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FÜR ÖFFENTLICHE VERWALTUNG
BEI DER HOCHSCHULE
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Siedentopf / Hauschild / Sommermann

MODERNIZATION OF LEGISLATION AND IMPLEMENTATION OF LAWS

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PREFACE

The present volume collects the papers of the German participants of the third Dialogue Seminar with the Juridical Council of Thailand, which took place in Thailand from September 23 to 26, 1994.

Whereas the first Dialogue Seminar in 1992 focussed on the guiding principles of administrative law in a state governed by the rule of law, especially administrative procedure (see "Speyerer Forschungsberichte", vol. 122) and the second Dialogue Seminar in 1993 was devoted to the general aspects of law reform and law drafting (see "Speyerer Forschungsberichte", vol. 129), the third Dialogue Seminar dealt with special aspects of the modernization of legislation and the implementation of laws. In terms of the principle of checks and balances or the seperation of powers, the three seminars, sponsored by the Konrad Adenauer Foundation, concentrated on the process of law-making and law implementation by the legislative and/or executive power. Although the judicial control of public administration was already touched upon in the third Dialogue Seminar (documented in the present volume) the role of judiciary power, especially the function and principles of administrative justice, will be left for a second cycle of seminars.

The present volume contains a translation of the German Code of Administrative Court Procedure, which had to be produced especially for the purpose of the Seminar, but may be helpful to others who have to deal with the subject-matter in English. The translation of the Code of Administrative Court Procedure as well as the excerpt of the "Professors' Draft" of a Code of Environmental Protection was done by *Dr. Graham Cass*, to whom we owe special thanks for the competent, accurate and effective manner in which he undertook this difficult task. All crucial points of the translation of the legal provisions have been discussed with the authors of this volume and have been approved by them. We hope that the translation of this important German law will be useful to lawyers working in the field of comparative law.

Speyer/Bonn, September 1994 *The Authors*

CONTENTS

PART III

Impact of the European Community Law

APPENDIX

PART I

MODERNIZATION OF LEGISLATION

CODIFICATION: THE CONCEPTION OF A CODE OF ENVIRONMENTAL PROTECTION

Dr. *Karl-Peter Sommermann*

I. THE RISE OF A GLOBAL ECOLOGICAL CONSCIOUSNESS

Starting in the sixties of this century, it has become more and more obvious to the general public that the preservation of the natural environment has turned into a question of the survival of mankind. A decisive step forward was made in 1972: in that year the United Nations organized the first World Conference on the Human Environment, which took place in Stockholm and was attended by representatives of 113 countries. Some of the 26 principles proclaimed in the final Declaration of the Conference[1] are recalled below:

> "1. Man had the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permitted a life of dignity and well-being, and he bore a solemn responsibility to protect and improve the environment for present and future generations. ...
>
> 2. The natural resources of the earth, including the air, water, land, flora and fauna and, especially, representative samples of natural ecosystems, were to be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.
>
> 3. The capacity of the earth to produce vital renewable resources was to be maintained and, wherever practicable, restored or improved.
>
> 4. Man had a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat ...
>
> 5. The non-renewable resources of the earth were to be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment were shared by all mankind.

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1 Declaration adopted on 16 June 1972, UN Doc. A/Conf. 48/14 of 3.7.1972, published e.g. in the Yearbook of the United Nations vol. 26 (1972), pp. 319-21.

> 6. The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, had to be halted in order to ensure that serious or irreversible damage was not inflicted upon ecosystems. ...
>
> 7. States were to take all possible steps to prevent pollution of the seas by substances that were liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.
>
> 8. Economic and social development was essential for ensuring a favourable living and working environment for man and for creating conditions on earth that were necessary for the improvement of the quality of life."

In the same year, 1972, a team of scientists and experts appointed by the Club of Rome published their first famous study on "The Limits to Growth". A huge number of publications by economists, scientists, philosophers and futurologists followed[2] and almost all political parties "discovered" the protection of the environment as an important element of their political programmes. State organs since then have endeavoured to deal and cope with the "new" subject-matter[3]. At the level of international law, an increasing number of bilateral and multilateral treaties on general or special ecological aspects have been concluded. In the framework of the United Nations, various specialized agencies or programmes

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2 Cf. e.g. *J. Passmore*, Man's Responsibility for Nature. Ecological Problems and Western Traditions, London 1974.

3 The then President of the United States, *Jimmy Carter*, ordered a study to be made on the projected changes of population, natural resources and environment on earth up to the end of the 20th century. The study was published as "The Global 2000 Report to the President" (Washington 1980). In 1987 the German *Bundestag* (Parliament) set up a Commission of inquiry which was to report on precautionary prevention for the protection of the earth's atmosphere. Among the reports also published in English, cf. e.g.: "Protecting the Earth. A Status Report with Recommendations for a New Energy Policy", 2 volumes, Bonn 1991.

are engaged in or have been set up to deal with problems of the pollution of the environment, technological transfer and the protection of the "common heritage of mankind".

However, what counts in the final analysis is the implementation of the ecological principles at national level. Only if the national legal order of the states protects the environment effectively can a healthy and balanced environment prosper. The debates and controversies of the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, 20 years after the Stockholm Conference, revealed that there are still big disparities among members of the United Nations with regard to their will to commit themselves with binding force to taking effective measures against the diverse phenomena of destruction of or risks to the natural environment[4].

II. THE PRESENT STRUCTURE OF ENVIRONMENTAL LAW IN GERMANY

On the national level, environmental law evolved out of the "classical" police and industrial law which had developed in the 19th century. The legitimate task of the state organs of maintaining law and order, or rather of safeguarding public safety and order, included from the beginning the warding off of hazards to public health, which may originate not only in diseases or hazardous activities, but also in detrimental alterations to the human environment. However, only later did it become evident that the human environment constitutes a delicate ecosystem with a high degree of interdependence between its different elements and subsystems, which makes it necessary for the competent administrative authorities to exercise precaution and to act within a larger context. It is not enough to intervene only in select cases when the danger is imminent or the damage has already occurred. Considering the new

4 Cf. the Report of the Conference in three volumes, New York 1993 (A/CONF. 151/26/Rev. 1, Vol. I-III).

dimension of risks produced by modern technology, precautionary measures to provide against or minimize the incidence of potential hazards are needed.

In Germany, in step with technological and scientific as well as social progress, new laws were added to the general Industrial Code, such as the Federal Immission Control Act (1974), the Atomic Energy Act (1976), the Waste Avoidance and Waste Management Act (1986) and the Genetic Engineering Control Act (1990), to mention only a few important *federal* laws. Special laws and regulations, at federal and/or *Länder* level, can equally be found in all other fields belonging to the core of environmental law: nature conservation, landscape management, water conservation and water-quality control, radiological protection, protection against hazardous substances and soil protection. Moreover, numerous legal provisions directed at the prevention of climatic changes are emerging.

In general terms all of these laws work with traditional instruments of police and industrial law, on the one hand, and also with new mechanisms which are more suited to the large-scale control and general management of environmental behaviour. The following instruments belong to the first group, i.e. to the traditional instruments: orders and prohibitions, obligations to notify certain activities to supervisory bodies and requirements of permission or approval. Examples of modern instruments, belonging to the second group, are planning procedures, based on a careful environment assessment involving citizens affected and environmental associations, or pollution charges and other mechanisms which indirectly steer the environmentally relevant behaviour of companies or individuals.

The public administration today has at its disposal a sophisticated and wide range of instruments which enable it quite effectively to "steer" and control the most relevant activities which might give rise to hazards to our environment. However, as long as other countries offer industry far less stringent criteria on environmental acceptability, the maximum possible degree of environmental protection cannot be achieved in a single country, even if there is rapidly increasing demand for products

which are free from harmful substances and which are manufactured in a manner which does not cause any damage to the environment. In Europe, European Community Law is contributing to the development of common standards and national law is becoming more and more influenced and predetermined by supranational law. The most prominent examples are the directives of the European Community on environmental assessment and on access to environmental data.

Despite the relatively high standard of environmental protection achieved in Germany up to the present, a great deal remains to be done. A structural deficiency of existing German environmental law lies in the fact that the regulations on environmental standards, procedures and instruments of control are scattered over numerous acts and are not always sufficiently coordinated. This situation contrasts with the modern holistic approach according to which the human environment has to be seen as an interdependent and indivisible whole. The "confluence" of environmental criteria and procedures in laws regulating a comprehensive subject-area, such as the Town and Country Planning Code, takes this holistic approach into account, but does not alter the fact that the law remains essentially split up into an almost indeterminate number of legal instruments.

III. DRAFTING A COMPREHENSIVE CODE OF ENVIRONMENTAL PROTECTION FOR THE NEXT CENTURY

The insight that a holistic ecological approach requires adequate legal structures, and that harmonization of the specialized laws elaborated at different moments of history under different conditions is needed, has led to various initiatives concerning a uniform codification of the above-mentioned key sectors of environmental law. Demands for the unification and harmonization of environmental law can be traced back to the seventies. In that decade the Federal Environmental Agency also financed the first research project on this matter. However, the project

to produce a comprehensive codification of environmental law did not enter into a concrete stage until the late eighties when a group of four university professors of public law, at the request of the Federal Minister of the Environment, elaborated a draft of the general part of a Code of Environmental Protection.

1. The Initiative of the Federal Minister of the Environment and the Present Stage of the Drafting

The codification of environmental law is one of the most ambitious long-term projects of the Federal Minister of the Environment, and one which was also included in the governmental policy statement of the Federal Chancellor in the opening session of the newly-elected *Bundestag* (Parliament) in January 1991. If the political circumstances remain favourable, the project could be realized by the end of this century. Hopefully, it will be elaborated so carefully, and with the necessary openness to future developments, that it will turn out to be a long-lasting legal framework for an advanced ecological market economy. With the forthcoming amendment to the Basic Law, which will introduce the preservation and protection of the human environment as a constitutionally guaranteed principle of state policy, the guiding substantial principles of constitutional order may then be synthesized into the formula of a "social and ecological state governed by the rule of law".

With regard to the current stage of the codification project, the group of professors, augmented by a further four professors, has in the meantime elaborated the draft of a special part of a Code of Environmental Protection, which is about to be published (summer 1994), following the publication of the text of a general part in 1990. Parallel to the still ongoing drafting by the eight academics, in July 1992 the Federal Minister of the Environment appointed a Commission of Independent Experts to elaborate a further draft of a Code of Environmental Protection making use, of course, of the proposals and insights of the "Professors' Draft". The new Commission is presided over by the former President of the Federal Administrative Court, *Horst Sendler*. Among the members are

practitioners, but also the main drafter of the "Professors' Draft", *Michael Kloepfer*. Thus far the Commission has not yet presented the results of its work; a complete draft is expected to be finished by 1997. Therefore, the "Professors' Draft" will remain the main text of reference for the next three years. It may serve, if not as a perfect model, at least as a valid basis for discussion.

2. The Conception of the "Professors' Draft"

The draft code elaborated by the group of university professors proceeds from the premise that the existing distribution of competences between the Federation and the *Länder* will be maintained in principle. Thus, only those sectors of environmental policy which under the Basic Law (Constitution) belong to the legislative powers of the Federation are dealt with in the Code. However, this does not diminish the value of the draft code as a model for future codification since the Federation possesses legislative powers in practically all key areas of environmental law. Thus the Code refers to the protection of all three fundamental environmental media: soil, water and the atmosphere, and furthermore, of course, to living organisms themselves. The special part of the draft is devoted to the following subject-areas: nature conservation and landscape management (chapter 1), water conservation and water management (chapter 2), soil protection (chapter 3), immission control (chapter 4), atomic energy and radiological protection (chapter 5), protection against hazardous substances (chapter 6) and waste avoidance and waste management (chapter 7).

This enumeration of subject-areas regulated in the special part of the draft may give the impression that the Code of Environmental Protection consists of a mere collection of the existing federal laws gathered under a common label. However, although at the beginning of their work the drafters logically started by systematically taking stock of the existing legislation on environmental matters, the approach adopted is quite different. It can be summed up in the formula "harmonization, simplification and development of environmental law".

Harmonization presupposes an analysis of the existing laws as to whether divergent regulations for the various sectors of the environment are justified by the very nature of the subject-matter or whether they are only of accidental character and have to be explained historically. Harmonization of the different branches of environmental law will be successful if common denominators and structures can be found which may be synthesized into common regulations to be introduced in the general part of the Code of Environmental Protection. An essential element in the approach to codification is, therefore, the "filtering out" of general rules which may serve equally for the various sectors of the environment. However, common regulations for different sectors should under no circumstances be created at the price of levelling necessary distinctions.

The intended harmonization will consequently entail a simplification of environmental law. To the extent that common principles and norms can be found, parallel or accidentally divergent regulations presently contained in the specialized laws can be eliminated. This will lead to a significant reduction in the quantity of norms and to a considerable improvement to the transparency of environmental legislation. Another important effect of the harmonization and simplification of environmental law will be an improvement in the implementation of environmental law. The administrative authorities will no longer be confronted with a confusing array of structurally divergent laws, but will rather have to base their action upon a consistent Code, which in its different parts follows the same fundamental procedural and substantial criteria. For the general public, the new legislation will convey more legal certainty although, with regard to the very complexity of the subject-matter, it is not possible to draft a Code of Environmental Protection in such a manner that every citizen could easily understand all its legal provisions. However, efforts have to be made to formulate the legal text as clearly and as intelligibly as possible.

Finally, the "Professors' Draft" is not limited only to the systematization, harmonization and simplification of the *existing* laws: an additional aim is the further development of environmental law in general. This does not only involve filling regulatory gaps, but also a cautious new

orientation of environmental law. In this last respect, the "Professors' Draft" places particular emphasis on the promotion of more cooperative and flexible instruments for precautionary protection of the environment, such as environmental subsidies or the granting of permissions for plants, facilities or products under less rigorous conditions if they foster ecologically preferable forms of production. The guiding maxim of the drafters was the preference of "carrots" over "sticks" (more environmental protection through less coercion).

3. The General Part of the Draft: Fundamental Principles

The draft of the General Part of the Code of Environmental Protection is subdivided into 12 chapters, which altogether contain 169 sections. The headings of the chapters already give an impression of the common principles and regulations dealt with:

- General Provisions (purpose of the Code, definitions, principles of environmental protection);
- Environmental Duties and Rights;
- Planning (environmental concept plans, waste disposal plans, environmental programmes, statutory environmental constraints on other public planning schemes);
- Appraisal of Environmental Impact;
- Direct Control (opening controls, supervision, intervention);
- Indirect Control (environmental charges, environmental grants, flexible instruments, use of public facilities, Director of Environmental Protection and Environment Officer);
- Environmental Information;
- Environmental Liability and Compensation for Environmental Harm;
- Participation of Associations, Publicity of Procedures;
- Legislation and Regulations;

- Statutory Orders, Administrative Regulations (guidelines) and the Establishment of Technical Standards;
- Organisation and Competence, Environmental Liability of Public Authorities;
- Concluding Provisions.

The mere enumeration of these key terms reveals the wide range of issues of a substantial, formal and procedural character which are regulated in the general part of the Code, thus relieving the special part of the Code of a considerable number of common denominators. Consequently, the regulations of the special part (which comprises a further 429 sections) can concentrate on the particulars of the various sectors of environmental policy, particulars which really do need special consideration and cannot be managed by means of the general rules.

As far as the substantial regulations of the General Part are concerned, in order to understand the conceptional basis of the draft special attention should be paid to the fundamental principles enshrined in sections 4 to 6: the *principle of precautionary prevention*, the *polluter pays principle* and the *cooperation principle*. All of these three principles already to a greater or lesser degree underlie the existing environmental legislation and have been elaborated on by specialists in environmental law and policy.

The principle of precautionary prevention is based on the insight that a healthy and balanced environment cannot be guaranteed in the long term if the environmental authorities concentrate only on the prevention of imminent dangers. It is indispensable that they use planning procedures and other instruments capable of preventing the emergence of hazards in the future. A precautionary environmental policy particularly requires the circumspect and considerate use of natural media and resources. Therefore, it is not acceptable that state organs only react to new environmental risks. They must also "steer" the process of environmental protection, i.e. by pursuing an active environmental policy which anticipates future developments in order to minimize possible hazards. In section 4 of the draft, the principle of precautionary prevention is laid down as follows:

> "Appropriate measures are to be undertaken, in particular by forward planning and by reducing emissions and discharges in accordance with the levels achievable using the best available technology, to provide against any form of pollution which is either avoidable or whose long-term effects cannot be predicted."

The polluter pays principle imposes the responsibility (liability) for environmental damages and risks on those who have caused the risk. Therefore, it is not the user or consumer of a product who is responsible for adverse effects of the product, but the producer and distributor of the product; collective responsibility on the part of several persons is also conceivable. Section 5 para. 1 of the draft rules:

> "Those who cause detriment to the environment or give rise to a hazard or risk to the environment are liable for that detriment or threat."

However, since the polluter cannot always be determined, and there are cases in which the person held liable cannot be located or a claim against this person would not be equitable, environmental law remains dependent to a certain extent on responsibility being taken over by the community (the so-called "community pays principle"). Section 5 para. 2 of the draft takes into account these inevitable cases.

The cooperation principle refers to the cooperation of state organs and society in order to improve environmental protection. The term "cooperation" stands for all forms of participation of individuals or non-governmental associations in the process of decision-taking in environmental matters. The cooperation might therefore be realized by rights of hearing, of participation, or even by leaving an independent decision to the citizens. According to section 6 of the draft, measures which allow citizens to retain the possibility to take independent decisions have priority over prohibitions and orders, where this is compatible with providing an equivalent degree of protection for the environment and the party concerned is not placed under a greater burden. Considering the emphasis the draft places on the cooperation principle, one of the essential points of the professors' approach is the assumption that the

protection of the environment is not an exclusive task of the state, but is also entrusted to the citizens.

IV. CONCLUSION

A great deal of criticism has been raised against the project of a Code of Environmental Protection. It has been argued, for example, that the time was not "ripe" for such a far-reaching codification and that the general part of the draft remains too general because common denominators for the various sectors of environmental protection can only be found on a very abstract level.

Irrespective of all objections, and irrespective of the need for further discussion on a range of debatable points, the "Professors' Draft" is a valuable contribution to promoting more rational legislation in environmental matters in the future. Even the preparatory work for the draft revealed a considerable number of parallel or divergent regulations in the existing sectional laws which are either unnecessary or can be harmonized according to common principles. Whatever happens to the Code of Environmental Protection project in the coming years, the draft provides useful guidelines for the future systematization, harmonization and further development of environmental law.

SIMULATION AND PLANNING GAMES AS A TOOL IN THE DRAFTING PROCESS: TESTING LAW DRAFTS AND TRAINING OF OFFICIALS

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

I. DEFINITION: "PRECURSORY CHECKING" OF LEGAL REGULATIONS

The procedure in which a law is constructed today and the limited possibility to foresee the development of reality are the main causes for the fact that after coming into force it does not have, or only partially has the effects desired.

This discrepancy between aim and effect needs to be decreased. Today future laws are checked in the framework of examination of the draft[1] – in addition to the traditional legislative techniques (processing of the problem and gathering of materials, consultation of experts, hearings, etc.) – according to necessity, effectiveness and comprehensibility. The Ministry of the Interior and the Ministry of Justice also subject the draft of a law to an examination according to constitutional and constitutional judiciary norms (juridical examination – "Rechtsförmlichkeitsprüfung").

With the new to date not yet institutionalized procedures of examination in the framework of "precursory checking", the intent is that the legal norms are, in their drafting stage, examined in a kind of "virtual reality". The draft of a law is thereby viewed and tested as a regulation hypothesis as if it were already valid and enacted.

The basic idea of *precursory checking* of a legal regulation is the legislator's endeavour to anticipate rationally the effects of a planned regulation. In the course of this, the legislator's own expectations and aims should be sounded and the legal regulations improved or confirmed.

The experimental model situation, to which the legal draft is applied, allows for an unrestricted correction without legal effects on the basis of the insights gained with regard to the quality of the regulation effect.

In practice, two testing methods have developed for this purpose: the *planning game* and the *practice test*.

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1 The so-called "Blue Checklist" adopted by the Federal Government decision of 11th December 1984; see brochure "Simplifying Law and Administration", edited by the Ministry of Interior, 1988.

In the framework of the *planning game* (Planspiel) the law is tested in a constructed situation, from the bureaucratic ivory tower so to speak, in which those participating in the test take on "roles" (functions) in which, on the basis of a "script", they apply the law to a fictional case and "play" those people actually affected by the law. The experts should be included as they can often only recognize the practical effects and deficiencies of their conception when their drafts are "acted out". The planning game is a suitable method of testing in cases:

- where a direct application in its sphere of operation has to be dispensed with for reasons relating to time and expenditure or
- where the situation to be tested can only be "simulated" (e.g. accidents, etc.).

The *practice test* (Praxistest), on the other hand, is the real-time oriented testing of a legal draft in direct proximity and adaptation to the real situation to which the law will be applied later on. The legal regulation is applied to real, concrete procedures in daily practice by a selected administration as if the law were already enacted.

In summary one can say that this method of precursory checking of legal regulations is advisable where by means of laying down norms:

- socially, technologically or ecologically important effects are aimed at or anticipated,
- where these effects influence the actions of those addressed by the norms more or less directly,
- where these effects are influenced in their course by administrations or social groups and
- in the case of regulations pertaining to continually repetitive – difficult – mass procedures, the processing of which should take place as smoothly and regularly as possible,
- with regulations where mistakes could lead to severe harm and one cannot afford to pay this price,
- with regulations where due to the novelty of the problem or the procedure, especially in practical fields, only an insufficient infor-

mation basis exists (extension of knowledge pertaining to the problem),

- for the regulation of very complex interrelations due to which aspects might be overlooked.

II. OBJECTIVE: EFFECTIVE SETTING OF LAWS

Today we already have a broad basis of experience regarding these methods at our disposal; all in all, 12 testing procedures were executed on a national level from 1960 to 1975. The main emphasis of the legal regulations tested lay in the following fields: Federal Social Welfare Act, VAT Act, Town and Country Planning Act, Tax Reform Act and the Amendment to the Federal Building Code.

These experiences with the ex-ante examination of legal regulations before their enactment with regard to the assumed effects have revealed that unintended effects and problems of the norms' social acceptance "in daily life" can thereby be disclosed, analyzed and corrected early on. Therefore, precursory checking supports the effective implementation of norms by the legislator.

Especially in the process of the legal-technical circumscription of a new problem, there is the risk that even experienced legal experts cannot give consideration to one or the other of the consequential aspects of the regulations, its interrelationships or its effects.

The quality specifications that need to be applied to a law are the following:

- substantial necessity for standardization;
- suitability regarding the objective;
- administrative and judicial practicability;
- consideration of the citizens' needs and adequacy for the parties affected;

- efficiency (optimal ratio of effects to requirements and costs).

These quality specifications can often only be anything like satisfactorily redeemed with the knowledge of the varied effects of a legal regulation, but never finally. The primary aim of precursory checking is, therefore, to provide those working on the draft (e.g. the respective head of section in a ministry) and those who have to decide on the issue (Government, Parliament) with knowledge that they can use so that the draft of the law and its ideal achieve an optimal convergence with these specifications.

For however often a legal draft was thought through, the examinations revealed astounding additional insights, because only the practical application registered gaps, lack of clarity and opportunities for improvement hitherto unknown.

Furthermore, one must not underrate the interdependence of research and further education in this special legislative process. For especially the relation of further education, the development of methods and the actual testing procedure lead to mutual gains. Thus, on the one hand, the participants in further education develop a feeling for the dimensions of the effects of a legal regulation. On the other hand, important suggestions for improvement could already be gained in the phases of preparation and evaluation due to the direct experiences of those involved in the testing.

In the course of this, the pedagogical effects in the form of early familiarity with the new regulations as well as learning from and with each other feature as important "by-products", with the effect that professional differences are "rationalized" by means of cooperation and fears of contact are reduced.

III. PLANNING GAME AND PRACTICE TEST IN PRACTICE[2]

1. Practice Test of the Youth Welfare Act (Jugendhilfegesetz)

On behalf of the Federal Minister for Youth, Family and Health, the draft by the head of section for a Youth Welfare Act (Jugendhilfegesetz) was to be tested especially with regard to its suitability for execution in the administrations of the Youth Welfare Offices. In the practice test (1977), besides a multi-disciplinary project team from the Post Graduate School of Administrative Sciences Speyer, the respective Federal Ministry, the central municipal associations and eighteen (representative) Youth Welfare Offices were involved.

The Youth Welfare Offices, who were motivated by the central municipal associations to participate, came from the entire Federal Republic. On the basis of this selection one hoped to gain indications as to possibly differentiated application of the Youth Welfare Act due to structural peculiarities.

In the framework of the examination two test methods were applied:

- *Retrospective handling and solution of cases*: Closed cases from the Youth Welfare Offices were processed for the test and handed back to the test participants to be worked on again under the conditions of the legal draft.
- *Questionaire*: In order to determine the handling and assessment with regard to selected regulations in the new draft and to establish the structural characteristics of the Youth Welfare Offices, extensive questionaires were compiled and handed out to the participants to fill in.

After a two-day introductory session, the selected Youth Welfare Offices attempted to solve the processed cases with the help of the draft for a new Youth Welfare Act during a period of ten weeks. The total

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2 The tests mentioned have been realised in cooperation between the competent Ministeries and the Post Graduate School of Administrative Sciences Speyer.

time for the practice test, including the preparatory phase and the evaluation, amounted to twelve months.

The fact that the execution of the test proceeded exactly in line with its conception was only ensured by appointing a *coordinator* for each Youth Welfare Office, who was responsible for the overall handling and who played a key role in the testing procedure. He was in charge of distributing the work, controlling the execution of the test to schedule and ensuring that the filling in of the questionaire at the end of the test was, if possible, done in team work.

Furthermore, this coordinator was to ensure that work on the cases was based on an identical understandig of the task. If necessary, he was to solve problems in the working process and to answer questions from the skilled personnel solving the case or to have them clarified via his central municipal association representative.

The coordinators were also the main interlocutors for the project team, which had developed the methods for the specific practice test, controlled its execution, evaluated the results and finally submitted the suggestions for amendments to the draft.

In order for the coordinators to fulfill these central tasks, a two-day training seminar was held. Besides the presentation of the entire corpus of laws by a representative of the respective Federal Ministry, the coordinators were informed by the project team on methods, test objective, their task and the course of the test. This training seminar no doubt accounts for the test running smoothly, on schedule and almost without further need for clarification. Furthermore, it also ensured largely uniform processing of the test.

Thus, it can be noted as one of the crucial facts gained from experience that for participator and work-intensive test projects this form of test introduction and organization is suitable to guarantee the anticipated course of the test.

The suggestions gained in the practice text led to several significant substantive alterations, to the abandonment of unpracticable regulations, to an unambiguous or comprehensible formulation of the legal regula-

tions as well as to a more user-friendly compilation of the systematics of the Youth Welfare Act.

2. Planning Game for the Environmental Impact Assessment Law (Umweltverträglichkeitsprüfungsgesetz)

With the law on environmental impact assessment (Umweltverträglichkeitsprüfung) dated 16th November 1989 the EC-regulation of 27th June 1985 (85/337/EEC, Official Journal of the European Communities No. L175/40) was translated into national law.

In the case of the Environmental Impact Assessment Law an instrument for precautionary environmental policy was to be created with which all the effects of a specific project that could affect the environment could be assessed and evaluated.

With the Environmental Impact Assessment Law *three new test steps* were added for which no experience values existed so far but which promised improvements – perhaps even procedural expedition:

- the discussion and determination of the "examination framework" between the respective authority and the applicant before the actual administrative procedure begins, i.e. the authority in this case has the task to inform an entrepreneur who wants to build a new plant early on about which documents he needs to submit for the permit.
- the bringing together of approval procedures running parallel (e.g. water protection and pollution control examinations),
- the determined facts of a case relevant for the decision are to be assessed uniformly according to the regulations of the respective laws.

The Environmental Impact Assessment Law demanded the enactment of general administrative regulations in order to put the course of action into concrete terms. A "Working Draft for General Administrative Regulations" drawn up in the Federal Ministry for the Environment, Nature Conservation and Reactor Safety dated 9th May 1990 thus pri-

marily includes concrete regulations for the three new procedural phases:

- framework of the examination
- summarized depiction,
- assessment.

In order, to on the one hand, reveal lack of clarity, gaps and collisions and on the other hand to test the suitability and practicability of the administrative regulations, the Federal Parliament and the Federal Council demanded that the draft for the general administrative regulations be tested in a planning game.

The first step related to the selection and processing of suitable cases for the planning game. The criteria for the selection of the cases were the following:

- more than one case,
- high degree of realism,
- representative character of the cases,
- inclusion of the problem of interrelatedness of different environmental media, work on specific environmentally relevant problems.

Observing these criteria, three *typical cases* were selected which were based on real procedures:

- approval of the plan for a waste disposal plant
- new permit for the building and operation of a coal-fired power station,
- permit for a chemical plant.

In the processing of these three cases, all records including details of production techniques and process engineering, ecological conditions, security standards, etc. were considered.

The venture representatives, authorities and public representatives participating in the three planning games running parallel corresponded

with those persons or institutions who are in reality involved in the environmental impact assessment procedures.

The authorities are divided into one which finally grants the approval and another or several that contribute professionally and, for example, examine questions regarding water quality or nature conservation. In each of the planning games at least these authorities had to be included.

The evaluation of the planning game extended onto several levels of analysis and the inclusion of people involved from administrative practice, representatives of the venture and the public. The test results and the suggestions for improvement derived were gained on several levels:

- insights gained in the context of gathering of materials and the construction of the planning game as such,
- insights gained from a pre-test,
- insights gained in the course of the planning games,
- insights gained from the evaluation of several written interrogations of the participants in the planning games,
- insights derived from the numerous oral statements of the participants in the planning games (in the course of the planning game, in a plenum directly after the end of the planning game and in the subsequent events).

The result of the planning game, in which 40 experts applied new legal regulations (all in all 261 times) over a period of almost three days, led to numerous alterations and improvements in the working draft for general administrative regulations:

- a new order of the regulations was chosen, which was more closely oriented to the course of procedure than before,
- greater visual clarity was achieved in that tables with cross-references were placed above the fields of regulation within the administrative procedures,
- alterations and clarifications regarding the content were initiated, for example regarding the regulation concerning the leading authority, etc.

In the course of the planning game, it became more and more obvious that one can work on environmental problems best if one does not necessarily solve them by means of a strict application of detailed regulations, but also – already in the preliminary stages – if one searches for acceptable solutions in negotiations and consultations between the parties involved. This was confirmed by most of the participants in word and/or in deed.

IV. RECOMMENDATIONS TO THE USER OF THE TEST METHODS

The practical prerequisite for an increased execution of law tests within the legislative procedure is that the ministerial administration has the necessary test know-how at its disposal and that institutions exist that are able to carry out precursory checks on the complex legal and administrative regulations. Thus, the following brief description explains the methodological application of the test instruments in the case of the planning game.

1. Preparation

The quality of the preparation largely determines the success of the entire planning game.

When the head of department issues the direction to initiate a planning game, in the case of law drafts one should proceed from the point when a formulated draft is available or at the latest when the draft of the head of section is drawn up an agency must be included that is to execute this direction. The agency's task is the following:

- preparation of the test with regard to content and organization,
- conduct of the test throughout its execution

- analysis, assessment and written summary of the individual results.

Preparation of the content comprises the application of the draft to be tested to a test situation including the winning and preparation of the participants of the planning game. Before beginning with the individual assessment, it is necessary to develop a rough concept in which already all those points are included that need to be considered in the preparation of the test. In this rough concept the following needs to be elaborated on:

- the draft or parts of the draft that are to be tested and the objectives that are attached with regard to the groups the planned regulation is aimed at,
- the form of the game,
- the planned course of the test as such as well as the schedule,
- the agencies that have to be contacted regarding the recruiting of the participants from the future fields of application.

The organizational preparations mainly comprise:

- the coordination of the dates for the execution and evaluation of the test with the participants,
- provision of the necessary rooms, compilation of the information folders, etc.

Before the actual tests begins, the participants should be drawn together at one place for two to three days and carefully prepared for the planning games through lectures and discussions.

2. Execution

Task of the heads of the game during the execution is to control its course, especially:

- to supplement or correct the objective if necessary,

- to submit new forms of cases or formulations of the project on the basis of interim results,
- to give information to the participants (clarification of questions concerning the draft of the law, etc.),
- to correct mistakes of the participants (e.g. losing track of the reality that has been reproduced in the test),
- to ensure that the schedule is adhered to,
- to record the course of the test in writing.

Because the test is devised to gain insights about the draft tested, the assessment that comes at the end is of the utmost importance. The basis for the assessment by the heads of the game is provided by the experience reports of the individual participants, which should contain criticism and possibly suggestions for improvement.

After the evaluation of the experience reports by the heads of the game a final consultation with all the participants is to be held, in which the reports are explained individually.

On the basis of this final discussion and the experience reports, the heads of the game compile a final report, subdivided into the results of the test and suggestions for improvement, which is submitted to the agency which requested the test for evaluation.

3. Conclusions

Regarding the question whether the practice test should be preferred to the planning game, theoretical reflections favour the practice test for the testing of regulatory legal provisions. Practical reasons however oppose this when preparation and execution of the practice test would in all exceed more than about 9 months. On the whole, the decision for the execution of the precursory checking requires reflections on the following points:

- the careful weighing of the risks related to the checking,
- the estimation of a suitable point in time,

- the choice of suitable methods,
- the principal upper limits,
- the potential impairments of the results,
- as well as the usability of the results and the chances of utilization.

In spite of these limitations, one comes – from the perspective of profitability – to the unambiguous vote in favour of a more frequent use of law tests in the form of planning games and practice tests.

An initial step in this direction is the resolution of the Federal Government dated 20th December 1989 "on the measures for the improvement of law making procedure and administrative regulations" according to which in suitable cases "planning games, practice games and the like" should be applied more often.

The methods used are largely still unfamiliar to the legislative experts. Nor will a Ministry, on its own account, take upon itself the work and the costs of a law test and the uncertainties pertaining to the results. Furthermore, the capacities for the development and execution of these procedures exist neither in the ministerial administration nor in research to a satisfactory degree. It would thus be useful if the legislator included the obligation of a precursory checking of drafts of laws in the statutory authorization for important legal or administrative provisions.

DEREGULATION: REDUCING STATE ACTIVITIES

Dr. *Christoph Hauschild*

I. DEREGULATION: TERMINOLOGY AND CONCEPTS

In industrialized countries, just as in newly industrialized countries based on the market economy, the question as to the proper role for the state to play and the proper boundaries of state action is often discussed under the term "deregulation". However, the term "deregulation" is used in a number of differing ways. It appears to be difficult to agree upon clear terminology. In countries with a strong legalistic tradition, i.e. countries with administrative law, where state action is predominantly guided by the law, the term "deregulation" refers to the intensity and scope of legislation.

In the German case the term "deregulation" implies that there is an abundance of laws (primary or secondary legislation) or administrative provisions. This observation applies to the efforts towards deregulation taken by the Federal Government, even though economic objectives are the guiding motives. The economic orientation is reflected in the Government's policy statement:

> "The Federal Government regards the reduction of the number of regulations in industry, which has increasingly grown over the last decades, as one of the major tasks concerning its economic policy. This policy aims at greater economic freedom, more market, additional competition and more prosperity."

In 1987 the Federal Government set up a Deregulation Commission with the task of submitting specific proposals on reducing market access restrictions and price and quantity regulations in order to give the economy more flexibility and to improve growth and employment prospects.

After the report by the Deregulation Commission was completed in the spring of 1991, the Commission's 97 proposals were submitted to a working group of 6 Members of Parliament (from the political parties in power) for approval. The working group agreed upon all but 18 proposals.

Following this decision, the Federal Ministry of Economics now compiles on a regular basis the deregulation measures which have been initiated by the Federal Government over the last years. The most recent report is from April 1994. The sections of this report are divided according to the responsibilities of the federal ministries. A list of deregulation measures from 16 out of the 18 federal sector ministries is included in the deregulation report. It thus covers all measures which can in some way be related – sometimes in a somewhat remote sense – to the overall objective of reducing regulation or administrative barriers. The large variety of proosals, initiatives and adopted measures ranges from amending laws to facilitate investment in the housing and building sector to internal acts of reorganization within the federal administration, such as giving the Federal Office of Health a new institutional structure. Nevertheless, it is possible to discern the following main fields of endeavour:

- liberalization of markets and professions
- improvement in the quality of law-making and simplification of administrative procedures
- privatization of public tasks and activities.

The various deregulation projects are dealt with by the sector ministry concerned. The distribution of responsibilities among the federal sector ministries follows the principle of ministerial autonomy. With all necessary qualification, the basic policy issues in the context of deregulation are attributed as follows:

- liberalization of markets: Ministry of Economics
- quality of law-making: Federal Ministry of the Interior
- privatization: Federal Ministry of Finance.

In any event, the Common Ministerial Rules of Procedure require the inclusion of all sector ministries concerned according to their respective sphere of competence.

Thus in Germany the term "deregulation" is not restricted to a well-defined field of activity or competence within the Federal Government. One has to come to the conclusion that "deregulation" is used in the

broadest possible sense. This observation leads us on to the question as to whether it is at all legitimate to speak of a German deregulation policy or deregulation programme.

There is justification for speaking of a deregulation policy when the terminology is used to indicate the striving for a leaner and more efficient state. However, it leads to misconceptions when the terminology is used to suggest that deregulation will result in less regulation in the sense of the number of laws and legal provisions. As to the latter aspect, the choice between deregulation and regulation appears to be a false one.

As numerous experiences have shown, the development of leaner and more competitive structures in the public sector has been accompanied by reregulation providing for a new regulatory framework. Such "post-deregulation regulation" is, however, different in quality: it provides for a coordinating and monitoring role of government instead of an interventive one.

These developments, affecting the role of governments, the institutional set-up of public administration and administrative methods, will be discussed in greater detail in the final part of this paper after the following closer examination of the aspect of privatization.

II. PRIVATIZATION OF STATE ACTIVITIES

The policy of deregulation implies that governments have organizational choices at their disposal. The basic assumption is that a large number of public tasks is not irrevocably linked to public-sector organizations, but could equally be assigned to private organizations or self-regulating agencies.

Therefore, in the context of deregulation we have to deal with the question of choice between the public or private sector, or, in more

general terms, the question is rather how far the state should and could be "rolled back".

The measures either already taken or just proposed in this context of deregulation range from privatization to completely new forms of public delivery systems. Instead of privatization one could also use the term "marketization" of public services, which describes this development more accurately since market forces and private actors come into play.

At the moment Germany is experiencing a strong drive towards the privatization or marketization of public services. The most obvious cases are the privatization of public enterprises. On January 1st 1994 the German railways were transformed from public bodies into a joint-stock company. The reason given for this act of privatization was that the new company should be able to conduct business without being restrained by the specific rules of public-service legislation and of public budgeting. Starting next year the German telecommunications and postal services will also be transformed into joint-stock companies.

Subsequent to privatization, the newly formed joint-stock companies are still in the complete ownership of the Federal Government. However, the constitutional amendments accompanying this privatization authorize the Federal Government to give up its majority shareholding after a certain period of time.

These large-scale privatization programmes, which concern the employment relationships of more than 1 million public servants, are still in process. For the civil servants employed under public-law status, special transitional regulations have had to be elaborated in order to allow them to work for a private company. In the case of German Railways a special public employment authority was established, which is exercising the function of a public employer while at the same time leaving the working capacity of the civil servants with German Railways. In the case of the post office, postal banking and tele-communications companies each company was granted the status of employer for the civil servants concerned.

The reforms have been put into effect very recently so it is as yet very difficult to draw lessons from them, especially since the motives for pri-

vatization were different in each of these cases. The German railways have been privatized in order to reduce the fiscal burdens in running the public enterprise, whereas the privatization of telecommunications services, which has been a profitable sector, aims at participation in the global tele-communications market.

The German experience can be integrated well into the review of privatization policies published by the World Bank. The report from 1992, which is entitled "Privatization: The Lessons of Experience", examines why governments, in both developing and industrialized countries, are increasingly turning to privatization to achieve their economic goals. According to the World Bank the main lessons are clear:

- First, private ownership itself makes a difference. There is a higher probability of efficient performance in private enterprise.
- Second, the process of privatization, though not simple, can and has worked.

It is not the purpose of this paper to discuss the economic impacts of privatization - which is of course the World Bank's major objective. What is of interest in our context is the framework for privatization decisions and the managerial set-up that ensures the implementation of privatization projects.

With regard to decisions on privatization, the World Bank gives emphasis to two major factors:

- First, the nature of the market into which the enterprise will be divested: competitive or non-competitive.
- Second, country conditions: the overall macroeconomic policy framework and capacity to regulate.

Those factors are illustrated and related to each other in the following figure:

Privatization: The Framework for Decisions

Country Conditions	Enterprise Conditions: Competitive Market	Enterprise Conditions: Non-Competitive Market
High Capacity to Regulate/ Market Friendly	Decision: * Sell	Decision: * Ensure or Install Appropriate Regulatory Environment * Then Sell
Low Capacity to Regulate/ Market Unfriendly	Decision: * Sell, With Attention to Competitive Conditions	Decision: * Consider Privatization of Management Arrangements * Install Market Friendly Policy Framework * Install Appropriate Regulatory Environment * Then Sell

Source: World Bank

What is important to note is that the World Bank considers the capacity to regulate as a major factor for successful privatization. When competitive structures are non-existent, privatization decisions require an appropriate regulatory environment that clarifies service goals and establishes administrative supervision. The findings suggest that self-regulation is only possible where governments are well organized and possess clear inside knowledge.

According to the World Bank study, the factors for success in managing privatization are speed, transparency and consistency in implementation. Lessons from various countries show that lack of clarity in the role and responsibilities of ministries as well as the lack of regular procedures for public accountability and weak design of the institutional set-up may hamper or delay decision-making.

As in many other actions, transparency in the decision-making process creates legitimacy and public support. Transparency in privatization transactions can be ensured by having:

- clear and simple selection criteria for evaluating bids
- clearly defined competitive bidding procedures
- disclosure of purchase price and buyer
- well-defined institutional responsibilities
- adequate monitoring and supervision of the programme.

Thus the World Bank report provides very valuable criteria on how to reduce state activities through privatization. As mentioned above, Germany is currently experiencing two largescale acts of privatization. Besides these two cases, the Federal Government is determined to use the instrument of privatization on a broader basis to release public administration from inefficient and costly services. This political objective is to be realized through a change to the Federal Budget Law.

According to Art. 7 of the Federal Budget Law, attention has to be paid to the principle of economy in drawing up and executing the federal budget. This provision was amended at the end of last year by the following sentence:

> "These principles require an examination of the extent to which public tasks or economic activities serving a public purpose can be discharged by contracting out or by privatization".

This provision requires an examination of means of reducing state activities. The question is how to put such a requirement into practise. It is the purpose of a further amendment to the Federal Budget Law to provide the procedure for receiving private bids. The procedure is called the "interest-declaration procedure" (Interessenbekundungsverfahren). The objective is to enable private suppliers of services to make a bid to perform a public task in a more efficient way. Consequently, under a draft proposal the following sentence is be added to the Federal Budget Law:

> "In suitable cases private suppliers of services shall be given the opportunity to show whether and to what extent they are as well or better placed to deliver public tasks or

economic activities serving public purposes (interest-declaration procedure)."

For the implementation of the "interest-declaration procedure" certain administrative rules have to be established. The basic requirements applying to such a procedure of transferring public tasks or activities to the private sector have already been discussed in the context of the World Bank report. First of all, the procedure must be open to competition and has to be transparent. It is essential that the public task or the economic activity serving a public purpose is described so precisely that an interested party can calculate the scope and costs of the task or activity concerned on the basis of this description. The description should include in particular:

- to what extent the interested party has to take on responsibility for the planning, construction and funding of the measure
- how the terms of ownership are to be regulated
- over what period of time the measure or activity is to be undertaken
- what decision criteria will be relevant in the "interest-declaration procedure".

The description should be orientated to functional requirements in order to allow the interested party to include in the bid all technical and organizational requirements.

The description could, for technical reasons, require a particular legal form of operation, specific capital resources or a specific location for the seat of the firm, as long as there is no discrimination against foreign interest. The description must also stipulate the procedure for fixing the price.

Furthermore, there must be public notice of an invitation to participate in an interest-declaration procedure. The public notice should include information on where to obtain the description of the public task or activity proposed for transfer. It must be clearly stated that the purpose of the procedure is not to award public contracts and that participants are not bound by their bids. On this basis interested parties have to

declare within a specified time-limit how they intend to carry out the public task and what price they are willing to pay.

This new procedure is still in the drafting stage. But it is an excellent example of the need for additional regulation in the context of privatization. The procedure applies to privatization as well as to contracting out. Through contracting out, government activities are deregulated without being placed irrevocably in private hands. Functions may be contracted out either wholly or to the extent specified in the order.

III. IMPACT OF DEREGULATION ON GOVERNMENT STRUCTURES

Deregulation, privatization and contracting out bring about a change in the structure of government. Public tasks have to be managed within government, without government, and across governments. The new structures lead to a hybrid state in which governments seek less command, more decentralization, reduction in the size of public sector and increased use of market-based policy tools. The previous chapters have exemplified this development.

However, as important as it is to increase the use of private or quasi-private means of service provision in order to preserve the financial stability of the state, one has to raise the question as to how this development fits into the constitutional and legal framework upon which public administration is based. An issue of principle would be that as to whether there are certain core functions which should remain within government itself. A very practical question in this context concerns legal liability when functions are contracted out, or that of what procedural rules find application.

In Germany we already have examples of so-called mixed-organizations, which at the same time operate on the basis of both private and public law. The most famous case is the "Treuhandanstalt",

which is responsible for the privatization of eastern Germany's state-owned enterprises. In view of such an institutional mix, the scope of administrative law must be clearly defined as it is, for example, in Art. 1 of the German Law on Administrative Proceedings.

The pluralism in administrative methods also affects the administrative court system. According to Art. 40 VwGO:

> "Access to administrative courts is accorded in all public law disputes which are not of a constitutional nature to the extent that such disputes are not expressly assigned to some other court under federal law."

The essential precondition for taking legal action before an administrative court is that the case touches a public law dispute. With the emergence of hybrid organizations, which are neither public nor private but on the borderline of both sectors, a key question for legal practice is determining the court of competent jurisdiction. In the case of the German Treuhandanstalt – as an example of a hybrid organization – it took several court rulings to determine the court of competent jurisdiction in respect of particular decisions on privatization.

The increasing variety in public-sector management, which is reflected in terms such as "policy networks" or "hybridization of public administration", seems to entail additional regulatory measures. Similarly international comparison suggests that deregulation policies might contribute to a more efficient state with fewer functions, but regulation in terms of new laws is needed in order to avoid distortion in the development of society. At the same time this observation provides a reason for improving the quality of law-making – of future law as well as of already existing law.

Finally, it is important to note with regard to the objectives of privatization that markets cannot operate in a vacuum. The World Bank made it clear that markets require a legal and regulatory framework which only governments can provide. And, at many other tasks, markets sometimes prove to be inadequate or fail altogether. It is, therefore, not a question of state or market: each has a major and irreplaceable role.

This lesson can be verified by developments in countries with large-scale marketization policies in the eighties. These countries are now experiencing a strong tendency towards the reregulation of formerly public activities.

PART II

IMPLEMENTATION OF LAWS

PUBLIC PARTICIPATION: MODELS AND PRACTICE IN ADMINISTRATIVE PROCEDURE, E. G. ENVIRONMENTAL PROTECTION, PHYSICAL AND URBAN PLANNING

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

I. POLITICAL AND ADMINISTRATIVE AIMS OF PUBLIC PARTICIPATION

1. Public Participation as Supplementing Representative Democracy

By possibility of public participation in a representative democracy is and in large settled in election law, the local government laws, the state constitutions, in the framework of association articles as well as in numerous protective laws.

Primarily those persons are enabled to positive action who represent others on the basis of a mandate or those belonging to the respective executive. Upon these the citizens may exert influence. This influence usually takes place via political parties or associations and thus follows a prescribed course.

A consistently representative democracy does not mutually exclude public participation, but it does not necessarily depend upon it.

Looking at the development of public participation in Germany, one may ascertain that the first forms of citizen participation initially developed in the framework of local government politics and there especially in the fields of land laws and traffic regulation[1].

In the 60s and 70s, the demand for a greater degree of public participation primarily came from the students' movement, the extra-parliamentary opposition and later from the citizens' action groups movement. From then on and especially following a decision of the Federal Constitutional Court ("Mühlheim-Kärlich"-Decision of the Federal Constitutional Court of 1979, the participatory exertion of influence was given greater import as the court ruled that legal protection is a main function of public participation in the proceedings of the courts as well as in those of the authorities.

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1 See: Urban Development Law, 27th July 1971 (Federal Law Gazette 1971 I., p. 1125), Amendment of the Federal Building Code, 18th August 1976 (Federal Law Gazette I. p. 2256).

In the ensuing time, the demand for more public participation, especially in the framework of the realization of environmentally relevant large-scale projects, lead to numerous amendments in the respective laws and regulations[2].

In the face of the continual desire for increased participation, there has been no lack of activities in the decades past, especially in order to achieve greater proximity between the planning authorities and the citizens by means of public participation.

In this context, in addition to the conception of legal protection already mentioned, the effort increasingly gained priority to achieve a broad consensus within the framework of administrative decisions by means of appropriate public participation.

Today, different forms of public participation exist in Germany which can be graded according to their degree of involvement, the degree of involvement reflecting the degree of possible influence on the decision procedure by those eligible.

Thus, the participatory forms can be categorized as follows:

- *Observation*

Observation is the weakest form of participation. Included in the rights of observation, which belong to the principle of publicity, are the right of access to files, the right to information and to be informed or the rights to participate in public decisions via observation. Observation is wholly restricted to the transmission of information. Opportunities for exerting direct influence are not attached.

- *Cooperation*

According to functional criteria, this form of public participation can be subdivided into the following types of cooperation: consultation, hearing and commentary, discussion, coordination and the right of proposal.

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2 See Section 10 BImSchG (Federal Law Gazette I. S. 274) and Section 29 Federal Environmental Protection Law, 20th December 1976 (Federal Law Gazette I. p. 3574).

Those in charge of decisions are *counselled* by advisory boards, committees or discussion groups. By means of transferring information, experts and organized representatives, within the framework of the decision process, have the chance to assess certain interests at an early point in time and thus to work on the convictions held in order to influence the pending decision.

The medium of hearings proves an opportunity for those involved to publicize their opinions. Whereas part of the hearing initially primarily serves to gain information, which applies to those felling the decision as well as to those involved, those embued with the decision are, in "legally protective" hearings, additionally under the obligation to process those interests revealed in the framework of the hearing concerning the material rights of those involved.

The *commentary* has a lesser degree of participation than the hearing as it is only ordered when the decision process is already preliminarily ended. Thus, it serves less to gain information than rather to subsequently coordinate the decision.

The *discussion* incorporates all the functions of those participatory forms depicted above with the addition that this form of communication takes place between those in charge of the decision and those involved and covers legal and factual questions as well as those regarding evaluation.

Coordination refers to an offer of cooperation in which the diverging interests between those involved and those endowed which the decision are attuned at an early point in time in order to achieve a consensus on the broadest base possible.

The *right to proposal*, as a further form of participation, achieves an especially high degree of public participation when those in charge of the decisions have to supply a qualified explanation for the decision when the proposals are not taken into account.

- *Decision Participation*

Decision participation is characterized by a decision process depending upon consensus. The decision process in a proceeding takes the

following course: The decision is prepared by a leading personage of those in charge of the decision, and the consent of the eligible participants is brought about in a separate participation proceeding.

The citizens in this form of participation are only indirectly involved as the decision participation competencies so far were primarily granted to experts and interest representatives as members of collegiate bodies.

An exception is the local referendum (Bürgerentscheid), which is an institutionalized form of decision participation und direct citizen participation.

2. Aims of Public Participation

The possibility of participation follows different aims according to the point of view taken. One can therefore distinguish between state-oriented and citizen-oriented aims.

In the framework of the state oriented-aims, public participation is to serve the aim of improved integration of the citizen into the community, improved administrative action and an additional legitimation of administrative decisions.

The aim of integration includes that the citizen, when he participates in state action at an early point in time, no longer only views it as an alien but also as his own matter. Thereby, the individual's sense of responsibility and his communal sense with regard to the matter are enhanced. Public participation in the environmental compatibility tests may be cited here, which has the aim of encouraging the environmental consciousness of the people.

Furthermore, public participation can improve the rationalization of administrative action, as the decision processes are primarily information processing processes and conseqently the quality of a decision is dependent upon whether the authority has created a broad and secure decision basis for itself by letting the public participate early on, thus safeguarding itself against "*organizational blindness*".

A further effect of public participation at an early point is the improved effectiveness of the authority's decision. The early broadening

of the mind of the person in charge of the decision with regard to the scope of information supports the possibility to assess and foresee the administrative proceedings and leads to securing the liability of the decision as well as the execution and initiation of the ordered measure.

When, for example, in planning processes it only becomes evident at a later point in time that the plan does not meet with consent in the population and that significant matters have not been taken into consideration in the weighing process, then considerable investments in time and administrative work power are necessary in order to devise a plan that is factually correct and accepted by the public.

In the legislation process for Federal Laws (Bundesgesetze) the legislator has put these requirements into practice by determining the obligation to gather information for the Federal Ministries in the Sections 24 and 25 GGO II.

> Section 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.

> Section 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.

The hearing of associations in the phase of preparation in the legislation process has several advantages:

- due to the existent special professional knowledge in the associations the ministerial bureaucracy taps a source of information that is useful, often even indispensable, for the compilation of the draft of the official in charge;
- by including the associations, the different interest groups are channelled, by means of which the respective ministerial official in charge gains a rough picture of which concrete interests are affected by a planned legal amendment.
- the basis of a non-obligatory draft from the official in charge makes it easier in this phase to influence the later formulation of the draft as the ministry has not yet committed itself and thus perceives incitations and suggestions more as an enrichment.

In some of the ministries the calling upon experts is legally prescibed:

- Section 94 BGB Participation of the respective trade unions with bills concerning the status of the civil servants, especially the salary laws;
- Section 29 Federal Environmental Protection Law provides the opportunity for acknowledged legally able nature protection organi-

zations to express their opinions in the compilation of nature and countryside protection regulations.

The enhancement of citizen participation, even if it is in part only mediated through experts and association representatives, has the effect that on the one hand the administrative decision has become more closely bound to the citizen's will, whereas on the other hand the citizen also accepts the decision more readily and thereby it also serves to provide an additional democratic basis for the decision. Especially the experiences with the citizens' initiatives have shown that in the framework of conflict solution regarding environmentally relevant planning and permits an early and offensive public participation is necessary. The obligation of the authority to achieve a consensus as early as possible by involving the citizens thus also serves to realize the principle of the sovereignty of the people and consequently increases the legitimacy of governmental decisions.

The citizen-oriented objectives in the framework of citizen participation primarily attempt to realize the emancipation and legal protection concept.

The traditional means of influence, which the representative democracy offers in the form of elections and party membership, are partly not regarded as sufficient by the individual in order to directly influence administrative decisions. An intensification of the public participation has the effect that the individual can bring his interests, claims, ideas and needs to bear in the administrative decision process to a greater extent.

A further intention of public participation is the improvement of the citizen's legal protection, as intensified early citizen participation ensures that the administrative process of will formation and decision becomes clearer and more easily comprehensible so that the citizen is enabled to make a judgement und consequently to assert violations of the law more effectively. The essential prerequisite for the assessment of administrative acts as well as for an effective legal protection is therefore its publicity, at least regarding the affected citizen and/or the granting of his involvement in the administrative acts in the form of participation. Thus,

a positive assertion can be derived from the principle of the constitutional state regarding the necessity of the participation of the affected parties, but not that of a general public participation.

3. Problems of Participation

The strict primacy of a representative democracy has created a stable democratic governmental system. This system – and Article 20 of the German Constitution (Grundgesetz) does not oppose this – is open to forms of a more intensive public participation as well as for limited plebiscitary elements.

Regarding the issue of supplementation and modification of the system by means of integrating various forms of public participation, the possible disadvantages must not be withheld.

First of all, the citizen must after all be willing to participate in the administrative decision. To overcome the lack of interest on the part of the citizen is the task of the administration. The latter has to ponder upon the way in which "*participation support*" can best be achieved.

The individual self-realization of the citizen by means of participation is also impeded in those cases where a larger number of people is involved.

Furthermore, early public participation in administrative procedures may also protract the decision process and demand considerable additional employment of the administrative workforce. Opposed to this point of view is the chance that early public participation creates an understanding for the planned intentions and enables conflicts to be resolved before these lead to time-consuming appelate procedures against the planned project at a later point. The articulation of one's involvement is especially useful from the point of view of the anticipated legal protection[3].

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3 Especially the requirements for citizen participation, which have existed since the Federal Building Law Amendment of 1977, and the increasingly more extensive bringing in of so-called representatives of public issues were often viewed as the causes of too lengthy proceedings and related investment blockades or even of

A further problem lies in the possible disregard for the "general interests". The sum of the individual interests does not usually correspond with the general interests. It is very difficult for these general interests to make themselves heard and to win through.

II. PARTICIPATION IN LOCAL SELF-GOVERNMENT

In the framework of the fundamentally demanded homogeneity of the German Federal States (Länder; Art. 20 II 2, 38 I 2 GG), these can modify their State Constitutions and introduce supplementary instruments for direct democracy for the local level, of which the individual States have made different use.

The German Constitution itself even allows (smaller) communities the form of a parish meeting (Art. 28 Paragraph 1 Sentence 3 GG) as the most far-reaching form of direct decision. After the territorial reform and the general increasement in size of the communities it is pratically of no import.

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the abandonment of urban development planning. The empirical studies that exist to date draw a much more differentiated picture: In the case of development plans the procedural time spans have over the last 15 years only increased insignificantly. Although with around 30 months for the average development plan it is surely too long. However, the reasons for this and other procedural difficulties are only to a lesser degree caused by the regulation standards. More than not, they arise from the conflict potential of the plans themselves and from certain internal structural problems in the administration.

1. Bürgerentscheid (local referendum)[4]

The referendum can be considered a specific and practical procedure through which citizens exercise their right to participate in the running of public affairs.

It may be considered to be the most democratic method, making it easier to win acceptance of sometimes unpopular decisions from the majority of the population.

The question of citizen participation by means of local referendums is dealt with very differently in the legislation of the various Länder. It receives the most comprehensive treament in Baden-Württemberg, Brandenburg, Hessen, Saxony, Saxony-Anhalt and Schleswig-Holstein and Thuringia, all of which have the institution of the *"citizens' decision"* (Bürgerentscheid).

Local referendums can be initiated in either of two ways:

- the municipal council may decide on its own initiative. This decision must be taken by at least the majority of the members of the municipal council (in Baden-Württemberg, Saxony and Schleswig-Holstein two-thirds),
- alternatively, the citizens may request a referendum (Bürgerbegehren) by written applications, which must be signed by at least 10 % of the local citizens.

The "citizens' decision" (Bürgerentscheid) may take place only on what are deemed important municipal matters which qualify as such either in the light of legislative provisions or on the basis of a stipulation in the constitution of the municipality. Except in Schleswig-Holstein and Baden-Württemberg, the law lays down a negative catalogue of matters which may mot be submitted to referendum:

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4 Source see: Council of Europe. Local referendum, local and regional authorities in Europe, No. 52, 1993. Report prepared by the Steering Committee on Local and Regional Authorities (CDLR) for the 10th Conference of European Ministers responsible for Local Government The Hague 15-16 Sept. 1993.

a. tasks carried out on the instruction of a higher authority and matters which by law are the responsibility of the municipal council itself or of the mayor;

b. questions concerning the internal organisation of the municipal administration;

c. the legal status of the municipal councillors, the mayor and the municipal staff;

d. the budgetary regulations, municipal levies and the charges for municipal services and transport undertakings;

e. the annual accounts of municipal enterprises;

f. decisions in legal proceedings.

On the other hand, two Länder have drawn up a positive catalogue of matters which are eligible for referendums. In Baden-Württemberg these include:

a. the establishment, substantial enlargement and abolition of a public institution or facility intended to serve the inhabitants as a whole;

b. modification of the boundaries of a municipality or Landkreis;

c. the introduction or abolition of neighbourhood elections;

d. the introduction or abolition of the constitution of a district or locality.

Since 1975 in Baden-Württemberg about half of the citizens' initiatives have met the conditions of acceptance, while in about two-thirds of the citizens' decisions called on the basis of such a popular initiative the outcome was favourable to the objective of the popular initiative. The most common topics of such local referendums were planning questions especially concerning public facilities.

It is noteworthy, however, that in Baden-Württemberg many popular initiatives and also citizens' decisions fail to meet the formal conditions. For this reason there are sometimes calls to facilitate them, e.g. by reducing the quorum, extending the deadline for popular initiatives against a decision of the municipal council or expanding the sphere of what are deemed important municipal matter.

2. Direct Election of the Mayor

The direct election of the mayor by universal suffrage is politically one of the sustainable processes of the citizen's integration on the community level.

The universal suffrage strengthens the mayor's position with regard to the population and the municipal council.

In Hessen in the referendum (Volksabstimmung) of 1991, more than 80 % of those who partipicated voted for the installation of direct election of the mayor.

The direct election has several advantages:

- it provides the citizen with the choice between different candidates and thus strengthens his rights of self-determination and participation.
- it curbs the predominance of the parties to some extent, as experience has shown in Baden-Württemberg where especially candidates who had a distanced relation to their party were elected and re-elected. Half of the mayors in smaller communities there did not even belong to any party at all.
- the direct election challenges able, responsible and active people to run for office, who are self-confident, but who also attach great importance to having political leeway.

The universal suffrage promotes a personality profile that combines the positive aspects of an administrative expert with those of a politician: know-how, the power to integrate and political charisma.

III. PARTICIPATION IN ADMINISTRATIVE PROCEDURES

1. Participation in the Sense of Sections 11 of the Law on Administrative Proceedings [Verwaltungsverfahrensgesetz (VwVfG)]

The designation "participant" is one of the key terms of the law. The term "participant" is not synonymous with that of the "person involved", which the VwVfG also uses. "Involved" refers to a person whose legal interests are affected by an administrative act. Section 11 VwVfG determines who can actually participate in an administrative procedure:

> Section 11. Capacity to participate. – The following shall be capable of participating in such procedure:
>
> 1. Individuals and bodies corporate,
>
> 2. Associations, in so far as they can have rights,
>
> 3. Authorities.

Referring to this regulation, Section 13 VwVfG then lays down who – under the precondition of his capacity to participate according to Section 11 VwVfG – is on the basis of his relation to a particular administrative procedure a *person involved* or who can be called in as such.

> Section 13. Participants. – (1) Participants shall be:
>
> 1. those making and opposing an application,
>
> 2. those vis-à-vis whom the authority wishes to direct or has directed the administrative act,
>
> 3. those with whom the authority wishes to conclude or has concluded an agreement under public law,
>
> 4. those who have been involved in the procedure by the authority under paragraph 2.
>
> (2) The authority may ex officio or upon request involve as participants those whose legal interests may be affected by the result of proceedings. Where such result has a legal

effect for a third party, the latter may upon request be involved in the proceedings as a participant. Where he is known to the authority, he shall be informed by it that proceedings have commenced.

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

The Law of Administrative Procedure (Verwaltungsverfahrensgesetz) intends special laws of procedure for the persons involved:

a) The right to be heard according to Section 28 VwVfG

Content of the regulation is the hearing of the persons involved prior to the decree of an administrative act that affects their rights. Hearing according to Section 28 VwVfG means:

- the opportunity the authority grants the person involved to comment on the facts significant for the decision and
- the consideration of these comments in the decision regarding the person involved.

b) The right of access to the files according to Section 29 VwVfG

Object of the regulation is to grant those involved (in the sense of Section 13 paragraph 1 VwVfG) a fundamental legal claim to access to the files in order to safeguard their legal interests, a claim that takes into due account the interests relative to secrecy of others involved or third parties and the public interest regarding the authorities fulfillment of its tasks in compliance with the regulations.

c) The right to counsel and information according to Section 25 VwVfG

This regulation puts into concrete terms the public administration's duty of welfare and assistance with respect to the administrative procedure. It is supposed to prevent that

- a legally insufficiently informed citizen, unversed in dealing with an authority, cannot claim or assert his entitled rights and that

- uncertainties as to the legal situation stand in the way of a speedy and proper implementation of the administrative procedure.

2. Procedure of official approval of a plan (Planfeststellungsverfahren) Section 72 VwVfG

The hearing procedure according to Section 73 VwVfG serves the aspects of information and the balancing of interests. In the framework of the entire planning procedure, the hearing procedure related to time lies between the completion of the plan as such and its official approval. The persons affected in their interests and the authorities concerned in their work should be informed of the planning in progress in order to be able to influence its outcome either by means of objection or comment. After all, it should be attempted to achieve a balance between the opposing interests before the decree of the unilaterally binding declaratory decision (Planfeststellungsbeschluß) and to secure the broadest possible consent of those involved for the final plan.

IV. PARTICIPATION IN URBAN LAND USE PLANNING, TOWN DEVELOPMENT AND ENVIRONMENTAL PROTECTION

1. Urban Land-Use Planning[5]

In recent years both planning in already built-up areas and virgin developments have come up against entangled and conflicting sets of interests, which makes the role of intensive involvement by the general public all the more crucial.

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5 See: The Framework Condition Affecting Urban Development in the Federal Republic of Germany, Urban Planning Law, Federal Ministry for Regional Planning, Building and Urban Development, Translated by Prof. Dr. Carl-Heinz David and Dr. Graham Cass, University of Dortmund, 1987.

Therefore the provisions on public participation within the procedures governing the preparation of urban land-use plans form an important part of the Federal Building Code. The Federal Building Code (FBC) ensures that the interests of those affected and aggrieved by a planning measure are given full consideration by requiring two stages of public participation which are part and parcel of the following multi-stage process:

Urban Land-Use Planning Procedures
Procedural stages in urban land-use planning (basic model)
Preliminary stage

Resolution on the preparation of a plan

First phase of public participation
- Early involvement of the general public
- Participation of public agencies and of neighbouring municipalities

Second phase of public participation
- Draft plan goes on public display
- Repeated public display period (if necessary) or consultation with those directly affected following modifications to the draft plan

Resolution by municipality on adopting the land-use plan (with legally binding land-use plans this is a resolution to adopt a local statute)

Plan approval or notification procedure

(Legal review by the supervisory authorities)

Plans comes into force on issuing of public notice

a) Initial public participation

This takes place during the first phase of work on the plan prior to the draft plan being published or placed on public display. The FBC does not describe this process in any detail, but simply regulates the *principles involved.*

The general principles underlying the procedure to be followed during initial public participation are regulated in Section 3, para. 1 of the Federal Building Code. Regulation of the details is left to individual municipalities. However, the FBC lays out the fundamental principles which should govern public participation in specific cases. The central provision on public participation requires that

> "the public is to be informed at the *earliest possible stage* about the general aims and purposes of planning, about significantly different solutions which are being considered for the redesign or development of an area and of the probable impact of the scheme."

The Federal Building Code also states that the public is to be given suitable opportuninty for comment and discussion.

A matter of practical importance is the temporal relationship between public participation and participation by public agencies (e.g. water authorities, etc.) and neighbouring municipalities which may be affected. It can be prudent to consult the latter first so that their views are already available during the period of public participation; in this way "hopeless" variations to the plan can be excluded from consideration from the outset.

b) Formal public participation

Completion of the initial public participation procedure is followed by the second stage of formal public participation. Consultation at this point is focussed on the draft plan, which is placed on *public display*, or "unveiled". The normal form for public notice to take nowadays is publication in the municipality's official gazette or in the local press.

Public notice also keeps the amount of information included to the minimum required for members of the public to determine whether they are personally affected, and to make use of their rights of participation. One common practice is to state briefly the aims of a planning measure in the public notice and to add a small extract taken from the actual plan.

The draft plan, along with the explanatory report or justification, is then placed on public display for a period of one month. Any member of the public is entitled to inspect the plan and to make suggestions or raise objections, i.e. to be heard on their views. Depending on their significance, they may be taken up in the consideration stage along with all other viewpoints which have been previously submitted in the course of the plan development procedure.

The requirement that conflicting interests should be carefully weighed up is a fundamental obligation within the preparation of urban land-use plans. Under Section 1 para. 6 of the Federal Building Code public and private interests are to be duly weighed and fairly balanced. Section 1 para. 5 of the FBC lists the most important concerns which need to be taken into account during the preparation of urban land-use plans. This may take the form of a written statement which is handed in, or objections may be expressed orally; in the latter case they are taken down in writing by officials in the administration. The entitlement to participate in this stage of consultation extends to the same circle of people as in the case of initial public participation. Here, however, there is no duty to provide further explanations as was the case during initial public participation.

The treatment of suggestions and objections during the phase of formal public participation is regulated in detail by the FBC: the municipality is obliged to examine all statements and to consider carefully the matters of substance which have been raised. Those who have submitted suggestions or objections are to be informed individually of the outcome of this examination. The municipality may deviate from this form of communication in what are termed mass procedures, a situation which arises quite frequently in connection with controversial planning schemes and large-scale projects, where more than 100 people lodge what is in substance essentially the same objection. In this case it is sufficient for the results of the examination by the municipality to be made available for inspection by the people concerned. In practice the municipality usually performs this task by issuing a public notice stating the offices at which the outcome of the examination of objections may be inspected during normal working hours. It is usual and considered to be good

practice to notify at the same time whoever can be identified as having initiated a mass objection of this kind (e.g. organisers of petitions, local action groups, etc.).

Should the municipality decide not to accept the arguments behind these suggestions and objections, it is required to submit these to the higher administrative authority, along with a statement explaining its position.

In practice only few citizens participate in urban land-use planning procedures. A survey[6] revealed that merely 10 % of citizens had ever seen a development plan and that only 30 % were even aware of the existence of a public participation procedure in the course of the preparation of development plans. In addition to this modest participation of citizens with regard to numbers, a further difficulty arises in the face of its social imbalance: It is predominantly the articulate members of the middle class who become engaged in planning procedures. For example, only 16 % tenants compared to 29 % owners claimed the opportunity of participation. The participation of women and elder people also proved to be below the average. The experiences gained in the routine of public participation also reveal that substantial problems in communication exist between the administrative planners and the citizens and that members of the administration are not trained in handling citizens, who are laymen in the field of planning.

2. Urban Development Laws

A field of especial interest within the framework of public participation is urban redevelopment. Redevelopment measures are measures by which an area is substantially improved or redesigned in order to remedy deficiences in this field.

The beginning of an urban redevelopment is generally constituted by preliminary investigations as to the necessity of renewal measures. In this regard it must be kept in mind that redevelopment measures may

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6 Studies in Local Government and Politics No. 13, Public participation and local democracy, Oscar W. Gabriel, 1983.

lead to a substantial change of the quarter. This also applies when the redevelopment is conducted as an areal redevelopment (Flächensanierung), in which many buildings have to be demolished and replaced with new ones. But also in the case of more cautious urban redevelopments in which the buildings as such remain or are only improved or made more comfortable by building measures affecting their original substance, the residents have to reckon with many inconveniences over relatively long periods of time. For this reason the Urban Development Act, in its second chapter, intends an intensive involvement and right of participation for those affected:

> Section 137. Participation and Involvement by Parties Affected. Redevelopment measures shall be explained to and discussed with property owners, leaseholders, tenants and any other parties affected at the earliest possible opportunity. Parties affected shall be encouraged to involve themselves throughout the process of rehabilitation and to implement the physical measures required for redevelopment, and shall be given every possible assistance.

The regulation thereby aims in several directions:

- it is to ensure an early participation of those affected as a means of informing the planning community on the ideas of affected parties;
- furthermore it is, with regard to the community's rights of intervention, to increase the publicity of the planning process and,
- it is finally to improve the consideration of those interests of the parties affected significantly pertaining to the decision and in need of settlement.

The involvement of the parties affected by redevelopment measures in the process of preparation and execution is also to serve as an improved means to safeguard their legal position with regard to the extensive opportunities of intervention of the community within the framework of redevelopment. The community cannot be content with a formal participation, but must enable the affected parties to actively participate in the redevelopment, either by means of *information*, *con-*

sultation or other means of assistance. In this respect Section 137 Federal Building Code expresses the initially mentioned idea of increased effectiveness in that the planning process is improved and the success of urban development measures heightened by means of close coordination of the public and private measures.

> Federal Building Code. Section 139. Participation and Involvement of Public Agencies. (1) Each within its respective jurisdiction, the federal authorities, including their statuory separate estates, the federal states, the associations of municipalities and other corporations, bodies and foundations under public law shall support the preparation and execution of redevelopment measures as part of urban development.
>
> (2) The provisions under Section 4 on the participation and involvement of public agencies apply accordingly. Public agencies shall in addition notify municipalities of any alterations to their intentions.
>
> (3) Where an alteration is intended in respect of the aims and purposes of redevelopment or coordinated measures and plans to be undertaken by public agencies, the parties concerned shall consult with each other without delay.
>
> (4) On land given over to the purposes mentioned in Section 26 no. 2. and on land of the type described in Section 26 no. 3. redevelopment measures as part of urban development may only be executed with the consent of the agencies concerned. The agency shall give consent where, even after taking due account of its own responsibilities, an overriding public interest exists in the execution of the redevelopment measures.

According to this regulation, public agencies (corporations, bodies and foundations under public law) have the obligation to support the municipality in the preparation and execution of redevelopment measures as part of urban development. On the other hand, the municipality is obliged to provide opportunity for the public agencies whose tasks may be affected by the redevelopment measures to comment as

early as possible. The public agencies on their part are obliged to state their views. They are especially obliged to notify the municipality of any alterations to their intentions. According to Section 139 para. 3 Federal Building Code the municipality and the public agencies have to consult without delay when an alteration is intended in respect of already coordinated aims and purposes of redevelopment or of measures and plans to be undertaken by public agencies. This regulation is to put the respective addressee with the duty to notify into the position to review his own plans and measures or to comment on the plans and measures of the other party.

3. *Environmental Protection Law*

Environmental Protection Law, the rules of which are currently interspersed in many laws and regulations, is to be comprised in an Environmental Code. In the new draft of the Evironmental Code, Section 39 establishes public participation in the realization of environmental projects:

> Environmental Code. Section 39 Public Participation. (1) The competent authority is required to hear the general public within the course of the approval procedure on the basis of the documentation which has either been placed on display or made available for inspection by the general public pursuant to section 37. The hearing procedure shall be subject as applicable to the requirements of section 73, paragraphs 3 to 7, of the Code of Civil Procedure....

Thereby the citizens receive the opportunity to be heard within the framework of the approval procedure regarding the effects of the project on the environment, their proposals, suggestions and objections. In this context, the draft of the Environmental Code does not limit the group of citizens in the sense of a participation of only the affected parties, but fashions the involvement in the form of a general public participation, for which the Code of Civil Procedure serves as the procedural basis of the hearing procedure.

LEGAL SOURCES

Excerpt of the Law on Administrative Proceedings of 25 May 1976

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

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

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

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

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

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

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

(3) Inspection of documents is carried out in the offices of the authority keeping the records. In individual cases, documents may also be inspected at the offices of another authority or of the diplomatic or consular representatives of the Federal Republic of Germany abroad. The authority keeping the recods may make further exceptions.

Division 2: Planning proceedings

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

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

widely in the district in which the project may be expected to have its effect.

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

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

(3) The plan shall, at the instigation of the hearing authority, be open to inspection for a month in those communities in which the project may be expected to have its effect. This procedure may be omitted where those affected are known and are afforded the opportunity of examining the plan during a reasonable period.

(4) Any person whose interests are affected by the project may, up to two weeks after expiry of the period during which the plan is open to inspection, enter opposition to the plan in writing or in a manner to be recorded with the hearing authority or the commune. In the case referred to in paragraph 3, second sentence, the period for objection shall be determined by the hearing authority.

(5) The communes in which the plan is to be made public shall announce the fact in the usual manner in the area at least a week beforehand. The announcement shall state:

1. Where and for what period the plan is open to inspection,
2. That any objections must be made known to the authorites mentioned in the announcement within the period set for that purpose,
3. That in the event of a participant failing to attend the meeting fixed, discussions can proceed without him and later objections may be disregarded in discussions and decisions,
4. That:
   (a) those persons wishing to enter opposition may be informed of the dates of meetings for discussions by public announcement,

(b) the notifications of decisions as to objections may be replaced by public announcement,

if more than 300 notifications have to be made.

Persons affected who are not locally resident but whose identity and residence are known or can be discovered within a reasonable period shall at the instigation of the hearing authority be informed of the publishing of the plan, attention being drawn to sentence 2.

(6) Upon expirty of the period set for objections, the hearing authority shall discuss those objections made to the plan in good time and the opinions of the authorities with regard to the plan with the person responsible for the project, the authorities, the persons affected and those who have raised the objections. The hearing authority may also discuss objections which have been made too late. The date of the meeting for discussion must be announced at least a week beforehand in the manner usual in the district. The authorities, the person responsible for the project and those who have raised objections shall be informed of the period set for objections. If apart from notifications to authorities and the person responsible for the project more than 300 notifications are required, this may be done instead by public announcement. Public announcement shall be effected, notwithstanding sentence 2, by publishing the date of the meeting for discussion in the official journal of the hearing authority, as also in local daily newspapers with wide circulation in the district in which the project may be expected to have its effect. The period referred to in the second sentence shall be calculated from the date of publication in the official bulletin. Otherwise, the discussion shall be governed by the provisions concerning the oral hearing in formal administrative proceedings (section 67, paragraph 1, third sentence, paragraph 2, Nos. 1 and 4 and paragraph 3, and section 68) as appropriate.

(7) Notwithstanding the provisions of paragraph 6, sentences 2 to 5, the date of the meeting for discussion may already be fixed in the announcement under paragraph 5, second sentence.

(8) If a plan already opened for inspection is to be altered and if this means that the sphere of competence of an authority of the interests of third parties are affected for the first time or more greatly than hitherto,

they shall be informed of the changes and given the opportunity to raise objections or state their points of view within a period of two weeks. If the change affects the territory of another commune, the altered plan shall be oppened to inspection in that commune; paragraphs 3 to 6 shall apply as appropriate.

(9) The hearing authority shall issue a statement concerning the result of the hearing and shall send this together with the plan, the opinions of the authorities and those objections which have not been dealt with, to the planning authority, if possible within a month of the conclusion of the discussion.

Excerpt of the German Federal Building Code

Chapter I: GENERAL URBAN PLANNING LEGISLATION

Part One: Urban Land-Use Planning

Subdivision One: General Provisions

Section 1. The Scope, Definition and Principles of Urban Land-Use Planning.

(1) The function of urban land-use planning [Bauleitplanung] is to prepare and control the use of land within a municipality, for buildings or for other purposes, in accordance with this Act.

(2) Urban land-use plans comprise the preparatory land-use plan [Flächennutzungsplan] and the legally binding land-use plan [Bebauungsplan].

(3) It is the responsibility of municipalities to prepare land-use plans [Bauleitpläne] as soon as and to the extent that these are required for urban development and order.

(4) Land-use plans shall be brought into line with the aims of comprehensive regional planning [Raumordnung und Landesplanung].

(5) Land-use plans shall safeguard planned urban development and a socially equitable utilisation of land for the general good of the community, and shall contribute to securing a more humane environment and to protecting and developing the basic conditions for natural life. In the preparation of land-use plans, attention is to be paid in particular to the following:

1. the general requirement for living and working conditions which are conducive to good health, and the safety of the population at home and at work,
2. the housing requirements of the population – whilst avoiding unbalanced population structures – increasing property ownership among broader sections of the population development,
3. the social and cultural needs of the population, in particular those of families, the young and the elderly and those with handicaps, as well as to the requirements of the education system and the need for sports, leisure and the recreational facilities,
4. the preservation, renewal and development of existing local centres [Ortsteile] and to the shaping of the town- and landscape,
5. the requirements relating to the preservation and maintenance of historic monuments and to local centres, streets, and public spaces of historic, artistic or architectural importance which warrant preservation,
6. the requirements of Churches and religious organisations under public law for worship and pastoral care,
7. the requirements of environmental protection, nature protection and the preservation of the countryside [Landschaftspflege], in particular of the ecological balance in nature, and of water, the air, the ground including its mineral deposits, and the climate,
8. economic requirements, including maintaining the structural role of medium-sized companies, in the interests of local, close-to-the-consumer supply to the population, the requirements of agriculture and

forestry, of transport including local public transport, of the postal and telecommunications services, public utilities – in particular power supply and water, waste disposal and sewerage, and the protection of natural resources and the preservation, protection and creation of employment,

9. defence and civil defence requirements.

Land shall be used in a manner which is both economical and considerate. Land which is currently in agricultural or residential use, and woodland, shall only be reallocated for other uses and redeployed where a real need exists.

(6) In preparing land-use plans, public and private interests are to be duly weighed and fairly balanced.

Section 2. The Preparation of Land-Use Plans, Power to Prepare Statutory Instruments.

(1) The adoption of land-use plans falls within the responsibility of the relevant municipality. Public notice of the resolution on the preparation of a land-use plan is to be made in the manner customary in the municipality.

(2) Land-use plans for neighbouring municipalities must be coordinated.

(3) No person or party has the right to require a municipality to prepare or adopt land-use plans.

(4) The provisions of this Act on the adoption of land-use plans are also applicable in respect of amendments, supplements and cancellation.

(5) The Federal Minister for Regional Planning, Building and Urban Development, with the approval of the Federal Council [Bundesrat], is empowered to introduce regulations by legal ordinance on

1. representations and designations in land-use plans regarding
   a) the type of land use for building purposes,
   b) the degree of land use for building purposes and the manner in which this is to be calculated,

c) the coverage type and the plot areas which may or may not be built on;

2. the types of development – by constructing buildings or otherwise – permissible within specific land-use areas [Baugebiete];
3. the admissibility of designations under Section 9 para. 3 on various types and specific land-use areas or on developments – by constructing buildings or otherwise – permissible within these areas;
4. the preparation of land-use plans, including associated documentation, and the presentation of the contents of the plan, in particular with regard to the notation symbols used and their interpretation.

Section 3. Public Participation.

(1) The public is to be informed at the earliest possible stage about the general aims and purposes of planning, about significantly different solutions which are being considered for the redesign or development of an area, and of the probable impact of the scheme; the public is to be given suitable opportunity for comment and discussion. Public notification and discussion may be dispensed with in cases where

1. the amendments or supplements being made to the preparatory land-use plan do not affect its basic principles.
2. a legally binding land-use plan [Bebauungsplan] is being prepared, modified, or is revoked, where this has only minimal effects on the plan area and adjacent areas, or
3. public notification and discussion is also followed by the procedure as described in para 2 where discussion results in changes being made to the plan.

(2) Drafts of land-use plans with the accompanying explanatory report or statement of grounds are to be put on public display for a period of one month. The place and times at which plans may be inspected are to be made public at least one week in advance in the manner customary in the municipality with the advice that representations and suggestions may be lodged during the display period. Involved parties within the meaning of Section 4 para. 1 are to be

informed of plans being placed on display. Representations and suggestions ledged within the period allowed are to be examined; persons who have lodged objections or suggestions are to be informed of the outcome of this examination. In cases where more than one hundred people lodge what are essentially the same representations and suggestions, personal notification of the outcome of the examination may be dispensed with by allowing those concerned access to inspect the appraisal; public notice of the offices at which the appraisal may be inspected is to be made in the manner customary in the municipality. On submission of the land-use plans in accordance with Section 6 or 11, any representations and suggestions which have not been incorporated are to be included with the official comment of the municipality.

(3) Where amendments or supplements are made to the draft of a land-use plan subsequent to the display period, it shall once again be put on display in accordance with para. 2; in respect of this display period, stipulation may be made that only representations and suggestions pertaining to those sections which have been amended or added may be lodged. In cases where amendments and supplements to a binding land-use plan do not fundamentally affect the proposal, or where amendments or supplements to spaces or other representations in the draft version of the preparatory land-use plan are of a minor nature or of little significance, it is permissible to dispense with a further period of public display; Section 13 para. 1 clause 2 applies mutatis mutandis.

Section 4. Participation by Public Agencies

(1) During the preparation of land-use plans public authorities and bodies acting as public agencies and which are affected by the planning proposal are to be involved in the planning process from the earliest point possible. In their statements they shall inform the municipality of any planning schemes which are either proposed or currently in the process of planning, and of any other measures – including time schedules – which may be of relevance to local urban development and order. These parties shall be allowed a suitable period of time to submit their statements; where they fail to respond within the period allowed,

the municipality may assume that the public interests represented by these bodies are not affected by the land-use plan.

(2) Participation in accordance with para. 3 may proceed simultaneously with the procedure under Section 3 para. 2.

Excerpt of the Draft of the Code of Environmental Protection

Art. 39 Public Participation

(1) The competent authority is required to hear the general public on the environmental effects of the development project within the course of the approval procedure on the basis of the documentation which has either been placed on display or made available for inspection by the general public pursuant to section 37. The hearing procedure shall be subject as applicable to the requirements of section 73, paragraphs 3 to 7, of the Code of Civil Procedure. Associations which are recognised under section 131, paragraph 1 are to be heard in accordance with section 132, paragraph 1. No. 1, paragraph 2.

(2) Where the agency responsible for the development project makes alterations to the specifications required under section 37 during the course of the procedure, an additional stage of public participation pursuant to paragraph 1 may be dispensed with if there is no cause to fear significant additional or different impact on the environment.

(3) The competent authority shall make its decision on the permissibility of a development project, the appraisal of its environmental impact pursuant to section 42 and the grounds for the decision accessible to all parties whom it knows to be affected by the decision, and to those persons whose objections have been adjudicated on. In the case of a proposed development project being rejected, all parties whom it knows to be affected by the decision, and those persons who lodged objections, are to be notified on this rejection.

Art. 40 Transboundary Participation

(1) Where a proposed development may be expected to have a significant effect on the protected goods detailed in section 32, paragraph 1, second sentence in another member state of the European Communities, the competent authority shall notify the authorities nominated by this member state of this proposed development at the same time and to the same extent as it informs those authorities which are called upon to participate under section 38. In the case of a member state failing to nominate authorities for the purposes of participation, notification shall be made to the highest authority in the other member state with competence for environmental affairs.

(2) Paragraph 1 applies *mutatis mutandis* in accordance with the principles of reciprocity and equivalence in respect of a neighbouring state which is not a member of the European Communities.

(3) Any consultations which take place with the authorities of a neighbouring state on the basis of notification pursuant to paragraph 1 or paragraph 2 are to be conducted in accordance with the principles of reciprocity and equivalence. The principle of equivalence applies to procedures and evaluation criteria employed in the Federal Republic of Germany and in the neighbouring state.

(4) The participation of foreign nationals within the approval procedure is to be guaranteed in accordance with the principles of reciprocity and equivalence.

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PERFORMANCE ORIENTATION IN THE CIVIL SERVICE: A NECESSITY FOR THE IMPLEMENTATION OF LAWS

Dr. *Christoph Hauschild*

I. THE PERFORMANCE PRINCIPLE

One might well raise the question why the issue of performance orientation in the civil service has been included as a separate topic within the Third Dialogue Seminar with the general objective of discussing the "Modernization of Legislation and Implementation of Laws." In order to answer this question I would like to quote a famous saying made in 1850 by Bismarck, who was later to be chancellor of the German Empire:

> "To govern with bad laws and good civil servants is still possible. With bad civil servants, however, the best laws do not help."

Today's German civil service is not the civil service Bismarck knew in his day. Careers within the higher civil service class are no longer reserved exclusively to a small group in society as used to be the case in Prussia.

Admission to and a career in the German civil service are linked to the performance principle, as is customary in modern civil service systems. According to Art. 33 para 2 of the Basic Law:

> "Every German shall be equally eligible for any public office according to his or her aptitude, qualifications and professional achievement."

In practice the performance principle is split into a number of different aspects ranging from recruitment regulations to procedures for the assessment of performance on a regular basis. During the previous Dialogue Seminars I have presented various aspects which concern the professional qualification of civil servants. During the First Dialogue Seminar we talked about the issue of education and in-service training for civil servants in administrative law. It was pointed out that skills in legal techniques and methods play an eminent role in Germany's public administration and that public authorities traditionally recruit applicants with an education in law, although in recent years recruitment patterns

have become more open to other professions. In the course of the Second Dialogue Seminar, which was devoted to the topic of "Law Reform and Law Drafting", a special session was reserved for the issue of improving the techniques of legislation through in-service training. The question was raised as to what extent in-service training is required in order to safeguard professionalism in the particular field of law drafting. Emphasis was placed on the aspect that the necessary knowledge, skills and attitudes of the civil servants concerned need to be developed if changes in public administration are to be planned and implemented.

The object of this report is now to present and to discuss recent government projects aimed at modernizing the German civil service. I would like to concentrate on those aspects which are meant specifically to foster administrative performance. These are:

- First, performance-related pay
- Secondly, strategic personnel development

II. PERFORMANCE-RELATED PAY

Germany, like most other countries, is faced with scarce personnel and financial resources in the public sector. This shortage is believed to be of a long-term nature imposing rigid resource management. At the same time scarce resources seem to be the most effective and valuable incentive for governments for reconsidering public service regulations. The German government recently expressed its intention to enact special measures whose purpose will be to place increased attention on the performance aspect, on increases in mobility, and which will make pay regulations more flexible.

Within this context one of the most far-reaching projects concerns the introduction of performance-related pay schemes into today's existing public service pay systems. The crucial question is to what extent

pay and bonuses are valuable management tools in public administration for establishing greater efficiency and effectiveness in the civil service. The pay regulations for civil servants (Beamte), who are appointed to a service relationship on the basis of public law, are different from those affecting the employees and workers employed on the basis of private-law contracts. In the following, however, I shall refer only to the status of civil servant.

Civil service pay is a fitting example to illustrate the foundations of the modern professional civil service. Moreover, civil service pay is largely specific to the civil service, which is one of the reasons why most parts of the civil service still operate distinctively from the private sector. This uniqueness of the civil service with regard to management and the service relationship is withering away, but it still guides core functions such as law drafting and the supervision of law enforcement.

The general guideline for the payment of civil servants is that remuneration must be regulated by law, taking into account both general living requirements and the importance of official grades. It is important to note that payment is not just remuneration for work performed. The reason for this is that civil servants have special obligations in addition to the performance of work. These are:

- loyalty
- service in a fair and impartial manner and in the common interest
- obedience
- personal responsibility
- adherence to rules of conduct.

Because civil servants must dedicate themselves fully to government service, the public employer is obliged to provide for the welfare and protection of its officials. The assistance obligation is reflected in the pay system to the extent that it is based less on the idea of providing payment for a specific quantity, but rather on the idea of granting support. Thus the basic principle of the salary system is referred to as the "support principle". According to a ruling of the Federal Constitutional Court, civil service pay is to be set at such a level that it provides an income

commensurate with the grade, importance and responsibility associated with the position in question.

The level of payment must be based on two criteria: it must be appropriate to prevent the risk of officials becoming dependent on additional income to satisfy normal needs in life, and thus losing the independence required of them in a system based on the rule of law. At the same time, it must be in keeping with the position in question, i.e. correspond to the importance of the position, in order to ensure that the performance principle is applied. The consequence of this is that all positions are assessed in terms of their functions and pegged to specific pay scales. Thus the level of payment cannot be negotiated, since the fair pay principle deriving from the rule-of-law system could not be implemented in this way. Payment must be regulated by law. It must be adjusted regularly in keeping with general economic and financial trends.

Finally, civil service pay is always transparent since all salary and income provisions have to be regulated by law. The provisions on salaries are to be found in the Federal Law on Remuneration. This law applies to all officials employed in a service relationship under public law at all levels of government. Pay provisions are in general linked to posts and seniority.

One consequence is that civil-service pay to date has not always reflected the fact that individual performance is the decisive criterion for occupational advancement and with it for the monthly pay cheque. Thus in the recent past in many Western countries, performance-related pay elements have been put into effect in order to reward the particular contributions made by individual civil servants.

The German government intends to introduce different schemes of performance-related pay for civil servants. The intention is to introduce special bonuses, at first on an experimental basis, in order to test their results. The objective is to reward and encourage good performance, e.g. in particularly demanding tasks or functions. A constituent element of any performance-related pay scheme will be that bonuses will be restricted to a certain period of time. The assessment and decisions to

award bonuses will have to be made by the superiors in the line management.

It is a very controversial issue whether performance-related pay schemes actually do work positively as motivators, or on the contrary produce disincentive effects. Firstly, all performance-related pay schemes must conform to the principles of civil-service pay as outlined above. In particular they must be regulated by law and decisions upon awarding bonuses must be eligible for judicial review. Secondly, clear performance-assessment criteria must be developed for performance-related pay schemes and line managers must be made familiar with them through in-service training. These are basic preconditions for making bonus schemes practicable.

A further and a more crucial question is whether performance-related pay is in keeping with the organizational culture of the public sector. One of the distinctive hallmarks of professionalism in the civil service is that the civil servant devotes himself or herself to the public good and common interest in a spirit of neutrality in serving the state. Therefore the discretionary powers accorded to the civil service and the standardized employment relationship must be regarded as two sides of one coin.

The relatively rigid and egalitarian pay structure is a characteristic common among civil-service systems in advanced economies. As a result civil servants are strongly influenced by feelings of equity and fairness in evaluating their pay. Equity and fairness are part of the organizational culture and play a vital role in determining the acceptability of pay systems and pay levels.

This explains some of the objections to the introduction of performance bonuses, which are believed to be incompatible with the professional standards of equity, fairness and openness.

At a recent OECD meeting it was pointed out that worldwide experience with the administration of public-service pay teaches us that the system of payment, although very important, must not be allowed to impede other even more important motivational methods. In a public service where much depends upon teamwork, where productivity is hard

to define, and where outputs have often to be measured in longer-term perspectives, an ethic of independent professionalism is of crucial importance.

In particular, the uncertainties associated with the use of direct incentive devices make it all the more necessary to focus on developing people to achieve results. This aspect will form the following and final part of my presentation.

III. STRATEGIC PERSONNEL DEVELOPMENT

As a result of public criticism of red-tape and long administrative procedures and demand from the public to reduce state activities, there is constant pressure for improved results. For personnel management this means developing people. At the same time civil servants themselves expect more from their work. They expect to be given the responsibility to solve problems, the chance to earn performance-related pay – if such schemes are in place – and the chance to further develop their own skills.

The objective of improving managerial competences within the civil service system, though of crucial concern in many countries, has to be judged in the light of the existing legal framework, national traditions and values, in the same way as I did with regard to pay regulations.

As already discussed on previous occasions, the employment relationship in the civil service is governed to a very high degree by law in countries with a tradition of administrative law. At all stages of public service reforms, from their preparation until their implementation, it is therefore a question of strategy as to what extent such reforms must be accompanied by new regulations and changes in existing laws. It is probably true that in an administrative culture, in which public personnel administration is largely based on a detailed set of laws and administrative regulations, reform initiatives will be only successful if

they are accompanied by new legal provisions on personnel-management procedure.

Against this background much depends upon everyone's willingness to reconsider personnel policies, which still too often keep to the beaten track. But in order to continue to ensure the functional viability and effectiveness of public administration, it is necessary to match individual skills with the requirements of the workplace.

In Germany one aspect of the traditional principles of the civil service is the regulations on civil-servant career classes. All posts in the same area of work, and which require the same qualification and education, are known collectively as a "career class". The German civil service is structured into four different career classes. This career-class principle provides for new or higher-ranking functions to be assigned to within the respective career class. Career classes follow the traditional hierarchical organizational set-up of public administration. Each of the four career classes includes an entry level and a final senior level. Promotion from lower career classes to upper career classes is possible when specific qualification requirements are met.

The argument is increasingly being put forward that the assignment of new posts or higher-ranking functions should follow a strategic approach. Some feel that the best argument for considering such a strategic approach is the so-called "Peter-Principle". According to *Laurence J. Peter*, after whom this principle is named, in a hierarchy each employee tends to rise to his or her level of inability. The "Peter-Principle" implies a threatening aspect to the performance principle: The in-built tendency to rise to the level of incompetence makes it only a question of time until a civil servant is assigned to a function which he or she is unable to carry out.

However, just as hierarchical organizations produce such effects, so such disfunctions are regarded as a more or less natural consequence of work relations, which organizations have to live with. There must, therefore, be serious doubt as to whether the "Peter-Principle" can produce pressure for change. Unlike in the private sector, where markets create innovative effects, in the public sector improvements are

the result of a political process and have to be initiated by political decisions.

In Germany the pressure for change within the field of public management was not felt as strongly as, for example, the United Kingdom or the Netherlands. However, the more significant the scarcity of resources becomes, the more inevitable are new strategies for a more efficient use of resources becoming. Since the staff represents the central driving force for the fulfilment of public tasks, human resources have to be viewed as the all-important factor in the successful implementation of a more efficient and cost-effective administrative system.

However, the people in public administration should not be regarded simply as a tool or as an instrument to be engaged in executing the respective organizational tasks. On the contrary, people have their own ideas and their own interests with regard to their work. The new approach to personnel management is intended therefore to integrate both organizational and individual interests into a single strategy. The way to achieve this is by a constant and dynamic process of defining organizational goals, assessing the potentials and interests of the people employed, qualifying superiors for leadership functions - to name just a few elements to be considered.

One main element is agreements between personnel management and the staff members on core objectives. In order to achieve an increase in staff mobility and to structure career paths, more information on job performance, clear job objectives and new forms of performance evaluation are required.

The new approach relies on a regular structured dialogue between each member of the administrative unit und his or her immediate superior. Through this instrument all members of the staff will have the opportunity to conclude an agreement defining the main objectives and core tasks for a certain period of work, e.g. one year. After each period the results will be analysed and reasons for the success or failure discussed in detail. A further part of the dialogue is devoted to the determination of measures necessary to maintain or enhance performance. This part is also the framework for discussing the staff

member's potential with regard to higher-ranking or other functions. These discussions must be documented and the documentation on potentials of the person concerned will be forwarded to the unit competent for personnel affairs and will serve as a basis for personnel development and planning.

In Germany such structured staff dialogues are on the way, e.g. in the Federal Ministry of Economics. Every superior is required to discuss objectives and work performance with members of the staff.

A further instrument which could be introduced in organizations to enhance cooperation among staff is the team conference. In this context it is possible to discuss necessary or useful changes to the internal distribution of business, aspects concerning the flow of information and coordination. The aim of team conferences is to increase quality by the clarification of tasks and competences, by functional criticism and the realization of development options – all to the individual civil servant's and the organization's benefit.

Implementing these new instruments is a difficult task. In the case of the Federal Ministry of Economics, a sequence of in-service training seminars has been carried through in order to qualify superiors. In-service training is most useful when it is geared to specific modernization projects as in this case. The response to what is taught in seminars is immediate and can be related to actual work requirements. In such a context in-service training can be used as an instrument for achieving the following objectives:

- development of managerial skills
- testing of instruments for personnel policies, e.g. the staff dialogue
- preparation of line managers and superiors for their role as personnel-development agents
- testing and development of strategies for controlling the effects of new personnel policies
- evaluation of reform projects

It is not only by chance that I started and now conclude my presentation on performance orientation in the civil service with the

aspect of education and in-service training. The qualification aspect will surely play an increasing role in mastering future tasks and challenges.

IMPLEMENTATION OF LAWS AND THE ROLE OF ADMINISTRATIVE COURTS

Dr. *Karl-Peter Sommermann*

I. INTRODUCTION

A state governed by the rule of law is not only based upon democratic, rational and transparent legislation which guarantees both impartial and balanced performance of public tasks as well as the protection of individual rights, but also requires effective implementation of the laws. Otherwise, the rule of law remains an empty formula.

Therefore, the history of the constitutional state likewise is a history of the development of instruments and mechanisms meant to improve the application and putting into practice of the laws and legally protected rights. Above all during the last decades, important progress and manifold innovations have been accomplished. Only the most current and essential mechanisms will be presented here. Following the principle of separation of powers, three levels of monitoring the implementation of the laws can be distinguished:

- the parliamentary level,
- the administrative level and
- the judicial level.

II. PARLIAMENTARY MECHANISMS FOR MONITORING THE IMPLEMENTATION OF LAWS

Parliament as the bearer of primary legislative power has an original interest in the effective implementation of the laws which it has enacted. Although, in modern constitutional states, the main task of the control of legality is entrusted to the courts, special parliamentary mechanisms of control can be found in nearly all states. These mechanisms generally serve at the same time to inform the legislative organs about the practical feasibility and effects of the laws. In complex societies, which can only be governed by means of complex legal instruments, the legislator

cannot foresee every effect of the application of a law. Careful elaboration, and, if expedient, preliminary tests of the draft laws may help to avoid undesirable surprises. However, "feed-back" mechanisms are similarly indispensable in order to enable the legislator both to exercise its function of control vis-à-vis the executive power as well as to reconsider and, if necessary, to reform its legislation.

1. Sunset Legislation

If a law is intended to cope with a temporary problem, or if a law has experimental character, the duration (period of validity) of the law may be limited. If the law is to remain in force beyond the date of expiry, the legislative bodies have to reconsider the law and take a decision on its prolongation. Thus the implementation of the law will automatically be discussed in Parliament, positive and negative effects of its application weighed against each other and, should the case arise, amendments or better techniques of implementation will be considered.

In Germany, the unification accomplished in 1990 gave rise to a certain amount of sunset legislation. In order to foster a rapid improvement of the deficient infrastructure of the eastern part of the country, hindered by the sophisticated and time-consuming planning procedures which had been developed for the technologically, economically and ecologically advanced western part of Germany, simplified rules had to be issued for a transitory period. To this end, the federal Parliament not only suspended certain requirements of the regional planning procedures, but also introduced special laws for the new *Länder*, e.g. a law on the acceleration of the planning of transport infrastructure. The validity of this law is generally limited until the end of 1995 and for the federal railways until the end of 1999.

Experiences with sunset legislation had already been made before German unification. In order to relieve the burden of work on the administrative courts and as an exception from the principle of orality, a regulation on adjudication without oral proceedings, for instance, had been inserted in the Code of Administrative Jurisdiction for a limited period

of time and only for cases which display no particular complications. With some amendments, this regulation on what are termed court decrees was later confirmed for an unlimited period[1].

2. Establishment of Reporting Obligations on the Executive

In order to control and to gain information on the implementation of laws by the public administration, Parliament may always use such instruments as its rights to the interpellation of members of the Government and to setting up committees of inquiry. Considering the burden of work on a modern Parliament, however, this kind of control will be reserved to very select points only. If Parliament wants to be informed regularly on the implementation of laws concerning touchy or complex subjects, it may impose obligations on the Government to report periodically on the application or execution of the respective law. In German administrative law such reporting obligations can be found, for example, in the federal Territorial Planning Act (*Raumordnungsgesetz*)[2] and in the federal Law on Protection Against Harmful Effects on the Environment through Air Pollution, Noise, Vibration, and Similar Factors (*Bundes-Immissionsschutzgesetz*)[3]. The reports will be considered primarily in the competent Specialist Committees and may give rise to modifications of the law. Even before this, the Government may feel compelled to act or to change its practice by the mere fact of being obliged to render account of its activities at a later date; furthermore, the mere drafting of the report can convey insights which are useful for better implementation of the law in the future.

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1 See section 84 of the Code of Administrative Jurisdiction (translation in the appendix of the present volume).

2 Cf. section 11 of the Act.

3 Cf. section 61 of the mentioned Law.

3. Petitions Committee and Ombudsman

Parliamentary control and evaluation of the implementation of the laws would remain deficient if the relevant information were provided solely by administrative authorities. To gain a realistic picture of the working of the laws in practice, it is also indispensable to get information from the citizens affected. An appropriate means to recognize defects in laws or their defective application or execution at an early stage is the creation of a special organ to which citizens may direct petitions and complaints without particular formal requirements. This organ can be of collegiate or monocratic character. Examples are the German Petitions Committee of the *Bundestag*[4], on the one hand, and the Swedish Ombudsman, on the other.

Over the last few decades, an increasing number of states have introduced Parliamentary Commissioners, often called "Citizen's Defenders", shaped according to the monocratic Scandinavian model of the Ombudsman and designated to supervise the administration and to help citizens against intrusions or malfunctions of state organs. Such Commissioners can take action upon individual complaints, which are not subject to specific requirements of form, or on their own initiative, i.e. *ex officio*. Generally, the Commissioners do not have the power to resolve conflicts between administrative authorities and citizens with binding force. However, they have rights to inquire into administrative action, to inspect records and to obtain a statement on the merits from the competent public authority. In some countries the Commissioner or Ombudsman may also file a suit before the court in favour of a citizen; in Portugal the "Commissioner of Justice" (*Provedor de Justiça*) and in Spain the "People's Defender" (*Defensor del Pueblo*) are even empowered to apply for a review of a law enacted by Parliament before the Constitutional Court[5]. Often the mere investigations of the Ombudsman may lead to a change of criteria in the administration.

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4 See article 45c of the German Basic Law.

5 See article 281 para. 2 lit. d of the Portuguese Constitution of 1976 as amended in 1982/89/92 and article 162 para. 1 lit. a of the Spanish Constitution of 1978.

The main instrument of an Ombudsman, however, remains reporting to Parliament, which may, if necessary, take legislative measures or steps of control vis-à-vis the executive power in order to remedy defects and malfunctioning. The information reported to Parliament on the petitions received and the results of the subsequent inquiries can be presented in the annual reports, or, if immediate measures are to be taken, *ad hoc* in special reports. The recording of complaints and their statistical evaluation in the general reports puts the Ombudsman in a special position to detect structural deficiencies of the legal order or in the implementation of laws and will lead to concrete proposals for law reform. As for the success and influence of an Ombudsman, much depends on the impartial and forceful personality of the officeholder and on his enjoyment of general recognition and respect. In any event, the successful institutionalization of an Ombudsman requires adequate rules of election and status which guarantee the necessary independence of the officeholder.

In many countries there are several Ombudsmen. In step with the increasing complexity of technological, economic and social reality and the diversification of laws, specialized Ombudsmen have been set up, e.g. for protection against the misuse of personal data, for consumer protection or the protection of the environment. In Germany, the *Bundestag* (Parliament) instituted a Defence Commissioner, an institution which brought a great number of improvements to those performing their military service. People who refrain from seeking formal legal remedies will nevertheless often be ready to formulate an informal complaint to an Ombudsman.

Besides specialization according to subject areas (*ratione materiae*), various Ombudsmen operate on the basis of territorial jurisdiction (*ratione teritorii*). This will be the case above all in federal or at least decentralized states. In the German *Land* Rhineland-Palatinate, for example, where the Speyer School has its seat, a "Commissioner for the Citizens" (*Bürgerbeauftragter*) supervises the administration of the *Land* on behalf of the Parliament of Rhineland-Palatinate.

III. ADMINISTRATIVE MECHANISMS FOR MONITORING THE IMPLEMENTATION OF LAWS

In democratic states governed by the rule of law, the executive power is under the strict obligation to implement the laws correctly and effectively. In most cases implementation of the law does not only mean simple application of a norm to an individual case, but a multistage-process of fact- and law-finding and – if the law leaves room for different measures or decisions – exercise of discretion within the limits of the Constitution and the law and according to the purpose of the enabling law. The Government or other administrative authorities may use different instruments to safeguard the due implementation of the laws.

1. Administrative Regulations (General Guidelines for Interpretation and Discretion)

In order to cope with a complex reality, laws cannot always be unequivocal, but are, to a certain degree, indeterminate or open and therefore need to be interpreted and put into concrete terms. Furthermore, in cases where the legislator leaves room for administrative discretion, criteria have to be developed according to which decisions or measures are to be taken. It would be irrational and impede the necessary equal treatment of citizens if each administrative authority or even each public officer applied their own criteria of interpretation or discretion, not to mention the fact that it would be expecting too much of the civil servants, who work under pressure of time and are often not prepared for this kind of legal reasoning.

This is why the Government or other superior administrative authorities have to draw up administrative regulations (general guidelines) which develop the necessary criteria and guarantee equal and uniform implementation of the laws in all parts of the country. These administrative regulations (*Verwaltungsvorschriften*), in contrast to statutory orders (ordinances), enacted on the basis of an enabling law, are not considered

to be "real" law because its addressees are only agents of the public administration and not "external" individuals. Nevertheless, the individual may invoke his or her right to equality before the law if an administrative authority deviates from the guidelines.

The courts are not bound by administrative regulations. If they interpret the law differently, the Government or the respective higher authority has to change the guidelines accordingly. The same occurs when the law is amended. The lower authorities, which often base their daily work directly upon the administrative regulations, will rely upon the continuous updating of the guidelines.

2. Objection Procedures

An effective instrument of administrative self-monitoring is the objection (or: appeal) procedure. These procedures are initiated upon application by a citizen who is affected by an administrative measure or by an omission which he or she deems to be unlawful or inexpedient. Objection procedures give the public administration the opportunity to reexamine a decision and, if appropriate, to correct it before the citizen files an action in the court. In Germany, the general objection procedure is regulated in the Code of Administrative Jurisdiction[6] since the prior lodging of an objection before the competent administrative authority is a formal prerequisite for rescissory actions and actions for mandatory injunction. This explains why the procedure is also called a "preliminary proceeding". Nonetheless, the procedure remains part and parcel of the administrative proceedings.

Generally, the objection is required to be lodged before the administrative authority which issued or refrained from issuing the disputed administrative act within a specified period of time. If the issuing authority (authority of first instance) does not provide a remedy, as a rule the superior authority has to examine the case with regard to the legality *and* expediency of the administrative act or the refusal of the administrative

6 See sections 68 *et seq.*

act applied for. The superior authority will then decide in place of the issuing authority. The decision of the issuing authority will either be confirmed or overruled.

Administrative self-monitoring is only one function of objection procedures. They also form part of the system of protection of citizens' rights. The right of individuals to have their case reconsidered by a superior authority strengthens their position vis-à-vis the authorities and will have the effect of making the public officials work carefully and respect the rights of citizens. This presupposes, of course, that all of the organizational and personal requirements for the impartial functioning of public administration are fulfilled.

A third function of objective procedures lies in the relief of the workload on the (administrative) courts. In some cases the complaints of citizens will already be remedied either by the authority of first instance or by the superior authority; in other cases the objector may be persuaded of the lawfulness and expediency of the first administrative decision by a concurring statement of grounds given by the superior authority after reexamination. In this respect, the objective procedure may have a pacifying effect and foster the acceptance of an administrative measure.

3. *Initiating Law Reforms*

The daily work of the public authorities is best able to reveal the strong and weak points of the laws they have to implement. It would be wasteful and irrational not to use this experience in order to improve the laws. Therefore, the Government should collect information about the implementation of laws and the problems which arise in practice. The responsible ministries could establish "evaluation sections" in permanent touch with the specialized sections which took part in the drafting of the law. Once the problems have been analyzed, the respective ministries can then develop reform strategies which may lead to a modification of administrative regulations or, if necessary, to the elaboration of reform laws. Since governments generally have the right to introduce bills into

Parliament[7] and have at their disposal the necessary pool of experts, they are able to comply with this role as a driving force of reform.

IV. JUDICIAL MECHANISMS FOR MONITORING THE IMPLEMENTATION OF LAWS

The control mechanisms at the parliamentary and administrative levels are very important for improving the implementation of laws and, in the final analysis, the quality of the laws themselves. However, the complexity of public tasks and the "overstocked" time-table of the legislative bodies only allows for parliamentary control on very select points. Furthermore, history shows that the instruments of self-control by the executive power only work well, and abuse of power can only be avoided, if there are neutral institutions which will, in the case of remaining conflict, take a final, impartial and binding decision. Consequently, judicial control of the executive is a prerequisite for all well-performing systems of checks and balances.

1. Judicial Control as a Cornerstone of a State Governed by the Rule of Law

In Germany, the first independent administrative courts were introduced in several *Länder* in the second half of the 19th century. Quite early on, state theorists had considered judicial control of administrative action to be an essential element of a state governed by the rule of law. *Otto Bähr* wrote in his famous book on the essence of a state governed by the rule of law ("Der Rechtsstaat"), published in 1864: "Law and statutes can gain real importance and power only if they find a judgment ready to put them into effect."

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7 On German constitutional law, cf. section 76 para. 1 of the Basic Law.

Judicial control then became a cornerstone of the *Rechtsstaat*, which could not be removed without destroying the fundamental architecture of the legal system. Therefore, after World War II, in the wake of the defeated Nazi tyranny, particular emphasis was placed on the rebuilding and strengthening of the administrative jurisdiction, which was deemed to be a central guarantee against arbitrary administrative action and the violation of individual rights by the executive power. Consequently, an individual right to judicial protection was introduced in the first chapter (on fundamental rights) of the Basic Law of 1949 (Constitution of the Federal Republic of Germany). The first two sentences of article 19 para. 4 read as follows:

> "Where rights are violated by a public authority, the person affected shall have recourse to law. In so far as no other jurisdiction has been established, such recourse shall be to the ordinary courts."

This provision was later referred to as the "coronation of the state governed by the rule of law". The Federal Constitutional Court derived from it two essential principles: First, judicial protection has to be complete, i.e. no act of the public administration which might infringe a personal right is exempted from judicial control; any form of "political-question" doctrine is rejected. Second, the judicial protection of the citizens has to be effective. In urgent cases, it would not make any sense to keep the plaintiff waiting for a final judgment pronounced after a long court procedure and when the damage suffered by the individual can no longer be repaired. In order to prevent a public authority from creating a *fait accompli*, courts have to be empowered to take interim measures, i.e. to suspend an administrative act while litigation is pending (if the objection or the action of the individual does not automatically entail suspensory effect) or to issue temporary injunctions. If a citizen urgently requires public assistance and he or she can invoke a right which is likely to apply to the present case, there must be a possibility of obtaining a provisional court order within a matter of days or, if necessary, even of hours, which obliges the administration to act. This rule is applicable at least to cases where the damage caused by the inactivity of the competent administra-

tive authority would weigh more heavily (if the action later turns out to be well-founded) than the damage caused to the public interest by the taking of an unjustified measure (if the action later turns out to be unfounded).

This example already demonstrates that in the field of provisional protection by the courts much depends on the balancing of interests: as a general principle, the private or personal interest, on the one hand, and the public interest, on the other, have to be weighed against each other. If a third party is involved (e.g. if the administrative authority has taken a measure which bestows a benefit on one person and which at the same time imposes a burden on another) the balancing of interests becomes more complicated. Since the courts have to act immediately, a "summary" consideration of the case must suffice; careful examination of the merits will be reserved for the main court procedure.

2. Function and Extent of Judicial Control

*Going back to the origins of judicial control in Germany, two functi*ons of the right of action conferred on citizens against public authorities were discussed: Does judicial control serve to monitor the integrity of the objective legal order, or is it intended to safeguard the subjective (personal) rights of citizens. Nowadays, under the Basic Law of 1949, which enshrines the previously cited right of the individual to judicial protection, the answer is clear: the primary function lies in the protection of individual rights, which, however, does not exclude the maintenance and guarantee of the objective legal order from remaining a secondary function.

When drawing up rules for judicial control of the public administration, a crucial question will always be to what extent the decisions of the courts may interfere with administrative action. The various legal systems in Europe reveal a great variety of models in this respect. Starting from the assumption that court intervention serves to safeguard the legally protected rights of citizens, the general answer will be that the rules must enable the court to make those rulings and judgments which are

necessary for the realization of individual rights. Since these individual rights are not only "defence rights", directed against intrusions of the executive power in the private sphere, but also "performance rights", empowering the individual to demand beneficial decisions or other measures from the public administration, the establishment of rescissory actions by means of which administrative acts can be quashed (annulled) by the court is not sufficient for coping with the principle of the complete protection of the citizen's rights. Actions for mandatory injunction must also be admissible, a demand which cannot be taken for granted in many countries of the world. And if a public authority contests a specific legal relationship of an individual (e.g. a person's nationality) there must be a procedural way of resolving this conflict; declaratory actions, aiming at the declaration by the court of the existence or non-existence of a legal relationship, are an appropriate instrument in such cases. Finally, as has already been pointed out, for the sake of an effective remedy, provision must also be made for provisional (interim) protective measures adapted to the different classes of actions.

A further question concerning the extent of judicial control refers to the *justiciability* of those administrative decisions which, according to the enabling law, are within the discretion of the competent authorities. In these cases there is no doubt that the courts may review the formal and substantial legal prerequisites for the taking of a discretionary decision. It is not evident, however, to what extent the exercise of discretion may be reviewed. German administrative courts examine, pursuant to section 114 of the Code of Administrative Jurisdiction, whether the administrative act or its refusal or omission is unlawful for the reason that the limits of discretion established by the law have been exceeded, or discretion has not been used in accordance with the purpose of the enabling law. Furthermore, the courts examine the compliance with general constitutional principles, particularly with the principles of proportionality, equal treatment and clarity, all of which constitute essential elements of a state governed by the rule of law and consequently must be observed at all stages of the implementation of the laws.

3. Organisation of Judicial Control

When major judicial control of the activities of the public administration was set to be introduced in the German *Länder* in the second half of the 19th century, there was a lively discussion as to whether this control should be exercised by the ordinary courts or by specialized administrative courts. While *Otto Bähr* defended an enlargement of the competences of the proven ordinary courts, *Rudolf von Gneist* argued for the creation of independent administrative courts. Those who opposed the establishment of a new branch of courts feared that the new courts would not have the same independence as the traditional ordinary courts. The decision was soon taken in favour of specialized courts. Only claims for damages caused by public officials have remained under the jurisdiction of the ordinary courts up to the present.

The fear that administrative courts do not have the same independence as the "ordinary" courts is shown to be unfounded as soon as the judges of the different branches have the same personal and material independence and the courts are organized according to the same fundamental principles. In Germany this is the case for all five branches of jurisdiction provided for in the federal Constitution (in this context excluding from consideration constitutional jurisdiction): ordinary, administrative, financial, labour and social jurisdiction. The status of the judges of all five branches is defined in a largely uniform federal Judges Act. The courts of the five branches differ partly as far as the organisation of the instances and the composition of the bench divisions and senates are concerned. The main difference, however, lies in the procedural rules, especially in the inquisitorial principle which underlies the procedure before the general administrative courts and the specialized administrative courts (financial and social courts) and which has to be seen in contrast to the principle of party presentation governing the procedure before the ordinary courts as far as they act as private-law courts (the court does not conduct its own investigations but relies on facts and evidence placed before it by the parties). The inquisitorial principle, accor-

ding to which the court examines the facts of the case *ex officio*[8], is beneficial to the individual, who often does not have the same means to present facts and arguments. The citizen, therefore, does not need to worry about having competent representation before the court. Since the court itself will investigate *ex officio*, representation by a lawyer is not even necessary (*in contrast to the procedure before the ordinary courts*, at least if the value in dispute exceeds a certain amount). The principle of oral *proceedings*[9] *contributes to the availability of judicial support.*

V. CONCLUSION

A great variety of instruments for the improvement and control of the implementation of the laws is conceivable and can already be found in existing modern legal systems. In order to improve the position of the citizen and to involve him or her in the monitoring of the implementation of laws, an increasing number of states has introduced, on a parliamentary level, the institution of the Ombudsman ("Citizen's Defender"). On the administrative level, special objection procedures have been developed as self-control mechanisms, which, from the citizen's point of view, serve as an instrument for having one's case reconsidered and reviewed. The most important and effective instrument for the realisation of legally protected rights remains judicial control. The creation of specialized administrative courts can help foster the necessary professionalism of the judges, who are facing the growing complexity of public law. In order to cope with the requirements of effective judicial protection and control, procedural rules different to those governing ordinary (civil law) jurisdiction must in any case be introduced.

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8 See section 86 para. 1 of the Code of Administrative Jurisdiction.

9 Cf. section 101 para. 1 of the Code of Administrative Jurisdiction.

PART III

IMPACT OF THE EUROPEAN COMMUNITY LAW

ENVIRONMENTAL LAW REFORM IN THE FEDERAL REPUBLIC OF GERMANY

- CONCEPTION AND IMPLEMENTATION OF ENVIRONMENTAL LAW IN THE EUROPEAN COMMUNITY -

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

I. INTRODUCTION

The fundamental right to an environment is to be classified with social and economic rights, which go beyond the individual nature of the classic fundamental freedoms. Air, earth, water or natural surroundings do not belong to any individual. It is therefore difficult to imagine that an individual would be able to protect such environmental assets against encroachments made or authorized by the state, much less against the actions of private persons or enterprises. In addition to that difficulty there is also the consideration that no-one knows how far such a right over the environment extends. At what point can one no longer speak of the environment as being "clean".

In view of the evident difficulties of defining precisely the content and extent of such an individual right to the environment (as well as the persons benefiting from and entitled to claim) a second means of solution becomes conceivable: the protection of the environment is laid down in the constitution as a general principle, respect for which must be guaranteed by all authorities which exercise public powers. In order to describe such a basic provision, the concept of the "State objective" (Staatszielbestimmung) was developed in German constitutional theory. In September 1994 the committee for joint consideration of bills, composed of members of the Bundestag and members of the Bundesrat, recommended such a State objective regarding "protection of the environment" to be included in an amendment of the German Basic Law.

So far the Basic Law has only defined the **concurrent legislative powers** of the Federation in the main areas of environmental protection, such as waste disposal, air pollution control and noise abatement, since 1969 in Art. 74 No. 24 Basic Law, or the production and utilization of nuclear energy for peaceful purposes in Art. 74 No. 11a Basic Law. In other areas, such as hunting, nature conservation and landscape management or land distribution, regional planning and the management of water resources the Federation has only the **power to pass framework legislation**. As often in the constitutional and governmental framework of the Federal Republic of Germany, the distribu-

tion of powers and competences looks rather complicated at a first glance, also because the implementation of the environmental legislation is executed and managed mainly at the local government level.

The drafting of a comprehensive code of environmental protection was presented and discussed during our 3rd dialogue seminar. The draft of the general part, which was prepared by a commission of experts, has the ambition of defining the fundamental principles of environment protection before regulating the different subject-areas. There is no need to repeat these elements of the comprehensive code.

II. SPECIFIC ASPECTS OF ENVIRONMENTAL LEGISLATION

But there are some important general aspects of environmental law - making to be kept in mind when we look at the situation in Germany:

- A major instrument to bring about changes relating to the environment is legislation. It is not surprising that environmental law has developed over the last 20 years at impressive rates of growth.
- While law generally has groswn over centuries, and in part is still based on Roman law and precedents constitute a striking feature of law and continue to build traditions, environmental law is essentially virgin law, unprecedented in history.
- There is a consensus among environmental lawyers that environmental legal standards shall first of all serve to prevent pollution, not to repair it. Where legal means are used for the preservation, protection and improvement of the quality of the environment, these means must be of a preventive, not only of a corrective nature.
- Another distinctive element, in spite of all the difficulties of detail, is the possibility of measuring results. Science would be able to provide us with data on increases or decreases in pollution, on

endangered species and their evolution and on trends and tendencies. We are able to assess fairly well the effectiveness of the environment laws which we make and to learn from the past.

- An essential condition for efficient legislation in this area is the possibility of the public – the individual, as well as associations or groups – participating in environmental discussion. The public should have a right to participate in the conception, the drafting and the monitoring of environmental law and policy. Despite the existence of parliaments, one cannot ignore the fact that most of the details of environmental standards are made by administrations with little or no participation by individuals or groups. Where the same administration monitors those standards and where in practice no sanctions exist against the administration for cases of omissions or failures, it becomes all too common for standards to be fixed not in order to prevent damage and improve the environment but to legalise the pollution, and even for the standards which have been set to be disregarded.
- Even if it is true that the rate of regulation has increased - at the Federal as well as at the Länder level -, the results are far from being impressive. Already the monitoring of the existing regulations raises considerable problems.

III. STATE AND LOCAL RELATIONS ON ENVIRONMENTAL REGULATIONS

Law reform, this has often been stated in our dialogue seminars, needs a clear and objective analysis of the existing legislation and an assessment of the implementation of the regulations. These two preconditions for an efficient improvement of environmental legislation can clearly be seen when we look at the relationship between the local and the state authorities in the area of waste and sewage disposal. There are

clear standards to guide implementation as specified by the German water resources law (Wasserhaushaltsgesetz). Sewage is to undergo at least biological treatment. The standards for solid waste disposal are laid down in the waste disposal law (Abfallbeseitigungsgesetz). The responsibilities for environmental protection in these fields are clearly defined:

- Local communities are responsible for waste and sewage disposal as part of the public services they provide for their citizens;
- Their activities in this connection are supervised by special technical state agencies (Ämter für Wasser- und Abfallwirtschaft) as well as by the state district governments, which exercise general administrative and legal supervision over local communities;
- The administrative offices in charge are staffed with specialists for waste and sewage disposal. Within the local administrations special departments are responsible for these tasks. They employ engineers and technicians for planning and carrying out the tasks involved.
- The communities are able to raise the revenue needed for these environmental protection tasks. According to law citizens must utilize the public waste and sewage disposal facilities and must be charged fees that cover the cost of these services.

Despite these favourable conditions, significant implementation deficits can be found in practice:

- In more than one-third of German local communities, irrespective of the size of city, sewage disposal does not meet the standards of biological treatment.
- The procedures for making decisions or improving the environmental protection services are extremely long. Sometimes it takes more than ten years to reach a formal, binding decision on building or expanding a treatment plant. Frequently, the plants were already too small and overloaded at the time of their completion.
- But it is also true that over the years the requirements concerning the degree of environmental protection have been tightened substantially.

- The tightening of legal standards for environmental protection did not automatically induce the local communities to increase the level of their services. The most successful strategy for inducing local communities has been a form of indirect negative sanctions that consist of combining environmental protection approval with licensing new construction areas. Local communities would be granted approval for their development plans only if they were willing to improve their sewage treatment.

After having presented some practical aspects of the implementation of environmental law at the local level, I would like to come back to the modernization of the respective law itself, the conception, the drafting and the monitoring of environmental law and policy.

Perhaps the most important aspect to German environmental law is the fact that it is no longer a purely national law, but a law which is more and more determined by the environmental law of the European Community, since the Maastricht Treaty: the European Union.

IV. ORIGIN AND EVOLUTION OF COMMUNITY ENVIRONMENT POLICY

From the political and legal points of view, Community Environment Policy differs fundamentally from other community policies such as commercial or agricultural policies: no mention of it is made in 1957 in the Treaty of Rome. This omission is explained by the fact that in this year the idea of environment policy or of environmental protection simply did not exist. It was only 15 years after the signing of the Treaty of Rome, at the Paris Summit of 1972, that the Heads of State and Government felt that economic expansion should equally result in an improvement in the quality of life, and that to this end particular attention should be given to environmental protection. Since the Maastricht Treaty of February 1992 environmental protection has not only become an objec-

tive of the Community itself and the member states, but is also an objective in all cooperation with countries outside the European Community (Titel XVI, Art. 130r of the Treaty on European Union).

The most frequently used legal instrument with regard to environment policy is the "directive", as defined in Art.189 of the EEC-Treaty. These environmental directives have Art. 100 or 235 of the EEC-Treaty as the legal basis. The fundamental characteristic is that in both cases decision-making requires the unanimity of the members of the Council of Ministers and not a qualified or simple majority. The need to have unanimity first and foremost implies at best a permanent effort to find a compromise in order to reach an agreement. At worst, and this occurs fairly frequently, it leads to an agreement based on the lowest common denominator, if not a total impasse. As for the future, it is true that for the first time the treaty devotes a specific chapter to the environment. The method of decision used will nevertheless be that of unanimity.

The principles of environmental policy are to be found in the Community's Programmes of Action since 1973, laid down in 11 principles as follows:

- prevention of damage to the environment at source rather than combatting it after the event,
- taking account of the environmental effects of a measure as early as possible,
- avoidance of impairment of natural resources which significantly damage the ecological balance,
- improvement of scientific knowledge and encouragement of research for the purposes of preserving and improving the environment,
- costs of avoidance and removal of environmental nuisances to be paid for in principle by the person causing it,
- activities in one Member State not to be allowed to damage the environment in another Member State,
- taking account of the interests of developing countries,

- a clearly defined long-term concept of an environmental policy strengthens the effectiveness of the Community in international affairs,
- environmental protection is a duty of all inhabitants of the Community, and therefore environmental education is also necessary,
- in the case of every form of pollution the most appropriate level for taking action must be established,
- harmonisation of the environmental policy programmes of the individual State in order to avoid unilateral action and to achieve a co-ordination of policies without hindering progress in individual States.

V. *RESEARCH ON THE ENVIRONMENTAL POLICY CYCLES*

The Speyer Research Institute together with the European Institute of Public Administration Maastricht organized – under my co-ordination – two important research projects which covered the whole process of multinational and European policy-making in the field of environmental legislation of the European Community from the conception to the transposition into national law up to the implementation, monitoring and supervision stage. The results of these two research projects, one on the basis of a representative sample of directives in different policy areas, the other one focussing on the "drinking-water-directive" (Directive 80/778/EEC), are already published. I don't want to repeat these results extensively, but I want to mention that some of the issues and topics we discussed in our three dialogue-seminars on the rule of law and the modernization of legislation, administrative procedure and implementation appeared clearly as decisive elements of

an efficient reform of law, also European Community law, in our projects:

- the quality of interaction and co-operation between officials of the Member states and the Community level both in the process of policy decision and policy or law implementation,
- the wide range of actors in the process from the EEC level to the local level,
- the role of interest groups and sectoral groups who may or may not be interested in seeing that certain aspects of law are implemented,
- the conception and the implementation processes vary greatly from one policy area to the other: they involve different sets of actors, different interest groups and above all different relationships between Community responsibility, national, regional and local responsibilities,
- the implementation varies also with respect to the legal instruments involved: regulatory policies, where rules are set at the EEC level to be applied on national, regional and local level, follow a very different pattern of implementation than redistributive policies such as the structural funds programmes.

VI. FROM CONCEPTION TO REDESIGN: STAGES OF THE POLICY CYCLES

The conceptual framework underlying our research projects is based on the concept of the policy cycle, which has been used in policy analysis for some time and can also be used for an efficient organisation of the legislation and implementation process. There are seven distinct stages in the policy cycle as it applies to the EEC environmental policy:

- **policy development**: policy interests are articulated and first proposals for policy and law are made; often the EEC-Commission is the

initiator of new policies; at other times, it responds to suggestions from one or several Member States or interest groups; the expert input from officials of the Member States is crucial.

- **policy decision**: decision-making in environmental matters involves the Council of Ministers, the European Parliament and the Economic and Social Committee; the Member States in the Council have the final decision.
- **transposition of EEC law into Member State Law**: this marks the beginning of the implementation phase. Member States are asked to enact national laws in order to achieve the objective formulated in EEC directives or decisions. This stage involves the specification and concretization of the instruments to be used it involves the alignment of responsibilities to different government agencies and the specification of procedures to be followed. The activities of the Member States in this phase are monitored by the Commission.
- **application in the Member States**: Member States administrations (central and/or decentralized) as well as regional or local administrations will have to apply the policy and to implement the regulations.
- **monitoring and supervision**: The responsibility for checking the application is shared between the Member States and the Commission. If the Commission comes to the conclusion that application is inadequate in one Member State it can take recourse to an Article 169 EEC procedure. In practice, however, supervision by Member States government bodies and control through national courts (with possible reference to the European Court of Justice) is generally the most important aspect of monitoring and supervision as the Commission lacks the capacity for active supervision of all Member State actions.
- **evaluation**: This stage reviews, or ought to review, the whole policy cycle with the view to identify problems and weaknesses which need to be corrected in policy redesign or updating. It is important that the whole implementation process will be evaluated on the European and, comparatively, on the national level.

- **redesign and updating**: After problems and deficiencies have been identified, new steps might, or should, be taken to start the whole cycle all over again by updating policy, by amending existing law, by changing those aspects where problems have occurred, where instruments and application procedures have been inadequate and where policy objectives have not been reached.

There may now be the impression that all these issues are normative objectives of environmental law reform to be applied in the future. In reality they already influence the legislation and the implementation process and lessons are drawn from the empirical research projects; principles which we already discussed in our dialogue seminars, like the blue check-list for the simplification of law and administrative procedures, are finally based on this type of applied research.

VII. THE DRINKING WATER DIRECTIVE (80/778/EEC)

The Council directive relating to the quality of water intended for human consumption (July 15, 1980) establishes standards for the quality of water intended for human consumption. It does not apply to natural mineral waters and medicinal waters recognized or defined as such by the Member States. It has the purpose of promoting the free circulation of goods in the Community as well as protecting human health and the environment. The member States must ensure that the quality of water intended for human consumption complies with the directive within five years of notification, i. e. by mid-1985. In exceptional cases they may request the Commission for a longer period of time for complying with the parameter values established in Annex I of the Directive.

The drinking water directive is probably one of the most controversial of all environmental directives – and these controversies will continue into the future. It is controversial because

- it sets with great detail for a large number of parameters (62) limit values which are extremely difficult to reach in all Member States.
- it specifies measuring and monitoring methods and frequencies which impose significant cost for those who are responsible for delivering drinking water.
- it sets the highest standards for drinking water anywhere in the world.
- the details of the directive have given cause for many complaints and support the argument of technocratic overregulation from Brussels.
- the precision and detail of the technical requirements of the directive lead to implementation problems in every Member State. Several infringement (Article 169) procedures have been started against all Member States but only three have been convicted by the Court.
- the implementation problems concern legal, political, organizational, financial, technical and economic issues.
- the directive juxtaposes basic objectives of environmental protection with those of economic development.

The directive, because of its high standard in terms of environmental and health protection, contradicts the widely held view that EC-law represents a compromise on the lowest common denominator. The directive establishes the highest standards anywhere in the world and through this - despite all the implementation problems, or possibly because of them - has contributed significantly to a new consciousness and a deepened concern for water quality and increased efforts by Member State authorities to improve it. It demonstrates the pioneering nature of EC-law in the area of the environment.

Treaty on European Union (EUT)

Title XVI

Environment

Article 130r

1. Community policy in the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilization of natural resources;
- promoting measures at international level to deal with regional or worldwide environmental problems.

2. Community policy on the environment shall aim a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies.

In this context, harmonization measures answering these requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure.

3. In preparing its policy on the environment, the Community shall take account of:

- available scientific and technical data;
- environmental conditions in the various regions of the Community;

- the potential benefits and costs of action or lack of action;
- the economic and social development of the Community as a whole and the balanced development of its regions.

Nature of EC Law

Primacy of EC Law:

The EC Treaty has created its own legal system which became an integral part of the legal systems of the Member States and which their courts are bound to apply. The Member States have limited their rights, albeit within limited fields, and have thus created a body of law which binds their national and themselves.

EC-Law is directly applicable:

Every national court must apply Community law in its entirely and protect rights which the latter confers on individuals and must accordingly set aside provisions of national law which may conflict with it...

Duties of Member States

In Article 5 EUT it is mentioned that the Member States should adopt all appropriate measures to ensure the fulfillment of obligations arising under the Treaties. They shall facilitate achievement of its tasks and shall obtain from jeopardizing its objectives.

Article 189 of the EUT provides that:

In order to carry out their tasks the Council and the Commission shall, in accordance with the provisions of the Treaty, make regulations, issue directives, take decisions, make recommendations, or deliver opinions.

Regulations: A regulation is automatically binding and directly applicable in the Member States. Member States are not required to transpose and implement Community legislation into national law. A regulation gives right to the individuals which national courts must protect.

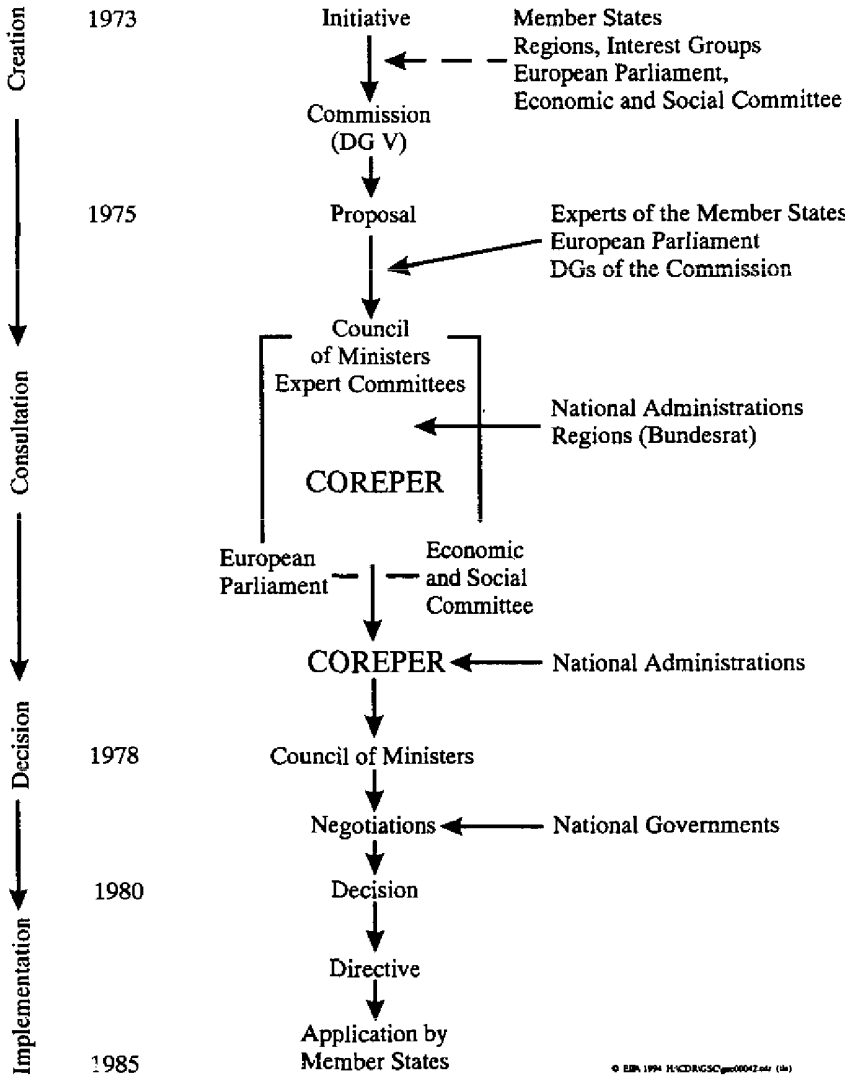
Directices: A directive must be implemented or translated into Member States laws or regualtions within a specified time. The directive "shall be binding, as to the result to be achieved, upon each Member State to which it is adressed, but shall leave to the national authorities the choice of form and methods". A directive can be directly applicable if the directive is sufficient clear and detailed.

Decision: "A decision shall be binding in its entirety upon those to whom is tis adressed".

Whereas a directive may be adressed to a state, a decision may also be adressed to a natural or legal person.

A Recommendation is not binding but tries to convince Member States to adopt certain measures.

Preparation, Formulation and Passing of Directive 80/778/EEC



Causes for Implementation Deficits:

a) technical problems (because of the detailed structure of a directive),

b) problems of notions (for ex: "best available technologies not entailing excessive costs"),

c) political problems (costs, pressure of interests groups),

d) long parliamentarian law making process,

e) reluctances of regions, Länder or communities to transform the EC law in regional law,

f) incompatibility of the instrument with the national legal system (the more developed national laws are, the more difficult transposition can be),

g) poor preparation of the directive and desinterest of national civil servants,

h) internal political changes (relativ rarely),

i) financial difficulties,

j) coordination problems between ministries (vertically and horizontally),

k) shortcomings in the relevant administrations to implement the directive (personnel deficits, knowledge deficits etc.).

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APPENDIX

CODE OF ADMINISTRATIVE COURT PROCEDURE

[Verwaltungsgerichtsordnung (VwGO)]

of January 21st 1960

In the wording as promulgated on March 19th 1991

(Federal Law Gazette I p. 686), amended by Article 3 G on new procedural provisions for asylum of June 26th 1993 (Federal Law Gazette I p. 1126) and Article 9 G on disencumbering the administration of justice of January 11th 1993 (Federal Law Gazette I p. 50)

Contents

PART I: COMPOSITION OF COURTS

Chapter 1: Courts

1. [Independence of Administrative Courts]

Administrative jurisdiction is exercised by courts, which are independent of and separate from administrative authorities.

2. [Courts and Instances of Administrative Jurisdiction]

Within the framework of general administrative jurisdiction, administrative courts (of first instance) and a Higher Administrative Court shall be established in each of the *Länder* (federal states) and the Federal Administrative Court in the Federation with its seat in Berlin.

3. [Organisation of Courts]

(1) The law shall provide for:

1. the establishing and dissolution of an administrative court or a Higher Administrative Court,
2. the relocation of the seat of a court,
3. changes to the boundaries of judicial districts,
4. the allocation of particular areas of work to one administrative court to serve the judicial districts of several administrative courts,
5. the establishing of particular bench divisions of administrative courts or senates of Higher Administrative Courts at other locations,
6. the passing of cases which are pending to another court in the course of the measures described in Nos. 1, 3 and 4, if jurisdiction is not to comply with previously valid provisions.

(2) A number of *Länder* may agree to establish a joint court or a joint adjudication body, or may agree to the extension of judicial districts across *Land* borders, including extension solely for particular areas of work.

4. [Presiding Board and the Assigning of Actions]

The courts of administrative jurisdiction are subject to the provisions of the second title of the Judicature Act as applicable.

5. [Composition and Organisation of Administrative Courts]

(1) Administrative courts are composed of a President and the required number of presiding judges and other judges.

(2) Bench divisions are to be established at administrative courts.

(3) To make decisions the division benches of administrative courts are to be composed of three judges and two honorary judges to the extent that decisions are not taken by a single judge. Honorary judges are not involved in making rulings outside oral hearings or in making court decrees (section 84).

6. [Assignment to Single Judges, Reassignment to the Division Bench]

(1) As a general rule bench divisions shall assign a dispute for a decision to one of its members sitting alone if

1. the case does not display any special complications of a factual or legal nature, and
2. the case is not of fundamental importance.

Probationary judges may not sit alone in their first year after being appointed.

(2) A case may not be assigned to a single judge if an oral hearing has already taken place before a division bench unless a provisional, partial or interlocutory judgment has been made in the intervening period.

(3) A judge sitting alone may reassign a case to the division bench subsequent to hearing the parties where a significant alteration to the state of proceedings leads to the case taking on fundamental importance or displaying special complications of a factual or legal nature. Reassignment back to a single judge is not permitted.

(4) Orders issued under paragraphs 1 and 3 are non-appealable. *Failure to order assignment does not constitute grounds for a legal remedy.*

7. and 8. *(cancelled)*

9. [Composition and Structure of Higher Administrative Courts]

(1) Higher administrative courts are composed of a President and the required number of presiding judges and other judges.

(2) Senates are to be established at Higher Administrative Courts.

(3) To make decisions the senates of Higher Administrative Courts are to be composed of three judges; the legislation of the *Länder* may provide that senates are to be composed of five judges, two of whom may be honorary judges. In those cases covered by section 48, paragraph 1, provision may be made for senates to be composed of five judges and two honorary judges.

10. [Composition and Structure of the Federal Administrative Court]

(1) The Federal Administrative Court is composed of the President and the required number of presiding judges and other judges.

(2) Senates are to be established at the Federal Administrative Court.

(3) To make decisions the senates of the Federal Administrative Court are composed of five judges; for purposes of making court rulings outside oral hearings they are composed of three judges.

11. [The Enlarged Senate at the Federal Administrative Court]

(1) An Enlarged Senate is to be established at the Federal Administrative Court.

(2) The Enlarged Senate adjudicates on matters where one senate wishes to depart from a decision taken by another senate or by the Enlarged Senate.

(3) Referral to the Enlarged Senate is permitted only where the senate whose decision is the subject of the proposed departure has declared on request from the senate wishing to depart from its decision that it abides by its legal opinion. Where the senate whose decision is the subject of the proposed departure is no longer able to deal with the issue as a result of a change to the court schedule for actions, it is replaced by the senate which, under the court schedule, would now have jurisdiction for the case in which the divergent decision was taken. The relevant senate adjudicates on the request and the answer and makes a ruling in the composition laid down for making judgments.

(4) The adjudicative senate may refer issues of fundamental importance to the Enlarged Senate for a decision where it deems this to be necessary for the advancement of the law or in order to safeguard uniformity in the dispensation of justice.

(5) The Enlarged Senate is composed of the President and one judge from each of the senates for appeals for final revision (revision senates) over which the President does not preside. Where referral is made by some other senate than a revision senate, or where a departure from a decision of this senate is sought, a member of this senate is also represented in the Enlarged Senate. Should the President be prevented from participating, his place is taken by a judge from the senate to which he belongs.

(6) Members and their deputies are appointed by the presiding board for one working year. This applies equally in the case of a member of another senate as provided in paragraph 5 and his deputy. The Enlarged Senate sits under the chairmanship of the President or, in his absence, of the seniormost member. The chairman has a casting vote.

(7) The Enlarged Senate rules only on questions of law. Its decisions are not required to be preceded by an oral hearing. Its decisions are binding upon the adjudicative senate on the matter at issue.

12. [The Enlarged Senate at the Higher Administrative Court]

(1) The provisions of section 11 apply to Higher Administrative Courts as appropriate to the extent that this court is involved in making a

final decision on a matter of *Land* law. Revision senates are replaced by the appeal senates set up under this Act.

(2) Where a Higher Administrative Court is composed of only two appeal senates, the Enlarged Senate is replaced by the Joint Senates sitting in plenary session.

(3) Some other composition for Enlarged Senates may be permitted under *Land* law.

13. [Court Offices]

Offices are to be set up at all courts. These shall be staffed by records clerks in the required number.

14. [Administrative and Legal Cooperation]

All courts and administrative authorities shall provide administrative and legal cooperation to courts with jurisdiction over administrative matters.

Chapter 2: Judges

15. [Primary-Office Judges]

(1) Judges are appointed for life where nothing is provided to the contrary in sections 16 and 17.

(2) *(cancelled)*

(3) Judges at the Federal Administrative Court must be over the age of thirty-five.

16. [Secondary-Office Judges]

At Higher Administrative Courts and at administrative courts judges appointed for life at other courts and also full professors of law may be appointed to serve as secondary-office judges for a fixed period of no

less than two years and not to exceed the duration of their primary-office appointment.

17. [Probationary and Mandated Judges]

Probationary and mandated judges may be called upon to sit at administrative courts.

18. *(deleted)*

Chapter 3: Honorary Judges

19. [Duties]

Honorary judges enjoy the same rights to participate in oral hearings and in coming to judgments as judges.

20. [Qualifications for Appointment]

Honorary judges must be in possession of German nationality. They should be over the age of thirty and have had their place of residence within the relevant judicial district for the last year prior to election.

21. [Exclusions from Honorary Office]

The following persons are excluded from holding the office of an honorary judge:

1. any person who as a result of a court ruling is disqualified from holding public office or who has been sentenced to a term of more than six months in prison for committing an offence with malice aforethought,
2. any person against whom charges have been preferred in respect of an offence which could result in disqualification from holding public office,

3. any person who has been restrained by court order in the disposal of his assets,
4. any person who does not enjoy voting rights to the legislative bodies of the *Land* in question.

22. [Impediments for Lay Assessors]

The following persons may not be appointed to serve as honorary judges:

1. members of the Federal Parliament (*Bundestag*), of the European Parliament, of the legislative bodies of a *Land*, of the Federal Government or of a *Land* government,
2. judges,
3. public officials and public-sector employees, unless they give their services in an honorary capacity,
4. career soldiers and fixed-term soldiers,

4a. regular and fixed-term members of the civil defence corps,

5. solicitors, notaries and other persons who take care of the legal affairs of others on a professional basis.

23. [Right of Refusal]

(1) The following persons have the right to refuse a call to serve as an honorary judge:

1. members of the clergy and ministers of religion,
2. lay assessors and other honorary judges,
3. persons who have served for eight years as honorary judges at courts of general administrative jurisdiction,
4. doctors, nurses and midwives,
5. pharmacists without assistants,
6. anyone over the age of sixty-five.

(2) In cases of special hardship applications from other persons for relief from holding this office may be entertained.

24. [Discharge from Honorary Office]

(1) Honorary judges are to be discharged from office if they

1. were not entitled to be appointed under sections 20 to 22, or can no longer be appointed, or
2. have committed a serious breach of their official duties, or
3. can assert one of the grounds for refusal contained in section 23, paragraph 1, or
4. are no longer in possession of the mental or physical faculties required to exercise this office, or
5. give up their place of residence within the judicial district.

(2) In cases of special hardship applications for discharge from the continued exercise of this office may be entertained.

(3) In those cases described in paragraph 1, Nos. 1, 2 and 4, a decision is taken by a senate at the Higher Administrative Court on application by the President of the administrative court, and in cases described in paragraph 1, Nos. 3 and 5 and in paragraph 2 on application by the honorary judge concerned. The honorary judge is to be heard prior to a decision being taken. This decision is non-appealable.

(4) Paragraph 3 applies *mutatis mutandis* in those cases described in section 23, paragraph 2.

(5) On application by the honorary judge, a decision taken under paragraph 3 is to be quashed by the senate at the Higher Administrative Court in cases where charges had been preferred and these charges have since been finally and conclusively dropped, or the accused has been acquitted.

25. [Election Period]

Honorary judges are elected to serve for a term of four years.

26. [Election Committee]

(1) A committee is to be constituted at each administrative court for the purpose of electing honorary judges.

(2) This committee is composed of the President of the administrative court acting as chairman, of one public official appointed by the *Land* government, and seven persons of trust to serve as committee members. The seven persons of trust, and also seven deputies, are elected from among the residents of the judicial district served by the administrative court either by the *Land* parliament, or by a parliamentary sub-committee appointed by it, or in accordance with *Land* law. They must meet the requirements for appointment to the office of an honorary judge. The governments of the *Länder* are empowered to make statutory provisions in divergence from sentence 1 regarding responsibility for the appointment of the public official. They may transfer these powers to supreme *Land* authorities.

(3) This committee has a quorum when at least the chairman, the public official and three persons of trust are in attendance.

27. [Number of Honorary Judges]

The number of honorary judges required at each administrative court is determined by the President to allow for each to be called upon to attend on no more than twelve days of session within one year.

28. [Nominations]

Every fourth year the counties and cities not attached to a county draw up a list of nominations for the office of honorary judge. The committee sets individually for each county or city the number of candidates to be included in the list. This number is arrived at by doubling the required number of honorary judges set under section 27. Inclusion in the list requires the endorsement of no less than two thirds of the statutory number of members of the representative body of the county or city. In addition to names, lists of nominations shall state each nominee's

place and date of birth and occupation; these lists shall be submitted to the President of the competent administrative court.

29. [Election Procedure]

(1) The committee elects the required number of honorary judges from the list of nominations by no less than a two thirds majority.

(2) Serving honorary judges remain in office until new elections are held.

30. [Call to Attend Sessions, Deputies]

(1) Before the beginning of the judicial year the presiding board of the administrative court shall fix the order in which honorary judges are to be called on to attend court sessions. A list containing no fewer than twelve names is to be drawn up for each bench division.

(2) A contingency list containing the names of honorary members who live close to the court may be drawn up to allow deputies to be called upon in the case of attendance being prevented by unforeseen circumstances.

31. *(cancelled)*

32. [Compensation]

Honorary judges and persons of trust receive compensation in accordance with the Compensation of Honorary Judges Act.

33. [Fines]

(1) Any honorary judge who fails to attend a court session on time without providing a reasonable excuse, or who fails in his duties in some other manner, is liable to a fine. He may also be held liable in respect of any costs attributable to his actions.

(2) A decision in this matter is made by the presiding judge. The presiding judge may cancel this decision in part or in its entirety where a reasonable excuse is subsequently offered and accepted.

34. [Honorary Judges at the Higher Administrative Court]

Sections 19 to 33 apply *mutatis mutandis* in respect of honorary judges at a Higher Administrative Court where honorary judges are permitted under *Land* legislation to act at Higher Administrative Courts.

Chapter 4: Representatives of the Public Interest

35. [The Chief Federal Public Attorney]

(1) A Chief Federal Public Attorney is to be appointed at the Federal Administrative Court. The Chief Federal Public Attorney is entitled to participate in any proceedings before the Federal Administrative Court for the purposes of protecting the public interest; this does not apply in the case of proceedings before disciplinary senates or military boards of review. He is bound by instructions from the Federal Government.

(2) The Federal Administrative Court shall allow the Chief Federal Public Attorney the opportunity to be heard.

36. [Representatives of the Public Interest]

(1) A representative of the public interest may be appointed at the Higher Administrative Court or at an administrative court in accordance with a statutory order issued by a *Land* government. He may be charged with representing the *Land* or state authorities either generally or on specific matters.

(2) Section 35, paragraph 2 applies *mutatis mutandis*.

37. [Qualifications for Holding Judicial Office]

(1) The Chief Federal Public Attorney and his permanent assistants from within the higher civil service class must meet the qualifications for holding judicial office, or satisfy the requirements of section 110, first sentence of the German Judges Act.

(2) Representatives of the public interest at Higher Administrative Courts and at administrative courts must meet the qualifications for holding judicial office under the German Judges Act. Nothing shall affect the provisions of section 174.

Chapter 5: Administration of Courts

38. [Supervision]

(1) The President of the court exercises a supervisory function over judges, public officials, public employees and other staff.

(2) The superior supervisory authority for administrative courts is the President of the Higher Administrative Court.

39. [Administrative Affairs]

Administrative affairs other than those of the administration of courts may not be transferred to administrative courts.

Chapter 6: Access to Administrative Courts and Competence

40. [Right of Access to Administrative Courts]

(1) Access to administrative courts is accorded in all public law disputes which are not of a constitutional nature to the extent that such disputes are not expressly assigned to some other court under federal law. Public law disputes within the sphere of *Land* law may also be assigned to other courts under *Land* law.

(2) Access to ordinary courts is accorded for pecuniary claims arising from loss, damage or impairment suffered for the public good and from public law deposits, as well as for claims for damages arising from the violation of public law obligations which are not based on an agreement under public law. Nothing shall affect the special provisions of civil service law (*Beamtenrecht*) and provisions on access to courts in the case of compensation for loss to property due to the withdrawal of unlawful administrative acts.

41. *(cancelled)*

42. [Rescissory Actions and Actions for Mandatory Injunction]

(1) An action may be brought to seek the quashing of an administrative act (rescissory action) as well as to seek an order to issue an administrative act which has been refused or omitted (action for mandatory injunction).

(2) Unless otherwise provided by law, an action is admissible only if the plaintiff claims that his rights have been infringed by the administrative act or by its refusal or omission.

43. [Declaratory Actions]

(1) An action may be brought to seek declaration of the existence or non-existence of a legal relationship or of the nullity of an administrative act if the plaintiff has a legitimate interest in prompt declaration (declaratory action).

(2) Declaration may not be sought where the plaintiff is entitled to sue, or could have sued for his rights by means of an action for the modification of rights or an action for performance. This does not apply in cases where the declaration sought concerns the nullity of an administrative act.

44. [Joinder of Causes of Action]

A plaintiff is entitled to group together a number of causes of action in one single action if all the causes of action are directed against the same defendant, are related and all fall within the jurisdiction of one court.

44a. [Legal Remedies for Procedural Actions on the Part of the Authorities]

Legal remedies for procedural actions on the part of official authorities may only be sought in conjunction with available legal remedies for substantive decisions. This does not apply where official procedural actions may be enforced or are directed against a non-party.

45. [Subject-Matter Jurisdiction]

The administrative court adjudicates in the first instance on all disputes for which access to administrative courts is accorded.

46. [Appellate Jurisdiction of the Higher Administrative Court]

The Higher Administrative Court adjudicates on the rights of

1. appeal against judgments of the administrative court,
2. complaint against other decisions of the administrative court,
3. appeal for final revision against judgments of the administrative court under section 145.

47. [Subject-Matter Jurisdiction of the Higher Administrative Court for Reviews of Lawfulness]

(1) The Higher Administrative Court adjudicates on application within the bounds of its jurisdiction on the validity of

1. by-laws issued under the provisions of the Federal Building Code and of statutory orders issued on the basis of section 246, paragraph 2 of the Federal Building Code,

2. other legal provisions ranked below the statutes of a *Land*, to the extent that this is provided in *Land* law.

(2) Application may be made by any natural person or body corporate aggrieved by the legal provision or its application, or who has reason to expect to be aggrieved within the foreseeable future, or by any public authority. It is to be directed against the corporation, institution or foundation which issued the legal provision. The Higher Administrative Court may grant the *Land* and other corporate bodies under public law whose competence is touched by the legal provision an opportunity to be heard on the matter within a specified period of time.

(3) The Higher Administrative Court shall not examine the compatibility of a legal provision with *Land* law where it is provided in law that the legal provision is subject to review exclusively by the constitutional court of the *Land* in question.

(4) Where proceedings to review the validity of a legal provision are pending at a constitutional court, the Higher Administrative Court may order the suspension of proceedings until such time as the case has been disposed of by the constitutional court.

(5) The Higher Administrative Court shall refer matters to the Federal Administrative Court for adjudication on the interpretation of law subject to final appeal, stating the reasons for its legal opinion, where

1. the case is of fundamental importance, or
2. the Higher Administrative Court wishes to depart from a decision of another Higher Administrative Court, the Federal Administrative Court, the Joint Senate of the Federal Supreme Courts or the Federal Constitutional Court.

Orders of referral are to be made known to all parties. The Federal Administrative Court rules only on questions of law.

(6) The Higher Administrative Court adjudicates and gives its judgment or, if it does not consider oral proceedings to be necessary, makes a ruling. Should the Higher Administrative Court come to the conclusion

that the legal provision is invalid, it declares it to be null and void; in this case the decision is generally binding and the respondent is required to advertise the operative part of the decision in exactly the same manner as the legal provision would be required to be advertised. Section 183 applies *mutatis mutandis* in respect of the effects of the decision.

(7) Non-referral under paragraph 5 may form the subject of a complaint. The complaint procedure is subject to the provisions of section 133, paragraphs 2, 3, first and second sentences, paragraphs 4 and 5, third sentence as applicable. The reasons to support the complaint must contain explanation of the fundamental importance of the case or identify the decision from which the impugned decision departs. The Federal Administrative Court adjudicates and gives its ruling. Where the complaint is held to be well founded, or the Higher Administrative Court has provided a legal remedy, the Federal Administrative Court adjudicates on the question of law. Where the Higher Administrative Court has come to a divergent interpretation on a question of law and its decision is based on this divergence, the Federal Administrative Court shall remand the case to the Higher Administrative Court, which shall cancel its decision and give a new ruling.

(8) On application the court may issue a temporary injunction where this is urgently required in order to prevent the creation of serious disadvantage or for other compelling reasons.

48. [Additional First Instance Jurisdiction of Higher Administrative Courts]

(1) The Higher Administrative Court rules in the first instance on all disputes concerning

1. the construction, operation, occupation in any other form, changes to and the closure, inclusion and demolition of structures within the meaning of sections 7 and 9a, paragraph 3 of the Atomic Energy Act,
2. the treatment, processing and other utilisation of nuclear fuels outside structures of the types described in section 7 of the Atomic Energy Act (section 9 of the Atomic Energy Act) and major devia-

tions or major changes within the meaning of section 9, paragraph 1, second sentence, of the Atomic Energy Act and the storage of nuclear fuels outside state custody (section 6 of the Atomic Energy Act),

3. the construction and operation of, and alterations to power stations utilising firing systems for solid, liquid or gaseous fuels with a furnace heat output of more than 300 megawatts,
4. the erection of overhead power cables with a voltage in excess of 100,000 volts and alterations to their course,
5. plan approval procedures under section 7 of the Waste Act for the construction and operation of, and major alterations to fixed structures for the incineration or thermal decomposition of waste with an annual throughput (effective capacity) in excess of 100,000 tonnes, and of fixed structures which are used partly or wholly for the temporary or permanent storage of waste materials within the meaning of section 2, paragraph 2 of the Waste Act,
6. the construction, extension or alteration and the operation of airports for civil air traffic,
7. plan approval procedures for the construction of new sections of tram and public rail routes and for the construction of shunting yards and container terminals,
8. plan approval procedures for the construction of, or changes to federal highways,
9. plan approval procedures for the construction of new inland waterways for general water-borne traffic.

Sentence 1 applies to disputes arising out of all of the permissions and consents required for a project, including those concerning ancillary facilities which are either spatially or operationally linked to the project. The *Länder* may provide by law that the Higher Administrative Court shall adjudicate in the first instance on disputes concerning putting into possession in cases described in the first sentence.

(2) The Higher Administrative Court adjudicates additionally in the first instance on actions brought against prohibitions of association

issued by a supreme *Land* authority under section 3, paragraph 2, No. 1 of the Law of Association and on directions issued under section 8, paragraph 2 of the Law of Association.

(3) The Higher Administrative Court of Berlin adjudicates in the first instance on actions brought against declaratory decisions made by the Berlin Government under section 5, paragraph 2 of the Law of Association.

49. [Final Appellate Jurisdiction of the Federal Administrative Court]

The Federal Administrative Court rules on:

1. appeals for final revision against judgments of the Higher Administrative Court under section 132,
2. appeals for final revision against judgments of administrative courts under sections 134 and 135,
3. complaints under section 47, paragraph 7, section 99, paragraph 2, and section 133, paragraph 1 of this Act, and of section 17a, paragraph 4, fourth sentence of the Judicature Act.

50. [First Instance Jurisdiction of the Federal Administrative Court]

(1) The Federal Administrative Court rules in the first and last instance on

1. public law disputes which are not of a constitutional nature between the Federation and the *Länder* and between individual *Länder*,
2. actions brought against prohibitions of associations made by the Federal Minister of the Interior under section 3, paragraph 2, No. 2 of the Law of Association and directions issued under section 8, paragraph 2, first sentence of the Law of Association,
3. *(cancelled)*
4. actions brought against the Federation and arising from matters concerning official regulations within the ambit of the Federal Intelligence Service.

(2) *(cancelled)*

(3) Where the Federal Administrative Court finds a dispute heard under paragraph 1 No. 1 to be of a constitutional nature, it shall refer the matter for adjudication to the Federal Constitutional Court.

51. [Suspension of Proceedings on the Prohibition of Association]

(1) In cases where the prohibition of an entire association has been ordered for enforcement under section 5, paragraph 3 of the Law of Association rather than prohibition of only one part of the association, any proceeding on an action brought by this part of the association against its prohibition shall be suspended until such time as a decision has been made on the action brought against prohibition of the entire association.

(2) Where a declaratory decision of the Berlin Government under section 5, paragraph 2 of the Law of Association is appealed from on the grounds of the prohibition or the direction made under section 8, paragraph 2, first sentence of the Law of Association being unlawful, the Higher Administrative Court shall suspend the proceedings until such time as a ruling has been made on the action brought against the prohibition or the direction made under section 8, paragraph 2, first sentence of the Law of Association. Nothing shall affect the provisions of section 16 paragraph 4 of the Law of Association.

(3) A decision of the Federal Administrative Court is binding upon Higher Administrative Courts in those cases described in paragraphs 1 and 2.

(4) The Federal Administrative Court shall inform Higher Administrative Courts of any action brought by an association under section 50, paragraph 1, No. 2.

52. [Territorial Jurisdiction]

Territorial jurisdiction is subject to the following provisions:

1. In disputes regarding immovable property or a local law or legal relationship, territorial jurisdiction lies solely with the administra-

tive court within whose district the assets are located or the local law applies.

2. In the case of a rescissory action brought against an administrative act issued by a federal authority or a federally incorporated body, institution or foundation under public law, territorial jurisdiction lies with the administrative court within whose district the seat of the federal authority, corporation, institution or foundation is located, subject to Nos. 1 and 4. This applies equally in the case of an action for mandatory injunction of an administrative act in those cases covered by sentence 1. In disputes under the Law of Asylum Procedure, however, territorial jurisdiction lies with the administrative court within whose district the alien is obliged to reside under the Law of Asylum Procedure; where territorial jurisdiction cannot be established by this criterion, it shall be settled in accordance with No. 3. Territorial jurisdiction for disputes brought against the Federation in territories falling under the jurisdiction of the Federal Republic of Germany's diplomatic and consular agencies lies with the administrative court whose district contains the seat of the Federal Government.

3. In the case of all other rescissory actions, territorial jurisdiction subject to Nos. 1 and 4 lies with the administrative court within whose district the administrative act was issued. Where this act was issued by a public authority whose sphere of competence extends over the judicial districts of a number of administrative courts, or by a joint public authority acting on behalf of several or all of the *Länder*, jurisdiction lies with the administrative court within whose district the aggrieved party has its seat or his place of residence. In the absence of either of the latter within the province of the public authority, jurisdiction is determined in accordance with No. 5. In the case of rescissory actions brought against administrative acts issued by the central office for university admissions set up jointly by the *Länder*, however, territorial jurisdiction lies with the administrative court within whose district this organisation has its seat. This also applies in respect of actions for mandatory injunction in those cases described in sentences 1, 2 and 4.

4. For all actions brought against bodies corporate under public law or a public authority arising out of continuing or previous terms of employment as a public official, as a judge or during compulsory or voluntary military service or civilian service (replacing military service) or from service in the civil defence corps, and for disputes concerning the origin of such terms of employment, territorial jurisdiction lies with the administrative court within whose district the plaintiff has his place of residence for purposes of employment, or failing that his place of residence. Should the plaintiff have neither a place of residence for purposes of employment nor a place of residence within the province of the authority which issued the original administrative act, territorial jurisdiction lies with the administrative court within whose district the public authority has its seat. Sentences 1 and 2 apply as appropriate to actions brought under section 79 of the Law on the Regulation of Legal Relationships of Persons Falling under Article 131 of the Basic Law.
5. In all other cases territorial jurisdiction lies with the administrative court within whose district the defendant has its seat, his place of residence, or failing this his place of abode, or previously had his place of residence or place of abode.

53. [Determination of the Competent Court]

(1) The competent court within the jurisdiction of the administrative courts is determined by the next highest court

1. if, in a particular case, the court which would normally be competent is prevented for reasons either of law or of fact from exercising its jurisdiction,
2. where there is uncertainty because of the boundaries of a number of judicial districts as to which court is competent to hear the dispute,
3. where the place of jurisdiction is determined in accordance with section 52 and a number of courts are to be considered,

4. where a number of courts have finally and conclusively declared themselves to have jurisdiction,
5. where a number of courts of which one is competent to hear the dispute have finally and conclusively declared themselves not to have jurisdiction.

(2) Where territorial jurisdiction cannot be settled under section 52, the competent court is determined by the Federal Administrative Court.

(3) Every party in a legal dispute and every court involved with the dispute may appeal to the next highest instance or to the Federal Administrative Court. The court to which appeal has been made may rule without an oral hearing.

PART II: PROCEDURES

Chapter 7: General Regulations on Procedure

54. [Exclusion and Rejection of Court Officials]

(1) The exclusion and rejection of court officials is governed by sections 41 to 49 of the Code of Civil Procedure as applicable.

(2) Any person who has played a part in the preceding administrative procedure is excluded from exercising the office of judge or of honorary judge.

(3) Fear of bias within the meaning of section 42 of the Code of Civil Procedure is deemed to exist in all cases where the judge or honorary judge represents a body whose interests are touched by the case.

55. [Administrative Regulations for Maintaining Order]

Sections 169, 171a to 198 of the Judicature Act on access to the public, powers to maintain order during proceedings, the official language used in court, consultation and coordination apply *mutatis mutandis*.

56. [Service]

(1) Orders and decisions which activate a time-limit, and also dates for hearings and summonses, are to be served; where a pronouncing judgment has been made in court, formal service takes place only where this is expressly laid down.

(2) Service is conducted *ex officio* in accordance with the provisions of the Administrative Notices Service Act.

(3) Persons who do not reside within the country may be required to nominate an authorised recipient to receive service.

56a. [Notification by Public Promulgation]

(1) Where the same announcement is required to be made to more than fifty persons, the court may rule for the remainder of the proceedings that notification shall be effected by means of public promulgation. This ruling must name the newspapers in which promulgation will appear; the newspapers to be selected should be daily newspapers with wide circulation within the area in which the decision is expected to have its effect. This ruling shall be served upon all parties. Parties are to be informed of the manner in which future notification will be effected and when the document is deemed to have been served. This ruling is non-appealable. The court may revoke this ruling at any time; it is required to revoke the ruling where the conditions stated in sentence 1 did not or no longer obtain.

(2) In the case of public promulgation, the document which is required to be promulgated must be displayed on the official court notice-board and published both in the Federal Advertiser and in the newspapers named in the ruling issued under paragraph 1, second sentence. In the case of public promulgation of a decision it is sufficient for only the operative part of the decision to be displayed and promulgated together with instructions as to what legal remedies are available. In place of displaying or publishing a document, it is acceptable for an announcement to be displayed or published containing information as to the time and place at which the document is available for inspection. Notice of a date for a hearing and summonses must be displayed or published in full.

(3) A document is deemed to have been served two weeks subsequent to its publication in the Federal Advertiser; attention is to be drawn to this fact in the publication. Following public promulgation of a decision, parties are entitled to make a written request for a copy of the decision; attention is similarly to be drawn to this right in the publication.

57. [Time-Limits]

(1) Where nothing has been provided to the contrary, a time-limit is activated on service, or, where service is not required, by notification or by a pronouncing judgment.

(2) Time-limits are subject to sections 222, 224, paragraphs 2 and 3, 225 and 226 of the Code of Civil Procedure.

58. [Instruction on Legal Remedies]

(1) The time-limit for lodging appeals or any other form of legal remedy begins with the party being instructed in writing of what legal remedies are available and of the administrative authority or court with which the legal remedy is to be lodged, stating the location of its seat and the time-limit to be observed.

(2) In the absence of such instruction, or where instruction is deficient, the lodging of a legal remedy is permissible only within one year of service, notification or pronouncing judgment, unless lodging of the legal remedy was prevented within the one-year time-limit for reasons of *force majeure*, or written instruction has been made to the effect that no legal remedy is available. Section 60, paragraph 2 applies *mutatis mutandis* in the case of *force majeure*.

59. [Duty of Information on Federal Authorities]

When a federal authority issues in writing an administrative act which is appealable, this act is to be accompanied by a declaration instructing parties of the legal remedy which is available to challenge the admini-

strative act, of the offices at which this appeal is to be lodged and of any time-limit which is to be observed.

60. [Restoration of the *status quo ante*]

(1) In the case of a person being prevented from observing a statutory time-limit through no fault of his own, this person is on application to be granted restoration of the *status quo ante*.

(2) Application is to be made within two weeks of this obstacle being removed. Substantiation of the facts to support this application are to be included with the application or stated during the hearing on the application. The legally significant act which has not previously been performed must be performed within the period allowed for submitting the application. Where this act has been performed, restoration of the *status quo ante* may be granted without an application being necessary.

(3) Applications are not admissible after a period of one year from the end of a time-limit which has not been observed unless an application could not be submitted within a year for reasons of *force majeure*.

(4) The decision on restoration of the *status pro ante* is made by whichever court is charged with ruling on the legally significant act which has not been performed.

(5) Restitution to the *status quo ante* is non-appealable.

61. [Capacity to Participate]

Capacity to participate in proceedings extends to

1. natural and juridical persons,
2. associations, to the extent that they can have legal rights,
3. public authorities, to the extent that this is provided under *Land* law.

62. [Capacity to Conduct Legal Proceedings]

Capacity to conduct legal proceedings extends to

1. persons with full legal capacity under civil law,
2. persons with limited legal capacity under civil law to the extent that they are recognised as being fully capable under civil and public law on the matters at issue in the proceedings.

(2) Where the matters at issue in the proceedings are affected by a reservation of consent under section 1903 of the German Civil Law Code, a person of full age and having legal competence who is placed under the care of a custodian shall be deemed capable of acting in administrative proceedings only in so far as he can act, under the provisions of civil law, without the consent of his custodian or he is recognised as being capable of acting under the provisions of public law.

(3) Associations and public authorities are represented by their statutory representatives, governing bodies or by specially appointed representatives.

(4) Sections 53 to 58 of the German Civil Law Code apply *mutatis mutandis*.

63. [Parties]

The parties in proceedings are

1. the plaintiff,
2. the defendant,
3. any third party who has been summoned to attend (section 65),
4. the Chief Federal Public Attorney or the representative of the public interest should he make use of his right to participate.

64. [Joinder of Parties]

The provisions of sections 59 to 63 of the Code of Civil Procedure on the joinder of parties apply *mutatis mutandis*.

65. [Summoning of Third Parties to Appear]

(1) As long as the proceedings have not been finally completed or are pending at a higher instance, the court is entitled to summon *ex officio* or on application other parties to appear if their legal interests are touched by the decision.

(2) Where third parties are affected by the legal dispute to such an extent that a uniform decision is called for in respect of all third parties, these parties are to be summoned to appear (mandatory summonses).

(3) Where the application of paragraph 2 would result in more that fifty persons being eligible to be summoned to appear, the court may make a ruling to order that only persons who have entered an application to appear within a time-limit to be stipulated shall be summoned to appear. This ruling is non-appealable. The ruling shall be published in the Federal Advertiser. In addition it shall be published in daily newspapers distributed with wide circulation within the area in which the decision may be expected to have its effect. The time-limit must be no less than three months from the date of publication in the Federal Advertiser. The announcement published in newspapers must state the closing date for submitting applications. Section 60 applies *mutatis mutandis* in respect of restoration of the *status quo ante* in cases of time-limits not being observed. The court shall summon any persons who would evidently be especially affected by a decision without requiring application to be made.

(4) The ruling on summonses shall be served on all parties. This ruling shall give the current state of the case and the reason for the summons. A summons to appear is non-appealable.

66. [Procedural Rights of Third Parties]

Within the petitions allowed to parties, third parties who have been summoned to appear are independently entitled to assert claims to means of prosecuting and defending a case, as well as to undertake all procedural acts. Divergent substantive petitions may only be made where the summons was a mandatory summons.

67. [Authorised Representatives and Advisers]

(1) Before the Federal Administrative Court every party must be represented by a solicitor or a professor of law at a German university. This applies equally in the case of appeals for final revision and complaints against leave to appeal for final revision not being granted, and to complaints in those cases described in section 47, paragraph 7, and section 99, paragraph 2 of this Act and in section 17a, paragraph 4, fourth sentence of the Judicature Act. Bodies corporate under public law and public authorities may be represented by public officials or public employees who are qualified to hold judicial office.

(2) Before administrative courts and Higher Administrative Courts, parties are entitled to be represented by a person authorised for that purpose at any stage in the proceedings and may call on the services of a legal adviser during the oral hearing. The court may make a ruling to order the appointment of an authorised representative or that the services of a legal adviser be called on. Before an administrative court or Higher Administrative Court capacity to act as an authorised representative or as a legal adviser extends to any person who is capable of pleading in an appropriate manner.

(3) Authorisation is to be made in writing. The certificate of authorisation may be presented at a later date; the court may set a time-limit for presentation. Where an authorised representative has been appointed, all services and communications by the court are to be directed to the authorised representative.

67a. [Joint Representation]

(1) Where more than fifty persons share the same interest in a dispute and no representatives have been authorised, the court may make a ruling to order them jointly to appoint an authorised representative within a suitable period of time if failure to do so would stand in the way of proper disposal of the action. Where these parties fail to appoint a joint authorised representative within the period allowed, the court may make a ruling to appoint a solicitor to represent them. These parties may undertake procedural acts only through the joint authorised

representative or his deputy. Rulings made under sentences 1 and 2 are non-appealable.

(2) The power of representation lapses on either the representative or the person represented making a written declaration to this effect to the court or having the declaration recorded by the records clerk; a declaration of this kind made by the representative must apply to all of the persons represented. Where a declaration of this kind is made by the represented party, the power of representation only lapses if notification is made simultaneously of another representative being appointed.

Chapter 8: Special Provisions on Rescissory Actions and Actions for Mandatory Injunction

68. [Preliminary Proceedings]

(1) Before a rescissory action may be brought, the legality and expediency of the administrative act must be examined in a preliminary proceeding. Examination is not required where this is provided for special cases in a law or where

1. the administrative act was issued by a supreme federal authority or supreme *Land* authority, unless examination is required by law,
2. a third party is aggrieved for the first time by an administrative decision on an objection.

(2) Actions for mandatory injunction are subject to paragraph 1 as applicable in the case of an application for performance of the administrative act having been refused.

69. [Objections]

The preliminary proceeding commences with the lodging of the objection.

70. [Due Form and Time for Objections]

(1) Objections must be submitted in writing or made in person for recording with the authority which issued the administrative act within a period of one month of the aggrieved party being notified of the administrative act. The time-limit is deemed to have been observed where the objection is lodged with the authority charged with deciding on the objection.

(2) Section 58 and section 60, paragraphs 1 to 4 apply *mutatis mutandis*.

71. [Hearing Third Parties]

Where the cancellation or modification of an administrative act ordered in a decision on an objection is capable of aggrieving a third party, this third party is to be granted a hearing prior to any decision being taken on the objection.

72. [Remedies]

Should the authority find the objection to be well founded, it shall provide a remedy and make a decision on costs.

73. [Administrative Decisions on Objections]

(1) Where a public authority does not provide a remedy for an objection, a decision shall be taken on the objection. This decision is to be taken by

1. the next highest authority, unless some other higher authority is designated in law with discharging this task,
2. the authority which issued the administrative act, in cases where the next highest authority is a supreme federal or *Land* authority,
3. a self-governing authority, in cases relating to self-government and where nothing is provided to the contrary in law.

(2) Nothing shall affect provisions under which public authorities may be replaced in preliminary proceedings under paragraph 1 by committees or advisory boards. Notwithstanding paragraph 1, these committees and advisory boards may be constituted at the authority which issued the administrative act.

(3) The decision on the objection must be accompanied by a statement of the grounds on which it was taken and instruction as to what rights of appeal are available to challenge it, and it must be formally served. The decision on the objection also states which party shall bear the costs.

74. [Time-Limits for Actions]

(1) Rescissory actions must be filed within one month of service of a decision on an objection. Where under section 68 a decision on an objection is not required, the action must be filed within one month of notification of the administrative act.

(2) Actions for mandatory injunction are subject to paragraph 1 as applicable in the case of an application for execution of the administrative act having been refused.

75. [Actions Following Inactivity of Administrative Authorities]

Where a decision on the merits of an objection or of an application for issue of an administrative act has not been taken within an appropriate period of time without sufficient reason, the action is deemed to be admissible notwithstanding section 68. The action may not be brought within three months of the objection being lodged or the application for issuing of the administrative act being submitted unless a shorter time-limit is warranted by the special circumstances of a particular case. Where there is sufficient reason for a decision on an objection not having been taken, or for an administrative act which has been applied for not having been issued, the court shall suspend the proceedings for an extendible period of time to be set by the court. Should the

objection be upheld or the administrative act issued within the time-limit set by the court, the cause of action shall be deemed to be settled.

76. *(cancelled)*

77. [Exclusivity of Proceedings on Objections]

(1) The provisions of this Chapter replace all other federal law provisions contained in other laws on objection and complaint procedures.

(2) This applies equally to provisions in the law of the *Länder* on objection and complaint procedures as preconditions for actions before administrative courts.

78. [The Defendant]

(1) Actions are to be brought

1. against the Federation, the *Land* or statutory body whose authority issued the impugned administrative act, or which failed to issue the administrative act for which an application was made; the defendant is adequately identified by naming the authority,
2. directly against the authority which issued the impugned administrative act, or which failed to issue the administrative act for which an application was made, where this is stipulated in the legislation of the *Land* in question.

(2) Where a third party is aggrieved for the first time by an administrative decision taken on an objection (section 68, paragraph 1, second sentence, No. 2), the authority for the purposes of paragraph 1 is the authority which decided on the objection.

79. [Substance of Rescissory Actions]

(1) The substance of a rescissory action is

1. the original administrative act in the form which it took on as a result of the decision on an objection,

2. the decision on an objection in cases where a third party is aggrieved for the first time by it.

(2) A decision on an objection may also form the sole substance of a rescissory action where and to the extent that it contains an additional and independent grievance in relation to the original administrative act. A violation of a fundamental procedural provision also constitutes an additional grievance to the extent that the decision on an objection rests on this violation. Section 78, paragraph 2 applies *mutatis mutandis*.

80. [Suspensory Effect]

(1) Objections and rescissory actions have a suspensory effect. This applies equally in the case of regulative and declarative administrative acts and administrative acts with double effect (section 80a).

(2) There is no suspensory effect only in the case of

1. demands in respect of public charges and costs,
2. non-postponable orders and measures taken by police officers, and
3. in other cases as stipulated in federal law,
4. and in cases in which immediate execution is ordered by the public authority which issued the administrative act or which is charged with deciding on an objection either in the public interest or in the overriding interest of a party.

(3) In those cases described in paragraph 2, No. 4, the special interest in immediate execution must be justified in writing. Special justification is not required in circumstances in which a public authority takes a precautionary emergency measure in the public interest in a case of imminent danger, in particular where there is a threat of risk to life or health or to property.

(4) The public authority which issued the administrative act or which is charged with deciding on an objection may, in those cases described in paragraph 2, order a suspension of execution to the extent that nothing is provided to the contrary in federal law. In the case of demands in respect of public charges and costs, it may also allow a suspension of execution

against the lodging of security. A suspension of execution shall be ordered in the case of demands in respect of public charges and costs where serious doubt exists as to the legality of the impugned administrative act, or where execution would result in undue hardship on the part of the party liable for the charge or costs and which is not warranted by the overriding public interest.

(5) On application the court may order suspensory effect, either wholly or in part, in respect of the main cause of action in cases described under paragraph 2, Nos. 1 to 3, or may reinstitute suspensory effect, either wholly or in part, in cases described under paragraph 2, No. 4. Applications may be lodged prior to a rescissory action being brought. Where at the time at which the decision is made the administrative act has already been executed, the court may order that the execution be set aside. Restitution of suspensory effect may be made contingent upon the lodging of security or some other condition being met. Time-limits may be set for the restitution of suspensory effect.

(6) In those cases described in paragraph 2, No. 1, applications under paragraph 5 are only admissible in cases where a public authority has already rejected an application for a suspension of execution either totally or in part. This does not apply where

1. the authority has failed to reach a decision on the merits of an application within an appropriate period of time without providing satisfactory explanation, or
2. execution has been threatened.

(7) The court where the principal cause of action is situated may amend or set aside rulings on applications issued under paragraph 5 at any time. The right is available to all parties to lodge an application for an order to be amended or set aside due to circumstances either having changed or not having been declared during the original proceedings through no fault of the party.

(8) In urgent cases a decision may be made by the presiding judge.

80a. [Administrative Acts with Double Effect]

(1) Where a third party launches an appeal against an administrative act issued in respect of and in favour of another person, the authority may

1. on application from the beneficiary, order immediate execution under section 80, paragraph 2, No. 4,
2. on application from the third party, order a suspension of execution under section 80, paragraph 4, and take interim measures in order to safeguard the interests of the third party.

(2) Where an aggrieved party launches an appeal against an administrative act issued in respect of himself and to his personal disadvantage but which benefits a third party, the authority may on application from the third party order immediate execution under section 80, paragraph 2, No. 4.

(3) On application the court may amend or set aside measures ordered under paragraphs 1 and 2 or order such measures to be taken. Section 80, paragraphs 5 to 8, applies *mutatis mutandis*.

Chapter 9: Procedure in the First Instance

81. [Commencement of Actions]

(1) An action must be filed in the court in writing. In the administrative courts it may also be filed in person by having it recorded with the records clerk.

(2) The action and all petitions shall be filed with copies for the other parties.

82. [Contents of the Plaint]

(1) The plaint must state the identity of the plaintiff and the defendant and the substance of the claim. It shall also contain a specific petition. The facts and evidence adduced to justify the claim are to be stated

and either originals or copies of the directive being challenged or of the relevant decision on an objection are to be appended.

(2) In the case of a plaint failing to satisfy these requirements, the presiding judge or some other judge appointed by the presiding judge (the reporting judge) shall require the plaintiff to furnish whatever is missing within a specified period of time. He may set the plaintiff a non-extendible time-limit where the information missing relates to one of the points required to be stated under paragraph 1, first sentence. Restoration of the *status quo ante* is subject to section 60 as applicable.

83. [Subject-Matter and Territorial Jurisdiction]

Subject-matter and territorial jurisdiction are determined in accordance with sections 17 to 17b of the Judicature Act as applicable. Rulings made under section 17a, paragraphs 2 and 3, of the Judicature Act are non-appealable.

84. [Court Decrees]

(1) The court may adjudicate and issue a court decree without oral proceedings if the case displays no particular complications of a factual or legal nature and the facts of the case have been established. The parties are to be heard prior to a court decree being issued. The provisions on judgments apply *mutatis mutandis*.

(2) Within one month of service of a court decree, parties may

1. lodge an appeal on a question of fact or a point of law or an appeal for final revision where a right of appeal exists,
2. in the case of leave to appeal being denied where an appeal on a question of fact or a point of law or an appeal for final revision is possible only with special leave, lodge an appeal against the denial of leave to appeal or make an application for a court hearing; in cases where both forms of legal remedy are resorted to, there shall be a court hearing,
3. where no right of appeal exists, apply for a court hearing.

(3) A court decree has the effect of a judgment; should an application for a court hearing be made in due time, a court decree is deemed not to have been issued.

(4) Where a court hearing has been applied for, the court may in its judgment refrain from repeating the statement of facts and reasons for its decision to the extent that its judgment follows the reasoning given for the court decree and this is stated in the judgment.

85. [Service of the Writ]

The presiding judge orders the writ to be served on the defendant. Service of the writ includes the requirement that the defendant shall respond in writing to the allegations made in the writ. Section 81, paragraph 1, second sentence applies *mutatis mutandis*. A time-limit may be set for the defendant's response.

86. [Inquisitorial Principle, Duty to Provide Information and Advice, Pleadings]

(1) The court examines the facts of the case *ex officio*; the parties are called upon to attend. The court is not bound by the pleadings and evidence offered by parties.

(2) An offer of evidence made during a court hearing may only be refused by means of a ruling by the court, for which refusal reasons are to be stated.

(3) The presiding judge must strive to ensure that any formal flaws are removed, that any ambiguous petitions are explained, that the petitions which are made are expedient to disposal of the case, that missing information is supplied where statements of fact are incomplete, and, in addition, that all essential declarations required for determination of and adjudication on the facts of the case are provided.

(4) The parties shall lodge pleadings for pre-trial review. A time-limit may be set by the presiding judge within which parties are required to lodge their pleadings. Pleadings shall be sent *ex officio* to all parties.

(5) Pleadings are to be accompanied by originals or transcripts, either extracts or the full text, of any document to which reference is made. Where an opponent may be assumed already to be familiar with such a document, or where a document is particularly lengthy, it is sufficient for precise identification of the document to be provided with the offer of it being available for inspection at the court.

87. [Pre-Trial Review]

(1) Prior to the court hearing the presiding judge or the reporting judge shall give whatever directions are required to enable the action to be disposed of in one hearing where this is at all possible. In particular he may

1. summon parties in order to discuss the facts of the case and the state of the dispute and to attempt to find an amicable settlement, and agree to a compromise;
2. request parties to add to or to elucidate their pleadings and to lodge any documents or any other objects which are suitable to be deposited with the court, and in particular he may set a time-limit for clarifying any specific points which are still in need of clarification;
3. seek information;
4. order documents to be presented;
5. order parties to appear in person; section 95 applies *mutatis mutandis*;
6. summon witnesses and experts to attend the court hearing.

(2) Parties are to be informed of all directions which are made.

(3) The presiding judge or reporting judge may take individual evidence. This is permissible only to the extent that it is expedient to simplifying the proceedings before the court and where it can be assumed from the outset that the court is capable of appraising the evidence appropriately without the direct experience of hearing it taken in court.

87a. [Decisions in Pre-Trial Reviews]

(1) Where a decision is made within the pre-trial review, the presiding judge adjudicates

1. on the suspension of proceedings or on making them a remanet;
2. on the retraction of actions, the renouncement or admission of claims;
3. on disposal of the principal cause of action;
4. on the value in dispute;
5. on costs.

(2) With the consent of the parties, the judge may also adjudicate alone on other matters in place of the bench division or the Senate.

(3) Where a reporting judge has been appointed, the reporting judge adjudicates in place of the presiding judge.

87b. [Setting of Time-Limits, Failure to Meet Time-Limits]

(1) The presiding judge or reporting judge may set the plaintiff a time-limit within which he is to state the facts which in his view have been, or alternatively have not been considered within an administrative procedure and which thus give rise to his grievance. A time-limit set under sentence 1 may be combined with a time-limit set under section 82, paragraph 2, second sentence.

(2) In respect of specific proceedings, the presiding judge or reporting judge may set a time-limit within which a party may be requested to

1. state facts or provide evidence;
2. present documents and other movables, to the extent that the party is obliged to do so.

(3) The court is entitled to reject any declarations and evidence presented after a final date set under paragraphs 1 and 2 and may then adjudicate without making any further enquiries if

1. it is the view of the court that the admission of such declarations and evidence would delay disposal of the litigation, and

2. the party has not produced a reasonable excuse for the delay, and
3. the party has been instructed of the consequences of failing to observe a time-limit.

The court may request the furnishing of *prima facie* evidence of the reason offered in excuse. Sentence 1 does not apply where the facts of the matter may be investigated at little expense without the cooperation of the party.

88. [Binding Effect of the Plaintiff's Claim]

The court may not go beyond the plaintiff's claim, but is not bound by the wording of the petitions.

89. [Cross-Petitions]

(1) Cross-petitions may be made at the court with which the original action has been filed where the counter-claim is related either to the claim made in the original action or to the defence filed against the claim. This does not apply where a counter-claim leads to jurisdiction for the action moving to another court under section 52, first sentence.

(2) Cross-petitions are not permitted in connection with rescissory actions and actions for mandatory injunction.

90. [Pendency]

(1) A case becomes pending on the action being lodged.

(2) (cancelled)

(3) (cancelled)

91. [Amendment of Actions]

(1) An action may be amended with the agreement of the other parties, or where the court considers such an amendment to be expedient.

(2) The agreement of the defendant to an amendment of the action is assumed to be given if, without voicing an objection, he enters a defence in respect of the amended action either in a written pleading or within an oral hearing.

(3) A decision that an amendment to the action has not taken place or that such an amendment is permissible is not independently appealable.

92. [Withdrawal of Actions]

(1) The plaintiff is entitled to withdraw an action until such time as the judgment becomes final and absolute. Withdrawal of an action after petitions have been lodged within the court hearing requires the consent of the defendant and of any representative of the public interest who may have taken part in the court hearing.

(2) Where an action is withdrawn, the court makes a ruling to dismiss the case which shall include an order on the legal consequences of withdrawal arising from this Act. This ruling is non-appealable.

93. [Combination and Separation of Actions]

The court may make a ruling to combine a number of actions pending and on the same matter to be heard and adjudicated on within the same proceedings. It may similarly order that a number of claims raised within one case be separated to be heard and adjudicated upon in separate hearings.

93a. [Test Cases]

(1) Where the lawfulness of an administrative measure is the subject of more than fifty actions, the court may proceed with one or several suitable cases (test cases) and suspend the other cases. Parties are to be heard prior to this decision being taken. Rulings to this effect are non-appealable.

(2) Where a final and absolute judgment has been given on the actions which have been dealt with in court proceedings, the court may give its decision on the cases which were suspended in the form of a ruling after hearing parties if it is unanimous in the view that these cases do not differ on any significant matters of fact or law from the test cases on which a final judgment has been given, and the facts of these cases have been established. The court may introduce evidence which was filed during a test case; it may at its own discretion order a witness to be reexamined or order a new expert appraisal from either the original or some other expert consultant. Parties have the same right of appeal against a ruling under sentence 1 as they would be entitled to if the court had given its decision in the form of a judgment. Parties are to be instructed of the availability of this right of appeal.

94. [Suspension of Proceedings]

Where a decision on a case is dependent either wholly or partly on the existence or non-existence of a legal relationship which itself forms the subject of another dispute which is pending or which has to be determined by an administrative authority, the court may order suspension of the proceedings until such time as the other dispute has been disposed of, or a decision has been made by the administrative authority.

95. [Appearance in Person]

(1) The court may order a party to appear in person. It may threaten the party with a fine in case of failure to appear equivalent to the fine which may be imposed on a witness who fails to appear for examination at an appointed time. In the case of culpable absence the court shall make a ruling to impose this fine. Both the threat and the imposition of the fine may be repeated.

(2) In the case of the party being either a juridical person or an association, the fine is to be threatened and imposed on whoever is entitled under law or statute to represent this body.

(3) The court may request a participating public authority or corporation under public law to send a public official or public employee to attend the court hearing; this representative must bear written proof of his powers to represent the authority or corporation and be sufficiently conversant with the facts of the matter and the legal situation.

96. [Direct Reception of Evidence]

(1) The court takes evidence during the oral hearing. It may in particular take ocular evidence, examine witnesses, experts and parties and require documents to be produced.

(2) In suitable cases the court may appoint one judge to take evidence prior to the court hearing or may request another court to take evidence specifying the individual questions relating to evidence.

97. [Dates for Taking Evidence]

Parties are to be informed of all dates for taking evidence and may be present when evidence is taken. They may address relevant questions to witnesses and experts. In the case of an objection to a question being raised, the court shall decide on the objection.

98. [Taking of Evidence]

Where nothing is provided to the contrary in this Act, the taking of evidence is subject to sections 358 to 444 and 450 to 494 of the Code of Civil Procedure as applicable.

99. [Duty of Authorities to Produce Documents and Provide Information]

(1) Public authorities have a duty to produce documents or files and to provide information. Where disclosure of the contents of such documents or files and such information would be detrimental to the good of the Federation or of a *Land*, or where these matters are required by law or by their very nature to be kept secret, the competent supreme super-

visory authority may refuse to produce documents or files or to provide information.

(2) On application by a party, the court with jurisdiction for the principal claim shall adjudicate and give a ruling on whether a case has been made for the satisfaction of the statutory requirements for the refusal to produce documents or files or to provide information. The supreme supervisory authority which made the declaration under paragraph 1 is to be summoned to attend these proceedings. The ruling is open to an independent challenge by means of a complaint. An adjudication on the complaint is made by the Federal Administrative Court if the court which first heard the case was the Higher Administrative Court.

100. [Access to Files; Transcripts]

(1) Parties may inspect court files and papers which have been lodged with the court.

(2) They are entitled to request copies, excerpts and transcripts from the clerk of the court at their own expense. Section 299a of the Code of Civil Procedure applies *mutatis mutandis* where court files have been replaced by microfiche copies. At the discretion of the presiding judge files may be handed over to an authorised solicitor to be removed for inspection to his home or offices.

(3) Draft versions of judgments, rulings and court orders, texts drafted during their preparation, and also documents pertaining to voting are neither available for inspection nor obtainable in transcript form.

101. [Principle of Oral Proceedings]

(1) Unless otherwise stated, the court decides on the basis of oral proceedings.

(2) With the agreement of the parties, the court may decide without oral proceedings.

(3) Where nothing is provided to the contrary, decisions of the court which are not judgments may be made without oral proceedings.

102. [Summonses, Sittings Away from the Seat of the Court]

(1) As soon as the date has been fixed for oral proceedings, the parties are to be summoned to attend; there must be a period of no less than two weeks, and at the Federal Administrative Court of no less than four weeks, between the date of service and the date of the hearing. In urgent cases the presiding judge may shorten this period.

(2) The summons shall state that in the case of a party failing to appear the action may be heard and adjudicated on in default of appearance.

(3) Courts of general administrative jurisdiction may hold sittings away from the seat of the court where this is required in the interests of expedient disposal of the case.

103. [Procedure at Oral Hearings]

(1) The presiding judge opens proceedings and conducts the oral hearing.

(2) After calling the case, the presiding judge or the reporting judge states the principal content of the files.

(3) Subsequently parties are allowed to speak in order to make and to substantiate their petitions.

104. [Duty of the Court to Put Questions and Discuss the Case with Litigants]

(1) The presiding judge is required to discuss the factual and legal aspects of the matter in dispute with the parties.

(2) The presiding judge must permit all members of the court to put questions on request. Where an objection is raised to a question, the court shall make a decision on the objection.

(3) Following discussion of the matter in dispute, the presiding judge declares the hearing closed. The court may order a case to be reopened.

105. [Court Records of Oral Hearings]

Court records are made in accordance with sections 159 to 165 of the Code of Civil Procedure as applicable.

106. [Court Settlements]

In order to dispose of a dispute either wholly or partially, parties may reach a settlement, to the extent that they are able to order the subject matter of the settlement, which is to be recorded with the court or with the commissioned or requested judge. A court settlement may also be reached by means of the parties accepting a proposal made by the court, the presiding judge or the reporting judge in the form of a ruling; acceptance is to be lodged in writing with the court.

Chapter 10: Judgments and Other Decisions

107. [Decisions in the Form of Judgments]

Where nothing is stated to the contrary, the decision on an action is given in the form of a judgment.

108. [Grounds for a Judgment, Free Evaluation of Evidence, Right to be Heard]

(1) The court decides according to its free conviction formed from the overall result of the proceedings. The grounds which have guided the judicial conviction are to be given in the judgment.

(2) The judgment is to be based solely on facts and evidence on which parties have had an opportunity to be heard.

109. [Interlocutory Judgments]

A preliminary ruling on the admissibility of an action may be given in the form of an interlocutory judgment.

110. [Part-Judgments]

Where only part of the matter at dispute is ripe for judgment, the court may give a part-judgment.

111. [Interlocutory Judgments on the Basis of an Action]

When a claim is in issue on the merits or the amount in connection with an action for performance, the court may make a preliminary decision on the basis of the action in the form of an interlocutory judgment. If it finds the claim to be valid, it may order negotiations to take place on the amount.

112. [Composition of the Court]

A judgment may only be rendered by the judges and honorary judges who took part in the proceedings on which the judgment is based.

113. [Operative Part of the Judgment]

(1) To the extent that an administrative act is unlawful and through it the rights of the plaintiff have been infringed, the court shall quash the administrative act as well as the interim decision on an objection. If the administrative act has already been executed, the court may then on application pronounce that, and how the administrative authority shall reverse the execution. This pronouncement is only permissible if the administrative authority is in a position to comply and the issue is ripe for judgment. If through withdrawal or otherwise the administrative act has already ceased to exist, then on application the court shall pronounce through judgment that the administrative act was unlawful if the plaintiff has a legitimate interest in such a declaration.

(2) If the impugned administrative act concerns a payment in cash or other fungible things or a declaration, then the court may fix the payment at a different amount or may replace the declaration by another. Where determination of the amount to be fixed or contained in a declaration can only be performed at considerable expense, the court may modify the administrative act by stating the factual and legal matters to which consideration wrongfully either has or has not been given in such a way that the administrative authority is able to calculate the amount on the basis of the decision. The administrative authority informs the party concerned informally and without delay of the result of the recalculation; once the decision has become final, the administrative act must be readvertised with its new contents.

(3) Where the court considers further investigation to be required, it may quash the administrative act and the interim decision on an objection without making a decision on the merits, to the extent that the enquiries which still have to be made are deemed in their nature or extent to be substantial and quashing the administrative act is also expedient with regard to the interests of parties. On request the court may make an interim ruling for the period until a new administrative act is issued, and may in particular require that security is to be lodged or is to remain in place either wholly or in part and that performances provisionally need not be restored. This ruling may be modified or quashed at any time. A decision under sentence 1 may only be given within six months of the administrative authority's files being received by the court.

(4) If, in addition to the quashing of an administrative act, a performance may also be demanded, then the order for performance is also permissible in the same proceedings.

(5) To the extent that refusal or omission of an administrative act is unlawful and this results in the rights of the plaintiff being infringed, the court shall pronounce the obligation on the administrative authority to undertake the official action for which an application has been made if the matter is ripe for judgment. Otherwise it shall pronounce the obligation to issue a decision to the plaintiff observing the opinion of the court.

114. [Reexamination of Discretionary Decisions]

To the extent that the administrative authority is authorised to act at its discretion, the court shall also examine whether the administrative act or its refusal or omission is unlawful for the reason that the statutory limits of its discretion have been exceeded or discretion has not been used in accordance with the purpose of authorisation.

115. [Actions Against Interim Decisions on Objections]

Sections 113 and 114 apply *mutatis mutandis* where an interim decision on an objection is the substance of a rescissory action in accordance with Section 79, paragraph 1, No. 2, and paragraph 2.

116. [Announcement and Service of the Judgment]

(1) Where oral proceedings have been held, judgments are in normal cases given at the session in which proceedings are closed; in special cases judgment may be given at another time to be announced at the close of proceedings and no later than two weeks from the date of announcement. The judgment is to be served upon all parties.

(2) The announcement of a judgment may be replaced by service; the judgment must then be passed to the clerk of the court within two weeks of the end of oral proceedings.

(3) Where the court makes a decision without oral proceedings, announcement of the decision is replaced by service upon all parties.

117. [Form and Content of the Judgment]

(1) The judgment is rendered "In the name of the people". It is to be set down in writing and signed by all of the judges who have had any part in the decision. Should a judge be prevented from adding his signature, a note is to be added to this effect beneath the judgment by the presiding judge, or in his absence by the seniormost judge, stating the reason for the inability to sign. Honorary judges are not required to sign.

(2) The judgment contains

1. the names, occupations and addresses of all parties and of their legal and authorised representatives stating what role they have played in the proceedings,
2. the designation of the court and the names of the members of the court who have had any part in the decision,
3. the operative part of the judgment,
4. the statement of facts,
5. the reasoning,
6. instruction on rights of appeal.

(3) The statement of facts shall state in brief the state of litigation laying special emphasis on the central contents of petitions. For details reference is to be made to pleadings, court records of proceedings and other documents to the extent that these convey sufficiently the state of litigation.

(4) Any judgment which on the day of its announcement had not yet been set down in writing in its entirety is to be passed to the clerk of the court in full within two weeks of the date of its announcement. Where, in exceptional cases, this is not possible, the judgment is to be passed to the clerk of the court within the said period of two weeks duly signed by the judges without the statement of facts, the reasoning and instructions on rights of appeal; the statement of facts, the reasoning and instructions on rights of appeal are to be set down in writing as soon as possible and passed to the clerk of the court duly signed by the judges.

(5) The court may refrain from repeating its statement of the reasoning where this follows the justification for the administrative act concerned or the decision on an objection and a declaration to this effect is included in its judgment.

(6) The records clerk shall add to the judgment a duly signed note of the date on which it is served, and in cases under section 116, paragraph 1, first sentence the date of its announcement.

118. [Correction of Clerical Mistakes]

(1) Clerical mistakes, errors in calculation and other obvious inaccuracies in the judgment of a similar nature shall be corrected at any time by the court.

(2) A decision may be made on such corrections without a preceding court hearing. A note of the ruling on corrections is to be made on the judgment and on all copies thereof.

119. [Correction of the Statement of Facts Contained a Judgment]

(1) Where the statement of facts stated in a judgment contains any other inaccuracies or ambiguity, an application for correction may be made within two weeks of service of the judgment.

(2) The court decides without hearing evidence and gives a ruling. This ruling is non-appealable. Only those judges who had any part in the judgment take part in this decision. In the case of a judge being prevented from attending, the presiding judge shall have the casting vote. A note of the ruling on corrections is to be made on the judgment and on all copies thereof.

120. [Supplementation of a Judgment]

(1) Where an application made by a party either on the facts of the case or on the consequences as to costs has been passed over either wholly or partially in the adjudication, a later decision on this matter shall on application be added to the judgment.

(2) Any application for a decision of this kind is to be made within two weeks of service of the judgment.

(3) Only that part of an action which has not already been disposed of shall form the basis of oral proceedings.

121. [Finality of Decisions]

To the extent that a decision has been made on the object at issue, final and non-appealable decisions are binding upon

1. the parties and their heirs at law, and
2. where section 65, paragraph 3 applies, those persons who have failed to make an application to be heard by the court within the time-limit allowed.

122. [Rulings]

(1) Sections 88, 108, paragraph 1, first sentence, sections 118, 119 and 120 apply *mutatis mutandis* in respect of rulings.

(2) Rulings must state the grounds on which they have been made if a right of appeal exists or if they constitute a decision on a legal remedy. Rulings on the suspension of execution (sections 80 and 80a) and on temporary injunctions (section 123) and any other rulings subsequent to disposal of the main cause of the action (section 161, paragraph 2) must in all cases be accompanied by a statement of the grounds on which they are based. Rulings which contain a decision on a right of appeal do not require any further substantiation in cases where the court dismisses the appeal on the grounds stated in the impugned judgment.

Chapter 11: Temporary Injunctions

123. [Issue of Temporary Injunctions]

(1) On application the court may issue a temporary injunction in respect of the object at issue, even before an action has been lodged, where a change to the existing situation could reasonably be expected to frustrate or seriously impair the applicant in the realisation of a right. Temporary injunctions are also permissible as a means of regulating a temporary state of affairs in respect of a disputed legal relationship where such regulation, in particular in the case of permanent legal relationships, appears to be necessary in order to ward off serious disadvantage or to prevent the threat of injury or for other reasons.

(2) Authority for the issue of temporary injunctions rests with the court where the principal cause of action is situated. This is the court of

first instance and, in the case of the principal cause of action being pending in appeal proceedings, the court of appeal. Section 80, paragraph 8 applies *mutatis mutandis*.

(3) The issue of temporary injunctions is subject to the provisions of sections 920, 921, 923, 926, 928 to 932, 938, 939, 941 and 945 of the Code of Civil Procedure as applicable.

(4) The court decides and gives its ruling.

(5) The provisions of paragraphs 1 to 3 do not apply to cases described in sections 80 and 80a.

PART III: FORMS OF APPEAL AND RESUMPTION OF PROCEEDINGS

Chapter 12: Appeals (on Questions of Fact and Points of Law)

124. [Admissibility and Lodging of Appeals].

(1) Parties have the right of appeal to the Higher Administrative Court against concluding judgments, including part-judgments under section 110, and against interlocutory judgments under sections 109 and 111.

(2) Appeal is to be lodged in writing with the court whose judgment is to be challenged within one month of service of the complete judgment; it may also be lodged in person by having it recorded with the records clerk. The time-limit for appeals is also deemed to be met where an appeal is submitted to the Supreme Administrative Court within the time-limit allowed.

(3) The petition of appeal must identify the impugned judgment and contain a specific application. It must also state the matters of fact and evidence on which the appeal is to be based.

125. [Appeal Proceedings, Rulings on Inadmissibility]

(1) Appeal proceedings are governed by the provisions of Part II as applicable, where nothing to the contrary is provided in this Chapter. Section 84 does not apply.

(2) Where an appeal is inadmissible, it must be disallowed. The decision on disallowal may be made in the form of a ruling. All parties are to be heard in advance. Parties have the same right of appeal against this ruling as would have been available had the court decided the matter by judgment. Parties are to be advised of the availability of this right of appeal.

126. [Withdrawal of Appeal]

(1) An appeal may be withdrawn up to the date on which the judgment becomes final and absolute. Withdrawal subsequent to the lodging of petitions during the court hearing requires the prior consent of the defendant and also that of any representative of the public interest who has taken part in the court hearing.

(2) The withdrawal of an appeal has the effect of relinquishing the right to appeal which was exercised by lodging the appeal. The court makes a ruling on the payment of costs.

127. [*Counter-Appeal*]

The respondent and other parties are entitled to lodge a counter-appeal during the course of the court hearing, even if they have chosen not to make use of their right of appeal. Where a counter-appeal is not lodged until after the lapsing of the time-limit for appeals, or where a party did not make use of the right of appeal, the counter-appeal becomes ineffective should the appeal be withdrawn or disallowed as inadmissible.

128. [Extent of Re-examination]

The Higher Administrative Court examines the dispute within the appeal procedure to the same extent as the administrative court. It also considers any new facts or evidence which have since been brought to light.

128a. [New Statements and Evidence, Delays, Exclusions]

(1) New statements and evidence which were not produced at the first instance within a time-limit set for this purpose (section 87b, paragraphs 1 and 2) are only to be admitted where it is the free conviction of the court that admission would not delay the disposal of the dispute, or where the party concerned provides a satisfactory excuse for the delay. The court may request the furnishing of *prima facie* evidence of of the reason offered in excuse. Sentence 1 does not apply where the party concerned has not been informed of the consequences of failing to meet a time-limit under section 87b, paragraph 3, No. 3, or in cases where it is easily possible to investigate the facts without the participation of the party concerned.

(2) Statements and evidence which have rightly not been admitted are similarly to be excluded from appeal proceedings.

129. [Limitation to Petitions]

The judgment of the administrative court may only be altered to the extent that alteration has been petitioned for.

130. [Remanding a Case]

(1) The Higher Administrative Court give a judgment to quash the impugned decision and remand the case to the administrative court if

1. the latter court has not yet reached a decision on the merits,
2. there is found to have been a major deficiency in procedure,
3. new facts or evidence have come to light which have a major bearing on the decision.

(2) The administrative court is bound by the legal opinion of the appellate decision.

130a. [Dismissal by Ruling]

Except in those cases described in section 84, paragraph 2, No. 1, the Higher Administrative Court may dismiss an appeal by ruling if it is unanimous in considering the appeal to be unfounded and sees no need for a court hearing. Section 125, paragraph 2, third to fifth sentences applies *mutatis mutandis*.

130b. [Dismissal without Stating the Grounds for the Decision]

In its judgment on the appeal, the Higher Administrative Court may refrain from repeating the grounds on which it is based to the extent that it dismisses the appeal as unfounded on the same grounds as those contained in the impugned decision.

131. [Restrictions on the Right of Appeal]

(1) In respect of specific areas of law, appeal may by means of a federal law be made contingent on special leave being granted. Where appeal is not limited by federal law, it may be limited by *Land* law in respect of particular areas of *Land* law. Restrictions on appeals are permissible only once and for a period of no more than five years.

(2) Leave to appeal is required to be granted within the judgment of the administrative court or, subsequent to a complaint, in a ruling of the Higher Administrative Court if the value of the cause of appeal does not exceed

1. one thousand German Marks, in the case of an action concerning either payment or an administrative act providing for payment,
2. ten thousand German Marks, in the case of disputes concerning liability for the reimbursement of public funds between bodies corporate under public law or public authorities.

This does not apply if the appeal concerns either recurrent or regular payments over a period of more than one year.

(3) In those cases described in paragraphs 1 and 2, leave to appeal may only be granted if

1. the case is of fundamental importance,
2. the judgment departs from a decision of the Higher Administrative Court, the Federal Administrative Court or the Joint Senate of the Federal Supreme Courts and rests on this departure, or
3. a deficiency in procedure on which the judgment may rest has been claimed and found.

(4) The Higher Administrative Court is bound by the leave to appeal.

(5) The decision of an administrative court not to grant leave to appeal is open to challenge by means of a complaint. The complaint is to be made with the court against whose judgment the appeal would be lodged within one month of the service of the complete judgment. The complaint must identify the impugned judgment. It should also state the facts and evidence to be used in support of the complaint.

(6) The lodging of a complaint suspends the legal force of the judgment.

(7) Should no remedy be provided for the complaint, the Higher Administrative Court adjudicates and makes a ruling. This ruling need not include justification. The judgment becomes non-appealable on the complaint being rejected by the Higher Administrative Court.

(8) Where a legal remedy is provided for the complaint or the Higher Administrative Court grants leave for the appeal, the complaint procedure is continued as an appeal procedure; the complainant is not required to lodge a formal appeal. Advice to this effect is to be included in the ruling.

Chapter 13: Appeals for Final Revision

132. [Leave to Appeal for Final Revision]

(1) Parties have the right to appeal for final revision to the Federal Administrative Court against the judgment of the Higher Administrative Court (49 No. 1) where leave for this appeal for revision has been granted by the Higher Administrative Court or, subsequent to a complaint against denial of the appeal, by the Federal Administrative Court.

(2) Leave to appeal for final revision may only be granted if

1. the case is of fundamental importance,
2. the judgment departs from a decision of the Federal Administrative Court, the Joint Senate of the Federal Supreme Courts or the Federal Constitutional Court and rests on this departure, or
3. a deficiency in procedure on which the judgment may rest has been claimed and found.

(3) The Higher Administrative Court is bound by the leave to appeal.

133. [Complaints Against Denial of Leave to Appeal for Final Revision]

(1) The denial of leave to appeal for final revision is open to challenge by means of a complaint.

(2) The complaint is to be lodged in writing with the court from whose judgment an appeal for final revision is to be lodged within one month of service of the complete judgment. The complaint must identify the impugned judgment.

(3) The grounds for the complaint must be stated within two months of service of the complete judgment. The grounds are to be lodged with the court from whose judgment the appeal for final revision is to be lodged. The statement of grounds must set out the fundamental importance of the case, or identify the decision which the judgment departs from, or indicate the deficiency in procedure.

(4) The lodging of a complaint suspends the legal force of the judgment.

(5) Should no remedy be provided for the complaint, the Federal Administrative Court adjudicates and makes a ruling. This ruling should state in brief the reasoning to support it; a statement of the reasoning may be dispensed with where this would not be a suitable contribution to clarification of the conditions under which leave for an appeal for final revision is to be granted. The judgment acquires legal force on the complaint being rejected by the Federal Administrative Court.

(6) Where the requirements described in section 132, paragraph 2, No. 3 are met, the Federal Administrative Court may in its ruling quash the impugned judgment and remand the dispute to be heard and adjudged elsewhere.

134. [Leap-Frog Appeals]

(1) Parties have the right to by-pass the instance of appeal on questions of fact or points of law in an appeal for final revision from the judgment of an administrative court (section 49, No. 29) if both the plaintiff and the defendant give their written consent, and provided that leave for this appeal has been granted by the administrative court either in its judgment or, in response to an application, in a ruling. The application is to be submitted in writing within one month of service of the complete judgment. The consent is to be appended to the application or to the notice of appeal for final revision in the case of leave to appeal being contained within the judgment.

(2) Leave to appeal for final revision may only be granted where the requirements described in section 132, paragraph 2, Nos. 1 or 2 are met. The Federal Administrative Court is bound by this assent. The denial of leave to appeal is non-appealable.

(3) Should the administrative court make a ruling denying an application for leave to appeal for final revision, the statutory period for filing an appeal on a question of fact or a point of law, or the time-limit for complaints against the denial of an appeal on a question of fact or a point of law recommences on service of this decision, provided that the application is made in due form and time and the statement of consent has been appended. Should the administrative court order the appeal for

final revision to be admitted, the statutory period for filing appeals for final revision commences on service of this decision.

(4) Appeals for final revision may not be based on procedural flaws.

(5) The lodging of an appeal for final revision and the required consent imply renunciation of any appeal on questions of fact or points of law.

135. [Appeals for Final Revision where Appeals on Questions of Fact or Points of Law are Barred]

Parties have the right of appeal for final revision to the Federal Administrative Court from the judgment of an administrative court (section 49, No. 2) where an appeal on a question of fact or a point of law is barred under federal law. An appeal for final revision may only be lodged with the leave of the administrative court, or, in response to a complaint against denial, of the Federal Administrative Court. The granting of leave to appeal is subject to the provisions of sections 132 and 133 as applicable.

136. [Barring of Appeals for Final Revision]

Appeals for final revision are not admissible against judgments described in section 47.

137. [Admissible Grounds for Appeals for Final Revision]

(1) An appeal for final revision may only be supported by claims of the impugned judgment resting on a breach of

1. federal law, or
2. a provision of the Law of Administrative Procedure of a *Land* which conforms in its wording with the Federal Law of Administrative Procedure.

(2) The Federal Administrative Court is bound by the findings of fact contained in the impugned judgment, except where admissible and well-

founded grounds for an appeal for final revision have been raised in respect of these findings.

(3) Where an appeal for final revision is based on a claim of deficiencies in procedure and yet none of the requirements described in section 132, paragraph 2, Nos. 1 and 2 is met, a decision is only to be made on those deficiencies in procedure which have been alleged. Beyond this the Federal Administrative Court is not bound by the grounds for appeal which have been asserted.

138. [Absolute Grounds for Appeals for Final Revision]

A judgment is always to be deemed to rest on a breach of federal law if

1. the court of judgment was not properly constituted,
2. the decision involved a judge who was barred by law from exercising judicial office, or who had been successfully rejected for fear of bias,
3. a party was denied the right to be heard,
4. a party in the proceedings was not properly represented in accordance with the provisions of the law, except where this party gave either explicit or tacit consent to the conduct of the case,
5. the judgment followed a court hearing at which there was a violation of the provisions on the publicity of proceedings, or
6. no grounds were stated in support of the judgment.

139. [Time-Limits; Lodging and Support of Appeals for Final Revision]

(1) Appeals for final revision are to be lodged in writing with the court whose judgment is to be appealed from within one month of service of the complete judgment or of the ruling admitting an appeal served in accordance with section 134, paragraph 3, second sentence. The time-limit for appeals for final revision is also deemed to be met where the appeal is submitted to the Federal Administrative Court

within the time-limit allowed. The appeal for final revision must identify the judgment appealed from.

(2) Where a remedy is provided for a complaint against leave to appeal for final revision not being granted, or where leave to appeal for final revision is granted by the Federal Administrative Court, the complaint procedure is continued as an appeal procedure unless the Federal Administrative Court quashes the judgment appealed from in accordance with section 133, paragraph 6; formal lodging of the appeal for final revision by the complainant is not required.

(3) The grounds for an appeal for final revision must be given within two months of service of the complete judgment or of the ruling granting leave to appeal in accordance with section 134, paragraph 3, second sentence; in those cases described in paragraph 2, the time-limit for furnishing the grounds to support an appeal for final revision is one month from service of the order granting leave to appeal. The grounds are to be lodged with the Federal Administrative Court. The time-limit may be extended by the presiding judge where an application to this end is made before the original time-limit has lapsed. The grounds must contain a specific petition and identify the statutory provision which has been violated and, where the complaint is based on deficiencies in procedure, state the facts which constitute the deficiency.

140. [Withdrawal of Appeals for Final Revision]

(1) An appeal for final revision may be withdrawn up to the date on which the judgment becomes final and absolute. Withdrawal subsequent to the lodging of petitions during the court hearing requires the prior consent of the defendant in proceedings for final revision and also that of the Chief Federal Public Attorney is he has taken part in the court hearing.

(2) The withdrawal of an appeal has the effect of relinquishing the right to appeal which was exercised by lodging the appeal. The court gives a ruling on the payment of costs.

141. [Appeal Proceedings]

Appeals for final revision are subject as applicable to the provisions on appeals on questions of fact and points of law where nothing to the contrary is provided within this Chapter. Sections 87a, 130a and 130b are not applicable.

142. [Inadmissibility of Amendments of Actions and Summonses to Third Parties to Appear]

(1) Amendments of actions and summonses to third parties to appear are not admissible within proceedings on appeals for final revision. This does not apply to summonses to third parties pursuant to section 65, paragraph 2.

(2) A third party summoned within proceedings for final revision in accordance with section 65, paragraph 2 is only permitted to make notification of a defect in procedure within a period of two months of service of the summons to attend. This time-limit may be extended by the presiding judge where application is made before the original time-limit has lapsed.

143. [Examination of the Conditions for Admissibility]

The Federal Administrative Court examines the admissibility of appeals for final revision and establishes whether such appeals have been lodged in due form and time and with the required supporting brief. Should any of these requirements fail to be met, the appeal is inadmissible.

144. [Decisions on Appeals for Final Revision]

(1) Where an appeal for final revision is found to be inadmissible, the Federal Administrative Court shall order by ruling that the appeal be disallowed.

(2) Where an appeal for final revision is unfounded, the Federal Administrative Court shall dismiss the appeal.

(3) Where the appeal for final revision is well founded, the Federal Administrative Court may

1. decide upon the merits of the matter,
2. quash the judgment appealed from and remand the case for a further hearing and new adjudication.

The Federal Administrative Court shall remand the dispute where a third party summoned to appear in accordance with section 142, paragraph 1, second sentence has a legitimate interest in remand.

(4) Where the reasoning is found to display a violation of existing law, but where the decision itself is nonetheless found to be correct on other grounds, the appeal shall be dismissed.

(5) Where the Federal Administrative Court remands the dispute to be heard and decided on by another court within a leap-frog appeal in accordance with section 49, No. 2 and section 134, it may at its own discretion remand it to the Higher Administrative Court which would have had jurisdiction for an appeal on questions of fact or points of law. Proceedings before the Higher Administrative Court are then subject to the same principles as if the dispute had become pending on a properly entered appeal with the Higher Administrative Court.

(6) The court to which a case is remanded for a further hearing and new adjudication must base its decision on the legal opinion of the court of appeal.

(7) A statement of the grounds for a decision on an appeal for final revision is not required in cases where the Federal Administrative Court finds notification of defects in procedure to be unfounded. This does not apply to notification of a defect pursuant to section 138 and, where the appeal for final revision claims only the existence of deficiencies in procedure, to notification of a defect which forms the basis for the granting of leave to appeal for final revision.

145. [Appeal for Final Revision to the Higher Administrative Court]

To the extent that appeals on questions of fact or points of law are limited in respect of *Land* law in accordance with section 131, *Land* legislation may allow appeals for final revision to the Higher Administrative Court and determine that they shall be subject as appropriate to the provisions governing appeal proceedings before the Federal Administrative Court.

Chapter 14: Complaints

146. [Admissibility of Complaints]

(1) Those decisions taken by administrative courts, presiding judges and reporting judges which are neither judgments nor decrees are subject to a right of complaint to the Higher Administrative Court on the part of parties and all other parties aggrieved by the decision, to the extent that nothing is provided to the contrary in this Act.

(2) Directions on the course of proceedings, orders to produce clarifying evidence, rulings on adjournment and time-limits, rulings on evidence, rulings on the refusal of offers of evidence and on the joining and separation of proceedings and claims may not be appealed from by means of a complaint.

(3) Saving statutory rights of complaint against the denial of leave to appeal on questions of fact or for final revision, complaints are not admissible in disputes over costs, fees and expenses where the value of the subject of complaint does not exceed two hundred German Marks.

(4) Complaints against rulings on the suspension of execution (sections 80 and 80a) and temporary injunctions (section 123) and also complaints against rulings within proceedings on legal aid are not allowed where appeal within the principal proceedings would have required leave to be granted under section 131, paragraph 2.

147. [Time and Form]

(1) Complaints are to be lodged with the court whose judgment is being challenged, in writing or in person by having them recorded by the records clerk, within two weeks of the judgment being pronounced. Nothing shall affect section 67, paragraph 1, second sentence.

(2) The time-limits for complaints is also deemed to be met if the complaint is lodged with the court of complaint within the time-limit.

148. [Remedies and Referral to the Higher Administrative Court]

(1) Where the administrative court, presiding judge or reporting judge whose decision is the subject of the complaint holds the complaint to be well founded, a remedy is to be provided; where this does not happen, the matter is to be referred to the Higher Administrative Court without delay.

(2) The administrative court shall inform parties of a complaint being referred to the Higher Administrative Court.

149. [Suspensory Effect]

(1) A complaint only has suspensory effect if it concerns the fixing of means of coercion or of maintaining order. The court, presiding judge or reporting judge whose decision is the subject of the complaint may also determine that execution of the said decision be suspended temporarily.

(2) Nothing shall affect the provisions of sections 178 and 181, paragraph 2 of the Judicature Act.

150. [Decisions by Ruling]

The Higher Administrative Court adjudicates on the complaint and gives a ruling.

151. [The Commissioned or Requested Judge; Records Clerk]

Applications may be made for a decision by the court on decisions made by the commissioned or requested judge or the records clerk

within two weeks of the decision being announced. The application is to be made in writing or in person by having it recorded by the records clerk at the court. Sections 147 and 149 apply *mutatis mutandis*.

152. [Complaints to the Federal Administrative Court]

(1) Saving section 47, paragraph 7, section 99, paragraph 2, and section 133, paragraph 1 of this Act and section 17a, paragraph 4, fourth sentence of the Judicature Act, the decisions of the Higher Administrative Court may not be appealed from by means of complaints to the Federal Administrative Court.

(2) In proceedings before the Federal Administrative Court, the decisions of the commissioned or requested judge or of the records clerk are subject to the provisions of section 151 as applicable.

Chapter 15: Resumption of Proceedings

153. [New Trials]

(1) Proceedings which have been completed and are final and conclusive may be reopened in accordance with the provisions of Book Four of the Code of Civil Procedure.

(2) The right to initiate proceedings for annulment and restitution extends also to representatives of the public interest and, in the case of proceedings before the Federal Administrative Court in the first and last instance, also to the Chief Federal Public Attorney.

PART IV: COSTS AND ENFORCEMENT

Chapter 16: Costs

154. [The Duty to Bear Costs]

(1) The defeated party bears the costs of the proceedings.

(2) The costs of an unsuccessful appeal are to be borne by the party which launched the appeal.

(3) A third party who has been summoned to appear may only be ordered to bear costs if he has himself either lodged petitions or appealed.

(4) The costs of a successful action to reopen the case may be awarded against the State to the extent that they do not result from fault on the part of one of the parties.

155. [Sharing Costs]

(1) In the case of a party partly succeeding and partly being defeated, the costs are to be shared or split proportionately. Where the costs are shared, each party bears half of the court costs. The costs may be imposed in total on one party where the other party is defeated on only a minor point.

(2) Anyone withdrawing a petition, action, appeal or any other application for a legal remedy is obliged to bear the costs.

(3) Costs arising from an application for restoration of the *status quo ante* are to be borne by the applicant.

(4) *(cancelled)*

(5) Costs attributable to fault on the part of one of the parties may be imposed on that party.

156. [Costs in Cases of Immediate Recognition]

Where the defendant has through his behaviour given no cause for an action to be brought, the plaintiff shall be liable for court fees if the defendant acknowledges the claim immediately.

157. *(cancelled)*

158. [Challenges to Orders to Pay Costs]

(1) Challenges to orders on costs are inadmissible where no appeal has been lodged against the decision on the main issue.

(2) Where no decision has been made on the main issue, the decision on costs is non-appealable.

159. [More than One Person Liable for Costs]

Where the party liable for costs comprises more than one person, section 100 of the Code of Civil Procedure applies *mutatis mutandis*. Where the legal matter at issue can only be decided uniformly in respect of the party liable for costs, the persons concerned are held jointly and severally liable for costs.

160. [Liability for Costs in the Case of Settlements]

In the case of a dispute being disposed of by means of a settlement and the parties not having come to any agreement on the matter of costs, each party shall bear half of the court fees. Each party is liable for his own extrajudicial costs.

161. [Orders to Pay Costs, Disposal of the Main Action]

(1) The court is obliged to include its decision on costs within the judgment or, in the case of proceedings coming to some other conclusion, to make a ruling on costs.

(2) Once the main issue of the dispute has been disposed of, and except for in those cases described in section 113, paragraph 1, fourth sentence, the court makes a ruling at its equitable discretion on the payment of costs; due consideration is to be shown for the previous state of affairs and of litigation.

(3) In all cases covered by section 75, the costs are to be borne by the defendant if the plaintiff had grounds to expect an official reply prior to the action being brought.

162. [Recoverable Costs]

(1) Costs are the court fees (charges and expenses) and the necessary expenditure incurred by parties in the appropriate prosecution or defence of an action, including the costs of the preliminary proceedings.

(2) The professional charges and expenses due to a solicitor or legal representative, and in matters relating to taxation to a tax consultant, are in all cases recoverable. Where a preliminary hearing was pending, charges and expenses are recoverable if the court required the appointment of an authorised legal representative for the preliminary hearing.

(3) The extrajudicial costs incurred by a third party who has been summoned to appear are only recoverable if, for reasons of equity, the court imposes them on the defeated party or awards them against the state.

163. *(cancelled)*

164. [Taxation of Costs]

On application the records clerk of the court of first instance shall fix the level of costs to be reimbursed.

165. [Challenges to the Taxation of Costs]

Parties may challenge the level of costs fixed for reimbursement. Section 151 applies *mutatis mutandis*.

166. [Legal Aid]

The provisions of the Code of Civil Procedure on legal aid apply *mutatis mutandis*.

Chapter 17: Enforcement

167. [Application of the Code of Civil Procedure, Provisional Enforceability]

(1) Where nothing is provided to the contrary within this Act, enforcement is subject as applicable to the provisions of Book Eight of the Code of Civil Procedure. The court of enforcement is the court of the first instance.

(2) Judgments on rescissory actions and actions for mandatory injunction may only be declared provisionally enforceable in respect of costs.

168. [Titles of Enforcement]

(1) Enforcement takes place on the basis of

1. final and provisionally enforceable judgments by courts,
2. temporary injunctions,
3. court settlements,
4. rulings on the taxation of costs,
5. awards made by courts of arbitration under public law and arbitration settlements which have been declared to be enforceable, to the extent that the decision on enforceability is non-appealable or declared to be provisionally enforceable.

(2) For purposes of enforcement, parties may on application be provided with copies of the judgment omitting the statement of facts and the reasoning, the service of which is equivalent in effect to service of a complete judgment.

169. [Enforcement in Favour of Public Authorities]

(1) Where enforcement is to be executed in favour of the Federation, a *Land*, an association of local authorities, a municipality or a public-law corporation, institution or foundation, enforcement takes place in accordance with the Administrative Enforcement Act. The enforcement

authority within the meaning of the Administrative Enforcement Act is the presiding judge of the court of first instance; he is entitled to call on the services of some other enforcement authority or of a bailiff for purposes of enforcement.

(2) Where enforcement is executed in order to compel action, toleration or omission within the process of administrative assistance among organs of the *Länder* , execution is to take place in accordance with the provisions of *Land* law.

170. [Enforcement Against Public Authorities]

(1) Where enforcement is to be executed against the Federation, a *Land*, an association of local authorities, a municipality or a public-law corporation, institution or foundation in respect of a pecuniary claim, enforcement is ordered by the court of first instance on application by the creditor. This court determines what enforcement measures are to be implemented and requests the relevant authority to undertake these measures. This authority is obliged to comply with the request in accordance with the regulations on enforcement applicable to it.

(2) Prior to issuing the warrant of enforcement, the court shall notify the authority or, where enforcement is ordered against public-law corporations, institutions and foundations, their legal representatives, of the intention of proceeding with enforcement, stating that enforcement may be warded off by making a payment within a time-limit to be set by the court. This time-limit must not exceed one month.

(3) Enforcement is not permissible against property which is essential for the performance of public tasks, or whose disposal would be in conflict with a public interest. The court shall rule on complaints after hearing the competent supervisory authority or, in the case of supreme federal or *Land* authorities, the competent minister.

(4) Credit institutions under public law are not bound by paragraphs 1 to 3.

(5) Prior warning of enforcement and observance of a period of delay are not required for the execution of a temporary injunction.

171. [Writ of Enforcement]

A writ of enforcement is not required in cases covered by sections 169 and 170, paragraphs 1 to 3.

172. [Administrative Penalties Against Public Authorities]

Where in those cases covered by section 113, paragraph 1, second sentence, and paragraph 5 and section 123 a public authority fails to meet an obligation imposed on it in a judgment or by a temporary injunction, the court of first instance is entitled to threaten to impose an administrative penalty not to exceed two thousand German Marks, on request setting a time-limit, and, should the time-limit lapse without payment being made, may impose and enforce this penalty *ex officio*. The threat, imposition and enforcement of an administrative penalty may be repeated.

PART V: CONCLUDING AND TRANSITIONAL PROVISIONS

173. [Application of the Judicature Act and of the Code of Civil Procedure]

Where nothing is contained to the contrary within the provisions of this Act on procedural matters, the Judicature Act and the Code of Civil Procedure apply *mutatis mutandis* provided that this is not precluded by the fundamental differences between the two types of procedure.

174. [Qualification to Hold Judicial Office]

(1) For representatives of the public interest at Higher Administrative Courts and at administrative courts, a qualification to enter the higher civil service class is equivalent to the qualification to hold judicial office under the German Judges Act if the former qualification was attained by passing the statutorily required examinations on completion

of no less than three years of study of law at a university and three years of professional training in public service.

(2) War veterans are deemed to meet the requirements contained in paragraph 1 if they have satisfied the special statutory requirements which apply to them.

175 to 177. *(cancelled)*

178 to 179. *(regulations on amendments)*

180. [Examination of Witnesses and Expert Witnesses Under the Law of Administrative Procedure or Social Law Code X]

Where the examination and swearing in of witnesses and expert witnesses is conducted in accordance with the Law of Administrative Procedure or Book Ten of the Social Law Code, this shall take place before the judge to whom this task has been assigned in the court schedule of responsibilities. The administrative court shall rule on the lawfulness under the Law of Administrative Procedure or Book Ten of the Social Law Code of any refusal to give evidence, to provide an expert opinion or to swear the oath.

181 to 182. *(regulations on amendments)*

183. [Nullity of Federal State Law]

Where the Constitutional Court of a *Land* has made a declaration of nullity in respect of *Land* law, or has nullified provisions of *Land* law, subject to special statutory regulation by the *Land* nothing shall affect the validity of decisions of courts with administrative jurisdiction which have become non-appealable and which are based on the nullified legal provision. Enforcement on the basis of a decision of this kind is not permissible. Section 767 of the Code of Civil Procedure applies *mutatis mutandis*.

184. [Special Arrangements of the *Länder*]

The *Länder* may allow Higher Administrative Courts to continue to use the previous designation of "Administrative Court of Justice" (*Verwaltungsgerichtshof*).

185.

(1) In the *Länder* of Berlin and Hamburg, counties, within the meaning of section 28, are replaced by districts.

(2) The *Länder* of Berlin, Bremen, Hamburg, Saarland and Schleswig-Holstein may permit departures from the provisions of section 73, paragraph 1, second sentence.

186.

Section 22, No. 3 applies in the *Länder* of Berlin, Bremen and Hamburg with the additional provision that persons acting in an honorary capacity within public administration are similarly not eligible for appointment as honorary judges.

187.

(1) The *Länder* may transfer to courts of administrative jurisdiction tasks of disciplinary and arbitral jurisdiction in connection with the apportionment of the assets and liabilities of public associations, attach professional disciplinary tribunals to these courts, and, within this process, may regulate matters of composition and procedure.

(2) In addition, in matters of public-service staff-representation law the *Länder* may issue regulations on the composition and procedure of administrative courts and of the Higher Administrative Court.

(3) The *Länder* may also provide that legal remedies shall have no suspensory effect to the extent that they are directed at measures taken within the process of administrative enforcement.

188. [Social Divisions, Social Senates, Exemption from Costs]

The areas of public welfare, youth welfare, care for war victims, disabled persons welfare and the development of vocational training shall be brought together in one bench division or senate. In proceedings of these kinds, court costs (fees and expenses) are not charged.

189. *(cancelled)*

190. [Continued Validity of Particular Special Provisions]

(1) Nothing shall affect the validity of the following laws, which depart from the provisions of this Act:

1. the Equalisation of War Burdens Act of August 14th 1952 (Federal Law Gazette I p. 446) in the wording of the relevant amending laws,
2. the Law on the Establishing of a Federal Supervisory Office for Insurance Companies and Building Societies of July 31st 1951 in the wording of the Law to Supplement the Law on the Establishing of a Federal Supervisory Office for Insurance Companies and Building Societies of December 22nd 1954 (Federal Law Gazette I p. 501),
3. *(cancelled)*
4. the Farm Land Consolidation Act of July 14th 1953 (Federal Law Gazette I p. 591),
5. the Public-Service Staff-Representation Act of August 5th 1955 (Federal Law Gazette I p. 477),
6. the Military Grievance Code (WBO) of December 23rd 1956 (Federal Law Gazette I p. 1066),
7. the Prisoner of War Compensation Act (KgfEG) in the wording of December 8th 1956 (Federal Law Gazette I p. 908),
8. section 13, paragraph 2 of the Patent Act and procedural regulations affecting the German Patent Office.

(2) *(cancelled)*

(3) *(cancelled)*

191.

(1) *(regulation on modifications)*

(2) Nothing shall affect the provisions of section 127 of the General Act on Public Service.

192. *(regulation on modifications)*

193. [The Higher Administrative Court as Constitutional Court]

In a *Land* with no constitutional court, nothing shall affect the jurisdiction transferred to the Higher Administrative Court to rule on administrative disputes within the *Land* until such time as a constitutional court is established.

194. *(no longer valid)*

195.

(1) *(Entry into Force)*

(2) to (6) *(Regulations on cancellation and amendments and superseded regulations)*

EXCERPT OF THE "PROFESSORS' DRAFT" OF A CODE OF ENVIRONMENTAL PROTECTION

[Umweltgesetzbuch]

General Part (1990)

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CHAPTER I: GENERAL PROVISIONS

Division 1: Purpose of the Act, Definitions

1. Purpose of the Act. – (1) The purpose of this Act is to protect the environment in order to provide long-term safeguards for

1. the ability of the eco systems to function efficiently, and
2. the utility of other natural assets.
   Measures undertaken for the protection of the environment are also beneficial to human health and well-being.

(2) Protection of the environment includes

1. the mitigation of risks to the environment and the prevention of environmental hazards,
2. the repair of damage to the environment and restoration of the ability of eco systems to function efficiently, and
3. the implementation of any necessary maintenance and shaping measures in the interests of the environment.

(3) Protection of the environment takes place within the framework of the legal system with due consideration given to other objects of legal protection.

(4) This Act is also a contribution to environmental protection outside the territorial application of this Act, and in particular to the requirements of environmental protection at an international and European level.

...

Division 2: Principles of Environmental Protection

3. Guidelines for Environmental Protection. – (1) Soil, water, the air and living organisms are to be protected from pollution. This protection shall also include the interrelations among these natural assets. Safeguards shall be provided to ensure that

1. the ground is protected from inappropriate land uses and that excessive consumption of land is avoided,
2. the public water supply is not put at risk and any avoidable consumption of water is prevented,
3. noise is minimised and that protective measures are taken in the case of unavoidable noise,
4. waste is minimised.

(2) Safeguards are also to be provided to ensure that

1. non-renewable natural assets are used sparingly and the consumption of renewable natural assets is regulated to make it sustainable,
2. impairment of the climate is minimised and that remediation measures are taken to compensate for any adverse effects which do occur,
3. the overall impression of a built environment which is as close to its natural state as is feasible is preserved or restored,
4. those material assets which are worthy of preservation are afforded all possible protection from environmental damage.

Protection is to be given to fauna and flora and in particular to endangered species; their natural habitats and conditions for existence are to be protected, maintained, developed and restored.

(3) These guidelines shall be taken into account in those decisions of state authorities in which a balance of interests has to be found.

(4) More far-reaching guidelines on environmental protection may be introduced under Land law.

4. The Principle of Precautionary Prevention. – Appropriate measures are to be undertaken, in particular by forward planning and by reducing emissions and discharges in accordance with the levels achievable using the best available technology, to provide against any

form of pollution which is either avoidable or whose long-term effects cannot be predicted.

5. The Polluter Pays Principle. – (1) Those who cause detriment to the environment or give rise to a hazard or risk to the environment are liable for that detriment or threat.

(2) Where there is no individual polluter or person to be held liable, or such a person either cannot be located or cannot be located in good time, or a claim against this person would not be equitable, responsibility rests with the community as a whole.

6. The Cooperation Principle. – (1) The protection of the environment is entrusted to the State and to the people. Incumbent upon public authorities are those duties assigned to them by the Constitution, by law or on the basis of a law. They are only to become involved where an acceptable level of environmental protection is not or cannot be effected by the general public. In this connection special consideration is to be given to the possibility of agreements on environmental protection.

(2) The authorities and affected parties are called upon to cooperate in accordance with the relevant statutory provisions in discharging the tasks described in paragraph 1, second sentence.

(3) Any measures which allow citizens to retain the possibility to take independent decisions have priority over prohibitions and orders, where this is compatible with providing an equivalent degree of protection for the environment and the party concerned is not placed under a greater burden.

(4) Public authorities shall transfer responsibility for the discharging of those tasks described in paragraph 1, second sentence, to non-state agencies where

1. this is stipulated in law, or
2. discharge of the task by the state would place a disproportionately severe burden on the parties affected and there is good reason to believe in each individual case that the

non-state agency can be depended upon to discharge this task properly.

To the extent that those tasks described in the first sentence are transferred to non-state agencies, these agencies shall discharge them on their own authority. The legislature shall provide for state supervision of the performance of these tasks.

CHAPTER II: ENVIRONMENTAL DUTIES AND RIGHTS

Division 1: Environmental Duties

7. Prevention of Hazards. – (1) All persons shall behave in a manner which does subject the environment to any greater hazard than is unavoidable under the particular circumstances. Unavoidable risks shall be kept to an absolute minimum.

(2) Any person who erects or operates an industrial plant, handles substances or performs activities which in the case of a hazardous incident would be capable of causing detriment to the environment must take whatever measures are required in view of the potential hazards in order to preclude the occurrence of incidents, and, should they occur, to contain their effects to a minimum.

8. Precautionary Protection. – Any person who erects or operates an industrial plant, handles substances or performs activities which are capable of giving rise to detriment to the environment must exercise the due care required by the particular circumstances in order to ensure that any form of detriment which is either avoidable or whose long-term effects cannot be predicted is, as far as possible, prevented from occurring. In particular, emissions and discharges are to be kept to the minimum levels achievable with the best available technology, residues are to be avoided wherever possible and natural assets are to be consumed economically.

9. Liability. – (1) Where the behaviour of a person gives rise to environmental detriment, constitutes a hazard or poses a risk to the environment within the meaning of section 7 or section 8, liability for removing the detriment or the hazard or for preventing the risk to the environment rests with the person who caused the detriment or the hazard or risk to the environment (the polluter). Remediation measures shall be taken by the polluter in respect of any pollution of natural assets which is permissible under section 7 or which can no longer be removed.

(2) Where the condition of property gives rise to detriment or constitutes a hazard to the environment, the owner and the occupier are responsible for removal of the cause of the detriment or the hazard to the environment.

10. Appraisal, Consideration and Indication of the Environmental Risks. – Associated with Processes and Products

(1) Prior to introducing a new manufacturing or application process or to launching a new product, the manufacturer or commercial user shall investigate and document the effects which this process or product has on the environment, including comparison with any available alternatives, and taking account of the residues and waste produced and energy consumption during manufacture in accordance with the relevant and more specific regulations, and shall show due consideration for these findings in coming to decisions.

(2) On offering a product for sale or on using the product, the manufacturer, distributor or commercial user shall label the product to give warning of the risks to the environment associated with the product concerned.

11. Self-supervision. – (1) Any operator of industrial plant which constitutes a hazard to the environment, any body discharging hazardous substances into a body of water, the manufacturer, distributor or commercial user of any product which constitutes a hazard to the environment is obliged to undertake continuous monitoring of the nature, duration and extent of emissions, of the reliability of any

equipment for reducing emissions or preventing breakdown or of the main applications of the products which it produces, has offered for sale or has used and which constitute a hazard to the environment, and it shall examine its emissions, equipment or products for signs of environmental detriment. Where there is good reason to suspect that the emissions, equipment or products give rise to detriment, the operator, manufacturer, distributor or commercial user is obliged to undertake continuous monitoring of the nature, duration and extent of such detriment.

(2) Monitoring pursuant to paragraph 1 need not be undertaken where this is technically impossible or would represent an unreasonable burden on the obligated party.

12. Notification of Changes in Circumstances. – Holders of environmental approvals issued under sections 52 to 56, holders of permits for environmentally hazardous industrial installations and applicants for or holders of certificates for environmentally hazardous substances issued under section 2, paragraph 8, fourth sentence are obliged to notify the competent authority without delay of

1. any significant deviations from the specifications which form the subject of the approval, permit or certificate or of the application,
2. any new findings regarding environmental detriment emanating from the installation itself or from the substances which are manufactured or employed at the plant or offered for sale by the holder. Nothing shall affect provisions on the requirement for approval or permission to be sought for major modifications to an industrial installation.

13. Familiarity with Current Developments in Science and Technology. – Any person who performs an action which is deemed to have a significant effect on the environment is obliged to do everything within his powers to remain abreast of current developments in science and technology to the extent that this may be relevant for purposes of

monitoring and evaluating the effects of the installation, substance or activity on the environment and of preventing or reducing the detriment which any of these may cause.

14. Environmental Accounting in Private Enterprises.

(1) Operators of installations requiring permission either under this Act or under statutory provisions based on this Act and who are required under section 264, paragraph 1, section 325, paragraph 1, first sentence, and paragraph 2 of the Commercial Code to prepare and to present an annual report are obliged to publish information annually on the main environmental effects emanating from these installations and from the products manufactured therein, including residues and waste, and stating what measures have been undertaken to prevent or to mitigate these effects and outlining the role of the environmental officer. This statement may form part of the annual report (section 289 of the Commercial Code).

(2) In cases where the operator is required under sections 290 and 293 to 296 of the Commercial Code to present a consolidated annual report, the operator shall, under paragraph 1, also report on the group. Section 291 of the Commercial Code applies mutatis mutandis.

Division Two: Environmental Rights

15. Right to Intervention by Public Authorities. – Any individual has the right to expect the competent public authority to take whatever measures it finds, after due consideration, to be required in order to avert environmental hazards and to reduce those risks by which the individual is particularly affected.

16. Use of Natural Assets by the Owner. – The owner of a natural asset, or the party entitled by the owner, has free use of the natural asset to the extent that this does not come into conflict with the rights of other persons, and, within the bounds of what is economically feasible, the use

of the natural asset satisfies the requirements placed on economic activity regarding environmental impact.

17. Use of Natural Assets by the General Public. – (1) Access to woods and open fields by means of roads and paths for the purpose of recreation is granted to all persons. Access to woods and unused land away from roads and paths is permitted to the extent that this cannot be expected to be detrimental in any significant way to the public good or to the interests of the owner. Access is at the individual's own risk.

(2) Details are to be regulated individually by the Länder. Where there is good reason to do so, they may impose restrictions on access and declare other types of use to be wholly or partially equivalent to access, and they may issue more far-reaching provisions on the public use of natural assets.

(3) Nothing shall affect regulations made under Land law on rights of public use of surface waters.

18. Maintenance of Secrecy. – (1) Every party has the right to the preservation of the confidentiality of information relating to him, in particular of confidential information of a personal nature and of trade and business secrets. A public authority is not permitted to divulge secret or confidential information to a third party without authorisation from the party affected.

(2) Prior to taking a decision on divulging confidential information, the party affected shall be heard.

(3) Any information provided by a party to the relevant public authority which this party considers to constitute a trade or business secret is to be marked as such and submitted separately; the party concerned is required to provide individual justification for each piece of information being considered to be a trade or business secret. Where the authority concerned sees no justification to warrant any of this information being deemed to be a trade or business secret, it shall make a decision on the matter after hearing the party affected. At the request

of the relevant authority, and to the extent that this itself would not constitute disclosure of secret information, the party affected shall submit a summary of the contents of those documents which he considers should remain confidential.

CHAPTER III: PLANNING

Division 1: Environmental Concept Plans

19. The Purpose and Definition of Environmental Concept Plans.

(1) The spatial requirements and measures to implement the aims of environmental protection shall be set out in environmental concept plans.

(2) Environmental concept plans comprise concept plans for each Land (section 23), regional concept plans (section 24) and local concept plans (section 25).

(3) Environmental concept plans are based on an appraisal of the current state of the environment and identify in text and in drawings the measures which are called for in order to protect and to improve the environment, to repair damage, to restore the eco systems to a state where they can function efficiently and to prevent further harm.

20. The Principles Underlying Environmental Concept Plans.

(1) Environmental concept plans shall be based on the following principles:

1. the ability of eco systems to function efficiently is to be preserved and improved; detriment is to be halted or compensated for by means of remedial measures,
2. non-renewable natural assets are to be used sparingly; the consumption of renewable natural assets is to be regulated to make it sustainable,

3. the land is to be used economically; it is to be protected from inappropriate uses; the input of substances is to be minimised; remediation measures are to be provided for contaminated land,
4. waters are to be kept free of pollution; their natural capacity for self-cleansing is to be preserved or restored; water reserves are to be used economically; the public water supply is to be protected from any form of risk,
5. air pollution and noise pollution are to be minimised,
6. impairment of the climate is to be minimised; where impairment is unavoidable, remedial planning measures are to be undertaken to compensate for such impairment,
7. vegetation is to be safeguarded within the framework of regulated land use; this applies in particular to woodlands, dense plant cover of other types and waterside vegetation,
8. wild animals and plants are to be protected in their communities as parts of the balance of nature and the natural variety of species which has evolved is to be secured; their natural habitats and conditions for existence are to be protected, maintained, developed and restored,
9. areas and sections of the landscape of special historical and cultural value are to be preserved; this applies equally to areas immediately surrounding cultural sites, historic buildings and other monuments which are either protected or which warrant protection to the extent that this is necessary in order to preserve the character or beauty of the site.

(2) Additional principles may be introduced under Land law.

21. Balancing of Environmental Interests, Consideration for Other. Planning Schemes

(1) The various principles set out in section 20 are to be carefully weighed up and brought into balance by those authorities entrusted with

the preparation of environmental concept plans under the overriding objective of affording optimum protection to the environment.

(2) Consideration is to be shown for the aims of comprehensive regional planning at federal and Land level. Any departures which are deemed to be necessary for reasons associated specifically with environmental protection are to be clearly indicted as such and require special justification. The Länder may decide individually to what extent and in what manner such indications of departures provide cause for making modifications to the existing aims of comprehensive regional planning.

(3) Attention is also to be paid to other requirements on the part of the general public concerning the utilisation of natural assets and to coordinating environmental concept plans with other public planning schemes.

22. Plan Elaboration Procedure. – (1) Within the framework set by sections 23 to 25, the Länder shall determine the competent authorities and public offices to be charged with the elaboration of environmental concept plans. The Länder shall regulate the procedure to be followed and are required in particular to ensure that any other public agencies whose interests may be affected by the content of plans, as well as any associations recognised under section 131, paragraph 1, are invited to participate. Provisions may be made to allow for wider public participation; such provisions are required to be made in connection with local environmental concept plans.

(2) In the process of preparing environmental concept plans, the Länder must ensure that no impediment is created to the implementation of the principles contained in section 20 in neighbouring Länder or within the territory of the Federal Republic of Germany in its entirety. Where the natural lie of the land calls for planning to cross Land boundaries, neighbouring Länder shall consult with each other during the preparation of their environmental concept plans on the needs and required measures in the areas concerned.

23. Environmental Concept Plans for the Länder. – (1) The Länder shall prepare environmental concept master-plans for their territories containing the requirements and measures to be adopted throughout the Land within the sense of section 19, paragraph 1. They may prepare separate sub-plans for particular areas or on specific topics.

(2) The Länder shall make regulations on the adoption of the content of their environmental concept plans into Land planning policy and other plans in accordance with section 5, paragraph 1 of the Federal Comprehensive Regional Planning Act.

24. Regional Environmental Concept Plans. – (1) Supra-local requirements and measures within the meaning of section 19, paragraph 1 shall be set out in regional environmental concept plans. Regional environmental concept plans are required to give more tangible shape to the principles contained in section 20 and the contents of the environmental concept plans of the Länder in both spatial and material terms. Section 23, paragraph 1, second sentence applies mutatis mutandis.

(2) Where this may be either of importance for individual regions or required for the purposes of implementing environmental protection guidelines (under section 3), the regional environmental concept plans shall identify specifically

1. priority areas for uses of high ecological value, including stipulation of the minimum proportions of sites to be given over to specific land functions and soil pollution levels,
2. areas in which provision needs to be made for special measures to protect waters or particular aspects of the natural world, parts of the landscape or of the ground, and for special measures in connection with air purity and to safeguard the climate (areas for special measures),
3. regional green-belts and green breaks to interrupt axes of urban development,

4. features which are intended to contain bodies of water, stating quality standards and the measures required to be taken to bring about or to preserve the designated features,
5. features which are intended to contain soils, stating quality standards and the measures required to be taken to bring about or to preserve the designated features,
6. measures to prevent air pollution and specification of target levels,
7. measures for the protection and preservation of wild animals and plants and their communities.

(3) Regional environmental concept plans shall identify suitable areas for safeguarding water and mineral reserves and show areas for recreation, holiday areas and other areas with leisure uses. Proposals may be included for areas to be kept free for location routes and infrastructure schemes and for locations for development projects which are of regional importance.

(4) The Länder shall make regulations on the adoption of the content of regional environmental concept plans into those plans provided for under section 5, paragraph 3 of the Federal Comprehensive Regional Planning Act. Provision may be made for a separate declaration of commitment for any content which is not suitable for adoption; section 6 of the Federal Comprehensive Regional Planning Act applies mutatis mutandis.

25. Local Environmental Concept Plans. – (1) Local requirements and measures within the meaning of section 19, paragraph 1 shall be set out in local environmental concept plans. Local environmental concept plans are required to give more tangible shape to the principles contained in section 20 and the contents of higher-ranking environmental concept plans in both spatial and material terms.

(2) Following due consideration of other public and private interests, any content of a local environmental concept plan which is deemed to be

suitable for adoption shall be included in the preparatory land-use plan [Flächennutzungsplan].

(3) The Länder shall regulate the procedure to be followed in preparing local environmental concept plans; this shall provide as far as possible for participation on equal terms by the municipality and a public authority with special responsibility for protection of the environment.

Division 2: Waste Disposal Plans, Environmental Programmes

26. Waste Disposal Plans. – (1) The Länder shall prepare plans on a supra-local basis for waste disposal, sewerage and for animal waste rendering. These plans shall in particular designate suitable locations for waste disposal facilities, indicating the catchment area, the agency responsible for operation and the principles to be employed in waste disposal.

(2) The Länder shall regulate the procedure to be followed in preparing waste disposal plans. Section 22, paragraph 2 applies mutatis mutandis.

(3) The designations contained in these plans may be declared to be legally binding.

27. Federal Programme for the Environment, Sectoral Programmes.

(1) The federal government shall outline the medium-term prospects of its plans and of other measures which have a bearing on the environment in a Federal Programme for the Environment. The draft programme shall be passed to the Federal Parliament [Bundestag] for comment. The Federal Programme for the Environment shall be subject to continual revision and up-dating.

(2) Sectoral programmes shall be prepared for specific areas of environmental policy.

Division 3: Statutory Environmental Constraints on Other Public Planning Schemes

28. Statutory Environmental Principles for Planning. – (1) In all spatially significant public planning schemes, specific uses are to be allocated to the sites in question in such a way as to prevent as far as possible the occurrence of any detriment to areas which are either exclusively of predominantly residential in nature, and of other areas which warrant protection.

(2) In all spatially significant public planning schemes, the ground is to be used sparingly and with consideration. Land given over to agricultural or woodland use may only be proposed and claimed for other use types to the extent that this is deemed to be necessary.

(3) Nothing shall affect more far-reaching statutory obligations on the consideration to be shown for environmental concerns.

29. General Rules for Finding a Balance of Interests in Connection with Environmental Protection. – (1) In the course of all spatially significant planning measures, federal and Land authorities and public offices are required to attach due weight to the preeminent issues of environmental protection, and in particular to protection of the eco system, in its consideration of diverging interests. Section 28, paragraph 3 applies mutatis mutandis.

(2) In cases of conflicts of aims, absolute priority is to be accorded to protection of the environment where there is a threat of serious and long-term destruction to the natural basis for existence.

30. Notification, Comment. – In the course of the preparation of all public planning schemes which may touch on the concerns of environmental protection, and to the extent that there is no more far-reaching form of mandatory participation, authorities and public offices are required to notify those authorities with special responsibility for environmental protection and to give them an opportunity to comment.

CHAPTER IV: APPRAISAL OF ENVIRONMENTAL IMPACT

Division 1: General Provisions

31. The Purpose of Appraising Environmental Impact. – The purpose of appraising environmental impact is to guarantee that uniform principles are implemented to prevent the creation of hazard to the environment and to mitigate environmental risks by

1. establishing, describing and evaluating the effects of schemes, plans and policies on the environment as early and as comprehensively as possible,
2. taking account of the results of environmental impact appraisal at the earliest possible stage in all decisions taken by authorities on the permissibility of development schemes and on plans and programmes.

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Division 2: Appraisal of Environmental Impact in Connection with Development Projects

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38. Participation of Other Public Authorities. – The competent authority shall seeks the opinion of the authority charged with providing an expert appraisal and from those authorities whose domains are affected by the development project. These comments shall be provided within a period of three months.

39. Public Participation. – (1) The competent authority is required to hear the general public on the environmental effects of the development project within the course of the approval procedure on the basis of the documentation which has either been placed on display or

made available for inspection by the general public pursuant to section 37. The hearing procedure shall be subject as applicable to the requirements of section 73, paragraphs 3 to 7, of the Code of Civil Procedure. Associations which are recognised under section 131, paragraph 1 are to be heard in accordance with section 132, paragraph 1, No. 1, paragraph 2.

(2) Where the agency responsible for the development project makes alterations to the specifications required under section 37 during the course of the procedure, an additional stage of public participation pursuant to paragraph 1 may be dispensed with if there is no cause to fear significant additional or different impact on the environment.

(3) The competent authority shall make its decision on the permissibility of a development project, the appraisal of its environmental impact pursuant to section 42 and the grounds for the decision accessible to all parties whom it knows to be affected by the decision, and to those persons whose objections have been adjudicated on. In the case of a proposed development project being rejected, all parties whom it knows to be affected by the decision, and those persons who lodged objections, are to be notified on this rejection.

40. Transboundary Participation. – (1) Where a proposed development may be expected to have a significant effect on the protected goods detailed in section 32, paragraph 1, second sentence in another member state of the European Communities, the competent authority shall notify the authorities nominated by this member state of this proposed development at the same time and to the same extent as it informs those authorities which are called upon to participate under section 38. In the case of a member state failing to nominate authorities for the purposes of participation, notification shall be made to the highest authority in the other member state with competence for environmental affairs.

(2) Paragraph 1 applies mutatis mutandis in accordance with the principles of reciprocity and equivalence in respect of a neighbouring state which is not a member of the European Communities.

(3) Any consultations which take place with the authorities of a neighbouring state on the basis of notification pursuant to paragraph 1 or paragraph 2 are to be conducted in accordance with the principles of reciprocity and equivalence. The principle of equivalence applies to procedures and evaluation criteria employed in the Federal Republic of Germany and in the neighbouring state.

(4) The participation of foreign nationals within the approval procedure is to be guaranteed in accordance with the principles of reciprocity and equivalence.

41. Confidentiality and Data Protection. – Nothing shall affect the validity of statutory provisions on confidentiality and data protection.

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Division 3: Environmental Impact Appraisal in Connection with Other Decisions

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