FORSCHUNGSINSTITUT FÜR ÖFFENTLICHE VERWALTUNG

Siedentopf/Hauschild/Sommermann

IMPLEMENTATION OF ADMINISTRATIVE LAW AND JUDICIAL CONTROL BY ADMINISTRATIVE COURTS

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Heinrich Siedentopf/Christoph Hauschild/Karl-Peter Sommermann

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Preface

In August 1997, the authors of the present volume organised a sixth Dialogue Seminar with the **Council of State** (formerly the Juridical Council) **of Thailand**. Co-operation with the Council of State began in 1992 and has been promoted by the **Konrad Adenauer Foundation**. Its aim is to develop a modern public administration governed by the rule of law.

During the first years, the German experts provided support during the drafting of an Administrative Procedure Act for Thailand. This Act was finally adopted in 1996 and entered into force in spring 1997. However, the Dialogue Seminars did not deal solely with specific problems of **administrative procedure law**, but also with more general subject-areas such as legistics and deregulation[1]. In more recent years, the implementation of laws, in particular the implementation of the administrative procedure law, became a central topic. The first part of the present volume, which brings togehter papers from the Fifth and the Sixth Dialogue Seminar, is dedicated to those aspects of implementation which had not already been considered in the preceding seminars.

As a next important reform step, the Thai Government intends – in compliance with the new Constitution, which was adopted in September 1997 – to introduce a specialised **administrative courts system** in order effectively to control the application of administrative law by independent judges, who will posses special qualifications in public law. Several aspects of judicial protection by administrative courts had already been discussed at earlier seminars[2]; the Sixth Dialogue Seminar, however, focused exclusively on this issue. The relevant contributions from the German participants are presented in the second part of this volume.

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1 Cf. the titles of the volumes which document the first three seminars: H. Siedentopf/K.-P. Sommermann/C. Hauschild, *The Rule of Law in Public Administration: The German Approach* („Speyerer Forschungsberichte", vol. 122), Speyer 1993; H. Siedentopf/C. Hauschild/K.-P. Sommermann, *Law Reform and Law Drafting* („Speyerer Forschungsberichte", vol. 129), Speyer 1993; and H. Siedentopf/C. Hauschild/K.-P. Sommermann, *Modernization of Legislation and Implementation of Laws* („Speyerer Forschungsberichte", vol. 142), Speyer 1994.

2 See, e.g., H. Siedentopf/C. Hauschild/K.-P. Sommermann, *Modernization of Legislation and Implementation of Laws* („Speyerer Forschungsberichte", vol. 142), Speyer 1994, pp. 93 *et seq.*

In the appendix, the reader will find an English translation of the German Federal Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) and the German Administrative Courts Code (*Verwaltungsgerichtsordnung*). A first translation of both laws has previously been published in the „Speyerer Forschungsberichte" vol. 122 and 142 respectively. For the purpose of the continuing co-operation with the Thai Council of State, these translations have been updated and revised and may now serve other lawyers as a helpful instrument of transnational legal communication. They represent the state of the respective legislation as of January 1st 1998.

Special thanks are due to Dr. *Graham Cass,* who translated the German laws. As in previous years, 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.

Speyer/Bonn, January 1998 *The Authors*

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PART I

IMPLEMENTATION OF ADMINISTRATIVE LAW

The Implementation of Administrative Procedure Law in the Civil Administration[1]

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

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1 I would like to thank Mr. Gerd Eckstein, Mag.rer.publ., for his support in the preparation of this manuscript.

I. Basic principles of administrative procedure under the rule of law

Public administration has to perform a variety of tasks in the framework of a modern society. The most important tasks are:

- translation of legal standards and binding concept-statements of the government into practicable measures and decisions,
- rendering of performance in all areas and at all levels of public service,
- planning of programmes for future developments,
- settlement of communal life – as far as required – through regulatory intervention.

Within the scope of the overarching mandate to guarantee a standard of living which provides equality, social balance and security in a free and democratic society, the administration has the following general operational goals[2]:

a) to serve all citizens

Modern administration means service in and for the community. The citizens with all their needs are the focal point of all administrative action. These actions must be clear, transparent and understandable. This is especially achieved through counselling and informing the citizens, the respective private institutions and associations and the media.

b) to be bound to basic rights and the law

One of the basic principles of public administration is the fact that every administrative action is bound to basic rights and the law. There are sophisticated mechanisms of control:

- political control by the parliamentary bodies,
- legal control by the courts, and
- financial control by the audit offices.

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2 See Government of the State of Lower Saxony, *General Operational Goals for the Administration and General Principles for Co-operation and Management in the Administration of the State of Lower Saxony*, 1993.

c) to take socially-compatible, objective and impartial decisions

Finding a balance between conflicting individual or group interests is a prerequisite for social peace. Inclusion of the effects of administrative action in advance makes it possible to estimate the personal and material consequences. This leads to reasonable and equitable decisions which are based on acceptance and have the prospect of enduring over a long period of time. Public acceptance of administrative actions and the legitimacy of the State's claim to act can only be permanently preserved by fulfilling the tasks in an objective and impartial manner.

d) to act in an economical and expedient manner

The public funds available for the huge number of administrative tasks must be used in an economical way. This requires all participants in the process of public value-adding to carry out their duties in a speedy and expedient manner. The best possible relation must be achieved between the intended goal and personnel and material expenditures.

e) to demand high quality

High quality at all levels of administrative action is a prerequisite for overcoming deficiencies and shortcomings in a modern industrial society. In order to meet these requirements, room for the initiative and creativity of all coworkers is to be specifically provided and promoted. This includes the delegation of responsibility and decision-making power and the establishment of a system of comprehensive co-operation based on trust.

II. The German Law on Administrative Proceedings and the Thai Draft of the Administrative Proceedings Act - some comparative notes

The German Law on Administrative Proceedings of May 25, 1976 is an important and impressive example of "constitutional law in concrete form"[3]. In Germany discussions concerning administrative procedures and their codification have been going on for many years. The legislators, the courts and

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3 Fritz Werner, "Verwaltungsrecht als konkretisiertes Verfassungsrecht", in: DVBl. 1959, pp. 527 f.

learned authors have co-operated since 1945 in developing administrative law within its constitutional context. The German Lawyers' Conference in 1960 tabled detailed recommendations which pronounced in favour of a uniform set of rules governing administrative procedure, including those aspects of general administrative law which were closely related to it.

The law of 1976 was intended to promote such uniformity by integrating disparate special provisions into a single set of rules. At the same time, the relevant procedural rules were to be simplified and rationalised. Another goal was to lay down clear rules for the participation of citizens in the administrative procedure. In addition, the law also regulates the manner in which administrative instruments are issued and their scope, as well as the conditions under which public contracts may be concluded.

In Germany the significance of administrative procedure for the effective protection of basic rights has been the focal point of discussion of legal policy and doctrine. In 1982 the Association of German Teachers of Public Law (*Staatsrechtslehrer*) organised a conference with the title "Administrative procedure between administrative efficiency and legal protection". The experts discussed the most important question: How can efficient administrative performance and the protection of individual rights be properly balanced in the formulation of an administrative procedure?

A similar development can be observed in other (Western) European countries – despite their differing constitutional, legal and administrative traditions. As a result of this common understanding of the necessity of increased individual protection under administrative procedure, the Committee of Ministers of the Council of Europe laid down essential principles in 1977. Resolution no. 31[4] enumerated five rights and duties which the law on administrative procedure of every Member State of the Council of Europe is required to guarantee:

- the right to hearing before the administration
- the right to access to essential facts
- the right to legal advice
- the duty of the administration to give reasons for its decisions
- the duty of the administration to indicate the possibilities for legal challenge to its decisions[5].

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4 Council of Europe, *Information Bulletin on legal activities*, June 1977, pp.45 f.

5 See Jürgen Schwarze, *European Administrative Law*, 1992, p.1186.

Like in Germany, and in other European countries where the discussion concerning administrative procedures and their codification has been going on for decades, the Thai authorities realised that there was a gap between, on the one hand, the claim to develop and create a modern society and, on the other hand, the legal system, especially in the field of administration.

The Juridical Council Act B.E. 2522 (1979) was an important step towards formulating some basic principles which administrative actions have to follow.

Despite the fact that knowledge of administrative law has not (yet) spread wide enough throughout Thai society, and despite certain obstacles in the political arena, some recommendations have been made on the provision of administrative procedure, e.g. in Case No. 89/2526 (Petition Council, panel no. 2), when the Cabinet endorsed a procedure establishing a rule that every government agency must inform the applicant whether it would or would not consider his petition or request[6]. Another example is Case No. 6/2528 (Petition Council, panel no. 2): the Prime Minister endorsed the suggestion that the Bangkok Metropolis must collect all evidence and deliver the file to the Public Prosecutor within 60 days – since there was no time limit in the law – in order to accelerate the decision-making process.

Nevertheless, Thailand still has only few substantial rules on administrative procedure, and these rules are scattered throughout more than 300 statutes. Because of this, the Office of the Juridical Council proposed a new course of action in 1991 by asking the Prime Minister to set up an *ad hoc* committee to draft an Administrative Procedure Code. This committee completed its task by September 17, 1991 and it proposed the Bill on Administrative Procedure, which consisted of 83 sections. After that, the Government asked the committee to reduce the size of volume by shedding some parts and to simplify and rescrutinise the bill as a whole.

The short chronology above shows how difficult and time-consuming it is to define a comprehensive set of rules because of the influence of different pressure groups which want to change certain reglementations according to the interests of their supporters. German experience shows that the formulation of new rules and regulations has to be a process of co-operation between many actors at different levels inside the administrative bodies. But examining the environment of the administrative system is important as well: the (affected) citizens have to be actively involved in the process of creating and –

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6 See Chaiwat Wongwattanasan, *Problems in Thai administrative procedure*, p.19 f.

afterwards – in the process of permanently redesigning the regulations with regard to the changing challenges of real life.

Formulating new regulations is sometimes a prolonged and slow-moving process. But the next step of the policy cycle – the implementation of new rules and methods – can be even more complex and controversial. To minimise the danger of being confronted with the fact that the intended results do not materialise, or materialise only to a certain extent, some remarks on the implementation process may be helpful to understand this complex social phenomenon.

III. The policy cycle

Walter Williams[7] characterised the dilemma of implementing policies with the generally justified statement: "In the largest number of cases it is impossible to say whether policies fail because they are based on bad ideas or because they are good ideas poorly executed."

One possible path to get out of this unsatisfactory situation is the creation of patterns with the aim of describing complex social phenomena.

The policy cycle is such a model to describe the permanence of change in social systems. The basic method of research is the analysis of the interrelations between actors or groups of actors and the social environment (legal framework, administrative system, economic situation, etc.) at different levels and in different phases of development. The policy cycle consists of the following stages:

1. Invention

The necessity for change has become obvious because of deficiencies in the current system. The promoters start to establish a conceptual framework. This includes the search for various alternatives and strategies to achieve an intended goal: the restructuring of the administrative system in the sense of making it more efficient, and in order to bring it "closer to the people". At this stage (conflicting) political interests are formulated and articulated.

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7 Walter Williams, *Social Program Implementation*, 1976, p.21.

2. *Initiative*

After realising the necessity for change, analysing the deficiencies and formulating the goals of the restructuring process and the routes to their realisation, the policy decision is made by the authorised bodies. In a pluralistic system, with division of labour, conflicts between different authorities may appear. Friedrich Nietzsche wrote: "There is no change imaginable without the struggle for power."[8] These conflicts must be resolved in a "creative" way, i.e. stalemate situations, where the opponents block any decision, have to be avoided by special rules, for instance by mediation[9].

3. *Implementation*

This phase of the policy cycle includes such aspects as:

- the specification and concretisation of the instruments to be used,
- the alignment of responsibilities to different (sub-)departments,
- the specification of procedures to be followed, information management, and
- the creation and the strengthening of acceptance among public employees and the people affected.

4. *Evaluation*

Evaluation means the *ex post* control of the results after the new regulation has been implemented. In a first step the state of affairs before the change started has to be compared with the effects which appeared subsequently. The second step is a comparison between the intended goals and the actual results. With the help of this analysis, shortcomings and deficiencies can be identified and ways can be found to overcome them.

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8 Friedrich Nietzsche, *Der Wille zur Macht - Versuch einer Umwertung aller Werte*, Stuttgart 1964, p.466.

9 See Wolfgang Hoffmann-Riem / Irene Lamb, "Negotiation and Mediation in the Public Sector - The German Experience", in: Christine Bellamy / John A. Taylor, *Towards the Information Polity? Public Administration in the Information Age*, in: Public Administration, Vol. 72, Number 1/1994, pp.309 f.

5. Updating and Redesign

The aim of this stage of the policy cycle is to close the gap between the intentions of the new regulations and their real effects in practical life:

- by updating the political decision,
- by amending existing law,
- by changing those aspects where problems have occurred, and where application procedures and instruments have been inadequate.

Top management are responsible for evaluating the output of the administration as a whole. For this reason they communicate with the middle management and with lower-ranking staff to gain an overall view of the problems connected with the practical realisation of the regulation. These insights, and the experiences of the employees at the bottom, have to be taken into consideration when the regulations are redesigned and updated.

When the policy objectives have not been achieved, the whole cycle starts all over again. In fact the policy cycle is not static but rather a dynamic process. For this reason it needs permanent feedback to be organised in an efficient way.

Because of the importance of implementation management for success in restructuring an administrative system (and because of the title of the lecture), some further remarks on this phase of the policy cycle may be helpful. Only since the 1970s have implementation studies been carried out. In other words: dealing with implementation is not a traditional field of scientific research, but a relatively new object of study.

IV. Implementation - an attempt to define applied and practical steps in the process

Traditionally, studies of public policy and public administration have been divided into three fields: strategy formation and design, implementation and evaluation. Implementation studies, however, suffered for a long time from a "black-box approach": It was assumed that all decisions in the policy-making process were "automatically" carried out by the "tools" of the implementation

system with the desired results. But in practice unintended consequences could frequently be observed[10].

With regard to these deficits, a new field of policy analysis was "discovered" by theorists in the 1970s: implementation studies. During the following years an enormous variety of models, approaches and frameworks has been created and developed. All of these different approaches have advantages and disadvantages when trying to describe "real life", because they are either prescriptive models, which examine what ought to happen in an ideal world, or descriptive models, which are impossible to apply in all situations. One could say: There are many theoretical approaches but few practical arrivals. This is, of course, an unsatisfactory situation. A possible solution to the problem of theoretical deficits is to define all main factors in the implementation process and to survey their interrelations.

The classical bureaucracy model of Max Weber (1864–1920) was the first mechanical "top-down" approach. This type of approach to implementation claims that the aims of an organisation are formulated at the top and afterwards translated into instructions for those who will implement the respective policy at the bottom. The main problem of this kind of approaches lies in the fact that the policy-makers and the government are not able to exercise "total control" during the implementation process because they have neither sufficient information nor adequate resources to deal with the complexity occurring.

In contrast to this, the "bottom-up" approach is focused on the individual member in the organisation. This approach starts at the "delivery point" – at the closest point of contact to the problems which have to be solved by the organisation. The role of the top level of organisation in this model is to enable the implementers to utilise their professional experience to the utmost ("human resources management"). The main deficit of the "bottom-up" approach is the loss of control and influence on the part of the decision-making authorities.

The only way out of these two "one-way streets" is a combination of the positive impacts of both approaches. Implementation, therefore, is to be understood as a process of interaction between the defining of aims and actions geared to achieving them. The term "process" underlines that implementation studies are studies of change. These studies examine the micro-structures of political life, and they try to answer the question as to how organisations

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10 See Talib Younis / Ian Davidson, "The Study of Implementation", in: Talib Younis (ed.), *Implementation in Public Policy*, Worcester 1990, p.3 f.

function; how they look after their interests in the framework of the political system; what motivates them to act in the way that they do, etc.

The combination of the different positions leads us to a pluralistic approach. As we have seen above, it is not possible to ignore the necessity of rules and procedures. On the other, hand the implementers make "their own" decisions based on their special know-how and their position closest to the problems, and by doing so they modify the intentions of the decision-makers. It is important to keep this inter-relationship between policy and action, between policy-maker and policy-implementer in mind when we try to analyse the challenges public administration nowadays faces. By relying on this broad form of contingency analysis, the unique interplay of factors affecting the decision-implementing process becomes evident.

V. Main factors of successful implementation strategies

The message of this introduction to the field of implementation studies was to show "... that a policy, in any field or endeavour, is only as good as its implementation."[11] As we have seen, implementation is a process of interaction between the decision-makers at the top (parliament, government, administration) and implementers, who have relative autonomy, at the bottom.

Indispensable preconditions for the successful implementation of new methods, laws or regulations are the development of routines (general rules of subordination, special procedures, division of labour) and the development of sophisticated know-how to handle the problems occurring. Before establishing new forms of co-operation inside an administrative organisation, or before introducing new legal acts which consider the relations between members of the civil service and citizens, it is necessary to consider the following topics.

1. Information and Participation

The most important "tool" of implementation management is information. The implementers at the bottom of the public administration have to be firmly convinced that they are contributing to the public welfare. They can only be motivated to work if they have enough information about their tasks and about

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11 Andrew Dunsire, "Implementation Theory and Bureaucracy", in: Talib Younis (ed.), *Implementation in Public Policy*, Worcester 1990, p.15.

strategies to handle conflicts connected with the process of practical realisation.

As we have already seen, so-called "shop floor" management is closest to the problems. This fact indicates that the members of the public service at the bottom must have special knowledge which is useful to allow them to act in an appropriate way when they come into contact with clients and citizens. The implementers on the "production line" are responsible for the tactics:

- work flow, time-keeping and control of operations,
- record keeping and maintenance.

Middle management has other duties. This tier of the administrative organisation is responsible for:

- planning of developments and scheduling (medium-term),
- deployment of resources and utilisation of services (transport, supplies, accommodation, etc.)
- establishing and fostering relations with other organisations, and
- development of new programmes with organisation-wide horizons.

Top management is focused on decision-making, i.e. this tier of the administrative body is responsible for defining the objectives of the organisation and the paths to their realisation at strategic level and on a long-term perspective. On the other hand, top managers also bear responsibility for evaluation of the effects at the bottom.

These facts underline that an organisation can be compared with a living organism: all parts have to co-operate in order to achieve a common goal. With regard to public administration, this goal is the effective organisation of social life under the rule of law.

If the first precondition was well-informed actors inside the administrative body, then the second precondition for successfully implementing new procedures and regulations is the participation of all parts of the organisation during the process of formulating new goals and of formulating the best routes towards concrete realisation. With regard to the special skills, knowledge and experience of the actors at the bottom, it is advantageous to offer them a certain degree of autonomy. Nevertheless, the rules have to be fixed in a clear way to prevent abuse of authority.

2. *Acceptance*

Every new regulation implies a change to the status quo. Psychologists have discovered that all human beings prefer the actual and familiar situation to an unknown future. This effect is called "tendency to adhere" (*Verharrungstendenz*). In other words: a person is only ready to change his behaviour and attitudes voluntarily if he is able to assume that the new regulation will be better than the current one. This conviction has to be created among members of the civil service and also among those who will be affected by the change: the citizens.

2.1 Acceptance among (affected) citizens

It is not only important to inform the staff of the administration about the intended changes and the new regulations, but the people affected also have to be informed well in advance. Several means are possible to make the positive intentions of the new regulations clear, for instance an information campaign via the media (information booklets, special news magazines, talk shows, etc.). These means can help to deepen the sense of lawfulness among the citizens and can also create a new quality of co-operation between them and the authorities.

2.2 Acceptance among public employees

To overcome open or hidden reservations inside the administrative body, especially at the bottom level, it is very important to show the benefits of the intended changes for public employees as well. Without motivation it will be almost impossible to achieve the final goals of the new regulations. There is one "key-word" to ensure this precondition of successfully implementing new administrative procedures: qualifications. Top and middle management have to explain the advantages of the forthcoming rules without hiding their disadvantages.

With regard to the Administrative Procedure Law, the top and middle managers have to make it clear to the lower ranks, for instance, that the instruction to the public concerning time and manner for appealing the decision is obligatory because of the rule of law. This instruction should not be regarded as a motion of no-confidence towards the individual employee affected, but as a part of the system governed by the rule of law.

A helpful measure to dynamise the process of change is the creation of special incentives (material or non-material) for public employees. By means of such incentives, top and middle management may motivate the lower ranks to gain new qualifications. (We should discuss this item afterwards because of its importance for the implementation process.)

3. Conflict management

Despite information, participation and qualifications, conflicts between public employees and their clients will nonetheless appear because every permission or licence can either be granted or rejected – depending on the circumstances of the particular case. There is no doubt about the fact that especially refusals, or even permissions with special limitations (obligations, burdens, charges), will give rise to conflicts. For this reason employees have to be specially trained. The top and middle managers are responsible for letting the lower-ranking staff know what modern conflict management is all about. This task demands at the same time that the higher ranks are adequately qualified to meet the challenge of coaching their staff.

VI. Flexibility – the ability needed to meet the rapid changes of our times

Public administration should be charged with the task of establishing an appropriate and effective legal framework as a prerequisite to creating an enabling environment which is conducive to promoting sustainable development. It is very important to take the interrelationship between law and public administration into consideration, because if this fact is neglected, the (inherited) legal framework may not sufficiently reflect the culture of the country and it may not be as flexible or responsive as it need be to meet the challenges of today and tomorrow. This flexibility of administrative procedure law is ensured by involving the experiences of administrative practice (feedback) and by the development of the law by judge-made law and by the legal sciences.

Law is one of the central pillars around which modern society is organised. It provides instruments which are essential to empower, regulate and control public administration. The members of the civil service are, on the one hand, authorised by the law and act, on the other hand, within the legal framework of law. Thus, the authority of law offers the basis for public administration. It also ensures rights, security and stability. Law is both the means by which government regulates and provides services to the citizens

and the means by which those citizens may protect their rights. The rule of law is also a vehicle with which to address problems of corruption or abuse of power. It regulates the on-going operation of public administration in terms of regularity and fairness and offers opportunities for participation. Administrative law provides means for controlling the public sector in the sense of providing mechanisms of accountability and responsibility.

Appropriate regulatory frameworks are vital to stimulate participation in economic development. The truth of this statement is proved by the current debate on the "*Wirtschaftsstandort Deutschland*" (Germany as a location for lucrative investment). But not only in the economic field are appropriate legal frameworks necessary. They are also an indispensable precondition for enhancing the development of civil society by means of:

- encouraging the participation of politically interested people, and
- setting guidelines for the effective implementation of governmental goals through public administration.

In providing for all these tasks, the legal framework of public administration provides a foundation for virtually all aspects of the task of governance[12]. Nevertheless, conflicts between differing goals do occur, e.g. between:

- environmental protection and economic development,
- legal security and the demand to accelerate planning processes,
- participation of all people affected and efficiency of decision-making.

The basic task for the Administrative Procedure Law in this context is to find compromises between the different points of view and to settle agreements which are well balanced with regard to public welfare and social justice.

Legal traditions and the way public administration sees itself both play an important role in the implementation process. In Germany the administrative bodies, especially at the higher ranks, are dominated by lawyers. For this reason the decisions of German administration are not only claimed to be strictly bound by the rule of law – they are indeed determined by thinking which focuses on lawfulness and proportionality.

During our fourth dialogue seminar last year Dhipavadee Meksawan, Deputy Secretary-General of the Civil Service Commission, characterised the

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12 See General Assembly of the United Nations, Economic and Social Council, Report of the Group of Experts on Public Administration and Finance on its twelfth meeting, 11 October 1995, pp.20 f.

three dominant values of the Thai bureaucracy as: personalism, paternalism and hierarchical status. The current situation – following the assessment by Mrs Meksawan – inside the administrative system of Thailand is that:

- the bureaucracy is organised and operated to reflect status differences;
- within these hierarchical structures there is a sincere desire to care for one's subordinates;
- personal relationships and individual concerns remain the basis for staff behaviours and interactions;
- one of the most important general motives is strong loyalty to one's family and friends.

In even more detail, Prof. Amara Raksasataya[13] describes the administrative culture of Thailand by stating that officials are expected to pay respect to superior officials. They should not argue or give contradictory opinions to higher-ranking officials. They are taught to be patient and humble. In this tradition, it is difficult to expect frank discussion, or talent and initiative to be displayed.

The Thai people are predominately Buddhists, who value mercy and forgiveness very highly. Thus, strict enforcement of the law, of new regulations and of the corresponding discipline is difficult to manage. The value of "Kreng-chai" – reluctance to cause a disturbance for fear of being disrespectful – is also widespread in Thai society. For this reason Thai officials will be very reluctant to do anything to displease others, especially to displease their seniors or superior officers. "Kreng-chai also implies an inability to say no. This leads to many things such as working on silly programmes and inconveniencing people."[14]

This statement concerning the actual features of the Thai bureaucracy is not to be understood as a fundamental criticism. The existence of hierarchies and personal relationships is without doubt – to a certain extent – necessary for an administration to function as a sound social organism. Nevertheless, personal motives like individual concerns and strong loyalty to one's family or friends have to be replaced by a corporate identity: working in the admini-

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13 Amara Raksasataya, *Thailand. Arbeitsmaterialien für den landeskundlichen Unterricht, Folge: Verwaltungs-profile*, edited by the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, Bad Honnef 1990. (translation – H.S.)

14 ibidem, p.99.

stration is a mission to serve all parts of society and not only some particular or egoistical interests.

VII. Summary and Perspectives

A comprehensive set of rules, integrated in a practicable Administrative Proceedings Act, can guarantee the citizens rights and equally makes it possible to achieve settlements without judicial review. Nonetheless, the possibility to sue before the court is essential for the efficiency of settlement procedures. These preconditions for an effective legal framework are to a large extent realised in the Thai Draft.

Furthermore, participation - both of the civil servants and of the citizens affected - is one of the basic principles for achieving acceptance of the new regulations. The main factors for securing high degrees of participation are:

- effective information management, and
- an appropriate system of qualifications for the public employees.

In recent years numerous countries have regulated and unified administrative procedures for decision-making. This codification makes it possible for any legal subject affected by the decision to be treated as a party in the procedure, and therefore to be heard, to know the grounds for the decision, and, if necessary, to appeal to a higher authority.

German experience shows that legal traditions are stable and enduring values which influence the administrative system and the way administrations see themselves. Sometimes these values seem to be conservative and not ready for rapid changes. The case of France[15] provides a good example of the fact that this assumption cannot be generalised. In this country, with an old tradition of administrative law, and where administrative procedure was in general regulated by case law, a simple decree (28 November 1983) has contributed to changing the balance in favour of citizens by imposing:

- an adversary procedure in decision-making when the rights of a legal subject are to be affected;
- an information requirement on the appeals available against the decision;

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15 See Gérard Marcou, "The Legal and Regulatory Framework of Public Administration", Paper prepared for the Expert Group Meeting of 31st July - 11th August preparing the Resumed Session of the UN General Assembly on Public Administration, p.20 f.

- an obligation to withdraw at any time a rule which is or has become unlawful and, on request of the person concerned, to withdraw any individual decision based on this rule.

These new provisions are the first elements of an administrative procedure concept. They are now widely used by claimants - if necessary before the administrative courts.

One of the fundamental tasks of public administration in modern states is to create solidarity among the citizens and to show the benefits of the society they belong to. If the administrative system were not to be able to meet this challenge, the social link and the acceptance of (political) institutions would vanish among the people. Therefore, no decline in the importance of an effective public administration can be foreseen.

However, the public administrations of the 21st century will differ from those at the end of the 20th century. Inherited authoritarian features will, step by step, wither away. State authorities must be fair, efficient, transparent, more responsive and closer to the people. The substance of public administration has to change in line with the changing expectations of society; its organisation and rules will also have to change. Functions which have become obsolete, and the institutions which were in charge of these functions, must be cut. The main difficulty in this context is to recognise which of the original service functions have to be fulfilled by the public administration, and which tasks can be delegated.

New Trends in the Implementation of Deregulation Policies

Dr. *Christoph Hauschild*

There is no question that deregulation policies remain a top political, administrative and legal issue in Germany. Public budgets constraints, the government programme for restructuring the social-market economy, and the globalisation of markets require further actions and efforts in the deregulation and streamlining of state activities. In Germany there is no disagreement between the political forces and among the public in general that there is no alternative to deregulation. Political debates on deregulation concentrate on the ways and means to achieve lower government spending and lean public administration.

I. Improving Legislative Procedures: Regulatory Checklists

1. German Checklist

As discussed before, the term deregulation stands for a series of measures intended to make government action more effective and accountable, including the complete withdrawal from certain activities. The sta rting point for all deregulation is that a specific sector of economic or social life has been subject to government intervention and regulation. One important aspect of deregulation policies is, therefore, deregulation through improving the management of legislative procedures. The main aim of legislation is to generate positive social effects. In many cases, however, legislation has unintended side effects, the scale and nature of which are not clear in advance. These side effects can lie in the area of compliance costs for businesses, consequences for market operations, or enforcement costs for public agencies. Legislation can therefore unintentionally undermine the main aims of policy.

An improvement in the quality of law-making is promised in particular by what are termed "regulatory checklists". Checklists are a method of assisting public administrators to reach better regulatory decisions. They contain sets of questions which reflect principles of good decision-making and require the systematic analysis of the need for government interventions, of alternative forms and of consequences.

A very recent and new development concerns the implementation of the German regulatory checklist, the "Blue Checklist", which was adopted as long ago as 1984 by the Federal Government to determine the necessity, effectiveness and comprehensibility of proposed federal legal measures. The Blue Checklist was initiated by the Federal Ministers of Interior and Justice. It serves primarily to assess the impact of a new regulation in its preparatory stage. It requires law-makers to scrutinise new regulations on the basis of 10

questions with regard to the necessity of action, the comprehensibility of the proposed text and effects for administrative enforcement and for the business community. The Blue Checklist Checklist was first presented in our series of dialogue seminars by Prof. Siedentopf in the 1993 seminar and has since been referred to several times. (The Blue Checklist is published in the 1993 volume of our seminar papers.)

At the beginning of this year, in March 1996, the Federal Government decided to include the Blue Checklist as an annex to the Common Ministerial Rules of Procedure. These Common Ministerial Rules of Procedure are internal governmental service regulations. They are obligatory and binding on all federal ministries. For the federal ministries the organisation and internal procedure for transacting incoming business is laid down in the general part. The special part of these joint ministerial service rules concerns the business relationship with parliament and other constitutional organs and the legislative procedure. The change in the rules on legislative procedure mentioned above provides for the Blue Checklist to be applied at each stage of law drafting and for each draft to specify compliance with the Blue Checklist.

A Cabinet decision created a new formal requirement for the preparation of draft legislation. The new procedural rules allow more effective management of the law-making process. According to the procedural change, any regulatory proposal submitted to the Cabinet must indicate that the draft has been checked on the basis of the Blue Checklist. Furthermore, the new rules of procedure require that the results of the checking procedure be specified in the legislative intent of the government draft.

The 1996 change to the Common Ministerial Rules of Procedure also includes the new obligation of a clear assessment of total costs and benefits – including those to business, citizens and public administrations.

In order to implement a stronger cost-orientation into the legislative drafting process the new rules require regulators to estimate the expected costs of each regulatory proposal in co-operation with the administrations and businesses concerned. According to the old version of the service rules, the participation and notification of experts and association experts and associations had the aim of obtaining their professional views on the draft. From now on administrators are required to consult the interested parties concerned to gain an idea of cost effects, in particular with regard to small and medium-sized businesses. These estimates also have to be specified in the legislative intent of the government draft.

2. OECD Checklist

Similarly in the international context the quality of government regulations is regarded as crucial for the implementation of deregulation policies. Regulatory quality is considered by many governments as a decisive component of economic performance and government effectiveness in improving the quality of life of citizens. Not only in Germany, but also in several other countries regulatory checklists have been developed and are now used by administrators. These checklists differ according to legal and administrative principles and government traditions, but they all focus on the functioning of the administrative procedures through which regulations are developed and put into practice. This common development is the background of the OECD-Checklist which I would now like to present to you in more detail.

Last year, in March 1995, the OECD Council adopted a recommendation that OECD member states should take effective measures to ensure the quality and transparency of government regulations. The OECD Council recommended that member states use as a guide the principles set out in the OECD Reference Checklist for Regulatory Decision-Making.

The OECD Checklist contains ten questions on regulatory decision- and policy-making. Not only in having the same number of questions (10), the OECD Checklist and the German Blue Checklist reveal a number of similarities. In fact the OECD Checklist was developed in close co-operation with national experts, and the German expert played an important role in the preparatory work at OECD level. Like the German checklist, the OECD Checklist is meant to guide administrators through the increasing complexity of regulatory design and application. The 10 questions in both checklists are, however, not identical in their wording. The similarities are rather rooted in the common underlying principles of reducing government intervention. Like the German checklist, the OECD Checklist sets out to reduce the number of regulations and, in a broader sense, to support the implementation of deregulation policies. This common purpose is reflected in the first three OECD questions:

Question one: Is the problem correctly defined?

Question two: Is government action justified? and

Question three: Is regulation the best form of government action?

These three questions instruct regulators to justify their action and to look for alternative forms of government intervention.

Again, like the German checklist, the OECD Checklist calls for a clear assessment of total costs and benefits arising from government action. The important aspects of administrative and fiscal costs, as well as regulatory costs and benefits across social groups, are to be given special consideration. Two checklist questions cover the cost/benefit estimates:

Question six: Do the benefits of regulation justify the costs?

Question seven: Is the distribution of effects across society transparent?

Particular interest is also given to the issue of whether compliance with the new law can be achieved. OECD question 10, as well as the German checklist, requires regulators to take into account the difficulties, and perhaps even resistance, which new regulations might encounter after they have entered into force and are meant to be implemented. In the explanatory note to the corresponding OECD question, it is stated that, even after the most rigorous decision-making process inside the administration, regulation still has to pass the most demanding test of all: the public must agree to comply with it. And I would like to add: the enforcement agencies must be willing to, and capable of putting the regulations into practice.

The OECD considers implementation very often to be a weak phase in the regulatory process in OECD countries. At this point I would like to quote the OECD on the compliance issue. The OECD states that:

> "Implementation should be considered at all phases of decision-making, rather than left to the very end. One common source of non-compliance, for example, is the failure of affected groups to understand the law, which may result from poorly-drafted or too complex regulations, or inconsistent interpretations by enforcement officials."

In saying this, the OECD confirms that implementation strategies must form an integral part of law-drafting procedures.

II. A Regulatory Management System: New Consultation Procedures

Everyone agrees that a regulatory checklist cannot stand alone. The checklist must be applied within a broader regulatory management system that includes elements such as information collection and analysis, consultation processes, and systematic evaluation of existing regulations. In view of such a broader approach to the issue of improving the quality of government regulation, the OECD Council recommends that member countries develop administrative

and management systems through which principles of good decision-making will be reflected in regulatory decisions.

Regulatory management can be considered as a sub-topic of public management. Issues discussed under public management apply equally to the development of a regulatory management system. In administrative-law countries such as Germany, with the tradition of an interventive public administration, regulatory procedures are to some extent the root of modern public administration, because regulatory decision-making requires a professional civil service based on a system of rules and regulations.

Like administration in general, regulatory procedures must be responsive to public needs and expectations. A regulatory management system therefore includes elements such as information collection and analysis, consultation processes, and systematic evaluation of existing regulations.

An important aspect of a regulatory management system is the link between the regulator and the wider public. Public officials generally agree that public consultation, properly done, can improve regulation. Consultation procedures might contribute to finding more effective alternatives, to lowering costs to businesses and administration, to increasing compliance and to accelerating the response to new technological developments.

The question, therefore, is not whether consultation procedures make sense, but how to carry through communication with the public. There is always the risk that consultation procedures will be dominated by groups who are familiar with the regulatory structure in question, or by well-organised and specialised interest groups who are experienced at making themselves heard. Administrative practice shows that stronger groups will participate more often in consultation and are better equipped for exerting their influence. The challenge is to manage the process of regulation to compensate for this natural imbalance.

In view of this challenge, recommendations have been made for opening up regulation and new consultation procedures. It is recommended that consultation should take place in an open and transparent manner. It is furthermore suggested that consultation be used to review and discuss alternative forms of government intervention prior to the development of specific regulatory programmes.

The development towards a broad use of consultation procedures gives reason for the assumption that consultation procedures are subject to change. Older forms of consultation tend to be consensus-oriented. They are often restricted to just a few groups, such as selected businesses and labour organisations. New consultation procedures are often linked in practice to analysis of

the impacts of regulation and closely associated with cost-benefit assessment. These new forms of consultation are in particular suited to the implementation of deregulation policies. In fact, the recent change in the German Law on Administrative Procedures goes back to a report by a commission on deregulation, which included, among other measures, recommendations on speeding up administrative procedures. This deregulation report on the competitiveness of the German economy was the result of extensive consultation with the businesses and administrations concerned.

New forms of consultation are one important aspect of the management of regulatory procedures. Another is the management of information, also for the purpose of improving communication between regulators and the public. At this point one ought to discuss the impact and opportunities which new information technologies provide for governments and administrations. I would like only to mention that some European countries have started to use the Internet for communicating with the public. The German government is working on a so-called "information super-highway" and it is not difficult to predict that the new information technologies will also come to have a great impact on regulatory decision-making procedures.

III. Alternatives to Traditional Regulation

The deregulation debate also touches the instruments of regulation. In the search for more cost-effective and more flexible policy instruments alternatives to traditional regulation are under discussion. In some policy fields traditional regulation is often considered to be to rigid and unresponsive in the face of new technological and economic developments and private-sector demands. The term "alternative", for most new forms of regulation under discussion, signifies that governments abstain from rule-making.

Alternative approaches to standardised solutions and inspection-based enforcement strategies have been introduced in particular in the field of environmental policies. Alternative environmental regulation is, for example, based on economic incentives. Economic incentives are intended to help to reduce water, air or soil pollution. The idea behind economic incentives is that businesses not only comply with general standards, but that they invest money to meet standards which are not yet generally legally binding. Economic incentives are created to encourage those who can manage the technological change to meet higher standards on a voluntary basis. Such a new instrument of regulation comes into play in particular when governments wish to support an investment in modern – and therefore in most cases expensive –

new environmental technologies. In these cases it would cause great financial difficulties for small and medium-sized enterprises if the government were to declare the new technology immediately as a legally binding standard for everybody.

Other alternative forms of regulation are voluntary or negotiated agreements, self-regulation or certification procedures. All such alternative forms have in common a devolution of regulatory competences to private-sector actors. A clear limit to such a devolution of competences is set by the rule of law. Therefore alternative forms of regulation cannot replace traditional regulation on a large scale. The rule of law reserves fundamental legislative decisions to the legislature, as provided for by constitutional law. Alternative forms of regulation can, however, play an important role in the definition and enforcement of certain standards, as was mentioned in the case of environmental protection or of consumer law.

Moreover, with alternative forms of regulation the state does not give away its competences completely. A typical feature of innovative instruments of regulation is that public- and private-sector actors share competences. Through new procedures, such as certification procedures or expert models, the classical top-down approach in the public-private relationship is replaced by forms of co-operation and mutual responsibilities.

As Dr. Sommermann pointed out in his presentation of the project on a Code of Environmental Protection in the 1994 seminar, the term "co-operation" stands for all forms of participation by individuals or non-governmental organisations in decision-making. The co-operation might be realised in practice by rights of hearing, participation, or even by leaving an independent decision to citizens.

Expert-models, as another alternative form of regulation, play an increasing role in the procedure for granting building permits. Here private experts take on the responsibility of checking and guaranteeing that a building project meets the specific legal requirements and obligations. Expert models are introduced to speed up private building construction.

These examples show that alternative forms of regulation concern less the legislative than the administrative procedures. These new forms of government action impose new challenges on the management of public affairs. Feed-back and control systems are required to monitor compliance with the law. Such new procedures, however, also include the chance to reduce red-tape and to increase the acceptance and reputation of public administration. As pointed out before with regard to regulative checklists, alternative forms

of regulation cannot either stand alone, but have be part of an integrated programme on redesigning government action.

In conclusion It would like to point out that, in the light of experiences made so far with deregulation policies, one of the most important messages seems to be that impacts and effects have to be studied in close co-operation with all groups concerned. Since deregulation does indeed often have far-reaching effects, it would also seem advisable to start deregulation on the basis of pilot-projects. Such pilot-projects could also be useful for testing innovative forms of regulation for the implementation of deregulation policies.

Execution and Enforcement of Administrative Acts

Dr. *Karl-Peter Sommermann*

The preceding dialogue-seminars concentrated on administrative procedure, which can be defined, in a broad sense, as the activity of an administrative authority aimed at taking a decision or some other measure, or at the conclusion of an agreement. In a narrow sense, administrative procedure means the activity of authorities directed at the examination of the basic requirements for, and the preparation and the issuing of an administrative act (see section 9 of the German Administrative Procedure Act and, very similar, section 5 of the Thai Draft Administrative Procedure Act). The present paper will focus on the proceedings which follow the issuing of an administrative act, and more specifically on the execution and the enforcement of an administrative act.

What is the difference between execution and enforcement?

Roughly speaking, enforcement deals with the application of means of coercion in order to implement an administrative act which contains an order directed at an individual or at a group of persons, while execution refers also, and primarily, to administrative acts which, by their very nature, cannot be enforced because their effects come into force *ipso iure*. This applies to administrative acts by which a legal position or legal relationship is formed, altered or terminated (so-called "formative administrative acts") and to administrative acts by which a legally relevant quality of a person or thing is ascertained (so-called "declaratory administrative acts").

I. The execution of administrative acts

The fact that the term "execution" is also applied to formative and declaratory administrative acts already indicates a broad understanding of the concept. If, for example, the owner of a piece of land makes use of a building permit, which is a formative administrative act, he or she "executes" the administrative act. Under German law this understanding is important for the system of legal protection of third parties.

1. Executability and suspensory effect of objections and rescissory actions

Let us assume that the competent authority granted the building permit even though the building project does not comply with certain requirements prescribed by law in favour of neighbours, e.g. with the obligation to respect a certain distance to the neighbouring house. May such a building permit (an administrative act) be executed?

First statement: A defective – and thus illegal – administrative act is valid until it is annulled; only particularly grave and evident defects may entail invalidity of the act. Therefore, as a rule, a defective administrative act can be executed, at least as long as it is not attacked or withdrawn.

Second statement: There must be a way for the person affected by an illegal administrative act to stop the execution even before a decision on its annulment by the administrative authority (or by a court) is taken. Otherwise, in the meantime, the execution of the administrative act could create a *fait accompli* and in certain cases even cause irreparable damage.

Therefore, the German Administrative Courts Code provides for the suspensory effect not only of rescissory actions, but also of objections, i.e. administrative remedies or – according to Thai terminology (see sections 44-48 of the Thai Draft Administrative Procedure Act) – of appeals against administrative acts. Suspensory effect means that the administrative act cannot be executed: it lacks executability. As will be shown later, a non-executable administrative act is also non-enforceable, so that the suspensory effect also provides protection against any kind of enforcement.

Before embarking on a deeper analysis of the suspensory effect and exceptions to it, I want to give two examples of the possible consequences of suspensory effect which illustrate that very different interests may be at stake and that the legislator, in regulating suspensory effect, has to provide for a flexible solution.

First example: The competent authority orders the owner of a house to demolish it because the structural stability of the house is no longer guaranteed so that the life and health of passers-by are at risk. If the owner, i.e. the addressee of the administrative act, lodges an appeal against the order, the order need not be fulfilled since the objection has suspensory effect. (Already on this point, one might object that there must be a way to exclude the suspensory effect if an imminent danger can only be averted by immediate execution.)

Second example: A person is granted a building permit. Of course, he or she does not have any interest in lodging an objection against this administrative act since it bestows a benefit on him or her. However, in this case, a neighbour may have an interest in the building permit not being executed. According to German law, the neighbour may lodge an objection against the building permit – even though he is not addressee of this act – if he is aggrieved in an individual position protected by law. The objection has suspensory effect, which means that the addressee of the permit is not entitled to

build the house until the legality of the permit has been confirmed by the superior authority or by the court, or until legal remedies have been examined.

Each of the above examples stands for one of two patterns of legal relationships: The first pattern is characterised by an ordinary *bilateral* legal relationship: it is the addressee of an administrative act imposing a burden who lodges the objection and who benefits from the suspensory effect. The second pattern is based on a multilateral legal relationship. In the case described only three parties are involved. The third party lodges an objection against an administrative act bestowing a benefit on another person. The suspensory effect is beneficial to him but detrimental to the addressee, who would have to refrain from building the house.

Both examples give rise to the question: How can the differing public and private interests all be given due consideration?

2. *Exclusion of suspensory effect*

The German legislator has taken notice of the fact that the automatic suspensory effect of an objection is not justified under all circumstances. There are situations where public or private interests outweigh the interests of the objector in the non-execution of the administrative act. Therefore, the law provides for a number of exceptions.

a) Order of immediate execution

The most important instrument for the public authority to exclude the suspensory effect is the order of immediate execution. Art. 80 para. 2 no. 4 of the German Administrative Courts Code stipulates that suspensory effect is not applicable 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. In order to prevent arbitrary use of this instrument, para. 3 of the same article lays down the obligation on the public authority which orders immediate execution to justify the special interest in written form. 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.

b) Other cases

Such measures do not even need a special order of immediate execution if they fall under the second category of administrative acts mentioned in para. 2 of section 80 of the Administrative Courts Code: Non-postponable orders and measures taken by police officers are generally (by law) excluded from the suspensory effect. The same applies to demands in respect of public charges and costs (first category of para. 2).

Finally, the suspensory effect may be excluded, according to no. 3 of para. 2 of the said article, by other laws of the Federation or of the *Länder* for special subject-matters, in particular in respect of objections and actions brought by third parties against administrative acts relating to investment or the to creation of employment. The empowerment of the *Länder* to stipulate exceptions was introduced by an amendment in 1996 for the purpose of improving the conditions for investment projects. It forms part of a far-reaching reform project aimed at speeding up procedures for issuing administrative permits.

3. Order of suspension or reinstatement of suspensory effect

Since the above-mentioned exceptions from suspensory effect can endanger the effective legal protection owed to individuals affected by defective disadvantageous administrative acts, the Administrative Courts Code provides for remedies by which the execution of an administrative act may be suspended (even if the suspensory effect of the objection is excluded *ex lege*), or by which the suspensory effect can be reinstituted (prior order of immediate execution; article 80 para. 2 no. 4).

a) Suspension of execution by the public authority

Upon demand or *ex officio*, the public authority which issued the administrative act, or the authority which has to decide on objections, may suspend the execution of an administrative act (article 80 para. 4 of the Administrative Courts Code). This is even possible in the case of a beneficial administrative act, if a third person has submitted an objection. In the above-mentioned example of the issuing of a building permit, the addressee could ask the authority to order immediate execution in order to be entitled to start the construction works irrespective of the objection lodged by the neighbour.

In this case, of course, the authority will carefully examine the arguments underpinning the objection. For if the neighbour is right, the illegal – and already executed – building permit will give rise to a claim for damages.

b) Order of suspensory effect by the court

Application to the public authority is not the only way to gain a suspension if the suspensory effect of the objection is excluded. In practice, the equivalent remedy of recourse to the administrative courts is much more important. Article 80 para. 5 of the Administrative Courts Code empowers administrative courts to order or to reinstitute suspensory effect. A considerable part of their workload is taken up with such remedies. Since the Basic Law, the German Constitution, guarantees a fundamental right to the complete and effective judicial protection of individuals, the courts have to decide on these cases without delay, if necessary within hours. In their decision, which is not a final resolution of the case but only a provisional measure, they will take into consideration the likelihood of a later rescissory action being successful and, in the light of this, will weigh the interests involved against each other.

The same principles apply to the opposite situation in which the addressee of a beneficial administrative act strives to have set aside an order of suspension granted in favour of a third party. If the court comes to the conclusion that the addressee deserves protection against the suspensory effect, it will take the respective measure.

Numerous other situations are conceivable where different public and private interests are involved. The system of articles 80 and 80a of the Administrative Courts Code intends to provide instruments for the resolution of all the different bilateral and multilateral situations.

II. The enforcement of administrative acts

1. Principles governing the enforcement of administrative acts

As has already been pointed out, only directive – and not formative or declaratory – administrative acts are capable of being enforced. Enforcement is the *ultima ratio* instrument which public authorities should apply only if the citizen does not comply with his or her duties. Unlike individuals who lodge claims against a person, the public authority does not need to go to the court to obtain a legal title which can be enforced, but is able to create enforceable

titles on its own by issuing administrative acts. This is a consequence of the inherent monopoly of power of the State.

Since public authorities have this far-reaching power, their competences have to be defined very clearly. In a State governed by the rule of law each measure of enforcement must have justification in the law, which, in turn, has to respect the fundamental principle of proportionality.

In Germany, the law of administrative enforcement is regulated in general laws (parliamentary acts) of the Federation and the *Länder*. A number of specific enforcement measures are regulated in the police laws of the *Länder*. At federal level, the most sensitive subject-area, the use of physical coercion (including fire-arms) is regulated in a (parliamentary) law on the use of direct coercion.

2. *Schematic view of administrative enforcement*

The main principles, however, are laid down in the general laws of administrative coercion. The federal law, which also inspired the laws of the *Länder*, makes a clear distinction between the enforcement of pecuniary claims, on the one hand, and the enforcement of an action, of toleration or omission on the other[1]. The prerequisites and procedures of enforcement can be outlined in the following scheme:

a) Enforcement of money claims (pecuniary claims)

   aa) Prerequisites for the initiation of enforcement:

      (1) an administrative act which provides for a payment of money;

      (2) the payment has fallen due;

      (3) reminder has been issued after one week.

   One week later:

   bb) Procedure of enforcement according to the provisions of the Tax Code (e.g. on the seizure of goods or the attachment of a debt).

b) Enforcement of an action, toleration or omission

   aa) Prerequisites for the beginning of the enforcement:

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1 The same distinction can be found in the Thai Draft Administrative Procedure Act (sections 55-63), which reveals many parallel regulations.

(1) an administrative act which orders the surrender of a thing, the undertaking of an action, or of toleration or omission;

(2) the administrative act must be incontestable (non-appealable) or immediately executable (enforceable).

Under exceptional circumstances, administrative coercion may be applied without a preceding administrative act (so-called "immediate enforcement")

- in order to prevent an unlawful act or
- an imminent danger.

bb) Procedure of enforcement:

(1) threat of coercion (may be combined with the administrative act which is to be enforced);

(2) determination of the means of coercion;

(3) Implementation of the means of enforcement.

cc) The means of coercion:

(1) Substitute performance: If the obligation to undertake an action which can be done by someone else (a fungible action) is not fulfilled, the enforcement authority can charge another person with the performance of the action at the expense of the person under obligation. (Examples: the authority may charge a private firm to remove a car or to pull down a house).

(2) Coercive penalty payment: If an action cannot be undertaken by a third party (non-fungible action – examples: fulfilment of the obligation to refrain from creating noise after 10 o'clock in the evening or to present oneself for military service) and if it depends solely on the will of the party liable, the latter can be forced to undertake the action by a penalty payment.

In the case of fungible actions, the threat of a penalty payment can be used if action by a third party is impracticable.

(3) Direct coercion: If performance by a third party or an administrative penalty payment does not produce a result, or if they are impracticable, the authority can force the liable party to take, tolerate or omit an action. The authority has to choose the form of coercion which hurts or aggrieve the person or his or her property least. (Example: In order to close the shop of a tradesman who has defrauded his customers, the public authority must

not destroy the shop or remove all goods. Generally, it is enough to seal the entrance door, provided that the breaking of official seals constitutes a criminal offence entailing criminal punishment).

When determining or making use of the various means of coercion, the executive authority is strictly bound by the principle of proportionality.

PART II

JUDICIAL CONTROL OF PUBLIC ADMINISTRATION BY ADMINISTRATIVE COURTS

The Control of Public Administration by the Courts

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

The judicial control of administrative acts is one of the fundamental requirements of democracy and the rule of law. There can be no rule of law when the State and the administrative authorities are not themselves subject to law. The control of administrative acts must guarantee that the state is fully subject to the law, while at the same time allowing for the efficient operation of administrative authorities.

In citing these principles I refer to the conclusions of a ministerial meeting of the **Council of Europe**, held in Madrid in November 1996. The subject of the meeting was the **judicial control of administrative acts**. The conclusions of this important ministerial meeting are added to my report as an appendix.

The subject of our Sixth International Dialogue Seminar is the **control of public administration by the courts**. Within the series of six dialogue seminars we have analysed a number of preconditions and elements of the rule of law, such as the legislative process, the drafting and modernising of law, deregulation and codification in specific areas, as well as administrative procedure. Looking back at the six years of co-operation and dialogue we can be proud of the progress made in the common understanding of the **rule-of-law requirements** in a democratic, open society. The Government of Thailand can certainly be proud of the **administrative procedure act** accepted by Parliament last year. Our common approach to the subject so far has been justified: first and foremost in reaching a common understanding of the rule of law as a guiding orientation for all administrative action. We all remember the open - and sometimes controversial - discussion we had on the concrete meaning and the real effect which some of the rule-of-law principles would have for the day-to-day actions of public administrators. We all remember the debate we had last year concerning the provision for an administrative procedure which allows for **effective legal remedies**, a debate which covered the draft of the public administration procedure act as well as the very concrete and practical aspects of the **implementation** of the new procedure in the different levels, authorities and services of the public administration in Thailand.

Allow me to recall some of the issues and requirements raised in last year's debate:

- the **right of the persons** concerned by an administrative act **to be heard** and informed in due time of their rights and of points of fact and law which are relevant to their case;
- the obligation on administrative authorities to take **administrative acts within a reasonable period of time**: beyond certain time limits the administrative decision is either deemed to be taken (in a favourable or unfavourable sense, according to national law on the specific issue in question) and can thus be challenged by the individual concerned, or there is a possibility to sue the administrative authorities before the courts for failure to act;
- the obligation on administrative authorities to **state reasons for their administrative acts**: this is an essential point for the possibility to challenge administrative acts, as courts will be able to control (at least) the legality of the act by controlling the legality of the reasons given;
- the obligation on administrative authorities actively to inform the individuals concerned of their **rights to challenge the administrative act** notified to them (indication of remedies and the corresponding time-limits and compulsory notification of administrative acts to the individual concerned).

Most of these principles are now laid down and fixed in the Thai administrative procedure act – just as they are also the **rule-of-law standard in most European countries**. In Thailand the implementation of these rules in the day-to-day work and the professional and ethical standards of administrators still have to be realised to ensure the proper functioning of the administration. The rules in favour of individuals and citizens have to be applied in practice with the **same effectiveness and rigour** as other elements of Thai law. We are very curious to hear from you during this dialogue seminar about the implementation of these principles and their general acceptance among citizens and by public administrators.

Some of the above-mentioned principles require the possibility of the administrative act falling under their respective scope being subjected to a **control of legality by a court** or by another independent body. The judicial control of public administration is the subject and issue at the centre of our sixth dialogue seminar. As the above-mentioned principles of rule of law for the administrative procedure have shown, they all lead in the final analysis to judicial control of the public administration – the **procedure** as well as the **content** of their decisions. It was my very strong conviction, based on my experience from the comparison of rule-of-law systems in Europe, that we would finally discuss the functions and structures of the administrative courts as the

ultimate cornerstone of the entire system of a state based on the rule of law and the judicial control of public administration.

The judicial control of public administration in itself must follow a number of **structural, procedural and personnel requirements,** which will be discussed in confronting the development in Europe, especially in Germany, with the draft of the Administrative Courts Code in Thailand. During the last meetings and seminars we have learned that the functional and organisational aspects of administrative courts are still rather controversial in the public, political debate in Thailand: regarding the importance and the impact of administrative courts, the controversial debate comes as no surprise. It may even enhance the interest of citizens in the institution which has the duty to protect their rights. As lawyers we have learned to assess the arguments used rather than to confront positions based on ideologies and power struggles.

Dr. **Sommermann** will present the various **procedures of administrative courts**, whilst Dr. **Hauschild** will discuss the **administrative aspects** of specialised administrative courts, such as the internal organisation of the courts or the professional qualifications and career of administrative judges. Both issues are so important and complex in themselves that each of them would justify a dedicated seminar of more than just a few days.

Both issues are also discussed in the **Council of Europe** arena, for example under the heading "The training of judges and public prosecutors in Europe" during a multilateral meeting in **Lisbon in April 1995**. This meeting included central and eastern European countries, where - with the help of western European countries - administrative jurisdiction will be established for the first time and from scratch. The German report for Lisbon mentioned the **German Academy of the Judiciary**, which was set up by an administrative agreement between the Federal Republic and the *Länder* dating from January 1st, 1973 at Trier. Among the Academy's clientele are administrative judges, who are confronted with subjects like "Political-Asylum Law" or interdisciplinary issues like "The Judicial System and the Media" or "Medicine and Law". The Academy has a specific mission in comparative and European law and has the task to facilitate co-operation with neighbouring European countries.

The meeting in Lisbon in 1995 was an opportunity for the 30 European countries represented to underline the crucial role of the law in establishing, handing down and securing the **fundamental values of a democratic pluralistic society**, and to define the administration of justice as a necessary function of the State, which includes the independence of the courts. The conference placed great importance on the notion of increasing **professionalism**

among judges by means of rigorous selection, and by initial and in-service training which places a premium on forming the judge's character – a training which does not merely provide them with technical skills and knowledge, but also develops their sense of responsibility and helps them to bear in mind the social and human repercussions of their judgements with a view to efficiency with a non-technocratic, human face. Although the training of judges has an ethical, moral and technical side, it also reflects the varying notions of public service in different countries and is therefore characterised by various differences that reflect the **social, economic and cultural context of each country**.

Looking back to our Thai-German dialogue seminars we have always respected and kept in mind the social, economic and cultural context of both countries. It was never our intention to present a ready-made blueprint of administrative procedure or of the judicial control of administrative acts or of the administrative courts. In our own country, in Germany, the control system *vis-à-vis* public administration has been influenced by a rule-of-law tradition going back to the last century, as well as by recent unlawful periods in our country. The control system has been developed over the last 50 years under our Basic Law and was re-introduced after German unification in the eastern German *Länder*. The judicial control of administrative acts, as organised by the Administrative Courts Code of January 21st 1960, is a living and learning system, as can be deduced from the very fact of the 6 amendments since 1960. The Code reacts to changes in the judicial environment, in legislation as well as in the academic debate. The Code has also reacted to political changes, like German unification and the transformation of the eastern German *Länder* and the building up of public administration based on the rule of law. The Code also reacted to economic changes like global economic competition and the conditions of national and international investments. The Code should be and, in the final analysis, is a system ready to react to changes and demands in its environment, which is the State, including Parliament and Government, society and the economic as well as the administrative system.

Being responsive to this environment does not mean being subject to its demands and values. Some principal requirements must be realised to make the judicial control of administrative acts a reliable and genuine cornerstone of the democratic systems found in our countries and based on the rule of law. Some of these basic requirements were listed and analysed in the conclusions of the Council of Europe at the end of the Madrid ministerial meeting in November 1996; these requirements may be discussed later this week in our workshops:

1. There is a variety of **internal and external control mechanisms** in each politico-administrative system: control by the administrative authority and the hierarchical system as well as by a reconsideration of administrative decisions by non-contentious means from outside (Ombudsman). However useful and efficient this system can be, the **non-contentious remedy** is **not sufficient in itself**. This is a very strong argument in favour of independent administrative courts with contentious remedies and procedures.
2. Among the requirements mentioned in the conclusions, there is a very strong option for a control system in which the control of administrative acts is realised by a **judge**, again without setting aside the other mechanisms of political, public or professional control already in existence. As in Germany in 1945, the control mechanisms may initially be restricted to a **limited number of acts** subject to review, because of the building-up phase of the control institutions and the professional preparation and training of the judges. But the final aim of the concept should be to place every administrative act within the jurisdiction of administrative courts.
3. A reasonable system of control of the authority's **exercise of discretionary power** can be realised by applying the principle of **proportionality**. Against the background of German experience, I can easily predict for Thailand a continuous debate around this principle and around the interest in or density of the control of courts in the future.
4. As for administrative procedure, the procedure in the administrative courts is similarly only effective if certain basic requirements are realised, such as fair and proper hearing, the **efficient functioning** of the administrative courts (legal and material independence of the judges, professional and financial assistance). The judges should be trained in the principles and the machinery of administrative law, and they should have acquired their own practical experience in the field of public administration. Here I refer to the recommendations made by the Committee of Ministers to the Member States on the independence, efficiency and the role of judges within the Council of Europe on 13 October 1994.

These requirements today represent a common standard, not yet realised in all European countries, for the judicial control of administrative acts. In our discussions we should find out whether and how our Administrative Court Codes comply with these standards.

Appendix: *Excerpt of*

Council of Europe, The Rule of Law and Justice
– Achievements of the Council of Europe, Strasbourg 1997:

a) Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, adopted on 13 October 1994 (pp. 63-66)

b) Judicial Control of Administrative Acts, Madrid, 13-15 November 1996 (pp. 93-94)

DIR/DOC (97) 8

The Rule of Law and Justice

ACHIEVEMENTS OF THE COUNCIL OF EUROPE

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

RECOMMENDATION No. R (94) 12

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES

ON THE INDEPENDENCE, EFFICIENCY AND ROLE OF JUDGES

(Adopted by the Committee of Ministers on 13 October 1994
at the 518th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law";

Having regard to the United Nations Basic Principles or the Independence of the Judiciary, endorsed by the United Nations General Assembly in November 1985;

Noting the essential role of judges and other persons exercising judicial functions in ensuring the protection of human rights and fundamental freedoms;

Desiring to promote the independence of judges in order to strengthen the rule of law in democratic states;

Aware of the need to reinforce the position and powers of judges in order to achieve an efficient and fair legal system;

Conscious of the desirability of ensuring the proper exercise of judicial responsibilities which are a collection of judicial duties and powers aimed at protecting the interests of all persons,

Recommends that governments of member states adopt or reinforce all measures necessary to promote the role of individual judges and the judiciary as a whole and strengthen their independence and efficiency, by implementing, in particular, the following principles:

Scope of the recommendation

1. This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional, criminal, civil, commercial and administrative law matters.

2. With respect to lay judges and other persons exercising judicial functions, the principles laid down in this recommendation apply except where it is clear from the context that they only apply to professional judges, such as regarding the principles concerning the remuneration and career of judges.

Principle I – General principles on the independence of judges

1. All necessary measures should be taken to respect, protect and promote the independence of judges.

2. In particular, the following measures should be taken:

a. The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other

legislation or incorporating the provisions of this recommendation in internal law. Subject to the legal traditions of each state, such rules may provide, for instance, the following:

i. decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law;

ii. the terms of office of judges and their remuneration should be guaranteed by law;

iii. no organ other than the courts themselves should decide on its own competence, as defined by law;

iv. with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively.

b. The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.

c. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.

However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above. These guarantees could be, for example, one or more of the following:

i. a special independent and competent body to give the government advice which it follows in practice; or

ii. the right for an individual to appeal against a decision to an independent authority; or

iii. the authority which makes the decision safeguards against undue or improper influences.

d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.

e. The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system.

f. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.

3. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office.

Principle II – The authority of judges

1. All persons connected with a case, including state bodies or their representatives, should be subject to the authority of the judge.

2. Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court.

Principle III – Proper working conditions

1. Proper conditions should be provided to enable judges to work efficiently and, in particular, by:

a. recruiting a sufficient number of judges and providing for appropriate training such as practical training in the courts and, where possible, with other authorities and bodies, before appointment and during their career. Such training should be free of charge to the judge and should in particular concern recent legislation and case-law. Where appropriate, the training should include study visits to European and foreign authorities as well as courts;

b. ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities;

c. providing a clear career structure in order to recruit and retain able judges;

d. providing adequate support staff and equipment, in particular office automation and data processing facilities, to ensure that judges can act efficiently and without undue delay;

e. taking appropriate measures to assign non-judicial tasks to other persons, in conformity with Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts.

2. All necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats.

Principle IV – Associations

Judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protecting their interests.

Principle V – Judicial responsibilities

1. In proceedings, judges have the duty to protect the rights and freedoms of all persons.

2. Judges have the duty and should be given the power to exercise their judicial responsibilities to ensure that the law is properly applied and cases are dealt with fairly, efficiently and speedily.

3. Judges should in particular have the following responsibilities:

a. to act independently in all cases and free from any outside influence;

b. to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law, to ensure that a fair hearing is given to all parties and that the procedural rights of the parties are respected pursuant to the provisions of the Convention;

c. to withdraw from a case or decline to act where there are valid reasons, and not otherwise. Such reasons should be defined by law and may, for instance, relate to serious health problems, conflicts of interest or the interests of justice;

d. where necessary, to explain in an impartial manner procedural matters to parties;

e. where appropriate, to encourage the parties to reach a friendly settlement;

f. except where the law or established practice otherwise provides, to give clear and complete reasons for their judgments, using language which is readily understandable;

g. to undergo any necessary training in order to carry out their duties in an efficient and proper manner.

Principle VI – Failure to carry out responsibilities and disciplinary offences

1. Where judges fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences, all necessary measures which do not prejudice judicial independence should be taken. Depending on the constitutional principles and the legal provisions and traditions of each state, such measures may include, for instance:

a. withdrawal of cases from the judge;

b. moving the judge to other judicial tasks within the court;

c. economic sanctions such as a reduction in salary for a temporary period;

d. suspension.

2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.

3. Where measures under paragraphs 1 and 2 of this article need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges.

Judicial control
of administrative acts
(Madrid, 13-15 November 1996)

Conclusions

The control of administrative acts is one of the fundamental requirements of democracy and the rule of law. The regulatory or individual acts of the State and its many administrative authorities regulary affects those within its jurisdiction and has a direct impact on the individual rights and freedoms recognised by the European Convention on Human Rights. There is no denying the imbalance of power that exists between the public administrative authorities and individuals. This relationship therefore needs to be effectively controlled to restore citizens' rights which have been infringed by an administrative authority. There can be no rule of law when the State and its administrative authorities are not themselves subject to the law. This is why it is essential, in the central and eastern European states in transition, that administrative law reforms are considered as much a priority as constitutional and judicial reforms.

The control of administrative acts must guarantee that the State is fully subject to the law while allowing at the same time for the efficient operation of administrative authorities. The willingness to reform must take account of the situation appropriate to each country and also of the fundamental principles that form the common heritage of Europe's democracies. While it may therefore be vain to try to define a European model for the control of administrative acts, we should nevertheless emphasise the guiding principles common to all States seeking to build a genuine State based on the rule of law.

1. It is important for central and local administrative authorities to develop greater respect for individuals' rights and freedoms and establish a climate of confidence. This can be achieved through clear, accessible rules for political decision-makers and officials with administrative power, and through special legal training for such people, among them those who draft administrative rules. A system for controlling administrative acts within the administrative authority itself, or by other non-contentious means, for citizens to request the reconsideration of an administrative decision (eg. Ombudsman) among them also helps to build such a climate of confidence. Furthermore, the advantage of such remedies is that they keep judicial disputes to a minimum and relieve the workload on the courts. Irrespective of whether or not it is compulsory (every system has its advantages and drawbacks), such a system must be organised with efficiency in mind. However useful, this may be the non-contentious remedy is not sufficient in itself.

2. In no event is it possible to eliminate the need for control of administrative acts by a judge. Articles 1 and 6 of the European Convention on Human Rights and the Court's corresponding case-law are clear on this point. It is important to stress the vital role of the domestic courts in guaranteeing individual rights and freedoms with regard to the administrative authorities, by respecting the requirement for legal security, and the responsibility of the government and the legislator, which must give the administrative authority the means to perform that role. Here again, although different types of control machinery exist, States based on the rule of law continue to be guided by several fundamental principles.

a. Judicial review by a court of an administrative act must be widely accessible to natural and legal persons who may wish to take action and in terms of the acts it

reviews.While the judicial review of all administrative acts cannot be organised overnight, reform should not authorise any further restrictions on acts subject to review; the aim of any reform should be to make all administrative acts, including general regulations, subject to review by a judge (the judge responsible for administrative matters or, for certain types of act and in some systems, the constitutional judge). Every Council of Europe member State or aspiring member should pay special attention to this principle, given the Court's case-law in this respect.

b. Although a judge, in his function of judging, cannot take the place of the administrative authority, he must provide reasonable control of the authority's exercise of discretionary power, in particular by applying the principle of proportionality.

3. A system of judicial review of administrative acts is not in itself sufficient. All safeguards guaranteeing an effective remedy must be implemented, as stated in particular in Article 13 of the European Convention on Human Rights. The remedy must comply with the requirements of Article 6 of that Convention; such remedy must provide for fair and proper hearing.

a. A remedy cannot be effective if the judge does not enjoy the necessary prestige and authority for an individual to be encouraged to approach him rather than another body, and for the administrative authority to respect his decision. The judge must be independent in his decision making and competent to deal with all administrative matters. Reforms aiming to remove all external pressures on the judge and to train judges in the principles and machinery of administrative law should therefore be encouraged.

b. A remedy cannot be effective if the cost of an administrative hearing discourages individuals from action; if it is not possible for such proceedings to be free of charge, a system of judicial and financial assistance must be provided.

c. A remedy cannot be effective if the judge cannot take a decision within a reasonable time; the State therefore has the responsibility to provide the resources needed for the administrative justice system to operate smoothly.

d. Lastly, a remedy cannot be effective if the judge's decision is not fully executed with the requisite speed, in the due process of law, particularly in administrative matters, given the interests at stake. The judge is therefore required, by a variety of means, to play an active role in the execution of his decisions.

Procedures of Administrative Courts in Germany

Dr. *Karl-Peter Sommermann*

I) Introduction: completeness and effectiveness of judicial protection

The organisation and procedure of administrative courts have to be seen in the light of the mission and function of the administrative jurisdiction. In Germany, where the origins of the administrative courts can be traced back to the sixties of the 19th century[1], their function was not always beyond dispute. Nowadays, it is uncontested that their primary mission is to safeguard the rights of individuals *vis-à-vis* public authorities. Article 19 para. 4 of the Basic Law of 1949 (i.e. of the German Constitution) guarantees a corresponding procedural right to judicial protection. From this provision the German Federal Constitutional Court has derived two fundamental principles, which are binding on the legislature and on the judiciary: first, judicial protection must be complete; second, judicial protection must be effective.

1) Completeness of judicial protection

Completeness means that the individual will obtain judicial protection against all kinds of acts and omissions of the executive power which may infringe one of his or her personal rights. German scholars, for greater precision, use the term "subjective public rights" (henceforth: subjective rights), which do not only embrace the fundamental rights enunciated in the Constitution, but also all other rights laid down in any general regulation of the legal system. According to the prevailing view in German jurisprudence and doctrine, legal rules include subjective rights if they are not only designed to serve public interest, but have also been established in order to protect specific personal interests[2]. The identification of subjective rights is easy when the legal rule in question refers explicitly to a right of a person to do or to obtain something. Identification is more difficult when the wording does not address individuals, but regulates general obligations or standards. Under these circumstances, it has to be asked whether such a legal rule serves the individual interest of a group of persons which can be delimited from others, and which the plaintiff who invokes the rule belongs to. To give an example: Dealing with building

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1 See K.-P. Sommermann, "Implementation of Laws and the Role of Administrative Courts", in: H. Siedentopf/C. Hauschild/K.-P. Sommermann, *Modernization of Legislation and Implementation of Laws* (= Speyerer Forschungsberichte, vol. 142), Speyer 1994, pp. 93-107 (at pp. 102-103).

2 The so-called "theory of protective norms" goes back to *Ottmar Bühler*, who, in 1914, published his book on "the subjective public rights and their protection by the German administrative jurisdiction".

law, German administrative courts have recognised that regulations concerning the observance of a minimum space between two neighbouring buildings convey a subjective right to the neighbours affected; they have, however, as a rule denied the neighbour-protecting character of regulations on the number of storeys.

This short look at the doctrine of the subjective (public) rights reveals that, in Germany, judicial control by administrative courts primarily constitutes a means of protection of the rights of the individual and only in the second place an instrument for safeguarding the integrity of the objective legal order. This approach is just the opposite of the French concept, where the protection of individual rights was originally considered to be only secondary. While, as a consequence of the different viewpoints, the German system focuses on "subjective rights", France and other European countries such as Spain and Italy put emphasis on the aspect of whether the plaintiff has a "personal", "direct" or "legitimate" interest in having his or her case settled by the court. Here the plaintiff fundamentally plays the role of an instrument to bring violations of the law before the courts.

In practice, however, there has been considerable rapprochement between these two systems. The interpretation of legal rules by a German administrative court with regard to the identification of subjective rights as a prerequisite for the admissibility of an action will generally lead to the same result as the examination of a French administrative court as to whether the plaintiff may invoke an interest which gives access to judicial control. The jurisprudence of the European Court of Justice, which combines elements of both systems, gives evidence of the compatibility of the different approaches.

2) Effectiveness of judicial protection

Whereas the completeness of judicial protection thus refers to the right to submit any dispute with a public authority to the courts, provided that a subjective right of the citizen is at stake, effectiveness relates to the quality of relief which is given by the courts. The German Federal Constitutional Court has emphasised again and again that the right to judicial protection is not limited to the mere formal possibility to get relief from the courts, but that it grants a substantive right to effective protection. Often it is the time factor which plays a crucial role for the effectiveness of judicial relief. A court decision that comes too late is of little – if any – use. Therefore, courts must be able to intervene before the public authority has created a *fait accompli* or before irreparable damage has been caused to the plaintiff. Consequently, the

courts must be vested with the power to grant interim relief and even precautionary protection, if otherwise irreparable damage cannot be prevented. The law of administrative court procedure has to take into account this necessity if it is to cope with the constitutional guarantee of complete and effective protection by the courts.

II) Prerequisites to filing an action

In principle, the German law of administrative court procedure, orientated towards the protection of concrete individual rights, excludes popular actions, i.e. actions filed by a non-affected *quivis ex populo*. Besides the fact that the general admission of popular actions would not fit within the German concept of judicial protection, it is hardly conceivable that such a system could work in the long run. Given the widespread willingness of citizens to file suits against public authorities[3], administrative courts would collapse under the workload and would, as a consequence, not be able to convey the protection to those whose personal rights are at stake. Therefore the procedural law for the administrative courts provides for a number of prerequisites which have to be fulfilled in order to make an action admissible. In German procedural law, general prerequisites, which apply to every kind of action, can be distinguished from special prerequisites, which are only applicable to certain kinds of actions.

1) Access to administrative courts: the "opening clause"

The first gate an action has to pass through is the "opening clause" of section 40 para. 1, first sentence, of the Administrative Courts Code[4]:

"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."

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3 In 1995, 221,759 new actions were filed in German (general) administrative courts (according to the report on administrative courts by the Federal Statistical Office, Wiesbaden 1996, at p. 8). This number does not include the actions filed in the specialised administrative courts, i.e. the social courts and the tax courts.

4 "Verwaltungsgerichtsordnung" of January 21st 1960 (Federal Law Gazette 1960 I p. 686), last amended by an Act of June 18th 1997 (the Judicial Communication Act) (Federal Law Gazette 1997 I p. 1430). Henceforth, sections without further indication refer to the Administrative Courts Code.

This provision is a clear decision against any "enumeration principle". In the Weimar Republic, the laws of the *Länder* still enumerated explicitly the specific categories of law disputes which fell within the competence of the administrative courts. The quoted section of the federal law of 1960, however, opens the way to the administrative jurisdiction for *all* public law disputes, so that there is no doubt left that it is the mission of the administrative courts to implement the constitutional guarantee of complete judicial protection of the individual *vis-à-vis* the public authorities. The general clause of section 40 of the Administrative Courts Code is the counterpart of the general clause of section 13 of the Courts Constitution Act, which opens the way to the ordinary (civil) courts in all private law disputes.

Public law disputes are disputes which have to be decided on the basis of public law, the latter comprising all legal rules referring to a legal relationship where at least one party is necessarily a public authority. The exclusion of disputes "of a constitutional nature" does not mean that the plaintiff may not invoke constitutional rights. On the contrary: administrative court actions are the first and main instrument for defending and enforcing fundamental rights. Only after such remedies have been exhausted may the plaintiff file a constitutional complaint in order to seek protection from the Federal Constitutional Court. An action "of a constitutional nature", which is not admissible under the administrative jurisdiction, presupposes that constitutional organs are in dispute about their rights and duties emanating from constitutional law. Such disputes have to be settled by the Federal Constitutional Court or the constitutional courts of the *Länder*, as applicable.

As far as the exception of assignment to other courts is concerned, special attention has to be paid to the social courts and to the tax courts. Both branches of specialised administrative courts have their own procedural law, which is regulated in the Social Courts Act of 1953 and the Tax Courts Act of 1965 respectively. However, both Acts and the Administrative Courts Code concur in all essential regulations. Another example of the assignment of public law disputes to other courts is contained in Art. 34, third sentence, of the Basic Law: Claims concerning the liability of state organs have to be resolved by the ordinary (civil) courts. This competence of the civil courts has been maintained mainly for historical reasons. It would be perfectly consistent with the general principles of procedural law to assign such disputes to the administrative courts.

2) Other general prerequisites for the admissibility of an action

There are a number of further prerequisites which are indispensable for the admissibility of an action. The most important procedural prerequisites are the following:

- Jurisdiction of German courts.
- Subject-matter jurisdiction of the respective administrative court: In certain subject matters, not one of the administrative courts, but the respective higher administrative court adjudicates as court of first instance (see sections 47 and 48); in exceptional cases, even the Federal Administrative Court rules in the first (and last) instance (see section 50).
- Territorial jurisdiction of the administrative court where the action is filed (section 52).
- Capacity to participate: Not only natural and juridical persons are capable of being a party to the proceedings, but also associations without full legal capacity, to the extent that they can have legal rights, and public authorities as far as this is provided for in a *Land* law (see section 61).
- Capacity to conduct legal proceedings: This capacity is possessed by all (natural) persons with full legal capacity under civil law, and to a certain extent also by other persons (see section 62 para. 2). While a plaintiff does not need to be represented by a lawyer before an administrative court, he is obliged to be represented before the Federal Administrative Court or the higher administrative courts (section 67: representation by a solicitor or a professor of law at a German university).
- The action must be filed in writing and must contain certain key elements (sections 81 and 82); the plaintiff may have recourse to the records clerk of the court, who is obliged to help him file the suit.
- The litigation may not be pending in another court.
- The action may not constitute an abuse of the process of the court.

3) Special prerequisites for the admissibility of an action

Starting from a sophisticated system of types of action, the German law of administrative court procedure has established a number of special procedural prerequisites, each of which corresponds to a particular kind of action, and which have to be fulfilled along with the general prerequisites. Because of

their reference to specific kinds of actions, they will be dealt with in the next chapter (III).

III) Kinds of actions

The most important consequence of the constitutional guarantee of *complete* judicial protection, reiterated in the general clause in section 40 of the Administrative Courts Code, is the necessity of a system of actions which covers all possible claims of individuals who invoke subjective rights *vis-à-vis* the public administration. The aim of the plaintiff may be to defend himself against an intrusion on the part of a public authority, to attain a judicial clarification of a personal legal status, or to obtain a certain performance. The different kinds or types of action, recognised explicitly or implicitly in the Administrative Courts Code, take account of these different positions. While in former times the admissibility of an action depended on the prior issuing of an administrative act, nowadays law suits can also refer to other forms of activity or behaviour of the public administration. Basically five kinds of action can be distinguished: rescissory actions, actions for mandatory injunctions, actions for performance, declaratory actions and actions concerning the review of the lawfulness of legal provisions.

1) Rescissory action

Notwithstanding the wide range of behaviour of the public administration which can become an object of administrative court procedures, the most important form of action is still the administrative act. If an individual wants to attack an administrative act imposing a burden on him, a rescissory action is the appropriate kind of action (see section 42 para. 1). This action is directed towards the annulment of the administrative act. Therefore, the administrative court has to examine whether the measure attacked by the plaintiff really is an administrative act; if this is not the case, the action has to follow a different procedural path, in most cases as an action for performance.

The definition of an administrative act is contained in section 35, first sentence, of the Administrative Procedure Act of 1976:

"An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and which is intended to have a direct, external legal effect."

This provision has already been discussed on another occasion[5]. The main elements are: The measure must refer to an individual, or at least to a concrete case, and it must entail a legal effect outside the inner sphere of the public administration. To give examples of administrative acts which can be impugned by a rescissory action: the prohibition of an assembly, the order to demolish a house, the prohibition on trading, the order to pay a statutory fee. It is important to note that according to the German understanding of the rule of law and of the completeness of judicial protection, no act of the public administration is exempt from judicial control. Any form of "political-question doctrine" or theory of "acte de gouvernement" is rejected. Consequently, the "political" character of a decision is irrelevant to the question of whether or not a measure constitutes an administrative act.

Furthermore, an admissible rescissory action presupposes that the plaintiff claims that the administrative act infringes upon one of his or her individual (subjective) rights (section 42 para. 2). Since German constitutional law grants to the individual comprehensive protection of freedom from unlawful interference by state organs, the addressees of an administrative act which imposes a burden are always regarded as having the right of action. This right is not as self-evident if the plaintiff is not the addressee of the administrative act. In such a case he has to claim that the administrative act entails detrimental effects on his rights. A building permit, for instance, can be attacked by the neighbour if he can claim that the building project violates regulations which have been established in favour of neighbours (e.g. the definition of a minimum space between two neighbouring buildings) and therefore convey subjective rights to them. For a rescissory action to be deemed admissible it is in any case not necessary to prove that a subjective right is really violated. It is sufficient that such a violation seems to be possible. The merits of the case, and consequently also the question as to whether the administrative act is unlawful and infringes a subjective right of the plaintiff, are examined by the court *ex officio* once the admissibility of the action has been stated.

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5 See K.-P. Sommermann, "Basic Elements of Administrative Procedure", in: H. Siedentopf/K.-P. Sommermann/C. Hauschild, *The Rule of Law in Public Administration: The German Approach* (= Speyerer Forschungsberichte, vol. 122), Speyer 1993, pp. 37-47 (at p. 38). The second sentence of section 35 of the Administrative Procedure Act extends the concept of the administrative act in stipulating: "A general order shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public-law aspect of a thing or its use by the public at large."

Another special prerequisite of the admissibility of a rescissory action is the prior contesting of the administrative act in an objection procedure (see section 68 *et seq.*)[6]. In general, the objection is required to be lodged before the administrative authority which issued the administrative act. If the issuing authority does not provide a remedy, the superior authority, as a rule, has to examine the case with regard to the legality and expediency of the administrative act. If the superior authority confirms the act, the person affected may file a rescissory action. The action must be filed within one month of service of the decision on the objection (see section 74). Only if the statement of legal remedy (including information about the location of the seat of the court where an action can be filed) is deficient or wrong is the time limit extended to one year (section 58 para. 2).

If all general and special prerequisites for the admissibility of the rescissory action are fulfilled, the administrative court investigates the merits of the case. The administrative court procedure is governed by the inquisitorial principle (section 86) which makes it easier for the court to obtain the necessary information and to help the citizen *vis-à-vis* the public administration. The court will examine whether the administrative act is lawful, including aspects of both formal and procedural lawfulness (especially the observance of the rules laid down in the Administrative Procedure Act) as well as substantive lawfulness. To the extent that an administrative act is unlawful and through it the rights of the plaintiff have been infringed, the court will annul the administrative act (section 113 para. 1, first sentence).

In cases where the administrative authority, according to the substantive law, is authorised to act at its discretion, the court also examines whether the administrative act may be unlawful for the reason that the statutory limits of the authority's discretion have been exceeded or discretion has not been used in accordance with the purpose of the authorisation (section 114). An important limit to the discretion of public authorities is set by the principle of proportionality, which is derived from the constitutional principle of the rule of law. The proportionality test comprises three questions: Is the administrative act suitable for the achievement of the purpose intended (principle of suitability)? Is there no other measure equally suitable but less harmful to the individual (principle of necessity)? Does the burden imposed not weigh heavier than the benefits, i.e. do the disadvantages to the individual outweigh the advantage to the community (principle of proportionality in the narrow sense)? If the court comes to the conclusion that the administrative authority did not

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6 The objection procedure was already dealt with on another occasion, see Sommermann (note 1), at pp. 101-102.

use its discretion correctly, it annuls the administrative act, as in all other cases of unlawfulness.

2) Action for mandatory injunction

Just the opposite aim of a rescissory action is pursued by an action for mandatory injunction. Here the action is brought to seek an order to issue an administrative act which has been refused or omitted (section 42 para. 1). Examples are actions directed towards the issuance of a building permit or the granting of a subsidy. The plaintiff must claim that his rights have been infringed by the refusal or omission of the administrative act (section 42 para. 2). Like rescissory actions, the action for mandatory injunction is only admissible, as a rule, if an objection had been lodged first (see sections 68 *et seq.*). Only if the administrative authority which has to decide on the objection does not remedy the case does the action become admissible. An exception is made in the case of "administrative silence": Where a decision on the objection has not been taken within an appropriate period of time, the action is deemed to be admissible without the prior completion of the objection procedure (action following inactivity of administrative authorities, see section 75).

An admissible action for mandatory injunction is well-founded if the refusal or omission of the administrative act which the plaintiff strives for is unlawful and infringes upon the rights of the plaintiff. In this case, the court pronounces the obligation on the administrative authority to issue the administrative act for which an application has been made. If there is still room for administrative discretion, it pronounces the obligation to issue a decision observing the opinion of the court (section 113 para. 5).

3) Action for performance

The issuing of an administrative act is a particular form of administrative performance. In addition to administrative acts, the public administration performs a great many other activities, such as giving information or offering services. If a plaintiff claims to have a right to performance, e.g. the remittance of an amount of money which has been granted in a prior administrative act or has been promised in an agreement under public law, he cannot choose an action for mandatory injunction because it is not the administrative act which he is striving for but simply the remittance of the money. In such cases, the (general) action for performance is the suitable kind of action.

Since it does not apply to disputes related to administrative acts, it has a subsidiary character.

German administrative courts apply this kind of action not only to requests for a positive activity by a public authority, but also to claims for an omission. If, for instance, the mayor of a town, on the occasion of a public speech, brings a person into ill repute without having any justification to do so, this person whose right to the integrity of personality is affected could file an action for performance to seek, on the one hand, public withdrawal of the defamation and, on the other, an omission of any similar defamatory declarations in the future. As far as omissions in the future are concerned, an action for performance may, exceptionally, also be directed against the impending issuance of an administrative act, if waiting until issuance would be unreasonable, e.g. because it would cause irreparable damage.

Whereas actions for mandatory injunction are only admissible if a prior objection procedure has taken place and the time limit of one month has been observed, general actions for performance lack such procedural prerequisites.

4) Declaratory action

Declaratory actions may only be considered if none of the aforementioned kinds of action is admissible. This is what is meant by section 43 para. 2. Notwithstanding the subsidiarity of declaratory actions, they are a procedural tool to seek declaration of the existence or non-existence of a legal relationship, or the nullity of an administrative act. Deviating from the criterion of the subjective right, admissibility presupposes that the plaintiff has a legitimate interest in prompt declaration (section 43 para. 1). Often this will not be the case because the legal relationship in dispute will only be a preliminary question for the issuing of an administrative act. In such cases the individual affected has to wait until the decision of the administrative authority has been taken and can be attacked by a rescissory action, or, in the case of a refusal, by an action for mandatory injunction. As a rule, declaratory actions are admissible when public authorities are contesting a certain legal relationship, for example the nationality of a person, which may be important for an indefinite number of administrative decisions.

A special kind of declaratory action which combines rescissory and declaratory elements is the so-called "declaratory action by continuation". The typical situation is regulated in section 113 para. 1, fourth sentence:

"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."

This provision is applied by the courts *mutatis mutandis* to situations where the administrative act had already become obsolete before the plaintiff filed his action. A "declaratory action by continuation" might be admissible, for instance, when a public assembly which was to take place on a certain date and occasion had been prohibited by the competent authority and the action was filed only after the scheduled day of the assembly. The necessary legitimate interest of the plaintiff in a declaration on the unlawfulness of the prohibition could, depending on the circumstances, be based upon the risk of repeated unlawful prohibitions on similar occasions in the future. Another legitimate interest could be an interest in rehabilitation if, for example, the administrative authority, in its administrative act, had accused the future plaintiff of acting illegally.

5) Review of validity of legal provisions

The Administrative Courts Code does not provide for a comprehensive action or procedure concerning the review of legal provisions. According to the general principles of judicial review, German courts review all legal rules which have to be applied in the concrete case. If a court comes to the conclusion that a statutory order or a by-law is unlawful, it will annul any administrative act which had been issued on the basis of such regulations. However, the judgement will have effect *inter partes* only, so that another court might come to a different conclusion. Consequently, the federal legislature has laid down a provision (section 47) which enables the *Länder* to confer the competence of a review procedure to their respective Higher Administrative Court, whose judgements then have effect *erga omnes*. However, the review must be limited to general provisions of the *Länder* ranked below statutes, i.e. below parliamentary acts. Most *Länder* have taken advantage of this authorisation. The competent Higher Administrative Court adjudicates on the application of any public authority or of any person who claims that his rights have been infringed by the legal provision or its application, or will be infringed in the foreseeable future. If the Higher Administrative Court holds that the legal provision is unlawful and therefore invalid, it declares it to be null and void.

The review procedure of section 47 applies neither to legal provisions of the Federation, except for provisions issued under the Federal Building Code

(see section 47 para. 1), nor to statutes (parliamentary acts) in general. Statutes can only be declared null and void by Constitutional Courts. As far as the compatibility of statutes of the Federation or the *Länder* with the Basic Law (the Federal Constitution) is concerned, the Federal Constitutional Court possesses the monopoly of annulment. Therefore, when an administrative court considers that a statute on whose validity its ruling depends is unconstitutional, it stays the proceedings and seeks an adjudication from the Federal Constitutional Court[7]. The decision of this court will have the force of statutory law[8].

IV) Instruments of interim relief

Since the ordinary procedure before the administrative jurisdiction can consume a considerable amount of time, particularly if the litigation goes through two or even three instances, it is only by means of interim relief that, in urgent cases, the effectiveness of judicial protection can be accomplished. Moreover, interim relief cannot be confined to mechanisms for the suspension of administrative acts; otherwise urgent actions for performance or declaration would not find their equivalents in the system of interim relief. The German system of interim relief is a dual one: a first category of relief is based upon suspensory effect, a second one upon temporary injunctions.

1) Suspensory effect

Suspensory effect is the suitable instrument of interim relief when the individual is to be protected against an administrative act imposing a burden. If, for instance, there were no possibility to suspend an administrative order to close a hotel, the owner of the hotel would have suffered considerable financial losses by the time he got a favourable judgement. If, in turn, the continued operation of the hotel would endanger life and limb of its guests, there must be a possibility for the competent authority to order the immediate execution of its decision in order to prevent damage or injuries to persons. This example shows that a schematic all-or-nothing solution would not be adequate for dealing with interim relief. Flexible solutions are called for which are adapted to the concrete case.

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7 See article 100 para. 1 of the Basic Law.

8 See section 31 para. 2 of the Law on the Federal Constitutional Court.

Section 80 of the Administrative Courts Code starts with a regulation which, at first glance, seems to follow a schematic solution: "Objections and rescissory actions have a suspensory effect." This short sentence means that the mere fact that a person lodges an appeal and, later on, files an action *automatically* causes the suspension of the administrative act. Consequently, the act may not be executed and does not create an enforceable obligation on the objector or plaintiff, as long as a final decision of the administrative court has not confirmed the lawfulness of the administrative act.

However, there are a number of exceptions from this automatism which are listed in section 80 para. 2. Four groups of exceptions are mentioned:

- first, demands in respect of public charges and costs;
- second, non-postponable orders and measures taken by police officers;
- third, cases in which Federal law or *Land* law explicitly stipulates exceptions; and
- fourth, cases in which immediate execution is ordered by the issuing authority.

As for the third group, the automatic suspensory effect of objections and rescissory actions has been abolished by an increasing number of sector-related Acts in the last few years. This applies, for instance, to planning approval decisions and will apply, for example, as of the beginning of 1998, to building permits: an objection lodged by a neighbour will then lack suspensory effect. The fourth group of exceptions is of great importance for the public administration. This provision empowers the administrative authority to exclude the suspensory effect by ordering immediate execution. However, several requirements have to be met: the order must serve a special public interest in immediate execution or, in multilateral legal relationships, an overriding interest of a party. Moreover, this special interest must be justified in writing.

Even if the suspensory effect is excluded for one of the aforementioned reasons, the objector or plaintiff will not remain helpless. Pursuant to section 80 para. 5, he may ask the administrative court to order or reinstitute suspensory effect. In a summary procedure, which can be reduced, if necessary, to a few hours, the court will decide on the basis of a weighing of interests. It will order suspensory effect when the individual interest in the suspension outweighs the public interest in the immediate execution. In this context, an important aspect will be the prospects of success in the main procedure of the litigation.

As has already been indicated, interim relief by suspensory effect becomes even more complicated in the case of multilateral relationships. Section 80a contains specific rules for objections of third parties against an administrative act issued in respect of and in favour of another person. The underlying principle of all regulations of interim relief is the weighing of private and public interests during the time needed for a final court decision. Sections 80 to 80b intend to create mechanisms which allow for such flexible solutions and enable the courts to take into account the particularities of the individual case.

2) Temporary injunctions

In all cases which would have to be brought to the administrative court by any kind of action other than a rescissory action, the interim relief stipulated in section 123 is the available procedure. According to this provision, the court may, upon application, issue temporary injunctions. Section 123 para. 1 distinguishes between preventive injunctions and regulatory injunctions. Preventive injunctions, on the one hand, are to safeguard the *status quo*. They presuppose that a change to the existing situation could reasonably be expected to frustrate or seriously impair the applicant in the realisation of a right. Regulatory injunctions, on the other hand, are to regulate affairs temporarily in respect of a disputed legal relationship. A court will issue a regulatory injunction where it appears to be necessary in order to ward off serious disadvantage or to prevent the threat of injury or for other reasons. This might be the case when a person urgently needs the assistance of the social-security service, or when a student wants to take up his studies, but a place at a public university has been refused to him. The temporary injunction will oblige the competent authority to act accordingly.

As in the procedure directed towards an order or reinstitution of suspensory effect, the court will weigh all public and private interests. An aspect of considerable weight in favour of the public interest (i.e. against an injunction) is the danger of creating a *fait accompli* which will prejudice or predetermine the court decision in the main procedure. A strong argument in favour of the applicant will always be the imminent impairment of fundamental rights. Here too, the prospects of success in the main procedure of the litigation have to be taken into account.

V) Forms of appeal

The Administrative Courts Code establishes several forms of appeal which can be lodged against the decisions of administrative courts.

1) General appeal

The general appeal (sections 124 *et seq.*) can be directed against judgements of the administrative courts. If the competent higher administrative court grants leave to appeal, it will re-examine the case as to the facts and as to the law (see section 128). The higher administrative court, instead of giving a concluding judgement, may also quash the impugned decision and remand the case to the administrative, if specific requirements are fulfilled, such as the emergence of new facts or evidence, (for details see section 130).

2) Appeal for final revision

The appeal for final revision (sections *132 et seq.*) is reserved mainly for the contesting of judgements of the higher administrative courts. The Federal Administrative Court will examine aspects of law only.

3) Complaints

The range of judicial appeals is completed by "complaints" (sections 146 *et seq.*), which are admissible if court decisions which are neither judgements nor judgement-like decrees[9] are contested. Complaints are admissible, for instance, against decisions of the administrative courts ordering suspensory effect or issuing temporary injunctions.

VI) Conclusion

The German law of administrative court procedure puts into concrete terms the constitutional guarantee of complete and effective judicial protection of the (subjective) rights of the individual *vis-à-vis* the public administration. The

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9 For the "decrees", which may substitute a judgement when no oral proceedings has taken place, see section 84.

completeness is accomplished by a general opening clause, which does not even exempt political or governmental acts, and by a system of various kinds of action, which cover all possible claims based upon subjective rights and which allow for different kinds of judgements (annulment of administrative acts, pronouncement of the obligation to issue an administrative act, declaration concerning a legal relationship, etc.). The effectiveness of judicial protection is realised, in addition to the various kinds of actions (even including actions to seek omissions in the future), by a system of interim relief which operates not only by the instrument of suspensory effect, but also, if necessary, by the courts the power to issue temporary injunctions.

A sophisticated system of judicial control of the public administration can only work if there are independent and professional courts which meet all the requirements for the efficient discharge of this difficult task. However, at this point we are already touching upon a new theme which will be dealt with in the lecture by Dr. Hauschild.

Administrative Aspects of an Administrative Courts System

Dr. *Christoph Hauschild*

I. Introduction

Today administrative courts are often seen in the same way as any other courts. The particularities of administrative jurisdiction are increasingly denied. However, structural differences do remain between administrative, fiscal and social courts on the one side, and ordinary courts on the other. Through the former state action is controlled, and through the latter private conflicts are mediated or criminal cases prosecuted. Because disputes before administrative courts call state action into question, the link between the state and administrative courts is not of a completely different dimension than in the case of ordinary courts. For this reason this introduction to the issue of administrative aspects of an administrative courts system will start by recalling the origins of administrative jurisdiction.

It is only over the last 130 years that an independent form of administrative jurisdiction has sprung up in Germany. In the early days an institutional link was maintained between administration and administrative courts. A further distinct feature was that German administrative jurisdiction originated in German provincial states, providing for different types of administrative courts, which was the reason for a low degree of centralisation in the subsequent historical development.

It was the Basic Law (the German Constitution) that established in 1949 the institutional framework for a uniform administrative courts system. The Basic Law states that anyone whose rights have been violated by public authority may have recourse to the courts (Article 19 para. 4). This provision rules out any control of administration through an internal self-regulatory body. However, the Basic Law left the institutional choices as to how administrative courts were to be organised to the legislature. It took the legislature until 1960 to act, when the Administrative Courts Code was put into effect and replaced the preceding distinct acts on administrative courts of the Federation and the individual *Länder*. The Administrative Courts Code makes specific regulations on the current subject, i.e. administrative aspects of an administrative courts system. They are contained in Part One of the Administrative Courts Code in Chapters 1 to 5. Although administrative courts are separate from ordinary courts, the administration of administrative courts is also governed by the Judicature Act and the German Judiciary Act.

II. Position of Courts in Germany

1. Structure of Jurisdiction

Administrative jurisdiction forms part of the German courts system. In Germany the courts are organised in a series of tiers. In accordance with the attribution of competences between the Federation and the *Länder,* as laid down in the Basic Law, only the supreme courts of justice are federal courts, whereas the courts of first and second instances belong to the *Länder*.

The establishment of administrative courts is provided for by Section 3 of the Administrative Courts Code (in the following the German abbreviation VwGO is used). It is important to note that Section 3 para. 1 VwGO requires a law on this subject matter. As regards jurisdiction for administrative cases, the courts of first instance are the administrative courts and those of the second instance the higher administrative courts. Each *Land* must have at least one administrative court, but may not set up more than one higher administrative court. It is, however, permissible for two *Länder* to establish a joint higher administrative court (Section 3 para. 2 VwGO).

According to the need in particular areas of work, Section 3 para. 1 (4) and (5) VwGO allows a decentralisation or centralisation of administrative jurisdiction. It is possible to allocate particular areas of work to one administrative court to serve the judicial districts of several administrative courts, or to establish particular chambers of administrative courts or senates of higher administrative courts at other locations. Centralisation makes sense in areas of work where this can bring about more efficient use of personnel and administrative resources because of the high number of disputes in these areas, for example, cases regarding the granting of political asylum. An argument for locating chambers or senates at other locations than the main seat of the court is to attain more local dispensation of justice.

The law establishing the administrative courts must also fix the territorial limits of an administrative court's jurisdiction. In practice the boundaries of judicial districts match the boundaries of the administrative areas within the *Länder*. In the case of the smaller *Länder*, they are identical with the *Land* borders. In the other *Länder* the court's jurisdiction embraces the area of a government district.

2. *Independence of the Courts*

The principle of a separation of powers by virtue of transferring the functions of the state to organs which do not depend upon each other, and which is explicitly set out in the Basic Law, has ensured the independence of courts both from the legislature and from the executive.

The courts enjoy threefold independence:

- In functional and organisational terms, the judiciary stands alongside the legislative bodies and the administrative authorities. As already mentioned, the link between administrative authorities and administrative courts occasionally found during the early days of administrative jurisdiction no longer exists. The administrative courts dispense justice: they do not act as a self-regulatory body for the administration.
- The judiciary at these courts is independent. Administrative courts are staffed with judges whose legal position and independence are guaranteed by virtue of Article 97 of the Basic Law. The provisions governing judges' working conditions are set out in the German Judiciary Act. According to the principles governing the service relationship of judges, judges are precluded from simultaneously exercising legislative or executive powers. By the same token, a member of parliament or of the executive branch of government cannot carry out the function of a judge. Moreover, a judge remains independent in practice because he is only subject to the law and not bound by any instructions as to the discharge of his activities. He is personally independent in that he cannot be dismissed or transferred against his will.
- The courts are also independent in respect of the cases which they handle, i.e. they are bound in their rulings only by the law and by justice. They are not subject to any instructions from either parliament or the government or the administrative authorities. No functions can be vested in the courts apart from the dispensation of justice – the sole exception being court administration, which, however, does not enjoy the independence of the core judicial functions.

The independence of administrative courts is repeated in Section 1 VwGO declaring that administrative jurisdiction is exercised by courts which are independent of and separate from administrative authorities. In addition to this basic regulation on the separation of powers, Section 39 VwGO states that administrative affairs other than those of the administration of courts may not be transferred to administrative courts. The term "administrative affairs" as

used by Section 39 VwGO encompasses all activities exercised by public authorities.

3. The Independence of Judges

Administrative court judges are independent, are not obliged to follow instructions and are subject only to the law. Because the service relationship of judges is governed by the principle of the separation of powers, certain duties are incompatible with the position of a judge. As mentioned before, the German Judiciary Act declares in Section 4 that a judge shall not simultaneously perform adjudicative and legislative or executive duties.

According to Section 42 Judiciary Act, a judge can be obliged to perform an additional activity only in the administration of justice and in court administration. The purpose of this regulation is to exclude judges from being involved in any other state function than in jurisdiction. Such a strict separation with regard to the sphere of duties seems to be especially justified in the case of administrative judges. This regulation applies to the service relationship of judges as long as they sit in courts on a full-time or part-time basis. The regulation on the incompatibility of duties is therefore linked to the performance of adjudicative tasks. It does not prevent judges from changing to a full-time or part-time position in public administration. In fact, judges are encouraged to seek a job in a ministry for a limited period of time in order to gain an insight into the process of policy-making and law-drafting. For the time they work for a ministry they are temporarily released (leave of absence) from their judicial duties.

The principle of the separation of powers, which governs the service relationship of judges, is also reflected in the rules on the appointment of honorary judges: Section 22 VwGO lists all those persons who may not be appointed to serve as honorary judges. Among those persons excluded from administrative jurisdiction are members of parliament, in their capacity as legislators, and public officials in their capacity as servants of the executive. This incompatibility clause does not apply to public officials if they perform their public duties on an honorary basis.

III. Administration of Courts and the State

The independence of the judicature is without question the decisive institutional aspect in the organisation of courts. However, the third power is part of

the state and the question is whether there should be any institutional link between courts and the executive branch of government. A crucial issue in the drafting period of the Administrative Courts Code was therefore the status of administrative courts. The presidents of the administrative courts, who had submitted their own draft of the Administrative Courts Code, had made the proposal that the Federal Administrative Court and higher administrative courts should be awarded the same constitutional, administrative and budgetary position as the courts of audit. The objective of the proposal was to give administrative courts a large degree of organisational autonomy, based on models such as the French and Italian Council of States, however, within the German courts system.

When reference is made to the institutional status of courts of audit, one has to be aware of the fact that German audit courts are completely independent of the executive branch of government. Therefore the proposal would have installed a relationship between courts and state very different from today's regime. The Federal Administrative Court would have been awarded the status of a supreme federal authority, or in the case of the higher administrative court a supreme *Land* authority, with the same institutional rank of a ministry and therefore free of any government supervision. Because of doubts on the constitutionality of such a status for administrative courts, the proposal was dismissed. Today of all the federal courts it is only the Federal Constitutional Court which has the status of a supreme federal authority (Law on the Federal Constitutional Court – Section 1: "*The Federal Constitutional Court shall be a federal court of justice independent of all other constitutional organs.*").

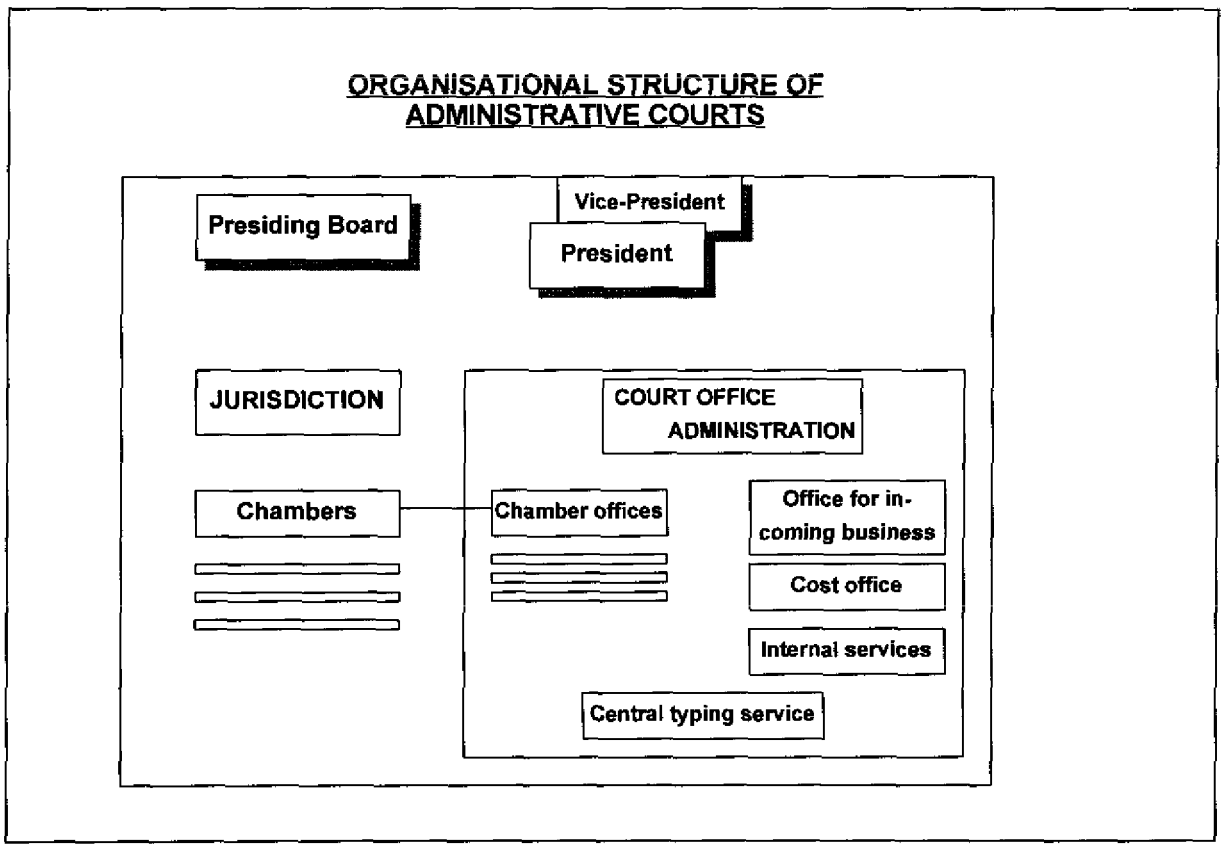
In the subsequent debate on the institutional status of administrative courts it was considered that their supervision must rest in the final instance with the state. According to constitutional law all state activities, with the exception of jurisdiction, auditing and monetary policies (Federal Bank), must be linked to the responsibility of a ministry. Whereas the independence of jurisdiction suffers no interference from the state, the courts are not free from state supervision when the administration of courts outside their core judicial functions is concerned. In contrast to the liberties German universities enjoy, for example in the nomination of their professors, court administration is part of state administration and subject to the general rules of procedure and supervision. The organisation of courts is guided therefore by two principles: the independence of jurisdiction, on the one hand, and state supervision of the administration on the other. The implementation of these institutional guidelines results in a complex administrative regime for administrative courts.

In practice it is not always easy to find a clear-cut distinction between those court functions protected by the principle of independence and those others subject to state supervision. Difficulties in drawing the boundaries correctly arise in particular with regard to the duties of judges. One example will serve to make the whole debate on institutional questions more concrete: Does the obligation on judges to wear a robe fall under their judicial independence or is the dress code subject to state supervision? The answer is that the outward appearance of judges does not fall within the core judicial functions. Therefore a judge who refuses to wear a robe could be instructed to do so by his superior authorities, i.e. in the final instance by the ministry in charge. In general, however, such questions tend to be dealt with under the guideline "in dubio pro independence".

There is at this point no need to go any deeper into the subject matter. Suffice it to note that since 1969 responsibility for the Federal Administrative Court has rested with the Federal Ministry of Justice. Until 1969 this competence was attached to the Federal Ministry of the Interior. At *Länder* level in most cases responsibility for the higher administrative courts and administrative courts similarly rests with the respective ministry of justice, with the exception of Bavaria, where the ministry of the interior still exercises the powers of supervision.

IV. Organisational Structure of Administrative Courts

The organisational structure of administrative courts has to adhere to the principles mentioned above, i.e. the independence of courts and judges on the one hand, and the integration of court administration into the system of ministerial responsibility on the other. Before going into detail, the following chart is intended to give an idea of the rather complex organisational set-up of administrative courts.



1. Internal Structure of Jurisdiction

The internal organisation of the courts' judicial functions in dispensing justice is also guided by constitutional principles. According to Article 101 para. 1 Basic Law, no one may be removed from the jurisdiction of their lawful judge. When raising the issue of the internal organisation of jurisdiction, one has therefore to focus on the question of how the guarantee of the lawful judge is put into practice.

The answer to this question is basically that the guarantee of the lawful and independent, neutral judge is safeguarded by the rules on the business distribution plan, which assigns to each judge his proper sphere of duties. The annual establishment of the business distribution plan follows a strict procedural regime. The competence to establish the business distribution plan falls within the sphere of self-regulatory duties of judges. The Administrative Courts Code touches the rules governing the business distribution plan only in a very cursory fashion. The Code refers in Section 4 VwGO to the provisions of the second title of the Judicature Act. Thus the same rules which apply to

the establishment of the business distribution plan in the other courts also apply to the administrative courts.

The Judicature Act requires that the so-called "board system" is installed in all courts for the organisation of judicial functions. The board system requires each court to establish a presiding board responsible for carrying out the self-regulatory duties as they are assigned to the judges. According to the Judicature Act, the members of the presiding board are the president of the court and a fixed number of elected judges. The number of judges to be elected to the presiding board depends upon the size of the court; for example, in courts with more than 20 posts for judges, eight judges have to be elected to the presiding board.

The prime task of the presiding board is to implement the rules for guaranteeing the lawful judge. The presiding board decides on the composition of the chambers or senates and assigns the subject matters to the judges. The business distribution plan is valid for one year and only in very exceptional cases can it be adapted to allow for changes during this period.

In public administration the situation is quite the opposite. Here the business distribution plan can be changed at any time without any preconditions other than respect for orderly administration. Contrary to the position of judges, civil servants can be assigned to another duty or post at the discretion of the head of department.

For the assignment of business to the judges the following criteria are relevant:

- qualifications and professional ability of the judge
- personnel composition of the judicial body (bench)
- the necessary specialisation on certain areas of public law in administrative courts
- continuity in jurisdiction
- the necessity to further advance administrative jurisdiction
- the individual wishes expressed by the judge after consultation on the distribution of business.

In addition to the establishment of the business distribution plan, the presiding board is assigned further duties in the management of the court's adjudicative functions. These duties are listed in Sections 21 a to 21 i of the Judicature Act.

From an institutional perspective it need only be noted that the election to the board, the work of the presiding board and, in particular, the establishment of the business distribution plan is not jurisdiction but fulfilment of special judicial duties assigned to judges. Through this special assignment to judges, independence in carrying out the functions assigned to the presiding board is also guaranteed.

2. Composition and Organisation of Administrative Courts

The Administrative Courts Code regulates the composition and organisation of administrative courts in Sections 5 to 10 VwGO. The law contains separate provisions for the courts of first and second instance and for the supreme instance at federal level. In the following the courts of first instance are dealt with in greater detail in order to illustrate the internal structure of German administrative courts.

Administrative courts exercise the three basic functions of courts through separate organs. These organs are the chamber, the president, and the presiding board:

- **chambers** (or **senates** in the case of the Higher Administrative Court or Federal Administrative Court) dispense justice
- the **president** represents the court as such as an institution of the state, including the court administration
- the **presiding board** is entrusted with judicial self-administration

The Administrative Courts Code mentions the chamber and the president as organs of the administrative court of first instance in Section 5 VwGO. The presiding board is, as already mentioned, part of the general institutional set-up of German courts which applies to administrative courts through Section 4 VwGO in connection with the Judicature Act.

a) The Chamber System

On the structure of administrative courts the Administrative Courts Code followed the deep-rooted system of dispensing administrative justice through chambers with the participation of citizens. The chambers are composed of three judges and two honorary judges. The honorary judges, however, do not participate in decisions taken outside the oral proceedings. One of the legislature's intentions in involving citizens is to give the people an insight into the

proceedings of the courts and thus increase the confidence of society in the judicial system.

As the organ of jurisdiction the chamber is the basic organisational unit of administrative courts of first instance. In contrast to the hierarchical structure of public authorities, the chamber, as a judicial working unit, is an independent organ. The independence of jurisdiction does not tolerate any internal hierarchy. Thus the chamber always acts as the court.

For several reasons the chamber system seems to be the most appropriate form for examining the legality of public-sector action. One justification for the chamber system is the fact that the control of public administration through courts is often preceded by complex and, in some cases, politically sensitive administrative procedures. It is therefore advisable to recall once again the general functions of administrative jurisdiction in order to make a fair estimation on the most appropriate way of organising the dispensation of administrative justice.

Administrative courts are empowered with:

- control of the administrative actions of specialised public authorities which often take their decisions with the participation and involvement of other public authorities
- control of an administrative procedure based on legal provisions such as the Administrative Procedure Act
- control of an administrative act which has been checked, in most cases, with regard to legality and expediency in a two-level objection procedure before being admitted for review by administrative courts
- control of administrative decisions which are increasingly the outcome of a political decision-making process
- control of administrative decisions through a court procedure which is governed by the requirement of examining the facts ex officio.

In addition to these powers in controlling public action, one has to take into consideration the fact that, due to recent limitations in the rights to appeal court decisions, the courts of first instance increasingly make the final decision in an administrative dispute.

The chamber system in administrative courts is an institutional choice to meet the special requirement of administrative jurisdiction. Arguments in support of the chamber system are:

- Through the participation of several judges, the interpretation of administrative law is much less influenced by individual political or ideological prejudice.
- The decision of a chamber creates a much higher degree of legitimacy than the decision of a single judge.
- The public authority affected by an administrative court decision is much more prepared to accept the decision of a chamber than that of a single judge, in particular when the court decision creates an obligation to change previous administrative practice.

In spite of all the undisputed advantages which the chamber system has brought to the establishment and reputation of the German administrative court system, the recent changes to the Administrative Courts Code envisaged a drastic re-orientation. In order to speed up procedures, single judges – rather than the chamber – will be in charge of dispensing administrative justice in a large number of the disputes that are submitted to administrative courts. According to the new regulations, chambers will in general assign a dispute for a decision to one of its members sitting alone

- if the case does not display any complications of a factual or legal nature
- and the case is not of fundamental importance (Section 6 para 1 VwGO).

It is difficult to predict the mid-term or even long-term effects on the German administrative courts system of the increasing assignment of disputes to single judges. It would be premature to try to estimate what success there will be in realising the underlying reform objectives. However, there are certain indications that give rise to some doubts about the new single-judge regime:

Firstly, incoming disputes have to be assigned to an individual member of the chamber according to the business distribution plan, notwithstanding the point in debate whether the court decision is ultimately taken by a chamber or by a member of this chamber sitting alone. The reform on assigning disputes to a member of the chamber sitting alone does therefore not affect the normal handling of incoming business, which has to adhere to the constitutional principle of the lawful judge.

Secondly, the real change between the traditional system of resolving disputes brought before the court through the chamber and the new way of assigning them to a member of the chamber sitting alone is that in the latter case the judge is deprived of the exchange of professional expertise with his colleagues. The reform therefore jeopardises the chamber system as an institutionalised form of communication among judges. The argument put forward

to justify such an interruption to communication among the members of the chamber is that such professional dialogue does not need any institutional framework in those particular disputes which are eligible for assignment to an individual judge, namely routine cases.

Thirdly, even in so-called routine cases a decision by the chamber makes sense in view of the need for continuity of jurisdiction.

Finally, there is a real doubt as to whether the reform objective of speeding up procedures before administrative courts can in fact be met. The working hours of a judge remains the same. He is able either to sit alone or to sit with the chamber. The personnel resources of the court are not increased by additional manpower. Whether the manpower available is used more efficiently now than was previously the case remains to be proved.

b) Staffing with Judges

With regard to the personnel dimension of the organisation of administrative courts, it need only be mentioned at this point that the Administrative Courts Code imposes on the state the obligation to provide the required number of presiding judges and other judges (Section 5 para 1 VwGO).

The posts of judges at courts fall within the state budget. It is, therefore, within the responsibility and discretion of the budgetary authorities concerned to determine the number of posts required. The courts themselves do not play any official part in the decision-making on their proper budget, apart from making themselves heard during the budget-drafting procedure. It lies within the budgetary prerogatives of the parliaments concerned to vote on the establishment plan of the courts.

Similarly courts do not have any direct influence on the recruitment and selection of judges. As a general rule, the recruitment of judges falls under the responsibility of the executive. Judges are appointed by the ministry responsible, i.e. in most cases by the Ministry of Justice. However, most *Land* laws on the selection of judges provide for the involvement of judicial selection committees in the recruitment procedure. The composition and competences of these judicial selection committees vary. There are also judges on them, but in every case they form a minority. On the whole, and compared with other countries, the executive is in a strong position with regard to recruiting judges.

When judges at the Federal Courts are to be appointed, a joint decision is taken by the Federal Minister of Justice together with a judicial selection

committee consisting of the *Land* ministers responsible for administrative courts and of an equal number of members elected by the Federal Parliament (Article 95 para 2 Basic Law).

As is often said: justice delayed is justice denied. Therefore the staffing of courts with judges must guarantee that disputes are decided within a reasonable time. One can question whether the average duration of administrative courts' procedures of 12 to 15 months at the courts of first instance could still be considered reasonable from the perspective of a person seeking a court decision.

However, courts, just like any other state institutions, are currently faced with the constraints in public budgets. It is therefore not a realistic option to believe that a remedy for long court procedures can be achieved through an increase in the number of administrative judges.

c) Court Offices

Each administrative court has to be equipped with a court office to assist and complement the work of judges. The underlying legal requirement is expressed by Section 13 VwGO. The court office is an organisational part of the court and exercises those judicial functions which are not assigned to judges. The court office is established by the president of the court. The work of court offices is entrusted to court clerks with a special educational background. The profession of a court clerk is a specialised career within the German civil service.

Court offices perform a wide range of service functions. These functions include the registration of incoming business, recording legal petitions, summoning witnesses as well as fixing court and lawyers' fees.

The actual organisational set-up of court offices can be very varied. Service functions might be more or less centralised in a number of service units. The above table on the organisational structure of administrative courts therefore gives only an indication of possible ways of organising such services, for example, by establishing chamber offices which are directly attached to the judges.

V. Supervision of Courts

The supervision of courts is divided into core judicial functions free of supervision, judicial functions subject to supervision, and non-judicial functions

as part of state administration and subject to full state supervision. The supervision of courts is dealt with in Chapter 5 of the Administrative Courts Code. The central provision of Chapter 5 is Section 38 VwGO on supervisory competences. Section 38 VwGO assigns to the President of the court the competence to exercise a supervisory function over judges, public officials, public employees and other staff. The regulation is, however, incomplete since the scope of these supervisory competences is not mentioned. This is again an example of the fact that the Administrative Courts Code is embedded in the system of laws governing the work of German courts.

The supervision of judges has to follow the rules established by the German Judiciary Act. The law is that a judge may be subject to supervision only in so far as this does not detract from his independence (Section 26 German Judiciary Act). These provisions allow the power to censure the improper execution of an official duty and to urge proper and prompt attention to official duties. There can, however, be no question that any form of supervision related to the dispensation of justice in a pending case is against the law.

The Administrative Courts Code does not deal with the supervision of non-judicial functions. Such non-judicial functions are, for example, the management of the administrative court's budget, book-keeping, management of the court's premises, the organisation of work procedures where jurisdiction is not involved, etc. In all these cases the normal rules of procedure apply. For administrative courts of first instance the superior supervisory authority is the President of the Higher Administrative Court. The supreme supervisory authorities are the ministries in charge of administrative courts.

These rules provide for a three-level administrative hierarchy for administrative courts of first instance. In the case of the Federal Administrative Court and the higher administrative courts, there are two tiers of hierarchy with final supervision through the ministries.

The Administrative Procedure Act applies to court administrations in so far as re-examination of court action is itself subject to control in administrative court proceedings (Section 3 para. 3 (1) Administrative Procedure Act).

VI. Professionalism of Administrative Judges

The institutional set-up of administrative courts can make a difference to the effectiveness of administrative jurisdiction. However, in the final analysis it is the professionalism of administrative judges that matters.

In 1993 the number of administrative judges at federal level was 70, out of a total of 594 federal judges, and at the *Land* level 2,151 out of a total of 20,078 judges. These numbers for administrative judges do not include the judges at military-service and disciplinary courts.

1. Service relationship of judges

The legal status of administrative judges is exactly the same as that of a judge in an ordinary court, and transfers from one type of court to the other are possible, though rare. They are rare because the personnel at each type of court are administered separately without any real central co-ordination. A further reason for the low degree of mobility is that young judges start to specialise at a very early stage in civil, criminal or public law.

The position of judges is regulated in the German Judiciary Act. The Judiciary Act of 1961 deals with the legal position of judges. For the first time it regulated judicial tenure for the federal level in an independent sense. Previously judges had been classified as civil servants. While it is true that, like civil servants, judges enter into a service relationship under public law vis-à-vis the state, the status of judges is nonetheless quite specific in nature in view of the independence of the judiciary.

Differences in the rules applying to judges in federal service and to those in the service of a *Land* determine the structure of the German Judiciary Act. The First Part (Sections 1 to 45a) relates to judicial office in the Federation and *Länder*, the Second Part (Sections 46 to 70) to judges in federal service, and the Third Part deals with judges in the service of a *Land*.

However fundamental the German Judiciary Act may be for the legal status of German judges, there are important provisions in other statutes that should not be ignored. For example, reference is made to civil service law in respect of questions that can be regulated in the same way for civil servants.

Although the remuneration of judges is based on a separate salary scale, it forms part of the Federal Remuneration Act, which correlates the remuneration of civil servants, judges and university professors. The salaries of judges correspond to comparable grades in the higher civil service. Increases in salaries are directly linked to adjustments to civil service remuneration. A minor distinction between the remuneration of judges and civil servants was introduced in the civil service reform of 1 July 1997. The recently introduced system of performance-related pay applies only to the remuneration of civil

servants. It was thought to be incompatible with the independence of judges to introduce performance-related pay elements into their remuneration.

2. *Qualification for Judicial Office*

In Germany there is no special training for judges. All lawyers basically undergo the same training and acquire the qualification for judicial office. The German Judiciary Act contains this fundamental provision on legal training. Section 5 provides that anyone who concludes his legal studies at a university by taking the first state examination, as well as subsequently completing a period of preparatory training by taking the second state examination, shall be qualified to hold judicial office. Sections 5a on university courses and Section 5b on the preparatory training provide the framework regulations for legal studies. The details of legal training are mainly dealt with in the training ordinances of the *Länder*.

Of all the lawyers who complete legal training only a few will actually work as a judge. Since the number of openings is small, only candidates with outstanding aptitude, qualifications and abilities to hold judicial office are at present appointed as assistant judges. Having successfully completed a three-year probationary period with courts or with the public prosecutor's office, an assistant judge can expect a permanent appointment as soon as a budget post becomes available.

In the case of administrative judges, permanent appointment has been linked to prior practical experience in public administration. It is still preferred that judges on probation with the prospect of becoming an administrative judge should usually spend a year with a public authority in order to familiarise themselves with the special features of public administration and decision-making procedures. However, this rule is not enforced in full by the ministries of justice in charge of administrative courts. This might be due to the lack of a direct link between the ministries of justice and general public administration. In Bavaria current practice corresponds more to the initial concept. Here, where the Ministry of the Interior is responsible for administrative courts, judges can only qualify for permanent appointment as administrative judges if they can show proof of a minimum of five years' practical experience of working in administration.

VI. Conclusion

In Germany the administrative efficiency of courts has only recently become a topic of discussion. The absence of such a discussion can be directly related to the sensitive nature of the issues that have to be raised in the context of court administration. In view of the independence of courts and judges, any discussion of administrative efficiency is much more complicated in the case of courts than in the case of public administration. It was not the purpose of this presentation to spearhead such a discussion, which, however, is becoming more and more urgent in the light of the fact that all public budgets are faced with the necessity of making substantial savings.

The purpose of the presentation – to reveal the internal institutional set-up of administrative courts – was much less ambitious, but complicated enough.

APPENDIX

Administrative Procedure Act

[Verwaltungsverfahrensgesetz (VwVfG)]

of May 25th 1976

(Federal Law Gazette I p. 1253), last amended by Article 1 of the Expedition of Administrative Procedures Act of September 12th 1996 (Federal Law Gazette I p. 1354)

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PART I

Scope, Local Competence, Official Assistance

1. Scope

(1) This Act shall apply to the administrative activities under public law of the official bodies:

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

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

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

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

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

2. Exceptions

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

(2) This Act also shall not apply to:

1. procedures of the Federal or local tax authorities under the Tax Code,
2. criminal and other prosecutions and the punishment of administrative offences, judicial proceedings carried out on behalf of foreign legal authorities in criminal and civil matters and, notwithstanding section 80, paragraph 4, to measures relating to the legal status of the judiciary,

3. proceedings at the German Patent Office and before its appointed arbitrators,
4. proceedings under the Social Security Code,
5. the law on the Equalisation of Burdens,
6. the law on restitution.

(3) As regards the activities:

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

3. Local competence

(1) The following shall be the provisions as regards local competence:

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

(2) In the event of several authorities being competent under paragraph 1, the decision shall be taken by the authority first concerned with the matter unless the supervisory authority with overall competence in such matters determines that the decision shall be taken by another locally competent author-

ity. In cases in which one and the same matter involves more than one place of business of a firm, the supervisory authority can appoint one of the authorities competent under paragraph 1, No. 2 as the authority with overall competence where this is called for in the interests of a uniform decision for all concerned. The said supervisory authority shall also decide as to local competence when a number of authorities consider themselves either to possess or not to possess the relevant competence or when for other reasons there is some doubt in the matter of competence. Where an overall supervisory authority does not exist, the supervisory authorities competent in the matter shall take a decision jointly.

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

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

4. Authorities' duty to assist one another

(1) Each authority shall, when requested to do so, render assistance to other authorities (official assistance).

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

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

5. Circumstances permitting and limits to official assistance

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

1. for legal reasons it cannot itself perform the official action;
2. for material reasons, such as the lack of personnel or equipment needed to perform the official action, it cannot itself do so;
3. to carry out its tasks it requires knowledge of facts unknown to and unobtainable by it;
4. to carry out its tasks it requires documents or other evidence in the possession of the authority approached;

5. it could only carry out the task at substantially greater expense than the authority approached.

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

1. it is unable to do so for legal reasons;
2. such assistance would be seriously detrimental to the Federal Republic or to a *Land* thereof.

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

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

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

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

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

6. Choice of authority

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

7. Execution of official assistance

(1) The admissibility of the measure to be put into effect by official assistance shall be determined by the law applying to the authority requesting as-

sistance and the execution of official assistance by that applying to the authority of which the request is made.

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

8. Cost of official assistance

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

(2) Where the authority from which official assistance is requested incurs costs in undertaking an official action, those costs incurred by it which are attributable to a third party (administrative charges, fees, expenses) shall be refunded.

PART II

General regulations governing administrative procedure

Division 1

Principles of administrative procedure

9. Concept of administrative procedure

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

10. Administrative procedure not tied to form

The administrative procedure shall not be tied to specific forms when no legal provisions exist which specifically govern procedural form. It shall be simple and appropriate and shall be conducted without undue delay.

11. Capacity to participate

The following shall be capable of participating in such procedures:

1. natural and legal persons,
2. associations, in so far as they can have rights,
3. authorities.

12. Capacity to act

(1) The following shall be capable of acting in administrative procedures:

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

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

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

13. Participants

(1) Participants shall be:

1. those making and opposing an application,
2. those *vis-à-vis* whom the authority wishes to direct or has directed the administrative act,

3. those with whom the authority wishes to conclude or has concluded an agreement under public law,
4. those who have been involved in the procedure by the authority under paragraph 2.

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

(3) A person who is to be heard, but is not a participant within the sense of paragraph 1, does not thereby become a participant.

14. Authorised representatives and advisers

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

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

(3) Where a person is appointed to act as representative in proceedings, he shall be the person with whom the authority deals. The authority may approach the actual participant where he is obliged to co-operate. If the authority does approach the participant, the authorised representative is to be informed. Provisions governing service on the representative shall remain unaffected.

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

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

(6) Authorised representatives and advisers may be refused permission to make written submissions when they are unsuitable for this purpose; they may

be refused permission to make verbal submissions when they are incapable of doing so adequately. Persons empowered to act in legal matters on behalf of others on a business basis may not be refused such permission.

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

15. Appointment of an authorised recipient

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

16. Official appointment of a representative

(1) Where no representative is appointed, the court dealing with matters of guardianship shall appoint a suitable representative when requested to do so by the authority for:

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

(2) In cases covered by paragraph 1, No. 4, the court responsible for appointing a representative shall be the court responsible for matters of custodianship in whose area the participant has his normal place of residence; oth-

erwise, the court responsible shall be the court of custodianship in whose district the authority making the request is situated.

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

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

17. Representatives in the case of identical submissions

(1) In the case of applications and petitions submitted in connection with administrative proceedings and signed by a list of more than fifty persons, or presented in the form of duplicated and identical texts (identical submissions), the person deemed to be representing the other signatories shall be that signatory who is identified by his name, profession and address as being their representative unless he is named by them as authorised representative [*Bevollmächtigter*]. Only a natural person may be a representative [*Vertreter*].

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

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

(4) Once the representative is no longer entitled to act, the authority may require the persons no longer represented to appoint a joint representative within a reasonable period. When the number of persons who are the subject of such a requirement exceeds 50, the authority may make the fact known by giving notice in the normal manner for that locality. If the requirement is not

complied with within the period set, the authority may *ex officio* appoint a joint representative.

18. Representatives for participants with the same interests

(1) If more than fifty people are involved as participants in administrative proceedings with the same interests and are unrepresented, the authorities may require them within a reasonable period to appoint a joint representative where otherwise the regular execution of administrative proceedings would be impaired. If the persons of whom such a requirement is made do not comply within the period set, the authority may *ex officio* appoint a joint representative. Only a natural person may be a representative.

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

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

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

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

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

20. Persons excluded

(1) The following persons may not act on behalf of an authority:

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

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

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

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

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

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

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

1. a fiancé(e),
2. a spouse,
3. relations and relations by marriage in the direct line,
4. siblings,
5. children of siblings,
6. spouses of siblings and siblings of spouses,
7. siblings of parents,
8. persons connected by a long-term foster relationship involving a common dwelling in the manner of parents and children (foster parents and foster children).

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

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

21. Fear of prejudice

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

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

22. Commencement of proceedings

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

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

23. Official language

(1) The official language shall be German.

(2) In the event of applications being made to an authority in a foreign language, or submissions, evidence, documents and the like being filed in a foreign language, the authority shall immediately require that a translation be provided. Where necessary the authority may require that the translation provided be made by a certified or publicly authorised and sworn translator or interpreter. If the required translation is not furnished without delay, the authority may, at the expense of the participant, itself arrange for a translation to be made. Where the authority employs interpreters or translators, they shall be remunerated in accordance with the appropriate provisions of the law on the remuneration of witnesses and experts.

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

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

24. Principle of investigation

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

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

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

25. Advice and information

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

26. Evidence

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

1. gather information of all kinds,
2. hear the evidence of participants, witnesses and experts or gather written statements from participants, experts and witnesses,

3. obtain documents and records,

4. visit and inspect the locality involved.

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

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

27. Affirmation in place of oath

(1) In ascertaining the facts of a case, the authority may require and accept an affirmation in place of oath only when the acceptance of such an affirmation concerning the matter involved and in the proceedings concerned is provided for by law or regulation, and the authority has been legally declared competent. An affirmation in place of oath shall only be required where other means of establishing the truth are not available, have been without result or require disproportionate expense. An affirmation in place of oath may not be required of persons who are unfit to take an oath under section 393 of the Code of Civil Procedure.

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

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

(4) Before an affirmation in place of oath is accepted, the person affirming shall be informed of the significance of such an affirmation and the legal con-

sequences under criminal law of making an incorrect or incomplete statement. The fact that this has been done must be included in the written record.

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

28. Hearing of participants

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

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

1. an immediate decision appears necessary because of the risk involved in delay or in the public interest;
2. the hearing would jeopardise the observance of a time limit 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 acts in considerable numbers or administrative acts using automatic equipment;
5. measures of administrative 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 regular fulfilment of the authority's tasks, where 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 records may make further exceptions.

30. Secrecy

Participants shall be entitled to require that matters of a confidential nature, especially those relating to their private lives and business, shall not be revealed by the authority without permission.

Division 2

Time limits, deadlines, restoration

31. Time limits and deadlines

(1) The calculation of time limits and the setting of deadlines shall be subject to the provisions of sections 187 to 193 of the Civil Code as appropriate, except where otherwise provided by paragraphs 2 to 5.

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

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

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

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

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

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

32. Restoration of the *status quo ante*

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

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

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

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

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

Division 3

Official certification

33. Certification of copies, photocopies, duplicated copies and negatives

(1) Every authority shall be competent to certify as true copies of documents it has itself issued. In addition, authorities empowered by statutory instrument of the Federal German Government under section 1, paragraph 1,

No. 1 and the authorities empowered under the law of the *Länder* may certify copies as true where the original document was issued by an authority or the copy is required for submission to an authority, except where the law provides that the issuing of certified copies of documents from official records and archives is the exclusive province of other authorities; the statutory instrument does not require approval of the Bundesrat.

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

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

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

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

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

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

34. Certification of signatures

(1) The authorities empowered by statutory orders by the German Federal Government under section 1, paragraph 1, No. 1 and the authorities empowered under the law of the *Länder* may certify signatures as true when the signed document is required for submission to an authority or other official body to which the signed document must be submitted by law. This shall not apply to:

1. signatures without accompanying text,

2. signatures which require public certification under section 129 of the Civil Code.

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

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

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

(4) Paragraphs 1 to 3 apply *mutatis mutandis* to the certification of personal identificatory marks.

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

PART III

Administrative Act

Division 1

Materialisation of an administrative act

35. Concept of an administrative act

An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and which is intended to have a direct, external legal effect. A general order shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large.

36. Additional stipulations to an administrative act

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

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

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

or be combined with

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

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

37. Determinateness and form of an administrative act

(1) An administrative act must be sufficiently clearly defined in content.

(2) An administrative act may be issued in written, verbal or other form. A verbal administrative act must be confirmed in writing when there is justified interest that this should be done and the person affected requests this immediately.

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

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

38. Assurance

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

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

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

39. Grounds for an administrative act

(1) An administrative act which is given or confirmed in writing must be accompanied by a written statement of grounds. This statement of grounds must contain the chief material and legal grounds which have caused the authority to take its decision. The grounds given in connection with discretionary decisions should also contain the points of view which led the authority to exercise its powers of discretion.

(2) No statement of grounds is required:

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

5. when a general order is publicly promulgated.

40. Discretion

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

41. Notification of an administrative act

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

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

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

(4) The public promulgation of an administrative act in writing shall be effected by advertising the operative part in the manner normal in the district. Promulgation shall state where the administrative act and its statement of grounds may be inspected. The administrative act shall be deemed to have been promulgated two weeks after the date of advertising by the means customary in the district. A general order may fix a different day for this purpose but in no case may this be earlier than the date following advertisement.

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

42. Obvious errors in an administrative act

The authority may at any time correct clerical mistakes and errors in calculation and similar obvious inaccuracies in an administrative act. When the person concerned has a justifiable interest, correction must be undertaken. The authority shall be entitled to request presentation of the document for correction.

Division 2

Validity status of an administrative act

43. Validity of an administrative act

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

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

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

44. Invalidity of an administrative act

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

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

1. it is issued in written form but fails to show the issuing authority;
2. by law it can be issued only by means of the delivery of a document, and this method is not followed;
3. it has been issued by an authority acting beyond its powers as defined in section 3, paragraph 1, No. 1 and without further authorisation;
4. it cannot be implemented by anyone for material reasons;
5. it requires an action in contravention of the law incurring a sanction in the form of a fine or imprisonment;
6. it offends against morality.

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

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

4. the collaboration of another authority required by law did not take place.

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

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

45. Making good defects in procedure or form

(1) An infringement of the regulations governing procedure or form which does not render the administrative act invalid under section 44 shall be ignored when:

1. the application necessary for the issuing of the administrative act is subsequently made;
2. the necessary statement of grounds is subsequently provided;
3. the necessary hearing of a participant is subsequently held;
4. the decision of a committee whose collaboration is required in the issuing of the administrative act is subsequently taken;
5. the necessary collaboration of another authority is subsequently obtained.

(2) Actions referred to in paragraph 1 may be made good up to the time of the conclusion of proceedings before the administrative court.

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

46. Consequences of defects in procedure and form

Application for annulment of an administrative act which is not invalid under section 44 cannot be made solely on the ground that it came into being through the infringement of regulations governing procedure, form or local competence, where it is evident that the infringement has not influenced the decision on the matter.

47. Converting a defective administrative act

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

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

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

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

48. Withdrawal of an unlawful administrative act

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

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

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

In the cases provided for in No. 3, the administrative act shall in general be withdrawn with retrospective effect.

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

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

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

49. Revocation of a legal administrative act

(1) A legal, non-beneficial administrative act may, even after it has become non-appealable, be revoked in whole or in part with effect for the future, except when an administrative act of like content would have to be issued or when revocation is not allowable for other reasons.

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

1. the revocation is permitted by law or the right of revocation is reserved in the administrative act itself;
2. the administrative act is combined with an imposition which the beneficiary has not complied with either at all or not within the time limit set;
3. the authority would be entitled, as a result of a subsequent change in circumstances, not to issue the administrative act and if failure to revoke it would jeopardise the public interest;
4. the authority would be entitled, on the ground of an amendment to a legal provision, not to issue the administrative act where the beneficiary has not

availed himself of the benefit or has not received any contributions attributable to the administrative act and when failure to revoke would be contrary to the public interest, or

5. in order to prevent or eliminate serious harm to the common good.

(3) A legal administrative act which provides for a one-off or a continuing payment of money or the making of a divisible material contribution, or which is a prerequisite for these, may be revoked even after such time as it has become non-appealable, either wholly or in part and with retrospective effect,

1. if, once this payment is rendered, it is not put to use, or is not put to use either without undue delay or for the purpose for which it was intended in the administrative act;
2. if the administrative act had an imposition attached to it which the beneficiary either fails to satisfy or does not satisfy within the stipulated period.

Section 48 paragraph 4 applies *mutatis mutandis*.

(4) The revoked administrative act shall become null and void with the coming into force of the revocation, except where the authority fixes some other date.

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

(6) In the event of a beneficial administrative act being revoked in cases covered by paragraph 2, Nos. 3 to 5, the authority shall upon application make good the disadvantage to the person affected deriving from his reliance on the continued existence of the act to the extent that his reliance merits protection. Section 48, paragraph 3, third to fifth sentences shall apply as appropriate. Disputes concerning compensation shall be settled by the ordinary courts.

49a. Reimbursement, Interest

(1) Where an administrative act is either withdrawn or revoked with retrospective effect, or where it becomes invalid as a result of the occurrence of a condition which renders it null and void, any payments or contributions which have already been made shall be returned. The amount of such a reimbursement shall be stipulated in a written administrative act.

(2) The amount to be reimbursed, excepting interest, is governed by the relevant provisions of the Civil Code on surrendering undue enrichment. The beneficiary is not entitled to claim that enrichment no longer exists where he was either aware of the circumstances which led to the administrative act being withdrawn, revoked or becoming invalid, or failed as a result of gross negligence to become aware of this.

(3) Interest shall be due on the amount to be reimbursed from the date on which the administrative act becomes invalid at a rate 3 per cent per annum above the currently valid Discount Rate of the German Federal Bank [*Deutsche Bundesbank*]. The payment of interest may be waived where the beneficiary cannot be held responsible for the circumstances which led to the administrative act being retracted, revoked or becoming invalid and repays the amount in full within the time limit stipulated by the authority.

(4) If this payment is not put to use on receipt without delay and for the intended purpose, the payment of interest may be demanded at the level stated in paragraph 3, first sentence for the period up to the date at which it is put to its designated use; the provisions of section 49, paragraph 3, first sentence, No. 1 remain unaffected.

50. Withdrawal and revocation in proceedings for a legal remedy

Section 48, paragraph 1, second sentence, paragraphs 2 to 4 and paragraph 6 and section 49, paragraphs 2 to 4 and 6 shall not apply when a beneficial administrative act which has been contested by a third party is quashed during a preliminary procedure, or during proceedings before the administrative court, and the quashing operates in favour of the third party.

51. Resumption of proceedings

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

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

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

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

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

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

52. Return of documents and other materials

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

Division 3

Legal effects of the administrative act on limitation

53. Interruption of limitation period by administrative act

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

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

PART IV

Agreement under public law

54. Admissibility of an agreement under public law

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

55. Composition agreement

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

56. Exchange agreement

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

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

57. Written form

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

58. Agreement of third parties and authorities

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

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

59. Invalidity of an agreement under public law

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

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

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

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

60. Adaptation and termination in special cases

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

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

61. Submission to immediate execution

(1) Any party to an agreement may submit to immediate execution deriving from an agreement under public law within the meaning of section 54, second sentence. The authority must in this case be represented by the head of the authority, his general deputy or a member of the civil service qualified for judicial office or fulfilling the requirements of section 110, first sentence of the German Judiciary Act. Submission to immediate execution shall only be valid when approved by the supervisory authority for the authority which is party to the agreement competent in such matters. The approval shall not be required when submission is by or to a supreme authority of Federal or *Land* government.

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

62. Supplementary application of provisions

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

PART V

Special Types of procedure

Division 1

Formal administrative procedure

63. Application of provisions concerning formal administrative procedure

(1) Formal administrative procedure pursuant to this Act takes place when required by law.

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

(3) Notice under section 17, paragraph 2, second sentence and the requirement under section 17, paragraph 4, second sentence shall be publicly announced in formal administrative proceedings. Public announcement shall be effected when the notification or the requirement is published by the authority in its official bulletin and also in local daily newspapers which circulate widely in the district in which the decision may be expected to have its effects.

64. Form of applications

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

65. Collaboration of witnesses and experts

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

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

the authority must state the subject of the interrogation and the names and addresses of those concerned. The court shall inform those concerned of the dates on which evidence will be taken.

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

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

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

66. Obligation to hear participants

(1) In formal administrative proceedings the participants shall be afforded the opportunity of making a statement before a decision is taken.

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

67. Necessity for an oral hearing

(1) The authority shall decide after an oral hearing, to which the participants shall be invited in writing on due notice. The invitations should point out that if a participant fails to appear, the discussions can proceed and decisions be taken in his absence. If more than 50 people have to be invited, this may be done by public announcement. Public announcement shall be effected by publishing the date of the hearing at least two weeks beforehand in the official bulletin of the authority, and also in the local daily newspapers with wide circulation in the district in which the decision may be expected to have its effect, reference being accordingly made to the second sentence. The period referred to in the fourth sentence shall be calculated from the date of publication in the official bulletin.

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

1. an application is fully complied with by agreement between all concerned;
2. within the period set for this purpose no party has entered opposition to the intended measure;

3. the authority has informed the participants that it intends to reach a decision without an oral hearing and no participant opposes this within the period set for this purpose;

4. all participants have agreed to waive the hearing;

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

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

68. Conduct of oral hearing

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

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

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

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

1. place and date of hearing,

2. the names of the person in charge of the hearing, and of the participants, witnesses and experts appearing,

3. the subject of the inquiry and the applications made,

4. the chief content of statements by witnesses and experts,

5. the result of any visit to the location concerned.

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

69. Decision

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

(2) Administrative acts which conclude the formal proceedings must be in written form, must contain a statement of grounds and be sent to the participants. In cases referred to in section 39, paragraph 2, Nos. 1 and 3, no statement of grounds is required. Where more than 50 notifications have to be sent, this may be replaced by public announcement. Public announcement shall be effected by publishing the operative part of the decision in the official bulletin of the authority, and also in the local daily newspapers with wide circulation in the district in which the decision may be expected to have its effect. The administrative act shall be deemed to have been delivered two weeks from the day of publication in the official bulletin, which fact shall be included in the announcement. After public announcement has been made and until the period for appeal has expired, the administrative act may be requested in writing by the participants, which fact shall also be included in the announcement.

(3) If formal proceedings are concluded in another manner, those concerned shall be informed. If more than 50 notifications have to be sent, this may be replaced by public announcement; paragraph 2, third sentence shall apply *mutatis mutandis*.

70. Contesting the decision

No examination in preliminary proceedings is required before an action is brought before the administrative court against an administrative act issued in formal administrative proceedings.

71. Special provisions governing formal proceedings before committees

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

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

(3) Any participant may reject a member of the committee who is not entitled to take part in the administrative proceedings (section 20) or who may

be prejudiced (section 21). A rejection made before the oral hearing must be explained in writing or recorded. The explanation shall not be acceptable if the participant has attended the oral hearing without making known his reasons for rejection. Decisions as to rejection shall be governed by section 20, paragraph 4, second to fourth sentences.

Division 1a

Expediting development consent procedures

71a. Scope of application

Where administrative procedures have the purpose of issuing consent (consent proceedings) to facilitate the execution of development schemes which form part of the economic activities of the applicant, sections 71b to 71e shall apply.

71b. Expediting development consent procedures

The authority charged with issuing development consent shall make all the necessary arrangements available to it in law and in fact to ensure that the procedure can be disposed of within an appropriate period of time, and, on application, can be further expedited.

71c. Advice and information

(1) The authority charged with issuing development consent shall provide information as required on ways of expediting the procedure, including mention of any associated advantages or disadvantages. This may, on request, be performed in written form where this is warranted by the importance or the complexity of the particular case.

(2) Where necessary the authority charged with issuing development consent shall enter into discussion with prospective applicants, before any formal application is made, on

1. certification and documents the applicant is required to present,
2. what expert reports and surveys may be recognised within the consent procedure,
3. means of bringing forward the participation of third parties and of the general public in order to relieve the consent procedure,

4. the appropriateness of subjecting any specific factual prerequisites to the granting of development consent to prior clarification by the courts (independent examination of evidence).

The authority may call upon other authorities and, with the approval of the prospective applicant, third parties.

(3) Once an application has been made, the applicant shall be advised immediately as to whether the information and documentation submitted with the application are complete and as to how long the procedure can be expected to take.

71d. Star-shaped proceedings

(1) Where it is necessary to involve public agencies in a development consent procedure, the competent authority shall gather the opinions of such agencies concurrently, where this is feasible and warranted, and especially where this is requested by the applicant, and shall set a time limit for reporting (star procedures).

(2) Any comments made after expiry of the time limit shall be disregarded, unless the matters raised are already or should already have been known to the authority charged with issuing development consent or have a bearing on the legality of the decision.

71e. Application Conference

At the request of the applicant, the authority shall convene a meeting to include all other parties affected by the application as well as the applicant.

Division 2

Planning approval proceedings

72. Application of provisions governing planning approval proceedings

(1) Where the law requires proceedings to approve plans, these shall be governed by sections 73 and 78 and, unless these provide otherwise, by the remaining provisions of this Act. Section 51 and sections 71a to 71e 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) Notice under section 17, paragraph 2, second sentence and the requirement under section 17, paragraph 4, second sentence shall be publicly announced in planning approval proceedings. Public announcement 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 project developer shall submit the plan to the hearing authorities to enable the hearing to be held. The plan shall comprise the drawings and explanations to clarify the project, the reasons behind it and the land and structures affected.

(2) Within one month of receiving the complete plan the hearing authorities shall gather the opinions of those authorities whose spheres of competence are affected by the project and shall make the plan available for inspection in those communes in which the project may be expected to have its effect.

(3) Within three weeks of receiving the plan, the communes referred to in paragraph 1 shall make the plan available for inspection for a period of one month. This procedure may be omitted where those affected are known and are afforded the opportunity of examining the plan during a reasonable period.

(3a) The authorities referred to in paragraph 2 shall report their opinions within a period to be stipulated by the hearing authority, and not to exceed three months. Opinions entered subsequent to the date set for discussion shall be disregarded, unless the matters raised are already or should already have been known to the planning approval authority or have a bearing on the legality of the decision.

(4) Any person whose interests are affected by the project may, up to two weeks after expiry of the inspection period, enter opposition to the plan in writing or in a manner to be recorded with the hearing authority or with the commune. In the case referred to in paragraph 3, second sentence, the period for objection shall be determined by the hearing authority. On expiry of the time limit for lodging objections, no objections shall be allowed saving those which rest on specific titles enforceable under private law. Advice shall be given to this effect in advertising the inspection period or in the announcement of the closing date for lodging objections.

(5) Those communes in which the plan is to be made public shall give advance notice of the fact in the usual manner in the area. 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 authorities mentioned in the announcement within the time limit set for that purpose;

3. that in the event of a participant failing to attend the meeting for discussion, discussions can proceed without him;

4. that:
   a) those persons who lodge objections may be informed of the dates of meetings for discussion by public announcement,
   b) the notification of decisions on objections may be replaced by public announcement,
   if more than 50 notifications have to be made or served.

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 plan being made available for inspection, attention being drawn to sentence 2.

(6) Upon expiry of the time limit 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 project developer, the authorities, the persons affected by the plan and those who have raised objections to it. 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 project developer and those who have raised objections shall be informed of the date set for discussion of the plan. If apart from notifications to authorities and the project developer more than 50 notifications are required, this may be replaced 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, and 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. Discussion shall be concluded within three months of expiry of the time limit for raising objections.

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

(8) If a plan already open for inspection is to be altered, and if this means that the sphere of competence of an authority or 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 made available for inspection in that commune; paragraphs 2 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 resolved, to the planning approval authority, if possible within one month of the conclusion of the discussion.

74. Decisions on planning approval, planning consent

(1) The planning authority shall consider and decide on the plan (planning approval decision). The provisions concerning decisions and contesting decisions in formal administrative proceedings (sections 69 and 70) shall apply.

(2) The planning approval decision shall contain the decision of the planning approval authority concerning the objections on which no agreement was reached during discussions before the hearing authority. It shall impose upon the project developer the obligation to take measures or to erect and maintain structures necessary for the general good or to avoid detrimental effects on the rights of others. Where such measures or facilities are impracticable or irreconcilable with the project, the person affected may claim reasonable monetary compensation.

(3) Where it is not yet possible to make a final decision, this shall be stated in the planning approval decision; the project developer shall at the same time be required to submit in good time any documents still missing or required by the planning approval authority.

(4) The planning approval decision shall be sent to the project developer, those people known to be affected by the project and those people whose objections have been dealt with. A copy of the decision, together with advice on legal remedies and a copy of the plan as approved, shall be open for inspection in the communes concerned for two weeks, the place and time at which the plan may be inspected being made known in the manner customary in the district. With the end of the inspection period, the decision shall be deemed to have been served on the other parties affected, which fact shall be made known in the announcement.

(5) If apart from the project developer more than 50 notifications have to be made under paragraph 4, this may be replaced by public announcement. Public announcement shall be effected by publishing the operative part of the decision of the planning approval authority, as well as advice on legal remedies and a reference to the fact that the plan is open to public inspection pur-

suant to paragraph 4, second sentence, in the official bulletin of the competent authority, and also in local daily newspapers with wide circulation in the district in which the project may be expected to have its effect. Attention must be drawn to any impositions. At the end of the period of public display, copies of the decision are deemed to have been served on those affected by it and on those who have raised objections; attention must be drawn to this in the public announcement. Between the time of the public announcement and the expiry of the period during which legal remedies may be sought, those affected by the decision and those who have raised objections may make written requests for copies of the decision; attention must likewise be drawn to this in the public announcement.

(6) Planning consent may be issued in place of a planning approval decision where

1. there is no impairment of the rights of others or where those affected have declared in writing that they consent to the utilisation of their property or of some other right, and
2. agreement has been reached with those public agencies whose spheres of competence are affected.

Planning consent has the same legal effects as planning approval except for the predetermining legal effect with regard to later expropriation; the granting of such consent shall not be governed by the provisions on planning approval procedures. Re-examination in preliminary proceedings is not required prior to the filing of an action with the administrative court. Section 75, paragraph 4 applies *mutatis mutandis*.

(7) Planning approval and planning consent are not required in cases of minor significance. Such cases are deemed to exist where

1. no other public concerns are affected, or the required decisions on the part of authorities have already been taken and are not in conflict with the plan, and
2. rights of others are not affected, or the relevant agreements have been reached with those affected by the plan.

75. Legal effects of planning approval

(1) Planning approval has the effect of establishing the admissibility of the project, including the necessary measures subsequently to be taken in connection with other installations and facilities, having regard to all public interests affected thereby. No other administrative decisions, in particular consent issued under public law, grants, permissions, authorisations, agreements or

planning approvals are required. Planning approval legally regulates all relationships under public law between the project developer and those affected by the project.

(1a) Flaws in the weighing of public and private interests touched by the project shall be deemed to be significant only where they have clearly exerted an influence on the outcome of deliberations. Significant flaws in weighing public and private interests shall only result in the decision on planning approval or the planning consent being annulled where such flaws are not capable of being rectified by means of modifications to the plan or by a supplementary procedure.

(2) Once the decision on planning approval has become non-appealable, there is no possibility of upholding claims to discard the project, to remove or alter installations or to restrain their use. In the event of unforeseeable effects of the project, or of installations built in accordance with the approved plan, on the rights of another becoming apparent only after the plan has become non-appealable, the person affected may require that measures be undertaken or structures erected and maintained to exclude the detrimental effects. Such measures shall be imposed on the project developer by a decision of the planning approval authority. If such measures or the installation of such structures are impracticable or irreconcilable with the project, a claim may be made for reasonable monetary compensation. If measures or structures within the meaning of sentence 2 become necessary because of changes which occur on a neighbouring piece of land after the planning approval procedure has been concluded, the costs arising shall be borne by the owners of the adjacent land, unless such changes are the result of natural occurrences or *force majeure*; sentence 4 shall not apply.

(3) Applications seeking to enforce claims to the erection of installations or structures or for reasonable compensation in accordance with paragraph 2, second and fourth sentences shall be made to the planning authority in writing. These shall only be acceptable if made within three years of the date on which the person affected became aware of the detrimental effects of the project resulting from the non-appealable plan, or of the installations. They may not be made once thirty years have passed from the creation of the situation shown in the plan.

(4) If work is not commenced on the project within five years of the plan becoming non-appealable, it shall become invalid.

76. Changes to the plan before the project is finished

(1) If before the project is finished it is desired to alter the plan, a new approval procedure shall be required.

(2) In the case of the changes to the plan being of negligible importance, the planning approval authorities may waive the need for a new procedure where the interests of others are not affected or where those affected have agreed to the change.

(3) If, in the cases referred to in paragraph 2, or in other cases, of a negligible change being made to a plan, the planning approval authority conducts an approval procedure, then no hearing and no public notification of the planning approval decision is required.

77. Annulment of a planning approval decision

If a project on which work has commenced is permanently abandoned, the planning authority shall annul the approval decision. The annulment decision shall impose upon the project developer the restoration of the *status quo ante* or other suitable measures where these are necessary for the common good or in order to avoid the rights of others being detrimentally affected. If such measures are required because changes occur on an adjacent piece of land after the planning approval procedure has been completed, the project developer may, by a decision of the planning approval authority, be obliged to undertake suitable measures. However, the cost thereof shall be borne by the owner of the adjacent piece of land except where such changes are the result of natural occurrences or *force majeure*.

78. Coincidence of several projects

(1) In the event of a number of independent plans, the execution of which requires planning approval procedures, coinciding in such a manner that only a uniform decision is possible for these projects or parts thereof, and if at least one of the planning approval procedures is regulated by Federal law, these projects or parts thereof shall be the subject of one single planning approval procedure.

(2) Competence and procedures shall be governed by the regulations relating to planning approval proceedings prescribed for that installation or facility which affects a large number of relationships under public law. In the event of uncertainty as to which legal provision applies, and where according to the various relevant provisions a number of Federal authorities are competent falling within the spheres of competence of a number of supreme Federal authorities, the decision shall fall to the Federal German Government, or oth-

erwise to the highest competent Federal authority. Where there is uncertainty as to which legal provision applies, and if according to the various relevant provisions, a Federal authority and a *Land* authority are competent, and the highest Federal and *Land* authorities are unable to reach an agreement, the Federal and *Land* governments shall come to an agreement as to which legal provision shall apply.

PART VI

Procedures for legal Remedies

79. Remedies for administrative acts

Formal remedies for administrative acts shall be governed by the Administrative Courts Code and its implementing legislation, except where the law otherwise determines; otherwise the provisions of this Act shall apply.

80. Refund of costs in preliminary proceedings

(1) Where an objection is successful, the legal entity whose authority issued the impugned administrative act shall refund to the person appealing the costs involved in the legal prosecution or defence proceedings. This shall also apply where the objection is unsuccessful only because the infringement of a prescription as to form or procedure is to be ignored under section 45. Where the objection is unsuccessful, the person entering the appeal shall refund to the authority which issued the impugned administrative act the costs involved in the necessary legal prosecution or defence proceedings. This shall not apply when an objection is entered against an administrative act which was issued:

1. in the context of an existing or previously existing relationship of employment or official service under public law, or
2. in the context of an existing or previously existing official duty or an activity which may be performed instead of the legally required official duty.

Costs arising due to the fault of a person entitled to a refund shall be borne by him; the fault of a representative shall be regarded as that of the person represented.

(2) The fees and expenses of a lawyer or other authorised representative in preliminary proceedings are refundable when the use of a lawyer's services was necessary.

(3) The authority making the decision as to costs shall upon application fix the amount of the costs to be refunded. If a committee or advisory board (section 73, paragraph 2 of the Administrative Courts Code) has made a decision as to costs, the fixing of costs shall be the responsibility of the authority forming the committee or advisory board. The decision as to costs shall also determine whether the services of a lawyer or other authorised representative were necessary.

(4) Paragraphs 1 to 3 shall apply also to preliminary proceedings connected with measures relating to the legal status of the judiciary.

PART VII

Honorary Positions, Committees

Division 1

Honorary positions

81. Application of the provisions covering honorary positions

Sections 82 to 87 govern participation in an administrative procedure in an honorary capacity as far as legal provisions do not provide for exceptions.

82. Duty of honorary participation

A duty to assume an honorary position shall exist only when the duty is provided for by legislation.

83. Performance of an honorary function

(1) A person who assumes an honorary position shall perform the function in a conscientious and impartial manner.

(2) Upon assuming the position, he shall be expressly obliged to carry out the tasks in a conscientious and impartial manner and to observe secrecy. A written record of the conferring of this obligation shall be made.

84. Duty to observe secrecy

(1) A person who assumes an honorary position shall have the duty to observe secrecy concerning the official business revealed to him, even after the honorary participation has come to an end. This obligation shall not apply to

official communications or facts which are common knowledge or whose significance requires no obligation of secrecy.

(2) A person who assumes an honorary position may not testify in court, make statements outside court or make declarations concerning the official business he is obliged to keep secret without permission.

(3) Permission to testify as a witness may be refused only if the testimony is detrimental to the welfare of the Federation or a *Land*, or the execution of public duties is seriously jeopardised or substantially obstructed.

(4) If the person who holds an honorary position is a participant in a legal action before a court, or if his arguments serve to protect legitimate personal interests, permission to testify may be refused, even if the conditions in paragraph 3 are fulfilled, only if compelling public interests necessitate refusal.

(5) Permission granted in cases covered in paragraphs 2 to 4 shall be granted by the specially competent supervisory authority which appointed the person to the honorary position.

85. Compensation

A person who performs an honorary function shall have a right to compensation for necessary expenses and for loss of earnings.

86. Dismissal

Persons who have been called upon to perform an honorary function can be dismissed for good cause by the authority which appointed them. Good cause is especially shown if the person who holds an honorary position

1. violates his duty in a grievous manner or proves to be unworthy;

2. is no longer capable of performing the duties in a proper manner.

87. Administrative offences

(1) An administrative offence shall be deemed to have been committed by any person who

1. does not assume an honorary position although he is obliged to do so;

2. lays down an honorary position which he is obliged to assume without a valid and sufficient reason.

(2) The administrative offence can be punished by a fine.

Division 2

Committees

88. Application of the provisions concerning committee procedure

Sections 89 to 93 shall govern committees, advisory councils and other collegial bodies (committees) when they participate in an administrative procedure, unless legislation provides for exceptions.

89. Order in the meetings

The chairman shall open, preside over and close the meeting; he shall be responsible for order.

90. Quorum

(1) Committees shall constitute a quorum when all the members have been duly summoned and at least three members who are eligible to vote are present. Resolutions can also be passed in a written procedure if no committee member objects.

(2) If a matter of official business has been deferred due to lack of quorum and the committee is again summoned to take action on the same subject, the committee shall constitute a quorum regardless of the number of committee members present as long as this provision has been indicated in the summons.

91. Adoption of a resolution

Resolutions shall be adopted by a majority of votes. In the case of a parity of votes, the chairman shall have the casting vote as long as he is eligible to vote; otherwise a parity of votes shall be deemed to be a rejection of the resolution.

92. Elections by committees

(1) Unless a member of a committee objects, voting shall be carried out by acclamation or signal, or else by ballot. A secret ballot shall be used if a committee member so requests.

(2) The candidate who receives the greatest number of ballots cast shall be elected. In the case of a parity of votes, the official in charge of the election shall decide the election by drawing a lot.

(3) Unless otherwise resolved by unanimous vote, the election procedure to be used when a number of similar elective positions are to be filled shall be the d'Hondt highest number procedure. In the event of the highest number

being shared, the official in charge of the election shall determine the allocation of the last elective position by drawing a lot.

93. Minutes

Minutes of the meeting shall be kept. The minutes must contain information concerning the

1. time and place of the meeting,
2. name of the chairman and of the committee members present,
3. subject dealt with and the motions presented,
4. resolutions passed,
5. election results.

The minutes shall be signed by the chairman and by a secretary if a secretary has been called in to keep the minutes.

PART VIII

Concluding Provisions

94. Delegation of municipal duties

By legal ordinance, the governments of the *Länder* shall be able to transfer duties which are incumbent on the communes under sections 73 and 74 of this Act to other local authorities, or to an administrative community. The legal provisions of *Länder* which already contain the appropriate regulations shall not be affected.

95. Special arrangements for defence matters

With regard to defence matters, after a declaration of a state of defence or a state of tension, the following can be dispensed with: hearing of participants (section 28, paragraph 1); confirmation in writing of an administrative act (section 37, paragraph 2, second sentence); written statement of grounds for an administrative act (section 39, paragraph 1). In derogation of section 41, paragraph 4, third sentence, an administrative act shall be deemed to have been promulgated in these cases on the day following the date of announcement. The same shall be valid for the other applicable regulations pursuant to Article 80 a of the Basic Law.

96. Transitional proceedings

(1) Proceedings which have already begun shall be concluded according to the provisions of this Act.

(2) The admissibility of a legal remedy for decisions which were issued before this Act came into force shall be governed by the provisions formerly in effect.

(3) Time limits which began before this Act came into force shall be computed according to the provisions formerly in effect.

(4) The provisions of this Act shall be valid for the refund of costs in preliminary proceedings if the preliminary proceedings have not been concluded before this Act enters into force.

97. Amendment of the Administrative Courts Code
[*Verwaltungsgerichtsordnung*]

98. Amendment of the Law Concerning Federal Long-Distance Highways
[*Bundesfernstraßengesetz*]

99. Amendment of the Immissions Act
[*Bundes-Immissionsschutzgesetz*]

100. Regulations under state law

The *Länder* shall be able to make laws which

1. provide for a regulation pursuant to section 16;
2. stipulate that for planning approval procedures executed on the basis of provisions under state law, the legal effects of section 75, paragraph 1, first sentence shall also be valid vis-à-vis the necessary decisions under Federal law.

101. City-state clause

The Senates of the *Länder* Berlin, Bremen and Hamburg are empowered to regulate local competence in derogation of section 3 according to the particular administrative structure of their respective states. In these states, approval pursuant to section 61, paragraph 1, sentence 3 is not required.

102. Berlin clause (no longer relevant)

103. Entry into force

(1) This Act shall enter into force on January 1st 1977 unless otherwise specified in paragraph 2.

(2) The authorisations contained in section 33, paragraph 1, first sentence, in section 34, paragraph 1, first sentence and paragraph 4, and also section 34, paragraph 5 and sections 100 and 101 shall enter into force on the day after promulgation.

Administrative Courts Code

[Verwaltungsgerichtsordnung (VwGO)]

of January 21st 1960

In the wording as promulgated on March 19th 1991

(Federal Law Gazette I p. 686), last amended by Article 1 of the Law on the Moving of the Federal Administrative Court from Berlin to Leipzig of November 21st 1997 (Federal Law Gazette I, p. 2742).

Federal Law Gazette III 340-1

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]

In each of the *Länder* (federal states) courts within the framework of general administrative jurisdiction are the administrative courts (of first instance) and one Higher Administrative Court and in the Federation the Federal Administrative Court with its seat in Leipzig.

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 Co-operation]

All courts and administrative authorities shall provide administrative and legal co-operation 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. *(cancelled)*

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,
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 who do not employ another pharmacist,
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 man-

ner, 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 cancellation 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 or legal person who claims to have been aggrieved by the legal provision or its application, or who or which has reason to expect to be aggrieved within the foreseeable future, or by any public authority, within a period of two years from the date of the legal provision being announced. 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 legal persons 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 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. Where it is possible for defects found in a by-law or statutory order issued under the provisions of the Federal Building Code to be

rectified by means of a supplementary procedure within the meaning of section 215 a of the Federal Building Code, the Higher Administrative Court shall declare the by-law or statutory order to be invalid; sentence 2, second clause shall apply *mutatis mutandis*.

(6) 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 deviations 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 31, paragraph 2 of the Recycling and Waste Act and also development consent procedures under section 10 of the Immissions 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 41, paragraph 1 of the Recycling and Waste Act,
6. the construction, extension or alteration and the operation of civil airports and airstrips where restrictions apply on built development.

7. plan approval procedures for the construction of new sections of track for trams, public railways and magnetic levitation trains 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 or extension of federal waterways.

Sentence 1 applies to disputes on development consent granted in lieu of planning approval, as well as to all 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.

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 99, paragraph 2, and section 133, paragraph 1 of this Act, and under 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 2 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) A decision of the Federal Administrative Court is binding upon Higher Administrative Courts in those cases described in paragraph 1.

(3) 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 administrative 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 legal persons 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), 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 co-ordination 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 in-

formation 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 administrative 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 and the Higher Administrative Court every party who lodges a petition must be represented by a solicitor or a professor of law at a German university. This applies equally to appeals for final revision and to complaints against leave to appeal for final revision not being granted, and to the lodging of complaints in those cases described in section 99, paragraph 2 of this Act and in section 17a, paragraph 4, fourth sentence of the Judicature Act, as well as to petitions for leave to appeal on questions of fact or on points of law or to file complaints. Legal persons under public law and public authorities may be represented by public officials of public employees who are qualified to hold judicial office, or by members of the administrative class of the civil service with diplomas in law gained in the former GDR. In matters relating to the welfare of victims of war and to disability law, and to associated matters of social welfare law, members and employees of associations for war victims and for the disabled shall also be permitted to provide legal representation before the Higher Administrative Court where such persons are empowered by by-laws or by power of attorney to act for the plaintiff. In cases relating to matters of taxation, tax consultants and auditors shall also be permitted to provide legal representation before the Higher Administrative Court. In cases relating to public officials and to associated social matters, and in cases concerned with the staff representation, members and employees of trade unions shall also be permitted to provide legal representation before the Higher Administrative Court where such persons are empowered by by-laws or by power of attorney to act for the plaintiff.

(2) Before 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 capacity to act as an authorised representative or as a legal adviser extends to any person who is capable of pleading properly.

(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 twenty 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 re-examined in a preliminary proceeding. Re-examination is not required where this is provided 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. the administrative decision on a remedy or on an objection gives rise to a grievance.

(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. [Hearings]

Where the annulment or amendment of an administrative act within objection proceedings comes to be connected with a grievance, the party affected is to be granted a hearing prior to any decision being taken on the objection by either the issuing authority or the objection authority (remedial decision).

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 an administrative decision on an objection is taken which contains a grievance (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 administrative decision on a remedy or on an objection in cases where this gives rise to a grievance.

(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, or, within the jurisdiction of a *Land*, in *Land* law, in particular in respect of objections and actions brought by third parties against administrative acts relating to investment or to the creation of employment,
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.

The *Länder* may also provide that legal redress shall have no suspensory effect where this is directed against measures adopted by the *Länder* in the course of administrative enforcement under Federal law.

(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*.

80b. [Cessation of Suspensory Effect]

(1) The suspensory effect of an objection and of a rescissory action ceases on the objection or the rescissory action becoming non-appealable, or, where the rescissory action has been rejected in the first instance, three months after termination of the statutory period for stating the grounds of the appeal against the rejection. This also applies in cases where execution by an authority has been suspended, or where suspensory effect has been reinstated or ordered by the court, except where the authority has suspended execution until such time as the administrative act becomes non-appealable.

(2) On application the higher administrative court may order suspensory effect to remain operative.

(3) Section 80, paragraphs 5 to 8, and section 80a apply *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. apply for leave to appeal on a question of fact or a point of law or apply for a court hearing; where both forms of legal remedy are resorted to, there shall be a court hearing,
2. lodge an appeal for final revision, where leave for this has been granted,
3. lodge an appeal against the denial of leave to appeal or apply for a court hearing, where leave to apply for an appeal for final revision has been denied; where both forms of legal remedy are resorted to, there shall be a court hearing,
4. 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;

7. give the administrative authority the opportunity to remedy defects in procedure and form within a period of no more than three months, where he is satisfied that this will not unduly delay termination of the dispute.

(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 co-operation 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) The action is deemed to have been withdrawn when the plaintiff fails to pursue the action for more than three months, despite being called upon by the court to do so. Paragraph 1, second sentence applies *mutatis mutandis*. In being called upon to pursue the action, the plaintiff shall be advised of the legal consequences ensuing from sentence one and under section 155, paragraph 2. The court shall make a ruling deeming the action to have been withdrawn.

(3) Where an action is withdrawn, or is deemed to have been 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 twenty 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 re-examined or order a new expert appraisal from either the original or some other expert consultant. The court may deny a motion for the admission of evidence relating to facts on which evidence has already been taken within test cases where it is convinced that admission of such evidence would not contribute towards establishing new facts capable of having a bearing on the decision and would delay termination of the dispute. Refusal may be contained within the decision taken under sentence 1. 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 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. On request the court may suspend proceedings on defects in procedure or form where this is deemed expedient in the interests of concentrating proceedings.

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 supervisory 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.

(4) Section 227, paragraph 3, first sentence of the Code of Civil Procedure is not applicable.

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 cancel 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 cancel 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 cancellation of 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 cancelled 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 cancellation 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. [Re-examination 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. The administrative authority may amend its discretionary decision on an administrative act up to and during proceedings before the administrative court.

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 proceed-

ings 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 in 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 against concluding judgments, including part-judgments under section 110, and against interlocutory judgments under sections 109 and 111 where leave to appeal has been granted by the Higher Administrative Court.

(2) Leave to appeal shall only be granted

1. where serious doubts exist as to the correctness of the judgment,
2. if the case displays special difficulties in fact or in law,
3. if the case is of fundamental importance,
4. if the judgment departs from a decision of the Higher Administrative Court, the Federal Administrative Court, the Joint Senate of the Federal Supreme Courts or the Federal Constitutional Court and rests on this departure, or
5. where a procedural flaw affecting the judgment of the appeal court has been claimed and found and on which the decision may rest.

124a. [Leave to and Grounds for Appeals]

(1) Leave to appeal shall be applied for within one month of the judgment being served. The petition of appeal shall be filed with the administrative court. It must identify the impugned judgment. The petition shall state the

grounds on which leave to appeal is to be granted. The filing of a petition impedes the judgment from becoming final and absolute.

(2) The Higher Administrative Court shall make a ruling on the petition. The Higher Administrative Court may dispense with a statement of grounds where it accedes to the petition or where it rejects it unanimously. On rejection of the petition, the judgment becomes final and non-appealable. Where the Higher Administrative Court grants leave to appeal, the hearing on the petition shall be continued as an appeal hearing; filing of a separate appeal is not required.

(3) The grounds for an appeal shall be stated within one month of the ruling on leave to appeal being served. The statement of grounds shall be lodged with the Higher Administrative Court. The time limit for lodging grounds for appeal may be extended by the presiding judge where this is applied for prior to the closing date being reached. The statement of grounds must contain a specific petition as well as the detailed grounds for the challenge (grounds for the appeal). Should any of these requirements not be met, the appeal shall be deemed inadmissible.

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 appeal is deemed to have been withdrawn when the appellant fails to pursue the action for more than three months, despite being called upon by the court to do so. Paragraph 1, second sentence applies *mutatis mutandis*. In being called upon to pursue the action, the appellant shall be advised of the legal consequences ensuing from sentence one and under section 155, para-

graph 2. The court shall make a ruling deeming the appeal to have been withdrawn.

(3) 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 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]

The Higher Administrative Court may rule on an appeal if it is unanimous in considering the appeal to be founded or 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 make reference to the facts of the impugned judgment if it adopts the determinations of the administrative court in their entirety. It 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. *(cancelled)*

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 (section 49 No. 1) and against judgments made under section 47, paragraph 5, first sentence, 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 a petition for 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. *(cancelled)*

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. *(cancelled)*

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 as well as on the rejection of court officials may not be appealed from by means of a complaint.

(3) Saving statutory rights of complaint against the denial of leave to appeal 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 four hundred German Marks.

(4) Complaints against decisions of the administrative court on the suspension of execution (sections 80 and 80a) and on temporary injunctions (section 123) and also complaints against rulings within proceedings on legal aid are admissible only to the extent that leave has been granted by the Higher Administrative Court in application of section 124, paragraph 2.

(5) Petitions for leave to lodge a complaint are to be made with the administrative court within two weeks of the decision being announced. Petitions must state the impugned decision. The petition shall state the grounds on which leave to lodge a complaint is to be based.

(6) The Higher Administrative Court shall rule on petitions, which the administrative court shall submit to it without delay. Section 124a, paragraph 2, sentences 2 and 4 apply *mutatis mutandis*; section 148, paragraph 1 shall not apply.

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 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, Brandenburg, Bremen, Hamburg, Mecklenburg-West Pomerania, Saar*Land* 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.

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)*

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