administrative action in the Law of Administrative Procedure. First, these forms have to crystallize in practical experience and in scientific debates. It is part of the strength of our Law of Administrative Procedure that it leaves enough room for the development of new forms of action and thus disproves the prediction of the opponents to a codification that a general Law of Administrative Procedure will become a hindrance to progress.

To sum up, it seems to me important to stress that a codification of administrative procedure must not fix too many details, so that the administrative authorities remain able to develop new forms of action beneficial to the citizens. However, the law must be strict and thus reliable for the citizens as to the safeguard of the individual rights, such as the right to a hearing, the right to information and the protection of legitimate expectations. Despite the mentioned defects, the short history of the Federal Law of Administrative Procedure can be characterized as very successful. Its influence goes far beyond its area of application. It has not only become a model for the equivalent laws in the Länder, but also the starting point for all particular procedural regulations in laws of specific subject-matters, even if the differences in the detail regulations of such laws are not always comprehensible. As a lawyer, I can hardly imagine the activity of the administrative authorities nowadays without the orientation provided by the Law of Administrative Procedure.

PART III

TRAINING OF CIVIL SERVANTS

THE CITIZEN ORIENTATION AND THE SERVICE ORIENTATION OF THE CIVIL SERVICE: CONCEPT AND TRAINING

Univ.-Prof. Dr. Dr. h.c. *Heinrich Siedentopf*

INTRODUCTION

Citizen orientation means responding to citizens, understanding their wishes and encouraging their active participation in the decision-making process. The idea is not a new one. If one takes a look at the changing role of the state, its functions and responsibilities in a modern industrialized country at the turn of the century, it becomes clear that, over the years, community service administration has become a major administrative concern. However, the question has to be raised whether the administration itself acts in a citizen-oriented manner.

1. THE CHANGING ROLE OF THE STATE

Public administration is moulded by the prevailing political, social, economic, technical and cultural conditions.

In nineteenth-century Germany, the principal administrative tasks were the keeping of law and order and of peace and security.

The twentieth century, however, is characterized by the expansion of state activities – above all in the field of social services. It was Lorenz von Stein who said in 1865 that "Liberty is real only in the man who possesses the requirements thereof, material and intellectual goods as the condition of self-determination".

A modern state is supposed not only to protect the individual's freedom and liberty but also to guarantee social security, increasing affluence and social progress.

This idea finds its expression in Art. 20 of the Basic Law. The Federal Republic of Germany declares itself to be a social state. Its duty is not only to assure social security. The range of public duties has grown over the years and is now exceedingly wide. Nowadays, the administration is also concerned with health care, universal education, public transport, housing and the protection of the environment- to mention just a few examples. It is no doubt true that the role of the administration has changed considerably.

2. THE PROBLEM OF OVER-REGULATION

The Basic Law establishes a state which is governed by the rule of law. All three powers have to observe law and justice. This means that the activity of public administration, particularly in its relations with the citizen, takes place within the framework of the legal system. The legal system includes a variety of legal sources: the Constitution, formal law,the law of the European Communities, judge- made law and statutory orders. Under the rule of law, law not only sets the limits to administrative action, but it is considered to be an indispensable precondition for every administrative action. Moreover, legal regulations often spell out the details and give the necessary explanations for the implementation of the written law. The judge- made law plays an important role in the field of administrative action as well.

As the access to administrative courts is guaranteed by the Basic Law, every citizen can claim the protection of his rights in the courts if he feels his rights have been violated by public authority. Although their main task is to apply existing law, the courts fill existing gaps in the law by creating law. Thus, administrative rulings can have a great impact on future administrative affairs. The conclusion is that the administration is

bound by a growing number of laws and regulations and court rulings. This leads to a decreasing flexibility in dealing with the varied and changing needs of clients. In addition to that, the complexity of the social, economic and political environment of modern administration makes it impossible to solve public problems in one go. A number of decisions must follow each other. The whole problem can be summed up in the word "over-bureaucratisation".

3. FEDERALISM

In this context, another aspect is to be mentioned. Federalism is one main element of the Basic Law. There are three levels of government and administration. First, the Federal Government exercises (limited) administrative powers. Second, each state has its own constitution, a democratically elected parliament, a government and administrative agencies. Pursuant to the Constitution, the Länder execute federal laws as agents of the Federation. Finally, the communes have the right to regulate on their own responsibility all the affairs of the local community within the limits set by law. Thus, local government is also an essential part of the political order of the Federal Republic. As a result, each administrative level has different tasks and individual requirements which distinguishes it from the others.

4. THE INDIVIDUAL'S ROLE

Last but not least, the role of the individual has changed greatly. In a modern twentieth-century state, the state and its executive power exist for the sake of the people. People must never become mere objects of state power. According to the Basic Law, the German people are sovereign. All state authority derives from the people and shall be exer-

cised by the people by means of elections and voting and by specific legislative, executive and judicial organs. In addition to that, the Basic Law contains a catalogue of basic rights in Art. 1 to 19. The first article is the most important one. It states that the " dignity of man shall be inviolable. To respect and protect shall be the duty of all state authority". As can be seen from the list of basic rights in Art. 1 to 19, the Constitution itself grants a variety of important individual rights which are immediately valid in law. This catalogue of rights underlines the individual's importance in a modern state.

5. THE ROLE OF THE ADMINISTRATION

The problem with the development of the modern state was that a change of administration did not take place at the same time. If a state exists for the sake of the people, this requires a different attitude towards them. Old bureaucratic structures and ways of functioning, however, were preserved. For a long time, administration has been characterized as being over- centralised, impersonal and unable to face the new challenges. In 1989, a German study looked at the public image of the administration at local level. Twenty nine resident registration offices were reviewed. About 2800 citizens were interviewed. According to this study, a majority of citizens today is of the opinion that most civil servants in local agencies are friendly and helpful. However, approximately fifty percent complain about slow work procedures and a lack of information and participation.

6. THE PUBLIC'S POINT OF VIEW

The first step for an authority wishing to improve its relations with the public could be to find out the citizens' point of view. They could be

asked about the experiences they had as clients of the administration. Other possible points of interest are:

- what kind of service people want
- what kind of service they want to see expanded or improved
- what suggestions they have about improving services

Moreover, it might be interesting to inquire whether clients understand the language of the administration, for instance, whether they understand the letters they receive or the forms they are asked to complete.

How can the authority get in contact with its clients? One method to find out about public opinion is to listen to the customers. Complaints and suggestions provide a valuable source of information about the things that are wrong and should be improved. Further possibilities are:

- to hand out questionnaires
- to hold public meetings

  or to
- carry out market research on customers' experiences and needs.

Knowing the public's views will certainly help to serve the public better. As a precondition, however, public servants must be seriously willing to make use of the information. It is not sufficient to know about the client's perspective. Public opinion should be used as a way of evaluating the system.

What else can be done to make the public service serve the public? Perhaps the most important points are:

- deregulation
- public access
- increased citizens' participation in public administration
- civil service training

  and
- an improved use of modern technology

7. DEREGULATION

Deregulation means, on the one hand, a decrease in the number of laws and regulations and, on the other hand, a simplification of rules. The content of legal regulations has become so complicated that even administrative experts demand a simplification. Although the aim is clear, special attention must be given to the principle of the Rule of Law. As already mentioned, the Basic Law established a state based on this principle. In no case, can the administration interfere with the legal rights of the individual without being authorized by law to do so. Furthermore, all important questions must be decided by democratic legislation. In spite of these difficulties, deregulating efforts did take place over the years. In 1984, a committee was appointed by the Federal Government to look at the problem of over-regulation. The committee issued a checklist for proposed legal provisions. According to this list, the first question to be raised is whether a new law is needed at all. In case a new regulation is necessary, it must be decided whether the length of the period for which it would remain in force could be limited. The committee reviewed about 1,500 regulations and abolished some of them.

However, deregulation is not only a task at the federal level. At present, the states are also preoccupied with deregulating efforts. A main concern is the simplification of administrative procedure, for instance, the procedure to obtain a planning and building permission.

8. PUBLIC ACCESS

The administration has to provide easy physical access. This includes the opening hours. In Germany, for instance, shops are allowed to open for business from 7 am to 6.30 pm. A few years ago, the closing hours act was amended. Now, on Thursdays, the shop-opening hours have been extended until 8.30 pm. After a while, most local administration offices

took up this idea. Now, the opening hours of the public administration offices are also extended in order to make it easier to use the services.

Service orientation means also easy geographical access. Buildings and staff should be located in a way that the public can get to them easily in person, or by phone. Several German cities established Citizens' Offices. They are organized as "One-Stop-Shops", that is to say, the client gets in contact with representatives of different administration agencies in one location. The civil servants can make arrangments for their agencies to deal with the clients in case it is necessary. These Citizens' Offices also provide information brochures from all of the concerned offices. Often, an information desk is set up in the Entrance Hall as the first point of contact for the visitors. A Citizens' Complaints telephone line is part of this concept as well. These public offices have proved to be very successful.

Better access includes the access to information. Giving administrative information to customers is one important way of improving access. Moreover, in a democratic state, citizens should be able to take part in an administrative decision-making process. However, public involvement must be based on public information.

The purpose of public participation is to enhance the quality of decision- making through providing the opportunity to the public to contribute, especially to those who may be affected by the decisions. As a precondition, participation requires a public's right of access to administrative information. It is not sufficient to inform people about their rights to a service and how to get access to it. The information should include what the government aims to achieve politically and financially and how far it succeeds. In the last decade, a number of states have passed laws providing for the public's right of access to information.

According to § 29 of the German Law of Administrative Procedure, one has to claim a legal interest in order to have a right of access to administrative information.

As a matter of fact, there are administrative procedures providing only inadequate opportunities for public involvement, for instance, formal hearings on legalistic questions. On the other hand, public partici-

pation is needed in administrative action. It must not be forgotten, however, that "the public" is not a homogenous group but is composed of individual citizens, people organized in special interest groups and officials at all levels of government. It is because of this that there are no easy solutions. In any case, the administration should support the citizens' will to participate by

- giving information about all important activities
- establishing procedures for public hearings on a regular basis
- encouraging people to participate.

9. THE LANGUAGE

The language of the administration remains a problem still to be solved at all levels of government. Generally speaking, the language should be clear, precise and understandable. In view of the complexity of the legal, economic and social system, this may be difficult. It must become a high priority task of the federal and state legislation to simplify the legal language. According to the above- mentioned checklist issued by a Federal Government Committee, the question has always to be raised whether a proposed provision is unbureaucratic and understandable.

At the local governmental level, however, it is important that the client, when filling in a form, must be able to understand what is expected of him. Not just letters but also forms, notices and information brochures must be accessible for all members of the public. New forms, therefore, must be tested for clarity, and the old ones should be reviewed.

10. CIVIL SERVICE TRAINING

Consideration must be given to the civil service training as well.

Training intends to activate the human mind and to energize the latent faculties in order to enable public servants to perform their role well. Of course, it is important that the public servants are competent and well-informed. However, as the quality of public administration and its performance depend in particular on the civil servants' attitude, it is even more important to provide the participants with interpersonal skills. Training programmes should help to improve the relations between clients and the administration. Therefore, the courses must provide the participants with basic skills such as listening, communication, identifying and understanding the client's needs and resolving interpersonal conflicts. On the other hand, training can serve the purpose to motivate the staff. The civil servants may want to speak about their own problems of providing good service and discuss their experiences with colleagues and counselors. In any case, every kind of training should encourage people to welcome and to deal with the clients' problems. It should be given to all those who are in regular contact with the public.

11. MODERN TECHNOLOGY

Efforts to improve administrative action in a modern, industrial society must include the use of modern technology. There can be no doubt about the fact that electronic information technology leads to a rationalisation of work procedures. In Germany, one can hardly find any public institution which does not use Electronic Data Processing (EDP). However, EDP not only increases the efficiency of administrative action, it can also have a direct effect on the relationship between the administration and its clients. Communication technology can allow immediate access to information. It can help to provide prompt service to the public. The Federal Employment Office, for instance, has established a

job allocation system to which the individual employment exchanges are linked by remote data transmission facilities. Thus, an unemployed citizen can get immediate information about the labour market without waiting for an employee to serve him.

On the other hand, it is clear that modern technology enhances efficiency more than it enhances participation and human values.

If one accepts that electronic information technology has changed and will change administrative structures considerably, specially-designed programmes in this area must be initiated. Training should not only include computer application but also sensitize the participants to the inherent dangers, that is to say, to a possible neglect of clients' interests. Administration offices using modern communication technology must find ways to remain in close contact with the customers by

- helping people understand modern communication systems
- seeking their feedback
- giving individual help and assistance.

EDUCATION AND TRAINING OF CIVIL SERVANTS IN ADMINISTRATIVE LAW

Dr. *Christoph Hauschild*

I. INTRODUCTION

The professional qualification of the German public service is very much shaped by the fact that the application of law is traditionally considered a prime task. As in other administrative-law countries, the knowledge of legal techniques is common among German civil servants. In general, skills in law are regarded as a basic qualification for civil servants of the administrative or executive class. This explains the fact that, in Germany, generalist administrators in higher ranks are, in the large majority, educated in law. Thus, in the German public service, the lawyer is not considered a technical specialist, as he is in countries with a Whitehall-tradition.

II. CHARACTERISTICS OF THE GERMAN PUBLIC SERVICE

Before the question of the education and training of civil servants in administrative law is discussed, it is important to point out some characteristics of the German public service.

In Germany, the duties of the public service are discharged by civil servants (Beamte), employees (Angestellte) and workers (Arbeiter) in

all levels of administration. The status of a civil servant is governed by public law, while employees and workers are employed with contracts of private law.

Civil servants are assigned the most important roles of all public servants as they are generally entrusted with the exercise of state authority. Employees and manual workers may only be temporarily entrusted with duties involving the exercise of state authority. Therefore, the following remarks on the education and training in administrative law primarily concern the group of civil servants within the German public service.

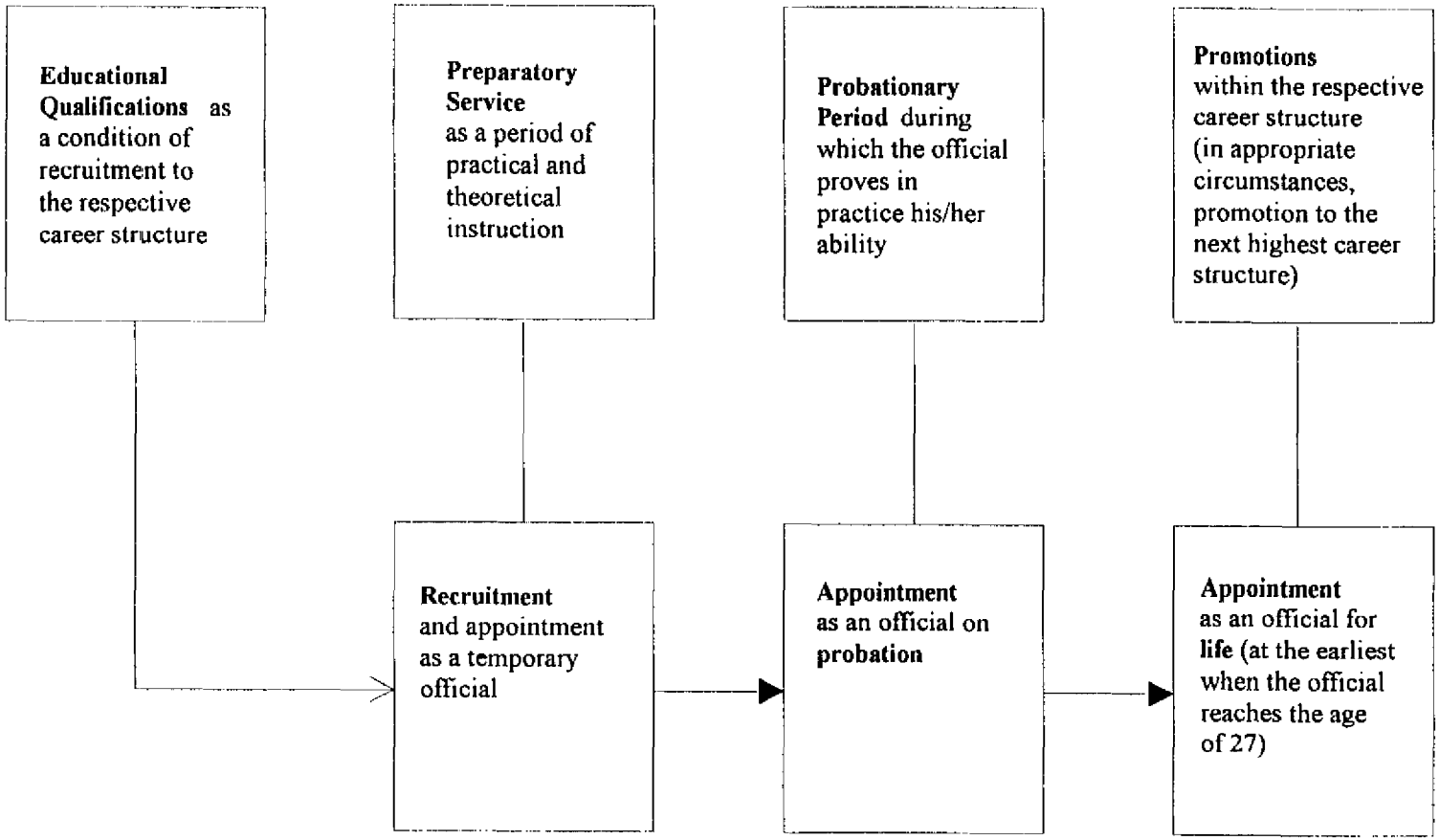
According to the jurisdiction of the Federal Constitutional Court, the professional public service understands itself as, and is understood to be, an institution which, based on professional knowledge, performance, and loyal fulfilment of duty, ensures a stable administration and thereby complements and balances the political forces which govern society.

The public service is characterized by a uniform structure based on a homogeneous career system with four categories: higher, higher intermediate, middle and lower service. The categories of civil servants, entry conditions and career evolution in the public service, pay scales etc. are homogenized in all levels of administration through federal legislation.

Therefore, the educational qualifications as a condition of recruitment to the respective career structure are identical for the federal, Länder and local administrations. In this way, the professional standard is quite uniform across all levels and spheres of German administration and allows, in principle, the interchange of personnel.

The main characteristics of the German educational system apply as well to the public service. One of these characteristics is the duality of theoretical (academic) and practical education. This principle is reflected in the career structure of the civil service by the requirement of preparatory service. In general, each civil servant starts the career with a preparatory service which is geared to the requirements of the respective service class. Therefore, the preparatory service is the initial part of the normal career pattern of a civil servant in Germany. The different stages before appointment as an official for life are illustrated by the following chart:

Normal Careeer Pattern of a Public Official in the Federal Republic of Germany



Source: Manual of International Legal and Administrative Terminology, Public Service Law, p. 59

III. EDUCATION

It seems important to make a clear-cut differentiation between the education qualifications required for entrance to a certain profession and the philosophy of in-service training. Through training, public servants are prepared to fulfil higher-ranking functions, or they are supposed to broaden their professional knowledge. Thus, education has basically a much stronger academic orientation than training.

1. Administrative class

It has already been pointed out that skills in legal techniques and methods are considered to be a standard qualification, also for top civil servants who belong to the administrative class (or higher service). The administrative class is the highest category in the German civil service, including the most senior top positions. The functions are different according to the level of government, but generally speaking, higher civil servants have primarily management and coordination tasks.

The overall portion of civil servants belonging to the administrative class within the German civil service is around 10 %. However, the percentage varies considerably between the levels and branches of administration. At the ministerial level, the portion is often more than 20 %, whereas in enforcement agencies, less than 5 % belong to the administrative class in general.

In Germany, the typical educational background for general administrators is law. The large majority of higher civil servants has studied law at a law school of a German university. Administrative law is a well-represented discipline in German law faculties. In particular, in recent years, this discipline has contributed to a refinement in the interpretation but also in the legislation of administrative law. In addition, legal studies in German law include a post-graduate preparatory service of about two years in courts, public administration and law offices.

A further characteristic of German legal studies is that students do not concentrate their law studies on a certain field. Therefore, all law graduates have, to some extent, knowledge in administrative law, which is, together with civil law, a mandatory part of law education. Due to this "generalist" approach in legal studies, recruitment to the administrative class is not based primarily on a qualification in the field of administrative law.

2. Executive class

The application of administrative law lies, to a great degree in the hands of the executive class, or higher intermediate service. The portion of this category in the German civil service is approximately 47 %. According to an empirical study of the different branches of the federal administration, fact-finding and the application of legal regulations make up more than 50 % of the duties of an executive official. The average figures concerning the functional working-load vary considerably for each of the federal authorities, e.g., within the federal customs administration, executive officials spend about 50 % of their working-capacity on the application of legal regulations. Nonetheless, these officials clearly fulfill the functional requirements of education for this service category.

The education of executive officials is carried out by colleges of public administration. Colleges of public administration were created during the seventies at the level of the Federation and the Länder. They are endowed with the exclusive competence to educate executive officials.

In order to enter colleges of public administration, students are required to have a university or college entrance qualification. Within the normal career pattern of a public official in the Federal Republic of Germany (see above chart), the studies at a college of public administration are equivalent to the preparatory service. Students are appointed as temporary officials and they receive a trainee-official's salary.

The studies at colleges of public administration follow the principle of duality, i.e., the three year term is split up into a theoretical and a

practical period of 18 months each. Colleges of public administration prepare students exclusively for a career in the civil service.

The studies at the colleges of public administration include administrative law as a major subject. More than a third of all courses concern administrative law studies. The students learn the constitutional and legal foundations for administrative action.

III. TRAINING

Each level of government has its own in-service training institutions in Germany. At the federal level, the Academy of Public Administration is the central in-service training institution of the Federal Government. In close cooperation with the federal administration, industry and academic institutions, the Federal Academy has the task of enhancing the performance of the public service through in-service training oriented towards practical requirements. Besides the Federal Academy, about 12 other federal in-service training institutions exist which meet the special training needs of particular branches of administration.

In-service training in administrative law is not a major concern. The reason for this is explained above in the section on the education of the administrative and executive class. In general, these civil servants have already received a profound knowledge of administrative law during their university or college studies.

Introductory programmes on administrative law exist for administrators without an education in law. During these one-week seminars, basic information on the legal working method and administrative law is provided. Similar seminars exist for executive officials who have had a technical education.

Furthermore, in-service training in administrative law plays a role in programmes for the promotion of executive officials to the administrative class. In the federal administration, executive officials who are admitted to promotion to the administrative class attend a four-month course.

This academically-oriented course includes further training in administrative law.

IV. CONCLUSION

Skills in legal techniques and methods play an eminent role in Germany's public administration. Therefore, public authorities traditionally recruit applicants with an education in law. There is, in general, no further need for an extensive in-service training in administrative law.

The very high standards in the science and practice of administrative law, however, pose a problem in the process of German unification. The staff from the former GDR is unfamiliar with the legal foundations of a democratic, federal and constitutional state. Therefore, numerous training programmes have been created in order to make them familiar with the new administrative system. These courses include administrative law as well. The Federal Academy devoted almost half of its capacity in order to meet the training needs which followed German unification.

APPENDIX

EXCERPT OF THE BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY of 23 May 1949 (as amended until 1990)[1]

The Parliamentary Council, meeting in public session at Bonn am Rhein on 23 May 1949, confirmed the fact that the Basic Law for the Federal Republic of Germany, which was adopted by the Parliamentary Council on 8 May 1949, was ratified in the week of 16 to 22 May 1949 by the parliaments of more than two thirds of the participating constituent states (Laender).

By virtue of this fact the Parliamentary Council, represented by its Presidents, has signed and promulgated the Basic Law.

The Basic Law is hereby published in the Federal Law Gazette pursuant to paragraph (3) of Article 145.[2]

PREAMBLE[3]

Conscious of their responsibility before God and men,

Animated by the resolve to serve world peace as an equal part in a united Europe,

The German people have adopted, by virtue of their constituent power, this Basic Law.

The Germans in the Länder of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate,

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1 Taken from the official translation published by the Press and Information Office of the Federal Government, Bonn.

2 The above notice of publication appeared in the first issue of the Federal Law Gazette dated 23 May 1949.

3 Amended by the Unification Treaty of 31 August 1990 and federal statute of 23 September 1990 (Federal Law Gazette II p. 885).

Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law is thus valid for the entire German People.

I. BASIC RIGHTS

Article 1 (Protection of human dignity)

(1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3)[4] The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

Article 2 (Rights of liberty)

(1) Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or against morality.

(2) Everyone shall have the right to life and to physical integrity. The liberty of the individual shall be inviolable. Intrusion on these rights may only be made pursuant to a statute.

Article 3 (Equality before the law)

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights.

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4 As amended by federal statute of 19 March 1956 (Federal Law Gazette I p. 111).

(3) No one may be disadvantaged or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.

Article 4 (Freedom of faith, of conscience and of creed)

(1) Freedom of faith, of conscience, and freedom to profess a religion or a particular philosophy (Weltanschauung), shall be inviolable.

(2) The undisturbed practice of religion shall be guaranteed.

(3) No one may be compelled against his conscience to render war service involving the use of arms. Details shall be regulated by a federal statute.

Article 5 (Freedom of expression)

(1) Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honour.

(3) Art and science, research and teaching shall be free. Freedom of teaching shall not release anybody from his allegiance to the constitution.

Article 6 (Marriage and family, illegitimate children)

(1) Marriage and family shall enjoy the special protection of the state.

(2) The care and upbringing of children shall be a natural right of and a duty primarily incumbent on the parents. The state shall watch over their endeavours in this respect.

(3) Children may not be separated from their families against the will of the persons entitled to bring them up, except pursuant to a statute,

where those so entitled fail in their duties or the children are otherwise threatened with serious neglect.

(4) Every mother shall be entitled to the protection and care of the community.

(5) Illegitimate children shall be provided by legislation with the same opportunities for their physical and mental development and for their place in society as are enjoyed by legitimate children.

Article 7 (Education)

(1) The entire schooling system shall be under the supervision of the state.

(2) The persons entitled to bring up a child shall have the right to decide whether the child shall attend religion classes.

(3) Religion classes shall form part of the ordinary curriculum in state schools, except in secular (bekenntnisfrei) schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.

(4) The right to establish private schools shall be guaranteed. Private schools, as a substitute for state schools, shall require the approval of the state and shall be subject to the statutes of the Laender. Such approval shall be given where private schools are not inferior to the state schools in their educational aims, their facilities and the professional training of their teaching staff, and where segregation of pupils according to the means of the parents is not encouraged thereby. Approval shall be withheld where the economic and legal position of the teaching staff is not sufficiently assured.

(5) A private elementary school shall be permitted only where the education authority finds that it serves a special pedagogic interest, or where, on the application of persons entitled to bring up children, it is to be established as an inter-denominational school or as a denominational school or as a school based on a particular philosophical persuasion

(Weltanschauungsschule) and a state elementary school of this type does not exist in the commune (Gemeinde).

(6) Preliminary schools (Vorschulen) shall remain abolished.

Article 8 (Freedom of assembly)

(1) All Germans shall have the right to assemble peaceably and unarmed without prior notification or permission.

(2) With regard to open-air meetings, this right may be restricted by or pursuant to a statute.

Article 9 (Freedom of association)

(1) All Germans shall have the right to form associations,partnerships and corporations.

(2) Associations, the purposes or activities of which conflict with criminal statutes or which are directed against the constitutional order or the concept of international understanding, shall be prohibited.

(3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to everyone and to occupations. Agreements which restrict or seek to impair this right shall be null and void; measures directed to this end shall be illegal. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91, may not be directed against any industrial conflicts engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions[5].

Article 10[6] (Privacy of letters, posts and telecommunications)

(1) Privacy of letters, posts and telecommunications shall be inviolable.

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5 Last sentence inserted by federal statute of 24 June 1968 (Federal Law Gazette I p. 709).

6 As amended by federal statute of 24 June 1968 (Federal Law Gazette I p. 709).

(2) Restrictions may only be ordered pursuant to a statute. Where a restriction serves to protect the free democratic basic order or the existence or security of the Federation, the statute may stipulate that the person affected shall not be informed of such restriction and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament.

Article 11 (Freedom of movement)

(1) All Germans shall enjoy freedom of movement throughout the federal territory.

(2)[6] This right may be restricted only by or pursuant to a statute, and only in cases in which an adequate basis for personal existence is lacking and special burdens would result therefrom for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or a Land, to combat the danger of epidemics, to deal with natural disasters or particularly grave accidents, to protect young people from neglect or to prevent crime.

Article 12[7] (Right to choose an occupation, prohibition of forced labour)

(1) All Germans shall have the right freely to choose their occupation, their place of work and their place of study or training. The practice of an occupation may be regulated by or pursuant to a statute.

(2) No person may be forced to perform work of a particular kind except within the framework of a traditional compulsory community service that applies generally and equally to all.

(3) Forced labour may be imposed only on persons deprived of their liberty by court sentence.

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7 As amended by federal statutes of 19 March 1956 (Federal Law Gazette I p. 111) and 24 June 1968 (Federal Law Gazette I p. 709).

Article 12a[8] (Liability to military and other service)

(1) Men who have attained the age of eighteen years may be required to serve in the Armed Forces, in the Federal Border Guard, or in a civil defence organization.

(2) A person who refuses, on grounds of conscience, to render war service involving the use of arms may be required to render a substitute service. The duration of such substitute service shall not exceed the duration of military service. Details shall be regulated by a statute which shall not interfere with freedom to take a decision based on conscience and shall also provide for the possibility of a substitute service not connected with units of the Armed Forces or of the Federal Border Guard.

(3) Persons liable to military service who are not required to render service pursuant to paragraph (1) or (2) of this Article may, during a state of defence (Verteidigungsfall), be assigned by or pursuant to a statute to an employment involving civilian services for defence purposes, including the protection of the civilian population; it shall, however, not be permissible to assign persons to an employment subject to public law except for the purpose of discharging police functions or such other functions of public administration as can only be discharged by persons employed under public law. Persons may be assigned to an employment – as referred to in the first sentence of this paragraph – with the Armed Forces, including the supplying and servicing of the latter, or with public administrative authorities; assignments to employment connected with supplying and servicing the civilian population shall not be permissible except in order to meet their vital requirements or to guarantee their safety.

(4) Where, during a state of defence, civilian service requirements in the civilian health system or in the stationary military hospital organization cannot be met on a voluntary basis, women between eighteen and fifty-five years of age may be assigned to such services by or pursuant to a

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8 Inserted by federal statute of 24 June 1968 (Federal Law Gazette I p. 710).

statute. They may on no account render service involving the use of arms.

(5) Prior to the existence of a state of defence, assignments under paragraph (3) of this Article may only be made where the requirements of paragraph (1) of Article 80a are satisfied. It shall be admissible to require persons by or pursuant to a statute to attend training courses in order to prepare them for the performance of such services in accordance with paragraph (3) of this Article as require special knowledge or skills. To this extent, the first sentence of this paragraph shall not apply.

(6) Where, during a state of defence, staffing requirements for the purposes referred to in the second sentence of paragraph (3) of this Article cannot be met on a voluntary basis, the right of a German to quit the pursuit of his occupation or quit his place of work may be restricted by or pursuant to a statute in order to meet these requirements. The first sentence of paragraph (5) of this Article shall apply mutatis mutandis prior to the existence of a state of defence.

Article 13 (Inviolability of the home)

(1) The home shall be inviolable.

(2) Searches may be ordered only by a judge or, in the event of danger resulting in any delay in taking action, by other organs as provided by statute and may be carried out only in the form prescribed by law.

(3) Intrusions and restrictions may otherwise only be made to avert a public danger or a mortal danger to individuals, or, pursuant to a statute, to prevent substantial danger to public safety and order, in particular to relieve a housing shortage, to combat the danger of epidemics or to protect juveniles who are exposed to a moral danger

Article 14 (Property, right of inheritance, taking of property)

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be determined by the statute.

(2) Property imposes duties. Its use should also serve the public weal.

(3) The taking of property shall only be permissible in the public weal. It may be effected only by or pursuant to a statute regulating the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the courts of ordinary jurisdiction.

Article 15 (Socialization)

Land, natural resources and means of production may for the purpose of socialization be transferred to public ownership or other forms of collective enterprise for the public benefit by a statute regulating the nature and extent of compensation. In respect of such compensation the third and fourth sentences of paragraph (3) of Article 14 shall apply mutatis mutandis.

Article 16 (Deprivation of citizenship, extradition, right of asylum)

(1) No one may be deprived of his German citizenship. Citizenship may be lost only pursuant to a statute, and it may be lost against the will of the person affected only where such person does not become stateless as a result thereof.

(2) No German may be extradited to a foreign country. Persons persecuted on political grounds shall enjoy the right of asylum.[9]

Article 17 (Right of petition)

Everyone shall have the right individually or jointly with others to address written requests or complaints to the competent agencies and to parliaments.

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9 Postscript: By federal statute of 28 June 1993 (Federal Law Gazette I p. 1002) the second sentence of Article 16 para. 2 was abrogated and an Article 16a containing a new, more restrictive regulation of the right to asylum was inserted.

Article 17a[10] (Restriction of individual basic rights through legislation enacted for defence purposes and concerning substitute service)

(1) Statutes concerning military service and substitute service may, by provisions applying to members of the Armed Forces and of substitute services during their period of military or substitute service, restrict the basic right freely to express and to disseminate opinions in speech, writing and pictures (first half-sentence of paragraph (1) of Article 5), the basic right of assembly (Article 8), and the right of petition (Article 17) insofar as this right permits the submission of requests or complaints jointly with others.

(2) Statutes serving defence purposes including the protection of the civilian population may provide for the restriction of the basic rights of freedom of movement (Article 11) and inviolability of the home (Article 13).

Article 18 (Forfeiture of basic rights)

Whoever abuses freedom of expression of opinion, in particular freedom of the press (paragraph (1) of Article 5), freedom of teaching (paragraph (3) of Article 5), freedom of assembly (Article 8), freedom of association (Article 9), privacy of letters, posts and telecommunications (Article 10), property (Article 14), or the right of asylum (paragraph (2) of Article 16) in order to combat the free democratic basic order, shall forfeit these basic rights. Such forfeiture and the extent thereof shall be determined by the Federal Constitutional Court.

Article 19 (Restriction of basic rights)

(1) Insofar as a basic right may, under this Basic Law, be restricted by or pursuant to a statute, such statute shall apply generally and not solely to an individual case. Furthermore, such statute shall name the basic right, indicating the Article concerned.

(2) In no case may the essence of a basic right be encroached upon.

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10 Inserted by federal statute of 19 March 1956 (Federal Law Gazette I p. 111).

(3) The basic rights shall apply also to domestic juristic persons to the extent that the nature of such rights permits.

(4) Should any person's right be violated by public authority, recourse to the court shall be open to him. Insofar as no other jurisdiction has been established, recourse shall be to the courts of ordinary jurisdiction. The second sentence of paragraph (2) of Article 10 shall not be affected by the provisions of this paragraph[11].

II. THE FEDERATION AND THE STATES (LAENDER)

Article 20 (Basic principles of state order, right to resist)

(1) The Federal Republic of Germany shall be a democratic and social federal state.

(2) All state authority shall emanate from the people. It shall be exercised by the people through elections and voting and by specific organs of the legislature, the executive power, and the judiciary.

(3) Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice.

(4)[12] All Germans shall have the right to resist any person seeking to abolish this constitutional order, should no other remedy be possible.

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Article 28 (Federal guarantee concerning Laender constitutions, guarantee of self-government for local authorities)

(1) The constitutional order in the Laender shall conform to the principles of the republican, democratic and social state under the rule of law

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11 Last sentence inserted by federal statute of 24 June 1968 (Federal Law Gazette I p. 710).

12 Inserted by federal statute of 24 June 1968 (Federal Law Gazette I p. 710).

(Rechtsstaat), within the meaning of this Basic Law. In each of the Laender, counties (Kreise), and communes (Gemeinden), the people shall be represented by a body chosen in general, direct, free, equal, and secret elections. In the communes the communal assembly may take the place of an elected body.

(2) The communes shall be guaranteed the right to regulate on their own responsibility all the affairs of the local community within the limits set by statute. Within the framework of their statutory functions, the associations of communes (Gemeindeverbaende) shall also have such right of self-government as may be provided by statute.

(3) The Federation shall ensure that the constitutional order of the Laender conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

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III. THE FEDERAL PARLIAMENT (BUNDESTAG)

(Art. 38 - 49)

IV. THE FEDERAL COUNCIL (BUNDESRAT)

(Art. 50 - 53)

IVa.[13] THE JOINT COMMITTEE

(Art. 53a)

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13 Inserted by federal statute of 24 June 1968 (Federal Law Gazette I p. 710).

V. THE FEDERAL PRESIDENT

(Art. 54 - 61)

VI. THE FEDERAL GOVERNMENT

Article 62 (Composition)

The Federal Government shall consist of the Federal Chancellor (Bundeskanzler) and the Federal Ministers.

Article 63 (Election and appointment of the Federal Chancellor)

(1) The Federal Chancellor shall be elected, without debate, by the Bundestag upon the proposal of the Federal President.

(2) The person obtaining the votes of the majority of the members of the Bundestag shall be elected. The person elected shall be appointed by the Federal President.

(3) Where the person proposed is not elected, the Bundestag may elect within fourteen days of the ballot a Federal Chancellor by more than one half of its members.

(4) Where no candidate has been elected within this period, a new ballot shall take place without delay, in which the person obtaining the largest number of votes shall be elected. Where the person elected has obtained the votes of the majority of the members of the Bundestag, the Federal President shall appoint him within seven days of the election. Where the person elected did not obtain such a majority, the Federal President shall, within seven days, either appoint him or dissolve the Bundestag.

Article 64 (Appointment of Federal Ministers)

(1) The Federal Ministers shall be appointed and dismissed by the Federal President upon the proposal of the Federal Chancellor.

(2) The Federal Chancellor and the Federal Ministers, on assuming office, shall take before the Bundestag the oath provided for in Article 56.

Article 65 (Powers exercised in the Federal Government)

The Federal Chancellor shall determine and be responsible for the general policy guidelines. Within the limits set by these guidelines, each Federal Minister shall conduct the affairs of his department independently and on his own responsibility. The Federal Government shall decide on differences of opinion between Federal Ministers. The Federal Chancellor shall conduct the affairs of the Federal Government in accordance with rules of procedure adopted by it and approved by the Federal President.

Article 65a[14] (Power of command over Armed Forces)

Power of command in respect of the Armed Forces shall be vested in the Federal Minister of Defence.

Article 66 (Incompatibilities)

The Federal Chancellor and the Federal Ministers may not hold any other salaried office, nor engage in an occupation, nor belong to the management or, without the consent of the Bundestag, to the board of directors of an enterprise carried on for profit.

Article 67 (Constructive vote of no confidence)

(1) The Bundestag can express its lack of confidence in the Federal Chancellor only by electing a successor with the majority of its members and by requesting the Federal President to dismiss the Federal Chancellor. The Federal President shall comply with the request and appoint the person elected.

(2) Forty-eight hours shall elapse between the motion and the election.

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14 Inserted by federal statute of 19 March 1956 (Federal Law Gazette I p. 111) and amended by federal statute of 24 June 1968 (Federal Law Gazette I p. 711).

Article 68 (Vote of confidence, dissolution of the Bundestag)

(1) Where a motion of the Federal Chancellor for a vote of confidence is not carried by the majority of the members of the Bundestag, the Federal President may, upon the proposal of the Federal Chancellor, dissolve the Bundestag within twenty-one days. The right of dissolution shall lapse as soon as the Bundestag elects another Federal Chancellor with the majority of its members.

(2) Forty-eight hours shall elapse between the motion and the vote thereon.

Article 69 (Deputy Federal Chancellor, tenure of office of members of the Federal Government)

(1) The Federal Chancellor shall appoint a Federal Minister as his deputy.

(2) The tenure of office of the Federal Chancellor or a Federal Minister shall end in any event on the assembly of a new Bundestag; the tenure of office of a Federal Minister shall also end on any other termination of the Federal Chancellor's tenure of office.

(3) At the request of the Federal President, the Federal Chancellor, or at the request of the Federal Chancellor or of the Federal President, a Federal Minister shall be bound to continue to manage the affairs of his office until the appointment of a successor.

VII. LEGISLATIVE POWERS OF THE FEDERATION

Article 70 (Legislation of the Federation and the Laender)

(1) The Laender shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.

(2) The division of competence between the Federation and the Laender shall be determined by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.

Article 71 (Exclusive legislative power of the Federation, concept)

In matters within the exclusive legislative power of the Federation, the Laender shall have power to legislate only where and to the extent that they are given such explicit authorization by a federal statute.

Article 72 (Concurrent legislative power of the Federation, concept)

(1) In matters within the concurrent legislative powers the Laender shall have power to legislate as long as and to the extent that the Federation does not exercise its right to legislate.

(2) The Federation shall have the right to legislate in these matters to the extent that a need for regulation by federal legislation exists because:

1. a matter cannot be effectively regulated by the legislation of individual Laender, *or*
2. the regulation of a matter by a Land statute might prejudice the interests of other Laender or of the whole body politic, or
3. the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of any one Land, necessitates such regulation.

Article 73 (Exclusive legislation power catalogue)

The Federation shall have exclusive power to legislate in the following matters:

1.[15] foreign affairs and defence, including the protection of the civilian population;
2. citizenship in the Federation;
3. freedom of movement, passport matters, immigration, emigration and extradition;
4. currency, money and coinage, weights and measures, as well as the determination of standards of time;

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15 As amended by federal statutes of 26 March 1954 (Federal Law Gazette I p. 45) and 24 June 1968 (Federal Law Gazette I p. 711).

5. the unity of the customs and trading area, treaties on commerce and on navigation, the freedom of movement of goods, and the exchanges of goods and payments with foreign countries, including customs and other frontier protection;
6. federal railroads and air transport;
7. postal and telecommunication services;
8. the legal status of persons employed by the Federation and by federal corporate bodies under public law;
9. industrial property rights, copyrights and publishing law;
10.[16] cooperation of the Federation and the Laender concerning
   (a) criminal police,
   (b) protection of the free democratic basic order, of the existence and the security of the Federation or of a Land (protection of the constitution) and
   (c) protection against activities in the federal territory which, through the use of force or actions in preparation for the use of force, endanger the foreign interests of the Federal Republic of Germany,

   as well as the establishment of a Federal Criminal Police Office and the international control of crime.
11. statistics for federal purposes.

Article 74 (Concurrent legislation, catalogue)

Concurrent legislative powers shall cover the following matters:

1. civil law, criminal law and execution of sentences, the organization and procedure of courts, the legal profession, notaries and legal advice (Rechtsberatung);
2. registration of births, deaths, and marriages;
3. the law of association and assembly;
4. the law relating to residence and settlement of aliens;

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16 As amended by federal statute of 28 July 1972 (Federal Law Gazette I p. 1305).

4a.[17] the law relating to weapons and explosives;

5. the protection of German cultural assets against migration abroad;

6. refugee and expellee matters;

7. public welfare;

8. citizenship in the Laender;

9. war damage and reparations;

10.[18] benefits to war-disabled persons and to dependants of those killed in the war as well as assistance to former prisoners of war;

10a.[19] war graves of soldiers, graves of other victims of war and of victims of despotism;

11. the law relating to economic matters (mining, industry, supply of power, crafts, trades, commerce, banking, stock exchanges, and private insurance);

11a.[20] the production and utilization of nuclear energy for peaceful purposes, the construction and operation of installations serving such purposes, protection against hazards arising from the release of nuclear energy or from ionizing radiation, and the disposal of radioactive substances;

12. labour law, including the legal organization of enterprises, protection of workers, employment exchanges and agencies, as well as social insurance, including unemployment insurance;

13.[21] the regulation of educational and training grants and the promotion of scientific research;

14. the law regarding expropriation, to the extent that matters enumerated in Articles 73 and 74 are concerned;

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17 Inserted by federal statute of 28 July 1972 (Federal Law Gazette I p. 1305) and amended by federal statute of 23 August 1976 (Federal Law Gazette I p. 2383).

18 As amended by federal statute of 16 June 1965 (Federal Law Gazette I p. 513).

19 Inserted by federal statute of 16 June 1965 (Federal Law Gazette I p. 513).

20 Inserted by federal statute of 23 December 1959 (Federal Law Gazette I p. 813).

21 As amended by federal statute of 12 May 1969 (Federal Law Gazette I p. 363).

15. transfer of land, natural resources and means of production to public ownership or other forms of collective enterprise for the public benefit;
16. prevention of the abuse of economic power;
17. promotion of agricultural production and forestry, securing the supply of food, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing, and preservation of the coasts;
18. real estate transactions, land law and matters concerning agricultural leases, as well as housing, settlement and homestead matters;
19. measures against human and animal diseases that are communicable or otherwise endanger public health, admission to the medical profession and to other medical occupations or practices, as well as trade in medicines, curatives, narcotics, and poisons;

19a.[22] the economic viability of hospitals and the regulation of hospitalization fees;

20.[23] protection regarding the marketing of food, drink and tobacco, of necessities of life, fodder, agricultural and forest seeds and seedlings, and protection of plants against diseases and pests, as well as the protection of animals;

21. ocean and coastal shipping, as well as sea marks, inland navigation, meteorological services, sea routes, and inland waterways used for general traffic;

22.[24] road traffic, motor transport, construction and maintenance of long-distance highways as well as the collection of charges for the use of public highways by vehicles and the allocation of revenue therefrom;

23. non-federal railroads, except mountain railroads;

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22 Inserted by federal statute of 12 May 1969 (Federal Law Gazette I p. 363).

23 As amended by federal statute of 18 March 1971 (Federal Law Gazette I p. 207).

24 As amended by federal statute of 12 May 1969 (Federal Law Gazette I p. 363).

24.[25] waste disposal, air pollution control and noise abatement.

Article 74a[26] (Concurrent legislative power of the Federation, remuneration and pensions of members of the public service)

(1) Concurrent legislative power shall further extend to the remuneration and pensions of members of the public service whose service and loyalty are governed by public law, insofar as the Federation does not have exclusive power to legislate pursuant to item 8 of Article 73.

(2) Federal statutes enacted pursuant to paragraph (1) of this Article shall require the consent of the Bundesrat.

(3) Federal statutes enacted pursuant to item 8 of Article 73 shall likewise require the consent of the Bundesrat, insofar as for the structure and assessment of remuneration and pensions, including the rating of posts, provision is made for criteria or minimum or maximum rates other than those provided for in federal statutes enacted pursuant to paragraph (1) of this Article.

(4) Paragraphs (1) and (2) of this Article shall apply mutatis mutandis to the remuneration and pensions of judges in the Laender. Paragraph (3) of this Article shall apply mutatis mutandis to statutes enacted pursuant to paragraph (1) of Article 98.

Article 75[27] (Power of the Federation to pass framework legislation, catalogue)

Subject to the conditions laid down in Article 72, the Federation shall have the right to enact framework legislation concerning:

1.[28] the legal status of persons in the public service of the Laender, communes, or other corporate bodies under public law, insofar as Article 74a does not provide otherwise;

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25 As amended by federal statute of 12 April 1972 (Federal Law Gazette I p. 593).

26 Inserted by federal statute of 18 March 1971 (Federal Law Gazette I p. 206).

27 As amended by federal statute of 12 May 1969 (Federal Law Gazette I p. 363).

28 As amended by federal statute of 18 March 1971 (Federal Law Gazette I p. 206).

1a.[29] the general principles governing higher education;

2. the general legal status of the press and the film industry;

3. hunting, nature conservation and landscape management;

4. land distribution, regional planning, and the management of water resources;

5. matters relating to the registration of residence or domicile (Meldewesen) and to identity cards.

Article 76 (Bills)

(1) Bills shall be introduced in the Bundestag by the Federal Government or by members of the Bundestag or by the Bundesrat.

(2)[30] Bills of the Federal Government shall first be submitted to the Bundesrat. The Bundesrat shall be entitled to state its position on such bills within six weeks. A bill which, on submission to the Bundesrat, is exceptionally specified by the Federal Government to be particularly urgent may be submitted by the latter to the Bundestag three weeks later, even though the Federal Government may not yet have received the statement of the Bundesrat's position; upon receipt, such statement shall be transmitted to the Bundestag by the Federal Government without delay.

(3)[31] Bills of the Bundesrat shall be submitted to the Bundestag by the Federal Government within three months. In doing so, the Federal Government shall state its own view.

Article 77 (Lesiglative procedure)

(1) Federal statutes shall be enacted by the Bundestag. Upon their adoption they shall, without delay, be transmitted to the Bundesrat by the President of the Bundestag.

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29 Inserted by federal statute of 12 May 1969 (Federal Law Gazette I p. 363).

30 As amended by federal statute of 15 November 1968 (Federal Law Gazette I p. 1177).

31 As amended by federal statute of 17 July 1969 (Federal Law Gazette I p. 817).

(2)[32] The Bundesrat may, within three weeks of the receipt of the adopted bill, demand that a committee for joint consideration of bills, composed of members of the Bundestag and members of the Bundesrat, be convened. The composition and the procedure of this committee shall be regulated by rules of procedure to be adopted by the Bundestag and requiring the consent of the Bundesrat. The members of the Bundesrat on this committee shall not be bound by instructions. Where the consent of the Bundesrat is required for a bill to become a statute, the Bundestag and the Federal Government may also demand that the committee be convened. Should the committee propose any amendment to the adopted bill, the Bundestag must again vote on the bill.

(3)[33] Insofar as the consent of the Bundesrat is not required for a bill to become a statute, the Bundesrat may, when the proceedings under paragraph (2) of this Article are completed, enter an objection within two weeks against a bill adopted by the Bundestag. The period for entering an objection shall begin, in the case of the last sentence of paragraph (2) of this Article, on the receipt of the bill as readopted by the Bundestag, and in all other cases on the receipt of a communication from the chairman of the committee provided for in paragraph (2) of this Article to the effect that the committee's proceedings have been concluded.

(4) Where the objection was adopted with the majority of the votes of the Bundesrat, it can be rejected by a decision of the majority of the members of the Bundestag. Where the Bundesrat adopted the objection with a majority of at least two thirds of its votes, its rejection by the Bundestag shall require a majority of two thirds, including at least the majority of the members of the Bundestag.

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32 As amended by federal statute of 15 November 1968 (Federal Law Gazette I p. 1177).

33 As amended by federal statute of 15 November 1968 (Federal Law Gazette I p. 1177).

Article 78 (Passage of federal statutes)

A bill adopted by the Bundestag shall become a statute if the Bundesrat consents to it, or fails to make a demand pursuant to paragraph (2) of Article 77, or fails to enter an objection within the period stipulated in paragraph (3) of Article 77, or withdraws such objection, or where the objection is overridden by the Bundestag.

Article 79 (Amendment of the Basic Law)

(1) This Basic Law can be amended only by statutes which expressly amend or supplement the text thereof. In respect of international treaties the subject of which is a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or which are intended to serve the defence of the Federal Republic, it shall be sufficient, for the purpose of clarifying that the provisions of this Basic Law do not preclude the conclusion and entry into force of such treaties, to effect a supplementation of the text of this Basic Law confined to such clarification[34].

(2) Any such statute shall require the consent of two thirds of the members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments of this Basic Law affecting the division of the Federation into Laender, the participation on principle of the Laender in legislation, or the basic principles laid down in Articles 1 and 20 shall be inadmissible.

Article 80 (Issue of ordinances)

(1) The Federal Government, a Federal Minister or the Land governments may be authorized by statute to issue ordinances (Rechtsverordnungen). The content, purpose, and scope of the authorization so conferred shall be laid down in the statute concerned. This legal basis shall be

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34 Second sentence inserted by federal statute of 26 March 1954 (Federal Law Gazette I p. 45).

stated in the ordinance. Where a statute provides that such authorization may be delegated, such delegation shall require another ordinance.

(2) The consent of the Bundesrat shall be required, unless otherwise provided by federal legislation, for ordinances issued by the Federal Government or a Federal Minister concerning basic rules for the use of facilities of the federal railroads and of postal and telecommunication services, or charges therefor, or concerning the construction and operation of railroads, as well as for ordinances issued pursuant to federal statutes that require the consent of the Bundesrat or that are executed by the Laender as agents of the Federation or as matters of their own concern.

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VIII. THE EXECUTION OF FEDERAL STATUTES AND THE FEDERAL ADMINISTRATION

Article 83 (Distribution of competence between the Federation and the Laender)

The Laender shall execute federal statutes as matters of their own concern insofar as this Basic Law does not otherwise provide or permit.

Article 84 (Land execution and Federal Government supersivion)

(1) Where the Laender execute federal statutes as matters of their own concern, they shall provide for the establishment of the requisite authorities and the regulation of administrative procedures insofar as federal statutes consented to by the Bundesrat do not otherwise provide.

(2) The Federal Government may, with the consent of the Bundesrat, issue general administrative rules.

(3) The Federal Government shall exercise supervision to ensure that the Laender execute the federal statutes in accordance with applicable law. For this purpose the Federal Government may send commissioners to the highest Land authorities and, with their consent or, where such consent is refused, with the consent of the Bundesrat, also to subordinate authorities.

(4) Should any shortcomings which the Federal Government has found to exist in the execution of federal statutes in the Laender not be corrected, the Bundesrat shall decide, at the request of the Federal Government or the Land concerned, whether such Land has violated the law. The decision of the Bundesrat may be challenged in the Federal Constitutional Court.

(5) With a view to the execution of federal statutes, the Federal Government may be authorized by a federal statute requiring the consent of the Bundesrat to issue individual instructions for particular cases. They shall be addressed to the highest Land authorities unless the Federal Government considers the matter urgent.

Article 85 (Execution by the Laender as agents of the Federation)

(1) Where the Laender execute federal statutes as agents of the Federation, the establishment of the requisite authorities shall remain the concern of the Laender except insofar as federal statutes consented to by the Bundesrat otherwise provide.

(2) The Federal Government may, with the consent of the Bundesrat, issue general administrative rules. It may regulate the uniform training of civil servants (Beamte) and other salaried public employees (Angestellte). The heads of authorities at the intermediate level shall be appointed with its agreement.

(3) The Land authorities shall be subject to the instructions of the competent highest federal authorities. Such instructions shall be addressed to the highest Land authorities unless the Federal Government considers the matter urgent. Execution of the instructions shall be ensured by the highest Land authorities.

(4) Federal supervision shall cover the lawfulness and appropriateness of execution. The Federal Government may, for this purpose, require the submission of reports and documents and send commissioners to all authorities.

Article 86 (Direct federal administration)

Where the Federation executes statutes by means of direct federal administration or by federal corporate bodies or institutions under public law, the Federal Government shall, insofar as the statute concerned contains no special provision, issue pertinent general administrative rules. The Federal Government shall provide for the establishment of the requisite authorities insofar as the statute concerned does not otherwise provide.

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VIIIa. JOINT TASKS[35]

(Art. 91a – 91b)

IX. THE ADMINISTRATION OF JUSTICE

Article 92[36] (Court organization)

Judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Laender.

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35 Inserted by federal statute of 12 May 1969 (Federal Law Gazette I p. 359).

36 As amended by federal statute of 18 June 1968 (Federal Law Gazette I p. 657).

Article 93 (Federal Constitutional Court, jurisdiction)

(1) The Federal Constitutional Court shall decide:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a highest federal body or of other parties concerned who have been vested with rights of their own by this Basic Law or by rules of procedure of a highest federal body;
2. in case of differences of opinion or doubts on the formal and material compatibility of federal law or Land law with this Basic Law, or on the compatibility of Land law with other federal law, at the request of the Federal Government, of a Land government, or of one third of the Bundestag members;
3. in case of differences of opinion on the rights and duties of the Federation and the Laender, particularly in the execution of federal law by the Laender and in the exercise of federal supervision;
4. on other disputes involving public law, between the Federation and the Laender, between different Laender or within a Land, unless recourse to another court exists;

4a.[37] on complaints of unconstitutionality, which may be entered by any person who claims that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been violated by public authority;

4b.[38] on complaints of unconstitutionality, entered by communes or associations of communes on the ground that their right to self-government under Article 28 has been violated by a statute other than a Land statute open to complaint to the respective Land constitutional court;

5. in the other cases provided for in this Basic Law.

(2) The Federal Constitutional Court shall also act in such other cases as are assigned to it by federal legislation.

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37 Inserted by federal statute of 29 January 1969 (Federal Law Gazette I p. 97).

38 Inserted by federal statute of 29 January 1969 (Federal Law Gazette I p. 97).

Article 94 (Federal Constitutional Court, composition)

(1) The Federal Constitutional Court shall consist of federal judges and other members. Half of the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat. They may not be members of the Bundestag, the Bundesrat, the Federal Government, nor of any of the corresponding bodies of a Land.

(2) The constitution and procedure of the Federal Constitutional Court shall be regulated by a federal statute which shall specify in what cases its decisions shall have the force of law[39]. Such statute may require that all other legal remedies must have been exhausted before a complaint of unconstitutionality can be entered, and may make provision for a special procedure as to admissibility.

Article 95[40] (Highest courts of justice of the Federation, Joint Panel)

(1) For the purposes of ordinary, administrative, fiscal, labour and social jurisdiction, the Federation shall establish as highest courts of justice the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court, and the Federal Social Court.

(2) The judges of each of these courts shall be selected jointly by the competent Federal Minister and a committee for the selection of judges consisting of the competent Land Ministers and an equal number of members elected by the Bundestag.

(3) In order to preserve uniformity of decisions, a Joint Panel (Senat) of the courts specified in paragraph (1) of this Article shall be set up. Details shall be regulated by a federal statute.

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39 Inserted by federal statute of 29 January 1969 (Federal Law Gazette I p. 97).

40 As amended by federal statute of 18 June 1968 (Federal Law Gazette I p. 657).

Article 96[41] (Other federal courts, exercise of federal jurisdiction by courts of the Laender)

(1) The Federation may establish a federal court for matters concerning industrial property rights.

(2) The Federation may establish military criminal courts for the Armed Forces as federal courts. They may only exercise criminal jurisdiction while a state of defence exists, and otherwise only over members of the Armed Forces serving abroad or on board warships. Details shall be regulated by a federal statute. These courts shall be within the competence of the Federal Minister of Justice. Their full-time judges shall be persons qualified to hold judicial office.

(3) The highest court of justice for appeals from the courts mentioned in paragraphs (1) and (2) of this Article shall be the Federal Court of Justice.

(4)[42] The Federation may establish federal courts for disciplinary proceedings against, and for proceedings in pursuance of complaints by, persons in the federal public service.

(5)[43] In respect of criminal proceedings under paragraph (1) of Article 26 or involving the protection of the State, a federal statute requiring the consent of the Bundesrat may provide that Land courts shall exercise federal jurisdiction.

Article 96a[44]

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41 The original Article 96 was repealed by federal statute of 18 June 1968 (Federal Law Gazette I p. 658). The present Article 96 is the former Article 96a as inserted by federal statute of 19 March 1956 (Federal Law Gazette I p. 111) and amended by federal statutes of 6 March 1961 (Federal Law Gazette I p. 141), 18 June 1968 (Federal Law Gazette I p. 658), 12 May 1969 (Federal Law Gazette I p. 363), and 26 August 1969 (Federal Law Gazette I p. 1357).

42 As amended by federal statute of 12 May 1969 (Federal Law Gazette I p. 363).

43 Inserted by federal statute of 26 August 1969 (Federal Law Gazette I p. 1357).

44 Cef. note 39.

Article 97 (Independence of the judges)

(1) The judges shall be independent and subject only to the law.

(2) Judges appointed permanently on a full-time basis in established positions cannot, against their will, be dismissed or permanently or temporarily suspended from office or given a different posting or retired before the expiration of their term of office except by virtue of a judicial decision and only on the grounds and in the form provided for by statute. Legislation may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

Article 98[45] (Legal status of judges in the Federation and the Laender)

(1) The legal status of the federal judges shall be regulated by a special federal statute.

(2) Where a federal judge, in his official capacity or unofficially, infringes the principles of this Basic Law or the constitutional order of a Land, the Federal Constitutional Court may decide by a two-thirds majority, upon the request of the Bundestag, that the judge be given a different office or retired. In a case of intentional infringement, his dismissal may be ordered.

(3)[46] The legal status of the judges in the Laender shall be regulated by special Land statutes. The Federation may enact outline provisions, insofar as paragraph (4) of Article 74a does not provide otherwise.

(4) The Laender may provide that the Land Minister of Justice together with a committee for the selection of judges shall decide on the appointment of judges in the Laender.

(5) The Laender may, in respect of Land judges, enact provisions corresponding to those of paragraph (2) of this Article. Existing Land consti-

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45 As amended by federal statute of 18 March 1971 (Federal Law Gazette I p. 206).

46 As amended by federal statute of 18 March 1971 (Federal Law Gazette I p. 206).

tutional law shall remain unaffected. The decision in a case of impeachment of a judge shall rest with the Federal Constitutional Court.

Article 99[47] (Decision by the Federal Constitutional Court and the highest courts of the Federation in disputes concerning Land law)

The decision on constitutional disputes within a Land may be assigned by Land legislation to the Federal Constitutional Court, and the decision at last instance in matters involving the application of Land law to the highest courts of justice referred to in paragraph (1) of Article 95.

Article 100 (Compatibility of statutory law with the Basic Law)

(1) Where a court considers that a statute on whose validity the court's decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This shall also apply where this Basic Law is held to be violated by Land law or where a Land statute is held to be incompatible with a federal statute.

(2) Where, in the course of litigation, doubt exists whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.

(3)[48] Where the constitutional court of a Land, in interpreting this Basic Law, intends to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another Land, it shall obtain a decision from the Federal Constitutional Court.

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47 As amended by federal statute of 18 June 1968 (Federal Law Gazette I p. 658).

48 As amended by federal statute of 18 June 1968 (Federal Law Gazette I p. 658).

Article 101 (Ban on extraordinary courts)

(1) Extraordinary courts shall be inadmissible. No one may be removed from the jurisdiction of his lawful judge.

(2) Courts for special fields of law may be established only by legislation.

Article 102 (Abolition of capital punishment)

Capital punishment shall be abolished.

Article 103 (Hearing in accordance with the law, ban on retroactive criminal legislation and on repeated punishment)

(1) In the courts everyone shall be entitled to a hearing in accordance with the law.

(2) An act can be punished only where it constituted a criminal offence under the law before the act was committed.

(3) No one may be punished for the same act more than once under general criminal legislation.

Article 104 (Legal guarantees in the event of deprivation of liberty)

(1) The liberty of the individual may be restricted only by virtue of a formal statute and only in compliance with the forms prescribed therein. Detained persons may not be subjected to mental or to physical ill-treatment.

(2) Only judges may decide on the admissibility or continuation of any deprivation of liberty. Where such deprivation is not based on the order of a judge, a judicial decision shall be obtained without delay. The police may hold no one on their own authority in their own custody longer than the end of the day after the day of apprehension. Details shall be regulated by legislation.

(3) Any person provisionally detained on suspicion of having committed an offence shall be brought before a judge not later than the day following the day of apprehension; the judge shall inform him of the rea-

sons for the detention, examine him and give him an opportunity to raise objections. The judge shall, without delay, either issue a warrant of arrest setting forth the reasons therefor or order his release from detention.

(4) A relative or a person enjoying the confidence of the person detained shall be notified without delay of any judicial decision imposing or ordering the continuation of his deprivation of liberty.

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X. FINANCE

(Art. 104a – 115)

Xa.[49] STATE OF DEFENCE

(Art. 115a – 115l)

XI. TRANSITIONAL AND CONCLUDING PROVISIONS

(Art. 116 – 146)

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49 Entire section Xa inserted by federal statute of 24 June 1968 (Federal Law Gazette I p. 711).

LAW ON ADMINISTRATIVE PROCEEDINGS OF 25 MAY 1976 (as amended until 1990)[1]

PART I: SCOPE, LOCAL COMPETENCE, OFFICIAL ASSISTANCE

1. Scope. – (1) This Law shall apply to the administrative activities under public law of the official bodies:

1. Of the Federal Government and public law eutities, institutions and foundations operated directly by the Federal Government,
2. Of the Länder and local authorities and other public law entities subject to the supervision of the Länder where these execute Federal legislation on behalf of the Federal authorities,

where no Federal Law or regulation contains similar or conflicting provisions.

(2) This Law shall also apply to the administrative activities unter public law of the authorities refered to in paragraph 1, No. 2 when the Länder of their own authority execute Federal legislation within the exclusive or concurrent powers of the Federal Government, where no Federal Law or regulation contains similar or conflicting provivions. This shall apply to the execution of Federal legislation enacted after this Law comes into force only to the extent that the Federal legislation, with the agreement of the Bundesrat, declares this Law to be applicable.

(3) This Law shall not apply to the execution of Federal law by the Länder where the administrative activity of the authorities under public law is regulated by a procedural law of the Länder.

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1 The translation of Parts I to VI is based with the kind permission of Butterworths Publishing House on *William Dale*, Legislative Drafting: A New Approach, 1977, pp. 234-266. Section 44 par. 5 have been corrected and sections 12, 16 and 20 updated by *Patricia Fay Magiera* who also translated Parts VII and VIII.

(4) For the purposes of this Law "authorities" shall comprise any body which performs tasks of public administration.

2. Exceptions. – (1) This Law shall not apply to the activities of churches, religious bodies and communities of belief and their associations and institutions.

(2) This Law also shall not apply to:

1. Procedures of the Federal or local tax authorities under the Tax Code,
2. Criminal and other prosecutions and the sanctioning of administrative offences, judicial proceedings carried out on behalf of foreign legal authorities in criminal and civil matters and, notwithstanding section 80, paragraph 4, to measures relating to the legal status of the judiciary,
3. Proceedings at the German Patent Office and before its appointed arbitrators,
4. Matters referred to in section 51 of the Social Courts Law and the laws on the promotion of training, the severely handicapped, housing supplements, as also social assistance, youth services and the welfare of war victims,
5. the law on the Equalisation of Burdens,
6. The law on restitution.

(3) As regards the activities:

1. of the court administrations and the administrative bodies of the judiciary, including the public law entities under their supervision, this Law shall apply only in so far as the activity is subject to control in administrative court proceedings;
2. of the authorities in assessing performance, suitability and the like of individuals, only sections 4 to 13, 20 to 27, 29 to 38, 40 to 52, 78, 80 and 96 shall apply;
3. of representatives of the Federal Government abroad, this Law shall not apply;

4. of the authorities of the German postal services (Deutsche Bundespost) in what concerns the use of the equipment of the postal and telecommunications services, this Law shall not apply.

3. Local competence. – (1) The following shall be the provisions as regards local competence:

1. In matters relating to immovable assets or to a right or legal relationship linked to a certain place: the authority in whose districts the assets or the place is situated,
2. In matters relating to the running of a firm or one of its places of business, to the practice of a profession or to the carrying out of other permanent acivity: the authority in whose district the firm or place of business is or is to be run, the profession practised or the permanent activity carried out,
3. In other matters relating to:
   (a) an individual: the authority in whose district the individual is or last was normally resident,
   (b) a body corporate or association: the authority in whose district the body corporate or association is or last was legally domiciled,
4. In matters for which competence cannot be derived from Nos. 1 to 3: the authority in whose district the event giving rise to the official action occurs.

(2) In the event of several authorities being competent under paragraph 1, the decision shall be taken by the authority first concerned with the matter unless the supervisory authority with overall competence in such matters determines that the decision shall be taken by another locally competent authority. In cases in which one and the same matter involves more than one place of business of a firm, the supervisory authority can appoint ont of the authorities competent under paragraph 1, No. 2 as the authority with overall competence where this is called for the interests of a uniform decision for all concerned. The said supervisory authority shall also decide as to local competence when a number of

authorities consider themselves either to possess or not to possess the relevant competence or when for other reasons there is some doubt in the matter of competence. Where an overall supervisory authority does not exist, the supervisory authorities competent in the matter shall take a decision jointly.

(3) If in the course of the administrative process some change in the circumstances determining competence occurs, the authority hitherto competent may continue the administrative process when this makes for simplicity and efficiency of execution while protecting the interests of those concerned and where the agreement of the authority now competent is obtained.

(4) Where delay involves a risk, and matters cannot be postponed, any authority shall be locally competent when the event giving rise to the official action occurs in its district. The authority locally competent under paragraph 1, Nos. 1 to 3 shall be informed immediately.

4. Authorities' duty to assist one another. – (1) Each authority shall, when requested to do so, render assistance to other authorities (official assistance).

(2) It shall not be deemed official assistance when:

1. Authorities assist each other in the course of a relationship in which one issues directives to another,
2. Assistance involves actions which are the task of the authority approached.

5. Circumstances permitting and limits to official assistance.

(1) An authority may request official assistance particularly when:

1. For legal reasons it cannot itself perform the official action,
2. For material reasons, such as the lack of personnel or equipment needed to perform the official action, it cannot itself do so,
3. To carry out its tasks it requires knowledge of facts unknown to and unobtainable by it,

4. To carry out its tasks it requires documents or other evidence not in the possession of the authority approached,
5. Could only carry out the task at substantially greater expense than the authority approached.

(2) The authority approached may not provide assistance when:

1. It is unable to do so for legal reasons,
2. Such assistance would be seriously detrimental to the Federal Republic or to a Land thereof.

The authority approached shall not be obliged to submit documents or files nor to impart information when proceedings must be kept secret either by their nature or by law.

(3) The authority approached need not provide assistance when:

1. Another authority can provide the same assistance with much greater ease or at much lower cost,
2. It could only provide such assistance at disproportionately great expense,
3. Having regard to the tasks carried out by the authority requesting assistance, it could only provide such assistance by seriously jeopardising its own work.

(4) The authority approached may not refuse assistance on the grounds that it considers the request inappropriate for reasons other than those given in paragraph 3, or considers the purpose to be achieved by the official assistance inappropriate.

(5) In the event of the authority approached not considering itself obliged to provide assistance, it shall so inform the authority making the request. In the event of the latter insisting that official assistance should be provided, the decision as to whether or not an obligation to furnish such assistance exists shall be taken by the supervisory authority with overall competence in the matter or, where no such authority exists, the supervisory authority competent in matters with which the authority of whom the request is made is concerned.

6. Choice of authority. – In the event of a number of authorities being possible providers of official assistance, an approach for assistance shall where possible be made to an authority of the lowest administrative level of the administrative branch to which the authority requesting assistance belongs.

7. Execution of official assistance. – (1) The admissibility of the measure to be put into effect by official assistance shall be determined by the law applying to the authority requesting assistance and the execution of official assistance by that applying to the authority of which the request is made.

(2) The authority requesting assistance shall be responsible *vis-à-vis* the authority from which assistance is requested for the legality of the measure to be taken. The authority of which assistance is requested shall be responsible for the execution of the official assistance.

8. Cost of official assistance. – (1) The authority requesting assistance shall not be liable to pay the authority from which official assistance is requested any administrative fee therefor. It shall, however, refund to the latter any expenses in excess of fifty German Marks in each individual case, if so required. In the event of authorities of one and the same legal entity providing each other with assistance, no expenses shall be refundable.

PART II: GENERAL REGULATIONS GOVERNING ADMINISTRATIVE PROCEDURE

Division 1: Principles of administrative procedure

9. Concept of administrative procedure. – For the purposes of this Law, administrative procedure shall be the activity of authorities having an external effect and directed to the examination of basic requirements, the preparation and the issuing of an administrative act or to the conclusion of an administrative agreement under public law; it shall include the

issuing of the administrative act or the conclusion of the agreement under public law.

10. Administrative procedure not tied to form. – The administrative procedure shall not be tied to specific forms when no legal provisions exist which specifically govern procedural form. It shall be simple and appropriate.

11. Capacity to participate. – The following shall be capable of participating in such procedure:

1. Individuals and bodies corporate,
2. Associations, in so far as they can have rights,
3. Authorities.

12. Capacity to act. – (1) The following shall be capable of acting in administrative procedures:

1. Individuals having the legal capacity to contract under civil law,
2. Individuals whose legal capacity to contract is limited under civil law, where they are recognised as having the capacity to contract for the object of the procedure under civil law or as having capacity to act under public law,
3. Bodies corporate and associations (section 11, No. 2) in the person of their legal representatives or of specially appointed individuals,
4. Authorities through their heads, representatives or persons appointed by them.

(2) If there is a reservation of consent under section 1903 of the Civil Code regarding the object of the procedure, a person of full age and having legal competence who is placed under the care of a custodian shall be deemed capable of acting in administrative procedures only in so far as he can act, under the provisions of civil law, without the consent of the custodian or, he is recognized as being capable of acting under the provisions of public law.

(3) Sections 53 and 55 of the Code of Civil Procedure shall apply *mutatis mutandis*.

13. Participants. – (1) Participants shall be:

1. Those making and opposing an application,
2. Those *vis-à-vis* whom the authority wishes to direct or has directed the administrative act,
3. Those with whom the authority wishes to conclude or has concluded an agreement under public law,
4. Those who have been involved in the procedure by the authority under paragraph 2.

(2) The authority may *ex officio* or upon request involve as participants those whose legal interests may be affected by the result of proceedings. Where such result has a legal effect for a third party, the latter may upon request be involved in the proceedings as a participant. Where he is known to the authority, he shall be informed by it that proceedings have commenced.

(3) A person who is to be heard, but is not a party covered by paragrap graph 1, does not thereby become a participant.

14. Authorised representatives and advisers. – (1) A participant may cause himself to be represented by a person authorised for that purpose. The authorisation shall empower the person to whom it is given to take all such actions as relate to the administrative proceedings except where its contents state otherwise. The authorised person shall provide written evidence of his authorisation upon request. Any revocation of authority shall only become effective *vis-á-vis* the authority when received by it.

(2) authorisation shall not be terminated either by the death of the person granting such authorisation, or by any change in his capacity to act or in his legal representative; when however, appearing in the administrative proceedings on behalf of the legal successor, the authorised person shall upon request furnish written evidence of his authorisation.

(3) Where a person is appointed to act as representative in proceedings, he shall be the person with whom the authority deals. The authority

may approach the actual participant where he is obliged to co-operate. If the authority does approach the participant, the authorised representative is to be informed. Provisions governing service on the representative shall remain unaffected.

(4) A participant may appear in negotiations and discussions with an adviser. Any points made by the adviser shall be deemed to have been put by the participant except where the latter immediately contradicts them.

(5) Authorised representatives and advisers shall be rejected where they act in legal matters concerning other parties on a business basis without due authorisation.

(6) Authorised representatives and advisers may be refused permission to make written submissions when they are unsuitable for this purpose; they may be refused permission to make verbal submissions when they are incapable of doing so adequately. Persons empowered to act in legal matters on behalf of others on a business basis may not be refused such permission.

(7) Refusal of permission under paragraphs 5 and 6 shall also be made known to the participant whose authorised representative or adviser is refused permission. Acts relating to the proceedings undertaken by the authorised representative or adviser after such refusal of permission shall be invalid.

15. Appointment of an authorised recipient. – A participant without domicile or normal place of residence, registered office or management coming within the scope of this law shall, upon request and within a reasonable period, inform the authority of a person to be his authorised recipient for the purpose of this law. In the event of his failing to do so, any correspondence addressed to him shall be deemed to have been received by him on the seventh day following that of posting, except where it is ascertained that the document has not reached the addressee or has done so at a later date. The participant shall be informed of the legal consequences of his omission.

16. Official appointment of a representative. – (1) Where no representative is appointed, the court dealing with matters of guardianship

shall appoint a suitable representative when requested to do so by the authority for:

1. A participant whose identity is unknown,
2. An absent participant whose residence is unknown or who is prevented from looking after his concerns,
3. A participant without residence within the scope of this law who does not comply with the authority's request to nominate a representative within the period set,
4. A participant whose mental illness or physical, mental or emotional disability does not permit him to personally take part in the administrative proceedings,
5. Matters which are the subject of proceedings and where there is no owner, claimant, or person responsible to defend the rights and obligations in question.

(2) In cases covered by paragraph 1, No. 4, the court responsible for appointing a representative shall be the court responsible for matters of custodianship in whose area the participant has his normal place of residence; otherwise, the court responsible shall be the court of custodianship in whose district the authority making the request is situated.

(3) The representative shall be entitled to claim a reasonable remuneration and refund of his expenses from the legal entity of the authority requesting his appointment. The authority may require the person thus represented to refund its expenses. It shall determine the amount of remuneration and ascertain the amount of expenditure and costs.

(4) Otherwise, in cases listed in paragraph 1, No. 4, the appointment and office of the representative shall be governed by the provisions of the law on custodianship (*Betreuung*); in other cases, the provisions of the law on trusteeship shall apply as appropriate.

17. Representatives in the case of identical submissions. – (1) In the case of applications and petitions submitted in connection with administrative proceedings and signed by a list of more than fifty persons, or presented in the form of duplicated, identical texts (identical submissions), the person deemed to be representing the other signatories shall

be that signatory who is identified by his name, profession and address as being their representative unless he is named by them as authorised representative (*Bevollmächtigter*). Only an individual may be a representative (*Vertreter*).[2]

(2) The authority may disregard identical submissions which do not contain the information referred to in paragraph 1, first sentence clearly visible on each page containing a signature or which do not comply with the requirements of paragraph 1, second sentence. If the authority wishes to proceed in this manner, it must make the fact known by giving notice in the normal manner for that locality. The authority may, moreover, disregard identical submissions when the signatories have failed to give their name or address or have done so in an illegible manner.

(3) The power of representation shall lapse as soon as the representative or the person represented informs the authority in writing that this is the case. The representative may only make such a statement in respect of all the persons represented. If the person represented makes such a statement, he shall at the same time inform the authority whether he wishes to maintain his submission and whether he has appointed an authorised representative.

(4) Once the representative is no longer able to act, the authority may require the persons no longer represented to appoint a joint representative within a reasonable period. When the number of persons who are the subject of such a requirement exceeds 300, the authority may make the fact known by giving notice in the normal manner for that locality. If the requirement is not complied with within the period set, the authority may *ex officio* appoint a joint representative.

18. Representatives for participants with the same interests.

(1) If more than fifty people are involved as participants in administrative proceedings with the same interests and are unrepresented, the authorities may require them within a reasonable period to appoint a joint representative where otherwise the regular

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2 A distinction is made between *Bevollmächtigter* (authorised representative) and *Vertreter* (representative).

execution of administrative proceedings would be impaired. If the persons of whom such a requirement is made do not comply within the period set, the authority may *ex officio* appoint a joint representative. Only an individual may be a representative.

(2) The power of representation shall lapse as soon as the representative or person represented informs the authority in writing that this is the case. The representative may only make such a statement in respect of all the persons represented. If the person represented makes such a statement, he shall at the same time inform the authority of whether he wishes to maintain his submission and whether he has appointed an authorised representative.

19. Provisions relating to representatives in the case of identical submissions and those for participants with the same interests.

(1) The representative shall protect carefully the interests of the persons he represents. He may undertake all action relating to the administrative proceedings and shall not be tied to instructions.

(2) The provisions of section 14, paragraphs 5 to 7 shall apply *mutatis mutandis*.

(3) The representative appointed by the authority shall be entitled to claim from its legal entity a reasonable remuneration and refund of his expenses. The authority may require the persons represented to refund its expenditure in equal shares. It shall determine the amount of remuneration and ascertain the amount of expenditure and costs.

20. Persons excluded. – (1) The following persons may not act on behalf of an authority:

1. A person who is himself a participant,
2. A person related to a participant,
3. A person representing a participant under the law or by virtue of a general authorisation or in the specific administrative proceedings,
4. A relative of a person who is representing a participant in the proceedings,

5. A person employed by a participant and receiving remuneration from him, or one active on his board of management, supervisory board or similar body; this shall not apply to a person whose employing body is a participant,
6. A person who outside his official capacity has furnished an opinion or otherwise been active in the matter.

On an equal footing with the participant shall be anyone who may benefit or suffer directly as a result of the action or the decision. This shall not apply when the benefit or disadvantage is based only on the fact that someone belongs to a professional body or section of the population whose joint interests are affected by the matter.

(2) Paragraph 1 shall not apply to elections to an honorary position or to the removal of a person from such a position.

(3) Any person excluded under paragraph 1 may, when there is a risk involved in delay, take measures which cannot be postponed.

(4) In the event of a member of a committee (section 88) considering himself to be excluded or where there is doubt as to whether the provisions of paragraph 1 apply, the chairman of the committee must be informed. The commission shall decide on the matter of exclusion, the person concerned not participating in the decision. The excluded member may not attend further discussions or be present when decisions are taken.

(5) Relations for the purposes of paragraph 1, Nos. 2 and 4 shall be:

1. A *fiancé(e)*,
2. A spouse,
3. Relations and relations by marriage in the direct line,
4. Brothers and sisters,
5. Children of brothers and sisters,
6. Spouses of brothers and sisters and brothers and sisters of spouses,
7. Brothers and sisters of parents,

8. Persons connected by a long-term foster relationship involving a common dwelling in the manner of parents and children (foster parents and foster children).

The persons listed in Sentence 1 shall be deemed to be relations even where

1. The marriage producing the relationship in Nos. 2, 3, and 6 no longer exists;
2. The relationship or relationship by marriage in Nos. 3 to 7 ceases to exist through adoption;
3. In case No. 8, a common dwelling is no longer involved, so long as the persons remain connected as parent and child.

21. Possibility of bias. – (1) Where grounds exist to justify fears of bias in the exercise of official duty or if a participant maintains that such grounds exist, anyone who is to be involved in administrative proceedings on behalf of an authority shall inform the head of the authority or the person appointed by him and shall at his request refrain from such involvement. In the event of the fear of bias relating to the head of the authority, the supervisory authority shall request him to refrain from involvement where he has not already done so of his own account.

(2) Section 20, paragraph 4 shall apply as appropriate to a member of a committee (section 88).

22. Commencement of proceedings. – The authority shall decide after due consideration whether and when it is to instigate administrative proceedings. This shall not apply when the authority must, in law:

1. act *ex officio* or upon application,
2. may only act upon application and no such application is submitted.

23. Official language. – (1) The official language shall be German.

(2) In the event of applications being made to an authority in a foreign language, or submissions, evidence, documents and the like being filed in a foreign language, the authority shall immediately require that a

translation be provided. Where necessary the authority may require that the translation provided be made by a certified or publicly authorised translater or interpreter.[3] If the required translation is not furnished without delay, the authority may, at the expense of the participant, itself arrange for a translation to be made. Where the authority employs interpreters or translators, they shall be remunerated in accordance with the appropriate provisions of the law on the remuneration of witnesses and experts.

(3) If a notice, application or statement of intent fixes a period within which the authority is to act in a certain manner and such notifications are received in a foreign language, the period shall commence only at the moment that a translation is available to the authority.

(4) If a notice, application or statement of intent received in a foreign language fixes a period for a participant *vis-à-vis* the authority, enforces a claim under public law or requires the fulfilment of an action, the said notice, application or statement of intent shall be considered as being received by the authority on the actual date of receipt where at the authority's request a translation is provided within the period fixed by the authority. Otherwise the moment of receipt of the translation shall be deemed definitive, unless international agreements provide otherwise.This fact should be made known when a period is fixed.

24. Principle underlying examination. – (1) The authority shall determine the facts of the case *ex officio*. It shall determine the type and scope of investigation and shall not be bound by the submissions and motions to receive evidence of the participants.

(2) The authority shall take accounts of all circumstances of importance in an individual case, including those favourable to the participants.

(3) The authority shall not refuse to accept statements or applications falling within its sphere of competence on the ground that it considers the statement or application inadmissible or unjustified.

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3 Loosely translated because the same system does not apply in England, and there is no equivalent of *beeidigter Übersetzter*.

25. Advice and information. – The authority shall cause statements or applications to be made or corrected when it is clear that these have only been omitted or are erroneous due to lack of knowledge. It shall, where necessary, give information regarding the rights and duties devolving upon the participant in the administrative proceedings.

26. Evidence. – (1) The authority shall utilise such evidence as after due consideration it deems necessary in order to ascertain the facts of the case. In particular it may:

1. Gather information of all kinds,
2. Hear the evidence of participants, witnesses and experts or gather written statements from participants, experts and witnesses,
3. Obtain documents and deeds,
4. Visit and inspect the locality involved.

(2) The participants shall assist in ascertaining the facts of the case. In particular they shall state such facts and evidence as are known to them. A more extensive duty to assist in ascertaining the facts, and in particular the duty to appear personally or make a statement, shall exist only where the law specifically requires this.

(3) A duty shall exist for witnesses or experts to make a statement or furnish opinions, when the law specifically requires this. When the authority has called upon witnesses and experts, they shall be remunerated upon application in accordance with the appropriate provisions of the law governing the remuneration of witnesses and experts.

27. Affirmation in place of oath. – (1) In ascertaining the facts of a case, the authority may require and accept an affirmation in place of oath[4] only when the acceptance of such an affirmation concerning the matter involved and in the proceedings concerned is provided for by law or regulation, and the authority has been legally declared competent. An affirmation in place of oath shall only be required where other means of

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4 Witnesses in civil proceedings do not now give their evidence on oath as a rule, but make instead a solemn affirmation.

establishing the truth are not available, have been without result or require disproportionate expense. An affirmation in place of oath may not be required of persons who are unfit to take an oath under section 393 of the Code of Civil Procedure.

(2) If an affirmation in place of oath is recorded in writing by an authority, the only persons authorised to make such a recording shall be the head of the authority, his general deputy and members of the civil service qualified for judicial office or who fulfil the requirements of section 110, first sentence of the German law on the judiciary. Other members of the civil service may be authorised in writing to act generally in this capacity or for individual cases, by the head of the authority or his general deputy.

(3) The affirmation shall consist of the affirming person's confirming the correctness of his statement on the matter concerned and declaring "I affirm in place of an oath that to the best of my knowledge I have told the pure truth and have concealed nothing". Authorised representatives and advisers may take part in the recording of an affirmation in place of oath.

(4) Before an affirmation in place of oath is accepted, the person affirming shall be informed of the meaning of such an affirmation and the legal consequences under criminal law of making an incorrect or incomplete statement. The fact that this has been done must be included in the written record.

(5) The written record shall in addition contain the names of those present and the place and date of the record. The written record shall be read to the person making the affirmation for his approval or upon request for him to look through. The fact that this has been done should be noted and signed by the person affirming. The written record shall then be signed by the person receiving the affirmation in place of oath and by the person actually making the written record.

28. Hearing of participants. – (1) Before an administrative act affecting the rights of a participant may be executed, the latter must be given the opportunity of commenting on the facts relevant to the decision.

(2) This hearing may be omitted when not required by the circumstances of an individual case and in particular when:

1. An immediate decision appears necessary because of the risk involved in delay or in the public interest,
2. The hearing would jeopardise the observance of a period vital to the decision,
3. It is intended not to diverge, to his disadvantage, from the actual statements made by a participant in an application or statement,
4. The authority wishes to issue a general order or similar administrative act in considerable numbers or administrative acts using automatic equipment,
5. Measures of enforcement are to be taken.

(3) A hearing shall not be granted when this is grossly against the public interest.

29. Inspection of documents by participants. – (1) The authority shall allow participants to inspect the documents connected with the proceedings where knowledge of their contents is necessary in order to enforce or defend their legal interests. Until administrative proceedings have been concluded, the foregoing sentence shall not apply to draft decisions and work directly connected with their preparation. Where participants are represented as provided under sections 17 and 18, only the representatives shall be entitled to inspect documents.

(2) The authority shall not be obliged to allow documents to be inspected where this would impair the authority's regular fulfilment of its tasks, knowledge of the contents of the documents would be to the disadvantage of the country as a whole or of one of the Länder or where proceedings have to be kept secret under a law or by their very nature, i.e., in the rightful interests of participants or of third parties.

(3) Inspection of documents is carried out in the offices of the authority keeping the records. In individual cases, documents may also be inspected at the offices of another authority or of the diplomatic or con-

sular representatives of the Federal Republic of Germany abroad. The authority keeping the recods may make further exceptions.

30. Secrecy. – Participants shall be entitled to require that their secrets, especially those relating to their private lives and business, shall not be revealed by the authority without permission.

Division 2: Periods of grace, dates, restoration

31. Periods and dates. – (1) The calculation of periods and the setting of dates shall be subject to the provisions of sections 187 to 193 of the Civil Code as appropriate, except where otherwise provided by paragraphs 2 to 5.

(2) A period set by an authority shall begin with the day after the day on which the period is made known, except where the person concerned is informed otherwise.

(3) If the end of a period falls on a Sunday, or on a public holiday or a Saturday, the period shall end with the end of the following working day. This shall not apply when the person concerned has been informed that the period shall end on a certain day and has been referred to this provision.

(4) If an authority has to fulfil a task only for a certain period, this period shall end at the end of the last day thereof, even where this is a Sunday, a public holiday or a Saturday.

(5) A date fixed by an authority shall be observed even when it falls on a Sunday, a public holiday or a Saturday.

(6) When a period is fixed in terms of hours, Sundays, public holidays and Saturdays shall be included.

(7) Periods fixed by an authority may be extended. Where such periods have already expired, they may be extended retrospectively, particularly when it would be unreasonable to allow the legal consequences of the expiry of the period to take their course. The authority may combine the extension of the period with an additional proviso under section 36.

32. Restoration of the *status quo ante*. – (1) Where a person has for no fault of his own been prevented from observing a legal period, he shall, upon request, be granted a restoration of the *status quo ante*. The fault of a representative shall be deemed to be that of the person he represents.

(2) Such an application must be made within two weeks of the removal of the obstacle. The facts justifying the application must be substantiated when the application is made or during the proceedings connected with the application. The action which the person has failed to carry out must be effected within the application period. If this is done, restoration of the *status quo ante* may be granted even without application.

(3) After a lapse of one year from the end of the period which was not observed, no application may be made for the restoration of the *status quo ante* and the action not carried out cannot be made good, except where it was impossible for this to be done within the period of a year for reasons of *force majeure*.

(4) The application for restoration of the *status quo ante* shall be decided upon by the authority which has to decide on the matter of the action not carried out.

(5) Restoration of the *status quo ante* shall not be permitted when this is excluded by legal provision.

Division 3: Official Certification

33. Certification of copies, photocopies, duplicated copies and negatives. – (1) Every authority shall be competent to certify as true copies of documents it has itself issued. In addition, authorities empowered by statutory instrument of the Federal German Government under section 1, paragraph 1, No. 1 and the authorities empowered under the law of the Länder may certify copies as true where the original document was issued by an authority or the copy is required for submission to an authority, except where the law provides that the issuing of certified copies of documents from official records and archives is the exclusive province

of other authorities; the statutory instrument does not require approval of the Bundesrat.

(2) Copies may not be certified as true when circumstances justify the assumption that the original contents of the documents, the copy of which is to be certified, have been changed, and particularly when the document concerned contains gaps, deletions, insertions, amendments, illegible words, figures or signs, traces of erasure of words, figures and signs or where the continuity of a document composed of several sheets has been interrupted.

(3) A copy is certified as true by means of a certification note placed below the copy. This note must contain:

1. An exact description of the document, a copy of which is being certified,
2. A statement that the certified copy is identical with the original document submitted,
3. A statement to the effect that the certified copy is only issued for submission to the authority specified, when the original document was not issued by an authority,
4. The place and date of certification, the signature of the official responsible for certification and the official stamp.

(4) Paragraphs 1 to 3 shall apply *mutatis mutandis* to the certification of:

1. Photocopies and similar technically duplicated documents,
2. Negatives photographically prepared from documents kept by an authority.

Duplicated documents and negatives shall, when certified, be equal to certified photocopies.

34. Certification of signatures. – (1) The authorities empowered by statutory instrument by the German Federal Government under section 1, paragraph 1, No. 1 and the authorities empowered under the law of the Länder may certify signatures as true when the signed document is

required for submission to an authority or other official body to which the signed document must be submitted by law. This shall not apply to:

1. Signatures without accompanying text,
2. Signatures which require public certification under section 129 of the Civil Code.

(2) A signature may only be certified when it has been made or acknowledged in the presence of the certifying official.

(3) The certification note shall be placed immediately adjacent to the signature to be certified and must contain:

1. A statement that the signature is genuine,
2. An exact identification of the person whose signature is certified, as also a statement as to whether the official responsible for certification made sure of the identity of the person and whether the signature was made or acknowledged in his presence,
3. A statement that the certification is only for submission to the authority or other body mentioned,
4. The place and date of certification, the signature of the official responsible for certification and the official stamp.

(4) Paragraphs 1 to 3 apply *mutatis mutandis* to the certification of the marks of those that are illiterate.

(5) Statutory provisions under paragraphs 1 and 4 do not require the approval of the Bundesrat.

PART III: ADMINISTRATIVE ACT

Division 1: Realisation of an Administrative Act

35. Concept of administrative act. – An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and which is in-

tended to have a direct, external legal effect. A general order shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large.

36. Additional stipulations to an administrative act. – (1) An administrative act which a person is entitled to claim may only be accompanied by an additional stipulation when this is permitted by law or when it is designed to ensure that the legal requirements for the administrative act are fulfilled.

(2) Notwithstanding the provisions of paragraph 1, an administrative act may after due consideration be issued with:

1. A stipulation to the effect that a privilege or burden shall begin or end on a certain date or shall last for a certain period,
2. A stipulation to the effect that the commencement or ending of a privilege or burden shall depend upon a future occurrence which is uncertain (condition),
3. A reservation as regards annulment,

or be combined[5] with

4. A stipulation under which the beneficiary is required to perform, suffer or cease a certain action (imposition),
5. A reservation to the effect that an imposition may subsequently be introduced, amended or added to.

(3) An additional stipulation may not counteract the purpose of the administrative act.

37. Definiteness and form of an administrative act. – (1) An administrative act must be sufficiently definite in content.

(2) An administrative act may be issued in written, verbal or other form. A verbal administrative act must be confirmed in writing when

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5 The distinction here is between a stipulation (1, 2 and 3) which is additional to the administrative act, and may bew attacked separately, and a stipulation (4 and 5) which is part of the administrative act, and may not.

there is justified interest that this should be done and the person affected requests this immediately.

(3) A written administrative act must reveal the issuing authority and bear the signature or name of the head of the authority, his representative or person appointed by him.

(4) In the case of a written administrative act issued by means of automatic equipment, the signature and name required in paragraph 3 above may be omitted. Keys may be used to indicate content where the person for whom the administrative act is intended or who is affected thereby is able to see its contents clearly from the explanations given.

38. Assurance. – (1) The agreement by a competent authority to issue a certain administrative act at a later date or not to do so (assurance) must be in writing to be valid. If before the administrative act in respect of which such assurance was given, participants have to be heard or the collaboration of another authority or of a committee is required by law, the assurance may only be given after the participants have been heard or after collaboration with the said other authority or the committee.

(2) Notwithstanding the provisions of paragraph 1, first sentence, section 44 shall apply as appropriate to the invalidity of the assurance, section 45, paragraph 1, Nos. 3 to 5 and paragraph 2 to the remedying of deficiencies in the hearing of participants and the collaboration of other authorities or committees, section 48 to withdrawal and, notwithstanding paragraph 3, section 49 to annulment.

(3) In the event of the basic facts or legal situation of the case changing after an assurance has been given to such an extent that, had the authority known of the subsequent change it would not have given the assurance or could not have done so for legal reasons, the authority is no longer bound by its assurance.

39. Grounds for an administrative act. – (1) An administrative act which is given or confirmed in writing must be accompanied by a written statement of grounds. This statement of grounds must contain the chief material and legal grounds which have caused the authority to take its decision. The grounds given in connection with discretionary decisions

should also contain the point of view which led the authority to exercise its powers of discretion.

(2) No statement of grounds is required:

1. When the authority is granting an application or is acting subsequent to a statement and the administrative act does not infringe upon the rights of another,
2. When the person for whom the administrative act is intended or who is affected thereby is already acquainted with the opinion of the authority as to the material and legal positions and able to grasp it without written argumentation,
3. When the authority issues identical administrative acts in considerable numbers or with the help of automatic equipment and individual cases do not merit a statement of grounds,
4. When this derives from legal provision,
5. When a general order is publicly promulgated.

40. Discretion. – where an authority is empowered to act at its discretion, it shall do so in line with the purpose of such empowerment and shall respect the legal limits to such discretionary powers.

41. Notification of an administrative act. – (1) An administrative act shall be made known to the person for whom it is intended or who is affected thereby. Where an authorised representative is appointed, the notification may be made known to him.

(2) An administrative act in writing which is sent by post in connection with this law shall be deemed to have been notified on the third day after posting, except where it is not received or is received at a later date; in the case of doubt the authority must prove receipt of the administrative act and the time of receipt.

(3) An administrative act may be publicly promulgated when this is permitted by law. A general order may also be publicly promulgated when notification of those concerned is impracticable.

(4) The public promulgation of an administrative act in writing shall be effected by making known the operative part in the manner normal in

the district. The notification shall state where the administrative act and its statement of grounds may be inspected. The administrative act shall be deemed to have been promulgated two weeks after the date of notification by means normal in the district. A general order may fix a different day for this purpose but in no case may this be earlier than the day following notification.

(5) Provisions governing the promulgation of an administrative act by service shall remain unaffected.

42. Obvious errors in an administrative act. – The authority may at any time correct orthographical and arithmetical errors and similar obvious errors in an administrative act. When the person concerned is justifiably interested, he must be contacted. The authority shall be entitled to request presentation of the document for correction.

Division 2: Existence of an administrative act

43. Validity of an administrative act. – (1) An administrative act shall become effective *vis-à-vis* the person for whom it is intended or who is affected thereby at the moment he is notified thereof. The administrative act shall apply in accordance with its tenor as notified.

(2) An administrative act shall remain effective for as long as it is not withdrawn, annulled, otherwise cancelled or expires for reasons of time or for any other reason.

(3) An administrative act that is invalid shall be ineffective.

44. Invalidity of an administrative act. – (1) An administrative act shall be invalid where it is very gravely erroneous and this is obvious when all relevant circumstances are duly considered.

(2) Regardless of the conditions laid down in paragraph 1 an administrative act shall be invalid if:

1. It is issued in written form but fails to show the issuing authority,
2. It can by law be issued only by means of the delivery of a document, and this method is not followed,

3. It has been issued by an authority acting beyond its powers as defined in section 3, paragraph 1, No. 1, and without further authorisation,
4. It cannot be implemented by anyone for material reasons,
5. It requires an action in contravention of the law incurring a sanction in the form of a fine or imprisonment,
6. If offends against morality.

(3) An administrative act shall not be invalid merely because:

1. Provisions regarding local competence have not been observed, except where a case covered by paragraph 2 No. 3 occurs,
2. A person excluded under section 20, paragraph 1, first sentence, Nos. 2 to 6 is involved,
3. A committee required by law to play a part in the issuing of the administrative act did not take or was not qualified to take the necessary decision;
4. The collaboration of another authority required by law did not take place.

(4) If the invalidity only applies to part of the administrative act it shall be entirely invalid when the invalid portion is so substantial that the authority could not have issued the administrative act without the invalid portion.

(5) The authority may ascertain invalidity at any time *ex officio*; it must be ascertained upon application when the person making such application has a justified interest in so doing.

45. Making good defects in procedure or form. – (1) An infringement of the regulations governing procedure or form which do not render the administrative act invalid under section 44 shall be ignored when:

1. The application necessary for the issuing of the administrative act is subsequently made,
2. The necessary statement of grounds is subsequently provided,
3. The necessary hearing of a participant is subsequently held,

4. The decision of a committee whose collaboration is required in the issuing of the administrative act is subsequently taken,
5. The mecessary collaboration of another authority is subsequently obtained.

(2) Actions referred to in paragraph 1, Nos. 2 to 5 may be made good only up to the time of conclusion of preliminary proceedings or, where such preliminary proceedings do not take place, by the time a plea is entered with the administrative court.

(3) Where an administrative act lacks the necessary statement of grounds or has been issued without the necessary hearing of a participant beforehand, so that the administrative act could not have been contested in good time, failure to observe the period for legal remedy shall be regarded as unintentional. The event resulting in restoration of the *status quo ante* under section 32, paragraph 2 shall be deemed to occur when the omission of procedural action is made good.

46. Consequences of defects in procedure and form. – Application for annulment of an administrative act which is not invalid under section 44 cannot be made solely on the ground that it came into being through the infringement of regulations governing procedure, form or local competence, where no other decision could have been made in the matter.

47. Converting a defective administrative act. – (1) A defective administrative act may be converted into a different administrative act when it would have the same aim, when it could legally have been issued by the issuing authority using the procedures and forms in fact adopted, and when the requirements for its issue have been fulfilled.

(2) Paragraph 1 shall not apply when the different administrative act would contradict the clearly recognisable intention of the issuing authority or when its legal consequences would have been less favourable for the person affected than those of the defective act. Converting is not permissible when the withdrawal of the administrative act would probably not be allowable.

(3) A decision dictated by a legal requirement cannot be converted into a discretionary decision.

(4) Section 28 shall apply *mutatis mutandis.*

48. Withdrawal of an administrative act contrary to law. – (1) An administrative act contrary to law may, even after it has become nonappealable, be withdrawn in whole or part either retrospectively or with effect for the future. An administrative act which gives rise to a right or an advantage relevant in legal proceedings or confirms such a right or advantage (beneficial administrative act) may only be withdrawn subject to the restrictions of paragraphs 2 to 4.

(2) An administrative act contrary to law which provides for a once-for-all or continuing payment of money or the making of a divisible material contribution,[6] or which is a precondition for these, may not be withdrawn so far as the beneficiary has relied upon the continued existence of the administrative act and his reliance is, having regard to the public interest in a withdrawal, deserving of protection. Reliance is in general deserving of protection when the beneficiary has utilised the contributions made or has made financial arrangements which he can no longer cancel or can cancel only by suffering a disadvantage which cannot reasonably be asked of him. The beneficiary cannot claim reliance when:

1. He obtained the administrative act by false pretences, threat or bribery,
2. He obtained the administrative act by giving information which was substantially incorrect or incomplete,
3. He was aware of the illegality of the administrative act or was unaware thereof due to gross negligence.

In the cases provided for in No. 3, the administrative act is in general withdrawn with retrospective effect. Where the administrative act is withdrawn, any payments or contributions made must be returned, the amount of such refund being governed by the provisions of the Civil Code concerning the payment of unjustified enrichment. The person liable to return the enrichment cannot claim that the enrichment no longer exists because of the fulfilment of the conditions laid down in No. 3

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6 E.g. a quantity of articles in bulk.

above where he was aware of circumstances, or unaware of them due to gross negligence, which made the administrative act illegal. The payment to be made shall be fixed by the authority at the time it withdraws the administrative act.

(3) If an administrative act contrary to law, not covered by paragraph 2, is withdrawn, the authority shall upon application make good the disadvantage to the person affected deriving from his reliance on the existence of the act to the extent that his reliance merits protection having regard to the public interest. Paragraph 2, third sentence shall apply. However, the disadvantage in financial terms may not exceed the amount of the interest which the person affected had in the continuance of the administrative act. The financial disadvantage to be made good shall be determined by the authority. A claim may only be made within a year, which period shall commence as soon as the authority has informed the person affected thereof.

(4) If the authority learns of facts which justify the withdrawal of an administrative act contrary to law, the withdrawal may only be made within one year from the date of gaining such knowledge. This shall not apply in the case of paragraph 2, third sentence, No. 1.

(5) The decision concerning withdrawal shall be taken, once the administrative act has become non-appealable, by the authority competent under section 3. This shall also apply when the administrative act to be withdrawn has been issued by another authority.

(6) Disputes concerning payments to be made under paragraph 2 and the financial disadvantage to be made good under paragraph 3 may be determined in the administrative courts where there is no question of compensation on the ground of action comparable to expropiation (*enteignungsgleichen Eingriffs*).[7]

49. Annulment of a legal administrative act. – (1) A legal non-beneficial administrative act may, even after it has become non-appealable, be annulled in whole or in part with effect for the future, except when an

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7 This is because the ordinary courts try actions against the authorites for compensation.

administrative act of like content would have to be issued or when annulment is not allowable for other reasons.

(2) A legal, beneficial administrative act may, even when it has become non-appealable, be annulled in whole or part with effect for the future only when:

1. The annulment is permitted by law or the right of annulment is reserved in the administrative act itself,
2. The administrative act is combined with an imposition which the beneficiary has not complied with at all or not within the period set,
3. The authority would be entitled, as a result of a subsequent change in circumstances, not to issue the administrative act and if failure to annul it would jeopardise the public interest,
4. The authority would be entitled, on the ground of a change in the law, not to issue the administrative act in so far as the beneficiary has not availed himself of the benefit or has not received any contributions on the grounds of the administrative act and when failure to annul would be contrary to the public interest, or
5. In order to prevent or eliminate serious harm to the common good.

Section 48 shall apply *mutatis mutandis.*

(3) the annulled administrative act shall become null and void with the coming into force of the annulment, except where the authority fixes a later date.

(4) Once the administrative act has become non-appealable, decisions as to annulment shall be taken by the authority competent under paragraph 3. This shall also apply when the administrative act to be annulled has been issued by another authority.

(5) In the event of a beneficial administrative act being annulled in cases covered by paragraph 2, Nos. 3 to 5, the authority shall upon application make good the disadvantage to the person affected deriving from his reliance on the continued existence of the act, to the extent that his

reliance merits protection. Section 48, paragraph 3, sentences 3 to 5 shall apply as appropriate. Disputes concerning indemnification shall be settled by the ordinary courts.

50. Withdrawal and annulment in proceedings for a legal remedy. – Section 48, paragraph 1, second sentence, paragraphs 2 to 4 and paragraph 6 and section 49, paragraphs 2, 3 and 5 shall not apply when a beneficial administrative act which has been contested by a third party is annulled during preliminary procedure or during proceedings before the administrative court and the annulment operates in favour of the third party.

51. Resumption of proceedings. – (1) The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when:

1. The material or legal situation basic to the administrative act is subsequently changed to favour the person affected,
2. New evidence is produced which would have meant a more favourable decision for the person affected,
3. There are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure.

(2) An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by legal redress.

(3) The application must be made within three months, this period to begin with the day on which the person affected learnt of the grounds for resumption of proceedings.

(4) The decision regarding the application shall be made by the authority competent under section 3; this shall also apply when the administrative act it is desired to annul or amend was issued by another authority.

(5) The provisions of section 48, paragraph 1, first sentence and of section 49, paragraph 1 shall remain unaffected.

52. Return of documents and other materials. – When an administrative act has been annulled or withdrawn and appeal is no longer pos-

sible, or it is ineffective or no longer effective for other reasons, the authority may require such documents or materials as have been distributed as a result of the administrative act and which serve to prove the rights deriving from the administrative act or its exercise, to be returned. The holder and, where the latter is not the owner, the owner also of these documents or materials are obliged to hand them over. However, the holder or owner may require that the documents or materials be handed back to him once the authority has marked them as invalid. This shall not apply to materials for which such a marking is impossible or cannot be made with the necessary degree of visibility or permanence.

Division 3: Legal effects of the administrative act on limitation

53. Interruption of limitation period by administrative act.

(1) An administrative act which is issued in order to enforce the claim of a legal entity under public law interrupts the limitation period in respect of the claim. This interruption shall continue until the administrative act has become non-appealable or the administrative proceedings which led to its being issued have been otherwise settled. Sections 212 and 217 of the Civil Code shall be applied as appropriate.

(2) If an administrative act has become non-appealable within the meaning of paragraph 1, section 218 of the Civil Code shall be applied as appropriate.

PART IV: AGREEMENT UNDER PUBLIC LAW

54. Admissibility of an agreement under public law. – A legal relationship under public law may be constituted, amended or annulled by agreement (agreement under public law), in so far as this is not contrary to legal provision. In particular, the authority may, instead of issuing an administrative act, conclude an agreement under public law with the person to whom it would otherwise direct the administrative act.

55. Composition agreement. – An agreement under public law within the meaning of section 54, second sentence, under which an uncertainty existing even after the reasonable consideration of the facts of the case or the legal situation is eliminated by mutual yielding (composition), may be concluded if the authority at its discretion considers the conclusion of such a composition agreement advisable in order to eliminate the uncertainty.

56. Exchange agreement. – (1) An agreement under public law within the meaning of section 54, second sentence, under which the party to the agreement binds himself to give the authority a counter-consideration, may be concluded when the counter-consideration is agreed in the contract as being for a certain purpose and serves the authority in the fulfilment of its public tasks. The counter-consideration must be in proportion to the overall circumstances and be materially connected with the contractual performance of the authority.

(2) Where a claim to the performance of the authority exists, the only counter-consideration which may be agreed is one which might be the subject of an additional proviso under section 36 were an administrative act to be issued.

57. Written form. – An agreement under public law must be in written form except where another form is prescribed by law.

58. Agreement of third parties and authorities. – (1) An agreement under public law which infringes upon the rights of a third party shall become valid only when the third party gives his agreement in writing.

(2) If instead of an administrative act, the issuing of which by law requires the acceptance, agreement or approval of another authority, an agreement is concluded, the latter shall not become valid until the other authority has collaborated in the form prescribed.

59. Invalidity of an agreement under public law. – (1) An agreement under public law shall be invalid when its invalidity derives from the appropriate application of provisions of the Civil Code.

(2) An agreement within the meaning of section 54, second sentence shall also be invalid when:

1. An administrative act with similar content would be invalid,
2. An administrative act with similar content would be illegal not merely for a deficiency in procedure or form under section 46, and this fact was known to the parties,
3. The conditions for conclusion of a composition agreement were not fulfilled and an administrative act with similar content would be illegal not merely for a deficiency in procedure or form under section 46,
4. The authority requires a counter-consideration which is unacceptable under section 56.

(3) If only a part of the agreement is affected by the invalidity, it shall be invalid in its entirety, unless it can be assumed that it would also have been concluded without the part that is invalid.

60. Adaption and termination in special cases. – (1) If the circumstances which determined the content of the agreement have altered since the agreement was concluded so substantially that one party to the agreement cannot reasonably be expected to adhere to the original provisions of the agreement, this party may require that the content of the agreement be adapted to the changed conditions or, where such adaptation is impossible or not reasonably to be expected of the other party, may terminate the agreement. The authority may also terminate the agreement in order to avoid or eliminate grave harm to the common good.

(2) Termination must be in written form, except where the law prescribes another form. Reasons for termination must be stated.

61. Submission to immediate execution. – (1) Any party to an agreement may submit to immediate execution deriving from an agreement under public law within the meaning of section 54, second sentence. The authority must in this case be represented by the head of the authority, his general deputy or a member of the civil service qualified for judicial office or fulfilling the requirements of section 110, first sen-

tence of the German law on the judiciary. Submission to immediate execution shall only be valid when approved by the supervisory authority for the authority which is party to the agreement competent in such matters. The approval shall not be required when submission is by or to a supreme authority of central or local government.

(2) The Federal law on the enforcement of administrative orders shall apply *mutatis mutandis* to agreements under public law within the meaning or paragraph 1, first sentence when the party entering upon the agreement is an authority within the meaning of section 1, paragraph 1, No. 1. If an individual or body corporate under private law or an association not having legal capacity effects execution for a monetary claim section 170, paragraphs 1 to 3 of the Code governing Administrative Courts shall apply *mutatis mutandis*. If execution is designed to obtain performance, suffering or non-performance of an action against an authority within the meaning of section 1, paragraph 1, No. 1, section 172 of the Code governing Administrative Courts shall again apply as appropriate.

62. Supplementary application of provisions. – In so far as sections 54 to 61 do not provide otherwise, the remaining provisions of this law shall apply. The provisions of the Civil Code shall also additionally apply as appropriate.

PART V: SPECIAL TYPES OF PROCEDURE

Division 1: Formal administrative procedure

63. Application of provisions concerning formal administrative procedure. – (1) Formal administrative procedure under this Law takes place when required by law.

(2) Formal administrative procedure is governed by sections 64 to 71 and, unless they provide otherwise, the other provisions of this Law.

(3) Notification under section 17, paragraph 2, second sentence and the requirement under section 17, paragraph 4, second sentence shall be

publicly announced in formal administrative proceedings. Public notification shall be effected when the notification or the requirement is published by the authority in its official bulletin and also in local daily newspapers which circulate widely in the district in which the decision may be expected to have its effects.

64. Form of applications. – If formal administrative procedure requires an application, this shall be made in writing or be recorded in writing by the authorities.

65. Collaboration of witnesses and experts. – (1) In formal administrative proceedings witnesses are obliged to give evidence and experts to provide opinions. The provisions of the Code of Civil Procedure regarding the obligation to give evidence as a witness or to furnish an opinion as an expert, the rejection of experts and the hearing of statements by members of the civil service as witnesses or experts shall apply *mutatis mutandis.*

(2) In the event of witnesses or experts refusing to give evidence or furnish an opinion in the absence of any of the grounds referred to in sections 376, 383 to 385 and 408 of the Code of Civil Procedure, the authority can ask the administrative court competent in the area in which the witness or expert has his domicile or normal residence to interrogate him. If the domicile or normal residence of the witness or expert is not at a place where there is an administrative court or specially constituted chamber, the competent municipal court may be requested to make the interrogation. In making its request the authority must state the subject of the interrogation and the names and addresses of those concerned. The court shall inform those concerned of the dates on which evidence will be taken.

(3) In the event of the authority's considering it advisable for statements to be made under oath in view of the importance of the evidence of a witness or of the opinion of an expert, or in order to ensure that the truth is told, it may request the court competent under paragraph 2 to administer the oath.

(4) The court shall decide as to the legality of a refusal to give evidence or an opinion or to take the oath.

(5) An application under paragraph 2 or 3 to the court may be made only by the head of an authority, his general deputy or a member of the civil service qualified for judicial office or fulfilling the conditions of section 110, 1st sentence of the German law on judicial matters.

66. Obligation to hear participants. – (1) In formal administrative proceedings those involved (the participants) shall be afforded the opportunity of making a statement before a decision is taken.

(2) Participants shall be afforded an opportunity of attending hearings of witnesses and experts and inspecting the locality concerned and of asking pertinent questions. They shall be furnished with a copy of any written opinion.

67. Necessity for an oral hearing. – (1) The authority shall decide after an oral hearing to which the participants shall be invited in writing on due notice. The invitations should point out that if a participant fails to appear, the discussions can proceed and decisions be taken in his absence. If more than 300 people have to be invited, this may be done by public announcement. Public announcement shall be effected by publishing the date of the hearing at least two weeks beforehand in the official bulletin of the authority, as also in the local daily newspapers with wide circulation in the district in which the decision may be expected to have its effect, reference being accordingly made to the second sentence. The period referred to in the fourth sentence shall be calculated from the date of publication in the official bulletin.

(2) The authority may reach a decision without an oral hearing when:

1. An application is fully complied with by agreement between all concerned,
2. No party has within the period set for this purpose entered opposition to the intended measure,
3. The authority has informed the participants that it intends to reach a decision without an oral hearing and no participant opposes this within the period set for this purpose,
4. All participants have agreed to waive the hearing,

5. An immediate decision is necessary because of the risk involved in delay.

(3) The authority shall pursue proceedings so as to ensure that if possible the matter can be settled in one hearing.

68. Conduct of oral hearing. – (1) The oral hearing shall not be public. It may be attended by representatives of the supervisory authority and by persons working with the authority for training purposes. The person in charge of the hearing may admit other people if no participant objects.

(2) The person in charge of the hearing shall discuss the matter with the parties concerned. He shall endeavour to clarify applications which are unclear, to see that relevant applications are made, inadequate statements supplemented and that all explanations necessary to ascertain the facts of the case are given.

(3) The person in charge of the hearing shall be responsible for good order. He may have persons who do not observe his orders removed. The hearing may be continued without such persons.

(4) A written record shall be made of the oral hearing and must contain the following information:

1. Place and date of hearing,
2. The names of the person in charge of the hearing, and of the participants, witnesses and experts appearing,
3. The subject of the inquiry and the applications made,
4. The chief content of statements by witnesses and experts,
5. The result of a visit to the location concerned.

The written record shall be signed by the person in charge of the hearing and, where the services of such a person are used, by the person keeping the written record. Inclusion in a document attached in the form of an appendix and designated as such shall be equivalent to inclusion in a written record of the hearing. The record of the hearing shall make reference to the appendix.

69. Decision. – (1) The authority shall take its decision having considered the overall result of proceedings.

(2) Administrative acts which conclude the formal proceedings must be in written form, must contain a statement of grounds and be sent to the participants. In cases referred to in section 39, paragraph 2, Nos. 1 and 3, no statement of grounds is required. Where more than 300 notifications have to be sent, this may be done instead by public announcement. Public announcement shall be effected by publishing the operative part of the decision in the official bulletin of the authority, as also in the local daily newspapers with wide circulation in the district in which the decision may be expected to have its effect. The administrative act shall be deemed to have been delivered two weeks from the day of publication in the official bulletin, which fact shall be included in the announcement. After public announcement has been made and until the period for appeal has expired, the administrative act may be requested in writing by the participants, which fact shall also be included in the announcement.

(3) If formal proceedings are concluded in another manner, those concerned shall be informed. If more than 300 notifications have to be sent, this may be done instead by public announcement; paragraph 2, third sentence shall apply *mutatis mutandis*.

70. Contesting the decision. – No examination in preliminary proceedings is required before an appeal is entered before the administrative court against an administrative act issued in formal administrative proceedings.

71. Special provisions governing formal proceedings before committees. – (1) If the formal administrative procedure takes place before a committee (section 88), each member shall be entitled to put relevant questions. If a question is objected to by a participant, the committee shall decide as to its admissibility.

(2) Only committee members who have attended the oral hearing may be present during discussions and voting. Other persons who may attend are those employed for training purposes by the authority forming the committee, on condition that the chairman permits them to attend. The results of the voting must be recorded.

(3) Each participant shall be entitled to reject one member of the committee who may not take part in the administrative proceedings (section 20) or who may be biased (section 21). A rejection made before the oral hearing must be explained in writing or recorded. The explanation shall not be acceptable when the participant has attended the oral hearing without making known his reasons for rejection. Decisions as to rejection shall be governed by section 20, paragraph 4, second to fourth sentences.

Division 2: Planning proceedings

72. Application of provisions governing planning proceedings. – (1) Where the law requires proceedings to ascertain plans, these shall be governed by sections 73 and 78 and, unless these provide otherwise, by the remaining provisions of this Law. Section 51 shall not apply and section 29 shall apply with the condition that files shall, at the due discretion of the authority, be open to inspection.

(2) Notification under section 17, paragraph 2, second sentence and the requirement under section 17, paragraph 4, second sentence shall be publicly announced in planning proceedings. Public notification shall be effected by the authority publishing the notification or the requirement in its official bulletin and also in local daily newspapers which circulate widely in the district in which the project may be expected to have its effect.

73. Hearing. – (1) The person responsible for the project shall submit the plan to the hearing authorities to enable the hearing to be held. The plan shall comprise the drawings and explanations which make clear the project, the reasons behind it and the land and plantations affected.

(2) The hearing authorities shall gather the opinions of the authorities whose sphere of competence is affected by the project.

(3) The plan shall, at the instigation of the hearing authority, be open to inspection for a month in those communities in which the project may be expected to have its effect. This procedure may be omitted where

those affected are known and are afforded the opportunity of examining the plan during a reasonable period.

(4) Any person whose interests are affected by the project may, up to two weeks after expiry of the period during which the plan is open to inspection, enter opposition to the plan in writing or in a manner to be recorded with the hearing authority or the commune. In the case referred to in paragraph 3, second sentence, the period for objection shall be determined by the hearing authority.

(5) The communes in which the plan is to be made public shall announce the fact in the usual manner in the area at least a week beforehand. The announcement shall state:

1. Where and for what period the plan is open to inspection,
2. That any objections must be made known to the authorites mentioned in the announcement within the period set for that purpose,
3. That in the event of a participant failing to attend the meeting fixed, discussions can proceed without him and later objections may be disregarded in discussions and decisions,
4. That:
   (a) those persons wishing to enter opposition may be informed of the dates of meetings for discussions by public announcement,
   (b) the notifications of decisions as to objections may be replaced by public announcement,

   if more than 300 notifications have to be made.

Persons affected who are not locally resident but whose identity and residence are known or can be discovered within a reasonable period shall at the instigation of the hearing authority be informed of the publishing of the plan, attention being drawn to sentence 2.

(6) Upon expirty of the period set for objections, the hearing authority shall discuss those objections made to the plan in good time and the opinions of the authorities with regard to the plan with the person responsible for the project, the authorities, the persons affected and those

who have raised the objections. The hearing authority may also discuss objections which have been made too late. The date of the meeting for discussion must be announced at least a week beforehand in the manner usual in the district. The authorities, the person responsible for the project and those who have raised objections shall be informed of the period set for objections. If apart from notifications to authorities and the person responsible for the project more than 300 notifications are required, this may be done instead by public announcement. Public announcement shall be effected, notwithstanding sentence 2, by publishing the date of the meeting for discussion in the official journal of the hearing authority, as also in local daily newspapers with wide circulation in the district in which the project may be expected to have its effect. The period referred to in the second sentence shall be calculated from the date of publication in the official bulletin. Otherwise, the discussion shall be governed by the provisions concerning the oral hearing in formal administrative proceedings (section 67, paragraph 1, third sentence. paragraph 2, Nos. 1 and 4 and paragraph 3, and section 68) as appropriate.

(7) Notwithstanding the provisions of paragraph 6, sentences 2 to 5, the date of the meeting for discussion may already be fixed in the announcement under paragraph 5, second sentence.

(8) If a plan already opened for inspection is to be altered and if this means that the sphere of competence of an authority of the interests of third parties are affected for the first time or more greatly than hitherto, they shall be informed of the changes and given the opportunity to raise objections or state their points of view within a period of two weeks. If the change affects the territory of another commune, the altered plan shall be oppened to inspection in that commune; paragraphs 3 to 6 shall apply as appropriate.

(9) The hearing authority shall issue a statement concerning the result of the hearing and shall send this together with the plan, the opinions of the authorities and those objections which have not been dealt with, to the planning authority, if possible within a month of the conclusion of the discussion.

74. Planning decision. – (1) The planning authority shall approve the plan (planning decision). The provisions concerning the decision and the contesting thereof in formal administrative proceedings (sections 69 and 70) shall apply.

(2) The planning decision shall contain the decision of the planning authority concerning the objections on which no agreement was reached during discussions before the hearing authority. It shall impose upon the person responsible for the project provisos concerning the establishment and maintenance of plants necessary for the general good or to avoid detrimental effects on the rights of others. Where such provisos or plant are impracticable or irreconcilable with the project, the person affected may claim reasonable monetary compensation.

(3) Where a final decision still cannot be made, this shall be stated in the planning decision; the person responsible for the project shall at the same time be required to submit in good time any documents still missing or required by the planning authority.

(4) The planning decision shall be sent to the person responsible for the project, those people known to be affected and those people whose objections have been dealt with. A copy of the decision together with a legal ruling and a copy of the plan as approved shall be open for inspection in the communes concerned for two weeks, the place and time of such opening for inspection being made known in the manner customary in the district. With the end of the period of inspection, the decision shall be deemed to have been sent to the other parties affected, which fact shall be made known in the announcement.

(5) If apart from the person responsible for the project more than 300 notifications have to be made under paragraph 4, this may be done instead by public announcement. Public announcement shall be effected by publishing the operative portion of the decision of the planning authority, the legal instruction and a reference to the fact that the plan is open to public inspection under paragraph 4, second sentence, in the official bulletin of the competent authority, as also in the local daily newspapers with wide circulation in the district in which the project may be expected to have its effect. Attention must be drawn to any requirements

imposed. At the end of the period of public exhibition, copies of the decision are deemed to have been delivered to those affected by it and to those who have raised objections; attention must be drawn to this in the public announcement. Between the time of the public announcement and the expiry of the period during which appeals may be made, those affected by the decision and those who have raised objections may make written requests for copies of the decision; attention must likewise be drawn to this in the public announcements.

75. Legal effects of the planning decision. – (1) The planning decision has the effect of establishing the admissibility of the project, including the necessary measures subsequently to be taken in connection with other arrangements, having regard to all public interests affected thereby. No other administrative decisions, particularly public law approvals, grants, permissions, authorisations, agreements or planning approvals are required. The planning decision legally regulates all relationships under public law between the person responsible for the project and those affected thereby.

(2) Once the planning decision has become non-appealable, there is no possibility of claims being made to discard the project, to remove or alter plant or the cease using it. In the event of unforeseeable effects of the project or of plant built in accordance with the approved plan on the rights of another becoming clear only after the plan has become non-appealable, the person affected may require that provision be made or plant constructed and maintained to exclude the detrimental effects. Such measures shall be imposed on the person responsible for the project by a decision of the planning authority. If such provision or the construction of such plant is impracticable or irreconcilable with the project, a claim may be made for reasonable monetary indemnification. If precautions or plant within the meaning of sentence 2 become necessary, because of changes which occur on a neighbouring piece of land after the planning approval procedure has been concluded, the costs arising shall be borne by the owners of the adjacent land, unless such changes are the result of natural occurrences or *force majeure*; sentence 4 shall not apply.

(3) Applications seeking to enforce claims for the construction of plant or for reasonable compensation in accordance with paragraph 2, second and fourth sentences shall be made to the planning authority in writing. These shall only be acceptable if made within three years of the date on which the person affected became aware of the detrimental effects of the project in accordance with the non-appealable plan or of the plant. They may not be made once thirty years have passed from the creation of the situation shown in the plan.

(4) If work is not commenced on the project within five years of the plan's becoming non-appealable, it shall become invalid.

76. Changes in the plan before the project is finished. – (1) If before the project is finished it is desired to alter the plan, a new approval procedure shall be required.

(2) In the case of changes in the plan of negligible importance, the planning authorities may waive the need for new proceedings when the interests of others are not affected or when those affected have agreed to the change.

(3) If in the cases referred to in paragraph 2 or in other cases of a change being made to a plan that is of negligible importance, the planning authority carries out approval procedure, no hearing and no public notification of the planning decision is required.

77. Annulment of planning approval decision. – If a project on which work has commenced is finally abandoned, the planning authority shall annul the approval decision. The annulment decision shall impose upon the person responsible for the project the restoration of the *status quo ante* or other suitable measures where these are necessary for the common good or in order to avoid the rights of others being detrimentally affected. If such measures are required because changes occur on an adjacent piece of land after the planning approval procedure has been completed, the person responsible for the project may, by a decision of the planning authority, be obliged to take suitable measures. However, the cost thereof shall be borne by the owner of the adjacent piece of land except where such changes are the result of natural occurrences or *force majeure*.

78. Coincidence of several projects. – (1) In the event of a number of independent plans, the execution of which requires planning approval procedure, coinciding in such a manner that only a uniform decision is possible for these projects or parts thereof, and if at least one of the planning approval procedures is regulated by Federal German law, these projects shall be the subject of only a single planning approval procedure.

(2) Competence and procedures shall be governed by the regulations relating to planning approval proceedings prescribed for plant which affects a large number of relationships under public law. In the event of uncertainty as to which legal provision applies, and where according to the various relevant provisions a number of Federal authorities are competent in the spheres of competence of a number of supreme Federal authorities, the decision shall fall to the Federal German Government, *viz.* to the highest competent Federal authority. Where there is uncertainty as to which legal provision applies and if according to the various relevant provisions, a Federal authority and a Land authority are competent, and the highest Federal and Land authorities are unable to reach an agreement, the Federal and Land governments shall agree as to which legal provision shall apply.

PART VI: APPEAL PROCEDURES

79. Appeals against administrative acts. – Formal appeals against administrative acts shall be governed by the Code governing Administrative Courts and its implementing legislation, except where the law otherwise determines; otherwise the provisions of this Law shall apply.

80. Refund of costs in preliminary proceedings. – (1) Where an appeal is successful, the legal entity whose authority issued the disputed administrative act shall refund to the person appealing the costs involved in the legal prosecution or defence proceedings. This shall also apply where the appeal is unsuccessful only because the infringement of a prescription as to form or procedure is to be ignored under section 45.

Where the appeal is unsuccessful, the person entering the appeal shall refund to the authority issuing the disputed administrative act the costs involved in the necessary legal prosecution or defence proceedings. This shall not apply when an appeal is entered against an administrative act which was issued:

1. In the context of an existing or previously existing employment or official service relationship under public law, or
2. In the context of an existing or previously existing official duty or an activity which may be performed instead of the legally required official duty.

Costs arising due to the fault of a person entitled to a refund shall be borne by him; the fault of a representative shall be regarded as that of the person represented.

(2) The fees and expenses of a lawyer or other authorised representative in preliminary proceedings are refundable when the use of a lawyer's services was necessary.

(3) The authority making the decision as to costs shall upon application fix the amount of the costs to be refunded. If a committee or consultative body (section 73, paragraph 2 of the Code governing Administrative Courts) has made a decision as to costs, the fixing of costs shall be the responsibility of the authority forming the committee or consultative body. The decision as to costs shall also determine whether the services of a lawyer or other authorised representative were necessary.

(4) Paragraphs 1 to 3 shall apply also to preliminary proceedings connected with measures relating to the legal status of the judiciary.

PART VII: HONORARY POSITIONS, COMMITTEE PROCEDURE

Division 1: Honorary Positions

81. Application of the provisions covering honorary positions. – Sections 82 to 87 govern participation in an administrative procedure in an honorary capacity as far as legal provisions do not provide for exceptions.

82. Duty of honorary participation. – A duty to assume an honorary position shall exist only when the duty is provided for by legislation.

83. Performance of an honorary function. – (1) A person who assumes an honorary position shall perform the function in a conscientious and impartial manner.

(2) Upon assuming the position, he shall be especially obliged to carry out the tasks in a conscientious and impartial manner and to observe secrecy. A written record of the conferring of this obligation shall be made.

84. Duty to observe secrecy. – (1) A person who assumes an honorary position shall have the duty to observe secrecy concerning the official business revealed to him, even after the honorary participation has come to an end. This obligation shall not apply to official communications or facts which are common knowledge or whose significance require no obligation of secrecy.

(2) A person who assumes an honorary position may not testify in court, make statements outside of court or declarations concerning the official business he is obliged to keep secret without permission.

(3) The permission to testify as a witness may be refused only if the testimony is detrimental to the welfare of the Federation or a Land, or the execution of public duties is seriously jeopardized or substantially obstructed.

(4) If the person who holds an honorary position is party to a lawsuit, or if his arguments serve to protect legitimate personal interests, permis-

sion to testify may be refused, even if the conditions in paragraph 3 are fulfilled, only if compelling public interests necessitate refusal.

(5) Permission granted in cases covered in paragraphs 2 to 4 shall be granted by the specially competent supervisory authority which appointed the person to the honorary position.

85. Compensation. – A person who performs an honorary function shall have a right to compensation for necessary expenses and for loss of earnings.

86. Dismissal. – Persons who have been called upon to perform an honorary function can be dismissed for good cause by the authority which appointed them. Good cause is especially shown if the person who holds an honorary position

1. violates his duty in a grevious manner or proves to be unworthy
2. is no longer capable of performing the duties in an orderly manner.

87. Administrative offences. – (1) An administrative offence shall be deemed to be committed by any person who

1. does not assume an honorary position although he is obliged to do so;
2. lays down an honorary position which he is obliged to assume without a reason worthy of recognition.

(2) The administrative offence can be punished by a fine.

Division 2: Committees

88. Application of the provisions concerning committee procedure. – Sections 89 to 93 shall govern committees, advisory councils and other collegial bodies (committees) when they participate in an administrative procedure, unless legislation provides for exceptions.

89. Order in the meetings. – The chairperson shall open, preside over and close the meeting; he shall be responsible for order.

90. Quorum. – (1) Committees shall constitute a quorum when all the members have been duly summoned and at least three members who are eligible to vote are present. Resolutions can also be passed in a written procedure if no committee member objects.

(2) If a matter of official business has been deferred due to lack of quorum and the committee is again summoned to take action on the same subject, the committee shall constitute a quorum regardless of the number of committee members present as long as this provision has been indicated in the summons.

91. Adoption of a resolution. – Resolutions shall be adopted by a majority of votes. By a parity of votes, the vote of the chairperson is decisive as long as he is eligible to vote; otherwise a parity of votes shall be deemed to be a rejection of the resolution.

92. Elections by the committee. – (1) Unless a member of a committee objects, voting shall be carried out by acclamation or signal, or else by ballot. A secret ballot shall be used if a committee member so requests.

(2) The candidate who receives the greatest number of ballots cast shall be elected. In the case of a parity of votes, the official in charge of the election shall decide the election by drawing a lot.

(3) Unless otherwise resolved by manimous vote, the election procedure to be used when a number of similar elective positions are to be filled shall be the d'Hondt highest number procedure. In the event of the same highest number, the official in charge of the election shall determine the allocation of the last elective position by drawing a lot.

93. Minutes. – Minutes of the meeting shall be kept. The minutes must contain information about the

1. time and place of the meeting,
2. name of the chairperson and of the committee members present,
3. subject dealt with and the motions presented,
4. resolutions passed,
5. election results.

The minutes shall be signed by the chairperson and by a secretary if a secretary has been called in to keep the minutes.

PART VIII: CONCLUDING PROVISIONS

94. Delegation of municipal duties. – By legal ordinance, the state (Land) governments shall be able to transfer duties which are incumbent on the municipalities under sections 73 and 74 of this Law to other local authorities, or to an administrative community.[8] The legal provisions of those states (Länder) which already contain the appropriate regulations shall not be affected.

95. Special arrangements for defence matters. – (1) With regard to defence matters, after a declaration of a state of defence or a state of tension, the following cases can be dispensed with: hearing of participants (section 28, paragraph 1); confirmation in writing of an administrative act (section 37, paragraph 2, sentence 2); written statement of grounds for an administrative act (section 39, paragraph 1). In derogation of section 41, paragraph 4, sentence 3, an administrative act shall be deemed to have been promulgated in these cases on the day following the date of notification. The same shall be valid for the other applicable regulations pursuant to Article 80 a of the Basic Law.

(2) Paragraph 1 shall not be applicable in Berlin.

96. Transitional Proceedings. – (1) Proceedings which have already begun shall be concluded according to the provisions of this Law.

(2) The admissibility of an appeal against decisions which have been issued before this Law came into force shall be governed by the provisions formerly in effect.

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8 An administrative community is an administrative body made up of several municipalities.

(3) Limitation periods which have begun before this Law has come into force shall be computed according to the provisions formerly in effect.

(4) The provisions of this Law shall be valid for the refund of costs in preliminary proceedings if the preliminary proceedings have not been concluded before this Law enters into force.

97. Amendment of the Code governing Administrative Courts (*Verwaltungsgerichtsordnung*)[9]

98. Amendment of the Law Concerning Federal Long-Distance Highways (*Bundesfernstraßengesetz*)[10]

99. Amendment of the Law Concerning the Protection against Harmful Effects on the Environment through Air Pollution, Noise, Vibration, and Similar Factors (*Bundes-Immissionsschutzgesetz*)[11]

100. Regulations under state law. – The states (Länder) shall be able to make laws which

1. provide for a regulation pursuant to section 16;
2. stipulate that the legal effects of section 75, paragraph 1, sentence 1 are also valid for official approval of plans executed on the basis of provisions under state law, as well as vis-à-vis the necessary decisions under Federal Law.

101. City-state clause. – The Senate of the states (Länder) Berlin, Bremen and Hamburg are empowered to regulate local competence in derogation of section 3 according to the particular administrative structure of their respective states. In these states, approval according to section 61, paragraph 1, sentence 3 is not required.

102. Berlin clause. (no longer relevant)

103. Entry into force. – (1) This law shall enter into force on 1 January 1977 unless otherwise specified in paragraph 2.

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9 A reprinting of the Law here is omitted.

10 A reprinting of the Law here is omitted.

11 A reprinting of the Law here is omitted.

(2) The authorizations contained in section 33, paragraph 1, sentence 2, and in paragraph 4, section 34, paragraph 5, and in section 34, paragraph 1, section 1, as well as sections 100 and 101 shall enter into force on the day after promulgation.[12]

12 The Law was promulgated on 29 May 1976.

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