

**FORSCHUNGSINSTITUT  
FÜR ÖFFENTLICHE VERWALTUNG**  
BEI DER HOCHSCHULE  
FÜR VERWALTUNGSWISSENSCHAFTEN SPEYER

**Siedentopf / Hauschild / Sommermann**

**LAW REFORM AND LAW DRAFTING**

**2. Auflage**

---

**SPEYERER 129  
FORSCHUNGSBERICHTE**

ISSN 0179-2326

**Heinrich Siedentopf/Christoph Hauschild/Karl-Peter Sommermann**

**Law Reform and Law Drafting**

**Speyerer Forschungsberichte 129**

**Heinrich Siedentopf/  
Christoph Hauschild / Karl-Peter Sommermann**

**LAW REFORM AND  
LAW DRAFTING**

**2., unveränderte Auflage**

**FORSCHUNGSINSTITUT FÜR ÖFFENTLICHE VERWALTUNG  
BEI DER HOCHSCHULE FÜR VERWALTUNGSWISSENSCHAFTEN SPEYER**

**1994**

1. Aufl. Dezember 1993  
2., unveränderte Aufl. September 1994

Druck und Verlag:  
**FORSCHUNGSINSTITUT FÜR ÖFFENTLICHE VERWALTUNG**  
bei der Hochschule für Verwaltungswissenschaften Speyer

Alle Rechte vorbehalten

## PREFACE

This volume documents the papers of the German experts given on the occasion of the Second Dialogue Seminar with the Juridical Council of Thailand which took place from August 5-8 1993 in Rayong, Thailand.

The seminar was devoted to the subject of "Law Reform and Law Drafting" and continued the project which began in 1992 to advise the Juridical Council of Thailand on the preparation of an administrative procedure law for Thailand. The project was sponsored by the Konrad Adenauer Foundation in cooperation with the Speyer Post-Graduate School of Administrative Sciences under the scientific management of Prof. Dr. Dr. h.c. *Heinrich Siedentopf*.

The Thai delegation attributes decisive importance to improving the legislative procedure. Up to now the preparation of laws, legal ordinances and administrative regulations in Thailand has largely been viewed as an internal matter for government and its administration. Those parties affected by the law, interest groups or external experts are usually not involved in the process. For this reason great interest was shown by the Thai delegation in the procedure of notification specified in the Common Ministerial Rules of Procedure. The German delegation placed particular emphasis on the Check List and questions concerning draft legislation as an important instrument of improving the quality and efficiency of legal regulations.

The appendix includes the so-called Blue Checklist of the Federal Government as well as an excerpt of the regulations pertinent to the legislative procedure which are contained in the Common Ministerial Rules of Procedure. We should like to thank Ms. *Susan Jacob* for the translation of these Rules of Procedure, and for the revision of the English used in these papers. We should also like to thank the Research Institute of Public Administration at the Post-Graduate School of Administrative Sciences for its technical support.



## CONTENTS

### PART I

#### Law Reform and Deregulation Policies in Germany

##### Law Reform and Deregulation

Univ.-Prof. Dr. Dr. h.c. *Heinrich Siedentopf* ..... 3

##### Regulation and Deregulation in Social and Economic Matters

Dr. *Christoph Hauschild* ..... 19

### PART II

#### Legislative Process and Principles of Codification

##### Legislative Process and Rationality

Dr. *Karl-Peter Sommermann* ..... 35

##### Codification: Examples and Limits

Dr. *Karl-Peter Sommermann* ..... 47

### PART III

#### Improving the Quality of Legislation by Testing Draft Laws and Training

##### Testing Draft Laws and Implementation Studies

Univ.-Prof. Dr. Dr. h.c. *Heinrich Siedentopf* ..... 61

##### Training in Techniques of Legislation

Dr. *Christoph Hauschild* ..... 71

## VIII

### APPENDIX

Excerpt of the Basic Law for the Federal Republic of Germany of 23 May 1949, Art. 76-80 .....	81
Excerpt of the Common Ministerial Rules of Procedure, Special Part (GGOII) .....	85
Checklist to determine the necessity, effectiveness and comprehensibility of proposed federal legal measures .....	99
Bibliography (Publications in English) .....	105
The Authors .....	107



## **PART I**

# **LAW REFORM AND DEREGULATION POLICIES IN GERMANY**



## LAW REFORM AND DEREGULATION

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

### I. THE FLOOD OF LAWS

Excessive regulation is not a new problem. It was even a point of discussion in the first decades of our century, when authors like Carl Schmitt and Max Weber complained about the complexity of the legal system. We have since witnessed a continuous rise in the number of legal provisions. In 1963, 3,500 statutes and about 75,000 regulations were in existence in Germany at national level. By 1988, the number of statutes had risen to 5,000 and the number of regulations to 90,000. During its first four year legislative period – the period of reconstruction in the wake of World War II – the Federal Parliament produced 4,300 pages of legislation (printed in the Federal Law Gazette). By the seventh legislative period, however, this figure had risen to 12,800 pages. Innumerable regional and local regulations are also in force.

European Community Law also has to be considered. Germany is a member of the European Community (EC). According to Art. 189 of the EEC Treaty, the EC institutions have the power to enact laws that are binding on, and directly applicable to, all Member States as long as the EC has been conferred the appropriate powers in a given field in line with the Treaty of Rome upon which the EC was founded. According to Art. 189 of the EEC Treaty, the EC regulatory instruments include regulations, directives and general decisions. A regulation has general application, is binding in its entirety and is directly applicable to all Member States. In contrast, directives are binding upon each Member State in terms of the result to be achieved, i.e. they leave the choice of form and methods to the national authorities. General decisions have the same characteristics and effects as regulations, but they are binding only

upon the party concerned. The European Court of Justice has concluded from the treaties establishing the European Communities that Community law takes precedence over national law. This approach is necessary to ensure the necessary harmonisation of the laws of the Member States. These Community regulations are issued in great number and play an important role in the current German legal system.

It is quite easy to find reasons for the large number of rules in a complicated and complex economic and social system in Western Europe.

First of all, mention should be made of the transition from the bourgeois "Rechtsstaat" (state governed by the rule of law) to the modern "Sozialstaat" (social welfare state). All state activities in the social field have a legal basis. According to Art. 20 (3) of the Basic Law, the German Constitution: "Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice" and in particular by the basic rights stipulated in the first part of the Basic Law, which confers personal rights on the individual. The administration is subject to the rule of law. This applies not only to the classical responsibility to enforce the law, but also to its responsibility to ensure the subsistence of the population and to provide a wide range of services on a large scale through the state. The past 40 years after World War II can be characterized by an increase in state welfare activity, particularly the provision of social services by the state. The rules and regulations in the area of state welfare, however, are characterised by great volume, detail and complexity.

Secondly, according to the Basic Law and the Federal Constitutional Court, all important and controversial questions have to be decided by democratic legislation. In view of the abuse of law under National Socialism, the authors of the Constitution believed that a free exercise of administrative or judicial authority with no legal basis or legally defined limits would expose citizens to arbitrariness, i.e. to injustice.

What is more, federalism has a strong tradition in Germany. Federalism, the organization of the Federal Republic of Germany as a federation of 16 Member States (Länder), is a main element of the Basic Law.

Each Land has its own governmental and legislative powers and is not merely a province or administrative subdivision. Certain fields, such as the maintenance of law and order, police, education and cultural affairs are generally matters for each Land. Thus, legislative action takes place at three levels: the federal level, the Länder level and the local level.

Like all highly industrialised societies, Germany possesses a wide and varied range of public bodies to which are entrusted the administration and management of public affairs. All administrative action of these bodies is strictly bound by written law. The hierarchy of laws in Germany is as follows:

- The Basic Law (Grundgesetz)

The German Basic Law is the highest source of law. Pursuant to Art. 79(3) of the Basic Law, legislature is prohibited from amending the Basic Law in such a way as to change or abrogate the specific fundamental principles laid down in it, such as the binding nature of human rights for all three areas of State authority.

- Laws (Gesetze)

Secondly, there are the "Gesetze". In German law, a "Gesetz" is a legal provision made by a constitutional-law-giving body with due regard to the Constitution.

- Statutory ordinance (Rechtsverordnung)

According to Art. 80 of the Constitution, the Federal Government, a Federal Minister or the Land governments may be authorized by a law to issue ordinances. The content, purpose and scope of the authorization so conferred must be set forth in this law.

- Administrative regulation (Verwaltungsvorschrift)

An administrative regulation is a direction by an authority to the subordinate authorities. In most cases it is intended to guarantee the correct, appropriate and uniform performance of administrative activity.

As a result we are faced with an increasing amount of legislation for every walk of life. The flood of standards has led to additional administrative functions and responsibilities. The role of the administration tends to increase. At the same time, there is concern amongst the administration whose task is to apply these laws and the citizens who must observe them. Although, generally speaking, the personnel is well trained and competent, public administration has reached the limit of its ability to cope with the information flow. Administrative planning for the future cannot merely react to the fixed substance of a legal provision but must take into consideration a great many social, economic and political factors when making decisions. And it is precisely in this planning period that administrative decisions affect not only one single individual but many people with very varied consequences.

It became increasingly clear that legislative and administrative action cannot solve all economic and social problems. Financial crisis and economic policy also played their part in the move towards "less governmental interference". It was in the early 1980s that the new German government decided to stop the expansion of government activities and to fight for deregulation in order to improve the quality of governmental and administrative decision-making. On the 13 July 1983, the Federal Government declared that deregulation would become a focal political issue in the following years:

*"The effectiveness and credibility of governmental activity will grow if the state refrains from controlling too many spheres of life. In the past, the state has taken on an excessive number of functions. It is imperative to change this situation. We must succeed in simplifying the law and weeding out unnecessary regimentation."*

## **II. DEREGULATION**

Deregulation is a traditional strategy to counteract a glut of rules. Deregulation means the systematic streamlining, reduction and simplification of legal provisions. Over the years, as stated above, deregulation has become a priority field in the political work of the German Federal Government. There are several factors which may serve to reduce the flood of legislation. A reduction is necessary because

- a transparent regulatory system makes administrative action more visible and understandable to the public;
- it makes the administrative process easier;
- it leads to lower costs for the government and often also for the citizens;
- less time is required for dealing with administrative matters;
- room for individualised service is created.

Thus, a reduction of laws should improve administrative efficiency, speed up the administrative procedure and improve popular acceptance.

## **III. THE INDEPENDENT COMMISSION FOR THE SIMPLIFICATION OF LAW AND ADMINISTRATION OF THE FEDERAL GOVERNMENT**

1983 – 1987

Deregulation at federal government level means that the entire federal legislation must be reviewed in respect of the possibilities to streamline legal provisions. This mandate is given to all federal ministers. The Cabinet has explicitly made deregulation a compulsory task of every federal minister. The ministries must submit reports on achievements to date. They are requested to check which legal and administrative regula-

tions can be lifted and which can be simplified. The most urgent need for simplification is in the area of legislation concerning building, statistics, trade and industry.

A deregulation organization has been set up. Its coordinating body is in the Federal Ministry of the Interior and a contact point can be found in every ministry.

An independent Federal Commission for the simplification of law and administration has been appointed by the government to take action on its own initiative and support the ministries in their deregulative efforts. The Commission is chaired by the Parliamentary State Secretary of the Federal Ministry of the Interior. The Commission consists of state secretaries of the various regional ministries, university lecturers on public administration, a member of the Federal Court of Audit, members of business associations and of local and regional authority associations. The coordinating body in the Federal Ministry of the Interior at the same time serves as the secretariat of the Independent Commission. The Commission started work in November 1983. The public was asked to cooperate with the Commission. Within three years, more than 1500 proposals and suggestions put forward by citizens have been submitted to the Federal Commission. The ministries were requested to give their comments on every proposal, followed by a decision of the independent Commission. The implementation of the decisions adopted, however, is the responsibility of the ministries.

The Federal Commission invites the political representatives of the ministries and interest groups to take part in its meetings and to comment on the deregulation projects.

Draft laws and subordinate legislation must be scrutinized and tested with regards to their suitability of enforcement to a greater extent before becoming law. This can be achieved by making greater use of the specialized knowledge and experience of users both within and outside the administration at a federal and regional level. In suitable cases in which the implementation may be associated with substantial difficulties, in increased use of test and checking methods (planning game, practical test, etc.) should be made.



#### IV. THE CHECKLIST FOR PROPOSED LEGAL PROVISIONS AT FEDERAL LEVEL

The Commission checked all draft laws. Draft legislation was submitted to the secretariat of the Commission at an early stage. In respect of controlling the quality of new regulations, the Federal Minister of the Interior and the Federal Minister of Justice have drawn up *"the blue checklist to determine the necessity, effectiveness and comprehensibility of proposed federal legal measures"*. (Appendix 4) All the parties involved in the legislative process have been obliged to scrutinise new regulations in terms of their necessity, effectiveness and intelligibility by means of ten questions.

The following 10 questions have to be considered in the drafting process:

1. Is action at all necessary?

This question refers to the objective of legislative action. In particular, the law-makers are obliged to ask themselves what will happen if nothing is done. Is a law needed or will the problem solve itself within a certain period of time ?

2. What are the alternatives?

Are there alternatives to legislative action? What other instruments are available to achieve the objective? (e.g. measures to ensure the effective application of existing legal provisions).

3. Is action required at *national level*?

In many cases it is not necessary to solve a problem at national level but to leave it to the local or to the regional level.

4. Is a new *law* needed?

It is only needed when the matter is so significant that – according to the Rule of Law – it should be handled by parliament only.

5. Is *immediate* action required?

6. Does the scope of the provision need to be as wide as intended?

Sometimes it is recommendable to leave certain details to administrative regulations or ordinances and to avoid letting a law become too detailed and confusing.

7. Can the duration of force be limited?

There are examples of the so-called sunset legislation, especially for the new German Länder, and of time-limited, experimental provisions, for example in law education at the Universities ("Experimentierklausel").

8. Is the provision unbureaucratic and understandable?

Will the new provision be able to be understood and accepted by the average citizen?

9. Is the provision practicable?

Was the administrative level responsible for the implementation and application, for example the Association of local authorities, asked for advice and comments? This question refers to the execution of the provisions. Even at the preparatory stage it should be checked whether the chosen provision can be followed directly or whether it leaves the requisite discretionary scope.

10. Is there an acceptable cost-benefit ratio?

The budget law foresees cost-benefit studies for major public investments and projects.

This is one of the most important questions in view of the increasing financial problems even experienced by western states. How high are the costs likely to be for the state or for those for whom the provision is intended, or for persons or enterprises affected? In particular, can small and medium-size enterprises be reasonably expected to bear the additional costs?

This checklist thus serves to assess the impact of a new law in its preparatory stage.

One recent German example is the draft law concerning environmental protection. A new law is intended to emphasize the importance

of environmental protection and to increase its effectiveness and efficiency. The Federal Minister for the Protection of the Environment set up a commission in July 1992 to work on a new simplified environmental law. Using the German regulatory checklist the Commission reviews the draft law with a view to assessing its quality standard.

But Germany is not the only European country to use a regulatory checklist. Spain, the Netherlands and Sweden have also recently adopted regulatory principles for use by decision-makers. The Organization for Economic Cooperation and Development (OECD) analyzed the contents of 11 regulatory checklists from countries all over the world. Although it is difficult to draw a comparison between the various checklists in view of the differing legal and institutional frameworks, there is "common concern about the need for regulation and a questioning of its costs, effects and effectiveness" (OECD report on "the design and use of regulatory checklists in OECD Countries" 1992). Furthermore, if a checklist is to be used effectively there must be political commitment to the principles and criteria in the list and the establishment of a control and performance monitoring function within government. Consideration should also be given to the training of officials in the use of these checklists. Perhaps the most important point, however, is a change in the public sector's attitude towards regulation. In this context, checklists can help to approach problems from a new angle and to think differently about regulation.

## **V. REDUCING THE DENSITY OF REGULATIONS IN THE EUROPEAN COMMUNITY**

The Federal Government is also making efforts to reduce the excessive number of regulations within the EC. A committee of State Secretaries responsible for European Affairs started its work in 1984. The committee adopted Guidelines for the Simplification of Regulation for EC Projects. In addition, the independent Commission has talks on de-

regulation with members of the EC Commission and the European Court of Justice.

In 1991 the European Community decided to recognize subsidiarity as a constitutional principle of Community law by the Maastricht Agreements. Although there is no general agreement on the definition of subsidiarity, one can say that subsidiarity means that "a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level". From now on, the European Community should take action in a particular area only to the extent to which given objectives can be attained more effectively at the Community level than at the level of the individual Member State. The official recognition of subsidiarity in the Maastricht Treaty on European Union, which has entered into force in December 1993, expresses the hope for further decentralisation and deregulation at European level.

According to Art. 4 of the European Charter on Local-Self-Government, subsidiarity means that "public responsibilities shall generally be exercised in preference by those authorities which are closest to the public. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy." However clear the abstract concept of subsidiarity may sound, its practical application in specific instances involves several problems. It is doubtful whether political actors share the same definition of what subsidiarity is and what criteria should be applied to make it work. "But far from being a "one-best-way" golden rule, subsidiarity as a constitutional principle provides an appropriate context for decision-making and deregulation, emphasizing the general directions in which change should take place".

## VI. THE RESOLUTION OF THE FEDERAL GOVERNMENT OF 20.12.1989

Since 1983, the Federal Government has systematically pursued the objective of simplifying law. From 1984 to 1987, by the means of two acts and two ordinances, 42 acts and ordinances were repealed and more than 350 detailed provisions in another 73 acts and ordinances deleted or streamlined, and the Federal Ministers have started over 200 deregulation projects.

In a 1989 Resolution the Federal Government presented measures aimed at a better preparation of new legal provisions. The federal ministers were requested to take internal organizational measures to ensure that new legislation is scrutinized at the earliest possible point under various aspects, such as necessity and effectiveness. Special training in this area is to be given to the law-makers, that is to say to those who are involved in the ministries in the legislative process.

Furthermore, practical tests are conducted with a view to estimating the practicality and the real effects of provisions before they are enacted. If necessary, a provision is initially applied in a certain region only or is restricted to particular areas of activity. Furthermore, sunset legislation has become more and more important. This means that the duration of legal validity is limited from the outset. The effects of legal provisions are also analyzed. How many people will be affected? What impact will the new law have on industries or on small and medium-size firms? These questions have to be raised each time a new law is being prepared.

In view of the federal system in Germany it becomes clear that the Länder also play an important role in law-making in the Federal State. Being involved in the process of law-making, the Länder are also faced with the task of checking whether regulatory action is needed. At present, deregulation is practised at both federal and Länder level. Some Länder, like North-Rhein-Westphalia or Rhineland-Palatinate have already set up Commissions to simplify law and administration. Debu-

reaucratization also means that the Federal Government has to give the Länder more scope for autonomous, citizen-oriented regulations when implementing federal law. A first step was taken in leaving it to the Länder to decide which state authority is to have responsibility and is to be competent for the implementation of federal law.

But despite these special commissions and checklists for civil servants, it will take some time to bring about a real change in regulatory standards. The main reason is, as stated above, that the German administrative system is based on the rule of law, that is to say administrative action takes place only on a legal basis. The development started in the middle of the 19th century under the influence of liberalism and constitutionalism. The bourgeois state required that the branches of government be separated and that administration be carried out on the basis of laws. Another question is whether the demand for rules will decrease as a result of interest groups and the system of legal protection required by the Basic Law. Over the last decades, more and more people have been claiming the right to participate in administrative decision-making and the right to legal protection against decisions once they have been taken. Thus public participation sometimes leads to more complicated regulations and to time-consuming administrative procedures.

But the Commission's work goes on. According to the Progress Report of the Independent Commission for the Simplification of Law and Administration of the Federal Government 1983-1987, the Commission sees itself as the motor of law and administration simplification, which as a permanent political task, can only be achieved in many, often small steps, and requires constant encouragement and support.

## VII. PRIVATIZATION

Privatization means the transfer of activities under public control from the public to the private sector. Privatization is a strategy to reduce the responsibilities and costs of government. Where regulation is syn-

onymous with state intervention in the private sector, privatisation of public companies will, of course, have a deregulating effect. It is evident that the density of regulations can be reduced by removing particular activities from the public to the private sector. "(Privatization) *automatically reduces the size of government, state controls and the public budget. It relieves governments of detailed management and possible contentious subsidies. It enables the new owners to offer their goods at market rates, to streamline operations and to rid themselves of publicly protected feather-bedding*" (M. Derthick/P. J. Quirk, *The Politics of Deregulation*). Its aim is also to extend the freedom of action enjoyed by the individual and to reduce his dependence upon state services.

The transfer to the private sector will only be acceptable if a framework of regulation to protect the public interest is maintained.

The British Government in particular regards the liberalization of the economic sector as one of its major concerns and has in fact made substantial progress in this direction. In Germany, the transfer from the public to the private sector has also been discussed for several years now.

Two important public bodies, the Federal Postal Services and the Federal Railways, or at least certain important sectors of them, are subject of the current privatization debate. In 1987, the German Federal Government appointed a Commission for the removal of anti-market regulations. The restructuring of the German telecommunications market is based upon the Federal Government's "Concept for the restructuring of the telecommunications market", which was based on a report of this Commission. The report includes suggestions concerning the reorganization of telecommunications.

As a result of this study, three public enterprises were founded, but most telecommunication services have been opened to free competition. On 8 June 1989, the German Federal Parliament adopted the Act on the Restructuring of the Postal Services and Telecommunications. This Act provides the legal basis for restructuring and entered into force on 1 July 1989. The reform includes the reorganization of the German Federal Post Office as well as the establishment of a new regulatory framework for the provision of telecommunications networks, services and terminal

equipment. The Ministry of Post and Telecommunications is now empowered to grant to third parties the rights allocated to the Federal Government in the postal and telecommunications fields in accordance with the respective legal provisions and, where applicable, to issue licences. The other tasks in the postal and telecommunications sector will be performed by three public enterprises with regard to postal, banking and telecommunications services.

In the meantime, it is now possible for telephone users to buy telephones, once available only from the telephone company, in every department store. Telephone answering equipment, once a costly luxury confined to businesses, has become an accessory affordable by many homeowners. These changes have occurred because government laws and regulations, which formerly discouraged competition, now encourage it – and consumers are not the only ones to feel the effects. Thus, the European Community policy in this field aims at the removal of traditional exclusive rights of the telecommunications administrations. The removal of these rights, their replacement by (regulated) competition between telecommunications and private providers of telecommunications networks, services and equipment is one important approach to deregulation in Germany.

## **VIII. THE HARMONISATION OF LAWS IN THE EUROPEAN COMMUNITY**

The process of creating an internal market in Europe leads to a certain amount of deregulation. The initiative of establishing an internal market reinforces the European Community's commitment to a competitive economic setting in Europe. The integration process has already removed barriers for trade and other activities within the Community.

It is clear that there is a need for deregulation in every Member State. Deregulation is closely linked to the elimination of all obstacles between Member States. Not only Germany, but all Member States of



the European Community are subject to a proliferation of regulations. The number of laws in these countries has increased tenfold since the beginning of the century. The national regulations in different Member States are so varied that the creation of uniform rules is necessary in order to establish the Single European Market. One main instrument of harmonisation is Art. 100 of the EEC Treaty, which stipulates the harmonisation of laws which "directly affect the establishment or functioning of the common market". This is to be carried through by means of directives. A directive is an instrument addressed to Member States, i.e. it does not directly create new law in the Member States. A directive is binding upon each Member State to which it is addressed "as to the results to be achieved". The Community members are obliged to transpose a directive into their own laws within a prescribed period of time. Harmonisation of the national laws is the final goal. Harmonisation is aimed at reducing differences so as to make such laws approximate or equivalent. Until now, Art. 100 of the EEC Treaty served as a legal basis for the harmonisation of several hundred directives. But critics frequently state that there are far too many and far too detailed EC directives for the approximation of laws so that there is hardly any deregulating effect.

Regulation has increased substantially in many countries in recent decades. As the examples suggest, there are various reform strategies to stop or at least slow down the rapid regulatory expansion. Reform efforts are aimed at improving the ways that governments exercise power through regulatory action. They serve both democratic and economic purposes.



## **REGULATION AND DEREGULATION IN SOCIAL AND ECONOMIC MATTERS**

*Dr. Christoph Hauschild*

### **I. INTRODUCTION**

The public sector is responsible for the legal and administrative environment in which private business activity takes place. Without doubt there is a clear interdependence between economic and social advance and the "regulatory environment" which guides public administration decision-making. Regulation in social and economic matters is understood in a wide context. In addition to statutes and bills, government spending programmes and policy decisions all have regulative effects. There are also fiscal and statistical requirements to which private enterprises must comply.

Regulations and administrative orders affect production decisions and costs. They influence national economic efficiency, the rate of technological and organisational innovation and the direction and speed of structural adjustment. It is indisputable that some effects of government or administrative decision-making are unforeseen or even possibly undesired.

## II. ECONOMIC AND SOCIAL REGULATIONS IN THE CONTEXT OF ECONOMIC COMPETITIVENESS

In the context of the globalisation of markets and the increased mobility of capital, private enterprises compare the performance of the public sector in different countries ever more critically. Thus any national regulative activity of a public nature must also be judged in the light of the competitiveness of a national economy. Regulations in social and economic matters in particular can contribute to, or undermine, international competitiveness. One of the top priorities of regional economic integration is therefore to *harmonize social and economic regulations*.

Jacques Delors, the President of the Commission of the European Communities, estimates that 80 % of all social and economic regulations in the EC Member States will originate from community legislation by the end of this century. The fact that European legislation is increasingly setting the competitive standards for the private sectors within the Member States makes it necessary to develop a European perspective on this issue.

Public sector performance is looked upon in terms of competitiveness – particularly in this current period of economic difficulty and crisis. This is also true for the current German situation. Criticism put forward by private business representatives and economists concerns both the high density of regulations and current social reforms. A senior manager of IBM Germany gave the following example for the density of regulations. Enterprises are obliged to give information to, or must register at, at least 42 public authorities. He raises the question as to who in the public service is in a position to survey all the data and to draw from them the necessary information required to formulate policy options. It seems therefore evident that complicated laws will be directly reflected in a complicated public administration and that efficiency of public administration begins with legislation.

A member of a consultant firm formulates the same observation in a more general statement:

"In many cases the conditions for innovation could be improved without financial outlay. Particular reference is made in this context to the abundance of laws, regulations and administrative rules; whereas each of them might be well founded, viewed as an accumulated whole they have become increasingly impenetrable and, owing to a lack of coordination between the competent agencies, they have lead to increasingly longer procedures in obtaining official permits for innovative projects in the high-tech area, for example. Added to this is an inflationary expansion of judicial rights which lead to even longer court proceedings."

This analysis is shared by anybody who criticises bureaucratic procedures and reaches the conclusion that for an innovative enterprise the administrative risk (*Behördenrisiko*) is often higher than the market risk (*Marktrisiko*). In other words, administrative procedures pose a higher risk to a new product than the competition presented by the free market. The whole debate on regulative expansion is reduced to the simple economic question of market viability.

Now that the socialist system of planned economy has disintegrated and has made way for a market economy in Central and Eastern Europe, private enterprises are increasingly considering the option of locating new investment projects in these countries. The illustrative term of "delocalisation" is used in France to describe the fear of loosing private investors. It is interesting to note that "delocalisation" has a double meaning: the term was first used for the removal of government agencies from Paris to other regions in France and now also stands for the displacement of private business in the manner mentioned above.

## **1. The question of deregulation in the social sector**

A situation has now emerged in highly developed European countries in which social regulations are questioned in order to reduce expenditure both in the public and in the private sector. Many European social security systems are based on the principle that employers and employees alike share the financial burden. However, the extent and costs of the services provided have long since required public subsidy. New social

services of any kind are therefore hotly disputed. An illustrative example is that during the negotiations on the treaties for the creation of European Union, the British Government resisted a European Charter of Social Rights. The same issue caused a governmental crisis in Britain in the wake of the ratification of the Maastricht Treaties.

It is not the object of this report to discuss the wide field of social policies. However, it must be recognised that in social market systems social policies belong to the fundamental pillars of the economic system. The extent and detail of social regulations varies from country to country according to national traditions. In times of scarce public resources a reduction rather than a deregulation in social matters is to be observed. As a consequence, social services are continued, albeit to a reduced extent. A more recent tendency is the search for more efficiency and managerial competence in the social services. It is believed that there is quite a potential for cost reduction in the social services administrative sector.

## **2. The question of deregulation in the economic sector**

As far as the economic sector is concerned, a variety of issues have been discussed under the general heading of deregulation. There are two completely different directions.

- Firstly, deregulation in economic matters can be understood to mean that administrative simplifications are made in order to increase public sector performance and with this the competitiveness of the national economy.
- Secondly, deregulation is often connected with the idea of privatisation of public services or enterprises. Again, the term "privatisation" is used in many ways. At one end of the spectrum it may mean the total withdrawal of public authority from an activity, as is the case when a public enterprise is sold or transformed into a private company under state ownership. "Privatisation" may also be used to describe the use of private sector actors or techniques within a public sector framework.

Under consideration of the general topic of our dialogue seminar, I would like to focus on the first aspect, namely administrative simplification with regard to the economic sector. The prime aim of administrative simplification in the economic sector is to reduce those costs which are linked to legislative obligations. An example of this would be the observance of certain deadlines or the threat of administrative sanctions or penalties.

As pointed out before, regional economic integration is an important way of eliminating technical, physical and fiscal barriers in the transnational exchange of economic goods and services. The Single Market concept of the European Community replaces twelve different legislative systems by a single set of rules. Furthermore, it contributes significantly to deregulation by mutually recognising national rules.

At the European level, decisions destined to contribute to the completion of the Single Market have been taken in all domains of economic activity, such as technical harmonisation of products, liberalisation of capital, banking and insurance business, transport, company law and company taxation, intellectual and industrial property and many other items. These measures and the elimination of border controls, in particular the abolishment of the inspection of goods vehicles, have facilitated the internal exchange of goods and services. In view of the discussion on administrative simplification, the Council of the European Communities refrained from introducing the uniform administrative document which had been intended to regulate cross-Community trade.

One of the major objections to Community legislation is that it simply adds new rules and regulations to the existing national legislation. Instead of simplifying administrative procedures, Community law increases legislative complexity. One of the difficulties facing European legislation is the differing qualities of national administrations and the differing degrees of enforcement and control of legal rules and programmes. In the final part of my report I will present those proposals which seek to establish an institutional and legislative balance between the Community and the Member States.

### **3. Examples of deregulation in Germany**

On 24 June 1992, the Federal Government decided to abolish a number of regulations which were not in line with market-economy principles. This decision relates to the fields of insurance, transport, energy, technical inspection, legal advice and the labour market. The aforementioned cabinet decision is based on an expertise submitted by the Deregulation Committee in the spring of 1991. It reflects the Federal Government's endeavours to give the market and competition more scope in determining price and quality.

According to a recent report on Germany's deregulation policy, several measures have already been initiated. A good number of measures can be traced back to efforts of the European Community to introduce more competition throughout the Member States. Developments in the fields of insurance, transport and energy greatly depend on European legislation.

Of a number of measures which have already been initiated, some examples of German deregulation policy can be given.

- In respect of the laws pertaining to the profession of lawyer, the Federal Government intends to place cooperation between lawyers and members of other professions on a new basis. It is intended to create the possibility for lawyers to form partnerships with other professionals. It is also intended to allow lawyers to freely choose their place of residence and the location of their offices. The new regulations will abolish the localisation principle. The draft stipulates that a lawyer admitted to a county or district court may appear before any court in the federal territory. These are two measures among others aiming to deregulate the exercising of the lawyers' profession.
- In respect of the labour market, deregulation proposals deal with the system of collectively bargained agreements, working hours and labour leasing. All these measures are designed to make labour law more flexible.



- As far as the energy industry is concerned, the Federal Ministry of Economics commissioned a report on the possibility of applying the British system to restructure the electricity industry in Europe.

These are only a few examples of a long list of proposals and intended measures. They reflect the intention to create a more competitive environment in the liberal professions, labour markets and energy industry. These measures produce far-reaching effects. Owing to their controversial nature, it is not possible to predict whether they will actually be applied in the near future. However, the Federal Government seems to be determined to reduce regulations and business restrictions in various areas.

### **III. REGULATORY REFORMS**

The further question refers to the instruments available to improve the quality of regulative measures. As it is pointed out in the OECD paper on regulatory reform and management, regulations are nothing more and nothing less than decisions as to how state power shall be exercised. Thus, regulatory reforms might move in two, sometimes opposite, directions:

- Firstly, changing the process of regulatory decision-making to serve democratic values of accountability and transparency.
- Secondly, making the substantive outcome of regulation more efficient, effective and cost beneficial to the society at large.

I would like to give some examples of both directions in the following.

#### **1. Regulatory reforms to serve democratic values**

Regulatory reforms to serve democratic values should be understood in this context as measures which are intended to reinforce democratic

accountability of state action. A constituent element of a democratic state is that all organs with legislative powers must obey strict formal procedures in the enactment of laws or regulations.

a) *Primary or secondary legislation*

The first question to be raised in this context is the use of primary or secondary legislation. The first is an act of parliament and the second an act of the executive. The difference in source justifies the hierarchy of norms between these two legal acts. The distinction between primary and secondary legislation also reflects the separation of powers between parliament and the executive.

It is often proposed in debates on deregulation to increase the competence of the executive power in matters of legislation in order to avoid long parliamentary procedures. In countries other than Germany, in France for example, national parliaments are empowered by the constitution to delegate legislative competence to the government even in matters of primary legislation. By contrast, parliament in Germany does not have the right to delegate its competence to the government when an act of parliament is required by the constitution.

Alternatives to regulation through law are being sought in Germany. According to question 4 of the "Blue Checklist", it must be considered whether a new law is necessary, although the options open to law-makers are restricted. Question 4 also emphasises that due consideration must be given to the theory that basic judgements cannot be delegated by the legislature.

If there is a limit to the choice of available instruments under constitutional law, the question still might be asked as to whether the scope of the provision needs to be as wide as initially intended. As far as the details are concerned, the legislator is even required to make a choice between legislative instruments. According to question 6.3 of the Blue Checklist, the possibility of leaving the details to ordinances or incorporating them into administrative regulations must be examined.

*b) Transparency*

Another democratic value is the transparency of the legislative process. The public should be kept informed on legislative activities. The citizen has the right to understand the activities of the state. Laws are the prime instruments of governments in the implementation of their policies. However, it has become impossible, even for experts, to keep abreast of all legislative activities. During the eleventh legislative period of the German Federal Parliament from 1986 to 1990, a total of 595 draft bills were introduced into parliament – the majority by the Federal Government (321 = 54 %). Parliament finally passed 389 bills during this period. The large majority of these enacted laws were initiated by the Federal Government (74.5 %).

In addition to the government, the German Laender and the European Community also issue new regulations. A new approach towards greater transparency in the legislative process is sought at European Community level. The Commission publishes a legislative programme each year. The legislative programme is a planning tool designed to give an overview of the Communities' legislative business. It contains all legislative measures which the Commission intends to initiate during the coming year.

The programme seeks to attain two primary objectives. Firstly, it meets the need for transparency, that is to say, for clear, direct information on the basis and scheduling of Community legislative business that is pending or foreseeable in the medium term. The information it contains is intended for the Community institutions and for the Member States, the business world and the general public. From 1993, therefore, the programme is to be published in the Official Journal of the European Communities.

Secondly, the legislative programme seeks to boost the efficiency of the Community institutions by providing the necessary programming tool that can help rationally determine the specific objectives to be attained in legislative business during the respective period and direct the deployment of the appropriate resources.

*c) Participation*

Transparency is a necessary prerequisite of participation, which I want to mention as the last aspect in the context of regulatory reforms serving democratic values. In Germany, participation of experts and associations is foreseen in the Common Ministerial Rules of Procedure. A variety of different groups must be notified when preparing legislation. Attention is drawn in this context to the findings of a Community-wide research project on the application of Community law. One of the results to come of the empirical studies is that early participation facilitates later application of a Community law. The early involvement in the process of preparing and drafting Community legislation allows all interested parties to become familiar with the subject of the legislation and the possibilities for intervention, and this finally results in their loyalty to the substance of the particular Community law. The same holds true in a national context.

## **2. Regulatory reforms to make regulations more efficient**

As indicated above, another objective of regulatory reforms is to make the substantive outcome of a particular regulation more efficient, effective and cost beneficial. This objective is also included in the resolution of the Federal Government of 20 December 1989 on measures to improve legislation and administrative provisions.

The Federal Government resolution aims at a post-implementation evaluation of how well regulations have actually worked.

According to the OECD report, evaluations on the success and effect of enacted laws and ordinances are rare. Governments typically have little information on the effectiveness of laws. One of the major barriers to effective oversight of regulatory performance is the difficulty and high cost of evaluation.

The Federal Government requires the Federal Ministries to monitor laws and ordinances within their portfolio to a greater extent. The resolution states that the legislator has a legitimate interest in checking whether his legislative objectives have been achieved (after a sufficient

period of legislation), where problems of enforcement have arisen and whether further measures are required to attain the political objective. Empirical reports and investigations into legal facts are intended to provide parliament and the Federal Government with the requisite information.

An institutionalised form of post-implementation evaluation is the so-called sunset legislation. Sunset legislation aims at a stronger parliamentary control. In order to ensure regular evaluation, certain public programmes are limited to a maximum period of validity. They can only be continued if explicitly approved by parliament after an evaluation of the programme. Sunset legislation includes an exact time schedule for the expiry of a programme if parliament does not decide otherwise.

Practical experience with sunset legislation has been mainly gathered in the United States and here in particular at State level. It has been successfully applied in the field of governmental economic assistance granted to companies on a legal basis.

The term sunset legislation is not used in Germany. However, there are several examples of laws which have been enacted with a limited period of effectiveness. Examples are to be found in civil service legislation (part-time employment) or in respect of procedural regulations in the administrative court system. Question 7 of the Blue Checklist refers to the two possibilities of limiting the period of validity. The one possibility is that a certain provision is only required for a foreseeable period of time. The other is that provisions may be restricted to a time limit because they are of an "experimental" nature.

At all events, post-implementation evaluation requires great effort on the part of legislators and administrators. The practicality of such an approach must therefore be questioned. The objective and approach of making regulations more effective during the course of preparation and drafting would appear to be far more successful. The role of public administrators in the preparatory stage must be seen as decisive. How laws are written will greatly affect the ability of administrators to implement regulations. The involvement of public administrators in the wording of

new legislation is therefore crucial if the legislative intent is to be satisfied during implementation.

Regulatory checklists prove to be most valuable in the context of improving the quality of regulations. Contrary to post-implementation evaluation, regulative checklists apply to the drafting procedure. The orientation of checklists may differ from case to case: the purpose of the German "Blue Checklist" is general regulatory suitability, whereas the British checklist is very specifically orientated to appraising the likely costs to the economy business.

I would also like to mention another checklist which is used by the EC Commission to evaluate the impact of legislative proposals on enterprises in general and on small and medium-sized firms in particular. Its philosophy is to check the necessity and effects of Community action in the field of social and economic regulation. As mentioned before, the European Community is one of the major sources of legislation in social and economic matters. It is therefore one of the most important challenges to streamline Community legislation.

#### **IV. REGULATORY RELATIONS BETWEEN LEVELS OF GOVERNMENT**

The task of making regulations is more diversified today than ever before. National governments increasingly share regulatory decision-making and implementation with international or supranational levels of government. By conferring regulatory authority on international or supranational institutions other regulatory relationships are often established. As a result, regulatory systems are growing progressively more complex and multi-layered and surpass the traditional concept of state sovereignty.

There are several examples of regulatory diversification at the international level. In the field of economic cooperation an organisation such as GATT has produced over 100 treaty and side agreements. The Euro-

pean Community has achieved a very high degree of regulatory harmonization and economic and legal integration.

In the national context, federalism is an institutionalized form of a multi-layered regulatory system. Even in Germany the distribution of legislative competence between central and subcentral authorities is an issue of constant concern. The Federation and the Laender are the two levels with competence to issue laws. According to constitutional provisions, Federal Law takes precedence over Land Law (Art. 31 of the Constitution). However, the legislative powers of the Federation are limited. According to the German Constitution, the Laender have the right to legislate insofar as the constitution does not confer legislative powers on the Federation (Art. 70, Section (1) of the Basic Law). This is what is referred to as the principle of enumerated powers.

However, experience has shown that in multi-level governmental systems there seems to be an in-built tendency to move legislative powers to the higher level. The increase in legislative powers can be explained by the enlargement of legislative matters and constant changes and amendments to existing laws. At the same time, lower levels – in Germany the Laender – are faced with a decline in their ability to formulate and to realise their own policies through legislation.

European integration makes this question even more complicated. According to the European Community Treaty, European Community Law supersedes national legislation. There is a primacy of the Community legal order.

Once again, a shift of legislative powers is to be observed – in this case from the Member States to the European Community.

Such centralizing effects often infringe upon the constitutional status of the lower tiers of government. In order to counterbalance such effects, emphasis is placed on the so-called subsidiarity principle. A definition of the subsidiarity principle is to be found in the EC Bulletin No. 10 1992 pp. 116, which gives the view of the EC Commission. I would like to quote the general definition of the subsidiarity principle from this document:

**"This common-sense principle dictates that decisions should be taken at the level closest to the ordinary citizen and that action taken by the upper echelons of the body politic should be limited".**

In the exercise of legislative competence subsidiarity means that the higher level should do only what is best done at this level. The lesson to be learnt for the European integration process is to confine Community action to the essentials according to the motto, do less to achieve more. The onus is on the Community institutions to show that there is a need to legislate and take action at a Community level and at the intensity proposed.

There are still many open questions associated with the principle of subsidiarity and in particular as to how to make it practical in the further process of integration. The different actors involved in this process also develop different views on the interpretation of this principle. The Commission's point of view corresponds with its institutional interests of an agency at the central level. The Commission raises, for example, the question as to whether it might not be better to indicate the main areas reserved to the Member States rather than simply affirm that national powers are the rule.

Such an approach would, however, reverse the constitutional set-up which is characteristic of the distribution of legislative powers in federal systems. Federal systems are structured from the bottom upwards. In Germany the legislative powers of the Federation are not the rule, but have to be conferred on the federal authorities on a case-by-case basis.

It is not the purpose of my presentation to discuss in detail the very difficult question of distribution of powers in federal systems. I merely hope that you have now become more familiar with some recent tendencies, and the principle of subsidiarity is one issue discussed throughout all Member States of the European Community.



## **PART II**

### **LEGISLATIVE PROCESS AND PRINCIPLES OF CODIFICATION**



## LEGISLATIVE PROCESS AND RATIONALITY

*Dr. Karl-Peter Sommermann*

### I. TECHNICAL AND PROCEDURAL RATIONALITY OF LAW DRAFTING

In his work "The Spirit of Laws", *Montesquieu*, the most prominent founding father of modern Legistics, i.e. the art and science of writing "good" laws, gave the following advice (Book 29, Chapter 16): The style of the laws must be concise and simple and it is essential that their wording creates in all men the same ideas.

Today, nearly 250 years later, these criteria for rational law drafting have not lost anything of their topicality. However, it has become more and more difficult to implement them. The concept of a coherent natural law had already given way in the 19th century to legal positivism, which fostered a multiplication of laws in very different fields. What is more, the increasing social, cultural, economic and technical complexity of the late industrial societies, also characterized by pluralistic interests and values, does often not permit simple solutions. And this constraint is reflected in the structure and wording of many legal rules and codifications. Nevertheless, legislators must try to get as close as possible to the ideal formulated by *Montesquieu* if the laws are to remain intelligible and acceptable for the addressees, and if they are to be capable of implementation by those who have to administer them.

Rationality of laws or, more generally speaking, of written rules, not only refers to the style and wording in which they are drafted. It also includes criteria of structure and content and – what has become increasingly important and is related to the last mentioned criterion – the procedure in which a law is adopted. The procedural aspect is especially

linked to parliamentarism which emerged in step with liberalism and the constitutional state in Continental Europe. It was no longer the monarch who prescribed the law unilaterally, invoking principles of natural law if he felt the need to justify his commands. In most European countries, Parliament became the central instance for the creation of law and the law turned out to be a product of discussion, of "discourse", as modern communication theory puts it. In an ideal situation, the best arguments will determine the content of the law. Often, however, the final adoption by vote will be the result of a compromise which, by its very nature, entails certain inconsistencies or ambiguities. One may consider this disadvantage as the price to be paid when legitimacy of the laws is no longer sought in arbitrary natural law, but in the fact that the law results from a qualified discussion in which all relevant arguments have been considered and weighed against each other. The German sociologist *Niklas Luhmann* termed this new approach, which is also valid for the taking of decisions by administrative authorities, "legitimation by procedure" (see the title of his book, first published in 1969). In this sense, a high degree of legitimacy can only be reached if the procedure is shaped in a way that all relevant arguments in favour and against the intended regulation are heard, considered and weighed against each other before the final decision is taken. The legitimation thus derives from the observance of certain procedural rules.

Furthermore, legitimacy of a legislative act will also depend on the degree of consensus that is reached. Although theoretically, each valid law has the same authority, its legitimacy will be stronger if it is adopted not only by a simple majority but by a qualified majority, for instance. However, a consensus among the members of Parliament who belong to different political parties and generally represent different interest groups will often remain an ideal which is difficult to reach, even if, initially, all have agreed that the legal regulation of a certain problem is necessary. The dispute then will turn to the way in which the common goal is to be reached.

Considering the different types of written law, the criteria which the drafting or legislative procedure and the adoption have to satisfy cannot be the same for all. Regulations at constitutional level, i.e. at the highest

rank in the legislative hierarchy, demand a particularly careful elaboration because of their far-reaching normative scope and fundamental character. The rule that legislators should never act under the pressure of time is of special relevance here. Furthermore, the adoption by a simple majority does not seem to be sufficient to give these laws the adequate durability and legitimacy. Hence, in the case of constitutional law, particular efforts should be made to reach a consensus among the different parliamentary groups. The requirement of an adoption of constitutional amendments by a two-thirds majority, prescribed in Article 79 of the Basic Law of 1949 (the German Constitution), may guarantee this search for consensus. On the other hand, to demand a two-thirds majority for ordinary laws would be to paralyze daily parliamentary work and make a reaction on the part of the legislator to current problems that must be solved in a short time nearly impossible. Thus, the standards of the drafting and/or legislative procedure as well as the required majority have to be different according to the kind of laws that are to be enacted.

## II. THE LEGISLATIVE PROCESS IN GERMANY (FEDERAL LEVEL)

Nowadays, most of the democratic Constitutions provide for a multi-stage legislative process in order to guarantee that all relevant factors are taken into consideration. Drafting, examination and control by different bodies or organs fosters a greater rationality of the laws. The structure of the legislative process differs considerably between the countries as a result of historical and cultural particularities. In Germany, the federal structure is reflected in the federal organ "Bundesrat", which, in addition to the *Bundestag*, i.e. the federal Parliament, takes part in the legislative process, but does not constitute a typical second chamber as, for instance, the Senate in the United States. The *sui generis* character of the *Bundesrat* is already underlined by the fact that its

members are not deputies who are elected in the *Länder*, but are representatives of the Land governments.

The basic structure of the legislative process in Germany is laid down in Articles 76 to 78 and in Article 82 of the Basic Law. However, reading these articles does not convey a complete picture of the legislative process. In order to get to know the main phases of law drafting and deliberation, we must also take a look at the rules of procedure of the Ministries and of the *Bundestag*. According to the Basic Law, each of the constitutional organs has the power to adopt its own procedural rules.

## 1. The Constitutional Framework

If we first take a look at the relevant articles of the Basic Law, we are able to identify four constitutional organs which generally take part in the legislative procedure: The Federal Government, the *Bundestag* (the Federal Parliament), the *Bundesrat* (the Federal Council) and the Federal President. The central organs for the adoption of a bill are the *Bundestag* and the *Bundesrat*.

The right to introduce a bill in the *Bundestag* (Federal Parliament) is granted to the Federal Government, to the deputies of the *Bundestag* (according to the procedural rules of the latter: a parliamentary group<sup>1</sup> or at least five per cent of the members of the *Bundestag*, i.e. 33 members) and to the *Bundesrat*. In practice, most bills are submitted by the Government. This is not only due to the responsibility of the Government for the development of state policy, but also due to the fact that the Government, with its specialized Ministries, disposes of a large pool of experts who are needed if laws on a complex subject are to be drafted. Government bills go first to the *Bundesrat* which gives its opinion on the ministerial experts' draft. This opinion is not binding but very useful be-

---

1 A parliamentary group (*Fraktion*) is – according to para. 10 of the Rules of Procedure of the *Bundestag* – an association of at least 5 per cent of the members of the *Bundestag* who either belong to the same party or belong to parties which do not compete with each other in any *Land*. With the consent of the *Bundestag*, deputies not satisfying either of these criteria may be treated as a parliamentary group.

cause it gives the Government the opportunity to modify the draft at an early stage of the legislative process. Furthermore, the *Bundestag*, to which the draft is then transmitted, may already consider objections of the *Bundesrat* in its first deliberations.

The deliberation of the *Bundestag* consists of three "readings" in plenary sessions. The first reading generally ends with the President's referring the draft to a legislative committee for examination. We will comment on this important stage of the procedure, which is regulated in the procedural rules of the *Bundestag*, later on. After two further lectures in plenary sessions, the bill is passed (adopted) by the *Bundestag*.

In order to become a statute, the participation of the *Bundesrat* is needed. The kind of participation will depend on the category to which the bill belongs. The Basic Law differentiates between "consent bills" and "objection bills". Only the first category of bills requires a positive vote, the consent of the *Bundesrat*. The cases in which a law needs the consent of the *Bundesrat* are determined in the Basic Law. As a rule, all laws touching upon the sphere of competence of the *Länder* will require the consent of the federal organ *Bundesrat*<sup>2</sup>. Today, the majority of the laws are consent bills.

If the *Bundesrat* disagrees with a bill, be it a consent bill or a simple objection bill, it may be referred to the Mediation Committee (*Vermittlungsausschuß*), composed of members of the *Bundestag* and members of the *Bundesrat* (see Article 77 para. 2 of the Basic Law). In the case of a consent bill, the *Bundestag* and the Federal Government may also demand that the Mediation Committee be convened. Should the Committee propose any amendment to the bill, the *Bundestag* will again vote on the bill. The bill finally becomes a law when the *Bundesrat* consents to it. Otherwise, the bill fails. In the case of a simple objection

---

2 An important provision is Article 84 para. 1, for example: "Where the *Länder* 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."

law, the *Bundesrat* can, by its objection, only impose a suspensory veto, which can be overcome by the absolute majority of the *Bundestag*.

In order to enter into force after countersignature by the Federal Chancellor and the competent Minister, each law must be signed by the Federal President and promulgated in the Federal Law Gazette. Before signing the law, the Federal President must review the formal constitutionality, i.e. whether the law has been enacted in accordance with the formal and procedural provisions of the Constitution. For reasons of substantial unconstitutionality, e.g. inconsistency with fundamental rights or general constitutional principles, the Federal President may only refuse to sign the law in the case of an obvious unconstitutionality. This will happen extremely rarely. In the last resort, the conflict will then be solved by the Federal Constitutional Court.

## **2. The Main "Working Levels" in the Drafting Process: The Ministries and the Specialist Committees of the Bundestag**

The preceding description of the legislative procedure already shows that the participation of different organs introduces checks and balances in the procedure. However, for the purpose of exemplifying a rational law-making process, it might be interesting to go deeper into the preparatory work done on the ministerial level, and into the deliberations that take place in the *Bundestag*.

### **a) *The drafting process in the Ministries***

A first insight into the ministerial work can be obtained by the Common Ministerial Rules of Procedure. Chapter II especially deals with the preparation of law drafts. It contains rules on the determination of the Ministries which have to be involved and other procedural requirements, as well as rules concerning technical and formal questions. I would like to draw your attention to the provisions concerning the notifications of experts and associations involved in the legislative procedure, and further to the notification of central local authority associations and of the *Länder*, as far as the bill affects the interests of local bodies or of the



*Länder* (see para. 24 and 25 of the Common Rules). These rules testify that the drafting process is open at a very early stage to the arguments of affected and interested persons or institutions, as well as to external experts.

However, despite the facility to consult scientists and experts from other institutions if the subject matter so requires, the main preparatory work has to be done by the ministerial experts themselves. Above all, they must have special knowledge and skills in drafting techniques. Considering the huge number of drafts which have to be prepared in the Ministries, there is little room for learning these skills by trial and error and through casual advice of experienced colleagues. Systematic training of those involved in the drafting process is indispensable. The Federal Government has placed special emphasis on the training of methods which help simplify the law and avoid excessive regulation. All Ministries are obliged to ensure that every proposed legal measure in their field of responsibility is subjected to scrutiny at every stage as to necessity, effectiveness and comprehensibility. A special checklist, the so-called "Blue Checklist", containing a wide range of questions to be raised by the drafters, is designed to ensure rational law drafting. I shall come back to this "Blue Checklist" later on.

#### *b) The Role of the Specialist Committees of the Bundestag*

The great quantity of bills to be passed and the complexity of the subject matter to be regulated make it impossible for the *Bundestag* to work on the law drafts in plenary sessions only. On the one hand, intense examination or deliberation of details is done better in groups composed of not more than 20 or 30 persons – since the reunification of Germany, the *Bundestag* has 656 deputies (until 1990: 518). On the other hand, experts for the different subject areas are needed. Therefore, if the *Bundestag* is to remain an effective organ of control vis-à-vis the Government, and an efficient legislative organ, division of labour among the deputies becomes indispensable: Each deputy, notwithstanding his or her capacity as a "generalist", has to be a "specialist" in certain fields.

From the beginning, the *Bundestag* delegated a good deal of its legislative work to special committees, composed of members of the different political parties proportionate to their representation in the Plenum. Whereas at the beginning, committees were often created for special legislative projects or subject areas, the number of Specialist Committees (Fachausschüsse) was later reduced to the number of Ministries. Thus, today, a corresponding Specialist Committee of the *Bundestag* exists parallel to each Federal Ministry. Although the members of the committees are, or at least, become experts in the respective fields, they often make use of the possibility of consulting not only ministerial experts, who will be present in most of the sessions, but also external specialists. Public hearings have since become an integral part of the deliberations of the committees. In addition to experts from the universities or research institutions, representatives of interested associations, organisations or social groups are often invited. These hearings not only serve to better inform the deputies, but are also intended to show the external specialists the direction of new developments and projects and, if there are good arguments in favour of the projects, to gain their support. Furthermore, a participation of the persons or groups who will be affected by the law will foster their acceptance if they are really involved in a rational discussion and their arguments are considered by the deputies.

### III. CRITERIA FOR "GOOD LAW"

Modern Legistics has developed a wide range of criteria that have to be fulfilled in order to speak of "good law". Only some of the categories can be addressed here.

#### 1. The Structure of Laws

Legal provisions have to be put in a logical order which facilitates the understanding and application of the law. In view of the great variety of subject matter to be regulated, a fixed systematic order cannot be defi-

ned. Often, laws will begin with general provisions or definitions of technical terms which are used in the law. By contrast, it would seem to be more convenient to put provisions which provide for sanctions, transitional regulations or the date of the entry into force at the end. If the law consists of numerous provisions, it should be subdivided into books, chapters and/or sections, respectively. A table of contents, placed before the text of the law will be most helpful for the users of the law. In many countries, laws are introduced by a preamble. After World War II, the German legislator gave up this tradition. Short preambles are still to be found in a few laws only, such as the Basic Law. Long explanations of the intention of the drafters may be of historical interest but do not improve the quality of the law if it is not understandable on its own. In order to give a general orientation it would seem to be more convenient to define the main goal or task of the law in a first introductory provision.

## **2. Language and Style**

Much has been written on rational wording and style of legal regulations. A common demand is that, as far as possible, the laws must be understandable, also for the average citizen. Other key words in the debate are: simplicity, precision and consistency (also with regard to a uniform choice of words). As for the English language, many practical examples are given, for example, in the books: *W. P. Statsky, Legislative Analysis and Drafting*, 2nd ed., St. Paul/New York/Los Angeles/San Francisco, 1984; *G. C. Thornton, Legislative Drafting*, 3rd ed., London 1987.

## **3. Substantial Criteria**

As for the content or substance of the regulations, a bulk of legal, political, social, cultural and economic principles and/or criteria have to be considered. Thus, for example, the bill has to be consistent with public international law, with constitutional law and with the general principles of law. In particular, the regulations must not infringe upon fundamental rights and freedoms and must observe the principles of equal protection, proportionality, certainty of the law and protection of legiti-

mate expectations. Furthermore, laws may not demand the impossible. Their rules must be acceptable to the population and should, if possible, fit in with the customs of the country.

Finally, it must be underlined that the legislator should always try to be as impartial as possible. In his book "A Theory of Justice", which was first published in 1971, *John Rawls* proposed an intellectual experiment which might help drafters to be more impartial: When discussing the planned regulations, everybody should try to leave his or her own personal interests and circumstances out of consideration. To this end, he has to put himself in the position of an original drafter who has to elaborate, together with others, laws for a future society without knowing in which social position he will live. Because of this fictitious situation of the drafter behind a "veil of ignorance", he must always ask himself whether he could accept the proposed regulation as being fair for all conceivable positions in society.

#### 4. Checklists

It has already been pointed out that the criteria which are mentioned here belong to different categories and are only a selection. An exhaustive enumeration would never be possible anyway, since the changing social reality will always challenge a further development of the methods and approaches of Legistics which may contribute to an improvement of law drafting. Several states have drawn up checklists which enable the drafters to scrutinize law drafts in a systematic and coordinated way. As can be seen from a collection of texts of checklists used in the OECD Countries, edited by the OECD (PUMA/REG (93) 3/ANN of 5 May 1993), the checklists are developed under different perspectives. Since these checklists are partly a reaction to obvious deficiencies in the past, they also reflect a certain reform approach. In the German case, emphasis is placed on the simplification of law and avoidance of excessive regulation. The basic questions of the so-called "Blue Checklist", adopted by Federal Government decision of 11 December 1984 (see brochure "Simplifying Law and Administration", edited by the Ministry of the Interior, 1988, pp. 19-23), are:

1. Is action at all necessary?
2. What are the alternatives?
3. Is action required at *federal level*?
4. Is a new *law* needed?
5. Is *immediate* action required?
6. Does the scope of the provision need to be as wide as intended?
7. Can the length of the period for which it is to remain in force be limited?
8. Is the provision unbureaucratic and understandable?
9. Is the provision practicable?
10. Is there an acceptable cost-benefit relationship?

As you can derive from the questions, which are put in more concrete terms by numerous sub-questions, they do not only require a schematic technical scrutiny, but also a good deal of imagination. It will always be an advantage if law drafters have a great imagination, which is realistic and creative at the same time.

#### IV. CONCLUSION

The rationality of the legislative process must be realized on two levels: First, the procedure must be shaped in such a way that an open discourse with the affected addressees about the planned law is possible and all relevant arguments are considered. Second, in all stages of the drafting, the bill has to be examined according to the standards which have been developed by modern Logistics. Checklists can help systemize the scrutiny and avoid overlooking the relevant aspects.



## **CODIFICATION: EXAMPLES AND LIMITS**

*Dr. Karl-Peter Sommermann*

### **I. DO WE NEED CODIFICATIONS?**

The question as to whether codifications are needed does not refer to the different forms of codified law in the mere sense of written law in contrast to case law. The question as to whether we need written law has already been answered by universal state practice. Today, nobody will seriously deny the fact that we need, in our modern mass societies, written legal rules which are enforced by state organs if necessary. Even in common law countries, social interaction is regulated not only by customs, but also by statutes and other kinds of written law. Mere unwritten codes of conduct cannot protect the rights of the individuals effectively. The fixing of legal rules is a matter of legal certainty and security.

The following considerations will focus on a more specific and narrow meaning of the term "codification". I understand "codification" to mean the systematic and comprehensive regulation of a fundamental subject area, if not of a whole branch of the law.

#### **1. Origins of the Idea of Codification**

In Europe, the original idea of codification is linked to the Enlightenment. When this philosophic current was at its peak, most political theorists believed that all legal rules could be unified into one harmonious and consistent code on the basis of natural law principles. This conviction is reflected, for example, in the Prussian Code of Common

Law of 1794. And the French *Code Civil* of 1804 is also inspired by this line of thought.

In the course of the 19th century, whilst the belief in an all-encompassing unified law was no longer maintained, the idea of codification, now referring to certain branches of the law, stayed alive. Liberalism and legal positivism emphasised the importance of clear legal regulations for the certainty of the law and as a prerequisite for the effective protection of citizens against intrusions by other individuals or by state organs. It seemed that the objective of clearly defining legal positions could be realized best if all relevant legal rules for a specific social sector or sphere were united in one coherent code. As long as the task of the state was essentially defined as that of maintaining law and order, limited and clear rules could be developed more easily than in a modern, pluralistic welfare state which faces a great variety of community service tasks and has to cope with a bulk of new risks originating from industrialization and the accelerating evolution of technology.

The codifications of the second half of the 19th century are characteristic of the liberal era in which the bourgeoisie wanted the individual rights, in particular freedom of commerce and industry as well as all other property rights, to be safeguarded by the legal system. The Industrial Code (*Gewerbeordnung*) of the Northern German Federation, adopted in 1869, as well as the Civil Code of 1896, provide evidence of the dominating role of the property-owning bourgeoisie. The protection of individual liberty was particularly improved by the general Imperial laws on the constitution of courts, civil procedure, criminal procedure and bankruptcy, all enacted in 1877. The code of criminal procedure was later called the Magna Charta of the criminal. Together with the other judicial laws, it still constitutes a central element in the framework of our *Rechtsstaat* (state governed by the rule of law).

In the last two decades of the 19th century, the liberal conception of the state was modified by the introduction of social elements. The gradual rise of the "Social State" became manifest in the first codifications of social law: the law of (compulsory) health insurance for workers (1883), the law of (compulsory) accident insurance for workers (1884) and the law of (compulsory) invalidity and old age pension insurance



(1889). Later, in 1911, these three cornerstones of the German social security system were united in the Reich Insurance Code, which is still in force, albeit with numerous amendments. However, the main evolution of social law was still to come after World War I and World War II. On January 1, 1976, the General Part (Book I) of a planned comprehensive Code of Social Law entered into force, which up to now embraces books on common provisions for the social security and services (Book IV), on compulsory health insurance (Book V), on old age pension insurance (Book VI), on public assistance to children and young people (Book VIII) and on the social administrative procedure (Book X).

However, the most topical codification project at the present time refers to environmental law. Over the course of this century, the pollution and even destruction of the environment has become one of the greatest challenges ever to face mankind. And, of course, it is also an enormous challenge to the state legislator who must try to prevent major damage. I shall return to this point later.

## **2. The Diversification of Laws as a Consequence of a Complex and Rapidly Changing Reality**

In addition to the great codifications of the 19th century, an increasing number of laws (statutes and ordinances) came into force which regulated specific problems only or aspects of a comprehensive subject area which had frequently not been recognized as such. In many cases, the great codes, which were often drafted on concepts of a stationary, closed system, turned out to be insufficiently flexible and open to cope with new developments and problems which the never ending fantasy of reality has in store for society. Therefore, one reason for the tendency towards the diversification and even fragmentation of the laws, which began in the 19th century and gained momentum in the 20th century, can be found in the closed and balanced structure of the codifications into which regulations pertaining to a new or even adjacent subject area can hardly be incorporated without affecting the intended consistency and homogeneity of the law. Another reason for the diversification of laws lies in the fact that, in step with an increasing standard of living, many

economic and social activities have become more and more differentiated and the basic regulations which had been developed for the primary forms of activity no longer seemed adequate for the new, more sophisticated forms. A good example is provided by the Industrial Code mentioned above. Over the years, numerous laws have been added to this code which originally covered all industrial and commercial activities. The new laws, such as the Handicrafts Regulation Act (*Handwerksordnung*), the Statute Governing Restaurants (*Gaststättengesetz*), the Act concerning the road haulage of goods (*Güterkraftverkehrsgesetz*) or the Federal Law Concerning the Protection against Harmful Effects on the Environment through Air Pollution, Noise, Vibrations, and Similar Factors (Federal Immission Control Act = *Bundes-Immissionsschutzgesetz*), the latter constituting an important element of our environmental protection law, regulated special sectors or specific interdisciplinary aspects of commercial or industrial activities. The basic code remained in force as general law and is applicable to all aspects of those industrial and commercial activities which are not regulated by the specialized laws, according to the rule *lex specialis derogat legi generali*.

The law was not only diversified and multiplied at the parliamentary act level but also at the ordinance level (statutory orders). On average, each act passed at federal level entails more than three ordinances to be enacted by the Government or by one of the Ministries. The parliamentary legislator cannot, of course, regulate all details and has to concentrate on the essential questions, such as issues of fundamental rights. While he has to be precise and clear in this field he can be more abstract in the regulation of technical as well as minor formal and procedural issues. In addition to the concretization and completion of the acts by ordinances, further assistance must be given to those whose task is to apply or administer the sophisticated law. This is the reason for the great number of administrative regulations which are intended to facilitate the work of the civil servants and to create a uniform state practice. As has

already been pointed out elsewhere<sup>1</sup>, these internal regulations are not considered to be a real source of law.

### 3. The Rationality of Codifications

A look into the history, evolution and deficiencies of the great codifications permits some first conclusions to be drawn with regard to the question as to whether it is rational to draw up a codification for a certain field of law or a complex subject area.

**First thesis: The subject area which is to be regulated in a uniform and comprehensive codification must have developed to a phase of stabilization and be empirically explored.** The main social, economic, cultural and/or ecological implications should be known and experience concerning the interrelationship with other subject areas should already have been made. Otherwise, the codification will only survive a short time or, at least, will soon have to be amended to a great extent or supplemented by a large number of special laws, contravening the original approach of creating a homogeneous and comprehensive codification from the outset.

**Second thesis: The fundamental legal rules or principles of the respective subject area must have undergone a maturing process both in theory and in practice.** Codifications are generally the result of the gradual regulation of a particular subject area. First, single aspects of a developing subject area will be regulated in special laws. Often, the legislator will learn only after a certain period of time that some of the special laws concern the same fundamental subject area and therefore have to be coordinated and, if possible, harmonised. The legislator will then come close to a possible codification which does not generally confine itself to the harmonisation of law but which also unites a number of rules in a general section which applies to different areas of regulations.

---

1 See *K.-P. Sommermann*, Basic Elements of German Administrative Law, in: *H. Siedentopf/K.-P. Sommermann/C. Hauschild*, The Rule of Law in Public Administration: The German Approach, Speyer 1993, p. 25, at pp. 33-4.

This can only be done if there are related subject areas having a similar structure.

An example of the gradual development of a comprehensive codification is provided by the Town and Country Planning Code of 1986. Whereas, in the 19th century, urban planning law was not regulated in specific acts or ordinances and was only subject to the general police law, this lack of specific planning regulations turned out to be insufficient to guarantee a well-ordered growth of the towns and to protect landscape and nature in view of a rapidly growing population. Although the growth of the population is slightly negative in Germany at the present time, the problem is still topical since the increasing standard of living entails a further "consumption of landscape" through private, commercial and industrial building projects. A first comprehensive federal codification of urban and local planning law was only achieved in 1960. This act regulated the principles and criteria for town planning under the responsibility of the municipalities and communes which fulfil their task through the enactment of by-laws containing local development plans and building schemes. The act also defined the prerequisites for the granting of a building permit insofar as planning aspects are concerned. Aspects of security and supervision of construction work are laid down in the respective building codes of the Länder which also contain the legal basis for the granting of a building permit<sup>2</sup>. In 1986, the regulations contained in the federal act of 1960 were united with those of the federal law concerning measures for urban and rural reconstruction and development under the aforementioned Town and Country Planning Code. The Building Codes of the Länder could not be integrated into this federal code

---

2 The respective provision of the Building Code of Rhineland-Palatinate, for example, reads as follows: "The building licence shall be granted if the building project does not contravene provisions of the building law or any other regulation of public law." According to this rule, the authority must in all cases examine the consistency of the planned building project with the federal Town and Country Planning Code in connection with the local planning regulations contained in the respective by-law, with the Building Code of the Land and with any other rule of public law.

owing to the fact that legislative competence is separated in this field by constitutional law.

Another example of a long maturing process of a law until the enactment of a codification is provided by the Law on Administrative Procedure. It has already been pointed out elsewhere<sup>3</sup> that the efforts towards codification of this section of general administrative law can be traced back to the 1920s. The Federal Law on Administrative Proceedings was finally adopted in 1976.

**Third thesis:** In view of the increasing complexity of social, economic and technological conditions and their accelerated evolution, all-embracing definitive codifications of fundamental subject areas (e.g. environmental law, social law) would appear to be unattainable. Codifications must therefore be open to further developments. In many cases it will be more convenient to conceive codification as a framework which is open to supplementation rather than a closed system of interdependent rules. The increasing number of regulations in the general parts of codifications defining objectives of state action – final programmes in contrast to the traditional causal programmes – indicates the shift towards this new approach. The laws contained in the different sections of the special part thus appear as a developing whole in pursuit of general goals and principles. Such codifications will also delegate the regulation of rapidly changing details to governmental bodies which are in a position to react at short notice. Harmonised, general regulations of a complex subject area can most easily be attained in the field of procedural rules.

**Fourth thesis:** The harmonisation of laws belonging to the same, more abstract subject area into a common code can help simplify the law and provide for a greater transparency of the legal system. However, an effective simplification presupposes that adequate common denominators can be found. Each harmonisation of procedural or substantial rules will reduce complexity and thus make law more coherent and

---

3 See *K.-P. Sommermann*, The Codification of the Administrative Procedure, in: *H. Siedentopf/K.-P. Sommermann/C. Hauschild*, The Rule of Law in Public Administration: The German Approach, Speyer 1993, p. 49.

understandable. That is why the "general part" of a codification has to be considered as its very core. Often, the regulations in the general part will show a medium degree of abstraction because the legislator must on the one hand provide for directly applicable rules, whilst leaving sufficient room for the particularities of the specific subjects. Furthermore, even bringing together acts which had originally been scattered throughout the legal system will contribute to a greater clarity and transparency of the law in general.

## **II. LIMITS OF CODIFICATIONS**

Every codification is subject to a great number of limitations. A distinction can be made between two basic categories of limitations, namely legal limits and factual limits.

### **1. Legal Limits**

Legal limits derive from all higher ranking rules and principles within the legislative hierarchy. In particular, codifications adopted by parliamentary statute must conform with formal and substantive constitutional law. In Germany, the project of a Federal Code of State Liability failed because the question of competence had not been examined in sufficient detail. After a long process of drafting and deliberation, the Code, already enacted by the legislative organs in 1981, was finally declared unconstitutional by the Federal Constitutional Court. The Court ruled that the Federation was lacking the legislative power and that, in particular, state liability did not fall within the concurrent legislative power of the Federation for matters of "civil law" (cf. Article 74 No. 1 of the Basic Law).

Legal limitations are also set by public international law and European Community law. Often, however, these spheres of law, especially the latter, do not only limit codifications but also give incentives for, or even produce constraints on, new codifications.

## 2. Factual Limits

Factual limits may be of political, social, economic or of a merely technical character. Often, the drafters of codification are confronted with the task of finding legal regulations for social or technological matters which are subject to constant change. Particularly in the dynamic field of technology, rules and standards may lose their relevance before deliberations in Parliament have come to an end. One way out of this situation is to delegate the determination of technical standards or criteria to executive organs. Another possible solution may be provided by the Federal Immission Control Act (*Bundes-Immissionsschutzgesetz*) and the Federal Atomic Energy Act (*Atomgesetz*). These laws refer directly to the "state of the art" or "state of science and technology", respectively, which, by their very nature are dynamic. Such references ensure that the authorisation for the building or running of a chemical or nuclear plant will depend on the observance of the most advanced security standards. In order to identify these standards, the Administration can create bodies of experts whose task is to update the relevant standards on a continuous basis.

## III. CODIFICATION PROJECTS IN GERMANY

Over recent decades, several codification projects have become reality, such as the Federal Law on Administrative Procedure of 1976 which has already been dealt with in detail elsewhere<sup>4</sup>, the Code of Social Law (not yet complete) and the Federal Town and Country Planning Code of 1986. Another important codification project, dating back to the seventies, failed: the creation of a Labour Code which was to contain all

---

4 See K.-P. Sommermann, The Codification of the Administrative Procedure, in: H. Siedentopf/K.-P. Sommermann/C. Hauschild (eds.), *The Rule of Law in Public Administration: The German Approach* (= *Speyerer Forschungsberichte*, vol. 122), Speyer 1993, pp. 49-55.

relevant rules (at present scattered over numerous special laws) for individual contracts of employment. For the time being, there is no chance of this project being implemented in the near future.

The most ambitious codification project of recent years concerns a Code of Environmental Protection. This Code is to replace the great number of existing special laws of environmental protection which are often not sufficiently coordinated. The planned Code is intended to embrace the three fundamental environmental areas, namely soil, water and atmosphere. In 1990, a working group composed of four law professors appointed by the Federal Minister for the Environment, Nature Conservation and Nuclear Safety submitted a first draft of the general part of a Code of Environmental Protection which has produced lively discussions, also, for example, at the 59th Congress of the German Lawyers' Association which took place in Hannover in 1992. In its first provisions, the draft determines the purpose of the Code, gives definitions of key terms and lays down the general principles of environmental protection, such as the principles of prevention and cooperation and the polluter-pays principle. Critics raise the objection that the general part is too general and vague and therefore needs more specification in order to be operational. However, the lack of specificity may be symptomatic of the difficulty which always arises if one wishes to create common, harmonised rules for a diversified, complex subject area. Many problems are still to be overcome until the planned Code of Environmental Protection can come into effect. At present, a second working group, also including "practitioners" and chaired by the former President of the Federal Administrative Court, *Horst Sendler*, is elaborating a draft of the special part of the Code. Perhaps there will be more information on it next year when the codification of German environmental law will be discussed in detail<sup>5</sup>.

---

5 One of the subject areas to be dealt with in the third Dialogue Seminar which is planned for 1994 will be the codification of environmental law in Germany.



#### **IV. CONCLUSION**

Codifications presuppose a certain degree of maturity of the area subject to legislation. Today, as a result of rapid social, economic and technological change, an all-embracing definitive regulation of fundamental subject areas is unattainable, even if codification has been thoroughly prepared in theory and practice. However, codifications can help simplify the law and give it more clarity and transparency. In view of the increasing complexity of social and technological reality and the dynamic developments witnessed in these areas, codifications must be open to further developments and should use flexible techniques. When drawing up a codification, the legislator must concentrate on the essential questions, such as the effective protection and promotion of fundamental rights. The concrete regulation of technical as well as minor formal and procedural issues can be delegated to the Executive. This is particularly advisable when rules or standards need to be updated at short intervals.



### **PART III**

## **IMPROVING THE QUALITY OF LEGISLATION BY TESTING DRAFT LAWS AND TRAINING**



## TESTING DRAFT LAWS AND IMPLEMENTATION STUDIES

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

### INTRODUCTION

The story of the legal process does not end with the output of a specific legal act. Each output is a directive, addressed to someone. A rule is a general statement, telling some part of the public how to behave, what it can or cannot do. In practice, however, designing a rule to have the desired effect only and no other is impossible. Rules and regulations have many effects which are sometimes poorly understood. In some cases, undesirable effects may outweigh the intended benefits.

According to a 1992 report of the Organization for Economic Cooperation and Development (OECD), after years of costly and unsuccessful attempts to implement systematic programs to evaluate the effects of government activities, especially legal acts, many governments are pessimistic about expending more resources in this area. As the OECD report states, *"Even simple measures of impact are unavailable. Decision-makers are rarely able to determine whether the overall burden of regulation is increasing or decreasing, whether regulation is becoming more or less effective, whether specific reforms have had any short-term or long-term economic or social benefits"*.

Nevertheless, the legal, economic, social and technical impact issue is of great interest. Does a law governing the disposal of toxic wastes and the emission of toxic gases into the atmosphere produce a cleaner, safer environment? Does a government agency created to regulate the airline industry result in safer, less costly, more complete air service than before? These questions are important to many people, because governments

spend great amounts of time and wealth either trying to make such laws work or finding new ones that will work better.

In its Resolution on 20.12. 1989 the German Federal Government announced measures aimed at a better preparation of new legal provisions. The proposals can be summarized as follows:

- Consulting users and interest groups of new regulations to a greater extent in the future
- Checking the success and effect of enacted laws and ordinances to an increased extent
- Placing greater emphasis on the aspects relevant to an effective enforcement of new legal provisions in the statement of grounds for a new law
- Making use of technical support in the preparation of draft laws and subordinate legislation

## II. TESTING DRAFT LAWS IN GERMANY

A high percentage of civil servants in German ministries have a legal background, particularly in the traditional ministries, e.g. the Ministry of the Interior, the Ministry of Justice and the Ministry of Finance. However, a good understanding of the national legal system does not guarantee a specific quality or effectiveness of the legal provisions created. Therefore, the use of test and checking methods can be helpful to measure both success and effect of draft laws. A variety of test methods are available. Perhaps the most important ones are administrative and planning simulation games and practical tests.

In the Federal Republic of Germany, planned regulations have been seldom tested. From 1971 to 1987 tests were carried out for only 11 draft laws. In 1989 the Federal government decided *"that new laws at Federal level are to be tested to an increased extent where this is possible, taking account of the temporal and political circumstances, in order to be able to*

*better assess the effects and practicability of planned regulations".* In addition, a guideline concerning "the Administrative Planning Game as a Test Procedure in the Decision-Making Process" was issued by the Federal Minister of the Interior.

A planning game is the simulation of an administrative procedure based on a law draft. This testing method is appropriate whenever those who will be affected by the provisions cannot be integrated into the law-making process. As a precondition a planning game requires:

- the creation of a scenario with a specific type of problem
- a description of the institutions involved in this process (their goals should be specified)
- information on the game, on the evaluation of decisions and on possible results

Planning games provide experts, law-makers, government and parliament with the necessary information on the following.

#### 1) Legal Effectiveness

Does the law express the government's intention in such a way that the legal act will have the desired effect only?

#### 2) Comprehensibility and Acceptability

Not all of the statute-users are lawyers or experts. Even many politicians are non-lawyers and non-experts. Is the statute comprehensible to both categories? Is the language of the law draft clear and understandable?

#### 3) Cost Analysis

How high will the costs be for the Government, the Länder and those for whom the provision is intended? Are small firms able to handle the additional costs?

#### 4) Execution

Will the provision work? Will the responsible authorities be able to execute the provisions?

### 5) Legal Compatibility

When the draft becomes law it should harmonise as well as possible with existing law. What effect will the law have on other legal provisions?

Testing a draft law by means of a planning game can provide answers to all these questions.

To give one example, a planning game was conducted at federal level for the Draft Building Code. According to the Federal Government's statement of May 4, 1983 "the most urgent need for scrutiny" was "in the areas of legislation concerning building, statistics, trade and industry". As a result, a Draft Building Code was scheduled to be submitted by the end of 1985. The Federal Minister of Regional Policy, Building and Urban Development decided to run a planning game. The prime goal was to scrutinize the draft law with respect to its practicability and its effects on other legal provisions. Further points of interest were the costs to individuals, companies and institutions and costs stemming from the administrative procedure prescribed in the regulation as well as possible side effects. About twenty practitioners from all areas of enforcement, especially from the districts and local authorities, took part in the game. The results were presented later to the members of the Parliamentary Committee of Town Planning and Housing. They led to further improvements in the Building Code. A few planning games have since taken place. In the Government's view, "the experience made with the preparation of draft laws using methods of scrutiny may be described as positive".

It should not be forgotten, however, that testing draft laws always requires a certain amount of time and money. As the German Government emphasizes in its resolution of 20.12.1989, *"these costs may be counteracted by the substantial economic savings that will be made if only those regulations that are capable of being enforced are legalized"*.

As far as costs of this testing method are concerned, a planning game seems to be appropriate in selected cases only, e.g. when the subject matter is so complex that it is necessary to test draft laws under varying circumstances and changing conditions.



### III. IMPLEMENTATION STUDIES IN GERMANY

Implementation is about putting policies into practice. An often complex process of planning, organisation, coordination and promotion is necessary in order to achieve policy objectives. The aim of implementation studies in general is to improve the results achieved from the policy process. The above mentioned OECD paper on Regulatory Management and Reform Series states that – as in most other government activities – post-implementation evaluation of how well regulations have actually worked is rare.

One German example to be mentioned is the simplification of construction and house building legislation. With respect to a report by the Federal Minister of Building which outlined the weaknesses of current law governing construction, including the regulations to be observed by builders as well as the technical construction standards, the Federal Cabinet decided in 1984 to introduce a comprehensive plan of action for urban development, the construction sector and house building. Most of the existing provisions at federal and Länder level governing planning and building were scrutinized with respect to possible simplification. The most urgent need for scrutiny was in the area of legislation concerning house building. In the case of the Federal Building Code the scrutiny led to the reorganization of the entire field covered by the Building Code. A Housing Law Simplification Act came into force in 1985. It was amended in 1990 by a Federal Sunset Act which was also aimed at simplifying building legislation, and especially at streamlining development planning regulations (*Maßnahmegesetz zum Baugesetzbuch v. 1.6. 1990*). From the outset its duration of legal effect was limited to 1995. This is actually the most important example of sunset legislation. Other examples are to be found in the legislation for the new German Länder aimed at adapting their legislation to the Western standard. Even when the new bill was still being debated in the German Parliament (Bundestag), it had become clear that all political parties involved in the decision-making process were interested in how the new regulations would work. The German Parliament therefore instructed the Federal Government to

provide a systematic study on the practical implementation by 1994. A study group has been set up by the Federal Minister of Building and is intended to complete its work in 1994. This study group has been working on questions concerning the implementation of the new regulations at local level. A first report providing a study on implementation was submitted in 1992.

To understand the implementation study it is necessary to make a few preliminary remarks. The Federal Building Code provides the legal basis for the control of planning in a particular area. The municipalities have the right of self-government in this field as well as the responsibility for it. They determine the nature and the extent of building upon nearly all the land in the municipality, first by overall area planning and then by means of detailed planning. The implementation study was therefore required to focus on municipalities in the main.

The municipalities had been working with the new simplified regulations (Verfahrenserleichterungen und Präklusions-regelungen nach § 2 BauGB-MaßnahmenG) for some time when 147 towns were contacted by the research group and asked about their experiences. A total of 133 towns responded to a mailed questionnaire which included questions on the applicability and practicability of the new regulations. The major advantage of this kind of survey was that a scientifically selected random sample of towns could obtain an accurate representation of the results in almost all towns in Germany.

Comments on the new regulations were thus obtained from 133 out of 147 or 90.5 % of the towns. 76 towns (57 %) made use of the simplified legislature, including all cities with a population of more than 500,000. In contrast to this result, the experts discovered that 60% of the towns with a population of 200,000-500,000 applied the new regulations. In small towns with a population of 20,000-50,000 inhabitants, only 30 % made use of the simplified administrative procedure. In addition to this research project, many experiences were exchanged. All three levels of government, the Federal Government, the Länder and the municipalities were involved, trying to improve the practicability of the new provisions in this field and to speed up the administrative procedure. As a result,

guidelines were issued which summarized the most important aspects to be considered by the local authorities.

The report also includes a comparative research study concerning town planning and building legislation in other European Community Member States such as France, the Netherlands and Great Britain. The specific goal of the investigation was to find out whether foreign private enterprises starting a business in Germany face disadvantages because of the bureaucratic administrative procedure. This comparative research relied primarily on a descriptive mode of presentation, in this case by providing information on the foreign administrative procedures. The requirements for obtaining a building permit have been subject of particular emphasis. These reports dealing with the different planning systems in Europe show that although the planning systems vary widely, the administrative procedure in this sector is not considerably shorter in other European countries than in Germany. As the final report is scheduled for the end of 1994, it would be premature, according to the group of researchers, to draw general conclusions from this study. The experts decided, however, as a result of their studies, not to carry out case studies in France, Great Britain and the Netherlands. Their findings indicated that the possible results of additional case studies could not be generalized with respect to the individual participants' influence on the procedure.

#### **IV. THE IMPLEMENTATION OF COMMUNITY LEGISLATION IN THE MEMBER STATES**

Any research on implementation of laws must primarily deal with states as the subjects of legislative activity. Nevertheless, the extension of implementation studies to include the European Communities is justified by the fact that the European Communities have the power to enact norms that are directly applicable to individuals as well as to both private and public legal bodies in all Member States. According to Art. 189 of

the EEC Treaty, a regulation shall have general application and shall be binding in its entirety. Regulations shall be directly applicable in all Member States. In contrast, directives are only binding on their addressees, the Member States, with respect to the final result to be achieved and not to the means of achieving this result. "The reason for a distinction being made between regulations and directives lies in the intention of the authors of the Treaties not to place too much importance on the creation of rules which have autonomous immediate effect and to make partial use of national legal orders for the achievement of common objectives". It is the duty of each Community Member State, however, to pass national legislation for the implementation of EC directives. The question arises therefore, as to how these directives are implemented by national legislative bodies in the Member States of the European Community. As a rule, the individual Member State determines which national administrative authority is competent to enforce Community law within the framework of its constitutional and national administrative structure. Not only the competent administrative body, but also the implementation of Community law is determined nationally. Why do some Member States implement it with a delay or not at all? What could be done so that European Community policies are accepted more easily by citizens and administrators in all countries?

## **V. THE FIRST RESEARCH PROJECT ON THE IMPLEMENTATION OF COMMUNITY LEGISLATION IN THE MEMBER STATES (1988)**

At the request of the Commission of the European Communities, the European Institute of Public Administration in Maastricht working in cooperation with the Research Institute of the Speyer School, started a comparative research project on the implementation of Community legislation, i.e. regulations and directives. The author of this report was responsible for the coordination of the multinational research project.

As the national administrations play an important role in the context of implementing Community legislation, research was concentrated on the organization, structures, procedures and styles of national administrative systems from the aspect of implementing Community legislation.

A distinction was to be made between two research approaches, namely horizontal and vertical.

In respect of the horizontal approach, 17 directives were selected from a specific period and their implementation studied by national teams according to identical criteria. These directives were particularly important, given the fact that they are the preferred instrument for harmonising legislation whilst leaving national authorities with some room to manoeuvre.

The vertical approach focussed on analyzing the different implementation stages, describing the process from the viewpoint of national administrative structures. Two community regulations were selected for this in-depth analysis. This other study project concerned two regulations relating to social problems of road transport, namely legislation dealing with the driving hours of workers, which closely affect the citizens concerned. It was therefore possible to study not only the behaviour of the administrations, which have the task of ensuring that the application of these regulations is monitored, but also that of the citizen to whom the regulations are ultimately addressed.

The comparison of the implementation of the 17 EC directives as well as the project concerning two EC regulations could be described as giving a "kaleidoscopic image" because of the differences in administrative culture between the Member States and the variety of subject matter studied. According to the experts, however, some observations could be generalized:

- All reports showed that the approach of the ministerial departments to the application of Community law is more positive when they have participated in its preparation. Thus, it can be said that greatest attention should be paid to the participation of national administrations in the drafting of legal texts. The reports also point out the need for the regions and the German Länder to participate

effectively in the preparation of Community Law if their full cooperation is required to fill the enormous gap between the process of law drafting and law implementation or law enforcement.

- Although in most cases the public officials at a national level cooperate loyally in incorporation and implementation, delays are generally the result of intervention by interest groups or concerned parties, or even of interministerial conflicts.
- A very important factor, of course, is the availability of sufficient administrative, legal and financial resources to the relevant authorities to ensure effective enforcement of the regulations. Nevertheless, political factors must not be neglected when enforcing regulations. In many cases they dominate the approach to enforcement. Some Member States (such as Germany and the United Kingdom) seemed to take these regulations more seriously than others. Other Member States, however, do not wish to jeopardize the transport and distribution systems of their economy as a result of the legislation on driving hours.
- For the first time the importance of citizen participation through interest groups in the formulation of Community law has been outlined by this study as a condition for effective application.
- The research teams discovered that delays in implementing Community law cannot be sought in the intervention of the Parliament in most cases. Contrary to what is generally believed, Parliaments in general "play the game" of legislative implementation in those cases where they are asked to intervene.
- As one of the most interesting aspects of this research, the reports on the directives point out that Community law, once it has been incorporated, is applied neither better nor worse than national law.

The comparative analysis was not intended to characterize the Member States as "good" or "bad" Europeans. The national reports provide an overview regarding the actual application of Community law by the national administrations and they discuss the obstacles facing the implementation of European Community policies.

## **TRAINING IN TECHNIQUES OF LEGISLATION**

### **THE APPROACH OF THE FEDERAL ACADEMY OF PUBLIC ADMINISTRATION**

*Dr. Christoph Hauschild*

#### **I. INTRODUCTION**

It is considered a necessary key qualification for public administrators involved in the development of legislation to be familiar with the formal requirements and the procedures of legislation.

Without doubt the success of legislative measures is to a high degree determined by the professionalism in the way laws are prepared and drafted. This fact is also recognised by the Resolution of the Federal Government of 20.12.1989 on the measures to improve legislation and administrative provisions. It is the first paragraph of this resolution that refers to the need to provide in-service training in legislative techniques. It is stated that every Federal Minister is responsible for ensuring that those persons drawing up or scrutinizing legal provisions are provided with suitable advanced training in this area. The explanation to this paragraph says that increased training measures are aimed at ensuring that the objectives of simplifying law and administration are actively realized by all those involved in the ministries working in the legislative area.

The intended training measures are primarily incumbent on the Federal Academy of Public Administration, which is the central in-service training institution of the Federal Government and which was created to coordinate the training needs of the Federal administration. Because of

the lacking capacity of the Federal Academy to entirely satisfy the current demand for further training, the ministries conduct their own short-term seminars on the Blue Checklist in particular.

The programme of the Federal Academy for training legislative techniques is not limited to the aspect of simplifying law. This subject is moreover included in a broader two-week basic training course to develop legislative skills.

Such a broad approach is justified by the fact that most federal laws originate in the ministries. Three quarters of all bills passed by the Bundestag during the 11th legislative period were initiated by the Federal Government.

Even law students do not become acquainted with legislative techniques before entering a ministry. Universities teach the distribution of legislative powers and competences, but not the methods and techniques required to draw up a bill. The Federal Academy therefore provides qualifying courses at different career stages. The subject of legislative techniques is included both in introductory and advanced training programmes.

## **II. INTRODUCTORY TRAINING IN LEGISLATIVE TECHNIQUES**

Junior civil servants are required to attend an introductory training seminar within the first three months of service at the Federal Academy. Aim of the initial introductory courses is to make the new entrants familiar with the federal administration. An important aspect is the topic of preparing and drawing up bills. The junior civil servants are made familiar with the respective provisions of the Common Ministerial Rules, the "Blue Checklist" and the Federal Law data base.

The introductory training gives particular emphasis to the formal requirements to which all bills must conform. A main subject is the provision of paragraph 38 of the Common Ministerial Rules of Procedure ac-



according to which any bill must be sent to the Federal Ministry of Justice to check its agreement with national law before it can be presented to the Federal Government. The checking of agreement with national law is limited to formal questions; it does not concern the substantive contents of bills. The introductory training seminars also deal with the requirement of sending all bills to the Society for the German Language. One can conclude that introductory training is primarily concerned with technical questions of legislation.

### **III. ADVANCED TRAINING IN LEGISLATIVE TECHNIQUES**

The Federal Academy provides three types of advanced training seminars in the field of legislative procedures. The most intensive programme is the two-week basic training course on legislation for higher civil servants which has already been mentioned. The same type of seminar, albeit of one week duration, is also provided for civil servants belonging to the higher intermediate class. A further type of seminar provides qualification in the preparation and drawing up of administrative provisions.

In the following I would like to present to you the two-week course in more detail. The aim of the course is to familiarize the participants with:

- the use of legislation as an instrument of state action
- the procedure of drawing up a bill or regulation
- the formal requirements for drawing up a law
- the methods and techniques which contribute to improving legislation.

The contents of the course are as follows:

- Constitutional provisions in the field of legislation
- Impact of European legislation on national legislation
- Gathering and use of information when drafting a bill

- Regulatory goals and alternatives
- Methods of drawing up a draft
- Legal terminology, checking of agreement with national law
- Legislative procedures in the legislative organs
- Methods of checking regulatory drafts
- Implementation and control

The course's methods cover lectures, working groups and case studies.

As pointed out previously, the course combines the teaching of legislative skills with the overall goal of improving the quality of legislation itself.

Any kind of in-service training seminar has to fulfil several objectives. The primary aim is to increase knowledge in certain fields. Another is to develop new skills, and another is to provide an insight into the "real world" of public administration. The common denominator of all objectives is that they are ultimately intended to contribute to a higher quality in administrative work.

Each of the subjects of the basic course on legislation can be linked to one of the training objectives. I would like to give a more specific insight into the practice of drafting a bill.

The responsibility for drafting a bill lies with the ministry concerned. A considerable amount of work has to be done before the first draft proposal can be submitted. It is difficult to establish strict formal rules of procedure for this initial preparatory stage. The Common Ministerial Rules include only few directions as to how to proceed in detail.

The civil servant concerned primarily needs a clear idea on why action is to be taken. A bill might be motivated by:

- political decision of the head of the ministry
- decision of the legislature or a promise of the Federal Government to the legislature
- court decision

- implementation of EC law
- political activity of the parliamentary opposition
- wish of the Laender
- wish of expert or interest groups
- wish of citizens concerned
- proposal by the academic community
- necessity from the own professional point of view
- petition

Reason for and aim of the legislative project permit the first conceptual outline to be drawn up.

This would be the first step of many prior to sending a draft proposal to the Ministry of Justice for checking the formal requirements and prior to its submission to the Cabinet.

A major objective of in-service training is to pass on such professional expertise. The services of civil servants with practical experience are engaged to qualify their colleagues. It is not sufficient to familiarize them with the relevant legal rules on legislative procedures because these provide only the framework for drafting the bills. The single steps involved in the preparation of a bill are accomplished through the professional expertise and skills of the civil servants involved.

#### **IV. CONCLUDING REMARKS**

Under consideration of the objectives of in-service training in the field of legislative techniques, I would like to discuss in my concluding remarks the options open to organize a seminar programme.

First, I would like to point out that the Federal Academy does not employ any teaching staff of its own. In general, the lecturers are civil servants, academics or free-lance training staff. This means that lecturers

have to be hired for each training seminar. This leaves at the same time, however, many options for realizing the training objectives.

In the field of legislative techniques an essential objective is to pass on professional expertise. Therefore, most of the lecturers in the basic course on legislation are civil servants. However, multifarious actors and interests are involved in the actual legislative procedure. One might ask whether it is sufficient to concentrate legislative training on the imparting of professional expertise.

Another approach would be to include policy advisers, politicians and representatives of interest groups as lecturers in order to reflect the multifarious actors involved and concerned in the process of legislation. The legislative process can be explained as a pluralistic (= competitive bargaining) or corporatist (= consensus seeking) way of decision-making. Either way, the legislative process often includes the appeasement of conflicting interests. Training in techniques of legislation should therefore also include the question of how to deal with the public and how to negotiate with associations.

The organization of in-service training seminars must itself be of a dynamic nature. New trends must be integrated flexibly into seminar programmes. The major difficulty is to define the primary objectives in developing and holding seminars. In the case of the Federal Academy, the training needs of the federal ministries are the basic guideline. Emphasis is placed on meeting the requirements and interests of the participants concerned.

Training should furthermore form an integral part in preparing civil servants for senior positions. Skills in legislative techniques can also be considered a key qualification for senior staff. In-service training is still too often seen as discretionary, or even as a luxury. It is one of the first activities to be put aside or postponed if civil servants are too busy. It is therefore difficult to involve senior civil servants in particular in relatively lengthy or even short courses.

It is, however, essential that the necessary knowledge, skills and attitude of the civil servants concerned are developed if changes in public administration are to be planned and implemented. It is the task of the

senior management to motivate civil servants to get training and provide them with access to training.

If in-service training is to be accepted, and this also concerns training in legislative techniques, the training institution must ensure a close relationship between the work environment and training programmes.

Finally, it should not be forgotten that training programmes should be evaluated on a regular basis. The quality of training given can be improved continually by providing essential feedback on the outcome of the training measure to the institutions and persons involved.



## **APPENDIX**





**EXCERPT OF THE BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY of 23 May 1949, Art. 76-79<sup>1</sup>**

**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)<sup>2</sup> 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)<sup>3</sup> 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 (Legislative 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.

---

1 Federal Law Gazette 1949 I p. 1. The English text is taken from the official translation published by the Press and Information Office of the Federal Government, Bonn.

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

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

(2)<sup>4</sup> 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)<sup>5</sup> 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.

---

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

5 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<sup>6</sup>.

(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.

---

<sup>6</sup> Second sentence inserted by federal statute of 26 March 1954 (Federal Law Gazette I p. 45).



## **EXCERPT OF THE COMMON MINISTERIAL RULES OF PROCEDURE, SPECIAL PART (GGOII)\***

### **CHAPTER II: LEGISLATIVE PROCEDURE**

#### **Section 1: Preparation of drafts**

##### **Paragraph 22: Notification of the Federal Chancellery**

The Federal Chancellery must be notified should a bill having political relevance in preparation or work on the bill be influenced by significant events. The Federal Chancellery decides the extent to which the Press and Information Office of the Federal Government is to be notified.

##### **Paragraph 23: Involvement of the Federal Ministries**

(1) The Ministries involved in the legislative procedure are to be consulted even during preliminary work on the bills (refer also to Paragraph 70 subparagraphs 1 to 3 of the Common Ministerial Rules of Procedure I).

(2) The following Ministries are, for example, to be involved:

1. The Foreign Office when drafting Acts referring to the implementation of international treaties at national level pursuant to Article 59 paragraph 2 sentence 1 of the German Constitution.
2. The Federal Ministry of the Interior and the Federal Ministry of Justice should doubt arise as to the application of the German Constitution.
3. The Federal Ministry of Justice in order to prepare the inspection of agreement with national law (Article 38).

---

\* As amended until 1991.

4. The Federal Ministry for the Environment, Nature Conservation and Nuclear Safety if the interests of environmental protection may be affected in order to ensure that an environmental impact assessment is made (to avoid or compensate for environmental impairment).
5. The Federal Ministry of the Interior if the interests of local authorities are affected.
6. The Federal Ministry of the Interior and the Federal Commissioner for Economy in Government if new departments are to be created or existing ones altered.
7. The Federal Ministry of Finance for regulations concerning taxes or other charges.
8. The Federal Ministry of Finance and the Federal Commissioner for Economy in Government if income and expenditure of the Government, the Laender or local authorities are affected.
9. The Federal Ministry for Youth and Women if policies pertaining to women or youths are affected, and the Federal Ministry for Family and Senior Citizens if policies concerning family affairs are affected.
10. The Federal Ministry for Regional Planning, Building and Urban Development for provisions under public law are at issue which could affect urban planning or building regulations.

(3) Extensive or expensive preliminary work should not be commenced or commissioned in the event of any dispute existing between those highest Federal authorities chiefly involved in the legislative procedure until such times as the Cabinet has taken a decision. This does not affect the responsibility of Ministers for urgent preliminary work within their scope of competence.

(4) Reference is made to Paragraph 40 in respect of presenting the bill to the Cabinet. The accompanying letter must specify that Paragraph 16 of the Federal Government's Rules of Procedure has been observed.

**Paragraph 24: Notification of experts and associations involved in the legislative procedure**

(1) When preparing legislation the representatives of experts or associations involved in the legislative procedure may be given due notification thereof and requested to provide any documents which may be necessary, and may be given the opportunity to make comments. Time, extent and selection shall be a matter of discretion if there are no special regulations pertaining otherwise hereto. The bill should be marked confidential if it is to be treated as such.

(2) If bills have special political significance a decision must be obtained from the Federal Chancellor before contact is made with expert and association representatives. It should furthermore be ensured that contact is not made with expert and association representatives in such a way as to complicate the Cabinet decision.

(3) Experts or associations whose scope of competence does not extend beyond the Federal Territory should not generally be consulted.

**Paragraph 25: Notification of central local authority associations**

(1) Central local authority associations should be notified as early as possible of bills affecting the interests of local authorities. Paragraph 24 subparagraph 2 applies analogously. The bill should be marked confidential if it is to be treated as such.

(2) Before a Ministry notifies central local authority associations of bills it should be checked whether any one of the highest Federal authorities, which is to be expected to dispute main issues, intends to object to the central local authorities being notified.

**Paragraph 26: Notification of the Land Ministries**

(1) Laender representatives at national level (Paragraph 74 subparagraph 3 of the Common Ministerial Rules of Procedure I) should be notified as early as possible of bills affecting the interests of the Laender. The Laender representatives should then pass on this information to those Land Ministries whose scope of competence is affected. An ap-

appropriately marked authentic copy is to be enclosed which is to be passed on to the departments concerned with matters of legal and administrative simplification in the Laender. At the same time the bills are to be sent to the Secretariat of the Bundesrat by way of information. Paragraph 24 subparagraph 2 applies analogously. The draft should be marked confidential if it is to be treated as such.

(2) Before the coordinating Federal Ministry notifies the Land Ministries of bills, it must determine whether any one of the highest Federal authorities involved in the legislative procedure which is expected to dispute main issues is opposed hereto. This also applies in the event of any other Federal Ministry involved in the legislative procedure wishing to inform the Land Ministries of bills.

**Paragraph 27: Notification of parliamentary groups and Members of Parliament and of other agencies**

(1) Should it be deemed advisable to provide Members of Parliament, members of the press or other agencies or persons not officially involved in the legislative procedure access to the drafts from the Ministries or to their contents before the Federal Government has passed them, those Ministries or their representatives involved, and the Federal Chancellor in cases of fundamental political significance, decide the form this access will take. It should be checked whether the Bundesrat is to be informed of drafts or contents thereof.

(2) As soon as and insofar as experts and associations involved in the legislative procedure have been sent a bill (Paragraph 24), the headquarters of the parliamentary groups and, upon request, the members of the Bundestag, are to be informed of the bill; this does not apply insofar as special circumstances are opposed to notification. In cases of doubt the Ministers involved or their representatives, and the Federal Chancellor in cases of fundamental political significance, decide on the form this notification is to take. In the same way, the Secretariat of the Bundesrat and, upon request, the members of the Bundesrat, are to be notified of the bill.



(3) When providing due notification in accordance with sub-paragraph 1 or 2, explicit reference should be made to the fact that the nature of the bill is that of a non-binding ministerial draft bill which has been approved neither by the coordinating Minister nor by the Federal Government.

## **Section 2: Drafting of bills**

### **Paragraph 28: Marking of the bills and indicating official responsible**

(1) Bills must be marked with the date since they are frequently amended during their preparation. The date is to appear in the top right-hand corner of the draft, e.g. "Draft from January 15, 19..". Amendments to the latest draft should be specifically marked as such by means of a vertical line in the margin (amendments within a paragraph) and by underlining (amendments to individual sentences, words, figures, symbols and in the case of omissions).

(2) If bills are sent to the highest Federal authorities for comment, the accompanying letter should provide name of the competent head of section and assistant head of section or clerk together with their telephone numbers (extensions).

### **Paragraph 29: Name of the Act**

(1) The name of the Act is to be kept as short as possible. The term "referring to" is to be avoided. It is sufficient to specify the subject matter in an abbreviated form. An unambiguous abridged name should be provided if this serves the purposes of easier quotation. An abbreviation should also usually be stipulated.<sup>1</sup>

---

<sup>1</sup> Example: Bundesgesetz über individuelle Förderung der Ausbildung (Bundesausbildungsförderungsgesetz – BAföG).

(2) If the amended Act is cited in the name of the amendment, then the name of the former or its abridged name is to be used; it will then no longer be necessary to specify abbreviation, date and source. In the event of one single amendment amending several Acts, the amendments are to be specified collectively in the name.

(3) The name of an amendment is to be specified as follows:

"First Act amending the Act on ..."

or

"Second Act amending the Act on ...".

Formulations such as "Act supplementing ..." or "Act amending and supplementing ..." should not be used.

(4) The contract date is to be included in the name of Acts pursuant to Article 59 paragraph 2 of the German Constitution.

### **Paragraph 30: Introductory wording**

### **Paragraph 31: Effective date**

(1) Each Act should specify the date it will take effect; where not specified, it will take effect on the fourteenth day after the publication of the Federal Law Gazette (Article 82 paragraph 2 of the German Constitution).

(2) The effective date is to be stipulated using the following wording:

1. If the Act is to take effect at a future date:

"This Act shall come into operation on the first day of the calendar month following promulgation."

or

"This Act shall come into operation on ..."

or

"This Act shall come into operation on the .... day following promulgation".

2. If the Act is to take effect retrospectively:

"This Act shall come into operation on..."

An Act should only take retrospective effect in exceptional cases. If the Act contains penal provisions or provisions pertaining to administrative fines the following sentence should be added:

"...; the penal provisions shall, however, first come into operation on ..."

or

"...; the provisions pertaining to administrative fines shall, however, first come into operation on ..."

or

"...; the penal provisions and provisions pertaining to administrative fines shall, however, first come into operation on ..."

The earliest possible date for the penal provisions and provisions pertaining to administrative fines to take effect is, however, the day after promulgation.

The date of promulgation is the date on which the Federal Law Gazette appeared.

(3) If a specific date in the future has been set for an Act to come into effect, it should be ensured during the legislative procedure that the effective date is compatible with the date of promulgation.

(4) The following regulations pertaining to the effective date are to be included in Acts referring to the implementation of international treaties at national level in accordance with Article 59 paragraph 2 sentence 1 of the German Constitution:

1. In the case of treaties consisting of two pages:

"(1) This Act shall come into operation on the date of its promulgation.

(2) The date on which the treaty comes into operation in accordance with Article ... contained therein must be announced in the Federal Law Gazette."

2. In the case of treaties consisting of several pages:

"(1) This Act shall come into operation on the date of its promulgation.

(2) The date on which the treaty comes into operation in the Federal Republic of Germany in accordance with Article ... contained therein must be announced in the Federal Law Gazette."

The Foreign Office announces the date on which treaties take effect in the Federal Law Gazette.

**Paragraph 32: Authorisation to issue legal ordinances; power to issue general administrative regulations**

(1) If an Act is to authorise the Federal Government, a Federal Minister or the Land Governments to issue legal ordinances, then content, purpose and extent of said authorisation must be specified in the Act (Article 80 paragraph 1 of the German Constitution). The authorisation is to be worded with sufficient precision that it can be seen in which cases and with which objective use will be made thereof and so as to show the possible content of any legal ordinances to be issued; the formal Act must specify limits to the authorisation. Article 103 paragraph 2 of the German Constitution is to be observed if the legal ordinance to be issued is to contain penal provisions and provisions pertaining to administrative fines. The authorisation must contain the word "legal ordinance" under all circumstances.

(2) The authorisation in an Act, which is subject to the approval of the Bundesrat or which will be implemented by the Laender, must specify whether the ordinance requires the consent of the Bundesrat or not. The same applies to authorisations to issue ordinances on the subject matter specified in Article 80 paragraph 2 of the German Constitution.

(3) If an Act to be implemented by the Laender is intended to regulate authorisation to issue general administrative regulations, it should be explicitly stated that this authorisation requires the consent of the Bundesrat.

### **Paragraph 33: Uniformity of outward form**

(1) The Act is to be divided into paragraphs or articles. The division into articles is advisable for amendments and Acts referring to the implementation of international treaties at a national level in accordance with Article 59 paragraph 2 sentence 1 of the German Constitution. The paragraphs or articles are to be divided into sub-paragraphs where necessary. Paragraphs, articles and sub-paragraphs can be divided by numbers. Letters should only be used to sub-divide numbers. Sub-paragraphs should be indented for the sake of clarity and should be provided with Arabian numbers in parentheses. More extensive Acts with a continuous paragraph sequence may be divided into parts, chapters, sections and sub-sections.

(2) Parts, chapters and sections should bear headings. Sub-sections and paragraphs may also bear headings if this serves the purposes of easier reading.

(3) If the wording of the Act is not divided into paragraphs or articles it follows immediately on from the introductory wording as a special paragraph without heading.

### **Paragraph 34: Abbreviations; designation of quoted passages**

### **Paragraph 35: Legal terminology; clarity of contents**

(1) The language used in the Acts must be faultless and, where at all possible, written in a manner which can be easily understood by anyone.

(2) References should be avoided where at all possible. In particular, references to regulations should be avoided which, in their turn, refer to other regulations. If references are made they should be worded in such

a way that the reader can understand the underlying principle of the regulation without having to look it up.

(3) If an Act rescinds legal provisions or outdates them then said legal provisions should usually be listed individually in the final clauses of the Act.

**Paragraph 36: Clarity of amendments; public announcement of revised versions**

(1) Amendments should be self-explanatory. If extensive alterations are to be made, the Act should either be superseded by an entirely new Act or reworded in coherent parts.

(2) Given special reasons in individual cases the draft amendment can provide for the Federal Minister responsible for contents to publish the revised version of the Act in the Federal Law Gazette. The revised version may not alter the purport of an Act (declaratory revised version). Should doubt arise as to applicable law whilst preparing the revised version the Federal Ministry of Justice is to be consulted.

(3) The revised version must be preceded by an announcement. For this purpose use should be made of the specimen enclosed in Appendix 1a if the Act was promulgated after December 31, 1963 and has not hitherto been revised. In the case of Acts which were officially announced after December 31, 1963 the specimen enclosed in Appendix 1b is to be used, and the specimen enclosed in Appendix 1c for those Acts which were promulgated before January 1, 1964 and which have not since been revised. The introductory wording is to be omitted in the wording of the revised version.

(4) Articles and paragraphs which have not been included in the revised version are to be marked with the term "deleted". The provisions referring to the coming into force of the Act and to amendments and termination of other provisions are no longer necessary; their content is to be marked in parentheses. Reference is to be made in foot notes to announced amendments which are first to take effect after the revised version has come into operation.

**Paragraph 37: Involvement of the Society for the German Language (Gesellschaft für deutsche Sprache)**

Before draft bills are presented to the Cabinet they are to be sent in duplicate to the Society for the German Language (Gesellschaft für deutsche Sprache), Bundeshaus, 5300 Bonn 1, except in special cases. Return postage costs only are to be reimbursed if necessary.

**Section 3: Presentation of the bills**

*Sub-section 1: Bills of the Federal Government*

**Paragraph 38: Checking for agreement with national law**

(1) Before presenting a bill to the Federal Government it should be sent to the Federal Ministry of Justice to check its agreement with national law.

(2) When sending bills to the Federal Ministry of Justice it should be ensured that the Ministry has sufficient time to check and clarify questions of agreement with national law. If the Federal Ministry of Justice has been involved in the preparation of a bill and has already checked it in respect of compliance, it need not necessarily be sent to this Ministry again if the Ministry so agrees.

(3) In order to simplify the uniform compliance of bills with requirements of national law the Federal Minister for Justice can make recommendations and lay down basic principles in agreement with the Federal Minister of the Interior.

**Paragraph 39: Resolution of the Federal Government**

Before bills are passed on to the legislative body they must be presented to the Federal Government (Cabinet) for deliberation and decision. The Federal Government's Rules of Procedure dated May 11, 1951, as amended, apply to all decisions.

#### **Paragraph 40: Introduction of the bill**

(1) Bills, including legislative intent, are to be sent to the Office of the Federal Chancellor. The accompanying letter (refer also to Paragraph 23 sub-paragraph 4) must specify that the bill has been checked in terms of its agreement with national law, the extent to which the Ministries involved are agreed to the bill, and – if applicable – that the bill is particularly urgent (Article 76 paragraph 2 sentence 3 of the German Constitution). Divergent opinions are to be briefly outlined. The letter should also specify whether the costs for the implementation of the Act are to be borne by the Federal Government, Laender or local authorities, and if this is the case, whether the departments specified in Paragraph 23 sub-paragraph 2 no. 6 and 8 have given their consent. If any information is missing the Office of the Federal Chancellor will ensure that it is subsequently provided by the coordinating Ministry. The letter should furthermore specify the involvement of the Land Ministries and the outcome of said involvement and whether, from the point of view of the coordinating Ministry in the legislative procedure, any problems are to be expected in respect of the Laender.

(2) 1. The legislative intent should specify effects on income and expenditure (gross) of public budgetary funds, and in particular the foreseeable costs of implementing the Act, emphasising the additional expenditure or reduced income to be expected. The costs to be debited to Federal budgetary funds are to be broken down for the period of the applicable financial plan of the Government according to the main groups specified therein. It should be specified whether and to what extent the additional expenditure debited to the Federal budgetary funds has been allowed for in the financial plan. The figures are to be calculated in consultation with the Federal Ministry for Finances, and should be estimated if necessary. Costs of implementation are budgetary expenses occurring in the execution of the Act including personnel expenditure and administrative expenses. Personnel requirements should be broken down into civil servants, salaried employees and workers. Effects on the budgets of the Laender and local authorities should be specified separately. The legislative intent should also specify how planned additional expenditure and reduced income of the Federal Government can be compen-



sated. If no costs are to be expected in the implementation of the Act the legislative intent should also specify this.

1a. In addition and with respect to concurrent legislative power and skeleton legislation (Article 72 paragraph 2 of the German Constitution), the legislative intent to bills should also specify why a Federal legal provision is required. This explanation should refer to the entire project and the most important individual regulations. There need be no explanation in the case of amendments if the interests of the Laender with respect to legislative competence are evidently not affected.

2. In consultation with the Federal Ministry of Economic Affairs, the legislative intent must furthermore specify the extent to which the measures are expected to have an effect on individual prices and on the price level, and particularly on the consumer price level. Irrespective thereof, it should also be specified how the measures are otherwise expected to affect the consumer.

3. The legislative intent should also specify whether effects on the environment are to be expected.

4. The legislative intent should furthermore specify the expected effects on policies concerning women.

(3) The legislative intent should also specify other important solutions and explain how they came to be rejected. Furthermore, any differences of opinion put forward by the central local authorities within the framework of their involvement in accordance with Paragraph 25 are to be outlined in brief.

(4) In the case of amendments the provisions applying hitherto are to be included in the individual legislative intent of the Government Draft (original wording or purport if this is sufficient) if this is necessary to understand the suggestions for change and the size of document so allows.

(5) The bill is to be preceded by an overview which is to be broken down as follows:

- A. Objectives
- B. Solution

C. Alternatives

D. Costs

Important alternative suggestions made by the Bundesrat in its own bill or in applications from the midst of the Bundestag or which are listed in the intent of the bill and which are aimed at realising the objectives of the draft are to be specified under letter C.

If at all possible, the overview should not exceed a printed page.

(6) Appendix 2 shows the usual form of the accompanying letter.

(7) A copy is to be presented to the minister, the parliamentary undersecretary, the undersecretary and the heads of division and heads of section.

(8) Cabinet bills must be sent in good time so as to enable the period for checking in accordance with Paragraph 21, subparagraph 3 of the Federal Government's Rules of Procedure to be observed.

**Paragraph 41: Procedure for Acts referring to the implementation of international treaties at a national level in accordance with Article 59 paragraph 2 sentence 1 of the German Constitution**

(1) Since agreements under international law are usually extensive works which need to be published in several languages and their wording may not be altered during the course of the legislative procedure, the editorial office of the Federal Law Gazette should be consulted on a constant basis when preparing the bill. The passages required for deliberations in the Cabinet will be placed at the disposal of the coordinating Ministry from the printed matter which will be used for the Bundesrat and Bundestag publications at a later date.

(2) If German translations are provided for the draft of agreements under international law which cover several pages and in which the foreign language texts only are binding, the coordinating head of section is obliged to check the printouts and wording of the translation with due care and attention before the manuscript is sent to the Federal Law Gazette. The accompanying letter should specify that this has been done.

## **CHECKLIST TO DETERMINE THE NECESSITY, EFFECTIVENESS AND COMPREHENSIBILITY OF PROPOSED FEDERAL LEGAL MEASURES<sup>1</sup>**

### **1. Is action at all necessary?**

- 1.1 What is the objective?
- 1.2 Who is calling for action; what reasons are given?
- 1.3 How does this compare with the present position as to the facts and the law?
- 1.4 What defects have been identified?
- 1.5 What developments in, for example, the economy, science, technology and court interpretation have a particular bearing on the problem?
- 1.6 How many people are affected, and how many actual cases are there requiring a solution?
- 1.7 What will happen if nothing is done?  
(e.g. The problem is likely to become more acute,...remain unchanged,...solve itself with the passage of time or through the self-regulatory effect of social forces without state intervention. With what results?)

### **2. What are the alternatives?**

- 2.1 What has the analysis of the problem shown? Where do the causes of the problem lie? What factors are capable of being influenced?

---

1 Drawn up by the Federal Minister of Interior and the Federal Minister of Justice, adopted by Federal Government decision of December 11, 1984.

- 2.2 What generally suitable instruments are available making it possible to achieve the objective, either completely or with reasonable concessions?  
(including, for example, measures to ensure the effective application of existing provisions; public relations work, working agreements, investment, incentives; encouragement of and support for self-help of a kind that can reasonably be expected of those concerned; clarification by the courts)
  - 2.3 What instruments are most favourable if one gives special consideration to the following criteria?
    - a) Demands and burden on the private citizen and industry
    - b) Effectiveness (such as relevance and the extent to which the objective is likely to be achieved)
    - c) Public cost
    - d) Effect on existing norms and proposed programmes
    - e) Side-effects, consequences
    - f) Comprehensibility and acceptability of the instruments to those for whom they are intended and to the executing authorities.
  - 2.4 What course of action will make it possible to avoid new regulatory provisions?
3. Is action required at *federal level*?
    - 3.1 Can the object of the action to be taken be achieved – in part or in full – by the Laender, local authorities or other state agencies with the means they have available?
    - 3.2 Why is action required at federal level?  
(e.g. what justification is given for the need to maintain uniformity of living conditions under Article 72, paragraph 2 (3), of the Basic Law?)
    - 3.3 To what extent must the powers of the Federation be called upon?

**4. Is a new law needed?**

- 4.1 Do the matters to be regulated leave no alternative of legislation (due consideration being given to the theory that basic value judgements cannot be delegated by the legislature)?
- 4.2 Is the matter so significant for other reasons that it should be handled by parliament only?
- 4.3 To the extent that a formal law is not required: is some other ordinance having the force of law necessary?  
Why would an administrative regulation or possibly the charter of a federal corporation not suffice?

**5. Is immediate action required?**

- 5.1 What facts and interrelationships still have to be researched?  
Why is immediate regulation nonetheless necessary?
- 5.2 Why can a foreseeable need for amendment and regulation – e.g. with measures becoming effective at different times – not be allowed to actually emerge so that it can then be covered by one and the same legal provision?

**6. Does the scope of the provision need to be as wide as intended?**

- 6.1 Is the draft free of unnecessary statements of objectives or planning descriptions?
- 6.2 Can a restriction be placed on the depth of regulation (differentiation and detailed treatment) by couching it in broader terms (typification, generalisation, indeterminate legal concepts, general clauses, scope for discretion)?
- 6.3 Can details, including foreseeable amendments, be left to ordinances (i.e. issued by the Laender or Federal Government) or incorporated in administrative regulations?
- 6.4 Are the same matters already the subject of other provisions, especially superordinate legislation (avoidable duplication)? e.g. in
  - transformed, directly applicable international treaty law?
  - a European Community regulation?
  - a federal law (as opposed to ordinances (Verordnungen) contemplated by the Federal Government)

- ordinances (as opposed to contemplated general administrative regulations)
- 6.5 Have technical rules and standards already been introduced (such as DIN-Deutsche Industrie-Normen) which cover the matter to be regulated?
- 6.6 What provisions will be affected by the provision planned? Can they be dropped?
- 6.7 Has a forthcoming amendment prompted an examination of the scope of regulation going beyond the actual need for amendment?
- 7. Can the length of the period for which it is to remain in force be limited?**
  - 7.1 Is the provision only required for a foreseeable period of time?
  - 7.2 Is it possible to justify a time-limited "experimental provision"?
- 8. Is the provision unbureaucratic and understandable?**
  - 8.1 Will the new provision be readily understood and accepted by the average citizen?
  - 8.2 Why are proposed measures to reduce present unregulated areas or obligations to co-operate indispensable? e.g.
    - prohibitions, the obligation to obtain approval for or report something,
    - personal appearance at government offices,
    - formal applications, the obligation to furnish information or proof,
    - criminal sanctions or regulatory fines,
    - other restrictions.

Can they be replaced by milder restrictions?  
e.g. an obligation to report something instead of a prohibition with possible authorisation at a later date.
  - 8.3 To what extent can claim requirements or official authorizing procedures be brought into line with those in other areas of the law and reduced to a minimum in terms of time and effort?
  - 8.4 Can the persons concerned understand the proposed mode of regulations as regards vocabulary, sentence construction, length of

sentence, length of individual provisions, systematic treatment, logic and abstraction?

**9. Is the provision practicable?**

- 9.1 Will a provision based on the law of contract or of liability or some other form of civil law provision be sufficient, thus abviating the need for administrative action?
- 9.2 Why is it not possible to forego new official controls and individual administrative acts (or the involvement of a court)?
- 9.3 Can the chosen provisions be followed directly? Do they hold out the prospect that the number of individual acts necessary for the implementation of the law will be as small as possible?
- 9.4 Can directions and prohibitions under administrative law be enforced using the means already available?
- 9.5 Is it possible to forego special provisions on procedure and the availability of legal redress? Why do the general provisions not go far enough?
- 9.6 Why is it not possible to do without
  - a) provisions covering areas of responsibility and organisation
  - b) new authorities, advisory bodies
  - c) reservations securing the right of possible official involvement at a later date
  - d) obligations to submit reports, official statistics
  - e) standardized administrative procedures (e.g. forms)?
- 9.7 What authorities or other bodies should execute the provision?
- 9.8 What conflicts of interest are to be expected among the executing authorities?
- 9.9 Will those authorities be given the necessary room for manoeuvre?
- 9.10 What is their opinion on the clarity of the purpose to be achieved by the provision and on the task of execution?
- 9.11 Has the proposed provision been tested in advance with the participation of the executing authorities (simulation technique)?
  - Why not?
  - With what result?

**10. Is there an acceptable cost-benefit relationship?**

- 10.1 How high are the costs likely to be for those for whom the provision is intended, or for other persons affected? (where applicable, estimate or at least roughly indicate their nature and extent)
- 10.2 Can those for whom the provision is intended – especially small and medium-sized enterprises – be reasonably expected to bear the additional costs?
- 10.3 How high are the extra costs and expenditure likely to be for the Federation, the Laender and local authorities?
  - What possibilities are there of covering the extra costs?
- 10.4 Have cost-benefit analyses been carried out?
  - Why not?
  - What result have they produced?
- 10.5 How is it proposed to evaluate the provision after its entry into force with regard to effectiveness, demands on time and labour, and possible side-effects?



## BIBLIOGRAPHY (PUBLICATIONS IN ENGLISH)

- Atienza, Manuel, *Practical Reason and Legislation*, in: *Ratio Juris*, Vol. 5 (1992), pp. 269-287.
- Bardach, Eugene, *The Implementation Game. What Happens after a Bill Becomes a Law*, Cambridge (Mass.)/London 1977.
- Boukema, Hendrik J. M., *Good Law: Towards a Rational Lawmaking Process*, Frankfurt/Bern 1982.
- Bowers, Frederick, *Linguistic Aspects of Legislative Expression*, Vancouver 1989.
- Brown, Richard E., *The Effectiveness of Legislative Program Review*, New Brunswick (New Jersey) 1979.
- Dale, William, *Legislative Drafting: A New Approach*, London 1977.
- Derthick, Martha/Quirk, Paul J., *The Politics of Deregulation*, Washington 1985.
- European Community (ed.), *The Subsidiarity Principle*, Bulletin EC 10-1992, vol. 25, p. 116-126.
- Federal Ministry of the Interior (ed.), *Measures to Improve Legislation and Administrative Provisions*. Resolution of the Federal Government of 20.12.1989, Bonn 1990.
- Federal Ministry of the Interior, *Simplifying Law and Administration – an Important Policy Objective of the Federal Government*. A brief review of 1983-1987, Bonn 1988.
- Federal Ministry of the Interior, *Measures to Improve Legislation and Administrative Provisions*. Resolution of the Federal Government of 20.12.1989, Bonn 1990.
- Gretschmann, Klaus, *The Subsidiarity Principle: Who Is to Do What in an Integrated Europe?*, in: European Institute of Public Administration (EIPA) (ed.), *Subsidiarity: The Challenge of Change*. Working Document Proceedings of the Jacques Delors Colloquium 1991, Maastricht 1991.
- Hancock, M. Donald, *West Germany – The Politics of Democratic Corporatism*, Chatham (New Jersey) 1989 (esp. Chap. 3: The Constitutional-Institutional Framework).

- International Institute for Legal and Administrative Terminology (ed.), *Manual of International Legal and Administrative Terminology*, Köln/Berlin 1990.
- Kidder, Robert L., *Connecting Law and Society*, Englewood Cliffs 1983.
- Knapp, Viktor, *Some Problems of Legal Language*, in: *Ratio Juris*, Vol. 4 (1991), pp. 1-17.
- König, Klaus, *Developments in Privatization in the Federal Republic of Germany. Problems, Status, Outlook*, Speyerer Forschungsberichte No. 66, Speyer 1988,
- Nagel, Stuart S. (ed.), *Encyclopedia of Policy Studies*, New York/Basel 1983.
- Organisation for Economic Cooperation and Development, *Regulatory Management and Reform: Current Concerns in OECD Countries*, Paris 1992.
- Organisation for Economic Cooperation and Development, *The Design and Use of Regulatory Checklists in OECD Countries*, Paris 1993.
- Paterson, William E./Southern, David, *Governing Germany*, Oxford 1991 (esp. Chap. 5: The Legislative Dimension).
- Siedentopf, Heinrich/Ziller, Jacques (ed.), *Making European Policies Work*, Vol. I, London/Newbury Park/New Delhi 1988 (esp. Part III Section 4: The Implementation of Directives in the Member States).
- Statsky, William P., *Legislative Analysis and Drafting*, 2nd ed., St. Paul/New York/Los Angeles/San Francisco 1984.
- Stronck, Gaston/Vaubel, Dietrich (ed.), *Administrative Reform in Benelux and Germany*. Working Document, Maastricht/Bonn 1988.
- Thornton, Garth C., *Legislative Drafting*, 3rd ed., London 1987.
- Zander, Michael, *The Law-Making Process*, 2nd ed., London 1985.

## THE AUTHORS

*Hauschild, Christoph*, Dr. iur., Principal in the Federal Academy of Public Administration in the Federal Ministry of the Interior, Bonn, Germany.

*Siedentopf, Heinrich*, Dr. iur. Dr. iur. h.c., University Professor, Chair of Comparative Public Administration and Public Law at the Post-Graduate School of Administrative Sciences Speyer, Germany.

*Sommermann, Karl-Peter*, Dr. iur., Chief Executive Officer of the Research Institute for Public Administration at the Post-Graduate School of Administrative Sciences Speyer, Germany.